



No. VLC-S-S250785  
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

**RESPONSE TO PETITION**

**Filed by: Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe  
and Halalt First Nation** (the "Cowichan Nation respondents")

THIS IS A RESPONSE TO the petition filed January 31, 2025.  
The petition respondent estimates that the application will take 1-2 days.

**Part 1: ORDERS CONSENTED TO**

1. The Cowichan Nation respondents consent to the orders sought.

**Part 2: ORDERS OPPOSED**

1. None.

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

1. None.

**Part 4: FACTUAL BASIS**

1. The Cowichan Nation respondents accept the facts as set out in the petition, Part 2.
2. Further background and relevant documents are set out in the affidavit of Kathleen McKerracher.

**Part 5: LEGAL BASIS**

1. The position of the Minister is not lawful.

Regulatory Exceptions Apply

2. The Minister's position is contrary to applicable exceptions under the *Provincial Sales Tax Exemption and Refund Regulation*, B.C. Reg. 97/2013 (the "Regulation").
3. Section 81(1)(a)(i) of the Regulation exempts the legal services at issue. The legal services were purchased by the Cowichan Nation respondents each of which is a First Nation, being a "band" within the meaning of the federal *Indian Act*, R.S.C. 1985, c. I-5, as amended. The legal services relate to real property situated on "First Nation land" as that phrase is defined in the Regulation – e.g., as "a reserve".
4. The legal services advanced the Cowichan Nation respondents' claim of unauthorized Crown infringement of Cowichan Nation Aboriginal title to the Lands of Tl'uqtninus as "Indian settlement" lands historically appropriated as a provisional Crown reserve, in anticipation of finalization as an Indian reserve set apart by the Crown for their use and benefit. This alleged Crown withdrawal of the Lands of Tl'uqtninus from disposition relates the legal services to "First Nation Land" within the Regulation. This is consistent with provincial Crown creation of "reserved land" under the *Land Act*, R.S.B.C. 1996, c. 245, ss. 1, 15.
5. Further, the unauthorized Crown infringement alleged relates to real property situated on this "First Nation land". The Cowichan Nation respondents' claim impugns the Crown

grants of fee simple interests on the Lands of Tl'uq̓tinus, as well as the federal Crown's land use planning and leasing thereof.

6. Section 81(1)(b) of the Regulation also exempts the legal services at issue. The Cowichan Nation respondents purchased the legal services to advance the representative claim on behalf of all descendants of the Cowichan Nation. The Cowichan Nation respondents, being the members of the four plaintiff bands, and the claimed descendants of the Cowichan Nation, being the members of the five represented bands, are both aboriginal organizations representing the interests of Indians and bands. The claim seeks declarations that the descendants of the Cowichan Nation have aboriginal title to the Lands of Tl'uq̓tinus as unjustifiably infringed by the Crown. It also seeks declarations of their aboriginal right to fish the south (*i.e.* main) arm of the Fraser River for food as unjustifiably infringed by the federal Crown.
7. As in s. 81(1)(b), the legal services provided relate to (i) land claims negotiations, (ii) consultations with the government or the government of Canada in relation to aboriginal rights or aboriginal title, (iii) negotiations with the government or the government of Canada in relation to interim agreements that relate to aboriginal rights or aboriginal title, and (v) negotiations with other aboriginal organizations in relation to overlapping land claims.
8. The legal services provided relate to land claims negotiations as they seek to resolve an impasse in the Hul'q̓umi'num Treaty Group (HTG) negotiations with the Crown in the BC Treaty Commission process. The Cowichan Nation respondents and the claimed descendants of the Cowichan Nation have all been part of the HTG. The HTG has been engaged in land claims negotiations with the Crown within the BC treaty process since 1993. As of trial the Crown had refused to negotiate any HTG asserted interests in land at Tl'uq̓tinus (or elsewhere on the south arm of the Fraser River). The declaratory relief claimed seeks to resolve this impasse. Indeed, the Cowichan Nation respondents expressly seek declarations of provincial and federal Crown fiduciary duties to negotiate with the descendants of the Cowichan Nation reconciliation of claimed interests in land at Tl'uq̓tinus.
9. The legal services relate to consultations with the government of British Columbia and the government of Canada in relation to aboriginal rights or aboriginal title. Both the defendants British Columbia and Canada have pled and argued that the claimed Crown infringements were justified for having met any Crown duties of consultation at the relevant times, which the Cowichan Nation respondents deny. Indeed, the claim arose out of the Cowichan Nation respondents' concern the government of Canada had failed to adequately consult and accommodate them with respect to Cowichan Nation Aboriginal title to the Lands of Tl'uq̓tinus and Aboriginal right to fish the south arm for food. Further, the claim's relation to consultations with the government of Canada regarding Aboriginal title is demonstrated by Transport Canada's recent correspondence to the Cowichan Nation respondents seeking to ascertain their intentions for the Lands of Tl'uq̓tinus as established aboriginal title holders after trial judgment.

10. The legal services provided relate to negotiations with the government of British Columbia and the government of Canada in relation to interim agreements that relate to aboriginal rights or aboriginal title. The legal services have resulted in negotiation of a Cowichan Nation – British Columbia government-to-government agreement providing a framework for advancing reconciliation relating to Aboriginal title – *e.g.*, at the Lands of Tl'uqtnus. The legal services have also resulted in negotiation of an agreement between the Cowichan Nation respondents and Canada relating to implementation of any declared Aboriginal right to fish the south arm for food.
11. The legal services relate to negotiations with other aboriginal organizations in relation to overlapping land claims. The HTG and MIB have overlapping land claims. The defendant Musqueam Indian Band (MIB) joined in the claim after the Cowichan Nation respondents attempts at negotiation with the MIB failed in relation to MIB's overlapping land claim to the Lands of Tl'uqtnus and the south arm of the Fraser River. The claim stands to resolve this impasse.
12. The Minister's position on the tax payable is unlawfully contrary to applicable regulatory exceptions, case law and legal principles of interpretation.

Common Law, Confederation and s. 35 of the *Constitution Act, 1982*

13. Since the Crown assertion of sovereignty over British Columbia and the reception of the common law in 1846, the honour of the Crown has been a constitutional principle grounding different Crown duties in different circumstances all aimed at reconciling Crown sovereignty with pre-existing aboriginal interests.
14. In 1871, the province of British Columbia joined confederation and took its Crown powers under the *Constitution Act, 1867* and the *BC Terms of Union* absent any treaty with the Cowichan Nation and subject to Crown duties arising from the honour of the Crown.
15. The Crown's enactment of section 35 to the *Constitution Act, 1982* constitutionally entrenched the common law Crown duties arising from the honour of the Crown in relation to the existing aboriginal rights, including aboriginal title, of the aboriginal peoples of Canada.
16. To the extent that the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35, and the Regulation require the Cowichan Nation respondents to pay taxes on legal services provided for establishing Crown infringement of constitutionally protected Cowichan Nation aboriginal rights and enforcing these aboriginal rights by trial in this court they are unconstitutional and of no force or effect.

17. In any event, the imposition of the Provincial sales Tax Act on legal services provided to the Cowichan Nation respondents is an impermissible form of indirect taxation which is *ultra vires* the Province of British Columbia and of no force or effect.

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

1. Affidavit #1 of Kathleen McKerracher.
2. Affidavit #1 of David M. Rosenberg, K.C.

Dated: February 21, 2025



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Signature of David M. Robbins  
Lawyer for petition respondents,  
Cowichan Tribes, Stz'uminus First Nation,  
Penelakut Tribe and Halalt First Nation

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