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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

SALISBURY HOUSE OF CANADA LTD., EARL JOEL BARISH, LORNE SAIFER, HARRIS LIONTAS and HERSH WOLCH, applicants,	)	Counsel: BRENDEN D. COLLINS for the applicants
- and -	)	
DEPUTY MINISTER OF FINANCE FOR THE PROVINCE OF MANITOBA, respondent.	)	SHERRI M. WALSH DAVE G. HILL for the respondent
	)	JUDGMENT DELIVERED: August 18, 2017

GRAMMOND J.

INTRODUCTION

[1] The application in this matter was filed pursuant to ss. 58 and 59 of ***The Tax Administration and Miscellaneous Taxes Act***, C.C.S.M. c. T2 (**"*TAMTA*"**), to rescind the decision of the Chief Commissioner of the Tax Appeals Commission (the **"Commission"**) made October 21, 2011 (the **"Decision"**) pursuant to s. 43(1) of ***TAMTA***. More particularly, the applicants,

who are directors (the **"Directors"**) of Salisbury House of Canada Ltd. (the **"Corporation"**), seek to rescind a series of tax assessments issued against them. Pursuant to s. 59(5) of ***TAMTA***, the Court may affirm, rescind or vary the Decision.

BACKGROUND INFORMATION

[2] The retail sales tax that is the subject of the Decision (the **"Tax"**) was collected by the Corporation between April 1, 2006 and April 19, 2006. At the material time, s. 9(2) of ***The Retail Sales Tax Act***, C.C.S.M. c. R130 (the **"*RST Act*"**) provided:

> **Every vendor must:**
> (a) collect the tax payable under section 2 at the time that it is payable; and
> (b) in accordance with the regulations:
> (i) file returns with the director; and
> (ii) remit to the minister the tax that the vendor collected and any amount that the vendor was required to collect as tax but did not collect.

[3] Section 7(3) of ***The Retail Sales Tax Regulation***, Man. Reg. 75/88 R (the **"Regulation"**) provided that:

> The return of information and remittance of tax for each reporting period under subsection (1) or (2) are due on the 20th of the month following the end of the period.

[4] It is agreed that the Corporation was subject to a monthly reporting period. As such, the Tax was to be reported on and remitted by May 20, 2006. It is also agreed that the amount of the Tax, if the assessments are valid, is $52,051.41, plus interest.

[5] The Directors were elected on April 19, 2006, at which time the financial position of the Corporation was poor. The Directors sought to take steps to remedy that position and on May 25, 2006 caused the Corporation to file a notice of intention to file a proposal under the ***Bankruptcy and Insolvency Act***, R.S.C. 1958, c. B-3. The proposal was accepted by creditors on September 11, 2006 and approved by the Court on October 3, 2006.

[6] As a result of the proposal, pursuant to s. 43(4)(g) of ***TAMTA***, the Directors were found personally liable for payment of the Tax pursuant to s. 43(1) of ***TAMTA***, which provided at the material time, that:

> If a corporation fails to pay or remit when it is due
>
> (a) any tax that it is required to collect and remit; or
>
> (b) any tax payable by it under *The Retail Sales Tax Act*, if the tax was first assessed after May 10, 2000;[1]
>
> the persons who are directors of the corporation at that time are liable to pay the corporation's tax debt in respect of that failure. Subject to subsections (2) to (4), the tax debt may be enforced against any or all of those persons.

[7] In November 2006, the Directors paid the Tax, on an "in protest" basis, and without prejudice to their ability to seek a determination as to their obligations through the appropriate adjudication process.

[8] Thereafter, on or about February 6, 2007, the Directors wrote to the Commission and advised of why, in their view, they should not bear personal liability for the Tax.

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[1] The phrase "if the tax was first assessed after May 10, 2000" was removed from s. 43(1) as of June 30, 2016.

[9] The reasons cited included:

(a) The Directors wished to save the business of the Corporation, which they considered to be a viable company and a Winnipeg institution;

(b) The Directors had invested funds in the Corporation and had to address the "terribly complex and difficult issues which had been created primarily through the prior directors";

(c) The Directors wished to see the long-standing employees and dedicated management of the Corporation keep their jobs;

(d) When the Directors were elected on April 19, 2006 they "did not appreciate how desperate the company situation was, nor did [they] appreciate or have any knowledge of some of the wrongdoings which had taken place";

(e) The Directors should not be required to satisfy a debt incurred under the guidance of the previous directors, when the Directors had already incurred considerable expense and time relative to the Corporation. In other words, the Directors argued that it was unfair for them to pay the Tax;

(f) Their directorship was not a ploy to avoid paying the Tax; and

(g) The Directors caused retail sales tax to be remitted after their election as directors on April 19, 2006.

[10] On or about March 13, 2007, a Notice of Assessment for payment of the Tax issued to the Corporation. On April 20, 2007, the Directors appealed the Notice of Assessment and repeated the assertions made in February 2007 with respect to their personal liability.

[11] In August 2007, the Directors again wrote to the Commission and advised that they had been "provided with additional history into the company and . . . [were] dismayed to learn more of what the previous directors did to damage this excellent company". In addition, the Directors stated that they had "learned, more specifically, how the actions of the previous directors have put the company in such a precarious position. They did not put in what was promised and withdrew more than they were to invest".

[12] On September 17, 2007, the respondent Government of Manitoba (the "**Government**") made a written submission to the Commission with respect to the Directors' liability. The Government stated, among other things, that:

> (a) The directors have not made any suggestion that they exercised due diligence to attempt to ensure the company remitted its taxes for the period in question; . . .
>
> (b) The only explanation offered by the directors for why they should not be liable for the unremitted taxes is that they do not think they should be liable for a debt incurred by the corporation while under the control of previous directors; and
>
> (c) . . . there is no basis under ***TAMTA*** or at law to suggest that this is a defence to the statutory liability of the directors.

[13] On September 17, 2007, four new Notices of Assessment issued, to each of the Directors personally. The Government advised the Directors that the pending appeal relative to the Corporation could constitute an appeal of the

individual assessments also, and that they could make any additional comments to the Commission, subject to its approval.

[14] On September 27, 2007, the Directors responded to the Government's submission in writing and suggested, among other things, that there is a difference between the due date of taxes and the due date for remittance of taxes. In particular, the Directors stated that the Tax is due and owing on the day on which it is collected, but as an administrative convenience there is a fixed date for remittance (in this case, the 20th day of the month following the end of the reporting period).

[15] On October 30, 2007, the Commission dismissed the Directors' appeals and affirmed the assessment of the Tax as issued. Thereafter, there was further discussion as between the parties and it was agreed in June 2010 that the October 30, 2007 ruling of the Commission would stand only with respect to the Notice of Assessment issued to the Corporation. The Directors would be permitted to pursue appeals of the September 17, 2007 Notices of Assessment issued to each of them personally. The Directors now ask the Court to rescind the Decision, which flowed from those appeals.

[16] In June 2010, counsel for the Government wrote to counsel for the Directors and made reference to:

> [O]ur common understanding that your clients' ultimate goal is to get to a point where they can have their arguments heard and decided on their due diligence defences as directors of the corporation. . . . [W]e are in agreement that administrative efforts will be undertaken with the goal of seeing that happen.

[17] On September 14, 2011, the Commission wrote to both the Directors and the Government and requested their respective views on the question of "when the tax was due". The Commission also offered the following interpretation of s. 43(1) of ***TAMTA*** (the text of which is reproduced at paragraph 6 above), and of s. 7(3) of the ***Regulation***:

> If the tax was due 20 days after the month end, Finance says that you and your clients are liable for it. Finance invokes Reg 7(3). But 7(3) says that the remittance of the tax is due 20 days afterward. It does not say when the tax itself is due. If the tax is due at an earlier time, an argument can be made that ***TAMTA*** 43(1) can be read as follows:
>
> > If a corporation fails to repay or remit when it* is due ... any tax ... the persons who are directors of the corporation at that time** are liable to pay ...
> >
> > *"it" refers to the tax, not the remittance, because it appears to relate to 'any tax' in clauses (a) and (b)
> >
> > **the time when it – the tax – is due
>
> You say there is a difference between the due date of the tax and the due date for remittance. I am an accountant, not a lawyer. We accountants use the word 'due', but perhaps in a different way than do lawyers. I need lawyers to explain to me the meaning of 'due' in this context, please.

[18] The Commission requested a response to this inquiry by October 4, 2011, and stated, "[i]f either party has any questions, you can email me or leave me a voice message".

[19] While counsel for the Directors left a voice mail message for the Commission, the content of that message is unknown. On October 2, 2011, counsel for the Directors responded to the Commission in writing and, among

other things:

(a) Thanked the Commission for the opportunity "to address once again the central issue in this dispute".

(b) Advised the Commission that its September 14, 2011 invitation "centred the issue squarely".

(c) Advised the Commission that he would not repeat submissions made previously, including the Directors' September 27, 2007 submission.

(d) Advised the Commission that even if the Tax was due when argued by the Respondent (on May 20, 2006), the Directors would still have two arguments available to them: the due diligence defence and a mischief (or unfairness) defence.

(e) Argued the following points relative to the appropriate interpretation of s. 43(1) of ***TAMTA***:

(i) Any ambiguity in a taxing statute should be resolved in favour of the taxpayer;

(ii) Tax becomes due to the Government immediately upon collection, and is impressed with trust obligations from the time of collection until the time of remittance;

(iii) Before monies can be said to be subject to being held in trust, they must first be characterized as being "due";

(iv) The fact that the tax is not required to be remitted until the 20th day of the following month represents a grace period, to allow for the completion of bookkeeping related tasks by a vendor;

(v) If the tax is not remitted when required, it is overdue; and

(vi) The legislation inherently identifies a difference between the due date of tax and the due date of the remittance of tax; and

(f) Thanked the Commission for the opportunity to address "this issue afresh" and offered further input should the Commission require it.

[20] On October 7, 2011, counsel for the Government made a written submission to the Commission on the interpretation of s. 43(1), including the meaning of "due".

[21] On October 12, 2011, the Commission sent an email to counsel for both the Directors and the Government, attaching their respective written submissions and inviting comments in response to those submissions, before a fixed deadline of October 18, 2011. The Commission also stated, "[i]f you feel your submission adequately covers your position and there is no need to comment further, that is fine with me."

[22] On October 18, 2011, counsel for the Government made further written submissions, in response to the October 2, 2011 submissions of counsel for the Directors. Counsel for the Government stated:

> [A]s a preliminary note, and given that the issue of due diligence of the directors was sufficiently canvassed in the original submissions by the parties, we will confine our reply [to] the definition of 'due' within the legislative rubric . . . as per your original question.

[23] This submission was shared with counsel for the Directors on October 20, 2011. Counsel for the Directors made no further submissions to or inquiries of the Commission.

[24] On October 21, 2011, the Commission issued the Decision and affirmed the Notices of Assessment issued to the Directors. Among other things, the Commission stated:

> (a) [T]here is indeed ambiguity – the legislation is not as clear as it should be; . . .
>
> (b) Unfortunately, there is no alternate authority on which to rely, for example a contemporaneous statement of the legislators' policy objective [or] helpful jurisprudence. If these exist, they were not provided to me by either party. Therefore, the most all of us can do is carefully read the legislation to discern how it should be applied; . . .
>
> (c) I believe it is completely possible to infer that the tax (not the remittance thereof) is due when it is collected or accrued. Any fair-minded accountant would have reported a liability for RST due to Manitoba on the April 30, 2006 monthly financial statements in respect of April 1-18, 2006 sales, though the remittance thereof was not due until May 20. It is very possible to read 43(1) such that the directors who are liable to pay the tax are the directors as of the date of the tax (not the remittance) becomes due;
>
> (d) I would encourage an amendment to the preamble of 43(1) to refer specifically to the remittance date or refer to Reg. 7(3), rather than using the ambiguous word 'it'; . . .

(e) A failure in [the context of s. 43(1)] can only be the failure to remit the tax. . . . [T]he timing referred [to] in the preamble needs somehow to be tied to this failure. This can be only be [sic] achieved by reading 'due' as being the due date of the remittance; . . .

(f) With respect to the due diligence defence:

> [U]nfortunately no information was provided about what [the Directors] in fact did; and

(g) . . . the (less-than-clearly-worded) legislation indeed holds liable the new directors who had control over the company and its administrative functions on the remittance-due date . . . not the old directors . . . I am moved by the predicament of the new directors but I do not see any relief offered to them by ***TAMTA***.

ISSUES

[25] The issues are:

1) Did the Commission err in its interpretation of s. 43(1) of ***TAMTA***?

2) Did the Commission err in its interpretation of s. 43(2) of ***TAMTA*** (the "**Due Diligence Defence**"), or did it misdirect itself as to the material facts in its analysis of that issue?

3) Did the Commission conduct the proceedings in a manner that violated the legitimate and reasonable expectations of the Directors by failing to allow them to adduce all relevant evidence, such that the Directors were denied natural justice?

STANDARD OF REVIEW

[26] The parties agree that the applicable standard of review on the substantive elements of the Decision is reasonableness. As stated by the Supreme Court of Canada in ***Edmonton (City) v. Edmonton East (Capilano)***

Shopping Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293 ("***Edmonton (City")***, at paragraph 36:

> A decision cannot be reasonable unless it 'falls within a range of possible, acceptable outcomes' (*Dunsmuir*, at para. 47, per Bastarache and LeBel JJ.). Reasonableness is also concerned with 'the existence of justification, transparency and intelligibility within the decision-making process' (*ibid*).

ISSUE 1: DID THE COMMISSION ERR IN ITS INTERPRETATION OF S. 43(1) OF *TAMTA*?

RELEVANT LEGAL PRINCIPLES

[27] The modern approach to statutory interpretation that has been utilized by Courts in Canada includes reference to the purpose that the legislature intended to achieve in enacting a statute, and to the statute as a whole. In ***Edmonton (City)***, *supra*, at paragraph 44, the Court stated:

> In a case that raised the same issue ... the Alberta Municipal Government Board ... discerned the meaning of s. 467(1) by examining the words of the provision in their entire context and in their grammatical and ordinary sense, in harmony with the object and scheme of the (legislation). This is consistent with this Court's well-established approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

SUBMISSIONS OF THE DIRECTORS

[28] The Directors submitted that the Commission made two errors relative to the interpretation of s. 43(1) of ***TAMTA***, such that the Decision is unreasonable:

1) The Commission failed to apply well-established principles of statutory interpretation; and

2) The Commission failed to apply an established legal presumption in favour of the taxpayer, namely that an ambiguity in legislation must be resolved in favour of the taxpayer.

Statutory Interpretation

[29] The Directors submitted that in this case, the Commission's decision contains no purposive analysis of ***TAMTA*** or its intent. Rather, the Commission conducted an analysis of only the language of s. 43(1), which is a radical departure from the contextual approach that should apply.

[30] The Directors argued that pursuant to s. 43(1), taxes are "due" to the Government immediately upon collection, to be remitted pursuant to the process set out in the ***Regulation***. The Directors pointed to s. 73(2) of ***TAMTA*** which provides, among other things, that money equal in value to the tax collected, from the time the tax is collected until it is remitted, is deemed to be held in trust for, and beneficially owned by the Government.

[31] The Directors submitted that this approach is consistent with the conclusion of the Commission that, "[a]ny fair-minded accountant would have reported a liability for RST due to Manitoba on the April 30, 2006 monthly financial statements in respect of April 1 - 18, 2006 sales, though the remittance thereof was not due until May 20".

[32] The Directors stated that in this context, there could be no ploy to avoid tax debt by switching directors (as the Directors suggested in their February 6, 2007 submission), because resigning directors of a corporation retain liability for

any collected tax held in trust for the Government up to and including the date of their resignation.

[33] The Directors submitted that the Commission erred in finding that the word "failure" in s. 43(1) could refer only to a failure to remit tax. The Directors submitted that the word "failure" could also refer to a failure to collect tax, or to a failure to preserve the monies in trust for the Government. The Directors submitted that either of these interpretations is more consistent with the objects of ***TAMTA*** as a whole, which is to ensure that tax funds are collected, preserved and remitted to the Government. The Directors submitted that preservation of tax collected is a more crucial purpose of ***TAMTA*** than is remittance of tax.

[34] The Directors did not submit that the Commission's interpretation of the statute on its face and taken in isolation, without applying the appropriate legal principles, is outside the bounds of reasonableness. The Directors acknowledged that s. 43(1) on its own could reasonably be interpreted two different ways: either as interpreted by the Commission or as submitted by the Directors. The Directors argued that this reality does not make the Commission's decision as a whole reasonable, because reasonableness in the context of this application must be assessed in light of both the applicable statutory interpretation framework and the applicable legal presumption referenced in ***Québec (Communauté Urbaine) v. Corp. Notre-Dame de Bon-Secours***, [1994] S.C.R. 3 ("***Québec***").

[35] In summary, the Directors submitted that the Commission did not attempt to determine the legislative intent of ***TAMTA***, nor did it consider the collection and remittance process as a whole. Accordingly, the decision of the Commission could not reflect what the legislature intended and its conclusion is unreasonable.

Presumption in Favour of Taxpayer

[36] The Directors also argued that the Commission failed to apply an established legal presumption in their favour. In particular, in ***Québec***, *supra*, at pages 19 and 20, the Court held that there is a presumption in favour of a taxpayer, to be applied where the interpretation of a taxation statute is unclear, and where a court is compelled to choose between two valid interpretations of the legislation. The Court in ***Québec*** also stated, at page 15, that "regardless of who bears the burden of proof, that person will have to persuade the court that the taxpayer is clearly covered by the wording of the legislative provision which it is sought to apply" [emphasis in original].

[37] The Directors submitted that upon concluding that s. 43(1) of ***TAMTA*** is ambiguous or less than clearly worded, the Commission was bound to apply this presumption in favour of the Directors and resolve liability in their favour.

SUBMISSIONS OF THE GOVERNMENT

[38] The Government submitted that a decision maker is not required to articulate every point in their reasons for a decision to be considered reasonable. In this case, the Commission's reasons show that it addressed its mind to the

appropriate legislation, to the appropriate issues regarding the interpretation of that legislation and to the relevant facts. The Commission considered the submissions of counsel and issued a decision in plain language such that the Decision satisfies the requirements of justification, transparency and intelligibility.

Statutory Interpretation

[39] The Government submitted that the Decision is reasonable as it falls within a range of possible outcomes. Section 43(1) of ***TAMTA*** creates an obligation to collect and remit tax, which are two distinct steps. To determine when directors become personally liable for a failure to do one of those two steps, regard must be had to s. 9(2) of the ***RST Act***, referenced at paragraph 2 above. In this case, the Tax was due to be remitted by May 20, 2006, by which time the Directors were elected and responsible to remit the Tax.

[40] The Commission said in the Decision that the legislation must be read carefully to discern how it should be applied, and which group of directors should be liable. On a plain reading of s. 43(1), it is clear that the activity being referred to in s. 43(1) is the remittance of the tax, not the collection of the tax. In addition, the Government submitted that in s. 43(1), "failure" is the failure to remit the collected tax by the due date and "due" is the remittance due date.

[41] The Government noted that the Directors acknowledged in their February 2007 submission that in some cases the current directors of a corporation should be looked to for unpaid tax, as the switching of directors could be a ploy to avoid

this type of debt. This reflects that the Directors understood the policy behind s. 43(1) of ***TAMTA***.

[42] The Government also noted that in this case, the liability of the Directors was triggered because of the proposal of the Corporation in bankruptcy, a decision made by the Directors.

Presumption in Favour of Taxpayer

[43] The Government pointed to ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, [2002] 2 S.C.R. 559 ("***Bell ExpressVu***"), at paragraph 29, where the Court explained that for an ambiguity to exist, the words of a provision must be "reasonably capable of more than one meaning". One must, however, consider the entire context of the provision before determining whether it is reasonably capable of multiple interpretations. In addition, "it is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids", including other principles of interpretation [emphasis in original].

[44] The Government also submitted that in ***Québec***, *supra*, at pages 19 and 20, the Court held that the presumption in favour of the taxpayer is applied to resolve an ambiguity only where an ambiguity exists, namely two potential, valid interpretations of a statute. Use of the presumption is the exception not the rule, and it does not apply in this case because there is no ambiguity.

[45] In the Decision, the Commission acknowledged the submission of the Directors that the benefit of any doubt should be resolved in favour of the taxpayer. The Commission found that it was possible to infer that the tax (not the remittance thereof) is due when it is collected or accrued, and that the directors who are liable to pay the tax are the directors as at the date that the tax (not the remittance) becomes due.

[46] While the Commission encouraged an amendment to ***TAMTA***, it resolved the ambiguity by concluding that a "failure" in the context of s. 43(1) can only be the failure to remit tax, and that the timing within the preamble of the section must be tied to this failure. This can be achieved only by reading "due" as the due date of the remittance.

[47] The Government submitted that the Commission conducted an appropriate, purposive approach in that it reviewed the legislation in its entire context, and determined that there was actually no ambiguity. The Government submitted that the Decision meets the requirements set out in ***Edmonton (City)***, *supra*, such that it should be given deference and found to be reasonable.

ANALYSIS

[48] As set out at paragraph 26 above, I must consider whether the Decision falls within a range of possible, acceptable outcomes and whether it meets the requirements of justification, transparency and intelligibility.

[49] In ***Edmonton (City)***, *supra*, the Court stated, at paragraph 33, that:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: ... expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: '... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions' [citations omitted].

[50] Accordingly, I must be mindful of the expertise of the Commission, including with respect to ***TAMTA***, the ***RST Act*** and the ***Regulation***.

[51] In ***Santarsieri* (*Michele*) *Inc. et al. v. Manitoba* (*Minister of Finance*)**, 2015 MBCA 71 ("***Santarsieri***"), the Court noted that pursuant to ***TAMTA***, there is:

> [A] comprehensive administration and tax scheme governing compliance, inspections, assessment, appeals and collection of a number of taxes imposed by the Government of Manitoba. (paragraph 43)

[52] Further, the Court stated at paragraph 45:

> Prior to the enactment of *TAMTA* [in 2005], each of the taxing statutes contained its own separate process for administration, enforcement and appeals. The coming into force of *TAMTA* consolidated the administration, enforcement and appeal provisions of these various taxing statutes. So, while each of the taxing statutes governs different taxes, they are now all uniformly administered and enforced in accordance with the provisions set out in *TAMTA*.

[53] In this case, the Commission considered the language of s. 43(1) of ***TAMTA***, and concluded that the word "it" within that section is ambiguous. The Commission noted that there was no "alternate authority" before it on which to

rely, such as evidence of the legislators' policy objective or helpful jurisprudence. In other words, the Commission turned its mind to whether there was specific information available relative to the object and scheme of the legislation, and concluded that this information was lacking. As a result, the Commission stated that the legislation must be read carefully to discern how it should be applied.

[54] While the Decision does not contain further commentary relative to the purposive approach, it is not necessarily the case that the Commission failed to consider the legislative intent of ***TAMTA***, or the collection and remittance process as a whole.

[55] Having found an ambiguity relative to the meaning of the word "it" in s. 43(1) of ***TAMTA***, the Commission continued its analysis and considered the language in the balance of the section. When it considered that language and in particular the use of the word "failure", the Commission found "some much-needed clarity", in that "[a] failure in this context can only be the failure to remit the tax." In addition, the Commission stated that "the timing referred [to] in the preamble needs somehow to be tied to this failure. This can be [sic] only be achieved by reading 'due' as being the due date of the remittance."

[56] In other words, the Commission considered the entire context of the provision before concluding whether it was reasonably capable of multiple interpretations. Having resolved the ambiguity relative to the word "it", there was no genuine ambiguity that arose within the meaning set out in ***Bell ExpressVu***, *supra*.

[57] Having resolved the ambiguity that it identified, and being left with no genuine ambiguity, there was no need for the Commission to apply the "benefit of any doubt" or presumption in favour of the Directors.

[58] Accordingly, the Decision as a whole, relative to statutory interpretation and the application of the presumption, is within bounds of reasonableness and meets the requirements of justification, transparency and intelligibility.

[59] In addition, I have considered the appropriate interpretation of s. 43(1) of ***TAMTA*** and the applicability of the presumption in favour of a taxpayer in the face of an ambiguity. The outcome of this analysis further supports the conclusion that the Decision is within the bounds of reasonableness.

[60] To properly consider s. 43(1) of ***TAMTA***, (set out at paragraph 6 above), the words of the section must be examined in their entire context and in their grammatical and ordinary sense, in harmony with the object and scheme of the legislation.

[61] For the purposes of this analysis, it should be noted that in this case, it is "remittance", not "payment" with which we are concerned. As set out above, ***TAMTA***, including s. 43(1), governs many different taxation schemes, some of which require "payment" pursuant to governing legislation, and some of which required "remittance". In this case, s. 9(2) of the ***RST Act*** applies, which includes the word "remit", not "payment".

[62] In my view, the Directors are liable to pay the Tax pursuant to s. 43(1) of ***TAMTA*** because:

(a) The grammatical and ordinary meaning of "it" in the preamble to s. 43(1) is a reference to the "tax" or the "amount payable" referenced in sub-paragraphs (a) and (b) of the section. I do not agree with the Commission that the meaning of the word "it" is unclear or ambiguous within the section.

(b) The grammatical and ordinary meaning of "due" in s. 43(1) is the remittance deadline of the "tax" referenced in sub-paragraphs (a) and (b) of the section. Certainly, the remittance being "due" on a fixed date some time after collection is a practical and reasonable approach to remittance for accounting and other reasons. This interpretation of "due" is consistent with the use of that word in other sections within ***TAMTA***, such as the provisions relative to the payment of interest and penalties on outstanding remittances found in ss. 38 and 39. I accept that from an accounting perspective, tax may be "due" immediately upon collection, in the sense that the tax is trust money which belongs to the Government and should be recorded as such for bookkeeping purposes. The mere fact that the tax is held in trust does not, however, make the tax immediately "due" for remittance for administrative purposes pursuant to ***TAMTA***.

(c) The grammatical and ordinary meaning of "at that time" in s. 43(1) is when the remittance of the tax is due, in this case on May 20, 2006, and not when the tax was collected from a purchaser.

(d) The grammatical and ordinary meaning of "that failure" in s. 43(1) is the failure to remit tax when it is due for remittance; in this case by May 20, 2006. While a collector is bound by the ***RST Act*** to collect tax from a purchaser, if it fails to do so its remittance obligations remain, though it is entitled to recover that amount as a debt owing by the purchaser pursuant to s. 9(2.1)[2] of the ***RST Act***. As such, it is really the failure to remit and not the failure to collect that gives rise to liability of the collector, and potentially its directors.

[63] The grammatical and ordinary meaning of the whole of s. 43(1) as set out above is consistent with the purpose of ***TAMTA***, which is to provide for an organized system under which tax will be collected, preserved and remitted to the Government by collectors. For practical reasons, collectors are given a grace period within which to file returns and remit the tax for a particular timeframe, and if they fail to do so, consequences may be imposed under ***TAMTA***, including but not limited to the collection of interest, imposition of penalties and liability of directors.

[2] The language of this section was amended in 2012, but its general meaning was unchanged.

[64] I note that the Government bears the onus of establishing liability of the Directors under ***TAMTA***, and in my view that onus has been met in this case.

CONCLUSION

[65] I have concluded, with respect to the interpretation of s. 43(1) of ***TAMTA*** and the application of the presumption, that the Decision as a whole is within bounds of reasonableness and meets the requirements of justification, transparency and intelligibility.

[66] In addition, I am satisfied that pursuant to the language of s. 43(1) of ***TAMTA***, the Directors are liable to pay the Tax.

ISSUE 2: DID THE COMMISSION ERR IN ITS INTERPRETATION OF S. 43(2) OF *TAMTA*, OR DID IT MISDIRECT ITSELF AS TO THE MATERIAL FACTS IN ITS ANALYSIS OF THAT ISSUE?

RELEVANT STATUTORY PROVISION

[67] Section 43(2) of ***TAMTA*** provides as follows:

> A person is not liable under subsection (1) if he or she exercised the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances to prevent the corporation's failure to pay or remit tax.

SUBMISSIONS OF THE DIRECTORS

[68] The Directors argued that the Decision pursuant to s. 43(2) is unreasonable, because of both the test to be applied and the evidence before the Commission.

[69] The Directors submitted that the intent of the Due Diligence Defence within ***TAMTA*** is to ensure that directors who act prudently and who are not

responsible for a failure to remit are not held personally liable. Conversely, where a director is negligent in the performance of his or her duties, such that a corporation owes tax, the director should have to pay personally. In other words, the Due Diligence Defence is a way to ensure fairness in the application of s. 43(1) of ***TAMTA***.

[70] With respect to the application of the Due Diligence Defence, the Directors pointed to ***Thistle v. The Queen***, 2015 TCC 149, ("***Thistle***"), wherein the Court considered federal legislation containing provisions identical to that found in s. 43(2) of ***TAMTA***. The Directors relied upon two propositions derived from ***Thistle***, as follows:

1) While the Due Diligence Defence is an objective one, the context in which a corporation failed to pay must be taken into account; and
2) A positive duty to act does not arise until a director obtains information which would lead to the reasonable conclusion that there is or could reasonably be a potential problem with remittances.

[71] In this case, the Directors pointed to the following context of the Corporation's failure to pay. The Directors were elected on April 19, 2006 and the Tax was collected from April 1 to 18, 2006. By the time the Directors were involved, the Corporation did not have the funds to meet its liabilities and had failed to preserve the Tax in trust.

[72] The Directors submitted that they had no power to direct the Corporation until after the Tax was collected and the failure to preserve the Tax had occurred. Their only options going forward were to make a proposal in bankruptcy, and to ensure that the Corporation preserved the tax that it collected from their election. The Directors queried what else they could have done in the circumstances, and submitted that upon a consideration of all of the evidence in context, they acted as a reasonably prudent person would have acted.

[73] The Directors pointed to ***Thistle***, *supra*, wherein the Court found that the Due Diligence Defence was made out even though no positive steps were taken by the director before the failure to remit. The Court found that because of the surrounding context, the director could not have known that there was an issue and therefore a lack of positive steps prior to the remittance date did not foreclose the possibility of entitlement to the Due Diligence Defence.

[74] The Directors submitted that as s. 43(2) is a fairness provision, there should be no requirement to take positive steps, particularly where no options are available. In this case, the Commission found that it was unfair to hold the Directors responsible for the actions of their predecessors, but rejected the Due Diligence Defence.

[75] The Commission concluded that the Due Diligence Defence was not made out because there was no evidence of what the Directors did in terms of due diligence. The Directors, who acknowledged that they bore the burden of

establishing the Due Diligence Defence, submitted that there were numerous pieces of undisputed evidence before the Commission in support of that defence, which it failed to consider or misapprehended, as follows:

1) The Directors had no access to information regarding the financial state of the Corporation or its tax remittance procedures prior to becoming directors.

2) The Corporation was insolvent at the time the Directors were elected.

3) The former directors of the Corporation had failed to preserve collected tax in trust as they were required to do.

4) All tax was paid from the date that the Directors were elected, partially through the use of their personal funds.

[76] The Directors argued that the Commission's failure to consider this evidence constituted a breach of the Directors' rights to natural justice.

[77] The Directors submitted, therefore, that the Decision is clearly unreasonable, such that the Court should set it aside and find that the Due Diligence Defence has been made out.

SUBMISSIONS OF THE GOVERNMENT

[78] The Government submitted that the Commission's determination that the Directors did not bring themselves within the Due Diligence Defence was a reasonable conclusion. The Decision reflects that the Commission reviewed and

considered the Directors' arguments relative to the Due Diligence Defence, as presented in the submissions of both the Directors and their counsel.

[79] The Government submitted that to avail themselves of the Due Diligence Defence, the Directors must have taken steps to prevent the Corporation's failure to remit the Tax. In this case, the Directors were elected well before May 20, 2006 and did nothing to prevent the Corporation from failing to remit the Tax when it was due. In addition, they caused the Corporation to make a proposal in bankruptcy, which triggered their personal liability under s. 43(1) of ***TAMTA***.

[80] The Government pointed to ***Thistle***, *supra*, at paragraph 84, where the Court discussed the Due Diligence Defence and what is required to establish it, namely that the Directors "were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the concerned amounts".

[81] The Government argued that the Directors did not put forward evidence of what they did to engage the Due Diligence Defence. Rather, they made repeated statements that there was nothing that they could have done to avoid the bankruptcy proposal. Accordingly, the Directors argued that it is not fair for them to be liable for the Tax, which is an argument distinct from the Due Diligence Defence.

[82] While it may seem harsh to hold the Directors responsible, the Government submitted that the Directors took on the Corporation to save it,

knowing that it was in financial difficulty. Liability for the Tax fell to them as part of their rescue mission, particularly since they put the Corporation in bankruptcy.

[83] The Government submitted that the Commission turned its mind to the Due Diligence Defence and that it considered all of the submissions, after which it concluded that the defence was not made out. The Decision relative to the Due Diligence Defence was reasonable, was within a range of possible, acceptable outcomes, and was justified, transparent and intelligible.

ANALYSIS

[84] I have considered whether the Decision relative to the Due Diligence Defence falls within a range of possible, acceptable outcomes and whether it meets the requirements of justification, transparency and intelligibility. In this analysis, I must again be mindful of the expertise of the Commission.

[85] It is apparent on the face of the Decision that the Commission considered the Due Diligence Defence raised by the Directors. While the Commission did not make reference to s. 43(2) within the Decision, it concluded that while it was unsure of what more the Directors could have done in this case, "no information was provided about what they in fact did".

[86] The Decision does not contain any specific reference to the circumstances in which the Directors were elected, listed at paragraph 75 above. Having said that, the Decision does include reference to the fairness argument, and the thrust of the Directors' submission that they should not be personally liable for the misdeeds of the former directors of the Corporation. It is apparent that the

Commission recognized and understood the circumstances in which the Directors found themselves. The Commission concluded that ***TAMTA*** does not offer relief on the basis of fairness, regardless of the facts in this case as presented by the Directors.

[87] In these circumstances, I am not satisfied that the Commission erred in its interpretation of s. 43(2) of ***TAMTA***, that it misdirected itself as to the material facts in its analysis of the Due Diligence Defence or that it failed to consider evidence such that there was a breach of natural justice. I agree with the Commission that none of the information put forward by the Directors relates to efforts taken by the Directors to prevent the corporation's failure to remit tax, which is what s. 43(2) requires.

[88] Accordingly, the Commission's conclusion that the Directors provided no information about what they did was reasonable. While the Commission's reasons with respect to this issue are brief, I accept that the Decision meets the requirements of justification, transparency and intelligibility.

[89] In addition, I have considered the appropriate application of the Due Diligence Defence in this case. The outcome of this analysis further supports the conclusion that the Decision is within the bounds of reasonableness.

[90] I accept that the Due Diligence Defence exists to prevent personal liability of new directors, in certain circumstances, whose predecessors failed to collect tax and/or preserve tax. I also accept that new directors in any organization have an opportunity to conduct due diligence, prior to and after assuming the

role of director, which may include inquiries relative to a variety of financial matters, including tax remittances.

[91] I note that in ***Thistle***, *supra*, which I accept as a valid authority, even though it is not strictly binding on this Court, the Court stated, at paragraph 86, that:

> [T]he assessment of the director's conduct begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.

and, citing an earlier decision, that,

> > [T]he positive duty to act arises where a director obtains information, or becomes aware of facts, which might lead one to conclude that there is, or could reasonably be, a potential problem with remittances. Put differently, it is indeed incumbent upon an outside director to take positive steps if he or she knew, or ought to have known, that the corporation could be experiencing a remittance problem.

[92] When the Directors were elected, although they had not yet seen the financial records of the Corporation, they knew that it was in financial difficulty. The record in this case contains no evidence of the details, timing or extent of their knowledge relative to the details of the Corporation's finances, or how that knowledge changed over time. There is the statement by the Directors that at the time of their election they "did not appreciate how desperate the company situation was, nor did [they] appreciate or have any knowledge of some of the wrongdoings which had taken place".

[93] The reality is that at the time of their election, there could have been amounts owing by the Corporation for, among other things, income taxes, GST,

RST and wages. Personal liability can attract to directors in a variety of those circumstances for different reasons.

[94] I accept that the Directors had no power to direct the Corporation until the date of their election, which was after the Tax was collected and the failure to preserve the Tax had occurred. Having said that, there is no evidence of what, if any, due diligence the Directors conducted either prior to or after their election. While the Directors stated that they had no access to information regarding the financial state of the Corporation or its tax remittance procedures prior to becoming directors, there is no evidence of whether they attempted to obtain or review that information.

[95] There is also no evidence that the Directors turned their minds to the Corporation's potential tax liability at any time, or that they were ever specifically concerned with the tax remittances as required by ***Thistle***, *supra*.

[96] The record does not disclose what, if any, plan the Directors had to deal with the Corporation's liabilities after their election, including the Tax. Similarly, the record does not reflect how the previous directors caused the Corporation to account for collected tax held in trust or the nature of any financial activity related to the Tax.

[97] Accordingly, it is apparent that upon their election, the Directors assumed a risk relative to the Tax.

[98] In summary, there is no evidence that the Directors did anything to "prevent the corporation's failure to pay or remit tax" as required by s. 43(2).

Conversely, the Directors say that there was nothing that they could have done. While it may be correct that the Directors could not have successfully caused the Tax to be paid, there is no evidence that they took any steps to attempt to do so, including making inquiries of anyone, such as the previous directors or the Corporation's bookkeepers.

[99] This is so despite the fact that by May 20, 2006, the remittance date of the Tax, the Directors had been in office for one month and consequently had access to the Corporation's finances.

[100] Ironically, the liability of the Directors was triggered because of the proposal of the Corporation in bankruptcy, a decision made by the Directors. The record does not reflect whether the Directors were aware of the implications of their decision in terms of personal liability under s. 43(1) of ***TAMTA***.

[101] On the basis of the foregoing, the Directors did not establish the Due Diligence Defence pursuant to s. 43(2) of ***TAMTA***.

[102] With respect to the fairness argument, there is no provision within ***TAMTA*** that assists the Directors, including s. 43(2). In keeping with the spirit and intention of the legislation, it would seem that the legislature intended to extend the Due Diligence Defence to directors only in narrow circumstances, which have not been made out here.

CONCLUSION

[103] I have concluded that the Decision with respect to the interpretation of s. 43(2) of ***TAMTA*** and the Due Diligence Defence is within the bounds of

reasonableness and meets the requirements of justification, transparency and intelligibility. I am not satisfied that the Commission misdirected itself as to the material facts in its analysis of that issue or that the Directors were denied natural justice.

[104] In addition, I am not satisfied that the Directors established the Due Diligence Defence pursuant to s. 43(2) of ***TAMTA***, or that there is a fairness defence available to them pursuant to ***TAMTA***.

ISSUE 3: DID THE COMMISSION CONDUCT THE PROCEEDINGS IN A MANNER THAT VIOLATED THE LEGITIMATE AND REASONABLE EXPECTATIONS OF THE DIRECTORS BY FAILING TO ALLOW THEM TO ADDUCE ALL RELEVANT EVIDENCE, SUCH THAT THE DIRECTORS WERE DENIED NATURAL JUSTICE?

RELEVANT LEGAL PRINCIPLES

[105] The parties agree that the Directors were owed a duty of procedural fairness, such that they could put forward their views and evidence fully, for consideration by the Commission, before a decision was made. The parties agree that there is no deference owed to the Commission with respect to questions of natural justice and procedural fairness. They rely upon ***2127423 Manitoba Ltd. (c.o.b. London Limos) v. Unicity Taxi Ltd. et al***, 2012 MBCA 75, wherein the Court stated, at paragraph 11:

> If the Board has breached the duty of procedural fairness by failing to provide adequate disclosure, that breach is an error in law and it must be remedied. So a discussion of this breach in terms of standard of review is not really the appropriate terminology. See for example *London (City) v. Ayerswood Development Corp. et al* [citations omitted], where the court stated that ... :

> When considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. …

[106] In addition, the parties agree that the following five factors, identified by the Court in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 ("***Baker***") (paragraphs 23 – 27), represent a non-exhaustive list to be considered when determining the content of the duty of procedural fairness in a given case:

a) the nature of the decision being made and the process followed in making it;

b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

c) the importance of the decision to the individual affected;

d) the legitimate expectations of the person challenging the decision; and

e) the choices of procedure made by the agency itself.

SUBMISSIONS OF THE DIRECTORS

[107] The Directors submitted that in this case, the proceedings were quasi-judicial in nature and the outcome was very important to the Directors, such that a high degree of procedural fairness was required.

[108] The Directors argued that the Decision was procedurally unfair to them in two ways: the evidence relevant to the Due Diligence Defence (referenced at

paragraph 75 above) was not considered, and they were not given a fair opportunity to put their full case forward, including evidence and argument.

[109] The Directors acknowledged that generally, the Commission has a broad discretion pursuant to statutory authority to conduct the process in the manner of its choosing. The Directors stated, however, that in exercising its discretion, the Commission had to provide a clear, intelligible process in which all relevant evidence could be provided for consideration, which it failed to do in this case.

[110] After making the June 2010 agreement with the Government, pursuant to which the Notices of Assessment issued to the Directors would be appealed, the first contact by the Commission was on September 14, 2011. At no time did the Commission advise of the appeal process to be followed. Instead, it asked for assistance on the meaning of "due" within s. 43(1) of ***TAMTA***, without requesting general submissions from the parties regarding all of the issues on appeal. Accordingly, the Directors argued that the Commission conducted an inquisitorial process, which it was entitled to do, but which in this case exceeded the bounds of procedural fairness.

[111] The Directors alleged that although their counsel responded to the Commission's inquiry on October 2, 2011, at which time he alluded to their defences of due diligence and mischief, it was anticipated that there would be a further opportunity to provide submissions. The Directors stated that while there was sufficient evidence before the Commission to accept the Due Diligence

Defence, there could have been more evidence presented if the opportunity to do so had been given.

[112] The Directors submitted that when, on October 12, 2011, the Commission invited comments from the parties on each other's submissions it was not a final opportunity to make submissions on the appeal generally, but rather a request for comments only on each other's submissions relative to the meaning of "due". The Directors pointed to the content of the Government's submission of October 18, 2011, which was restricted to the meaning of "due", and submitted that given the high degree of procedural fairness owed in this case, one vague email should not be read as a call for final submissions on the appeal generally.

[113] In spite of the Directors' desire to make further submissions, the Commission issued the Decision without notice, without asking for any clarification of the Directors' Due Diligence Defence, and without allowing a fair opportunity for their arguments to be put forward.

[114] The Directors argued that there should be no less procedural fairness afforded to them in the second appeal, given that the Government issued the new Notices of Assessment on September 17, 2007, which required that a second process be undertaken relative to the liability of the Directors. This is so particularly given that the process of the second appeal did not mirror that of the first appeal in that the second appeal included an inquisitorial process, which the first appeal did not.

SUBMISSIONS OF THE GOVERNMENT

[115] The Government acknowledged that the Decision was quasi-judicial and that it was important to the Directors.

[116] The Government also acknowledged that the Directors were entitled to more than minimal procedural fairness, which was afforded by the Commission. The Government noted, as stated in ***Baker***, *supra*, at paragraphs 21 and 22, that:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. ... 'the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case'. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness.

and that:

> . . . [U]nderlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[117] The Government noted that the Commission has the discretion to choose the process to be followed, pursuant to ***The Tax Appeals Commission Act***, C.C.S.M. c. T3, s. 8, which provides:

> Evidence may be given before the commission in any manner that the commission considers appropriate, and the commission is not bound by the rules of law respecting evidence applicable in judicial proceedings.

[118] Pursuant to ***Baker***, *supra*, (paragraph 27), that flexibility must be considered, and important weight given to the choice of procedures made by the decision maker.

[119] The Government submitted that in this case, the Directors had a full and fair opportunity to put forward their views and evidence for consideration by the Commission, as required by ***Baker***, *supra*. The Directors knew what issues they wanted to address and they had two opportunities to do so, given that two appeals were filed, involving the same facts and issues.

[120] The Government submitted that the process followed within each of the two appeals was similar, in that the Commission reviewed the submissions of both sides and issued a decision. On the second appeal relative to the Directors, the Commission requested and received further submissions from the parties.

[121] The Government also noted that it provided to the Directors its position on their Due Diligence Defence as at September 17, 2007. While the Directors responded to the Government's position generally, no further specific information was provided with respect to that defence.

[122] The Government submitted that the legitimate expectations of the parties in this case were met. The parties had been through the process before and had discussed the process with counsel. Pursuant to ***Baker***, *supra*, (paragraph 26), the doctrine of legitimate expectations does not create substantive rights.

[123] Balancing all of the factors and circumstances, the Government submitted that the process of the Commission met the necessary procedural requirements,

and that the Directors knew what the process entailed, including the issues and the Government's position. The Directors were given from February 2007 to October 2011 to present their case. They were aware of their ability to raise the Due Diligence Defence and they did so.

ANALYSIS

[124] The Court must examine whether the Directors in this case were afforded the necessary procedural fairness.

[125] In ***Baker***, *supra*, the Court stated, at paragraph 28, that:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional, and social context of the decision.

[126] With respect to the nature of the decision, the nature of the statutory scheme and the process followed by the Commission, I note the comments of the Court in ***Santarsieri***, *supra*, at paragraph 4, that there are strong policy reasons favouring the need for an efficient process at the Commission, which is a quasi-judicial tribunal with all the powers necessary to conduct a full hearing, including receiving evidence and making findings of fact.

[127] Clearly, the Commission has discretion as to how to proceed in a given case. In this case, the Commission reviewed its file with respect to the Corporation, as is evident from the Commission's email to the parties sent on September 14, 2011. In that email, the Commission raised issues and asked questions of the parties with respect to the interpretation of s. 43(1) of ***TAMTA***,

but did not provide any information or seek submissions with respect to the process to be followed on the appeal. Conversely, neither the Directors nor the Government appear to have made inquiries regarding the process that the Commission intended to follow.

[128] I acknowledge that this issue is one of importance to the Directors and that they held a legitimate expectation that they would be able to present their case fully and fairly. It is apparent that the facts relative to the Directors' Due Diligence Defence were known in 2007 when the Directors provided their position and the Government responded. Neither at that time nor at any subsequent time did the Directors advise that additional submissions on the Due Diligence Defence were forthcoming. The Directors had multiple opportunities to make further submissions prior the issuance of the Decision, either from 2007, or alternatively from June 2010 when the parties agreed to proceed with an appeal relative to the liability of the Directors. At no time did the Directors make or ask to make any further submissions.

[129] In his October 2, 2011 letter, counsel for the Directors stated specifically that he would not repeat his earlier submissions. He commented on the meaning of "due", and he referenced the Due Diligence Defence. Thereafter, on October 12, 2011, the Commission extended an additional opportunity for further submissions, of which the Directors did not avail themselves.

[130] The Directors have stated that there was nothing more that they could have done to ensure that the Corporation remitted the Tax. At the same time,

they submit that they could have presented more evidence if they had been given the opportunity to do so. These positions are incongruous. This is so particularly given that the Directors have not advised the Court of the nature of any further evidence or submissions that they would have filed.

CONCLUSION

[131] I am satisfied, having considered the five factors listed in paragraph 106 above, that the Directors were afforded procedural fairness in this case.

[132] The Decision is affirmed. If the parties cannot agree on costs, they may make submissions on that issue.

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Grammond J.