

No. 2159575  
Prince George Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between:

Kidd Ventures Ltd.

Petitioner

And:

His Majesty the King in right of the Province of British Columbia

Respondent

**RESPONSE TO PETITION**

**Filed by:** His Majesty the King in right of the Province of British Columbia (the "Province").

THIS IS A RESPONSE TO the petition filed June 18, 2021.

**PART 1: ORDERS CONSENTED TO**

None.

**PART 2: ORDERS OPPOSED**

All.

**PART 3: ORDERS ON WHICH NO POSITION IS TAKEN**

None.

**PART 4: FACTUAL BASIS**

1. A Schedule of Defined Terms is attached to this response as Appendix A.
2. This proceeding is an appeal brought by the petitioner, Kidd Ventures Ltd. ("KVL") under section 51 of the *Motor Fuel Tax Act*, RSBC 1996, c 317

(the “Act”).<sup>1</sup> The Act imposes taxes on the purchase of various types of fuel, including gasoline, motive fuel (diesel), and coloured fuel which includes coloured gasoline and coloured diesel (collectively, “**Coloured Fuel**”).

3. This appeal concerns penalties and interest imposed on KVL in the amount of \$221,495.85 (including interest assessed; the “**Assessment**”) pursuant to sections 44, 45 and 46 of the Act, in respect of the period from July 1, 2015 to July 31, 2017 (the “**Audit Period**”).
4. During the Audit Period, KVL sold Coloured Fuel to purchasers and collected tax at the tax rate applicable to Coloured Fuel (the “**Coloured Fuel Tax Rate**” or “**Coloured Fuel Tax**”) without obtaining declarations in a form acceptable to the director under and as required by the Act (“**Declarations**” or “**Declaration**”). Without obtaining the required Declarations, KVL was required to collect tax on sales of Coloured Fuel at the rates of tax applicable to fuel that is not coloured (“**Clear Fuel**”) which are higher than the Coloured Fuel Tax Rate (“**Clear Fuel Tax Rate**” or “**Clear Fuel Tax**”). Therefore, the director under the Act (the “**Director**”) imposed a penalty equivalent to the tax that KVL should have but did not collect on sales of Coloured Fuel where KVL did not obtain the required Declarations, that is, the difference between Coloured Fuel Tax and Clear Fuel Tax (the “**Equivalent Penalty**”). The Director also imposed a penalty equal to 10% of tax that KVL should have collected but did not collect on sales of Coloured Fuel where KVL did not obtain the required Declarations until after the sales of that fuel (the “**10% Penalty**”).
5. KVL seeks to overturn the Assessment, challenging the validity of the Notice of Assessment and the constitutionality of the Equivalent Penalty. KVL also argues that, because the amounts of the penalties are based on

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<sup>1</sup> All statutory references are to the Act unless otherwise noted.

an extrapolation from sample periods in the Audit Period, the penalties are estimates and the Director is not permitted to make such estimates in calculating the penalties to be imposed. In the alternative, KVL argues that the methodology used to obtain the estimates was flawed. KVL does not provide evidence of any alternate amount for either penalty imposed or evidence that any alternate methodology would yield amounts for the penalties that are less than those imposed by the Assessment.

6. The Province takes the position that the Equivalent Penalty is constitutional, the Notice of Assessment is valid, the Director is permitted to impose penalties based on a calculation derived from sampling, sampling and extrapolation is contemplated by the Act, and the amount of the penalties is based on representative sample periods during the Audit Period, selected in consultation with KVL. KVL did not provide sufficient records to allow the Director to calculate the penalties by examining sales on a transaction by transaction basis and, in any case, it would be inefficient and disruptive to KVL's business to do so. KVL did not obtain the required Declarations and, therefore, did not collect the tax it was required to under the Act. KVL does not dispute this. KVL has not presented alternate amounts for the penalties and has not disproven the Assessment. The penalties and interest are properly imposed in accordance with the Act.

#### **Overview of the Act**

7. The Act taxes fuel at different rates depending on the type of fuel sold, location in which it is sold, and how it is to be used.
8. The collection scheme of the Act requires a retail dealer to collect tax from the end purchaser of the fuel, in this case, KVL's customers.
9. A retail dealer is required to obtain from a purchaser who purchases Coloured Fuel through a cardlock system or who purchases 45 litres or

more of Coloured Fuel a Declaration that the Coloured Fuel will be used only as authorized by section 15 of the Act. The authorized purpose declared by the purchaser is essentially that the Coloured Fuel will not be used in engines for travel on public roads. The retail dealer is required to obtain the Declaration at or before the time of sale. If a Declaration is not obtained, then the purchaser must pay, and the retail dealer must collect, the amount of tax that would be payable on the fuel if that fuel were not Coloured Fuel.

10. Effective July 1, 2015, retail dealers of Coloured Fuel were required under the Act to obtain Declarations from purchasers of Coloured Fuel in form FIN430 (a "FIN430") for a purchaser to purchase Coloured Fuel and pay tax at the lower rate of tax on Coloured Fuel of three (3) cents per litre (the Coloured Fuel Tax Rate). This is a different form than the form previously recommended by the Ministry (a "FIN438"). Effective July 1, 2015, the requirement to obtain such a Declaration from purchasers of Coloured Fuel was legislated in section 5.1 of the Act.
11. In May 2015, the Ministry of Finance (the "**Ministry**") sent out information packages to retail dealers in advance of July 1, 2015, advising of the changes and the obligations on retail dealers of fuel, pursuant to these changes in the Act (the "**2015 Changes**"). These information packages generally included:
  - a) a Notice of Program Change letter;
  - b) a New Coloured Fuel Seller agreement;
  - c) Notice 2015-001 MFT - Notice to Retail Dealers that Sell Coloured Fuel; and
  - d) A Coloured Fuel Certification blank form (FIN 430).
12. For the period between July and September, 2015, obtaining a declaration in the FIN438 was a form acceptable to the Director while

retail dealers were transitioning to the requirements pursuant to the 2015 Changes.

13. If a retail dealer fails to collect tax as required under the Act, the Director is empowered to impose an Equivalent Penalty and a 10% Penalty.

#### **KVL and the 2015 Changes**

14. KVL has been a retail dealer and authorized to sell Coloured Fuel under the Act since 2010. On May 20, 2015, the Ministry sent KVL an information package as described above.
15. Bruce Kidd, president of KVL, signed the agreement and sent it back to the Ministry on July 20, 2015. The Director signed the agreement on July 22, 2015. On August 11, 2015, the Ministry sent the agreement back to KVL, signed by Mr. Kidd and the Director (the "**Agreement**").
16. The Agreement set out KVL's obligations as an authorized seller of Coloured Fuel.
17. In signing the Agreement, KVL confirmed understanding and acceptance of the obligations explained in the Agreement.

#### **The Inspection, Audit and Assessment**

18. As a result of the 2015 Changes, the Ministry conducted a number of inspections of Coloured Fuel retail dealers to determine if dealers were complying with the new requirements. An inspection generally consists of an on-site inspection and a follow-up request and review of additional information.
19. On August 17, 2017, inspectors employed by the Ministry conducted an on-site inspection of KVL at its gas station and convenience store at 8087 Hart Highway, in Prince George, British Columbia (the "**Gas Station**").

20. After the on-site inspection, an inspector conducted some follow-up request and review of additional information (collectively, the “**Inspection**”).
21. In the course of the Inspection and in consultation with KVL, the inspector selected three test months during the period from July 1, 2015 to July 31, 2017 and examined records from those three test months to determine if KVL was in compliance with the new requirements resulting from the 2015 Changes.
22. Generally speaking, test periods are arrived at after discussion with the person under inspection or audit to ensure that the sample periods are representative and include periods of high, low, and average sales volume.
23. After reviewing the records, the inspector concluded that there was pervasive non-compliance with the requirements under the Act resulting from the 2015 Changes. As a consequence, the inspector concluded that the Ministry should conduct an audit under the Act. The inspector was also the auditor who conducted the consequent audit (the “**Auditor**”).
24. By letter dated March 6, 2018, the Auditor notified KVL that it had been selected to undergo a sales tax audit. The letter advised that the audit would cover the period of July 1, 2015, to July 31, 2017 (the “**Audit Period**”). The Auditor advised of the methodology that would be used for the audit and requested sample copies of FIN430s that had been collected for sales of Coloured Fuel over 45 litres during the Audit Period. The letter also directed to KVL to resources to assist KVL in understanding the audit process.
25. KVL did not begin to obtain FIN430s at all from purchasers of Coloured Fuel until August 2017 or later. Even once KVL began to obtain FIN430s

from its customers for past sales, KVL did not obtain any FIN430s or Declarations in a form acceptable to the Director in the Audit Period.

26. Because KVL had not obtained FIN430s from Coloured Fuel purchasers before or at the time of sale of Coloured Fuel either in excess of 45 litres or, in any quantity if sold at a cardlock pump, purchasers of Coloured Fuel in these circumstances were required to pay, and KVL was required to collect, Clear Fuel Tax on these purchases.
27. As a result of the audit, the Director imposed the following penalties and interest in respect of tax not collected by KVL on sales of Coloured Fuel during the Audit Period:
  - a) An Equivalent Penalty in the amount of \$192,918.98; and
  - b) a 10% Penalty in the amount of \$846.07 in respect of Coloured Fuel sold by KVL where the required Declarations were not obtained until after the sales of that Coloured Fuel occurred (the "**After-declared Sales**"); and
  - c) interest of \$27,730.80, all of which totalled \$221,495.85 (the "**Assessment**").
28. The Assessment was calculated as set out in Appendix B to this Response.
29. The Director has delegated the power to impose penalties and give notices of assessment to audit managers under section 61 of the Act.
30. An audit manager approved the Assessment and posted the audit, resulting in a notice of assessment being given to KVL under the Act. That notice was dated November 23, 2018 (the "**Notice of Assessment**"). A copy of that Notice of Assessment is Exhibit "A" to Affidavit #1 of Bruce Charles Kidd (the "**Kidd Affidavit**").

31. That Notice of Assessment was given to KVL on or around November 23, 2018.

**The Director's Assumptions and Findings of Fact**

32. In making the Assessment, the Director made the following assumptions and findings of fact in respect of the Audit Period:
- a) KVL is a corporation registered in accordance with the laws of British Columbia;
  - b) Bruce Kidd was the president of KVL;
  - c) KVL operates the Gas Station;
  - d) KVL is a retail dealer authorized to sell Coloured Fuel under the Act;
  - e) On May 20, 2015, the Ministry sent an information package to KVL consisting of:
    - a Notice of Program Change Letter dated May 20, 2015;
    - An Authorization to Sell Coloured Fuel agreement;
    - A 2015-001 (MFT) – Notice to Retail Dealers that Sell Coloured Fuel; and
    - A Coloured Fuel Certification blank form (FIN 430).
  - f) On July 9, 2015, Bruce Kidd, the president of KVL, signed and returned the Agreement to the Ministry, confirming understanding and acceptance of the obligations explained in that Agreement;
  - g) The Gas Station has multiple pumps at which Coloured Fuel can be purchased;
  - h) The Gas Station has four retail pumps at which fuel can be purchased by customers who either pay for that fuel at the pump or who pay for that fuel in the store, only when the Gas Station is open;
  - i) The Gas Station has three cardlock pumps which are 'unmanned', meaning that customers can purchase fuel from those pumps at any time (24/7);



- j) All of the pumps at the Gas Station, whether retail or cardlock, have multiple fuel products which can be purchased from them;
- k) Coloured premium gasoline could be purchased at the retail pumps and at cardlock pumps;
- l) Coloured diesel could be purchased at the retail pumps and at cardlock pumps;
- m) Pump number 14 had three products: regular gasoline, coloured premium gasoline, and coloured diesel;
- n) When a customer was purchasing fuel by paying at the pump or from a cardlock pump, KVL had no way of determining whether a customer was purchasing coloured diesel or coloured premium gasoline as the customer controlled the transaction;
- o) None of the pumps at which a customer could obtain Coloured Fuel at the Gas Station were locked;
- p) There were no controls on any of the pumps at which a customer could obtain Coloured Fuel to ensure that customers buying Coloured Fuel had to provide the Declaration required by the Act;
- q) KVL only obtained a Declaration from a customer if the customer paid for the Coloured Fuel in store, rather than paying at the pump or paying at a cardlock pump;
- r) KVL only recorded information about a Coloured Fuel sale if a customer paid for the Coloured Fuel in store, rather than paying at the pump or paying at a cardlock pump;
- s) KVL sold both coloured diesel and coloured premium gasoline in excess of 45 litres per transaction at the Coloured Fuel Tax rate without first obtaining the required Declaration;
- t) For in-store sales of Coloured Fuel, KVL assigned a number to each declaration form and customer, linking the sale to the declaration;
- u) KVL sold both coloured diesel and coloured premium gasoline;
- v) KVL did not obtain any FIN430 Declarations from any purchasers of Coloured Fuel before or at the time of the sales of the Coloured Fuel;

- w) The dates of signature by the purchasers on the FIN430 Declarations that KVL provided to the auditor during the audit are not the dates on which those purchasers actually signed those Declarations;
- x) The purchasers actually signed those Declarations sometime in August 2017 or later, after the inspection in August 2017;

***Penalty equivalent to tax not collected on Coloured Diesel***

- y) KVL did not obtain the required Declarations on about 86% of the litres of coloured diesel that it sold;
- z) KVL made total sales of coloured diesel of 981,943.16 litres (“**Total Coloured Diesel Litres**”);
- aa) KVL sold 842,320.48 litres of those Total Coloured Diesel Litres without obtaining the required Declarations (the “**Undeclared Coloured Diesel Litres**”);
- bb) The tax under the Act that the purchasers of the Undeclared Coloured Diesel Litres should have paid was \$101,078.46;
- cc) The tax under the Act that should have been but was not collected by KVL from purchasers of the Undeclared Coloured Diesel Litres was \$101,078.46;

***Penalty equivalent to tax not collected on Coloured Premium Gasoline***

- dd) KVL did not obtain the required Declarations on about 72% of the litres of coloured premium gasoline that it sold;
- ee) KVL made total sales of coloured premium gasoline of 1,110,378.75 litres (“**Total Coloured Premium Litres**”);
- ff) KVL sold 798,613.31 litres of those Total Coloured Premium Litres without obtaining the required Declarations (the “**Undeclared Coloured Premium Litres**”);

- gg) The tax under the Act that the purchasers of the Undeclared Coloured Premium Litres should have paid was \$91,840.53;
- hh) The tax under the Act that should have been but was not collected by KVL from purchasers of the Undeclared Coloured Premium Litres was \$91,840.53;

***10% Penalty re coloured fuel sales in test periods***

*Coloured Diesel*

- ii) 4.071834313% of KVL's coloured diesel sales were sales where KVL sold coloured diesel without obtaining Declarations at the time of the sales but obtained Declarations after the sales ("**After-declared Coloured Diesel Sales**");
- jj) In November 2015, May 2016 and July 2017, KVL sold 136,739.11 litres of coloured diesel;
- kk) In November 2015, May 2016 and July 2017, KVL sold 5,567.79 litres of coloured diesel without obtaining Declarations at the time of the sale but obtaining Declarations after the sale;
- ll) KVL sold 39,983.10 of the Total Coloured Diesel Litres, without obtaining Declarations at the time of the sales but obtaining Declarations after the sales (the "**After-declared Coloured Diesel Litres**");
- mm) The amount of tax that KVL should have collected but did not collect on the sales of the After-declared Coloured Diesel Litres was \$4,797.97;

*Coloured premium gasoline*

- nn) 2.86837169% of KVL's coloured premium gasoline sales were sales where KVL sold coloured premium gasoline without obtaining Declarations at the time of the sales but obtained Declarations after the sales ("**After-declared Coloured Premium Sales**");

- oo) In November 2015, May 2016 and July 2017, KVL sold 153,390.86 litres of coloured premium gasoline;
- pp) In November 2015, May 2016 and July 2017, KVL sold 4,399.82 litres of coloured premium gasoline without obtaining Declarations at the time of the sale but obtaining Declarations after the sale;
- qq) KVL sold 31,849.79 of the Total Coloured Premium Litres, without obtaining Declarations at the time of the sale but obtaining Declarations after the sales (the "**After-declared Coloured Premium Litres**"); and
- rr) The amount of tax that KVL should have collected but did not collect on the sales of After-declared Coloured Premium Litres was \$3,662.73.

#### **The Ministerial Appeal**

- 33. KVL appealed the Assessment (the "**Ministerial Appeal**") to the Minister of Finance (the "**Minister**") which was received by the Appeals Branch of the Ministry on February 15, 2019.
- 34. After the Ministerial Appeal was received, it was assigned to an appeals officer. The appeals officer communicated with KVL's representative and reviewed the material provided by KVL.
- 35. KVL did not provide any information or documents to the appeals officer in its appeal to the Minister other than the information and documents that were part of KVL's Ministerial Appeal.

36. In deciding KVL's appeal under section 50(4) of the Act, the Deputy Minister, on behalf of the Minister, made the assumptions and findings of Act set out above at paragraph 32 and the following additional assumptions and findings of Fact:
  - (a) KVL did not obtain any Declarations or any names, addresses, card numbers or expiry dates as recorded on any BC Farmer Identity Cards issued by the BC Agriculture Council from any of its customers who may have been farmers.
37. On June 11, 2020, the Deputy Minister, on behalf of the Minister, affirmed the Assessment in its entirety and notified KVL in writing of that decision by a letter of the same date (the "**Minister's Decision**").
38. KVL has appealed the Minister's Decision to this Court.
39. KVL has adduced no evidence that any of the purchasers in the sales in respect of which the Equivalent Penalty was imposed either paid the Clear Fuel Tax on the Coloured Fuel they purchased from KVL, were entitled to purchase the Coloured Fuel exempt from tax under the Act, or were entitled to pay the Coloured Fuel Tax on the Coloured Fuel they purchased.
40. The Equivalent Penalty was imposed with respect to tax not collected on sales of Coloured Fuel where no FIN430 Declarations were ever obtained. The 10% Penalty was imposed with respect to tax not collected on sales of Coloured Fuel where FIN430 Declarations were obtained *after* the sales occurred.

## **PART 5: LEGAL BASIS**

**The standard of review is correctness for questions of law in this statutory appeal**

41. This is a statutory appeal of penalties imposed under the Act.

42. On a statutory appeal, questions of law, including questions of statutory interpretation, are reviewed on a standard of correctness.

*Voroney v British Columbia*, 2020 BCSC 853 at para 17 [*Voroney*]  
*Teck Metals Ltd. v British Columbia*, 2020 BCSC 2065 at para 16 [*Teck*]  
*Hallmark Ford Sales Ltd. v British Columbia* 2010 BCCA 555 at para. 8  
[*Hallmark*]

43. The Supreme Court of Canada has directed that “where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision.”

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65  
at paragraph 37

44. Since statutory interpretation is a question of law, this Court is required to apply the appellate standards of review. The applicable standard of review is correctness.

*Housen v Nikolaisen*, 2002 SCC 33 at para. 8. [*Housen*]

**The findings of fact by the taxing authority are deemed proven unless disproven**

45. An appeal to this Court under the Act is a new hearing that is not limited to the evidence and issues that were before the Minister. Findings of fact are not reviewed on a “palpable and overriding error” standard as they would be in an appeal where the appellate court is reviewing the record of the proceedings below and new evidence is generally inadmissible.

*Teck, supra* at para 16.  
*La Bottega del Vino Ltd. v British Columbia*, 2014 BCSC 1553 (CanLII) at

paras. 56-58 [*La Bottega*]

46. In imposing penalties under the Act and in affirming such an imposition, the Director and the Minister each make assumptions or findings of fact to support the assessment or imposition (the “assumptions”).

*Teck, supra* at para 18, citing *Northland Properties Corporation v British Columbia*, 2010 BCCA 177 at paras 21-25 [*Northland*].

*La Bottega, supra*

47. Those assumptions are deemed true unless proven otherwise by the person assessed (the “taxpayer”), on a balance of probabilities. The taxpayer has the onus of disproving, on a balance of probabilities, any assumptions or findings of fact or of showing that the assumptions do not in their entirety support the assessment. It is not sufficient to merely deny the assumptions made.

*Northland, supra* at para 34; *Teck, supra* at paras 18 and 42.

*Trac v British Columbia* 2007 BCCA 60 at paragraphs 24, 25 & 36

48. The assumptions must be factual, must have been made at the time that the taxing authority’s assessment of tax, imposition of a penalty or appeal decision is made and must be communicated to the taxpayer.

*Northland, supra* at para 22; *Teck, supra* at paras 20-21.

49. KVL has not provided any evidence which would disprove the assumptions made by the Director or the Minister.

#### **Interpretation of Tax Statutes**

50. Pursuant to the modern rule of statutory interpretation, the words of a statute must be read “in their entire context and in their grammatical and

ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of parliament.”

*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42  
at paras 26-29 [*Bell ExpressVu*]

51. In *Placer Dome Canada Ltd. v Ontario*, the Supreme Court of Canada has provided guidance with respect to the approach to apply to the interpretation of tax statutes. The Court determined that, although in tax statutes there is sometimes a greater emphasis on the plain meaning of provisions, the modern approach applies to taxation statutes requiring a textual, contextual and purposive analysis. It also held that, if the text is ambiguous (either on its face or when read in the statutory context and purpose), the statutory context and purpose may resolve such ambiguity. The goal is to determine the most plausible interpretation of the provision.

*Placer Dome Canada Ltd. v Ontario*, 2006 SCC 20 at paras  
21-23  
[*Placer Dome*]

52. The Supreme Court of Canada has recently described the process that courts engage in when determining a statute’s interpretation:

“Statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute’s scheme and objects. Where the rubber hits the road is in determining the relative weight to be afforded to the text, context and purposes. Where the words of a statute are “precise and unequivocal”, their ordinary meaning will play a dominant role. In the taxation context, a unified textual, contextual and purposive approach continues to apply.



In applying this unified approach, however, the particularity and detail of many tax provisions along with the Duke of Westminster principle lead us to focus carefully on the text and context in assessing the broader purpose of the scheme.”

*Canada v Loblaw Financial Holdings Inc.*, 2021 SCC 51 at  
paras 41-42

### **Coloured Fuel and Retail Dealers under the Act**

53. Section 1(1) of the Act sets out prescribed definitions for various terms used in the Act including providing definitions for “coloured fuel”, “motive fuel”, “gasoline”, “purchaser” and “retail detailer”.
54. “Coloured Fuel” is defined in section 1 of the Act as:
  - (a) fuel, other than propane, coloured in accordance with section 14 and the regulations, and
  - (b) the following fuels if they are used for a purpose for which coloured fuel is authorized to be used under section 15:
    - (i) Methanol based fuel; and
    - (ii) Fuel of which at least 85% is ethanol
55. “Motive fuel” is defined in section 1 of the Act as diesel fuel or a mixture that contains diesel fuel but does not include Coloured Fuel.
56. “Gasoline” is also defined in section 1 of the Act, and this definition also does not include Coloured Fuel.

57. "Purchaser" is defined in section 1 of the Act as a person who, within British Columbia, buys or receives delivery of fuel
- (a) For the person's own use or for use by another person at the first person's expense, or
  - (b) On behalf of or as an agent for a principal for use the principal or by other persons at the expense of the principal.
58. "Retail Dealer", subject to section 1.1, means a person who, within British Columbia, sells fuel to a purchaser.
59. During the time period of KVL's audit, Clear Fuel in the area in which KVL sold fuels were subject to the following taxes:
- sections 4(1)(a) and 13(1) of the Act collectively applied tax to clear gasoline at a rate of 14.5 cents per litre; and
  - sections 10(1)(a) and 13(1) of the Act collectively applied tax to clear motive (diesel) fuel at a rate of 15 cents per litre.

Act, section 4(1)(a), 10(1)(a) & 13(1)  
*Transportation Act* [S.B.C. 2004] Chapter 44, section 34(2)(b)  
*Transportation Act Regulation* B.C. Reg. 546/2004, section 2

60. Pursuant to section 5 of the Act, Coloured Fuel is taxed at a rate of 3 cents per litre. Purchasers of any kind of fuel under the Act must pay tax on it at the time of the purchase.

Act, sections 4, 5, 5.1 10 (as well as others), and 15

61. Section 14.1 of the Act states that the Director may authorize a person to sell Coloured Fuel, subject to the terms and conditions the Director considers appropriate.

Act, section 14.1

62. Section 15 of the Act sets out authorized uses for Coloured Fuel.

*Act, section 15*

63. Section 5.1 of the Act imposes an obligation on a purchaser to pay Clear Fuel Taxes on their fuel purchase unless the fuel retail dealer, before or at the time of sale, obtains from the purchaser a Declaration that the Coloured Fuel will be used for purposes authorized by section 15 of the Act. This obligation of a retail dealer to obtain such a Declaration is to ensure that Coloured Fuel, which is taxed at a significantly lower rate than Clear Fuels under the Act, is only purchased by those entitled to that lower rate of tax: generally, those who are operating vehicles that are not travelling on a public road.

*Act, section 5.1*

64. The Act contemplates that the Director may impose different types of penalties, such as the Equivalent Penalty and the 10% Penalty.
65. If the fuel retail dealer fails to charge Clear Fuel Taxes to purchasers who do not make the required Declarations, the Director must impose on that fuel retail dealer a penalty equal to the amount of the tax that should have been collected, plus interest calculated at the rate and in the manner prescribed.

*Act, section 44(1)*

66. Section 44(1) imposes the Equivalent Penalty where a person who should have collected tax did not. Section 44(1.1) gives the Director discretion to reduce the Equivalent Penalty either by the amount of tax that a purchaser actually paid or by the amount of a refund of tax to which a purchaser would have been entitled had the purchaser paid the tax. This subsection permits the Director not to impose the Equivalent Penalty on a retail

dealer in respect of sales of Coloured Fuel to purchasers from whom the retail dealer obtains Declarations *after* the sales occurred.

Act, sections 22.1 and 44(1.1)(b)

67. Section 45(1)(c) provides the Director with discretion to impose a penalty of 10% of the tax that ought to have been collected and remitted, in addition to any other penalty imposed. The imposition of a 10% Penalty is not dependent on another penalty's already having been imposed, although it can be in addition to other penalties.

Act, section 45(1)(c)

**The Equivalent Penalty is constitutionally valid and *intra vires* the provincial legislature**

68. KVL argues that the penalty imposed by section 44(1) of the Act and the authorization and reimbursement contemplated by section 44(4) of the Act are unconstitutional because they impose an indirect tax which is outside the jurisdiction of the provincial legislature pursuant to section 92(2) of the *Constitution Act, 1867*.
69. The burden is on KVL to show that section 44 of the Act is unconstitutional.

*Sullivan on the Construction of Statutes*, 7<sup>th</sup> ed. (Toronto: LexisNexis Canada Inc., 2022), § 16.01, pp 515-516 [*Sullivan*].

70. The Equivalent Penalty and the 10% Penalty are within the legislative competence of the provincial Legislature under any of sections 92(2), 92(13) or 92(15) of the *Constitution Act, 1867*.

*Constitution Act, 1867*, 30 & 31 Victoria, c. 3, ss 92(2), 92(13) and 92(15)

71. On a textual, contextual and purposive approach to the interpretation of the Act and, in particular, section 44(1), the penalty contemplated is not a tax.
72. Section 44(1) should be read and interpreted in light of the principle of statutory interpretation that the Legislature intended to stay within the confines of its constitutional competence.

*Air Canada v British Columbia*, [1989]1 S.C.R. 1165 at 1193  
*Re Application under s 83.28 of the Criminal Code*, [2004] 2 S.C.R.  
248 at para 35, p 269-270  
*Sullivan*, pp 3-4

73. The text of the provision is clear that it is a penalty. The provision says:  
...the director must impose on the person who should have collected the tax *a penalty equal to the amount of the tax* that should have been collected...[emphasis added]

The Act, s 44(1)

74. While the text is not determinative, the wording is clear and unambiguous and must be considered in the interpretation.

*Placer Dome, supra*

75. In context and considering the purpose of the Act and the purpose of the penalty in section 44(1), in particular, the penalty is not a tax.
76. In the context of the Act, it is clear that the tax is imposed on the purchasers of fuel and not on the retail dealers.

*Air Canada, supra*

77. The Act imposes collection and other obligations on the retail dealers. Retail dealers are obligated under the Act to collect the tax at the

applicable rate and, if they do not, the penalty imposed on them if they do not is to:

"...put teeth into the statutory requirement that the vendor collect tax from the purchaser, to penalize a vendor who is in breach of his duty to collect tax under the statute by making him personally liable for that amount of money and to impose a deterrent on the business community."

*Re Syroco Canada and Minister of Revenue*, (1983)

42 O.R. (2d) 258 [*Syroco*]

78. Section 92(15) of the *Constitution Act, 1867* gives the Province the authority to impose penalties to enforce its legislation which is precisely what the Province is doing by section 44(1) of the Act. Those penalties are in furtherance of a valid scheme of direct taxation within the Province.

*Syroco, supra*

*Grand River Enterprises Six Nations Ltd. v Ontario (Finance)*, 2017

ONCA 680 (CanLII) (leave to appeal to SCC dismissed 2018 CanLII

43781 (SCC)), at para 72 [*Grand River*]

*Constitution Act, 1867*, 30 & 31 Victoria, c. 3, ss 92(2) and 92(15)

79. The penalty in section 44(1) of the Act is what it purports to be: a penalty imposed by the Province to enforce collection obligations on retail dealers. The purchasers of the fuel pay the tax. The retail dealers, among others, collect it and, if they do not, there is a monetary penalty.
80. An amount equal to tax that a person, in this case, KVL, a retail dealer, has to pay, is not a tax itself if the tax is levied on the ultimate consumer. The penalty in section 44(1) of the Act is a means of ensuring the collection of amounts payable under the Act and is integral to the scheme of the Act.

*Grand River, supra* at paras 71, 72 and 74

*Tseshaht Band v British Columbia*, 1992 CanLII 5970 (BCCA) at  
paras 25-39, 44-49 and 55-56

81. KVL's second constitutional argument has no merit, even if section 44 of the Act provides for the imposition of a tax, which it does not. Section 44 of the Act is contained in an act of the provincial Legislature: the Act.

*Constitution Act, 1867*, ss 90 and 53  
*Eurig Estate (Re)*, [1998] 2 S.C.R. 565

**The Notice of Assessment and the Assessment are valid**

82. KVL argues that the Notice of Assessment is not valid because it is not signed by the person authorized under the Act to issue the Notice and is not apparent on the face of the Notice that it is issued by the person authorized under the Act to issue the Notice.
83. The Act sets out that the Minister may appoint a director for the purposes of administering the Act.
84. The Director has the authority to impose penalties under sections 44 and 45 of the Act. If the Director imposes such penalties, the Director must give a notice of assessment to the person on whom the penalties are imposed.

Act, ss 44, 45, and 46

85. Subsections 46(2) and (3) of the Act state that:
- (2) Evidence that a notice of assessment under subsection (1) or (1.1) has been given is proof, in the absence of evidence to the contrary, that the amount estimated, assessed or imposed under this Act is due and owing, and the onus of proving otherwise is on the person liable to pay the amount estimated, assessed or imposed.

(3) Subject to being amended, changed or varied on appeal or by reassessment, an estimate, assessment or penalty made or imposed under this Act is valid and binding despite any error, defect or omission in the estimate, assessment or penalty or in procedure.

86. In this case, there is no dispute that Notice of the Assessment was given to KVL the Notice of Assessment. As noted on the Notice, the Notice of Assessment was sent to KVL at 8087 Hart Hwy, Prince George, BC V2K 3B8.
87. Under section 61 of the Act, the Director is authorized to delegate in writing any of the Director's powers or duties under this Act.
88. The Director has delegated the power to impose penalties and give notices of assessment to audit managers. In this case, an audit manager imposed the penalties and caused the Notice of Assessment to be issued and sent to KVL.
89. Therefore, there is evidence that the Notice of Assessment was issued by the Director's delegate, as authorized by the Act.
90. It is apparent on the face of the Notice of Assessment that it is being issued under the Act and in accordance with the provisions of the Act. The correct statutory provision of the Act that imposes the Equivalent Penalty – section 44(1) - is cited on the Notice of Assessment. Section 44(1) sets out that the Director imposes the Equivalent Penalty. The Notice of Assessment also sets out that the Act provides for the assessment of other penalties, including the 10% Penalty. The Notice of Assessment provides the information necessary for KVL to understand why it is receiving the Notice, in respect of what period, and under what legislation. There is no requirement in the Act that anyone must sign the



Notice of Assessment. There is no 'accumulation of errors' on this Notice of Assessment that would make it invalid.

*Air Canada v Turner*, [1984] BCJ No 2766, 1984 CanLII 319 at para 22  
[*Turner*]

91. In any case, under section 46 of the Act, the penalties imposed as reflected in the Notice of Assessment are valid and binding despite any error in the penalties themselves or in procedure. Section 46 of the Act has broader wording than the provision of the *Judicial Review Procedure Act* that was under consideration in the *Turner* case.

Act, s 46

*Turner, supra*

92. The Assessment imposing the penalties was validly made by a delegate of the Director pursuant to powers given under the Act. The Notice of Assessment was given to KVL. Both the Assessment and the Notice are valid.

Act, ss 44, 45, 46 and 61

**The Director may use sampling and extrapolation to calculate penalties**

93. KVL argues that there is no legislative authority to conduct an audit or impose a penalty under the Act based on an estimate. Presumably, this is an argument that the Director cannot calculate an Equivalent Penalty or a 10% Penalty using the Ministry practice, which was employed in the audit in this case, of using test periods and then extrapolating results from those test periods over the audit period (block sampling).
94. Accepting KVL's argument would mean that all penalties based on tax not collected on sales would have to be calculated by examining every transaction in an audit period. This would be time-consuming and

disruptive to the business of the person under audit and also an inefficient use of Ministry resources.

95. The Act allows the calculation of tax not paid in a manner and by the procedure the Director considers appropriate. This contemplates a manner of calculation that does not require examining every transaction under audit.

Act, s 43

96. Therefore, the Director must also be able to calculate a penalty equivalent to tax not collected from a purchaser or any penalty based on tax not collected in the same manner and by the same procedure as tax not paid since tax not collected from a purchaser on a sale also means that, generally, the purchaser did not pay the tax on that sale.
97. KVL also challenges the methodology used to calculate the penalties imposed and says, essentially, that it is incumbent on the Director to demonstrate that the methodology was reasonable and representative.
98. KVL's argument is not supported in the jurisprudence. It is KVL who must demonstrate, or at least bring into doubt by evidence, that there is a flaw in the extrapolation methodology that was used.

*Northburn Prescriptions Ltd. v British Columbia*, 2014 BCSC 2124 at paras 56-57 [*Northburn*], citing *Telus Communications (Edmonton) Inc. v Canada*,

2008 TCC 5

*La Bottega*, *supra*

Act, s 46

99. In conducting the audit and using block sampling to extrapolate over the Audit Period, the auditor was acting in accordance with Ministry practice. The auditor advised KVL of the methodology that would be used to conduct the audit and provided KVL with the Ministry's publicly available

bulletin information. The auditor selected the test periods in consultation with KVL and, because of concerns expressed by KVL, selected longer test periods than usually selected.

100. KVL did not provide sufficient sales information to determine its sales of Coloured Fuel in the Audit Period and it was clear to the auditor that KVL had not obtained the Declarations from purchasers of Coloured Fuel, as required since July 1, 2015 when the 2015 Changes took effect.
101. KVL does not dispute that it did not collect tax when it should have. The dispute is about the amount of tax that KVL should have collected.
102. The burden is on KVL to disprove the Assessment and, to do that, generally it would have to put forward an alternate amount of tax that it should have collected but did not. KVL has not done this. KVL has not brought into doubt by evidence that the methodology used by the auditor to calculate the penalties was flawed. KVL has not disproven the Assessment.

*Northburn, supra*

*527758 B.C. Ltd. v British Columbia*, 2014 BCSC 233 at para. 127

*620247 Ontario Ltd. v Canada*, [1995] T.C.J. No. 340 at para. 8

Act, s 46

**KVL made no mistake of fact in this case and, in any case, KVL was not duly diligent in determining its obligations as a retail dealer under the Act.**

103. KVL has been authorized to sell Coloured Fuel under the Act since 2010.
104. KVL knew about the 2015 Changes in advance of their coming into effect and understood its obligations under the Act regarding the requirement to

obtain Declarations when selling Coloured Fuel. It acknowledged its understanding in the Agreement.

105. KVL failed to obtain the required Declarations when selling the Coloured Fuel and failed to collect the Clear Fuel Taxes from the purchasers as required under the Act.
106. A due diligence defence is available to the imposition of penalties under tax legislation in certain circumstances.

*Pillar Oilfield Projects Ltd. v Canada, [1993] TCJ No 764;*  
*Canada (Attorney General) v Consolidated Canadian Contractors Inc.,*  
*[1999] 1 FC 209 (FCA);*  
*Thomas v British Columbia, [2002] BCJ No 2924.*

107. KVL has not argued that it was duly diligent in its petition but the Province argues, in any case, that it was not duly diligent. KVL did not take all reasonable precautions to avoid the event, that is, the non-collection of tax at the applicable tax rate and KVL made no mistake of fact in this case. KVL was given notice of the 2015 Changes and its president, Mr. Kidd, signed the Agreement acknowledging understanding of those changes and the new requirements on KVL as a retail dealer under the Act. KVL knew that, as an authorized Coloured Fuel retail dealer, it was required to collect FIN430 Declarations in order to collect tax on those sales of Coloured Fuel at the Coloured Fuel Tax Rate. KVL did not put any controls on the pumps at the Gas Station to ensure that purchasers could not purchase Coloured Fuel without providing the required Declaration. KVL knew that it had some obligation to obtain a Declaration because KVL continued to use the FIN438 forms after July 1, 2015.

108. KVL did not take reasonable precautions to ensure that it complied with its obligations as a retail dealer under the Act. KVL made neither a reasonable error of fact in not collecting tax at the applicable tax rate on the sale of Coloured Fuel to purchasers who had not made the required Declarations nor did KVL take reasonable precautions to ensure it complied with the Act.

*Corporation de L'Ecole Polytechnique v Canada*, 2004 FCA 127  
at para 28

### **Conclusion**

109. KVL is liable for the Equivalent Penalty imposed under section 44(1) of the Act, the 10% Penalty imposed under section 45(1) of the Act, and the consequent interest assessed. The penalty provisions of the Act are constitutional, the Notice of Assessment and Assessment are valid, the Director may calculate a penalty under the Act using block sampling and extrapolation, KVL has shown no flaw in that methodology that would reduce the penalties imposed, and KVL, in circumstances where it is clear that KVL did not collect some tax at the applicable rate, has put forward no alternate calculation of that uncollected tax. KVL has not disproven the Assessment or the Minister's Decision affirming that Assessment in its entirety. KVL is not entitled to the recovery of any penalties paid.

110. Therefore, the appeal should be dismissed under section 51(5) of the Act, with costs to the Province.

**PART 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Thomas Hamer, sworn December 9, 2022;
2. Affidavit #1 of Shawna Hamilton, sworn December 9, 2022; and
3. Further evidence as counsel may advise and this Honourable Court permits.

The Province estimates that the hearing of the petition will take 2 days.

Date: December 9, 2022



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Sarah A.E. Kay and Sointula Kirkpatrick  
Counsel for the Respondent  
His Majesty the King in right of the  
Province of British Columbia

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Name of the Respondent's lawyer: Sarah A.E. Kay & Sointula Kirkpatrick

**Appendix A – Index of Defined Terms**

<b>Defined Term</b>	<b>Definition</b>
<b>Act</b>	Means <i>Motor Fuel Tax Act</i> , RSBC 1996, c. 317
<b>After-declared Coloured Diesel Litres</b>	Means the 39,983.10 of the Total Coloured Diesel Litres sold by KVL without obtaining Declarations at the time of the sales but obtaining Declarations after the sales
<b>After-declared Coloured Diesel Sales</b>	Means 4.071834313% of KVL's coloured diesel sales were sales where KVL sold coloured diesel without obtaining Declarations at the time of the sales but obtained Declarations after the sales
<b>After-declared Coloured Premium Litres</b>	Means the 31,849.79 of the Total Coloured Premium Litres sold by KVL, without obtaining Declarations at the time of the sale but obtaining Declarations after the sales
<b>After-declared Coloured Premium Sales</b>	Means 2.86837169% of KVL's coloured premium gasoline sales were sales where KVL sold coloured premium gasoline without obtaining Declarations at the time of the sales but obtained Declarations after the sales
<b>After-declared Sales</b>	Means a 10% penalty in the amount of \$846.07 in respect of Coloured Fuel sold by KVL where the required Declarations were not obtained until after the sales of that Coloured Fuel occurred
<b>Agreement</b>	Means the authorization to sell coloured fuel agreement signed by KVL on July 9, 2015 and the Director on July 22, 2015 and returned to KVL on August 11, 2015
<b>Assessment</b>	Means the assessment of penalties imposed on KVL in the amount of issued \$221,495.85, including interest
<b>Assumptions</b>	Means the assumptions and findings of fact made by the Director and the Minister in respect of the audit period
<b>Auditor</b>	Means the auditor who conducted the audit under the Act
<b>Audit Period</b>	Means the period between July 1, 2015 and July 31, 2017
<b>Clear Fuel</b>	Means fuel that is not coloured
<b>Clear Fuel Tax Rate   Clear Fuel Tax</b>	Means the higher tax rate applicable to fuel that is not Coloured Fuel
<b>Coloured Fuel</b>	Means fuel of any type other than propane that is coloured in accordance with the <i>Motor Fuel Tax Regulation</i>

### Appendix A – Index of Defined Terms

Defined Term	Definition
<b>Coloured Fuel Tax Rate   Coloured Fuel Tax</b>	Means the rate of tax of 3 cents per litre applicable to coloured fuel
<b>Declaration   Declarations</b>	Means the form(s) acceptable to the director under and as required by the Act
<b>Director</b>	Means the director appointed under section 60.1 of the Act to administer the Act
<b>Equivalent Penalty</b>	Means the penalty equal to the amount of tax that should have been collected, but was not collected plus interest
<b>10% Penalty</b>	Means the penalty set out in section 45(1)(c) of the Act for the failure to collect tax on sales of Colourer Fuel without obtaining the required Declarations
<b>FIN 430</b>	Means the coloured fuel declaration that was required after July 1, 2015
<b>FIN438</b>	Means the coloured fuel declaration that was required prior to July 1, 2015
<b>Gas Station</b>	Means the gas station and convenience store operated by KVL, located at 8087 Hart Highway, Prince George, British Columbia
<b>Inspection</b>	Means the on-site inspection which took place on August 17, 2017 by inspectors employed by the Ministry
<b>KVL</b>	Means Kidd Ventures Ltd.
<b>Minister</b>	Means Minister of Finance
<b>Ministerial Appeal</b>	Means the appeal of the Assessment made to the Minister
<b>Minister's Decision</b>	Means the letter dated June 11, 2020 whereby the Deputy Minister, on behalf of the Minister affirmed the Assessment and notified KVL in writing of that decision
<b>Ministry</b>	Means the Ministry of Finance
<b>Notice of Assessment</b>	Means the Notice issued to KVL on November 23, 2018



### Appendix A – Index of Defined Terms

Defined Term	Definition
<b>Taxpayer</b>	Means the person assessed, on a balance of probabilities which has the onus of disproving on a balance of probabilities, any assumptions or findings of fact or showing that the assumptions do not in their entirety support the assessment
<b>Total Coloured Diesel Litres</b>	Means the total sales of coloured diesel of 981,943.16 litres sold by KVL during the audit period
<b>Total Coloured Premium Litres</b>	Means the total sales of coloured premium gasoline of 1,110,378.75 litres sold by KVL during the audit period
<b>Undeclared Coloured Diesel Litres</b>	Means the 842,320.48 litres of coloured diesel fuel sold by KVL without obtaining the required Declaration
<b>Undeclared Coloured Premium Litres</b>	Means the 798,613.31 litres of coloured premium gasoline sold by KVL without obtaining the required Declaration
<b>2015 Changes</b>	Means the May 2015 information package sent to retail dealers advising of changes to the obligations on retail dealers of coloured under the Act

Appendix B

Kidd Ventures Ltd. (KV)

Note: all cardlock and retail sales that are the responsibility of Husky have been removed i.e. tender types: HuskyPro, Fleet, Myhusky RE, Routecomm & Promo Cert

Note: all amounts below are in litres

Month	Total (KV) LS Diesel Dyed Sold	Total (KV) Premium Dyed Sold	Sales <45 LS Diesel Dyed	Sales <45 Premium Dyed	Total Litres Dyed with Documents (with documents obtained after)	Total Litres Dyed Premium with Documents (with documents obtained after)	Dyed Diesel Litres to be Assessed	Dyed Premium Litres to be Assessed	Diesel Rate Difference (F)	Gas Rate Difference (F)
Nov-15	36,675.23	33,477.42	3,811.64	9,593.67	827.23	1,621.20	32,036.36	22,262.55	0.12	0.115
May-16	50,532.20	47,996.43	5,529.85	12,879.62	2,279.95	790.88	42,722.40	34,326.93	0.12	0.115
Jul-17	49,531.68	71,917.01	4,533.68	16,196.05	2,460.61	1,987.74	42,537.39	53,733.22	0.12	0.115
<b>TOTAL</b>	<b>136,739.11</b>	<b>153,390.86</b>	<b>13,875.17</b>	<b>38,668.34</b>	<b>5,567.79</b>	<b>4,399.82</b>	<b>117,296.15</b>	<b>110,322.70</b>	<b>A</b>	

Assessed in sample period	Diesel Bar Code 9131	Premium Gas Bar Code 9104
(B) Total coloured fuel litres sold in test period	<b>B</b> 136,739.11	153,390.86
(A) Total coloured fuel litres sold to be assessed in test period A=B-C-G	<b>A</b> 117,296.15	110,322.70
(D) Percentage of coloured fuel litres sold to be assessed based on results of periods tested - D=A/B	<b>D</b> 85.7809810%	71.9226035%
(J) Total sales in audit period (July 1, 2015 to July 31, 2017)	<b>J</b> 981,943.16	1,110,378.75

Litres Sold to be assessed - E=D\*J

Tax Rate Difference

Assessment for KV cardlock sales w/o FIN430's - difference between clear and coloured - Tax to be assessed = E \* F

<b>\$</b> 101,078.46	<b>\$</b> 91,840.53	<b>\$</b> 192,918.99	<b>Total Tax Not Collected</b>
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Assessed in sample period

	Diesel	Premium Gas
(B) Total coloured fuel litres sold in test period	<b>B</b> 136,739.11	153,390.86
(G) Total coloured fuel litres sold to be penalized in test period	<b>G</b> 5,567.79	4,399.82
(I) Percentage of coloured fuel litres sold to be penalized based on results of periods tested - G/B	<b>I</b> 4.071834313%	2.86837165%
(J) Total sales in audit period (July 1, 2015 to July 31, 2017)	<b>J</b> 981,943.16	1,110,378.75
Total Litres to be penalized - K=J*I	<b>K</b> 39,983.10	31,849.79
Tax Rate Difference	<b>F</b> 0.120	0.115
Penalty - 10%	<b>H</b> 10%	10%

Assessment of Penalty for KV cardlock sales with FIN430's obtained after the date of trans. - Tax to be penalized = K\*F\*H

<b>\$</b> 479.80	<b>\$</b> 366.27	<b>\$</b> 846.07	<b>Total Penalty</b>
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