Docket: 2009-3734(IT)G

BETWEEN:

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

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on October 17, 2011, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Isabelle Pillet
Counsel for the Respondent:	Anne-Marie Boutin
	Marie-Aimée Cantin

JUDGMENT

The reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years are allowed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of April 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of January 2013.

François Brunet, Revisor

Citation: 2012 TCC 120
Date: 20120412
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REASONS FOR JUDGMENT

Bédard J.

[1] During the taxation years ending on December 31, 2004 and 2005 (the relevant years), Bioartificial Gel Technologies (BAGTECH) Inc. (Bagtech) incurred scientific research and experimental development (SR&ED) expenses and SR&ED capital expenditures. To determine Bagtech's investment tax credit (ITC) for SR&ED for the relevant years, the Minister of National Revenue (the Minister) concluded that Bagtech was not a "Canadian-controlled private corporation" (CCPC) within the meaning of subsection 125(7) of the *Income Tax Act* (the ITA). The Minister, therefore, concluded that, during the relevant years, Bagtech was a "non-qualifying corporation" within the meaning of subsection 127(9) of the ITA and was not entitled to the "refundable investment tax credit" provided for in subsection 127.1(1) of the ITA.

[2] The only issue in this case is whether Bagtech was a CCPC under subsection 125(7) of the ITA. That definition reads as follows:

> 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);

[3] The appellant essentially contends that a "particular person" does not control Bagtech simply because they hold more than 50% of the voting shares, since the person is bound by the unanimous shareholders' agreement (the USA), which prevents them from electing a majority of Bagtech's directors (see Appendix 1). However, the respondent contends that, for the purposes of paragraph (*b*) of the definition of the expression "Canadian-controlled private corporation" in subsection 125(7) of the ITA, shareholders' agreements or unanimous shareholders' agreements may not be taken into consideration. The respondent submits that, in the event that the Court concludes that the existence of a unanimous shareholders' agreement must be taken into consideration in determining whether the "control" referred to in paragraph (*b*) of the definition

of the expression "Canadian-controlled private corporation" is exercised by the "particular person", the "particular person" nonetheless had *de jure* control during the relevant years. The respondent's submission is that if the clauses in the nature of a unanimous shareholders' agreement are taken into consideration, legal control was not withdrawn from the non-resident shareholders, who together form the majority shareholders, since:

(a) the clauses in the nature of a unanimous shareholders' agreement did not operate to withdraw *de jure* control from the non-resident shareholders, who form the majority; and

(b) a majority of the clauses in the unanimous shareholders' agreement provide that they will be implemented by ordinary resolution. The non-residents, therefore, control the decision-making in relation to those clauses.

[4] The parties agreed to an [TRANSLATION] "agreement as to the facts, issue and documents" (Exhibit A-1), of which I reproduce the section on the facts in full here:

[TRANSLATION]

AGREEMENT AS TO THE FACTS, ISSUE AND DOCUMENTS FILED BY CONSENT

1. RELEVANT FACTS ADMITTED BY THE PARTIES

1.1 Bioartificial Gel Technologies (BAGTECH) Inc. ("Bagtech") was incorporated on March 8, 1996, under the *Canada Business Corporations Act* ("CBCA").

1.2 It is a taxable Canadian corporation as defined in subsection 89(1) of the *Income Tax Act* (Canada) ("ITA").

1.3 After it acquired patented technologies, Bagtech specialized in cutting-edge medical technologies, including the development of several ranges of moist bandages that assist in speeding the scarring process for various types of wounds.

1.4 Since it began operating, and throughout the 2004 and 2005 taxation years, each ending on December 31 ("2004 and 2005 taxation years"), Bagtech carried on scientific research and experimental development activities ("SR&ED").

1.5 During the 2004 taxation year, Bagtech incurred SR&ED operating expenses in the amount of $1,017,722 and SR&ED capital expenditures in the amount of $431,517.

1.6 During the 2005 taxation year, Bagtech incurred SR&ED operating expenses in the amount of $1,461,189 and SR&ED capital expenditures in the amount of $69,641.

1.7 Bagtech's authorized capital stock is composed of Class A, B, C, D and E shares.

1.8 Only Class A shares are voting and participating.

1.9 Class B and C shares bear a non-cumulative dividend at a maximum rate of 8% and are redeemable in the amount of the stated capital.

1.10 Class D and E shares bear a non-cumulative dividend at a maximum rate of 8% and are redeemable at the stated amount plus a premium equivalent to the difference between the stated amount and the fair market value of property received by the company at the time the shares were issued.

1.11 Throughout the 2004 and 2005 taxation years, only one Class D share was issued and outstanding, at the time of incorporation, in the name of Guy Fortier ("**Fortier**"), a Canadian resident, in consideration for certain technologies.

1.12 All other issued and outstanding shares were Class A shares.

1.13 In the first round of financing, carried out in 1998, the Fonds régional de solidarité de l'île de Montréal (Quebec, Canada) ("**FRSIM**") and the Fonds de Solidarité des travailleurs du Québec (F.T.Q.) (Quebec, Canada) ("**FSTQ**") participated in the subscription for Class A shares of Bagtech.

1.14 The other investors were a group represented by the founders of Bagtech, and only investors resident in Canada were shareholders of Bagtech.

1.15 In 1999, two European "business angels" subscribed to the capital stock of Bagtech, and in 2000, two other venture capital corporations subscribed to the capital stock: SGF Santé Inc. (Quebec, Canada) ("**SGF**") and Finedix B.V. (Amsterdam, Netherlands) ("**Finedix**").

1.16 In 2002, the following venture capital corporations subscribed to the capital stock of Bagtech: Medco SA (Geneva, Switzerland) ("**Medco**"), Schroder & Co. Bank AG (Zurich, Switzerland) ("**Schroder**") and Gutrafin Limited (London, England) ("**Gutrafin"**), with the result that 45.31% of the outstanding Class A shares were then held by non-residents of Canada.

1.17 In 2003, in an additional round of financing, a number of shareholders acquired new Class A shares of Bagtech: the venture capital

corporation Auriga Ventures II (Paris, France) ("**Auriga**") and two "business angels", Youri Popowski (Geneva, Switzerland) ("**Popowski**") and Investissements Onami inc. (Quebec, Canada) ("**Onami**").

1.18 On September 11, 2003, the Bagtech shareholders signed a document entitled [TRANSLATION] "unanimous shareholders' agreement" ("**USA**"), which included the following clauses:

"RULES OF INTERNAL GOVERNANCE

Article 3.1 Subject to the following provisions, the Shareholders agree, during the term of this Agreement, to take the necessary measures and to use the voting rights associated with the Shares they hold to elect and continue seven Directors on the Board of Directors.

Article 3.2 On the date of this Agreement, the Shareholders agree that the Board of Directors shall be composed of representatives appointed by the Shareholders as hereinafter set out:

Group A 2 Directors (including Marie-Pierre Faure)

Group B 3 Directors (including one appointed jointly by FSTQ and FRSIM, one appointed by SGF and one appointed by Auriga)

Group C 2 Directors (including André Lamotte)"

1.19 Under the definition set out in article 1.21 of the USA, Group A is composed of the following shareholders: Marie-Pierre Faure ("**Faure**"), Fortier, Richard J. Deckelbaum ("**Deckelbaum**"), Jean Emmanuel Raphael Guetta ("**Guetta**"), Amaze through its delegated director, Richard Émile Azera ("**Amaze**"), Jean-François Brisson ("**Brisson**"), Marie-Claude Lévesque ("**Lévesque**"), Marielle Robert ("**Robert**"), Popowski and Onami.

1.20 Under the definition set out in article 1.22 of the USA, Group B is composed of the following shareholders: SGF, FSTQ, FRSIM, Finedix and Auriga, of which SGF appoints one director and FSTQ and FRSIM jointly appoint a second director.

1.21 Under the definition set out in article 1.22 of the USA, Group C is composed of the following shareholders: Medco, Gutrafin and Schroder, which appoints two directors, including Collin Bier who is to act as chair of the board of directors.

1.22 On December 31, 2004, over 60% of the Class A shares outstanding were held by non-residents of Canada.

1.23 In the period from January 1 to July 21, 2005, the shareholders of Bagtech were the same as the shareholders on December 31, 2004.

1.24 On July 22, 2005, other investors subscribed to the capital stock of Bagtech: HSBC (Switzerland), Auxitec (France), Ayman (Switzerland) and Bagadine (France).

1.25 Following the subscriptions of those investors for shares in the capital stock of Bagtech, clauses 3.1 and 3.2 of the USA were changed by amendment to the USA dated July 22, 2005, to indicate that the number of directors of Bagtech would be increased to eight from seven, and that the number of directors appointed by Group C would increase to three from two, one of whom would be appointed by Bagadine.

1.26 On December 31, 2005, over 70% of the Class A shares outstanding were held by non-residents of Canada.

1.27 When Bagtech's original return for its 2004 and 2005 taxation years was filed, the corporation was not designated as a "Canadian-controlled private corporation" ("CCPC").

1.28 On or about June 1, 2007, under subsection 127.1(1) of the ITA, an amended prescribed form was filed for the 2004 and 2005 taxation years, to have Bagtech's status recorded as a CCPC and an "eligible corporation", for it to be given the applicable refundable investment tax credits at the 35% rate instead of the 20% initially claimed, and to have a portion of that credit refunded to it.

1.29 On October 21, 2008, Bagtech made an assignment of property and Price Waterhouse Coopers Inc. was appointed as trustee in the bankruptcy of Bagtech.

1.30 On November 3, 2008, CRA issued its decision that Bagtech was not, in its opinion, a Canadian-controlled private corporation during the 2004 and 2005 taxation years.

1.31 On April 9, 2009, CRA issued a "notice of determination of loss" for the 2004 and 2005 taxation years.

Analysis and Conclusion

[5] Under paragraph (*b*) of the definition of a CCPC in subsection 125(7) of the ITA, a corporation is not a CCPC where, if each share of the corporation that is owned by a non-resident person or a public corporation were owned by a "particular person", the corporation would be controlled by the particular person.

[6] As was held in *Sedona Networks Corp. v. The Queen*, 2007 FCA 169, the paragraph (*b*) analysis must be done in two stages. First, it is necessary to determine who the non-resident persons and public corporations are, and assume that their shares are owned by a "particular person". Second, once that attribution is made, it is necessary to determine whether the corporation is controlled by that "particular person". In the case, the evidence is that on December 31, 2004, 62.52% of the outstanding Class A shares of Bagtech (Class A shares being the only voting shares of Bagtech during that year) were held by non-residents of Canada. The evidence also is that on December 31, 2005, 70.42% of the outstanding Class A shares of Bagtech (Class A shares being the only voting shares of Bagtech during that year) were held by non-residents of Canada.

[7] The question to be answered now is: while the "particular person" held 62.52% and 70.42% of the outstanding Class A shares of Bagtech on December 31, 2004, and December 31, 2005, respectively, did the "particular person" actually control Bagtech during those years? To answer that question, the meaning of the word "control" for the purposes of the ITA must be determined.

[8] The courts have had to rule on the issue of control a number of times, since there is no definition in the ITA.

[9] The leading case with respect to control is *Buckerfield's Ltd. v. Minister of National Revenue*, [1965] 1 Ex. C.R. 299, in which President Jackett wrote:

> 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 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 the view, however, that in Section 39 of the *Income Tax Act* [the former section dealing with associated companies], 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. [Emphasis added.] See *British American Tobacco Co. v. I.R.C.*, [1943] 1 All 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.

[10] That excerpt from the decision of the Exchequer Court was subsequently cited and approved on a number of occasions by the Supreme Court of Canada (the SCC), in particular in *Minister of National Revenue v. Dworkin Furs (Pembroke) Ltd.*, [1967] S.C.R. 223, *Vina-Rug (Canada) Ltd. v. Minister of National Revenue*, [1968] S.C.R. 193, *R. v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288, and *Duha Printers (Western) Ltd. v. The Queen*, [1998] 1 S.C.R. 795.

[11] It is clear from that case law that, for the purposes the ITA, "control" of a corporation means *de jure* control and not *de facto* control. In short, *Buckerfield's* stands for the proposition that the test consists in deciding whether the majority shareholder enjoys "majority 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".

[12] One important clarification was subsequently added to the comments made by President Jackett in *Buckerfield's*. Indeed, in *Imperial General Properties Ltd.*, *supra*, at para. 11, the SCC stated that, in determining *de jure* control, "the court is not limited to a highly technical and narrow interpretation of the legal rights attached to the shares of a corporation". In fact, the highest court in the land essentially reiterated what had been said by Thurlow J. in *Donald Applicators Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 43, affirmed by [1971] S.C.R. v, and held that "[n]either is the court constrained to examine those rights in the context only of their immediate application in a corporate meeting", and that, on the contrary, "these rights must be assessed in their impact 'over the long run'" (*Imperial General Properties Ltd.*, *supra*, at para. 11).

[13] While under the legislation that governs the corporation, directors generally have the express right to manage the corporation's day-to-day activities, the majority shareholder exercises that control indirectly by virtue of their right to elect the board of directors. Accordingly, it is unquestionably the majority shareholder, and not the directors themselves, who exercise control of the corporation "over the long run": see *British American Tobacco Co. v. I.R.C.*, [1943] 1 All E.R. 13, at p. 15.

[14] The final important authority regarding the *de jure* control rule laid down in *Buckerfield's* is, of course, *Duha Printers*, a decision of the SCC.

[15] In that case, the fact that the relevant test was *de jure* control was not really disputed by the parties. The dispute related, rather, to the factors that may be taken into consideration in the determination of whether there is *de jure* control.

[16] Iacobucci J. commenced his analysis by reiterating 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" *(Duha Printers, supra*, at para. 37). On that point, it should be recalled that the central objective of the *Buckerfield's* test is to determine where effective control of the corporation lies.

[17] The SCC then concluded that, as a general rule, "external agreements are not to be taken into account as determinants of *de jure* control": at paras. 51 and 55.

[18] The SCC's reasoning is justified by the principle that *de jure* control is the control conferred by the majority vote in a corporation. While the SCC has sometimes been prepared to examine factors other than a corporation's share register, its review has always been restricted only to the constating documents, not external agreements. The only exception is found in cases like *Minister of National Revenue v. Consolidated Holding Co.*, [1974] S.C.R. 419, where the very capacity to act was limited by external documents, but that exeption has emerged only in cases where the shares were held by trustees: at paras. 48 to 50.

[19] Iacobucci J. also placed some weight on the fact that "taxpayers rely heavily on whatever certainty and predictability can be gleaned from the *Income Tax Act*". Accordingly, in the opinion of the SCC, "a simple test such as that which has been followed since *Buckerfield's*" is desirable: para. 52. "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": para. 58.

[20] Accordingly, Iacobucci J. dismissed the possibility of reviewing external agreements in the *de jure* control analysis, and stated:

> . . . agreements among shareholders, voting agreements, and the like are, as a general matter, arrangements that are not examined by courts to ascertain control. In my view, this is because they give rise to obligations that are contractual and not legal or constitutional in nature. (para. 59)

[21] Iacobucci J. then examined the question of whether a unanimous shareholders' agreement must be qualified as contractual in nature, or in the nature of a constating document.

[22] The SCC settled the issue by deciding that a unanimous shareholders' agreement is "a corporate law hybrid, part contractual and part constitutional in nature" (para. 66). That being said, the SCC was careful to go on to say that the constitutional element of the unanimous shareholders' agreement is even more potent than its contractual features: para. 67.

[23] Accordingly, if an agreement can be considered to be a unanimous shareholders' agreement (USA) within the meaning of the *Canada Business Corporations Act* (the CBCA), it must be taken into consideration just like the corporation's constating documents in order to determine *de jure* control. The legal reasoning underlying the principle that a unanimous shareholders' agreement may play a vital role in the *de jure* control analysis is summarized well by the following comments of Iacobucci J.:

> As I have said, the essential purpose of the *Buckerfield's* test is to determine the locus of effective control of the corporation. To my mind, it is impossible to say that a shareholder can be seen as enjoying such control simply by virtue of his or her ability to elect a majority of a board of directors, when that board may not even have the actual authority to make a single material decision on behalf of the corporation. The *de jure* control of a corporation by a shareholder is dependent in a very real way on the control enjoyed by the majority of directors, whose election lies within the control of that shareholder. When a constating document such as a USA provides that the legal authority to manage the corporation lies other than with the board, the reality of *de jure* control is necessarily altered and the court must acknowledge that alteration. (para. 70)

[24] In other words, the share register should be examined having regard to the relevant legislative provisions governing the corporations (in this instance, the CBCA) and the corporation's constating documents (to which unanimous shareholders' agreements must be seen as analogous). However, external agreements play no role in this analysis, since they are relevant only to *de facto* control.

[25] Lastly, the SCC concludes by cautioning that "the simple fact that the shareholders of a corporation have entered into a USA does not have the automatic effect of removing *de jure* control from a shareholder who enjoys the majority of the votes in the election of the board of directors". The extent to which the provisions of a unanimous shareholders' agreement restrict or abrogate the directors' powers must be examined (para. 81): "it is possible to determine whether *de jure* control has been lost as a result of a USA by asking whether the USA leaves any way for the majority shareholder to exercise effective control over the affairs and fortunes of the corporation in a way analogous or equivalent to the power to elect the majority of the board of directors (as contemplated by the *Buckerfield's* test)" (para. 82).

[26] 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.

[27] While *Duha Printers* clearly stands for the proposition that a unanimous shareholders' agreement must be taken into consideration in determining *de jure* control, the Minister submits that an agreement of that nature must have no influence on the second stage of the analysis (that is, the determination of control of a corporation by a "particular person") for the purposes of paragraph (*b*) of the definition of a CCPC. Paragraph 21 of technical interpretation 2008–0265902I7 – *Canadian-Controlled Private Corporation* provides a fairly good summary of the Minister's argument on this point. That paragraph reads as follows:

> [TRANSLATION]
>
> 21. In that specific case, indeed as a general proposition, we reiterate our position that a USA has no impact on the second stage of the analysis (i.e. determination of control of a corporation by the hypothetical particular person) for the purposes of paragraph (*b*) of the definition of CPCC in subsection 125(7). It still seems to us that the determination provided for in the second stage of the analysis is purely arithmetical. The case law in no way rejects that approach; on the contrary, the Federal Court of Appeal unreservedly holds that mere possession of shares by a non-resident majority is sufficient to give the non-residents control for the purposes of paragraph (*b*) of the definition of CCPC in subsection 125(7). In any event, as stated in the Document, the hypothetical particular person is not a party to any unanimous shareholders' agreement or deemed to be such for the purposes of paragraph (*b*) of the definition of CCPC in subsection 125(7).

> CRA, Technical Interpretation 2008-0265902I7, "Canadian-Controlled Private Corporation" (May 6, 2008), at para. 21.

[28] At this point, I think it will be useful to summarize the circumstances in which Parliament added paragraph (*b*) to the definition of a CCPC. It was added by S.C. 1998, c. 19, subsection 145(2), and evidently runs counter to the decision of the Federal Court of Appeal in *Silicon Graphics Ltd. v. The Queen*, [2003] 1 F.C. 447, in which the Court held 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" (at para. 36). The comments by the Federal Court of Appeal were made in the context of an analysis of the applicable law before new paragraph (*b*) was added to the definition of a CCPC.

[29] In this regard, the purpose of the provision is, moreover, clearly laid out in the relevant technical notes published by the Minister of Finance:

> Currently, a corporation is a CCPC if it is a private corporation and a Canadian corporation (both of which terms are defined in subsection 89(1) of the Act), and it is not controlled, directly or indirectly in any manner whatever by one or any combination of public corporations (other than prescribed venture capital corporations) or non-resident persons. This amendment ensures that two other types of corporation are not CCPCs. The first type are corporations that, if they are not actually controlled by non-residents, avoid that status only because their shares are widely held. The second type are corporations the shares of which are listed on a foreign stock exchange.
>
> A corporation the voting shares of which are distributed among a large number of persons is usually not considered to be controlled by any group of its shareholders, provided the shareholders do not act together to exercise control. As a result, it may be argued that a private Canadian corporation that is owned by a number of non-residents or public corporations is not controlled by non-residents or public corporations, and is thus a CCPC. New paragraph (*b*) of the CCPC definition clarifies that this is not the case. Paragraph (*b*) requires non-residents' and public corporations' shareholdings – not only of the corporation in question, but of all corporations – to be notionally attributed to one hypothetical person. If that person would control the corporation, then the corporation is not a CCPC.

> Department of Finance of Canada, Explanatory Notes Relating to Income Tax (December 8, 1997), s. 125(7), "Canadian-controlled private corporation".

[30] The practical result is, therefore, that paragraph (*b*) of the definition of a CCPC creates a legal fiction. This kind of alteration of reality was thoroughly canvassed by the SCC in *R. v. Verrette*, [1978] 2 S.C.R. 838. Writing for the Court, Mr. Justice Beetz characterized this kind of legal fiction as a "deeming provision" and explained its effect as follows:

> A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. (p. 845)

[31] The purpose and application of a deeming provision was then examined in detail by the Federal Court of Appeal in *Attorney General of Canada v. Scarola*, 2003 FCA 157, [2003] 4 F.C. 645, in which Létourneau J. based his explanation in part on the following French doctrine:

> Fiction is a process that, as repeatedly noted, is part of the pragmatics of law. It consists first in misrepresenting the facts, stating them to be other than what they really are and extracting from that very adulteration and that false supposition the legal consequences that would flow from the dissembled truth, if that truth existed beyond the cloak of external appearances. (para. 19)

[32] In *Survivance v. Canada*, 2006 FCA 129, at para. 55, the Court stated: "Insofar as [a legal fiction] effectively alters reality, its meaning should be limited to what is clearly expressed. A deeming provision cannot otherwise modify the actual situation that obtains."

[33] Indeed, those comments are consistent with those of the SCC in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, in which Madam Justice McLachlin, as she then was, stated, in comments that have been repeatedly cited since then:

> The Act is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must

> therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention: . . . . (par. 43)

[34] Accordingly, I am of the opinion that, in spite of the particular characteristics of paragraph (*b*) of the definition of a CCPC, it must be read in its entire context and in its ordinary and grammatical sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: see *Ludco Enterprises Ltd. v. The Queen*, 2001 SCC 62, [2001] 2 S.C.R. 1082, at para. 36.

[35] Consequently, the legal effects of this legal fiction, which are superimposed on the truth that is being pushed aside, mean that the "particular person" to whom we are referring here is deemed to have the same rights and to be subject to the same obligations as the non-resident owners of the shares of the corporation in question.

[36] Subsection 146(3) of the CBCA provides:

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

[37] Considering everything that has been discussed here, I therefore find it very difficult to defend the position that the "particular person" referred to in paragraph (*b*) of the definition of a CPCC cannot be deemed, in determining *de jure* control, having regard to the alteration of the facts imposed by the provision, to be a party to the unanimous shareholders' agreements then in effect.

[38] The Minister contends that the effect of having regard to a unanimous shareholders' agreement in effect at the time the test of the hypothetical shareholder is examined could be to skew the analysis of control of the corporation in question, since when the unanimous shareholders' agreement in question was written, the shareholders of the corporation could certainly not have foreseen that the fictitious shareholder for which the provision provides would join in the future. Accordingly, in order to avoid unusual or undesirable results, the Minister concludes that it is preferable not to deem the hypothetical shareholder to be a party to the unanimous shareholders' agreements then in effect. The Minister explains:

> Where Canadian residents do not own enough shares to elect a majority of the board of directors, the objective and effect of the presumption in paragraph (*b*) of the CCPC definition is to treat the hypothetical person as having the ability to exercise effective control over the affairs and fortunes of the corporation in a way analogous to the power to elect the majority of directors. That is so because the hypothetical person is not a party to a unanimous shareholder agreement nor is that person deemed to be a party to it. In our view, it would be contrary to both the text and the purpose of the provision to consider that the fiction of control created by the application of paragraph (*b*) of the CCPC definition could be diluted by an agreement that restricts the powers of the directors of a corporation to allocate them to shareholders that would never include the hypothetical shareholder.
>
> See: Andrew W. Dunn, Ron Durand, Phil Jolie, and Mark Symes, "Canada Revenue Agency Round Table," Report of the Proceedings of the Sixty-First Tax Conference, 2009 Conference Report (Toronto; Canada Tax Foundation, 2009), at pages 3:14-3:15.

[39] In my view, the answer is inescapable. The result appears incongruous only if we choose not to have regard to the fiction. It is not incongruous if the fiction is given full effect.

[40] In my humble opinion, we need only imagine a situation where all of the shareholders that are non-residents or that are public corporations decided, for some reason, to sell all their shares in the corporation to the same purchaser. It is undeniable that, in such a case, the purchaser of the shares would be a party to any unanimous shareholders' agreement then in effect.

[41] I could not agree more with the Federal Court of Appeal, when it stated: "There would be a risk of creating intolerable uncertainty if the courts could override a deeming provision of general application solely because the result it produces in a particular case seemed undesirable to them. Parliament is well aware of the effect of the presumptions it enacts, and it is up to Parliament to set limits on their scope." (*Survivance*, *supra*, at para. 79).

[42] In this case, paragraph (*b*) of the definition of a CCPC is a provision of general application and it is the role of the courts to give effect to it.

[43] In conclusion, I am of the opinion that the hypothetical shareholder contemplated in paragraph (*b*) of the definition of "Canadian-controlled private

corporation" in subsection 125(7) of the ITA is bound by the Bagtech USA signed in 2003, and subsequently by the amendments made in 2005.

[44] The question that should now be answered is: must the clauses of a USA governing the election of a corporation's directors be taken into consideration in the determination of *de jure* control of the corporation?

[45] In my opinion, before answering that question, we need a clear understanding of the nature of a unanimous shareholders' agreement for the purposes of the CBCA. Subsection 146(1) of the CBCA reads 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.

[46] Subsection 146(1) of the CBCA seems to be setting four requirements that an agreement must meet in order to be qualified as a unanimous shareholders' agreement. First, the agreement obviously must be lawful and meet the general requirements for contractual validity. Second, the agreement must be in writing, and it should be noted that this requirement is indeed a prerequisite for validity and not merely evidentiary. It must also be entered into by all the shareholders of a corporation, whether among themselves or with third parties. And third, it must 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. An agreement signed by all the shareholders that merely increases the number of votes required for certain actions to be taken by the shareholders, in accordance with subsection 6(3) of the CBCA, may, in exceptional situations, be a unanimous shareholders' agreement, even if it does not restrict or abrogate any of the directors' powers. However, that is the only exception, under both Quebec and federal law: see Paul MARTEL, *Entreprises et sociétés,* Collection de droit 2011-2012, École du Barreau du Québec, vol. 9, 2011, pp. 41 *et seq*.

[47] These four requirements that a unanimous shareholders' agreement must meet in order to be valid were also reiterated by the SCC in the only case that has examined unanimous shareholders' agreements in detail: *Duha Printers, supra*.

[48] The CBCA, the Ontario *Business Corporations Act* and the *Civil Code of Québec*, for example, all provide for an express exception to the prohibition on fettering the power of the directors. Thus the various Canadian statutes governing business corporations provide that unanimous shareholders' agreements will be valid, notwithstanding the common law principle that shareholders, even acting unanimously, may not fetter the board's power to manage or supervise the management of the business and affairs of the corporation or prevent it from performing its legal duty to do so. (The prohibition on fettering the powers of the directors seems to originate in *Automatic Self Cleansing Filter Syndicate Co. Ltd. v. Cuninghame*, [1906] 2 Ch. 34 (C.A.). The principle was then reiterated in *Motherwell v. Schoof*, [1949] 4 D.L.R. 812 (Alta. S.C.) and *Atlas Development Co. v. Calof* (1963), 41 W.W.R. 575 (Man. Q.R.).)

[49] In fact, before there were unanimous shareholders' agreements, the ability of shareholders to control the corporation was limited to the power to elect and dismiss directors. When unanimous shareholders' agreements became part of corporate law, they fundamentally altered the landscape by creating a mechanism whereby shareholders can strip directors of their management powers in whole or in part.

[50] Moreover, a unanimous shareholders' agreement does not merely limit the directors' powers. It has a positive aspect in that it provides that the shareholders may exercise the powers they have taken away from the directors.

[51] In and of themselves, unanimous shareholders' agreements make it possible for shareholders to considerably depart from the standard rules of corporate law; they bring a degree of flexibility to the some of the rather rigid and arid old principles.

[52] In addition, and as I noted earlier, regarding legal recognition of USAs, the SCC clarified a number of aspects of a unanimous shareholders' agreement in *Duha Printers, supra*. Writing for the SCC, Iacobucci J. said that a unanimous shareholders' agreement is "a corporate law hybrid, part contractual and part constitutional in nature" (*Duha Printers, supra*, para. 66).

[53] That being said, the SCC was careful to go on to say that the "constitutional element of the USA is even more potent than its contractual features": paras. 67 and 68.

[54] Another important element of a unanimous shareholders' agreement is obviously that it can be binding on future shareholders. In fact, a purchaser or transferee of shares is deemed, under an irrebutable presumption, to be a party to the unanimous shareholders' agreement: see subsection 146(3) of the CBCA However, if the purchaser or transferee is not informed of the existence of the unanimous shareholders' agreement, by an endorsement on the share certificate or otherwise, the shareholder may, no later than 30 days after he becomes aware of the existence of the unanimous shareholders' agreement, rescind the transaction by which he has acquired the shares: see subsection 146(4) of the CBCA.

[55] It also seems to me to be essential to conclude this overview of unanimous shareholders' agreements by stressing that the very nature of unanimous shareholders' agreements is to restrict the directors' power and expand the power of shareholders in the management of the corporation: see Paul MARTEL, *Entreprises et sociétés, Collection de droit 2011-2012*, École du Barreau du Québec, vol. 9, 2011, p. 41 *et seq*.; Normand RATTI, *La convention unanime des actionnaires*, (1986) C.P. du N. 93. The SCC could not have been clearer on this point, stating that "[u]nlike an 'ordinary' shareholder agreement, which cannot interfere with the exercise of the directors' powers, a USA can and must do so". (*Duha Printers*, *supra*, at para. 71). Ultimately, the effect of a unanimous shareholders' agreement restricting the directors' power must be to substitute the shareholders for the directors in the exercise of their rights, powers and responsibilities, to the extent of the restriction: see subsection 146(5) of the CBCA. Instead of removing the administrators, a unanimous shareholders' agreement simply strips them of their powers and rights and their associated responsibilities. The CBCA also provides that the directors shall manage the business of a corporation "[s]ubject to any unanimous shareholder agreement" (see subs. 102(1) of the CBCA), and expressly requires that the directors and officers comply with the provisions of such an agreement: see subsection 122(2) and section 247 of the CBCA.

[56] The question that should now be answered is: can a unanimous shareholders' agreement contain clauses other than clauses relating to the management of a corporation? If so, are only those clauses restricting the directors' power covered by the provisions of the applicable corporations legislation relating to unanimous shareholders' agreements? In other words, do only the clauses that restrict the directors' power create the presumption that they may be set up against new shareholders?

[57] Although the agreement is described as a unanimous shareholders' agreement, it must be kept in mind that an agreement signed by all shareholders, the only effect of which is to restrict the directors' power, cannot be considered to be a unanimous shareholders' agreement within the meaning of the CBCA and cannot be set up against future shareholders: see Paul MARTEL, *La société par actions au Québec*, vol. 1, *Les aspects juridiques*, Montréal, Wilson & Lafleur, 2011, paras. 27-34.

[58] Conversely, an agreement entered into by all shareholders of a corporation that restricts the directors' power can be qualified as a unanimous shareholders' agreement notwithstanding the fact that it is called something else: see Paul MARTEL, *La société par actions au Québec*, *supra*, paras. 27-34, *Alteco v. The Queen*, [1993] T.C.J. No. 213 (QL), [1993] 2 C.T.C. 2087, at para. 35.

[59] Moreover, the question of whether an agreement is a unanimous shareholders' agreement, when some of its provisions restrict the directors' powers, is still controversial: see Nathalie BEAUREGARD and François AUGER, *Les conventions entre actionnaires*, Journées d'études fiscales, (Montréal, Canadian Tax Foundation, 2010), p. 12.

[60] Well before being appointed to the bench, Iacobucci J. had spoken on this point:

> The statutory provision relating to unanimous shareholder agreements are found in ss. 2(1) and 146 of the CBCA, and ss. 1(1), 45 and 108 of the OBCA. Note that the distinguishing feature of a "unanimous shareholder agreement" in the statutes is that it "restricts, in whole or in part, the powers of the directors to manage [or, in the OBCA, to supervise the management of] the business and affairs of the corporation". Suppose an agreement between all the shareholders of the corporation restricts the authority of the directors, but also contains other agreements, relating to such matters as buy-sell arrangements, requisite shareholders votes on the undertaking of fundamental changes, shareholder voting agreements, etc. Is the whole agreement a "unanimous shareholder agreement", or only that part that relates to the authority of the directors? Do the words "in whole or in part" in CBCA s. 146(2) and OBCA s. 108(3) refer to the "written agreement", or do they refer to the restriction of the powers of directors? The distinction may be important. For example, a transferee of shares with notice of a common law voting agreement is not bound by the agreement (because of the absence of privity of contract); see Greenhalgh v. Mallard, [1943] 2 All E.R. 234 (C.A.). However, a transferee of shares subject to a u.s.a. is bound by the u.s.a.; see CBCA s. 146(4), OBCA s.

> 108(4) (although note the limitation contained in CBCA s. 49(8), OBCA s. 56(3)).
>
> See: Frank IACOBUCCI, *Canadian Corporation Law: Some Recent Shareholder Developments*, The Cambridge Lecture 1981, complied by N. Eastham and B. Krivy, 1982, p. 88, at pages 92 to 95.

[61] A number of authors, Paul Martel being just one, nonetheless maintain that a USA may contain clauses other than clauses relating to the management of the corporation, but that still, [TRANSLATION] "only clauses restricting the directors' power are covered by the provisions of the legislation relating to unanimous agreements, and the presumption that those provisions create in respect of new shareholders applies only to those clauses and not to the rest of the agreement" (see Paul MARTEL, *Les conventions entre actionnaires*, Montréal, Wilson & Lafleur, 2007, pp. 340-341). Paul Martel also argues that it would be preferable to incorporate the two types of clauses in separate agreements:

> [TRANSLATION]
>
> In general, administration clauses should be treated, in practice, as apples, and other clauses as oranges, and they should be in two separate documents. Particularly at the provincial level, it is difficult to have purchase and sale clauses take the form of a restriction on the directors' power, and it is virtually impossible to do so for voting and corporate clauses. Administration clauses, a "unanimous agreement" in the sense of the Act, will automatically be binding on new shareholders (mind that the share certificates are endorsed to that effect), while the other clauses will be binding on new shareholders who expressly adhere to them, with the authorization of the signatories.
>
> See: Paul MARTEL, *Les conventions entre actionnaires*, *supra*, at page 341.

[62] Daniel Lafortune shares that opinion and writes:

> [TRANSLATION]
>
> That being the case, is a stranger to the agreement who becomes a shareholder bound by the shareholders' agreement? A distinction must be made in that regard. Are we dealing with provisions in the nature of a unanimous agreement or provisions of an entirely different nature?
>
> For provisions that are not in the nature of a unanimous agreement, the rule is simple. By operation of the principle of the relative effect of contracts, strangers are not bound by the agreement, unless they agree to be.

> See: Daniel LAFORTUNE, *La convention d'actionnaires* (2002), 36 R.J.T. 197, at page 217.

[63] The Superior Court of Quebec also seems to be of the opinion that a unanimous shareholders' agreement is divisible, and, indeed, gives an excellent summary of that approach in *Leblanc v. Fertek Inc.*, REJB 2000-20884, [2000] J.Q. No. 4045 (QL). In that decision, Mr. Justice Dalphond dealt differently with clauses in the nature of a unanimous shareholders' agreement that appear in a simple shareholders' agreement:

> [TRANSLATION]
>
> 49 The agreement among the shareholders dated January 31, 1996, as indicated in its fifth "Whereas", has two objectives: to record the shareholders' agreement regarding management of the corporation and regarding the ownership and transfer of their shares.
>
> 50 The first aspect is a unanimous shareholders' agreement within the meaning of s. 146(2) of the CBCA, since it is an agreement in writing signed by all the shareholders relating to the management of the business and affairs of the corporation.
>
> 51 The purpose of a unanimous shareholders agreement, or a declaration by the sole shareholder to the same effect, is essentially to restrict the powers of the directors of the corporation, not the ownership of shares. Indeed, it is because that is the purpose of this kind of agreement that it can be made by a sole shareholder, as provided by subs. 146(3) of the CBCA. The directors and officers of the corporation, including Tassé, shall comply with the agreement (s. 122(2) of the CBCA).
>
> 52 The second aspect of the agreement deals with questions relating to ownership of shares and not the management of the corporation. That class of agreement does not need to be agreed to by all shareholders. Accordingly, we see agreements among shareholders representing only a majority, governing their right to vote at annual general meetings, for example, or granting them first refusal rights in the event that shares are sold. The validity of an agreement of that nature has long been recognized (*Bergeron v. Ringuet*, [1960] S.C.R. 672, [1958] B.R. 222) and it is government by the civil law of contracts, unless there are specific provisions in legislation that applies to the corporation, such as the CBCA or the *Securities Act*. Because it is a contract, there must be at least two parties, because a person cannot contract with themself.

> 53 To summarize, the two aspects of the agreement made between the shareholders in January 1996 must not be confused, even though they appear in the same document. (at paras. 49 to 53)

[64] However, other authors believe that a unanimous shareholders' agreement may deal with incidental subjects that do not directly affect the internal management of the corporation. Kevin P. McGuinness writes:

> 12.209 In addition, provisions are scattered throughout both the OBCA and the CBCA indicating various subjects that may be dealt with in a USA, aside from the general authority to restrict the power of the directors.
>
> . . .
>
> 12.212 . . . the question is sometimes raised as to whether a unanimous agreement may deal with matters outside the management of the corporation. . . . it is doubtful that the inclusion of any such collateral provisions would adversely affect the validity of a unanimous shareholder agreement or its status as such. It has always been open to the shareholders to regulate their own relationship.
>
> See Kevin P. McGUINNESS, *Canadian Business Corporations Law*, 2nd ed., Markham, LexisNexis, 2007, pages 1215 to 1218

[65] After noting that, in his opinion, a unanimous shareholders' agreement may contain various incidental provisions that are not intended to restrict directors' powers, without jeopardizing the validity of the agreement, Mr. McGuinness lists a number of incidental questions that may be addressed in a unanimous shareholders' agreement, including the election of directors (pages 1215 to 1216).

[66] The Alberta Court of Queen's Bench also supported that position, to a certain extent, in *Wood v. Wood*, [2004] A.J. No. 1230 (QL), 2004 ABQB 775, where it expressly recognized the validity of a clause in a unanimous shareholders' agreement relating to the election of the board of directors:

> 8 The USA provided that the directors of the company would be Mr. Wood, Jennifer Wood and Mrs. Wood so long as each remained a shareholder. Two directors would constitute a quorum. If either Mr. Wood or Jennifer Wood ceased to be a director, the other would be "exclusively entitled to appoint a replacement director". If Mrs. Wood should cease to be a director, she would not be replaced. (au par. 8)

[67] Iacobucci J. made a very interesting observation before he was appointed to the bench: see Frank IACOBUCCI, *Canadian Corporation Law: Some Recent Shareholder Developments*, *op. cit.* In fact, he first just reminds us simply that a unanimous shareholders' agreement appeared in the Canadian corporate law with section 146 of the CBCA, and the concept was subsequently adopted in a majority of corporations laws, including by section 146 of the Alberta act, the *Alberta Business Corporations Act*, RSA 2000, c. B-9.

[68] Iacobucci J. noted that section 146 of the Alberta act seems to expand the scope of a USA beyond what is provided in the CBCA. Although the main purpose of a USA, at least under the federal statute, is to restrict the directors' power, section 146 of the Alberta act, which is set out in Appendix 2, does seem to have expanded its scope. Briefly, under section 146 of the Alberta act, abrogating the powers of directors and assigning them to the shareholders is merely one possible purpose of a USA: see paragraph 146(1)(*c*). That section provides that a USA may provide for the manner of electing directors: see paragraph 146(1)(*b*). After canvassing the issue, Iacobucci J. makes the following comments:

> The new Alberta Business Corporations Act adopts and extends the u.s.a. concept [section 146]. After acknowledging that the primary approach of the CBCA u.s.a. provisions reflected a desire to have shareholders rather than directors manage a closely-held company, the designers of the Alberta statute felt that the u.s.a. should be expanded in scope to make the device even more useful and to clarify some of the problems which were felt to be present in the CBCA provisions.
>
> With respect to the expanded scope of the u.s.a., the Alberta section allows the entrenchment of any provision concerning the internal affairs and organization of the corporation. The Alberta definition of a u.s.a. includes an agreement which does any one of the following:
>
> (1) regulates the rights and liabilities of shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;
>
> (2) regulates the election of directors;
>
> (3) provides for the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors;

> (4) includes any other matter that may be contained in a u.s.a. pursuant to any of other provision of the Alberta Business Corporations Act.
>
> See: Frank IACOBUCCI, *Canadian Corporation Law: Some Recent Shareholder Developments*, *op. cit.*, at pages 92 to 95.

[69] On reading section 146 of the Alberta statute, we must conclude that the Alberta legislature intended to expand the scope of a unanimous shareholders' agreement. The section expressly provides that a shareholders' agreement may include a number of elements other than abrogating the powers of the board of directors: see subsection 146(1). Moreover, the Alberta act expressly provides that a unanimous shareholders' agreement is binding on future shareholders, even if it contains provisions that have nothing to do with restrictions on the directors' power of management and oversight: see subsections 146(2) and (3).

[70] Some useful conclusions can be drawn from this comparative examination of the federal and Alberta legislation.

[71] First, if a unanimous shareholders' agreement, as first provided for by the CBCA, could, from the outset, have included provisions other than restrictions on the power of the directors, why did Alberta subsequently see fit to make substantial changes to the wording of the CBCA? Other jurisdictions, such as Quebec and Manitoba, have merely reiterated the essence of section 146 of the CBCA (see the *Business Corporations Act*, RSQ, c. S-31.1, section 213 and *The Corporations Act*, C.C.S.M., c. C225, subsection 140(2)). Why would one legislature go to the effort of specifying, in its corporations act, that a unanimous shareholders' agreement may do more than restrict, in whole or in part, the powers of the board of directors, if the CBCA already permitted that?

[72] Second, why did Parliament not make it clear, similarly to Alberta, that a unanimous shareholders' agreement may include provisions other than provisions abrogating the directors' powers of management and oversight, when it would have been easy to do so if that had been its intention?

[73] In another vein, I would briefly note that a number of doctrinal opinions are to the effect that if someone tried to take advantage of the benefits of unanimous shareholders' agreements by incorporating minor restrictions on the powers of directors, simply to satisfy that requirement, a court could declare those restrictions to be insufficient and refuse to characterize the document as a unanimous shareholders' agreement: see Nathalie BEAUREGARD and

François AUGER, *Les conventions entre actionnaires, op. cit.*, page 12. I would note immediately that in my opinion, that position must be rejected.

[74] It is apparent from this analysis that the question of whether unanimous shareholders' agreements may contain only clauses restricting the power of directors remains to be settled.

[75] The question that should now be asked is: in examining *de jure* control, must clauses limiting the right of the majority shareholder to elect the directors of a corporation incorporated under the CBCA be considered, if those clauses appear in a unanimous shareholders' agreement that also restricts the directors' power?

[76] One school of thought holds that in examining *de jure* control, a unanimous shareholders' agreement should be examined, as constituting a single instrument, particularly in relation to clauses whose sole effect is to restrict the power of the majority shareholders to elect the directors. Referring expressly to *Duha Printers*, Nathalie Beauregard and François Auger opine:

> [TRANSLATION]
>
> Accordingly, a unanimous shareholders' agreement whose clauses restrict the ability of the majority shareholder to elect the members of the board of directors or that substantially fetters the directors' power to manage the corporation may have an impact on the *de jure* control of the corporation. This type of clause will therefore have to be scrutinized closely at the time the unanimous shareholders' agreement is signed.
>
> See: Nathalie BEAUREGARD and François AUGER, *Les conventions entre actionnaires, supra*, p. 18

[77] Other authors take a more nuanced approach, and say that in examining the *de jure* control of a corporation, while *Duha Printers* may seem to support the proposition that a unanimous shareholders' agreement must be read as inseverable, only the provisions that concretely restrict the directors' powers must be taken into consideration:

> It may seem strange that the restriction of the powers of directors is the feature that permits other unrelated provisions of the agreement, namely, those dealing with the election of the directors, to be taken into account in determining *de jure* control, especially since the very restriction of the

> directors' powers might make one wonder why the ability to elect them should continue to be the litmus test for "effective control".
>
> See: Robert COUZIN, *Some Reflections on Corporate Control*, 2005, vol. 53, Can. Tax. J., 305, p. 318

[78] That line of thought, or at least the criticism it levels at the conclusions reached by the SCC, seems to better reflect certain fundamental principles of corporate law, and to some degree converge with the position advocated by Paul Martel, who contends that a unanimous shareholders' agreement may address subjects other than the management of the corporation; however, [TRANSLATION] "only clauses that restrict the power of the directors are governed by the provisions of the act relating to unanimous shareholders' agreements, and the presumption they create regarding new shareholders applies only to those clauses, and not to the rest of the agreement" (Paul Martel, *Les conventions entre actionnaires*, *op. cit.*, pp. 340-341.).

[79] Moreover, we would note that the Superior Court of Quebec has clearly held that a unanimous shareholders' agreement is severable; in fact, it gave an excellent summary of this approach in *Leblanc v. Fertek Inc.*, *supra*. In that case, involving an application for an injunction under section 247 of the CBCA because of failure to comply with a unanimous shareholders' agreement, Dalphond J. accorded different treatment to clauses in the nature of a unanimous shareholders' agreement that appeared in a simple shareholders' agreement. It should be noted, however, that the case related to corporate law and not the application of *Duha Printers* in determining *de jure* control.

[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.

[81] However, a careful reading of paragraph 85 of the decision in *Duha Printers* leads me to conclude that any restriction on the power of the majority shareholder to elect the directors, set out in the constating document of the corporation or in a unanimous shareholders' agreement, must be considered in the determination of *de jure* control.

[82] I agree that this is an unusual result. A restriction on the election of directors will not be relevant to the analysis of *de jure* control if it appears in a voting agreement, while the same restriction will be relevant if it is in a

unanimous shareholders' agreement. That being said, we have no choice but to follow the doctrine of the SCC, even though it may seem illogical.

[83] It would have been an easy matter for the SCC to write that in deciding whether there is "effective control", both any restriction on the majority shareholder's power to elect the directors as manifested in the constating document of the corporation and any restriction on the power of the directors to manage the business and affairs of the corporation as manifested in any unanimous shareholders' agreement must be taken into consideration.

[84] However, the SCC states, instead, that we must have regard to either of these restrictions in either of those documents.

[85] I am, therefore, of the opinion 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, in the light of *Duha Printers*.

[86] To summarize, I am of the opinion:

(i) that a unanimous shareholders' agreement must be taken into consideration for the purposes of paragraph (*b*) of the definition of the expression "Canadian-controlled private corporation" in subsection 125(7) of the ITA; and

(ii) that a restriction on the right of the majority shareholder to elect the directors, set out in a written unanimous shareholders agreement, must be taken into consideration in the determination of the *de jure* control of a corporation.

[87] The analysis I have done of the clauses of the USA that are genuinely in the nature of a unanimous shareholders' agreement (that is, that restrict the power of the directors), which I have identified (see Appendix 3), has persuaded me that they are minor restrictions on their power. In my opinion, the clauses do not operate to strip the hypothetical shareholder of *de jure* control.

[88] We will now examine the provisions of the USA relating to the election of directors that were in effect during the 2004 taxation year.

[89] Under paragraph 3.2 of the USA, the directors are elected by three groups: Group A, Group B and Group C. Because the "particular person" would have certain Class A shares, they would be a member of each of those groups.

[90] Because the directors chosen by Group A are elected by residents of Canada and two of the three directors chosen by Group B are elected by residents of Canada, the "particular person" contemplated by paragraph (*b*) of the definition of a CCPC could appoint only one of the five directors chosen by the members of those groups.

[91] Because none of the three members of Group C is a resident of Canada, the "particular person" could appoint both directors elected by that group.

[92] Accordingly, notwithstanding the fact that the "particular person" would hold more than 50% of the Class A shares of Bagtech, under the USA, it could not elect a majority of the directors: under the USA, it is residents of Canada who elect a majority of the directors, that is, four of the seven directors. As a result, the "particular person" could not, during the 2004 taxation year, have controlled Bagtech within the meaning of paragraph (*b*) of the definition of a CCPC in subsection 125(7) of the ITA.

[93] We will now examine the clauses of the USA that were in effect during the 2005 taxation year.

[94] Under paragraph 3.2 of the USA, the directors are elected by three groups: Group A, Group B and Group C. Because the "particular person" would have certain Class A shares, they would be a member of each of those groups.

[95] Because none of the three members of Group C is a resident of Canada, the "particular person" could appoint the directors elected by the group: two directors, from January 1 to July 21, and three directors, starting on July 22.

[96] Accordingly, notwithstanding the fact that the "particular person" would hold more than 50% of the Class A shares of Bagtech, under the USA, it could not elect a majority of the directors: under the USA, it is residents of Canada who elect four of the seven directors, from January 1 to July 21, and four of the eight directors, from July 22 to December 31. As a result, the "particular person" could not, during the 2005 taxation year, have controlled Bagtech within the meaning of paragraph (*b*) of the definition of a CCPC in subsection 125(7) of the ITA.

[97] Accordingly, I am of the opinion that Bagtech was a "Canadian-controlled private corporation" within the meaning of subsection 125(7) of the ITA during the 2004 and 2005 taxation years and, therefore, that it was entitled to the "refundable investment tax credit" provided for in subsection 127.1(1) of the ITA.

[98] For all these reasons, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 12th day of April 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of January 2013.

François Brunet, Revisor

Appendix 1

UNANIMOUS SHAREHOLDER AGREEMENT (RELEVANT PORTION)

UNANIMOUS AGREEMENT AMONG THE SHAREHOLDERS OF BIOARTIFICIAL GEL TECHNOLOGIES (BAGTECH) INC.

signed at Montréal, Quebec, on September 11, 2003

BETWEEN: **INVESTISSEMENTS ONAMI INC.,** having its principal place of business at 285 avenue Clarke, suite 202, Westmount, Quebec, Canada H3Z 2E3, represented herein by Hanan Ghraoui, who is duly authorized for the purposes hereof, as she has declared;

(hereinafter "**Onami**")

AND: **AURIGA VENTURES II**, Fonds Commun de Placements à Risques, represented by the management company Auriga Partners, a limited liability company with management and supervisory boards and capital of 456,250 Euros, having its head office at 18 avenue Matignon, 75008 Paris, represented herein by Jacques Chatain, who is duly authorized for the purposes hereof;

(hereinafter "**Auriga**")

AND: **YOURI POPOWSKI**, businessman, domiciled and residing at 16 rue Michel Servet, Geneva, Switzerland, 1206;

(hereinafter "**Popowski**")

AND: **MEDCO SA**, a limited liability company duly constituted under the laws of Switzerland, having its head office at 11 rue de la Rôtisserie, CH-1204, Geneva, Switzerland, represented herein by Ferdinand O. Walser, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**Medco**")

AND: **GUTRAFIN LIMITED**, a limited liability company duly constituted under the laws of Switzerland, having a place of business at 40 Egerton Crescent, London, England 5W3 2EB,

represented herein by Francis C. Lang, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**Gutrafin**")

AND: **SCHRODER & CO. BANK AG**, acting on behalf of its clients, a commercial bank duly constituted under the laws of Switzerland, having its head office at Central 2, Zurich, Switzerland, represented herein by Antonio Winspeare Guicciardi, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**Schroder**")

AND: **FONDS DE SOLIDARITÉ DES TRAVAILLEURS DU QUÉBEC (F.T.Q.)**, a legal person constituted under the *Act to establish the Fonds de solidarité des travailleurs du Québec (F.T.Q.)*, having its head office at 8717 rue Berri, Montréal, Quebec H2M 2T9, represented by and acting through Daniel Laporte, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**FSTQ**")

AND: **FONDS RÉGIONAL DE SOLIDARITÉ ÎLE DE MONTRÉAL, SOCIÉTÉ EN COMMANDITE**, a limited partnership duly constituted under the laws of Quebec, acting through its general partner Gestion du fonds regional de solidarité Île de Montréal Inc., having its principal place of business 255 rue St-Jacques Ouest, 3rd floor, Montréal, Québec H2Y 1M6, itself represented by and acting through André Savard, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**FRSIM**")

AND: **SGF SANTÉ INC.**, a company legally constituted under the laws of Quebec, having its head office at 600 rue de la Gauchetière Ouest, suite 1700, Montréal, Quebec, represented by and acting through Francis Bellido and Marc Paquet, who are duly authorized for the purposes hereof, as they have declared;

(hereinafter "**SGF**")

AND: **FINECIX B.V.**, a limited liability company duly constituted under the laws of the Netherlands, having its head office at (1043 EJ) Teleportboulevard 140, Amsterdam, Netherlands, represented by and acting through Willem van Wettum, general manager, who is duly authorized for the purposes hereof, as he has declared;

(hereinafter "**Finedix**")

AND: **GUY FORTIER**, residing and domiciled at 3428 rue Marcil, Montréal, Quebec H4A 2Z3;

(hereinafter "**Fortier**")

AND: **MARIE-PIERRE FAURE**, residing and domiciled at 1109 Place Guertin, Ville St-Laurent, Quebec H4M 1X5;

(hereinafter "**Faure**")

AND: **RICHARD J. DECKELBAUM**, residing and domiciled at 8 Harvard Lane, Hastings-on-Hudson, New York 10806, U.S.A.;

(hereinafter "**Deckelbaum**")

AND: **JEAN-FRANÇOIS BRISSON**, residing and domiciled at 3020 Contrecoeur, Montréal, Quebec, H1L 3Z8

(hereinafter "**Brisson**")

AND: **9079-1039 QUÉBEC INC.**, a company legally constituted under the laws of Quebec, having its head office at 1109 Place Guertin, Ville St-Laurent, Quebec H4L 1X5, represented by and acting through Marie-Pierre Faure, its president, who is duly authorized for the purposes hereof, as she has declared;

(hereinafter "**9079**")

AND: **AMAZE INTERNATIONAL SPRL**, a corporation duly constituted under the laws of Belgium, having a place of business at 206 Avenue de Messidor, Brussels 1180, represented by and acting through Richard Émile Azera, its delegated director, who is duly authorized for the purposes hereof, as he has stated;

(hereinafter "**AMAZE**")

AND: **JEAN EMMANUEL RAPHAEL GUETTA**, residing and domiciled at 19 Church Mount, London N2 0RW, United Kingdom;

(hereinafter "**Guetta**")

AND: **RICHARD ÉMILE AZERA**, residing and domiciled at 206 Avenue Messidor, 1180 Brussels, Belgium;

(hereinafter "**Azera**")

AND: **MEDICAL SCIENCE PARTNERS INTERNATIONAL (MSPI)**, a Singapore general partnership, represented by and acting through André Lamotte, partner, who is duly authorized for the purposes hereof, as he has stated;

(hereinafter "**MSPI**")

AND: **MARIE-CLAUDE LÉVESQUE**, domiciled and residing at 3460 Peel #1515, Montréal, Quebec H3A 2M1;

(hereinafter "**Lévesque**")

AND: **MARIELLE ROBERT**, domiciled and residing at 6979 De Lanaudière #2, Montréal, Quebec H2B 1Y1;

(hereinafter "**Robert**")

(**Onami, Auriga, POPOWSKI, Medco, Gutrafin, Schroder, MSPI, FSTQ, FRSIM, Fortier, Deckelbaum, Brisson, 9079, AMAZE, Guetta, SGF and Finedix, Lévesque and Robert** being hereinafter collectively referred to as the "**Shareholders**")

AND: **BIOARTIFICIAL GEL TECHNOLOGIES (BAGTECH) INC.**, a corporation legally constituted under the *Canada Business Corporations Act*, having its head office at 400 rue de Maisonneuve
ouest, suite 1156, Montréal, Quebec H2A 1L4, represented by and acting through Marie-Pierre Faure, its president, who is duly authorized for the purposes hereof, as she has declared;

(hereinafter the "**Corporation**")

WHEREAS the Corporation's authorized capital stock is composed of an unlimited number of Class A, B, C, D and E shares without par value, of which there are **8,162,749** Class A shares and 1 Class D share issued and outstanding;

WHEREAS the shares of the Corporation that are outstanding (or reserved for issue) are divided among the shareholders, as of the date hereof, in the proportions set out below as among the shareholders, who are the beneficial owners thereof by good and valid title, free and clear of any priority, mortgage or encumbrance whatsoever;

Shareholders	**Number and Class of Shares**	**%**
Faure	1,041,280 Class A shares	12.76
FRSIM	771,980 Class A shares	9.46
Fortier	547,610 Class A shares and 1 Class D share	6.71
SGF	540,541 Class A shares	6.62
Finedix	472,973 Class A shares	5.79
Schroder	837,897 Class A shares	10.27
Medco	761,031 Class A shares	9.32
Gutrafin	648,649 Class A shares	7.95

Shareholders	Number and Class of Shares	%
FSTQ	135,135 Class A shares	1.66
9079	90,037 Class A shares	1.10
Deckelbaum	61,804 Class A shares	0.76
AMAZE	47,393 Class A shares	0.58
Guetta	47,393 Class A shares	0.58
Brisson	2,000 Class A shares	0.03
MSPI	195,135 Class A shares	2.39
Auriga	1,621,621 Class A shares	19.87
Popowski	270,270 Class A shares	3.31
Lévesque	15,000 Class A shares	0.18
Robert	15,000 Class A shares	0.18
Onami	40,000 Class A shares	0.49
TOTAL	**8,162,749** Class A shares, 1 Class D share	100.0

WHEREAS each of the Shareholders declares that it is the beneficial owner, directly or on behalf of its clients (in the case of Schroder), as of the date hereof, by good and valid title, free and clear of any charge, priority, mortgage or encumbrance whatsoever, of the number of Class A or Class D shares indicated alongside its name in the foregoing table;

WHEREAS in addition to the 360,270 Class A shares of the capital of the Corporation reserved for the employees of the Corporation for the purposes of its profit-sharing program, the 195,135 Class A shares of the capital of the Corporation reserved for MSPI under a consultancy agreement made between MSPI and the Corporation, the 81,000 warrants (at $1.85 per share) issued to FRSIM and the share purchase option granted to Garantie Québec under a loan offer accepted by the Corporation on July 17, 2001, under which Garantie Québec may purchase 75,502 common shares of the capital of the Corporation at a price of $1.85 per share (the "**GQ-2001 Option**"), no option or other right to purchase shares of the Corporation or other securities convertible into shares has been authorized or is outstanding, and no agreement has been made to issue such option or other right;

WHEREAS Faure declares that she is directly the owner, on the date hereof, by good and valid title, free and clear of any priority, mortgage or encumbrance, of all of the currently issued and outstanding common shares of the capital stock of 9079;

WHEREAS Azera declares that he is directly the owner, on the date hereof, by good and valid title, free and clear of any priority, mortgage or encumbrance, of all of the currently issued and outstanding common shares of the capital stock of AMAZE;

WHEREAS no option or other right to purchase shares or other securities convertible into shares of 9079 has been authorized or is outstanding, and no agreement has been made to issue such option or other right;

WHEREAS no option or other right to purchase shares or other securities convertible into shares of AMAZE has been authorized or is outstanding, and no agreement has been made to issue such option or other right;

WHEREAS no option or other right to purchase shares or other securities convertible into shares of Finedix has been authorized or is outstanding, and no agreement has been made to issue such option or other right;

WHEREAS the parties hereto have agreed that it is in the best interests to agree to certain terms and conditions governing the ownership and transfer of the Shares in the capital stock of the Corporation, the issued and outstanding shares in the capital stock of 9079 and the issued and outstanding shares in the capital stock of AMAZE and Finedix and all other voting or participating shares subsequently acquired in the capital stock of the Corporation, 9079, AMAZE and Finedix and the exercise of the rights associated with such shares; and

WHEREAS the parties have agreed to cancel and replace the Initial Shareholders Agreements (as defined in this Agreement) by this Agreement.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS

In this Agreement, the following expressions and words have the following meanings, unless otherwise indicated by the context:

1.1 "**Shareholders**" means the persons identified in the preamble and any natural or legal person who may become a party to this Agreement as a registered holder or authorized transferee of Shares in the Corporation (in which event, the provisions of this Agreement shall be interpreted *mutatis mutandis*);

1.2 "**Institutional Shareholders**" means, collectively, Auriga, Medco, Gutrafin, Schroder, FSTQ, SGF, FRSIM and Finedix, and "**Institutional Shareholder**" means any one of them individually;

1.3 "**Shares**" means (i) the shares of the Corporation held by the Shareholders, (ii) the shares acquired by the treasury of the Corporation or by one of the Shareholders during the term of this Agreement, and (iii) any share resulting from the consolidation, splitting or other reorganization of the capital stock of the Corporation;

1.4 "**Voting Share**" means the issued and outstanding shares of the capital stock of the Corporation that give the right to vote at any meeting of the Shareholders of the Corporation, which are, on the date hereof, the Class A shares of the capital stock of the Corporation;

1.5 "**Offered Shares**" has the meaning assigned to that expression in paragraph 5.1;

1.6 "**Participating Shares**" means the shares of the capital stock of the Corporation that, at any time, give the holders the right (i) to share in the residue of the Corporation's property upon dissolution or upon voluntary or forced liquidation, and (ii) to participate in the profits or surplus assets of the Corporation;

1.7 "**Director**" means a natural person who sits on the Board of Directors;

1.8 "**undiluted base**" means the total number of Voting Shares issued and outstanding;

1.9 "**Alienate**" (and "**Alienation**") means to mortgage, with or without dispossession, to encumber by a charge, an option to purchase or an option to sell, or otherwise commit as legal or conventional security, or otherwise alienate in anyway whatsoever, or any attempt to perform any such transaction;

1.10 "**Bank**" has the meaning assigned to that word in paragraph 10.2;

1.11 "**Transferor**" has the meaning assigned to that word in paragraph 4.2;

1.12 "**Transfer**" means to sell, transfer, exchange, give, dispose of or otherwise assign in any manner whatsoever, or any attempt to perform any such transaction, and the act of doing any of those things;

1.13 "**Committees**" means, collectively, any committee created by the Board of Directors;

1.14 "**Board of Directors**" means the Board of Directors of the Corporation and of each of its Subsidiaries, as the case may be;

1.15 "**Control**" (of) an entity means possession by a person, other than as creditor, of securities that carry more than 50% and thus enable that person to elect a majority of the directors of the entity in question;

1.16 "**Agreement**" means this Shareholders' Agreement and any rider, amendment or alteration that may be made to it in writing, and the Agreement may also be referred to from time to time by the expression "**this Agreement**";

1.17 "**Initial Shareholders' Agreements**" means the agreements among the Shareholders of the corporation signed on December 13, 2000, and December 4, 2002;

1.18 "**Subscription Agreement**" means the subscription agreement signed by Gutrafin, Auriga, Medco, Popowski, Schroder, Onami and the Corporation on the date hereof;

1.19 "**Founders**" means Faure, Fortier, Deckelbaum, Guetta, Azera and Brisson;

1.20 "**Subsidiary**" means any legal controlled, at present or in future, directly or indirectly, by the Corporation;

1.21 "**Group A**" means the Founders, Lévesque, Robert, Popowski and Onami;

1.22 "**Group B**" means SGF, FSTQ, FRSIM, Finedix and Auriga;

1.23 "**Group C**" means Medco, Gutrafin and Schroder;

1.24 "**Permanent Incapacity**" means a physical or mental incapacity or any illness whatsoever lasting for a consecutive period of more than six months, or 12 months, cumulatively, over a consecutive period of 18 months, which prevents the person concerned from attending to their usual business and performing their normal functions, tasks and responsibilities for the Corporation, where there is no reason to believe that it will be resolved during the lifetime of the person; or

1.25 "**Fair Market Value**" means, unless otherwise indicated in this Agreement, the fair market value from time to time of all of the participating Shares or all of the shares of the Corporation, as the case may be, as determined based on the value of the Corporation's business (at the expense of the Corporation and with no discount for minority participation or premium for controlling position) by an independent valuator who is a

member of the Canadian Institute of Chartered Business Valuators chosen unanimously by the members of the Board of Directors or, in the event that a unanimous decision is not reached, on application by the vendor Shareholder, by a judge of the Superior Court of Quebec sitting in the Judicial District of Montréal, within 60 days following the appointment of the valuator or within such other time as may be provided in this Agreement; and where the Fair Market Value of any participating Share must be determined, it shall be equal to the fair market value as determined by the independent valuator in accordance with the foregoing, divided by the number of participating Shares then outstanding;

1.26 "**Good Faith Offer**" means an offer made to a Shareholder by a person other than a Related Person of the Shareholder for the Transfer in whole or in part of the Shares and Convertible Securities of which the Shareholder is the beneficial owner and where that person establishes, by producing an irrevocable bank letter of credit, that they have the necessary financial resources at the time the offer is made to complete the cash purchase of the Shares and Convertible Securities;

1.27 "**Person**" includes a natural person, a legal person, including a company, a business corporation or a cooperative, a partnership, including a partnership constituted under the Civil Code of Québec, a trust, a succession, an association of persons whether or not incorporated, a joint venture, a state or a regulatory or self-regulating body, or a board, office, commission or other public body. Unless otherwise indicated by the context, any reference to a corporation refers to any legal person, including a company, a business corporation, a cooperative or any other incorporated entity, and any partnership;

1.28 "**Related Person**" means, in respect of any other Person, any Person who is not dealing with such other Person at arm's length, within the meaning assigned to that expression by subsection 251(1) of the *Income Tax Act* (Canada);

1.29 "**Leaves Voluntarily**" means leaves of their own accord;

1.30 "**Convertible Security**" means any right, option, warrant or other security (within the meaning of the *Securities Act* (Quebec) conferring the right to acquire Shares or that may be converted into or exchanged for Shares;

1.31 "**Book Value**" means the book value of the Shares of the Corporation established in accordance with the Corporation's audited annual financial statements, consolidated where applicable, for the fiscal year preceding the event that gave rise to the determination of the book value, and adjusted to reflect subsequent events, such financial statements to be prepared by the

Auditors applying the generally accepted accounting principles, consistently applied, and accompanied by a report by the Auditors; and

1.32 "**Auditors**" means the Corporation's auditors on the date of the event in respect of which a request is made to the Auditors.

2. GENERAL AGREEMENTS

2.1 The parties to this Agreement agree, mutually and irrevocably, for the term of the Agreement, to do anything that is required and to govern themselves in all respects in such a way as to give full effect to the provisions of the Agreement.

2.2 The Shareholders shall guarantee compliance with section 13 by the persons whom the Shareholders, respectively, put forward to sit on the Board of Directors.

2.3 Every Shareholder who is entitled to appoint one or more Director and who Transfers all of their Shares shall immediately secure the resignation of the persons they appointed to the Board of Directors and to Committees.

3. RULES OF INTERNAL GOVERNANCE

3.1 Subject to the following provisions, the Shareholders agree, during the term of this Agreement, to take the necessary measures and to use the voting rights associated with the Shares they hold to elect and continue seven Directors on the Board of Directors.

3.2 On the date of this Agreement, the Shareholders agree that the Board of Directors shall be composed of representatives appointed by the Shareholders as hereinafter set out:

Group A	2 Directors (including Marie-Pierre Faure)
Group B	3 Directors (including one appointed jointly by FSTQ and FRSIM, one appointed by SGF and one appointed by Auriga)
Group C	2 Directors (including André Lamotte)

In addition, FSTQ and FRSIM may jointly appoint an observer to the Board of Directors who shall be entitled to receive all notices of meetings and all documents accompanying such notices.

On the date of this Agreement and for as long as the majority of the Shareholders so agree, Colin Bier shall act as Chair of the Board of Directors. Colin Bier is a Director appointed by the Group C Shareholders.

3.3 The Shareholders further agree that each of the Institutional Shareholders may, at its option, be represented on any Committee by a number of representatives proportional to the percentage of Voting Shares of the capital stock of the Corporation that it holds, on an undiluted basis, provided that there shall be a minimum of one representative.

3.4 The Shareholders agree to take the necessary measures and to use the voting rights associated with the Shares they hold to make a by-law providing:

3.4.1 that at least six meetings of the Board of Directors will be held each year with a maximum of two months between meetings;

3.4.2 that a notice of meeting shall be delivered by hand or sent by registered or certified mail or by facsimile, provided that, if sent by facsimile, receipt by the addressees is confirmed and as soon as possible thereafter an original copy of the notice of meeting is sent by special delivery, at least 10 business days before the date of a meeting; however, emergency meetings of the Board of Directors may be convened on at least 48 hours' notice. Such notice shall contain the place, date and time of the meeting and shall be accompanied by a detailed agenda, the minutes of the previous meeting and any document that will enable the Directors to form an informed opinion about the proposed agenda items. In addition, the general by-laws of the Corporation shall provide that meetings of the Board of Directors may be held by telephone;

3.4.3 that the presence of a representative of each of Group A, Group B and Group C who is in office at the time is needed in order to establish quorum for any meeting of the Board of Directors. If, as a result of the absence of the representative of any of those groups, there is no quorum, the meeting shall be adjourned to a date no earlier than five business days, or in the case of an emergency meeting, two business days, from the date of the initial meeting. Quorum for the resumed meeting shall be a majority of the Directors present;

3.4.4 the by-laws shall provide that each of the Directors appointed by the Institutional Shareholders may convene a meeting of the Board of Directors or of any Committee;

3.4.5 that quorum at any Shareholders' meeting may not be achieved unless the Shareholders who together hold 50% plus one of the voting rights associated with the outstanding Shares, and quorum shall require that the Institutional Shareholders be present. If there is no quorum at a Shareholders' meeting, the meeting shall be adjourned to a date no earlier than five business days from the date of the initial meeting. Quorum for the resumed meeting shall be a majority of the Shareholders present;

3.4.6 that the Shareholders on the Board of Directors or any Committee of the Corporation, other than a person paid or employed by the Corporation, shall be entitled to reimbursement for their travel expenses and to an honorarium of $500.00 (plus GST and QST) for each meeting that they attend, it being agreed that before a first public issue by the Corporation, any employee of an Institutional Shareholder shall waive their honorarium.

3.5 In the event that a vacancy arises on the Board of Directors (whether by reason of death or illness or any other similar reason) or that a Shareholder decides to withdraw a representative that it is entitled to appoint to be elected to the Board of Directors, the other Shareholders agree to fill the vacant position or remove that representative in accordance with the instructions given by the Shareholder that is entitled to fill the position under this Agreement.

3.6 Notwithstanding paragraph 13.1.3 of this Agreement, the Shareholders agree to create a management committee that will be composed of Marie-Pierre Faure, the general manager of the Corporation (who will be appointed from time to time by the Board of Directors in accordance with the by-laws of the Corporation), a representative appointed by a majority vote of the votes held by the members of Group B (it being agreed that Group B may replace that representative from time to time at its own option) and a representative appointed by a majority vote of the votes held by the members of Group C (it being agreed that Group C may replace that representative from time to time at its own option). The committee shall have as its primary function advising the Board of Directors, ensuring that decisions made by the Board of Directors are carried out, and performing any duty that may be delegated to it from time to time by the Board of Directors. The decisions of the Committee shall be made by unanimous vote of the members present, provided that there is quorum. Quorum at any meeting of the management committee shall be achieved if there are two members present, but no meeting of the committee may be validly held without a representative of Group B or Group C present.

4. PROHIBITION ON TRANSFER OR ALIENATION

4.1 The Shareholders agree that they are not entitled to Transfer any Share or Convertible Security held by them, or any right or interest thereunder, or to Alienate any such Share or Convertible Security or any right or interest thereunder, unless the Transfer is made or the Alienation effected in accordance with the provisions of the Agreement. In addition, by reason of the strategic role played by Faure in the Corporation, Faure or 9079 further agree not to Transfer or Alienate the Shares or Convertible Securities they hold on the date of this Agreement, or may later hold in the Corporation, before June 30, 2009.

Notwithstanding the foregoing, Faure and/or 9079 shall be at liberty to Transfer their Shares, on the same basis as the other Shareholders, if (i) the Transfer or successive Transfers relate, cumulatively, to fewer than 282,829 Class A shares and Faure and 9079 together continue to hold a minimum of 848,488 Class A shares after such Transfer or successive Transfers, or (ii) such Transfer results from the application of the provisions set out in any of the following sections of this Agreement:

- section 7 (Option);
- section 8 (Drag-Along Right);
- section 10 (Put Option); and
- section 11 (Exit).

4.2 Notwithstanding section 6, a Shareholder (the "**Transferor**") may at any time Transfer its Shares or Convertible Securities, in whole or in part, without having to offer them first to the other Shareholders, provided that such Transfer is made to a legal person the Shareholder controls and the sole objects and activities of which are to hold shares and securities. The Directors shall be required to authorize such Transfer notwithstanding any other provision of the charter or by-laws of the Corporation, provided:

4.2.1 that the Transferee (i) confirms to the other Shareholders its irrevocable consent to be bound by the provisions of the Agreement in the form of Schedule 4.2, (ii) succeeds and is substituted for the Transferor in all of the Transferor's rights, benefits, obligations and responsibilities, and (iii) agrees not to issue shares or convertible securities of its capital stock to persons other than the Transferor; and

4.2.2 that the Shares or Convertible Securities that are Transferred become subject to the provisions of the Agreement.

4.3 Notwithstanding the provisions of this Agreement, the parties acknowledge that each of FSTQ and FRSIM may at any time Transfer its Shares and Convertible Securities, as the case may be, in whole or in part, without having to offer them to the other Shareholders, provided that such Transfer is made to

a regional solidarity fund, a specialized fund or any other investment fund that it shall in all cases post as a member of its network and in which it holds the majority of voting and participating shares or membership shares. The Directors shall be required to authorize such Transfer notwithstanding any other provision of the charter or by-laws of the Corporation, without prior authorization by the Shareholders, provided:

4.3.1 that the Transferee or Transferees confirm in writing to the other Shareholders their irrevocable consent to be bound by the provisions of this Agreement, in the form of Schedule 4.2;

4.3.2 that the Transferee or Transferees succeed and are substituted for FSTQ or FRSIM, as the case may be, in all its rights, benefits, obligations and responsibilities; and

4.3.3 that the Shares and Convertible Securities remain subject to the provisions of this Agreement.

4.4 Notwithstanding the provisions of this Agreement, the parties acknowledge that SGF may at any time Transfer the Shares and Convertible Securities that it holds, in whole or in part, as the case may be, without having to offer them to the other Shareholders, provided that such Transfer is made (i) to any successor or assign designated in accordance with the provisions of its incorporating statute or incorporating document or any other legislation to which it may be subject, (ii) to any Person belonging to the same group as the Société Générale de Financement du Québec or having similar objects, as such objects are set out in its incorporating statute or incorporating document, and to which the Shares and Convertible Securities held by SGF, as the case may be, maybe Transferred, whether free of charge or for onerous consideration, by decision of the Government of Quebec or SGF, or (iii) to any Person under the Control of SGF, or (iv) to any Person in which the Government of Quebec, directly or indirectly, holds a financial participation or of which the Government of Quebec appoints a majority of the members of the board, or any person ultimately controlled by such Person, provided, however, in all cases set out in this section,

4.4.1 that the transferee of such shares confirms to the Shareholders its irrevocable consent to be bound by the provisions of this Agreement in the form of Schedule 4.2;

4.4.2 that the transferee succeeds and is substituted for SGF in all its rights, benefits, obligations and responsibilities; and

4.4.3 that the Shares and Convertible Securities transferred by SGF remain subject to the provisions of the Agreement.

4.5 Notwithstanding the provisions of this Agreement, Schroder may at any time transfer his Shares and Convertible Securities, in whole or in part, as the case

may be, that he holds without having to offer them to the other Shareholders, provided that such Transfer is made to any beneficiary who is a client of Schroder on behalf of whom the said Shares and Convertible Securities are held on this date by Schroder as trustee, provided:

4.5.1 that the transferee of the said Shares confirms to the Shareholders its irrevocable consent to be bound by the provisions of this Agreement in the form of Schedule 4.2; and

4.5.2 that the Shares and Convertible Securities transferred by Schroder remain subject to the provisions of the Agreement.

4.6 Without prejudice to any other remedy, any Transfer made or Alienation effected contrary to this Agreement, whether directly or indirectly, shall be null, void and of no effect, both as against the other Shareholders and as against the Corporation, and may not be entered in the registers.

4.7 Faure agrees that certain of her ownership rights in the shares of 9079 and securities convertible into voting shares that she holds or may hold in the capital stock of 9079 shall be restricted in that she is not entitled to Transfer or Alienate, directly or indirectly, any shares of 9079, or any other right or interest in or under those shares, unless she has obtained the prior written agreement of each of the Institutional Shareholders, which consent may be denied at the discretion of each Institutional shareholder. In addition, Faure agrees to ensure that no share in the capital stock of 9079 shall be issued unless 9079 has obtained the prior written consent of each of the Institutional Shareholders, which consent may be denied at the discretion of each Institutional Shareholder.

4.8 Azera agrees that certain of his ownership rights in the shares of AMAZE and securities convertible into voting shares that he holds or may hold in the capital stock of AMAZE shall be restricted in that he is not entitled to Transfer or Alienate, directly or indirectly, any shares of AMAZE, or any other right or interest in or under those shares, to any natural or legal person doing research, development or marketing in the field of hydrogel. Azera further agrees to ensure that no share in the capital stock of AMAZE, or security convertible into voting shares of AMAZE, shall be issued to any natural or legal person doing research, development or marketing in the field of hydrogel.

4.9 Notwithstanding paragraph 4.8 above, Azera and AMAZE agree to offer all Voting Shares and Convertible Securities held by AMAZE, in the event that a change of control of AMAZE takes place, it being agreed that the Voting Shares and Convertible Securities will be offered in accordance with the procedure described in section 6.

4.10 The Share certificates issued or that may be issued by the Corporation, and the certificates representing the shares issued or that may be issued by 9079, by AMAZE and by Finedix, shall bear a notice that they are subject to the terms and conditions of this Agreement and that they may not be Transferred or Alienated otherwise than in accordance with this Agreement.

4.11 In the event that, at any time during the period beginning on the date hereof and ending on December 13, 2005 (inclusive), a change of the direct, indirect or ultimate Control of Finedix were to take place in favour of any Person who is not a member of the group (as that expression is defined in the *Canada Business Corporations Act*) of which Finedix is a member on the date hereof (the "Group") and that Person is not engaged in research, development or marketing in the field of hydrogel, Finedix shall, immediately upon such change of Control becoming effective and without the need for any further formality, cease to enjoy the rights provided in section 3 (Internal Governance), sections 10 and 11 (Put Option and Exit) and section 13 (Conduct of Business) hereof, provided, however, that if the other Institutional Shareholders consent, at their entire discretion, such rights may be reassigned to it. Finedix acknowledges that this paragraph is reasonable for the protection of the rights of the other Institutional Shareholders.

4.12 In the event that a change of the direct, indirect or ultimate Control of Finedix were to take place in favour of any Person who is not a member of the Group and that Person is engaged in research, development or marketing in the field of hydrogel, Finedix shall give prior notice in writing to the Corporation, and upon receipt of such notice by the Corporation, the Corporation and the Group shall negotiate, in good faith, an agreement in respect of scientific collaboration and, where applicable, an agreement in respect of the sharing of new intellectual property, which agreement shall be approved by the other Institutional Shareholders, whose approval shall not be withheld except for valid reason.

4.13 In the event that a change of the direct, indirect or ultimate Control of Finedix were to take place in favour of any Person who is not a member of the Group and that Person is engaged in research, development or marketing in the field of hydrogel, Finedix shall, immediately upon such change of Control becoming effective and without the need for any further formality, cease to enjoy the rights provided in section 3 (Internal Governance), section 5 (Right of First Refusal), sections 8 to 11 (Drag-along Right, Put Option, Public Issue and Exit) and section 13 (Conduct of Business) hereof, provided, however, that if the other Institutional Shareholders consent, at their entire discretion, such rights may be reassigned to it. Finedix acknowledges that this paragraph is reasonable for the protection of the rights of the other Institutional Shareholders.

5. RIGHT OF FIRST REFUSAL

Any issue and distribution of Shares or Convertible Securities of the Corporation shall be made as follows:

5.1 The Board of Directors shall determine the number and class of Shares to be issued, and the price, terms and conditions and attributes of the Shares or Convertible Securities (the "**Shares Offered**"). The secretary shall communicate that information in writing, together with a copy of the resolution adopted by the Directors, to the Institutional Shareholders and shall inform them of the number of Shares Offered for which each of them is entitled to subscribe (the "**Offer**");

5.2 The Shares Offered shall be offered first to all Institutional Shareholders, Guetta, AMAZE, Popowski and Onami, who may subscribe for them, by preference, within 30 days following receipt of the Offer, pro rata to the number of Voting Shares they hold as a proportion of the total number of Voting Shares held among them on that date;

5.3 If an Institutional Shareholder, Guetta, AMAZE, Popowski or Onami wishes to exercise their right of first refusal, they shall so inform the Corporation, in writing, within the said 30 days; the notice shall state the number of Shares Offered that the Institutional Shareholder, Guetta, AMAZE, Popowski or Onami wishes to acquire;

5.4 If, on the expiry of the said 30 days, FRSIM has not served notice of its intention to acquire all of the Shares Offered to which it is entitled (for greater certainty, the parties confirm that the provisions of this paragraph 5.4 cannot apply if FRSIM were to serve notice of such intention), the secretary shall immediately so notify FSTQ in writing, and send a copy of the notice to the other Institutional Shareholders. FSTQ may then, within 5 business days following receipt of the notice from the Secretary, acquire the Shares Offered to which FRSIM would have been entitled;

5.5 If, on the expiry of the said 30 days, Guetta, AMAZE, Popowski, Onami or an Institutional Shareholder other than FRSIM has not served notice of its intention to acquire all of the Shares Offered to which it is entitled, the secretary shall immediately so notify, in writing, the Institutional Shareholders who have fully subscribed for their quota, and the said Institutional Shareholders may then, within 5 business days following receipt of the notice from the Secretary, acquire the Shares Offered that have not found a taker, pro rata to the number of Voting Shares that the Shareholders wishing to acquire them hold among them on that date.

5.6 If the provisions of paragraph 5.4 are applicable and FSTQ waives its right to acquire the portion of the Shares Offered to FRSIM, the said Shares Offered, and the Shares Offered in respect of which any other Institutional Shareholder, Guetta, AMAZE, Popowski or Onami has not served notice, in accordance with paragraph 5.3, of its intent to acquire, shall be offered to the Institutional Shareholders, Guetta, AMAZE, Popowski or Onami, which have subscribed for their quota, by the secretary of the Corporation sending them notice in writing on the expiry of the 5 days provided for in paragraph 5.4 hereof, and they may then, within 5 business days following receipt of such notice, acquire the Shares Offered that have not found a taker, pro rata to the number of Voting Shares that the Shareholders wishing to acquire them hold among them on that date;

5.7 If the provisions of paragraph 5.4 are applicable and FSTQ acquires the Shares Offered to which FRSIM would have been entitled, the Shares Offered in respect of which any Institutional Shareholder (other than FRSIM), Guetta, AMAZE, Popowski or Onami has not served notice of its intent to acquire shall be offered to the Institutional Shareholders, Guetta, AMAZE, Popowski or Onami, which have subscribed for their quota, by the secretary of the Corporation sending notice in writing to that effect immediately after the expiry of the 5 days provided for in paragraph 5.4 hereof, and they may, within 5 business days following receipt of such notice, purchase the Shares Offered that have not found a taker, pro rata to the number of Voting Shares that the Shareholders wishing to acquire them hold among them;

5.8 If the issue of Shares Offered has not been subscribed in full in the manner provided in this section, the unsubscribed Shares Offered may be issued by the Corporation to the other Shareholders who hold Voting Shares and then to third parties, provided that such third parties agree to be bound by this Agreement, in the form of Schedule 4.2;

5.9 The provisions of this section 5 shall not apply to issues of Shares to: (i) employees of the Corporation under the Share purchase option plan adopted by the Corporation December 4, 2002, for a maximum of 360,270 Shares; (ii) FRSIM, if and only if such issue is pursuant to the exercise of 81,000 warrants issued to FRSIM; (iii) MSPI, if and only if such issue is pursuant to the consultation agreement between MSPI and the Corporation dated November 11, 2002, for a maximum of 195,135 Class A shares of the capital stock of the Corporation; (iv) the persons referred to in section 21 of this agreement for the purposes of exercising the Options granted to them; (v) any of the Institutional Shareholders of Popowski or Onami, under the Subscription Agreement; and (vi) Garantie Québec, if and only if such issue is pursuant to the exercise of Option GQ-2001;

5.10 Except in respect of paragraph 5.4 and solely for the purposes of this section 5, it is agreed that for the purposes of calculating the Voting Shares and Shares held by FSTQ, the Voting Shares held by FRSIM shall be added to the Voting Shares held by FSTQ.

6. PRIORITY RIGHT TO PURCHASE

6.1 In cases in which a Shareholder (hereinafter the "**Vendor**") wishes to Transfer its Shares and, where applicable, its Convertible Securities, the Vendor shall offer all and not a portion of its Shares and, where applicable, its Convertible Securities (hereinafter the "**Securities Offered**"), in priority, subject to the following, to the other Shareholders who hold Voting Shares (collectively the "**Beneficiaries**") in accordance with the provisions of this section. If the decision of the Vendor to Transfer the Securities Offered is prompted by a Good Faith Offer, again relating to all of the Securities Offered, the Vendor shall then so inform the Beneficiaries, communicate to them the full content of the offer made to it and the identity of the interested purchaser (the "**Acquirer**"), and confirm to them in writing its intent to accept the said offer if the priority rights to purchase provided in this section are not exercised by the Beneficiaries (the offer initiated by the Vendor or, where applicable, the Good Faith Offer, hereinafter the "**Offer**");

6.2 The Offer shall be made by the Vendor by notice given to the Beneficiaries, stipulating (i) in the case of an Offer initiated by the Vendor, the asking price (which shall be payable only in cash or by bank note) and the terms and conditions applicable to the proposed Transfer, or (ii) in the case of a Good Faith Offer, the terms of the offer and a copy of the Good Faith Offer (collectively, in both cases, the "**Terms of Transfer**"). The notice of Offer shall constitute an irrevocable offer by the Vendor in respect of the Transfer of the Securities Offered to the Beneficiaries;

6.3 Each of the Beneficiaries shall then have the exclusive right (the "**Priority Right to Purchase**") to purchase the Securities Offered, unconditionally, in whole and not in part, pro rata to the total number of Shares it then holds as a proportion of the total number of Shares then held by the Beneficiaries (excluding the Shares held by the Vendor);

6.4 A Beneficiary's Priority Right to Purchase shall be exercised by giving notice to the Vendor within 45 days following receipt of the Offer and agreeing (i) to abide by each and every one of the Terms of Transfer, and (ii) to complete the transaction within 30 days following the date on which all of the Securities Offered by the Vendor find takers among the Beneficiaries; in the event of failure to so inform the Vendor within the time allowed, a Beneficiary will be presumed to have waived its Priority Right to Purchase;

6.5 If one of the Beneficiaries does not exercise or waive its Priority Right to Purchase and one or more of the other Beneficiaries has duly exercised it ("**Beneficiary Purchasers**"), the Vendor shall then give a new notice of offer in writing (the "**Second Notice**") to the Beneficiary Purchasers within three business days following the expiry of the time allowed for response in paragraph 6.4 to inform them that if they wish, they may acquire the balance of the Securities Offered, pro rata to the total number of Shares that each of the Beneficiary Purchasers holds as a proportion of the total number of Shares held by the Beneficiary Purchasers (excluding the Shares held by the Vendor and the Shares that are part of the balance of the Securities Offered);

6.6 The provisions of paragraphs 6.3 and 6.4 shall apply, *mutatis mutandis*, to the exercise of the rights of the Beneficiary Purchasers under paragraph 6.5, with the exception of the time allowed for response, which shall be 10 days;

6.7 If all of the Securities Offered have not been accepted on the terms set out in paragraph 6.5, no Security Offered shall be deemed to have been purchased, and subject to the Right of Co-sale provided in section 7 and the provisions of paragraph 6.8, the Vendor may Transfer all of the Securities Offered, but not part thereof only, to any person other than a party hereto, provided that they are Transferred in exact compliance with the Terms of Transfer. However, if the Transfer is not completed within 30 days following the expiry of the final time applicable under this paragraph 6.7 or if, where applicable, the Transfer may not be made in full compliance with the Terms of Transfer, the Vendor may not then Transfer the Securities Offered and shall, if it still wishes to Transfer them, offer them again in accordance with the provisions of this paragraph 6.7;

6.8 If the Transfer is made to the Acquirer, it may not be completed by the Vendor unless the Acquirer agrees to be bound by each of the provisions hereof as if it had been an original party to the Agreement and in compliance with all of the terms and conditions, in the agreement form attached in Schedule 4.2; the Securities Offered that are then purchased shall continue to be "Shares" or "Convertible Securities", as the case may be, within the meaning of this Agreement. If these agreements are not obtained, the Transfer shall be void and of no effect;

6.9 For the purposes of section 6, if the Vendor receives a proposal for the Transfer of Securities Offered and the proposal cannot be considered to be a "Good Faith Offer" because it does not meet the requirements set out in subparagraph 1.23, the Vendor may not accept the proposal and shall obtain a new offer that meets the said requirements before presenting it again to the Beneficiaries and triggering the Priority Rights to Purchase provided in section 6.

7. RIGHT OF CO-SALE

7.1 Notwithstanding the provisions of section 6, if a Vendor or Vendors who together hold more than 50.1% of the issued and outstanding Voting Shares, on an undiluted basis, agree to Transfer all of their Shares under a Good Faith Offer, each of the Beneficiaries may, within 45 days of receipt of the notice provided in 6.1, instead of exercising the Priority Right to Purchase provided in section 6, give notice to the Vendor(s) that they also wish to dispose (the "**Right of Co-sale**" of all of their Shares (the "**Drag-along Shares**") to the Acquirer pursuant to the offer provided in 6.1. In such a case and subject to 7.2, the Vendor(s) can only dispose of their Shares to said Acquirer if the Acquirer proceeds with the simultaneous acquisition of all Shares held by the Beneficiaries who will have given the notice provided for above under the terms of the offer provided for in 6.1. The exercise of said Right of Co-sale and the sale of the Shares to the Acquirer following the exercise of such a right do not result in the application of section 6;

7.2 The Shareholders acknowledge and agree that the representations and warranties imposed or other undertakings that may be agreed to by the Vendor may not and must not be imposed on Auriga, Medco, Gutrafin, Schroder, FSTQ, Finedix, FRSIM, AMAZE, Guetta, Popowski, Onami or SGF. Without limiting the generality of the foregoing, each of the Institutional Shareholders, AMAZE, Guetta, Popowski or Onami may not be required to give, to anyone other then them, representations or warranties stating: (i) that it is the sole registered and beneficial owner of its Shares and Convertible Securities, with the exception of the Shares and Convertible Securities held by Schroder as trustee for its clients, where applicable; (ii) that such Shares and Convertible Securities, if applicable, are free and clear of any appropriation; and (iii) that it may Transfer them on the terms stipulated above without restriction other than those set out in paragraph 7.2;

7.3 If a Beneficiary does not exercise its Right of Co-Sale by giving notice to the Vendor(s) within the time allowed, that Beneficiary shall be deemed to have waived its Right of Co-Sale;

7.4 On the expiry of the time provided in paragraph 7.1, the Vendor(s) shall give notice to the Acquirer of the number of Drag-along Securities which, by operation of the Right of Co-sale, are added to the Shares covered by the Offer. The Vendor may not Transfer the Shares covered by the Offer unless the Acquirer purchases the Drag-along Securities at the same time as it purchases the Shares covered by the Offer;

7.5 If a Beneficiary does not exercise its Right of Co-sale under paragraph 7.1, no Transfer may be made to an Acquirer before the Acquirer agrees to be bound by this Agreement, in the agreement form attached in Schedule 4.2;

7.6 If the Transfer to the Acquirer is not completed within 90 days following the expiry of the time provided in paragraph 7.1, the Vendor(s) may no longer Transfer the Shares covered by the Offer to the Acquirer, and if they still wish to Transfer them they shall offer them again in accordance with the provisions of sections 6 and 7;

7.7 The rights of each of the Beneficiaries provided in this section 7 shall be exercised independently.

8. DRAG-ALONG RIGHT

8.1 Notwithstanding the provisions of section 7, if Shareholders representing more than 60% of the issued and outstanding Voting Shares (on an undiluted basis) (the "**Vendors**") agree to Transfer all of their Shares under a Good Faith Offer for the acquisition of all of the Shares (the "**Offer**"), the Vendors may give notice to the Beneficiaries, within 45 days of receipt of the Offer, requiring the Beneficiaries to sell all their Shares (the "**Drag-along Shares**") to the Acquirer (the "**Drag-along Right**"), in which case the Beneficiaries shall be obliged to sell all the Drag-along Shares to the Acquirer, on the terms and conditions of the Offer which shall apply *mutatis mutandis*. The exercise of the Drag-along Right and the sale of the Shares of the Beneficiaries to the Acquire by virtue of the exercise of the Drag-along Right shall not trigger the application of sections 6 and 7;

8.2 The Shareholders acknowledge and agree that the representations and warranties imposed or an undertaking that may be given by the Vendor(s) may not and must not be imposed on Auriga, Medco, Gutrafin, Schroder, FSTQ, Finedix, FRSIM, AMAZE, Guetta, Popowski, Onami or SGF. Without limiting the generality of the foregoing, each of the Institutional Shareholders, AMAZE, Guetta, Popowski or Onami may not be required to give, to anyone other then them, representations or warranties stating: (i) that it is the sole registered and beneficial owner of its Shares and Convertible Securities, with the exception of the Shares and Convertible Securities held by Schroder as trustee for its clients, where applicable; (ii) that such Shares and Convertible Securities, if applicable, are free and clear of any appropriation; and (iii) that it may Transfer them on the terms stipulated above without restriction other than those set out in paragraph 8.2;

8.3 If the Vendor(s) do not exercise their Drag-along Right by giving notice to the Beneficiaries within the time allowed, that Vendors shall be deemed to have waived their Drag-along Right;

8.4 If the Transfer to the Acquirer is not completed within 90 days following the expiry of the time provided in paragraph 8.1, the Vendor(s) may no longer Transfer the Shares covered by the Offer to the Acquirer, and if they still wish to Transfer them they shall offer them again in accordance with the provisions of sections 6 and 7.

9. PUBLIC ISSUE

9.1 In the event that the Corporation intends to make a public issue by prospectus, it shall inform the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami as soon as possible and no later than 30 days before the scheduled date for filing any preliminary prospectus or shelf prospectus with the Commission des valeurs mobilières du Québec or any other securities regulator that may have jurisdiction;

9.2 The notice given by the Corporation shall, *inter alia*, offer the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami the opportunity to qualify the Shares they then hold in order to allow them to be resold under the terms of the prospectus or otherwise, in the proportion described in paragraph 9.3 hereof, subject to the provisions of paragraph 9.4 hereof;

9.3 In the event that the Corporation enters into a firm underwriting agreement or best efforts commitment in relation to such public issue by prospectus, it shall allow the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami to sell 75% of their Shares to the firm underwriter or through the agent;

9.4 In the event that the firm underwriter or agent is of the opinion that it cannot reasonably sell the Shares of the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami and of the Corporation, the Institutional Shareholders shall be deemed to have waived their resale rights in respect of their Shares, for the portion that cannot reasonably be sold, each pro rata to the number of shares held by it as a proportion of the total number of shares held by the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami;

9.5 In addition, where the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami retain Shares following a public issue by prospectus, it is understood and agreed that the Corporation and the other Shareholders shall make reasonable efforts to ensure that no Share held by the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami is placed in escrow, and all Shares to be placed in escrow shall be taken from the block held by the other Shareholders before the Shares held by the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami are placed in escrow and, in so far as is acceptable to the regulatory authorities concerned, all Shares held by the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami shall be

released from escrow before the Shares held by the other Shareholders are released from escrow;

9.6 It is agreed that in any public issue covered by this section, all costs associated with the preparation of the prospectus and all related costs and the fees of the firm underwriter or agent shall be borne by the Corporation, and the Institutional Shareholders, AMAZE, Guetta, Popowski and Onami shall bear no liability for such costs.

10. PUT OPTION

10.1 The Parties hereby declare their common intention to provide the Shareholders with liquidity no later than December 31, 2008, by transferring all of the Shares or assets of the Corporation or by public issue;

In the event of a public issue, the Institutional Shareholders (and their successors) shall be entitled to a priority right for the placement of their Shares for up to 75% of their participation, subject to the applicable legislation and regulations and the requirements that may be imposed by the Bank (as hereinafter defined);

10.2 In the event that the public issue has not been made by December 31, 2008, and the transfer of all of the Shares or assets of the Corporation has not taken place, the Parties agree that a commercial bank of international repute specializing in high-level transactions and independent of the Parties (the "**Bank**") and selected by majority vote of the Institutional Shareholders shall be retained with the mission of assisting them and studying (i) the possibility of the Shares being accepted for listing on a regulated financial instrument market or (ii) a transfer of all of the Shares or assets of the Corporation. The Parties agree to make their best efforts for the success of the mandate given to the Bank, and the Corporation agrees in this respect to disclose all necessary information to the Bank and give it access to its premises. The Bank shall account regularly on the progress of its mission to the Chair of the Board of Directors who shall so inform the Institutional Shareholders and the other Shareholders. If the Bank does not complete the mission assigned under its mandate within six months, the mandate shall be null and void;

10.3 In the event that neither a public issue nor a transfer of all of the Shares or assets of the Corporation has taken place by June 30, 2009, and that an Institutional Shareholder or Shareholders receives a cash offer to purchase from a Third Party (the "**Offeror**") for all of the Shares of the Corporation existing on the date of such offer, for a price corresponding to 100% of the stated capital of the Corporation (the "**Offer to Purchase**"), which Offer to Purchase has been approved by a two-thirds vote of the Institutional

Shareholders within one month of receipt by them, the other Shareholders expressly agree either (i) to transfer to the Offeror with the Institutional Shareholders all of their Shares, on the same terms as the Institutional Shareholders, or (ii) to make an alternative offer to purchase (the "**Alternative Offer**") to the Institutional Shareholders, within three months of the notice given by the Institutional Shareholders and their acceptance of the offer to Purchase, relating to all of the Shares of the Institutional Shareholders, provided that in the case referred to in subparagraph (ii) the Institutional Shareholders shall transfer all of their Shares to the maker of, and on the terms and conditions of, the Alternative Offer, where the Alternative Offer is higher than the initial Offer to Purchase;

In the event that the other Shareholders do not give notice to the Institutional Shareholders of their Alternative Offer within the aforesaid three months, the other Shareholders shall transfer to the Institutional Shareholders, on the same terms as the Institutional Shareholders, all of their shares to the Offeror [*sic*-Tr.];

10.4 In the interests of the Parties and the Corporation, the Institutional Shareholders and the other Shareholders agree, in order to give effect to the liquidity provided in the foregoing paragraphs on the best terms, to inform each other in good faith of the initiation and progress of all talks that any of them may engage in with a third party with a view to a Share Transfer. In addition, starting on the date of the mandate given to the Bank under paragraph 10.2 and for the six-month period provided in paragraph 10.2, the Parties have agreed not to initiate or conduct talks with a view to a Share Transfer otherwise than through that Bank and in cooperation with the other Parties.

11. EXIT

11.1 Notwithstanding any other provision hereof to the contrary, if 9079 or Faure (the "**Offeror**"):

11.1.1 Voluntarily Leaves the service of the Corporation before November 30, 2005, or

11.1.2 Voluntarily Leaves the service of the Corporation on or after November 30, 2005, but before November 30, 2006, or

11.1.3 is dismissed, with cause; or

11.1.4 ceases to be employed by the Corporation for any reason other than those referred to in subparagraphs 11.1.1 to 11.1.3; or

11.1.5 dies (in the case of Faure only); or

11.1.6 becomes affected by a Permanent Incapacity (in the case of Faure only); or

11.1.7 their Shares are seized and such seizure is not contested in good faith within five days, or if, where the seizure is contested and judgment is given, a third party acquirer takes possession of their Shares; or

11.1.8 becomes bankrupt or insolvent within the meaning of any insolvency legislation; or

11.1.9 is guilty of theft, fraud or embezzlement from the Corporation, or is guilty of any other criminal offence that harms the reputation of the Corporation; or

11.1.10 directly or indirectly does anything that violates any of the non-competition and non-solicitation undertakings set out in section 12, or that is prejudicial to the interests of the Corporation, and such default is not remedied within five business days following receipt of a notice in writing from any of the Shareholders stating the default complained of; or

11.1.11 refuses, neglects or omits to comply with the provisions of this Agreement and such default is not remedied within five business days following receipt of a notice in writing signed by one of the Shareholders stating the default complained of;

an exclusive and irrevocable option to acquire all of the Shares held, directly or indirectly, by the Offeror (the "**Shares Offered**") is granted on the date hereof by the Offeror (i) in the cases provided in subparagraphs 11.1.5, 11.1.6 and 11.1.8, to the Corporation and the Institutional Shareholders holding Voting Shares (the "**Beneficiary Shareholders**") (the Corporation and the Beneficiary Shareholders being sometimes collectively designated hereinafter as the "**Beneficiaries**") and (ii) in all cases other than those referred to in subparagraphs 11.1.5, 11.1.6 and 11.1.8, to the Corporation alone, at the price and on the terms and conditions hereinafter provided;

11.2 If the Offeror Voluntarily Leaves the service of the Corporation on or after November 30, 2006, an exclusive and irrevocable option to acquire all of the Shares held, directly or indirectly, by the Offeror (the "**Shares Offered**") is granted on the date hereof by the Offeror to the Corporation, at the price and on the terms hereinafter provided;

11.3 The option may be exercised during the three months following the date on which the Corporation or the Beneficiary Shareholders become aware of the event (the "**Exercise Period**");

11.4 In order to exercise the option, the Corporation or the Beneficiary Shareholders shall send notice in writing to the Offeror, during the Exercise Period, stating their intention to take up the option to which they are entitled;

11.5 In the cases referred to in subparagraphs 11.1.5, 11.1.6 and 11.1.8, the Beneficiary Shareholders shall determine, by majority vote, in a vote representing a majority of the votes for the Voting Shares they hold among them, whether the option will be exercised by them personally or by the Corporation. If they opt to exercise the option personally, the Shares Offered shall be divided among them pro rata to the number of Voting Shares they then hold as a proportion of all of the Voting Shares then held by the Beneficiary Shareholders, unless all of the Beneficiary Shareholders agree to proceed otherwise;

11.6 The sale price of the Shares Offered shall be equal to:

11.6.1 in the case of the events referred to in subparagraphs 11.1.9, 10% of the Fair Market Value of the Shares Offered;

11.6.2 in the case of the events referred to in subparagraphs 11.1.1, 11.1.3, 11.1.10 and 11.1.11, 25% of the Fair Market Value of the Shares Offered;

11.6.3 in the case of the event referred to in subparagraph 11.1.2, 50% of the Fair Market Value of the Shares Offered;

11.6.4 in the case of the event referred to in subparagraph 11.2, 75% of the Fair Market Value of the Shares Offered;

11.6.5 in the case of the events referred to in subparagraphs 11.1.4, 11.1.5, 11.1.6, 11.1.7 and 11.1.8, the Fair Market Value of the Shares Offered;

11.7 The sale price shall be payable upon completion of the transaction, which shall take place at the head office of the Corporation, no later than 2:00 p.m. on the 30th day following the date on which the option is taken up. However, in the event that the option to acquire the Shares Offered belongs *ab initio* to the Corporation alone and, by reason of the financial tests set out in the *Canada Business Corporations Act*, the Corporation is unable to purchase all of the Shares Offered, the exercise of the option provided in paragraph 11.3 shall be postponed to the date on which the Corporation is able to purchase all or part of the Shares Offered, but the Corporation shall have no more than two years to purchase all of the Shares Offered.

12. NON-COMPETITION AND NON-SOLICITATION

12.1 Faure declares that she is a shareholder of a company known as Caprion Pharmaceuticals Ltd. but holds no office or position as a director, manager or employee of that company, and the Corporation agrees to this. In addition, the Corporation acknowledges and agrees that she is a shareholder and director of the companies known as Valoribio Inc., EquiVision Inc. and IPPM S.A.;

12.2 Subject to 12.1, Faure undertakes and agrees, throughout the period during which she holds Shares and for a period of 24 months following the year that follows the date when she is voluntarily or involuntarily divested of her Shares, not to operate, directly or indirectly, any active business that is engaged in research, development or marketing in the field of hydrogel, or to engage in, be involved in or advise, or make loans to or guarantee the obligations of, any such business. The territory to which this clause applies is defined as North America and Europe;

12.3 With the exception of the activities ordinarily engaged in as a professor at the Université du Québec à Montréal, Fortier undertakes and agrees, throughout the period during which he holds Shares and for a period of 24 months following the year that follows the date when he is voluntarily or involuntarily divested of his Shares, not to operate, directly or indirectly, any active business that is engaged in research, development or marketing in the cosmetic, cosmeceutical and medical/therapeutic industries relating to skin care in general, including, but not limited to, the treatment of wounds, or to engage or be involved in such activities or advise any business in similar areas, or make loans to or guarantee the obligations of any person involved in such activities. The territory to which this clause applies is defined as North America and Europe;

12.4 Faure further undertakes and agrees, throughout the period during which she holds Shares and for a period of 24 months following the year that follows the date when she is voluntarily or involuntarily divested of her Shares, not to solicit, do business with or attempt to do business with, anywhere whatsoever, directly or indirectly, any of the clients of the Corporation or any Subsidiary of the Corporation;

12.5 Faure further undertakes and agrees, throughout the period during which she holds Shares and for a period of 24 months following the year that follows the date when she is voluntarily or involuntarily divested of her Shares, not to solicit or engage, directly or indirectly, as an employee or consultant or in any other capacity, any employee, director or officer (hereinafter collectively the "**employees**") working full-time or part-time for the Corporation or for any Subsidiary, or to attempt, directly or indirectly, to encourage any employee to leave their employment with the Corporation or any Subsidiary;

12.6 Each of Fortier and Faure further undertakes and agrees, throughout the period during which they hold shares and for a period of 24 months following the date on which they are voluntarily or involuntarily divested of their shares, not to attempt, directly or indirectly, to encourage or persuade any supplier to terminate its business relationship, in whole or in part, with the Corporation or with any Subsidiary of the Corporation;

12.7 In the event that either Fortier or Faure fails to comply with any of the foregoing undertakings, they hereby agree, without prejudice to the other rights and remedies of the Corporation and the Shareholders, to pay to the Corporation, on simple demand, immediately upon being in default, a penalty of $2,000 per day of default, without further formality or notice;

12.8 Each of Fortier and Faure acknowledges that failure to comply with the provisions of this section will cause serious and irreparable harm to the other Shareholders and the Corporation. Accordingly, in the event of such breach, the other Shareholders or the Corporation may immediately initiate injunction proceedings, in addition to the penalty that might be claimed under paragraph 12.7;

12.9 Payment of any penalty under this section, or any legal action initiated by the Beneficiaries of the undertakings set out in this section, may not in any way constitute permission for any default to occur or continue;

12.10 It is agreed that the foregoing prohibitions on competition and solicitation are separate and distinct stipulations from each other, and accordingly that if any prohibition is found to be unenforceable, the other restrictive clauses will not thereby be found to be unenforceable;

12.11 Each of Fortier and Faure expressly declares and acknowledges that the undertakings hereinbefore set out are an essential condition for their holding Shares, that the territories referred to extend to territories where the Corporation actively does business, that the undertakings given by them hereunder are reasonable in terms of the duration, the territory, the activities and the persons covered, and that they have had an opportunity to consult their legal advisor (or any other advisor they may see fit to consult) in relation to the transactions and obligations set out herein, including, but not limited to, the obligations provided in this section 12.

13. CONDUCT OF BUSINESS

13.1 Beginning on the date hereof, and for as long as Auriga, Medco, Gutrafin, Schroder, SGF, Finedix and FSTQ, acting jointly with FRSIM, are Shareholders and hold at least 5% of the Voting Shares on an undiluted basis

(it being agreed, for greater certainty, that in the case of FSTQ, acting jointly with FRSIM, they shall jointly (and not individually) hold at least 5% of the Voting Shares on an undiluted basis) or are creditors of the Corporation, any act, decision, resolution or bylaw relating to the matters hereinafter described may not be taken, made or applied (i) without being first approved by the Shareholders who hold at least 75% of the issued Voting Shares and (ii) without being first consented to as provided by law or by the articles or bylaws of the Corporation;

13.1.1 any change to the charter of the Corporation;

13.1.2 the Transfer or Alienation of all or a substantial portion of the assets of the Corporation or the granting of an option to that effect;

13.1.3 the dissolution or voluntary winding-up of the Corporation, or the consolidation, joining, reorganization, association (by way of partnership, joint venture or otherwise) or merger of the Corporation with another person, or the creation of a Subsidiary;

13.1.4 a declaration of bankruptcy, assignment for the benefit of creditors or filing of a proposal or notice of intent under the *Bankruptcy and Insolvency Act* of Canada or any other act done by the Corporation under a law relating to insolvency or the filing of an arrangement or proposed arrangement under the *Companies' Creditors Arrangement Act* (C-36), and the selection of a trustee, where applicable;

13.1.5 any decision involving a significant change in the nature of the objectives of the Corporation, and in particular any change in the place of the head office or the moving or establishment of any of its principal places of business outside Quebec;

13.2 To obtain the prior approval required under 13.1, the Corporation shall send a notice to the Shareholders explaining the action, decision, resolution or bylaw that requires their approval, together with all documents needed for making a decision, in accordance with the general bylaws of the Corporation. The approval or refusal of each Shareholder shall be exercised by giving notice to the Corporation within 21 days, or within 10 days if the Corporation specifies that it is urgent, following receipt of the complete notice from the Corporation, failing which any Shareholder who has not responded shall be deemed to have refused. Each of the Subsidiaries of the Corporation shall be bound *mutatis mutandis* by this section, and the Corporation shall ensure that each of its Subsidiaries complies with it;

13.3 In the event that a Shareholder, one of the Persons designated by that Shareholder to hold a position as a member of the Board of Directors or of the Committees under the provisions of section 3 hereof, or any Person related to them within the meaning of Canadian tax legislation (collectively, the "**Person Concerned**") is a party to a significant or substantial contract or draft contract with the Corporation or one of its subsidiaries (the "**Contract**"), or the Person Concerned is a director, officer, manager or shareholder of a party to the Contract or is related to one of them within the meaning of Canadian tax legislation, or the Person Concerned holds any other significant or substantial interest in that party to the Contract, such interest shall be disclosed to the Board of Directors or the Shareholders of the Corporation, as the case may be, in accordance with the procedure set out in section 120 of the *Canada Business Corporations Act*, as adapted to take into account the foregoing provisions, and the Person Concerned (including any individual designated by it to sit on the Board of Directors) shall then abstain from voting on any matter that might be submitted to the Board of Directors or the Shareholders of the Corporation in relation to the signing, cancellation, extension or renal of the Contract, the enforcement of the provisions of the Contract, or any recourse, arbitration, demand, action or other proceeding arising under the Contract, it being stipulated, however, that the prohibition on voting shall not affect matters relating to the day-to-day management of the Contract in the ordinary course of business, in respect of which the Person Concerned retains its right to vote after disclosing its interest. For greater clarity, SGF is deemed to be related only to the Société Générale de Financement du Québec and the corporations under its control.

13.4 No issue of a security of the Corporation shall be made without the prior express agreement of the Shareholders representing at least 50% of the capital stock on an undiluted basis.

13.5 No issue of a security of the Corporation shall be made without the prior express agreement of the Shareholders representing at least 50% of the capital stock on an undiluted basis.

14. ARBITRATION

14.1 Arbitration

Subject to their mandatory injunctive remedies, the parties hereto agree to submit to arbitration, to the exclusion of the common law courts, any real or apprehended dispute relating to their respective rights under this Agreement, in the following manner:

14.1.1 the applicant shall designate an arbitrator and give notice to the arbitrator and the respondent stating the identity of each of them and stating the general nature of the issue submitted and the remedies sought;

14.1.2 the respondent shall, within 10 days following receipt of the notice, appoint an arbitrator and inform the applicant and the arbitrator designated under subparagraph 14.1.1, in writing, failing which the arbitrator designated under subparagraph 14.1.1 shall sit alone and paragraphs 14.3 to 14.5 hereinafter shall apply *mutatis mutandis* to any such situation;

14.1.3 the two arbitrators so appointed shall, within 30 days following the appointment of the second arbitrator, designate a third arbitrator who shall be a member in good standing of the Barreau du Québec, who shall act as chairperson. If the two arbitrators are unable to agree on the choice of a third arbitrator within the time allowed, the Corporation Shall, within 10 days following the expiry of that time, make application to the court to designate the third arbitrator. In the event that the Corporation fails to do so within the time allowed, one of the parties could make application at the expense of the Corporation;

14.2 Sole arbitrator

In order to minimize the costs associated with the arbitration, the parties may, by a written agreement signed by each of them, agree to appoint a sole arbitrator;

14.3 Procedure

The arbitration procedure shall be as set out in Book VII of the Code of Civil Procedure of Quebec. The notice of arbitration given by the applicant shall state whether the applicant intends that the arbitrators hear the dispute as conciliators and they shall act as such if the respondent states in its written notice that the arbitrator chosen by the respondent consents;

14.4 Hearing and homologation

14.4.1 The arbitrators shall be authorized to set the places, dates and times of hearing and may, on their own initiative, before or during the hearing, allow any change to the request for arbitration and any cross-claim;

14.4.2 Unless there is an agreement to the contrary between the parties, the hearing shall begin no later than the 30th day following the appointment of the third arbitrator or, where applicable, of the sole arbitrator, and the arbitral award shall be given no later than 90 days after that appointment. The arbitrator or arbitrators, as the case may be,

subject to the 90 days allowed, shall release their decision in writing to the parties to the dispute within 30 days following the conclusion of the hearing, and their award, whether unanimous or by majority vote, shall set out the reasons for decision and shall be signed by each of the arbitrators;

14.4.3 When the arbitral award has been duly homologated by the court in accordance with article 946 of the Code of Civil Procedure it shall be final and binding on all parties to the dispute and on their successors and assigns;

14.5 Replacement

In the event that an arbitrator refuses or is unable to act, another arbitrator shall be designated to replace that arbitrator by the person or persons who appointed that arbitrator. If the replacement is not made within 15 days following a notice to that effect given to the person or persons who are to appoint that arbitrator, the vacancy shall be filled by the court on application by the Corporation, or failing such application, on application by one of the parties;

14.6 Fees

The fees of the arbitrators and the other costs shall be borne by the party designated in the arbitral award.

15. TERM OF THE AGREEMENT

15.1 With respect to each of the Shareholders, this Agreement shall be in force and have full effect provided that (i) all of the Shareholders have signed this Agreement and (ii) the Shareholder holds Shares; when a Shareholder ceases to hold Shares, this Agreement shall automatically terminate and become void and of no effect with respect to that Shareholder, subject to the then current obligations to the Corporation, the Subsidiaries and the other Shareholders under this Agreement;

15.2 This Agreement shall automatically terminate and become void and of no effect with respect to all of the Shareholders:

(i) if the Corporation declares bankruptcy or makes an authorized assignment of its assets for the benefit of its creditors in general, or is dissolved or voluntarily winds up;

(ii) if the Shareholders agree to terminate it, by consent; or

(iii) if the Corporation completes a public issue of its Shares by prospectus and the Shares are listed on a recognized North American stock exchange.

16. UNDERTAKINGS BY FAURE

16.1 Faure undertakes to comply with each and everyone of the undertakings given by 9079 under this Agreement as if the undertakings were given by her, and Faure shall be solidarily liable for the said undertakings with 9079.

16.2 Faure undertakes not to do anything that could, directly or indirectly, violate the provisions or the spirit of this Agreement.

17. UNDERTAKINGS BY AZERA

17.1 Azera undertakes to comply with each and everyone of the undertakings given by AMAZE under this Agreement as if the undertakings were given by him, Azera Faure shall be solidarily liable for the said undertakings with AMAZE.

17.2 Azera undertakes not to do anything that could, directly or indirectly, violate the provisions or the spirit of this Agreement.

18. COMPULSORY REDEMPTION

18.1 Notwithstanding any other provision of this Agreement to the contrary, if a Shareholder, other than Faure or Gestion (the "**Offeror**"):

18.1.1 dies (as the case may be); or

18.1.2 becomes affected by a Permanent Incapacity (in the case of Brisson only); or

18.1.3 becomes bankrupt or insolvent within the meaning of any legislation governing insolvency;

the other Shareholders who hold Voting Shares (the "**Co-shareholders**") may then require, by notice sent to the Offeror within 30 days following the date on which the applicable event is brought to the attention of the Co-shareholders, that the Corporation or the Co-shareholders purchase all of the Participating Shares and Voting Shares held by the Offeror (the "**Shares Redeemed**"), for a purchase price equal to the Fair Market Value of the Shares Redeemed on the date of that event, in accordance with the procedure described in section 6. The Co-shareholders shall then determine, within 15 days of the said notice, by a majority of the votes associated with the Voting Shares they hold among them, whether the Shares Redeemed will be purchased by them personally or by the Corporation. If the Co-shareholders opt to purchase personally, the Shares Redeemed shall be divided pro rata among them in proportion to the number of Voting Shares they then hold;

18.2 In the event that the right granted under this section is exercised, the purchase of the Offeror's Shares shall be completed within 30 days following the receipt of the notice of exercise of the right. On that occasion, the parties concerned must sign all the documents and do everything that is appropriate or necessary for that purpose;

18.3 The sale price of a bankrupt Shareholder's Shares will then be payable to that Shareholder's trustee in bankruptcy within 10 days of receipt by the Corporation of the valuation report stating the Fair Market Value of the Shares;

18.4 Accordingly, each Shareholder binds and obliges its legal representatives or liquidators or the trustee in bankruptcy of that Shareholder, in advance, to Transfer the absolute title to its Shares and to sign and deliver all documents and do everything that is appropriate or necessary in order to Transfer its Shares fully and without reservation in accordance with paragraph 18.2 above.

19. CONFIDENTIALITY

19.1 Each of the Shareholders agrees to maintain the confidentiality of all confidential intelligence and information concerning the Corporation and its subsidiaries, as the case may be, to which it may have access as a Shareholder or otherwise, and even if it subsequently ceases to be a Shareholder bound by the provisions of this Agreement, subject to the rights of the Shareholders:

19.1.1 to present all relevant information to any potential acquirer of their Shares, with the exception of industrial secrets and any information relating to intellectual property relating to the Corporation or its subsidiaries, for the purpose of enabling it to determine whether to acquire the Shares; and

19.1.2 to publish or otherwise advertise, for advertising disclosure purposes, the existence of their participation in the capital stock of the Corporation, the nature of the Corporation's activities, their respective size according to various criteria such as their turnover, or the number of their employees;

19.1.3 provide such intelligence and information to their controlling Shareholders and employees whose functions require that they be aware of it;

without having to obtain the prior written consent of the Corporation, provided that in the case referred to in paragraph 19.1.1 hereof, the Shareholder in question shall obtain a confidentiality agreement from any Person to whom the information is disclosed prior to disclosure;

19.2 The above undertakings do not apply to intelligence or information that (i) is or becomes in the public domain, (ii) is provided to a Shareholder by any third party bound by a relevant confidentiality agreement, or (iii) must be disclosed by law or pursuant to a judgment, decision or order or a court of competent jurisdiction.

20. REDEMPTION OF CLASS D SHARE ISSUED TO FORTIER

20.1 In the exercise of the right of redemption associated with the Class D share of the capital stock of the Corporation issued to Fortier, the Corporation shall pay the redemption price of the Class D share (the "**Redemption Price**") within 10 days following the delivery of the Corporation's audited annual financial statements to the Corporation by the Auditors for the year during which the right is exercised (the "**Year of Exercise**"), it being agreed, however, that notwithstanding any contrary provision in the bylaws of the Corporation, Fortier may not require the Corporation to redeem the said Class D share before December 20, 2003. Payment of the Redemption Price shall be made in several instalments if the Redemption Price is greater than 7.5% of the annual funds self-managed by the Corporation as determined by the said audited annual financial statements (the "**Maximum Payment**"). In that case, the Corporation shall pay Fortier the Maximum Payment and the payment of the balance of the full Redemption Price upon receipt of the audited annual financial statements of the Corporation for the year in question;

20.2 The Class D share redeemed by the Corporation under paragraph 20.1 shall be delivered to the Corporation and cancelled upon payment of the first instalment of the Redemption Price.

21. ANTI-DILUTION OPTION

21.1 In the event that the Corporation issues Voting Shares, one or more times, for a total amount greater than $2,000,000 at an average Share price lower than $1.85 (excluding any issue of Voting Shares reserved for employees of the Corporation, under a remuneration policy of the Corporation, that being 360,270 Class A Shares to date) until the transfer or listing of all Shares of the Corporation, each of Medco, Auriga, Schroder, Popowski, Gutrafin and Onami (the "**Beneficiaries**") will then have the option (the "**Option**") to subscribe and purchase, in whole or in part, a number of Voting Shares of the capital of the Corporation determined for each of them according to the following formula (the "**Shares under Option**"):

$$(A/B) - C = D$$

or:

A = the total amount invested by the Beneficiary for the subscription of Voting Shares under the subscription agreement between Medco, Auriga, Schroder, Popowski, Gutrafin, Onami and the Corporation dated September 11, 2003 (the "**2003 Subscription Agreement**");

B = the share price for the new Voting Share issue;

C = the total number of Voting Shares subscribed by that Beneficiary under the 2003 Subscription Agreement; and

D = the number of Shares under Option.

21.2 Once the Corporation issues Voting Shares, one or more times, for a total amount greater than $2,000,000, the Option may be exercised by the Beneficiaries as many times as there are issues of Voting Shares by the Corporation at a price lower than $1.85, whether it is below or above the $2,000,000 threshold;

21.3 The price for exercising the Option, that is, the issue price for the Shares under Option, shall be a total par value of $1.00, for each exercise of an Option, with no other consideration or cost for the Beneficiaries;

21.4 If the terms of article 21.1 are met, the Option may be exercised by the Beneficiaries on the date of any new issue of Voting Shares;

21.5 To exercise the Option, each Beneficiary shall give the notice in writing to the Corporation and attach $1.00 to the notice in payment of the issue price of the Shares under Option;

21.6 On the date of receipt by the Corporation of the notice of exercise and payment of the issue price of the Shares under Option, the Corporation shall issue the Shares under Option, in the same class as the shares issued to a new entrant, to the Beneficiaries, and shall forthwith deliver a certificate representing the Shares to them.

21.7 If, at any time before any exercise of the Option, the Voting Shares of the capital stock of the Corporation are amended from time to time:

21.7.1 by a reduction or adjustment to the number of outstanding Voting Shares, as a result of a consolidation;

21.7.2 by an increase in the number of outstanding Voting Shares, as a result of a split;

21.7.3 by a change, reclassification, redesignation, conversion or consolidation of Voting Shares with the result that they are then another class of shares;

21.7.4 by a merger or joining with another legal person or the transfer of all or virtually all of the assets of the Corporation to another legal person, the effect of which is the issue of voting and participating shares in the legal person resulting from the merger or joining or in the transferee of the assets of the Corporation; or

21.7.5 by any other reorganization of the capital,

a proportional adjustment or change will be made in the number and price of the securities to be issued at the time of exercise of the Option, to ensure that after the occurrence of such an event, the Beneficiaries are in a position that is no more or less favourable than immediately before the occurrence of the event. Fractions of shares resulting from the changes referred to above will not be taken into account.

Amendments to the Unanimous Shareholders Agreement

[TRANSLATION]

AMENDMENTS TO THE BIOARTIFICIAL GEL TECHNOLOGIES (BAGTECH) INC. UNANIMOUS SHAREHOLDERS AGREEMENT
dated September 11, 2003
(the "Unanimous Agreement")

The undersigned shareholders agree to amend the Unanimous Agreement as follows:

Replace sections 3.1 and 3.2 of the Unanimous Agreement with the following:

3.1 `Subject to the following provisions, the Shareholders agree, during the term of this Agreement, to take the necessary measures and to use the voting rights associated with the Shares they hold to elect and continue eight Directors on the Board of Directors.

3.2 On the date of this Agreement, the Shareholders agree that the Board of Directors shall be composed of representatives appointed by the Shareholders as hereinafter set out:

Group A	2 Directors (including Marie-Pierre Faure)
Group B	3 Directors (including one appointed jointly by FSTQ and FRSIM, one appointed by SGF and one appointed by Auriga)
Group C	2 Directors (including André Lamotte) and 1 designated by Bagadine

In addition, FSTQ and FRSIM may jointly appoint an observer to the Board of Directors who shall be entitled to receive all notices of meetings and all documents accompanying such notices.

On the date of this Agreement and for as long as the majority of the Shareholders so agree, Colin Bier shall act as Chair of the Board of Directors. Colin Bier is a Director appointed by the Group C Shareholders.

Add section 4.6(a) to the Unanimous Agreement:

4.6(a) Notwithstanding the provisions of this Agreement, Bagadine may, at any time, transfer its Shares and Convertible Securities, in whole or in part, as the case may be, that it holds without having to offer them to the other Shareholders, provided that such Transfer is made to the Groupe Chevrillon & Associés and the natural persons or legal persons that are (i) members of the Groupe Chevrillon & Associés; (ii) shareholders of the Groupe Chevrillon & Associés; or (iii) members of a management body of the Groupe Chevrillon & Associés or having a management body in common with the Groupe Chevrillon & Associés. The Groupe Chevrillon & Associés is defined hereby as the partnership Chevrillon & Associés, the natural persons or legal persons that are direct or indirect shareholders, or members of a management body of the partnership Chevrillon & Associés or its parent, sibling or children companies, provided that:

4.6.1 the transferee of the said Shares confirms to the Shareholders its irrevocable consent to be bound by the provisions of this Agreement in the form of Schedule 4.2;

4.6.2 the Shares and Convertible Securities transferred by Bagadine remain subject to the provisions of the Agreement; and

4.6.3 that the assignment does not operate to affect the status of private company within the meaning of the *Securities Act* (Quebec);

Appendix 2

Alberta

***Business Corporations Act*, RSA 2000, c B-9**

Article 146 "Unanimous shareholder agreement"

(1) A unanimous shareholder agreement may provide for any or all of the following:

(a) the regulation of the rights and liabilities of the shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;

(b) the regulation of the election of directors;

(c) the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors;

(d) any other matter that may be contained in a unanimous shareholder agreement pursuant to any other provision of this Act.

(2) If a unanimous shareholder agreement is in effect at the time a share is issued by a corporation to a person other than an existing shareholder,

(a) that person is deemed to be a party to the agreement whether or not the person had actual knowledge of it when the share certificate was issued,

(b) the issue of the share certificate does not operate to terminate the agreement, and

(c) if that person is a bona fide purchaser without actual knowledge of the unanimous shareholder agreement, that person may rescind the contract under which the shares were acquired by giving a notice to that effect to the corporation within a reasonable time after the person receives actual knowledge of the unanimous shareholder agreement.

(3) If a unanimous shareholder agreement is in effect when a person who is not a party to the agreement acquires a share of a corporation, other than under subsection (2),

(a) the person who acquired the share is deemed to be a party to the agreement whether or not the person had actual knowledge of it when the person acquired the share, and

(b) neither the acquisition of the share nor the registration of that person as a shareholder operates to terminate the agreement.

(4) If

(a) a person referred to in subsection (3) is a protected purchaser as defined in the *Securities Transfer Act* and did not have actual knowledge of the unanimous shareholder agreement, and

(b) the person's transferor's share certificate did not contain a reference to the unanimous shareholder agreement,

that person may, within 30 days after the person acquires actual knowledge of the existence of the agreement, send to the corporation a notice of objection to the agreement.

(5) If a person sends a notice of objection under subsection (4),

(a) the person is entitled to be paid by the corporation the fair value of the shares held by the person, determined as of the close of business on the day on which the person became a shareholder, and

(b) section 191(4) and (6) to (20) apply, with the necessary changes, as if the notice of objection under subsection (4) were a written objection sent to the corporation under section 191(5).

(6) A transferee who is entitled to be paid the fair value of the transferee's shares under subsection (5) also has the right to recover from the transferor by action the amount by which the value of the consideration paid for the transferee's shares exceeds the fair value of those shares.

(7) A shareholder who is a party or is deemed to be a party to a unanimous shareholder agreement has all the rights, powers and duties and incurs all the liabilities of a director of the corporation to which the agreement relates to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation, and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 119 or any other enactment, to the same extent.

(8) A unanimous shareholder agreement may not be amended without the written consent of all those who are shareholders at the effective date of the amendment.

(9) A unanimous shareholder agreement may exclude the application to the agreement of all but not part of this section.

Appendix 3

Complete list of provisions of the Bagtech Unanimous Shareholders Agreement that expressly limit the directors' power:

- Under paragraph 3.2, "for as long as the majority of the Shareholders so agree, Colin Bier shall act as Chair of the Board of Directors." This means that the power to appoint the Chair of the Board is at least temporarily removed from the directors.

- Subparagraph 3.4.1 requires that the directors hold "at least six meetings of the Board of Directors each year with a maximum of two months between meetings."

- Subparagraph 3.4.3 provides that "the presence of a representative of each of Group A, Group be and Group C is needed in order to establish quorum for any meeting of the Board of Directors."

- Paragraphs 4.2 and 4.3 provide for two situations in which certain shareholders will be authorized, on certain conditions, to transfer their shares, and "the Directors shall be required to authorize such Transfer notwithstanding any other provision of the charter or bylaws of the Corporation."

- Paragraph 10.2 provides that "in the event that the public issue has not been made by December 31, 2008, and the transfer of all of the Shares or assets of the Corporation has not taken place, the Parties agree that a bank selected by majority vote of the Institutional Shareholders shall be retained with the mission of assisting them and studying" certain issues.

- Paragraphs 11.5 and 18.1 provide that if a shareholder dies, becomes affected by a permanent incapacity or becomes bankrupt or insolvent, "the Co-shareholders shall then determine . . . by a majority of the votes . . . whether the Shares Redeemed will be purchased by them personally or by the Corporation."

- Paragraph 13.4 stipulates that "no issue of a security of the Corporation shall be made without the prior express agreement of the Shareholders representing at least 50% of the capital stock on an undiluted basis."

Complete list of the provisions of the agreement that are in the nature of a USA under subsection 6(3) of the CBCA

Note that under subsection 6(3) of the CBCA, an agreement signed by all the shareholders that increases the number of votes required in order for the shareholders to adopt certain measures may, as an exception, enjoy the status of a USA, even if it does not restrict or remove any power of the administrators. However, this is the only exception, under both the Quebec legislation and the Canadian legislation.

- Paragraph 13.1 provides that several decisions that should ordinarily be ratified by special resolution of the shareholders (and thus by a two-thirds vote, under subsection 2(1) of the CBCA) must be agreed to by a three-quarters vote.

CITATION:	2012 TCC 120
COURT FILE NO.:	2009-3734(IT)G
STYLE OF CAUSE:	PRICE WATERHOUSE COOPERS INC. ACTING IN THE CAPACITY OF TRUSTEE IN BANKRUPTCY OF BIOARTIFICIAL GEL TECHNOLOGIES (BAGTECH) INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 17, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	April 12, 2012

APPEARANCES:

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