



NO. Court File No. VLC-S-S-250785
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

David M. Rosenberg Law Corporation

Petitioner

AND:

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

Respondent

AND:

Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe and
Halalt First Nation

Respondents

PETITION TO THE COURT

ON NOTICE TO:

His Majesty the King in right of the Province of British Columbia
Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

Cowichan Tribes
Attn: Sulsulxumaat, Chief Cindy Daniels
5760 Allenby Road
Duncan, BC V9L 5J1

Stz'uminus First Nation
Attn: Thólmen, Chief John Elliott
12611 Trans Canada Hwy
Ladysmith, BC V9G 1M5

Penelakut Tribe
Attn: Chakeenakwaut, Chief Pam Jack
PO Box 360
Chemainus, BC V0R 1K0

Halalt First Nation
Attn: Sulsimutstun, Chief James Thomas
7973 Chemainus Road
Chemainus, BC V0R 1K5

The address of the registry is:

Vancouver Registry
800 Smithe Street
Vancouver, BC V6Z 2E1

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

This matter is an application for judicial review.

This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below, by

the person(s) named as petitioner(s) in the style of proceedings above

.....[*name(s)*]..... (the petitioner(s))

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The ADDRESS FOR SERVICE of the petitioner(s) is: 671D Market Hill, Vancouver, BC V5Z 4B5 Fax number address for service (if any) of the petitioner(s): (604) 879-4934 E-mail address for service (if any) of the petitioner(s): david@rosenberglaw.ca
(2)	The name and office address of the petitioner's(s') lawyer is: Rosenberg Law, 671D Market Hill, Vancouver, BC V5Z 4B5 Fax number address for service: (604) 879-4934

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. That the decision of the Minister under section 211 of the *Provincial Sales Tax Act* that the amount of \$45,135.16 assessed as penalty equivalent to tax not collected for services provided to the Cowichan Nation and \$6,993.65 interest be set aside.
2. That any amount collected to date pursuant to the Notice of Assessment L115156672 that relates to Provincial Sales Tax on legal services provided to the Cowichan Nation in this matter be refunded to the petitioner with interest.
3. A declaration that to the extent that the *Provincial Sales Tax Act* and Regulations required that the Petitioner pay taxes on the legal services that he provided in this case to the First Nation Respondents, the *Provincial Sales Tax Act* and Regulations are of no force or effect.
4. In the alternative, a declaration that the imposition of Provincial Sales Tax on legal services provided to First Nations is an impermissible form of indirect taxation which is ultra vires the Province and of no force or effect.

Part 2: FACTUAL BASIS

1. By Notice of Assessment dated July 21, 2022, the petitioner David M. Rosenberg Law Corporation was informed that as a result of an audit under the *Provincial Sales Tax Act* covering the period August 1, 2018 to December 31, 2019, that the petitioner was assessed a total of \$73,531.84. That amount was comprised of taxes due, penalty equivalent, and interest.

2. The Notice of Assessment further provided that it could be appealed to the Minister of Finance, such appeal to be received within 90 days of the date of the issue of the Notice of Assessment.
3. The petitioner did appeal the assessment and the documents in support of the appeal to the Minister were sent by registered mail October 4, 2022. That material included the Appeal to Minister form, appeal information submissions, and an affidavit containing supporting documentation. These materials are attached to the affidavit of David M. Rosenberg, K.C. filed in support of this Petition.
4. The Director of the Tax Appeals Litigation Branch, Ministry of Finance, acknowledged receipt of the appeal on October 12, 2022.
5. On November 12, 2024, more than two years later, the petitioner received a letter stamped November 6, 2024 signed on behalf of the Executive Director, Ministry of Finance. In that letter, the Executive Director purported to cancel the assessment in the amount of \$16,131.08 assessed as penalty equivalent to tax not collected for services provided to the Mi'kmaq Confederacy of PEI.
6. Further, in that letter the Executive Director cancelled the assessment in the amount of \$1,830.01 assessed as penalty equivalent to tax not collected for services provided to the Kitsumkalum Indian Band.
7. Further, the Executive Director affirmed the amount of \$52,128.81 (\$45,135.16 as penalty equivalent to tax and \$6,993.65 interest) assessed as penalty equivalent to tax not collected for services provided to the Cowichan Nation.
8. As noted in the decision, the Cowichan Nation is comprised of the members of various Indian bands, and Cowichan Tribes is one of the members. The decision indicated that the documents demonstrated that the legal services provided by the petitioner to the Cowichan Nation relates to litigation concerning Aboriginal Rights and Title. The Minister denied the claimed exemption on the basis that the legal services relate to litigation.

9. The petitioner now appeals to this court from the decision of the Minister under section 211 of the *Provincial Sales Tax Act* by way of a petition pursuant to section 212(1) of the *Provincial Sales Tax Act*.
10. The subject matter of the appeal relates to legal services provided by the petitioner to the Respondent First Nations with respect to their claims concerning Cowichan Nation Aboriginal Rights and Title which have been affirmed and recognized by section 35 of the *Constitution Act*.
11. The detailed background and relevant documents are set out in the affidavit of David M. Rosenberg, KC, and it is the position of the petitioner that the Provincial Sales Tax is not due and owing for the services rendered in this case.

Part 3: LEGAL BASIS

12. This petition is brought pursuant to sections 211 and 212 of the *Provincial Sales Tax Act* and Rule 2-1 of the Supreme Court Civil Rules.
13. Accordingly, the petitioner is named as the taxpayer against whom the Minister has determined the assessment as penalty equivalent to tax not collected for services provided to the Cowichan Nation is payable.
14. According to section 212 of the *Provincial Sales Tax Act*, a decision of the Minister may be appealed to the Supreme Court by way of a petition proceeding, and in accordance with the *Act*, the government is designated as the respondent.
15. In accordance with Rule 16-1(3), the petition and affidavit are served on the First Nation respondents as “all persons whose interests may be affected by the order sought”.
16. In the news release which accompanied the publication by the Attorney General of British Columbia of its Litigation Directives upholding Aboriginal rights, it stated: “The Province respects the right of Indigenous peoples to choose a preferred form to resolve legal issues, including the courts. In some instances, matters may require legal clarification or definition, or litigation may be unavoidable. When matters do result in litigation, these new directives

instruct counsel to act honourably and to assist the court constructively, expeditiously and effectively.”

17. Premier David Eby, then Attorney General, said “We are working to build a better future than our past by advancing true and lasting reconciliation through all aspects of government. It is important to preserve and respect the right of First Nations to advance Rights and Title through the court system when they choose to do so...”.
18. It has not always been the case that government policy welcomed First Nations’ participation in litigation. There was a time when the policy in British Columbia punished First Nations who chose to litigate their claims for Aboriginal Rights and Aboriginal Title. Those unfortunate policies of the past reflected an impoverished attitude toward First Nations and their right to recognition of constitutional protection. Perhaps the lowest point in Crown’s/Indigenous relations was the time when the province of British Columbia completely denied the existence of Aboriginal Rights and Title and in a misguided attempt to prevent First Nations from accessing the courts passed laws that made it illegal to do so.
19. How does this relate to the matter at issue and the application of the *Provincial Sales Tax Act*? It is fundamental that the Crown not deny or erect barriers that would dissuade or prevent First Nations from accessing the courts in protection of their Aboriginal Rights and Title. The position taken by the Minister in this matter supports a return to those dishonourable policies of the past.
20. The position of the Minister is that because the legal services provided by the petitioner to the Cowichan Nation relate to litigation concerning Aboriginal Rights and Title, it is not exempt under the applicable legislation. The Minister acknowledges that section 81 of the Regulations provides for exemption for the legal services provided for the benefit of land claims, title and/or treaty negotiations. The Minister also acknowledges that the Regulations exempt legal services related to negotiations. In this case the legal services were provided for the benefit of a land claim and Aboriginal Rights. The position of the Minister is quite simple. Even if the legal services would be exempt because they otherwise fit within the regulations, where the legal services relate to litigation they are not eligible for exemption.

21. The position of the Minister is not sustainable. This position does not find support in either the governing *Provincial Sales Tax Act* or the Regulations themselves.
22. The position taken by the Minister in this case is contrary to the published Litigation Directives of the Attorney General of British Columbia, the statutory exemptions that appear in the *Provincial Sales Tax Act* and the Provincial Sales Tax Exemption and Refund Regulation, the common law, and the Constitution.
23. The petitioner will rely upon recent authorities, such as *British Columbia v. New Westminster Indian Band No. 566*, 2022 BCCA 368 and *Yahey v. British Columbia*, 2020 BCSC 278 in support of its position on this Petition.
24. On its face, the exemptions enumerated in section 81 of the Regulations would appear to apply to the legal services provided in this case. For example, it is clear that the legal services “relate to real property situated on First Nation land” as the very question that is being litigated in the Cowichan Nation case is about whether or not the First Nations who are the recipients of the legal services, and who are the respondents in these proceedings, are the rightful owners of the Cowichan settlement land at issue, which the Crown set aside as a provisional Crown reserve. The land in question will be First Nation land if the Cowichan Nation is successful in this litigation. A plain language interpretation of s. 81 of the Regulations grounds exemption for the legal services provided. Moreover, surely a broad and generous interpretation of the policy, consistent with reconciliation, should include an exemption for the legal services which relate to the claim to Aboriginal title to the land.

British Columbia v. New Westminster Indian Band No. 566, 2022 BCCA 368 at paras. 82, 84.

25. From the perspective of the four bands who are respondents in these proceedings, the Lands of Tl’uq̓tinus at issue were taken by Crown officials. Had the wrongful taking not occurred, the Cowichan Nation would have a finalized Indian reserve at the present location of Tl’uq̓tinus. A purposive analysis of the *Provincial Sales Tax Act* and Regulations would exempt the payment of Provincial Sales Tax on the legal services that were provided in this case with respect to the land that the Cowichan Nation claims should be a present day Indian reserve.

26. In this era of reconciliation, the *Provincial Sales Tax Act* and Regulations should be interpreted to exempt the respondent First Nations in this case from paying Provincial Sales Tax on the legal services that were provided.
27. In addition, it is clear that the exemption from Provincial Sales Tax applies to negotiations and consultations relating to title, rights/land claims, etc. First Nations who seek to litigate against the Crown in regard to those exact matters, i.e. claims to Aboriginal title and rights, when the Crown has refused to recognize those claims, or adequately consult or accommodate in relation to them, should be seen as part of those negotiations.
28. It is part of the negotiations and consultations to be able to vindicate rights before the courts. Otherwise, the First Nations would be at a distinct disadvantage in the negotiations or consultations because they would not be able to access justice if the party with whom they were negotiating or consulting was intransigent.
29. The position taken by the Province, i.e. that the exemptions would not apply to litigation, would seem contrary to the provisions of UNDRIP, BC's DRIPA legislation, and its own policy concerning its commitment to reconciliation which recognizes that litigation is a legitimate means for resolving legal issues when First Nations advance their legal rights.
30. Until 1951 First Nations in Canada were barred from raising funds to bring claims against the Crown without authorization and it was an offense for anyone to do so. The present policy being advanced by the Minister in this case has echoes of that unfortunate and shameful history and is not consonant with reconciliation.

Section 35 and the Constitution

31. The Province's power to legislate regarding taxation in British Columbia must be exercised in the manner that upholds the honour of the Crown, promotes the object of reconciliation, and is consistent with the recognition and protection of Aboriginal and treaty rights by section 35(1) of the *Constitution Act*.
32. It is contrary to the commitment in section 35(1) for the Crown to charge Indigenous people Provincial Sales Tax on legal services where the purpose of those legal services is to access

the court to enforce their constitutionally protected Aboriginal rights, hold the Crown accountable for dishonourable conduct, and advance reconciliation.

33. The Crown, as the defendant in the Cowichan Nation case, cannot charge the First Nations who are plaintiffs in that case, Provincial Sales Tax to access the court to seek to enforce the Crown's constitutional obligations. This would be inconsistent with the honour of the Crown and the Crown's duties under section 35(1) to promote reconciliation.
34. Reconciliation takes place both inside and outside the courtroom. Courts have a role to play and parties will not always be able to resolve their issues without the assistance of the court. For this reason the courts will be called on to determine rights and obligations. The constitutional protection given to section 35(1) rights, and the difficult historical relationship between the Crown and Indigenous peoples, require the Courts to play an active role to ensure a fair process.
35. Courts are a necessary pillar in the process of reconciliation. A regime that requires Indigenous plaintiffs to pay the Crown for legal services to assist access to the court – a forum for reconciliation – is dishonourable and contrary to the objectives of section 35(1). More specifically, charging Provincial Sales Tax on legal services provided to Indigenous peoples who seek to uphold and protect their rights in court undermines the Crown-Indigenous relationship and risks exacerbating rifts, not healing them.
36. The charge of a substantial tax to access legal services for court proceedings to uphold the constitutionally protected right is antithetical to the purpose of section 35(1), the principle of honour of the Crown, and the objective of reconciliation. The taxes create an additional obstacle for Indigenous litigants whose claims often require long trials.

Affidavit #1 of David M. Rosenberg, K.C., at paras. 9, 10.

37. Because of the complexity and length of civil trials dealing with Aboriginal and treaty rights, it is reasonable to conclude that the burden of a Provincial Sales Tax on legal services for the conduct of those trials disproportionately and unfairly affects Indigenous peoples. This is of particular import given that the responsibility for reconciliation is a joint responsibility between Indigenous peoples and the Crown.

38. The requirement to pay Provincial Sales Tax on legal services in this case is inconsistent with the shared responsibility for reconciliation which is the overarching objective of section 35(1). The tax creates unfairness, imposes financial obligations to litigation (which can become significant in long trials), and reinforces the idea that the promise in section 35 still comes with strings attached. The court can draw a legitimate distinction for Indigenous peoples in these circumstances based on the Crown's unique obligations to Aboriginal peoples, and the unique status of Aboriginal and treaty rights in the *Constitution Act*, 1982.

39. Accordingly, this Court should find that the *Provincial Sales Tax Act* and Regulations that require Indigenous peoples to pay taxes on legal services for the purpose of enforcing section 35 rights is unconstitutional and of no force or effect insofar as it requires Indigenous peoples who are seeking to uphold or protect their section 35(1) Aboriginal rights from alleged infringements and who are required to do so through a trial, to pay Provincial Sales Tax on legal services that are required to access the BC Supreme Court.

Yahey v. British Columbia, 2020 BCSC 278, at paras. 25, 36, 40, 42, 54, 59, 61, 82, and 92.

40. The petitioner seeks a declaration that the *Provincial Sales Tax Act* and regulations are of no force and effect insofar as they require Indigenous peoples who are seeking to uphold and protect their section 35(1) Aboriginal or treaty rights from alleged infringements, and who are required to do so through a trial, to pay Provincial Sales Tax on those legal services to the Crown where the Crown is a defendant in those proceedings.

41. In any event, the imposition of Provincial Sales Tax on legal services provided to First Nations is an impermissible form of indirect taxation which is ultra vires the Province and of no force and effect.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of David M. Rosenberg, K.C.

Date: January 30, 2025

Signature of petitioner lawyer for petitioner
David M. Rosenberg, K.C.

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To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

.....
.....
.....

Date:

.....
Signature of Judge Associate Judge