Federal Court of Appeal  Cour d'appel fédérale

Date: 20160330

Docket: A-571-14

Citation: 2016 FCA 99

CORAM: **DAWSON J.A.**
RYER J.A.
DE MONTIGNY J.A.

BETWEEN:

MCGILLIVRAY RESTAURANT LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba, on March 3, 2016.

Judgment delivered at Ottawa, Ontario, on March 30, 2016.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: DAWSON J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Justice Patrick Boyle of the Tax Court of Canada (the "Judge"), dated November 28, 2014 and cited as 2014 TCC 357. The appeal arises out of reassessments issued by the Minister of National Revenue (the "Minister") pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") to McGillivray Restaurant Ltd. (the "Taxpayer") in respect of its 2007, 2008 and 2009 taxation years (the "Reassessments"). Unless

otherwise indicated, all references in these reasons to statutory provisions shall be to the corresponding provisions of the Act that applied in respect of the Reassessments.

[2] In each Reassessment, the Minister denied the Taxpayer's claim for a deduction from its tax otherwise payable under Part I of the Act for the applicable taxation year, pursuant to paragraph 125(1)(*a*) (the "Small Business Deduction"), on the basis that the Taxpayer was associated with one or more corporations in each such taxation year, within the meaning of subsection 256(1), and had not filed an agreement with any such corporation as contemplated by subsection 125(3).

[3] The issue in this appeal is whether, in the years covered by the Reassessments, the Taxpayer was associated with G.R.R. Holdings Ltd. ("GRR") and MorCourt Properties Ltd. ("MorCourt") on the basis that an individual, Mr. Gordon R. Howard, who had *de jure* and *de facto* control over GRR and MorCourt, also had *de facto* control over the Taxpayer, within the meaning of subsection 256(5.1).

[4] The Judge determined that MorCourt, GRR and the Taxpayer were associated corporations, within the meaning of subsection 256(1) and upheld the Reassessments.

[5] For the reasons that follow, I would dismiss the appeal.

I. BACKGROUND

[6] The appeal before the Judge proceeded on the basis of a partially agreed statement of facts. In addition, the Judge made a detailed summary of the evidence presented to him, which consisted of read-ins by the Crown from the examination for discovery of Mr. Howard and an Agreed Book of Documents. The essential facts for the purpose of dealing with the issues raised in this appeal are summarized below.

[7] At all relevant times, Mr. Howard and Mrs. Ruth Howard were married. Mr. Howard owned all of the issued shares of GRR and MorCourt. GRR was incorporated in the early 1980s and MorCourt was incorporated around the same time as the Taxpayer. Like the Taxpayer, each of GRR and MorCourt is a Canadian-controlled private corporation, within the meaning of subsection 125(7).

[8] In 1997, GRR entered into franchise agreements with Keg Restaurants Ltd. (the "Franchisor") and acquired certain territorial exclusivity rights with respect to the operation of Keg Restaurant franchises in Winnipeg. Pursuant to these arrangements, GRR successfully operated three Keg Restaurants in Winnipeg until late 2005. The exclusivity rights were conditional on GRR continuing to operate a minimum of three Keg restaurants in Winnipeg.

[9] At some time before the incorporation of the Taxpayer, Mr. Howard decided that the Pembina Highway Restaurant should be relocated. To that end, arrangements were made to

acquire some land on McGillivray Avenue and to obtain the Franchisor's consent to the relocation.

[10] In conjunction with the relocation transaction, Mr. Howard sought professional advice and, as a consequence, he determined that it would be prudent to "start separating some things", given the success that had been enjoyed since the acquisition of the three Keg-franchised restaurants.

[11] To that end, MorCourt was incorporated for the purpose of acquiring the restaurant buildings and the land upon which they were situated. More germane to this appeal, the Taxpayer was incorporated for the purpose of acquiring and operating the new McGillivray Avenue restaurant, including the franchise that would permit the operation of that restaurant.

[12] Consistent with the professional advice that Mr. Howard received, the Taxpayer was incorporated in August of 2005. Upon its organization, Mrs. Howard was issued 760 voting common shares for $76.00 and Mr. Howard was issued 240 voting common shares for $24.00. In addition, Mr. Howard was elected as the sole director of the Taxpayer and appointed as its only officer. No written shareholders' agreements were put into place. The capitalization of the Taxpayer was nominal.

[13] The record contains little to explain the basis upon which the Taxpayer legally acquired or financed the property that it used when it commenced operations at the McGillivray Avenue location in December of 2005, shortly after the closing of the Pembina Highway location.

However, the record does disclose documentation that provided for the assignment of the franchise covering the Pembina Highway location from GRR to the Taxpayer and the Franchisor's consent to that assignment.

[14] Mr. Howard was well aware of the importance of complying with the terms of the franchise agreements that related to the three restaurants, and the requirements for the consent of the Franchisor to the relocation of the Pembina Highway location and the assignment of the related franchise to the Taxpayer. At his examination for discovery, he testified that he assured the Franchisor that notwithstanding these changes, things would be run on the same basis as they had in the past. He also testified, at his discovery, that he gave similar assurances to the former Pembina Highway employees whose employment was transferred to the Taxpayer. Mrs. Howard had limited involvement in the operations of the Taxpayer. She and her husband personally guaranteed the obligations of the Taxpayer and GRR to the Franchisor.

[15] The determination of Mrs. Howard's 76% ownership interest in the Taxpayer was based upon the professional advice that had been provided to Mr. Howard. Nonetheless, the Taxpayer was organized on the basis that Mr. Howard would not need his wife's approval to make decisions on behalf of the Taxpayer. In that regard, Mr. Howard assured his wife that notwithstanding her 76% ownership position in the Taxpayer, the restaurants would continue to operate as they always had, and the evidence indicates that this is how things proceeded.

II. THE DECISION OF THE JUDGE

[16] The Judge determined that there were two competing interpretations of subsection 256(5.1). He found that this Court's decision in *Silicon Graphics Limited v. Canada*, 2002 FCA 260, [2003] 1 F.C.R. 447 [*Silicon Graphics*], provided a narrow interpretation under which a person would only be considered to have control in fact if that person had the clear right and ability either to effect significant change in the board of directors or the powers of the board of directors or to influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors.

[17] In contrast, he concluded that this Court's decisions in *Mimetix Pharmaceuticals Inc. v. Her Majesty the Queen*, 2003 FCA 106, [2003] 3 C.T.C. 72 [*Mimetix Pharmaceuticals*] and *Plomberie J.C. Langlois Inc. v. Canada*, 2006 FCA 113, [2007] 3 C.T.C. 148 [*Plomberie J.C. Langlois*] had broadened the test set forth in *Silicon Graphics*. Thus, he concluded that the test required him to look beyond the right and ability to affect the composition or powers of the board, and to consider broader manners of influence in making the determination of who in fact has effective control of the affairs and fortunes of the corporation in question.

[18] In applying this broader test, the Judge found that Mr. Howard could not have had any more effective factual control over the management and operation of the Taxpayer and its business.

[19] In addition, at paragraph 59 of his reasons, the Judge concluded that Mr. and Mrs. Howard had reached an agreement to the effect that the franchise covering the McGillivray Avenue location would be transferred to the Taxpayer and Mrs. Howard would acquire a 76% interest in the Taxpayer for a nominal amount, only if she agreed to ensure that Mr. Howard was the sole director and officer of the Taxpayer and that, as he had assured the Franchisor, things would be run as they always had been.

[20] Finally, the Judge concluded that while Mrs. Howard could have replaced her husband as the sole director of the Taxpayer (thereby repudiating their unwritten agreement), she did not do so, observing that if she had decided to do so, she would have had to be concerned about the potential consequences that could have resulted from such a decision.

III. RELEVANT STATUTORY PROVISIONS

[21] The provisions of the Act that are relevant to this appeal are paragraph 256(1)(*b*) and subsection 256(5.1), which read as follows:

Associated corporations	**Sociétés associées**
256 (1) For the purposes of this Act, one corporation is associated with another in a taxation year if, at any time in the year,	**256** (1) Pour l'application de la présente loi, deux sociétés sont associées l'une à l'autre au cours d'une année d'imposition si, à un moment donné de l'année :
…	**[…]**
(*b*) both of the corporations were controlled, directly or indirectly in any manner whatever, by the same person or group of persons;	*b*) la même personne ou le même groupe de personnes contrôle les deux sociétés, directement ou indirectement, de quelque manière que ce soit;

…	[…]
Control in fact	**Contrôle de fait**
(5.1) For the purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the "controller") at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation, …	(5.1) Pour l'application de la présente loi, lorsque l'expression « contrôlée, directement ou indirectement, de quelque manière que ce soit, » est utilisée, une société est considérée comme ainsi contrôlée par une autre société, une personne ou un groupe de personnes — appelé « entité dominante » au présent paragraphe — à un moment donné si, à ce moment, l'entité dominante a une influence directe ou indirecte dont l'exercice entraînerait le contrôle de fait de la société. …

IV. ISSUES

[22] There are two issues in this appeal:

a) Did the Judge err in his interpretation of the requirements of *de facto* control in subsection 256(5.1)?

b) Did the Judge err in concluding that the Taxpayer was associated with GRR and MorCourt for the purposes of paragraph 256(1)(*b*)?

V. STANDARD OF REVIEW

[23] In appellate review of a decision of the Tax Court of Canada, this Court applies the standard of correctness with respect to questions of law and the standard of palpable and overriding error with respect to questions of fact and mixed fact and law in respect of which there are no readily extricable questions of law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraphs 8, 10 and 37).

VI. ANALYSIS

A. Introduction

[24] The circumstances in which the Taxpayer was incorporated, organized, capitalized and then managed make it clear that Mrs. Howard had no meaningful interest in the Taxpayer or its affairs beyond her $76.00 investment in its common shares. Moreover, the totality of these circumstances indicate that the primary purpose of the incorporation of the Taxpayer and its acquisition of the Pembina Highway restaurant and the related franchise may have been an attempt to avoid the associated corporation rules in order to obtain an additional Small Business Deduction.

[25] The associated corporation rules in section 256 are aimed, *inter alia*, at ensuring that access to the Small Business Deduction is limited. A discussion of the scheme of the Act in respect of that tax incentive is not necessary for the purpose of these reasons.

[26] Prior to the incorporation of the Taxpayer, GRR operated three Keg restaurants and was limited to a single Small Business Deduction. The Taxpayer's incorporation and its acquisition of the McGillivray Avenue restaurant facilitated access to a second Small Business Deduction in respect of one of the three restaurant businesses that were previously carried on by GRR.

[27] The Minister took exception to the claim for a second Small Business Deduction and issued the Reassessments on the basis that GRR and MorCourt were associated with the Taxpayer, within the meaning of paragraph 256(1)(*b*), because those corporations and the

Taxpayer were all controlled by Mr. Howard. That Mr. Howard had both *de jure* and *de facto* control of GRR and MorCourt is not at issue. The Minister alleged that Mr. Howard also had *de facto* control of the Taxpayer, within the meaning of subsection 256(5.1).

[28] The Minister has not alleged that the parties to the transactions pursuant to which the Taxpayer acquired the McGillivray Avenue restaurant and the related franchise were engaged in abusive tax planning. In other words, this is not a case in which the general anti-avoidance rule in subsection 245(2) is engaged and the purpose behind the creation and deployment of the Taxpayer is irrelevant.

[29] The overarching question is whether it can be said that Mr. Howard or GRR had any direct or indirect influence that, if exercised, would result in either of them having control in fact of the Taxpayer.

B. Did the Judge err in his interpretation of the requirements of *de facto* control in subsection 256(5.1)?

[30] The determination of who controls a corporation or when an acquisition of control of a corporation occurs has considerable significance under the Act. Prior to the introduction of subsection 256(5.1), the Act included both "control" and "controlled directly or indirectly in any manner whatever" but, in both of those formulations, control was thought of as *de jure* control.

[31] In *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, 159 D.L.R. (4th) 457 [*Dula Printers*], the seminal decision of the Supreme Court of Canada on corporate control, *de*

jure control was referred to as the ability of the owners of the majority of the voting power in the corporation that would enable those owners to elect directors of the corporation and accordingly to enjoy effective control of the corporation. In colloquial terms, the majority shareholder has the power to get the directors to do what he or she wants in terms of the operation of the corporation, failing which that shareholder will use his or her majority voting power to replace those directors with others who will do his or her bidding.

[32] It is useful to recall that in paragraph 71 of *Duha Printers*, the Supreme Court affirmed that an ordinary shareholders agreement, in contradistinction to a unanimous shareholders agreement, is not relevant to the determination of *de jure* control. Thus, the voting power attributable to shareholdings, determined in light of the constating documents and the share register of a corporation, is generally the determinative factor in the *de jure* control analysis, except in limited circumstances not relevant to this appeal, in which *de jure* control may not lie with the person who holds the majority of the voting power in a corporation.

[33] In the *de facto* control analysis, as one would expect, there are a broader range of attributes – beyond voting power determined in the context of constating documents and share registers – that must be considered to determine whether the requirements of subsection 256(5.1) have been met in any given case. For example, the rights of a person under the provisions of a shareholders agreement, other than a unanimous shareholders agreement, under which shareholders agree that the person will be able to select the directors, would fall within the definition of "influence", within the meaning of subsection 256(5.1). So, must the requisite influence arise out of legally binding or enforceable arrangements, or can other kinds of

influence lead to a finding of *de facto* control? For example, does a person who by threats or other vile means, at one end of the spectrum, or by matrimonial or familial love and affection, at the other end of the spectrum, have the requisite influence over a shareholder, who would otherwise have *de jure* control of a corporation, that would be sufficient to establish that such person has *de facto* control over that corporation?

[34] Fortunately, in this appeal we are not obliged to resort to an analysis from first principles because the meaning of de facto control, for the purposes of subsection 256(5.1), has been previously considered by this Court.

[35] In *Silicon Graphics*, Justice Sexton formulated the test as follows:

> [67] It is therefore my view that in order for there to be a finding of *de facto* control, a person or group of persons must have the clear right and ability to effect a significant change in the board of directors or the powers of the board of directors or to influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors.

[36] This test was affirmed in *9044 2807 Québec Inc. v. Canada*, 2004 FCA 23, 325 N.R. 226 [*Transport Couture*], wherein Justice Noël (as he then was), stated:

> [24] It is not possible to list all the factors which may be useful in determining whether a corporation is subject to *de facto* control (*Duha Printers*, [1998] 1 S.C.R. 795, para. [38]). However, whatever factors are considered, they must show that a person or group of persons has the clear right and ability to change the board of directors of the corporation in question or to influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors (*Silicon Graphics*, [2002] FCA 260, para. [67]). In other words, the evidence must show that the decision-making power of the corporation in question in fact lies elsewhere than with those who have *de jure* control. [Emphasis added]

[37] At the heart of Justice Noël's description of the legal test for *de facto* control is essentially a restatement of the test enunciated by Justice Sexton in *Silicon Graphics*. Nothing in this excerpt from Justice Noël's reasons suggests an intention on his part to depart from the *Silicon Graphics* formulation of the test for *de facto* control.

[38] I do not interpret Justice Noël's last sentence in the above-quoted paragraph as broadening or otherwise altering the *Silicon Graphics* test. It immediately follows a clear and direct endorsement of the *Silicon Graphics* test. Moreover, in my view, its introductory phrase "In other words" indicates that this sentence is intended to constitute only a paraphrase of that test. Although interpreted in isolation this sentence might suggest a broader approach, its immediate context requires an interpretation bounded by the clear endorsement of the *Silicon Graphics* test.

[39] As previously mentioned, the Judge concluded that *Mimetix Pharmaceuticals* and *Plomberie J.C. Langlois* required him to consider broad manners of influence, including exercise of control over day-to-day operations in the *de facto* control analysis. While it is true that in these two decisions a broader test appears to have been considered, the narrow test set out in paragraph 67 of *Silicon Graphics*, which in my view was its *ratio decidendi*, was never directly challenged before this Court in either of these decisions.

[40] It is well established that this Court will follow its previous decisions unless "the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (see *Miller v. Canada (Attorney General)*,

2002 FCA 370, 220 D.L.R. (4th) 149 at paragraph 10). This Court did not address any argument that *Silicon Graphics* was manifestly wrong and should not be followed in either *Mimetix Pharmaceuticals* or *Plomberie J.C. Langlois*. Moreover, in both *Mimetix Pharmaceuticals* and *Plomberie J.C. Langlois*, this Court was primarily concerned with the Tax Court's appreciation of the evidence before it.

[41] To be clear, in my view, to the extent that those decisions may be taken as having prescribed a test for *de facto* control that is inconsistent with the *Silicon Graphics* test, those decisions ought not to be followed.

[42] At the hearing, Crown counsel asserted that this Court "clarified" the *Silicon Graphics* test in *Lyrtech RD Inc. v. Canada*, 2014 FCA 267, 470 N.R. 364 [*Lyrtech*], a decision that was apparently not before the Judge.

[43] In *Lyrtech*, this Court affirmed that the test for *de facto* control is that in *Silicon Graphics*, adding that paragraph 24 of the decision in *Transport Couture* clarified the *Silicon Graphics* test. As noted above, it is my view that the stipulated paragraph from *Transport Couture* must be taken as an affirmation of the *Silicon Graphics* test. Moreover, *Lyrtech* is another example of the Court responding to asserted errors in factual findings made in the decision under review. *Lyrtech* cannot, in my view, be read as having determined that the narrow test in *Silicon Graphics* was manifestly wrong and ought not to be followed. To the extent that *Lyrtech* may be taken as having repudiated the *Silicon Graphics* test, it ought not to be followed.

[44] Crown counsel argued that support for the broader approach to *de facto* control can be found within *Silicon Graphics* itself. In paragraphs 63 to 65 of that decision, the Court dealt with a number of arguments that were made to it as to the applicability of broader factors. In dismissing these arguments on the basis that they were unsupported on the record, it is my view that Justice Sexton cannot be taken as having undermined the test that he clearly enunciated in paragraph 67 of his reasons.

[45] Accordingly, I affirm that the narrow test set out in paragraph 67 of *Silicon Graphics* is correct and has not been overturned by this Court.

[46] I reject any assertion that the test for control in fact is based on "operational control". *De facto* control, like *de jure* control, is concerned with control over the board of directors and not with control of the day-to-day operations of the corporation or its business. Paragraph 256(1)(*b*) and subsection 256(5.1) specifically refer to control of a corporation and not to control of the corporation's business or operations. Indeed, this view is consistent with the conclusion of President Jackett set out in *Buckerfield's Ltd. v. Minister of National Revenue*, [1965] 1 Ex. C.R. 299 at pages 302-303, [1964] C.T.C. 504:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals. (see subsection (6) of section 39). The word "control" might conceivably refer to de facto control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a

> number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors …

[47] While *de jure* control generally looks only to share ownership in the limited context set forth in in *Duha Printers*, in determining who has control over the election of the board of directors — and thus the corporation — there is nothing to suggest that *de facto* control is anything other than control by some means short of that necessary to meet the test for *de jure* control. In my view, control of a corporation for the purposes of the associated corporation provisions of the Act has never been properly understood to mean what President Jackett referred to as control by management or what might otherwise be called "operational" control.

[48] The difference between *de facto* and *de jure* control, then, is limited to the breadth of factors that can be considered in determining whether a person or group of persons has effective control, by means of an ability to elect the board of directors, of a corporation. That said, it remains the case that the list of factors that may be considered when applying the *Silicon Graphics* test is open-ended. However, in my view, a factor that does not include a legally enforceable right and ability to effect a change to the board of directors or its powers, or to exercise influence over the shareholder or shareholders who have that right and ability, ought not to be considered as having the potential to establish *de facto* control.

[49] In my view, an interpretation of *de facto* control as contemplated by subsection 256(5.1) that fails to include a requirement that the influence in question must be grounded in a legally enforceable right or ability runs counter to the clear admonition of the Supreme Court of Canada

in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 wherein, at paragraph 12, the Chief Justice and Justice Major unequivocally stated:

> The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently …

[50] An interpretation of subsection 256(5.1) that encompasses "operational" control would import a degree of subjectivity into the *de facto* analysis that, in my view, would lead to unpredictability, rather than predictability, as mandated by the *Canada Trustco* interpretative approach.

[51] Having clarified that the *Silicon Graphics* test remains the test for *de facto* control, and it appearing that the Judge applied a different test, I now turn to the facts in this appeal.

C. Did the Judge err in concluding that the Taxpayer was associated with GRR and MorCourt for the purposes of paragraph 256(1)(*b*)?

[52] Having determined that the Judge applied an incorrect test for *de facto* control, it is necessary for me to apply the correct test to the facts of this case.

[53] The Judge determined that Mr. and Mrs. Howard reached an agreement to the effect that the franchise with respect to the Pembina Highway location would only be transferred from GRR to the Taxpayer if Mrs. Howard agreed to use the voting power associated with her 760 common shares of the Taxpayer to ensure that Mr. Howard was elected as the sole director of the Taxpayer and that his directorship endured. In essence, the Judge found that the Howards had

made an agreement under which the identity and composition of the board of directors of the Taxpayer would be under the control of Mr. Howard.

[54] At the hearing, counsel for the Taxpayer asserted that the Judge made a palpable and overriding error in finding that Mr. and Mrs. Howard had made such an unwritten agreement. Counsel correctly noted that the record contains no direct evidence of such an agreement. However, he agreed that if there had been a written agreement to the same effect, the Minister's position that the corporations were associated would be unassailable. Counsel asserted correctly that the Franchise Agreement, to which the Taxpayer was a party, did not require Mr. Howard to be the Taxpayer's sole director. From this, the Taxpayer asks this Court to infer that there was no such oral agreement and that the Judge erred in his inference that there was one.

[55] A review on a standard of palpable and overriding error requires an appellate court to show meaningful deference to the factual findings of a trial judge. In the circumstances, it is my view that the Judge's finding that there was an unwritten agreement between Mr. and Mrs. Howard was open to him on the evidence that was before him and in making it, he committed no palpable and overriding error.

[56] The absence of a written agreement is not proof that there was no unwritten agreement. The Judge was aware of the longstanding and successful relationship between Mr. Howard and the Franchisor, underscoring the trust that had been established between them over the years. This relationship indicates that the Franchisor may well have been satisfied by Mr. Howard's

verbal assurances that things would be run in the same way they always had in the three restaurants.

[57] Although the parties stipulated in the partial agreed statement of facts that Mrs. Howard could terminate Mr. Howard's directorship at any time, she did not do so. As long as the unwritten agreement was in effect, Mr. Howard retained the right to determine the entirety of the Taxpayer's board of directors, *i.e.* that he would constitute the entire board. It is clear that the rights possessed by Mr. Howard under the unwritten agreement with his wife fell short of giving him *de jure* control of the Taxpayer, as he did not own a majority of its voting shares and that agreement was not a unanimous shareholders agreement within the meaning of the governing corporate legislation. Nonetheless, as long as that agreement was not repudiated by Mrs. Howard, Mr. Howard's right to determine the Taxpayer's Board of Directors was influence of the type contemplated by subsection 256(5.1), within the interpretation of this Court set out in *Silicon Graphics*.

VII. CONCLUSION

[58] For the foregoing reasons, I would dismiss the appeal with costs.

"C. Michael Ryer"

J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-571-14

(APPEAL FROM A DECISION OF THE HONOURABLE JUSTICE PATRICK BOYLE OF THE TAX COURT OF CANADA DATED NOVEMBER 28, 2014, (DOCKET NO: 2012-2500(IT)G)).

STYLE OF CAUSE:	MCGILLIVRAY RESTAURANT LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 3, 2016
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	DAWSON J.A. DEMONTIGNY J.A.
DATED:	MARCH 30 2016

APPEARANCES:

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