

# Associated Corporations - De Facto Control

## Associated Corporations - De Facto Control

*McGillivray Restaurant Ltd v The Queen*, [2014 TCC 357](#)

The issue before the Court was whether the Appellant corporation was Associated with other corporations due to being "Controlled, directly or indirectly in any manner whatever, by the same person or group of persons" (256(1)(b) of the ITA), and therefore had to share the small business limit.

### FACTS

The Appellant corporation operated a Keg Restaurant, and its shares were owned 76% by a Wife and 24% by a Husband. The Husband owned two other restaurants in town, was the Appellant's landlord, and also provided the appellants management and financing services. Finally, the Husband was also the Appellants sole director, president, and general manager.

### ANALYSIS

The ITA provides in paragraph 256(1)(b) that two corporations are associated, if at anytime in the year, "both of the corporations were controlled, directly or indirectly in any manner whatever, by the same person or group of persons". The court referred to the decision in *Silicon Graphics Limited v The Queen*, 2002 FCA 260, where the FCA dealt with the concept of *de facto* control.

In order to determine whether there is *de facto* control, courts will examine (a) external agreements (*Duha Printers Ltd (Western) Ltd v Her Majesty the Queen*), [\[1998\] 1 SCR 795](#), (b) shareholder resolutions (*Société Foncière d'Investissement Inc v Canada*, [1995] TCJ No 1568, para 10 (TCC)), (c) ability of a party to change or influence the composition of the board, whether through a shareholders' agreement or otherwise (*International Mercantile Factors Ltd v The Queen* (1990), 90 DTC 6390 at 6399 (FCTD), aff'd (1994), 94 DTC 6365 (FCA)). These factors point towards a person's clear right and ability to affect significantly the boars of directors or the powers of the board of directors, or to be able to exercise real influence over the shareholder's who would be able to effect the preceding.

The FCA in *Transport ML Couture Inc v Her Majesty the Queen*, [2004 FCA 23](#), stated that there are many factors that may be relevant to determining whether a corporation is subject to the *de facto* control of a person or group, including family relationships. The evidence, however, must show that the decision-making power of the corporation in question in fact lies elsewhere than those who have *de jure* control. Some of the factors include (a) economic controlling influence, (b) control of day-to-day operations, (c) control over major corporate decisions, (d) business influence of such magnitude so as to be able to exert will, and (f) power to sign cheques of corporation (*Mimetix Pharmaceuticals Inc. v. Her Majesty the Queen*, 2001 TCJ No. 749, affirmed [2003 FCA 106](#)).

The Court concluded that it was hard to imagine how the Husband could have any more control over the affairs and fortunes of the Appellant corporation, and held that the Husband exercised *de facto* control.

**- Sas Ansari, JD LLM PhD (exp)**

If you like this website, please share with others and consider [supporting us with a donation](#).

[Back To Top](#) OR [Home](#)