

De Jure versus De Facto Directors of Corporations

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MacDonald v The Queen, [2014 TCC 308](#)

The Appellant was assessed under the directors' liability provisions of the *Income Tax Act* (Section 227.1) and *Excise Tax Act* (Section 323) to be liable for a corporation's tax debts.

The Appellant argued that he never consented to be a director and never held himself out to be a director of the corporation, or in the alternative exercised due diligence, and therefore not liable for the corporation's debts.

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ANALYSIS

For the purpose of the directors' liability provisions under the ITA and the ETA a "director" is either a de jure or a de facto director: *Mosier v. R.*, [\[2001\] G.S.T.C. 124](#).

De Jure Director

A de jure director is a person who has been appointed as a director under the appropriate corporate statute. Therefore one must look to the governing corporate statute under which the corporation was created or continued.

The public registry of directors only creates a rebuttable presumption that a person so listed is de jure director. This presumption may be overcome using evidence to the contrary, including evidence that the person never consented to be a director.

A person who was not aware they were a director and never consented to be a director is not a de jure director: *Lau v. R.*, [2003] G.S.T.C. 1; *Hay v. Canada*, [2004 TCC 51](#).

In this case, the person did not know he was a director and did not consent to act as a director. Also, the corporate process required to appoint a director was not followed, and no resolution was passed.

De Facto Director

A de facto director may be either (I) a person who is ostensibly duly elected but lacks some

qualification under the relevant corporate statute, or (ii) a person who simply assumed the role of director without any pretense of legal qualification.

The FCA in *Wheeliker v. R.*, [1999] 2 C.T.C. 395, held that de facto directors may be liable even without a valid appointment. But, de facto director findings are limited to persons who hold themselves out as directors: *Scavuzzo v. R.*, [\[2005\] G.S.T.C. 199](#).

Generally, it is not appropriate to assess a person as a de facto director where "there are legally appointed directors in office at the relevant time" (para 40), and should only be based on a person holding himself out as director based on written evidence of such behaviour (para 40). **[NOTE:** but see decisions in *McDonald v The Queen*, [2014 TCC 315](#); *Hartrell v The Queen*, [2006 TCC 480](#), aff'd [2008 FCA 59](#); where third party representation as director is not such an essential factor that its presence or absence would be conclusive]

Where a person "did not believe he is a director and never thought he had any authority to advise, influence, or control the management or director of the company", that person should not be considered a de facto director: *Perricelli v. R.*, [2002 G.T.C. 244](#). Also, steps including "steps taken to satisfy the requirements of the *Excise Tax Act* such as the preparation of invoices, meeting with the auditor, hiring a lawyer and signing cheques were not in themselves acts of a director": *Hay v. Canada*, [2004 TCC 51](#). The role the person plays cannot be limited or inconsistent with that of a director: *Mikloski v. R.*, [2004 TCC 253](#).

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