



**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Allan v. British Columbia (Chief Electoral Officer)*,  
2010 BCSC 1174

Date: 20100820  
Docket: S104702  
Registry: Vancouver

**IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996,  
C. 241, AND THE *RECALL AND INITIATIVE ACT*, R.S.B.C. 1996, C. 398,  
AND IN THE MATTER OF THE FEBRUARY 4, 2010 DECISION OF THE  
CHIEF ELECTORAL OFFICER TO APPROVE APPLICATION FOR  
INITIATIVE PETITION IP-2010-002 -  
“AN INITIATIVE TO SET ASIDE THE HARMONIZED SALES TAX (HST)”**

Between:

**JOHN ALLAN (on behalf of Council of Forest Industries),  
PIERRE GRATTON (on behalf of the Mining Association of  
British Columbia),  
PHILIP HOCHSTEIN (on behalf of Independent Contractors  
and Businesses Association),  
W.C. (WAYNE) HOSKINS (on behalf of Western Convenience  
Stores Association),  
RICK JEFFERY (on behalf of Coast Forest Products Association),  
and JOHN R. WINTER (on behalf of B.C. Chamber of Commerce)**

PETITIONERS

And

**THE CHIEF ELECTORAL OFFICER,  
and WILLIAM VANDER ZALM**

RESPONDENTS

Before: The Honourable Chief Justice Bauman

**Reasons for Judgment**

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Place and Date of Hearing:

Vancouver, B.C.  
18 August 2010

Place and Date of Judgment:

Vancouver, B.C.  
20 August 2010

I. INTRODUCTION

[1] On 4 February 2010, the Chief Electoral Officer for British Columbia declared that William Vander Zalm's "An Initiative to end the harmonized sales tax (HST)" (the "Initiative Petition") had met the requirements for an acceptable petition prescribed by s. 3 of the *Recall and Initiative Act*, R.S.B.C. 1996, c. 398 [RIA].

[2] After it successfully passed the threshold set by s. 7 of the *RIA*, Premier Gordon Campbell called the Initiative Petition "a victory for democracy", no doubt the case where over 700,000 registered voters signed the petition within the relatively brief time frame set by the *RIA*.

[3] The petitioners (an alliance of business groups in British Columbia) say that this "victory for democracy" is founded on a petition which should not have been approved in principle by the Chief Electoral Officer (the "CEO") under the *RIA*. The petitioners bring this application for judicial review and seek an order quashing the approval of the CEO and an order setting aside the Initiative Petition as being null and void.

[4] The issue then squarely arises: Does this exercise in grassroots democracy founder on a strict interpretation of the legal requirements which must be met to set it in motion under the *RIA*?

[5] I have concluded that it does not, that the Initiative Petition complies with the spirit and letter of the requirements under the *RIA* on a proper legal construction of those requirements and that the CEO was correct in his decision approving it under the legislation.

[6] This matter is one of intense public interest in this province. The CEO has of his own motion halted the process under the *RIA* which would normally follow a successful petition; he has declined to advance the Initiative Petition, and the draft Bill accompanying it, to the Select Standing Committee of the Legislative Assembly under s. 10 of the *RIA*. The proponents of the Initiative Petition are currently denied the fruits of their "victory for democracy".

[7] These considerations call for the Court to make a timely decision in language which is economical and direct. These reasons have been so drafted.

[8] I will deal with a number of issues which present on this application:

- whether the impugned decision of the CEO is properly the subject of judicial review;
- whether the petitioners have legal standing to pursue that review;
- whether the draft Bill accompanying the Initiative Petition is a legislative proposal “with respect to any matter within the jurisdiction of the Legislature”; and
- whether the draft Bill has been drafted in a clear and unambiguous manner.

## II. IS JUDICIAL REVIEW AVAILABLE?

[9] The petitioners submit that in making his determination under s. 4 of the *RIA*, that a particular initiative petition meets the requirements of s. 3 of the *RIA*, the CEO is exercising a “statutory power of decision” amenable to judicial review under the *JRPA*, R.S.B.C. 1996, c. 241 [*JRPA*].

[10] The *JRPA* allows for judicial review in respect of the exercise of a statutory power (s. 2). A “statutory power” is one conferred by an enactment to exercise “a statutory power of decision”.

[11] That phrase is defined so in s. 1 of the *JRPA*:

“**statutory power of decision**” means a power or right conferred by an enactment to make a decision deciding or prescribing

(a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

(b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,

and includes the powers of the Provincial Court;

[12] The petitioners say that the CEO’s decision to approve an initiative petition under the *RIA* is a “statutory power of decision” because it affects the rights of a person - namely, registered voters who “apply to the Chief Electoral Officer for the

issuance of a petition to have a legislative proposal introduced into the Legislative Assembly in accordance with this *Act*.”

[13] The respondent Vander Zalm, on the contrary, submits that approval under s. 4 of the *RIA* is not “a statutory power of decision” because “... it did not decide or prescribe any ‘legal right, power, privilege, immunity, duty or liability’ of any of the Petitioners, or of any person except the applicant, Mr. Vander Zalm ...”.

[14] The fact is that someone’s legal right or privilege is affected by the CEO’s decision. That may not be that of the petitioners is beside the mark, that fact simply goes to the standing of the petitioners to bring these proceedings and I turn to that issue.

### III. STANDING

[15] The petitioners argue that they enjoy public interest standing to challenge the decision of the CEO. Citing *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, they submit (at para. 29 of their submission) that they meet the test because:

- (i) There is a serious issue to be adjudicated;
- (ii) They have a genuine interest in this matter, in that they represent businesses that have a clear and compelling interest in the tax structure of the province; and
- (iii) There is no other legal route for resolution of the issue of whether the Initiative Resolution meets the requirements of the *Act*.

[16] The respondent Vander Zalm argues that the petitioners have “no genuine interest in the issue”; the issue here is a draft Bill and that citizens do not have standing to question the constitutional validity of legislation until it has been passed into law: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 and *Kytkevich et al. v. Leger* (1977), 5 C.P.C. 84 (F.C.T.D.).

[17] As will appear, I do not consider that the issue here is whether the draft Bill is constitutionally sound; the issue is rather whether the CEO was correct in deciding that the Initiative Petition met the requirements of the *RIA*. In respect of that issue, I

conclude the petitioners have public interest standing to bring these proceedings on the basis they advance. Given the tight time frames which they face under the *RIA* and the fact that these proceedings were commenced before the CEO began the verification process under the legislation, I find that the application for judicial review is timely. I further conclude that as there remain unfulfilled duties on the CEO under the *RIA*, the issue before the Court is not moot.

#### **IV. A MATTER WITHIN THE JURISDICTION OF THE LEGISLATURE?**

[18] This question lies at the heart of this application. It is important to frame the central issue accurately in light of the provisions of the *RIA*. In my view, the petitioners have not done so. The thrust of their submissions is that the CEO's decision must be quashed because the "Initiative Bill is not within the jurisdiction of the province".

[19] That is not the test. The draft Bill accompanying an initiative petition must comply with s. 2 of the *RIA* (s. 3) and the CEO must be satisfied that the requirements of s. 3 have been met (s. 4). Section 2 of the *RIA* provides:

##### **Subject matter of legislative proposals**

**2** A legislative proposal may be made with respect to any matter within the jurisdiction of the Legislature.

[20] One may reasonably ask if the distinction I am drawing is more imagined than real. It is not. The petitioners' formulation of the issue requires one to focus on the draft Bill and the constitutional validity of its precise provisions, when in reality the draft Bill may never be enacted in that initial form. The draft Bill, after a successful initiative petition, goes to the Legislature (if the Standing Committee so directs under s. 11 of the *RIA*). There, it may be passed, amended and passed, or defeated.

[21] It is for that reason that s. 1 of the *RIA*, in my view, is worded in the way it is; we are simply concerned with determining if the Bill is "with respect to any matter within the jurisdiction of the Legislature". If it is, and it is drafted in a clear and unambiguous manner, that is sufficient. Whether any final piece of legislation

resulting from this exercise can pass constitutional muster, is a question for another day in separate proceedings. I turn then to the central issue as I have cast it.

[22] On the standard of review, I accept, as submitted by the CEO, that on the question of whether the draft Bill complies with s. 2 of the *RIA*, the CEO's decision must be correct; on the question of whether it has been drafted in a clear and unambiguous manner the standard should be one of reasonableness. In my view, all the considerations set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (para. 64) support this conclusion.

[23] I reproduce the draft Bill in its entirety:

*Title:*

**HST Extinguishment Act**

*Preamble:*

Whereas a Harmonized Sales Tax (HST) combining the Provincial Sales Tax (PST) with the federal Goods and Services Tax (GST) as contemplated by the Governments of British Columbia and Canada contravenes Section 92, Article 2, of the Constitution Act 1867, which states;

*92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,*

*2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.*

And whereas the people of British Columbia, as expressed in the Citizen Initiative Petition against the Harmonized Sales Tax (HST) in British Columbia, wish to extinguish the tax, therefore;

*Part I*

(1) The Agreement titled "*The Comprehensive Integrated Tax Coordination Agreement*" between The Government of British Columbia and The Government of Canada establishing an HST in British Columbia is hereby extinguished and of no force or effect whatsoever.

(2) For greater clarity, the HST is hereby extinguished in British Columbia.

*Part II*

(1) A Provincial Sales Tax (PST) of 7% with the same applications and exemptions as at June 30<sup>th</sup> 2010 shall be reinstated as the only sales tax in British Columbia for the raising of a Revenue for Provincial Purposes.

*Part III*

(1) This Act shall be effective retroactively as of June 30<sup>th</sup> 2010.

(2) Any HST revenues owing to or received by the Provincial Government between the retroactive effective date of this Act and the actual date of Royal Assent, which are over and above the original PST amount as it would previously have been applied, shall be reimbursed to all British Columbians on a per capita basis.

[24] The focus of the petitioners' case is the submission that the draft Bill purports to extinguish (or effectively repeal) the amendments to the *Excise Tax Act*, R.S.C.1985, c. E-15 which brought the HST into force in this province. The petitioners point to the elementary proposition that a provincial legislature cannot so deal with federal legislation.

[25] The petitioners say that the title to the draft Bill, and in particular Part I (2) thereof, make clear the legislative thrust of the Bill and that thrust is beyond the competence of the Legislative Assembly.

[26] I rather ask, does the draft Bill deal with "any matter within the jurisdiction of the Legislature"?

[27] Part I (1) of the draft Bill provides:

*Part I*

(1) The Agreement titled "*The Comprehensive Integrated Tax Coordination Agreement*" between The Government of British Columbia and The Government of Canada establishing an HST in British Columbia is hereby extinguished and of no force or effect whatsoever.

(the "CITCA")

[28] The CITCA is central to the scheme by which the HST came into force in British Columbia. It was entered into by British Columbia and Canada on 27 November 2009.

[29] The CITCA calls on the Government of Canada to "make best efforts to introduce ... the necessary legislative amendments to give effect to the Agreement", and on both governments to "work collaboratively and in a timely manner towards the imposition of the [Harmonized Sales Tax in British Columbia]."

[30] Subsequent to the CITCA, the Government of Canada introduced on 4 December 2009 the *Provincial Choice Tax Framework Act*, S.C. 2009, c. 32, amending the federal *Excise Tax Act*, R.S.C. 1985, c. E-15 to “implement, effective July 1, 2010 the new fully harmonized value-added tax framework in Ontario and British Columbia”. These federal legislative amendments to the *Excise Tax Act* established the HST in British Columbia, effective 1 July 2010.

[31] Likewise, subsequent to the CITCA, the Government of British Columbia introduced on 30 March 2010, the *Consumption Tax Rebate and Transition Act*, S.B.C. 2010, c. 5, which repealed the existing provincial sales tax (the “PST”), established under the provincial *Social Service Tax Act*, R.S.B.C. 1996, c. 431. The *Consumption Tax Rebate and Transition Act* also made adjustments to British Columbia’s hotel room tax, established under the provincial *Hotel Room Tax Act*, R.S.B.C. 1996, c. 207 and provided transitional provisions to coordinate the implementation of the HST. The CITCA provides for its termination by either party after five years.

[32] Clearly, British Columbia’s role as a signatory to a federal/provincial agreement like the CITCA is a “matter within the jurisdiction of the Legislature”.

[33] The petitioners respond by saying that the draft Bill goes much further than simply dealing with B.C.’s participation in the CITCA. Part I (2) of the Bill purports to repeal federal legislation (see paras. 2-4 of the petitioners’ submission).

[34] I disagree. Part I (2) of the draft Bill follows subsection (1) dealing with the CITCA. It reads:

(2) For greater clarity, the HST is hereby extinguished in British Columbia.

[35] Clearly, the drafter of the Bill believed that by putting an end to B.C.’s participation in the CITCA, the effective result would be the extinguishment of the HST in British Columbia. In other words, the drafter believed that the HST’s viability in British Columbia depends on B.C.’s signature to the CITCA. Absent the CITCA, the HST falls - not by B.C. repealing federal legislation (essentially what the petitioners say the draft Bill does), but rather by ending B.C.’s participation in the

CITCA. And that legislative proposal is surely a matter within the jurisdiction of the Legislature. Part I (2) of the Bill is not a separate provision in the Bill reflecting an impermissible provincial interference with federal legislation. It is rather to make clear the purpose of Part I (1) of the Bill; in effect the drafter is saying that by ending B.C.'s participation in the CITCA the result, "for greater clarity", is the effective extinguishment of the HST in this province. That that is the intent of the drafter is further made clear by the fact that Mr. Vander Zalm, after consultations with Elections BC staff, removed a paragraph from the draft Bill which would have declared the *Provincial Choice Tax Framework Act* of no force or effect in British Columbia.

[36] The petitioners then mount a compelling argument that this result will not obtain; it is a misguided effort by the anti-HST coalition because, say the petitioners, if the CITCA falls, British Columbia is still subject to the HST. The petitioners say that this is by virtue of the amendments to the federal *Excise Tax Act*, making B.C. a participating province in the HST by its addition to Schedule VIII to the *Excise Tax Act*.

[37] But whether the draft Bill, however it may or may not be finally worded in adopted legislation, will be effective in its stated purpose of extinguishing the HST, is not the question to be answered on the inquiry by the CEO under the *RIA*. To reiterate, that question is whether the Bill is with respect to any matter within the jurisdiction of the Legislature, and by its focus on British Columbia's participation in the CITCA, it clearly is. In his letter to Mr. Vander Zalm at the outset of the application under the *RIA*, Anton Boegman, Executive Director, Corporate Planning and Event Management, Elections B.C. said this of the CEO's role under the *RIA*:

It is important to note that this office has no mandate to provide applicants with legal advice, and the limited screening role of the Chief Electoral Officer regarding draft Bills does not include assessing the potential legal effectiveness of the proposal in achieving the desired result.

In my view, this is essentially correct and it makes the point I have endeavoured to make above.

[38] Mr. Gall, for the petitioners, quite forcefully argues that on this application this Court must resolve the question of whether the draft Bill will be constitutionally effective in doing what it purports to do, that is extinguish the HST in this Province by extinguishing the CITCA. I respectfully disagree. What the Court must decide is whether the CEO was correct in concluding that the proposed Bill is “with respect to any matter within the jurisdiction of the Legislature”. I have determined that question. The legislative proposal deals with the extinguishment of British Columbia’s role in the CITCA. That is a matter within the jurisdiction of the Legislature. Whether that will lead to the result proclaimed in Part I (2) of Bill - the extinguishment of the HST in British Columbia - remains to be seen. In saying that, I am not abdicating the Court’s supervisory role on judicial review of this decision by holding that any far-fetched legislative proposal, which might be justified by some exotic constitutional theory, can be advanced under the *RIA*. I am here saying that on its face the draft Bill satisfies s. 2 of the *RIA*. Its legal effect, if adopted, is not for this Court at this time to opine upon or resolve.

[39] In my view, the CEO correctly determined that the draft Bill complied with s. 2 of the *RIA*.

**V. DRAFTED IN A CLEAR AND UNAMBIGUOUS MANNER?**

[40] Here I reproduce this submission of the petitioners:

58. Part II of the draft Bill states as follows:

(1) A Provincial Sales Tax (PST) of 7% with the same applications and exemptions as at June 30<sup>th</sup> 2010 shall be reinstated as the only sales tax in British Columbia for the raising of a revenue for Provincial Purposes.

59. The intent of Part II is to restore the provincial sales tax regime as it existed on June 30, 2010. However by reinstating the PST as the *sole* sales tax in British Columbia, the Initiative Bill fails to address other sales taxes that existed at that time. In particular, the *Motor Fuel Tax Act*, [RSBC 1996], c. 317 and the *Hotel Room Tax Act*, [RSBC 1996], c.207, were both in effect on June 30, 2010, but the draft Bill makes no provision as to whether these taxes would continue in force under the Extinguishment Act’s proposed tax regime.

60. Part III of the draft Bill provides that:

(2) Any HST revenues owing to or received by the Provincial Government between the retroactive effective date of this Act and the actual date of Royal Assent, which are over and above the original PST amount as it would previously have been applied, shall be reimbursed to all British Columbians on a per capita basis

61. The refund mechanism laid out in Part III of the draft Bill is unclear and ambiguous because it does not specify how eligibility for this refund will be determined, who will make that determination, and the source of the funds that will be used to finance this refund.

62. Finally, the preamble of the Initiative Bill incorrectly states that the HST contravenes s. 92, Article 2 of the Constitution Act of 1867. For this additional reason, the Initiative Bill does not meet the statutory requirement of being clear and unambiguous.

[41] The fact that the draft Bill may fail to revive taxes under the *Motor Fuel Tax Act*, R.S.B.C. 1996, c. 317 and the *Hotel Room Tax Act* may make the Bill imprudent, but it does not render its drafting unclear or ambiguous.

[42] Then it is said that the refund mechanism is unclear and ambiguous. I do not agree. It is indeed a model of simplicity, the defined refund "shall be reimbursed to all British Columbians on a per capita basis". Whether the refund scheme could have been fleshed out in considerably more detail in the draft Bill is not the point - that does not render the draft Bill in its current form unclear or ambiguous.

[43] Finally, the petitioners say that the preamble to the draft Bill is incorrect in stating that the HST contravenes s. 92, Article 2 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5. It may be, but its language to that effect is very clear and unambiguous.

## **VI. CONCLUSION**

[44] In the result I would not give effect to any of the petitioners' submissions, and I dismiss this application. In the circumstances of the parties' positions in these proceedings, weighing the balance of convenience and the fact that Mr. Vander Zalm has been successful in the Initiative Petition and its defence in this Court, I would respectfully ask that the Chief Electoral Officer perform his remaining duties

under the *Recall and Initiative Act* forthwith.

  
The Honourable Chief Justice Bauman

