

No. 2159575
Prince George Registry

Between

In the Supreme Court of British Columbia

KIDD VENTURES LTD.

Petitioner

and

**HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

Respondent

NOTICE

under section 8(2)(a) of the *Constitutional Question Act*, R.S.B.C. 1996, c.68

Name of Applicant: Kidd Ventures Ltd.

To: Ministry of Justice and Attorney General of British Columbia
Deputy Attorney General
1001 Douglas Street
Victoria, British Columbia, V8W 2C5

And to: Attorney General of Canada
900 - 840 Howe Street
Vancouver, British Columbia, V6Z 2S9

TAKE NOTICE, pursuant to Section 8(2)(a) of the *Constitutional Question Act*, an application will be made by the petitioner to the presiding judge at the courthouse at 250 George Street, in the City of Prince George, in the Province of British Columbia on a date to be set, questioning the constitutional validity of:

Section 44 of the *Motor Fuel Tax Act*, R.S.B.C. 1996, c.317 (the "impugned provision");

and seeking a remedy pursuant to section 52 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 as set out in the Petition attached to this Notice of Constitutional Question as Schedule A.

AND FURTHER TAKE NOTICE THAT at the hearing the Petitioner will make argument on the legal basis as set out in the Petition attached to this Notice of Constitutional Question as Schedule A and, in particular, will argue that the impugned provisions are ultra vires in that:

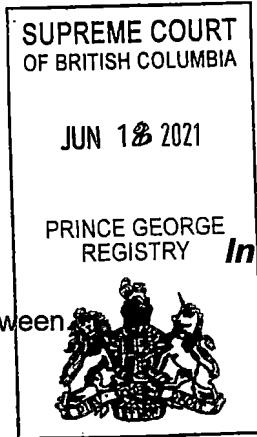
- (1) any penalty imposed by section 44(1) of the *Motor Fuel Tax Act* and the authorization for indemnification and reimbursement contemplated by section 44(4) of the Act, taken together, constitute, in substance, an indirect tax which is outside the jurisdiction of the legislative authority of the Province of British Columbia pursuant to section 92(2) of the *Constitution Act, 1867*;
- (2) In the alternative, if the impugned provisions constitute a direct tax, any penalty imposed by section 44 of the Act is invalid on the ground that it is imposed by a body other than the Legislature of British Columbia or without a clear and unambiguous authorization of taxation within the enabling statute in contravention of section 90 (incorporating by reference section 53) of the *Constitution Act, 1867*

Dated 18 June 2021



Signature of lawyer for Kidd Ventures Ltd.
Dan M. Marcotte, Q.C.

2159575



Schedule A

No.
Prince George Registry

Form 66
[Rules 16-1(2) and 21-5(14)]

Between

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Petitioner

and

HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondent

PETITION TO THE COURT

ON NOTICE TO: Her Majesty the Queen in Right of the Province of British Columbia
Ministry of Attorney General
Deputy Attorney General
1001 Douglas Street
Victoria, British Columbia, V8W 2C5

This proceeding has been started by the Petitioner*s for the relief set out in Part 1 below.

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
 - (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,

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed Petition was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Petition was served on you, or
- (d) if the time for response has been set by order of the Court, within that time.

(1) **The address of the Registry is:**

Prince George Law Courts
J. O. Wilson Square
250 George Street
Prince George, British Columbia
V2L 5S2.

(2) **The ADDRESS FOR SERVICE of the Petitioner is:**

Dan Marcotte, Law Corporation
Dan M. Marcotte, Q.C.
440 Brunswick Street
Prince George, British Columbia
V2L 2B6.

Fax number address for service (if any) of the Petitioner: Not Applicable.

E-mail address for service (if any) of the Petitioner: Not Applicable.

(3) **The name and office address of the Petitioner's lawyer is:**

Dan Marcotte Law Corporation
Dan M. Marcotte, Q.C.
440 Brunswick Street
Prince George, British Columbia
V2L 2B6.

CLAIM OF THE PETITIONER*

Part 1: ORDERS SOUGHT

1. An Order allowing the appeal of the Petitioner under section 51 of the *Motor Fuel Tax Act*, R.S.B.C.1996, c.317 (the "Act") from a decision of the Minister of Finance made under section 50(4) of the *Act* affirming a Notice of Assessment made under the Act.
2. A declaration that any penalty imposed on the Petitioner under section 44 of the Act is invalid on the ground that it is an indirect tax that is outside the legislative authority of the

Province of British Columbia under section 92(2) of the *Constitution Act, 1867*;

3. In the alternative, a declaration that any penalty imposed on the Petitioner under section 44 of the *Act* is invalid on the ground that it was imposed by a body other than the Legislature of British Columbia in contravention of section 90 (incorporating by reference section 53) of the *Constitution Act, 1867*;
4. A declaration that the Notice of Assessment is a nullity as it is not an assessment properly authorized or issued under the *Act*;
5. A declaration that the Notice of Assessment is a nullity as the *Act* does not authorize the issuance of a notice of assessment for a penalty unless and until a penalty is actually imposed under the *Act*;
6. A declaration that the Notice of Assessment is a nullity as the *Act* does not authorize a penalty to be imposed based upon an estimate, or in the alternative, that the methodology used to obtain the estimate was not reasonably based on adequate representative data;
7. A declaration that the Notice of Assessment is a nullity in that the audit employed by the Respondent exceeded the scope and purpose of an audit authorized by section 41 of the *Act*;
8. An order setting aside the Notice of Assessment and directing the Minister to refund to the Petitioner the amount that the Petitioner was compelled to pay by reason of the Notice of Assessment, together with such interest as may be applicable;
9. Costs, including special costs and applicable taxes on those costs; and
10. Such further and other relief as this Honourable Court deems meet and just.

Part 2: FACTUAL BASIS

1. The Petitioner, Kidd Ventures Ltd., is a corporation incorporated under the law of the Province of British Columbia with a registered office located at 440 Brunswick Street, in the City of Prince George, in the Province of British Columbia.
2. The Petitioner owns and operates a family business convenience store, Husky branded gas station and gas card lock system located at 8087 Hart Hwy in the City of Prince George and is a "retail dealer" of motor fuel under the *Motor Fuel Tax Act*, R.S.B.C.1996, c.317 (the "*Act*").
3. The Petitioner's business is located within a farming community and in close proximity to a marine recreational area. Many of the customers of the Petitioner's business are farmers and recreational boaters.
4. The Petitioner is authorized to sell coloured fuel (also called dyed or marked fuel) which is gasoline or diesel mixed with a specific dye to distinguish it from clear fuel.

5. Under the Act, coloured fuel is taxed at a lower rate than clear fuel and can only be used for those purposes specified in section 15 of the Act.
6. Section 5(1) of the Act provides that, subject to section 5.1, a purchaser of coloured gas must pay to the government, at the time of purchase, tax on the fuel at the rate of 3 cents per litre.
7. Section 5.1(1) requires a purchaser, who buys coloured fuel through a card lock system or in a quantity greater than 45 litres, to pay a differential tax unless the retail dealer selling the fuel obtains from the purchaser a declaration stating that the fuel will be used for a purpose set out in section 15 of the Act.
8. Section 5.1(1) is subject to section 5.1(2) which states that section 5.1(1) does not apply if, inter alia, the purchaser is a farmer or the coloured fuel is marine diesel fuel.
9. The Petitioner sold coloured fuel and in some cases did not obtain the declaration referred to in section 5(1). The Petitioner obtained declarations from purchasers of coloured fuel who paid in store but did not obtain declarations from purchasers of coloured fuel who paid at the pump. Sales for all fuel by pay at the pump transactions are recorded on the system of the Petitioner's fuel supplier, Husky Oil, and payments are credited to Husky's account. Sales for all purchases made in store are also recorded on Husky's system and payments are credited to the Petitioner. Information about pay at the pump transactions are not visible to the employees of the Petitioner.
10. In 2018 the Consumer Taxation Branch of the Ministry of Finance purported to conduct an audit of the Petitioner's records under the Act for the period from July 1, 2015 to July 31, 2017, a period of 25 months. The audit was conducted to determine whether tax had been applied at the correct rate and whether exemption certificates were obtained for sales of coloured fuel.
11. The audit was in fact an estimate derived from the sampling of three test periods during the 25 month audit period. Those three test periods were the month of November 2015, the month of May 2016 and the month of July 2017. The test results from these three months were then prorated over the entire 25 month audit period.
12. The Petitioner's records show that the months with the highest volumes of fuel sales are the nice weather months of May, June, July and August and, because of the location of the Petitioner's business, the month of November occurs during hunting season and because of that it is not a low sales month. Those records show that the months of May, July and November are not representative of normal monthly fuel sales and are not representative samples of the entire 25 month audit period.
13. The inspector conducting the audit sent to the Petitioner a letter, dated November 23, 2018, attaching with the results of the audit along with an assessment summary, which said, part:

<i>Unremitted tax:</i>	<i>\$0.00</i>
<i>Sales:</i>	<i>\$192,918.98</i>

<i>Purchases:</i>	<i>\$0.00</i>
<i>Tax Credits:</i>	<i>\$0.00</i>
<i>Audit Interest:</i>	<i>\$27,730.80</i>
<i>Refund Interest:</i>	<i>\$0.00</i>
<i>Penalty:</i>	<i>\$846.07</i>
<i>Total Assessment:</i>	<i>\$221,495.85</i>

14. The Ministry issued to the Petitioner a Notice of Assessment, dated November 23, 2018, requiring the Petitioner to pay the amount set out in the notice.
15. The Notice of Assessment said, in part:

"As a result of an audit under the Motor Fuel Tax Act covering the period 01-Jul-2015 to 31-Jul-2017, you are assessed as follows:

<i>Tax/Security Due:</i>	<i>\$0.00</i>
<i>Penalty Equivalent:</i>	<i>\$192,918.98</i>
<i>Audit Credits</i>	<i>\$0.00</i>
<i>Penalty:</i>	<i>\$846.07</i>
<i>Interest:</i>	<i>\$27,730.80</i>
<i>Assessment Total:</i>	<i>\$221,495.85</i>

The penalty equivalent shown above is a penalty imposed under section 44(1) of the Act equal to the tax or security that should have been but was not collected."

16. The penalty in section 44(1) of the Act is expressed to be an amount "equal to the amount of the tax that should have been collected..."
17. Section 44(4) of the Act permits the person penalized to "recover the amount imposed under subsection (1)..."
18. Subsequent to the Notice of Assessment the Petitioner paid the amount required to be paid together with further assessed interest.

Part 3: LEGAL BASIS

1. Section 50(1) of the Act provides that a decision of the minister under section 50(4) of the Act may be appealed to the Supreme Court by way of a petition proceeding.
2. Section 50(4.1) of the Act provides that an appeal under section 50(1) is a new hearing and

is not limited to the evidence and issues that were before the minister.

3. Section 52(1) of the *Constitution Act, 1982* provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force or effect.
4. Section 92(2) of the *Constitution Act, 1867* confers jurisdiction upon the provinces of Canada to raise revenue by way of direct taxes. The jurisdiction to raise revenue by the imposition of indirect taxes is reserved to the Government of Canada.
5. A fee or a penalty imposed by legislation or regulation can be, in substance, a tax particularly when the amount of the fee or penalty is expressed in the legislation or regulation to be equivalent to the amount of a tax otherwise imposed.
6. The penalty in section 44(1) of the *Motor Fuel Tax Act* (the "Act") is expressed to be an amount "...equal to the amount of the tax that should have been collected...".
7. Section 44(4) of the section 44(1) of the Act empowers the person penalized to "*recover the amount imposed under subsection (1)...*". This is, in effect, an assignment of the government's chose in action against those taxpayers primarily obligated, under the Act, to pay the tax.
8. A direct tax is one which is demanded from the very person who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.
9. The penalty contemplated by section 44(1) of the Act and the authorization and intention for indemnification and reimbursement contemplated by section 44(4) of the Act constitute, in substance, an indirect tax which is outside the legislative authority of the Province of British Columbia pursuant to section 92(2) of the *Constitution Act, 1867*.
10. If the penalty imposed under section 44 of the Act is a direct tax and within the jurisdiction of the Province of British Columbia then the imposition of that tax must be made by the Legislature in accordance with sections 53 and 90 of the *Constitution Act 1867* and, when so imposed, must be made by a clear and unambiguous authorization of taxation within the enabling statute. Section 44 of the Act does not do so.
11. A notice of assessment is not valid unless it is signed by, or at least that it be apparent on the face of the notice that it is issued by, the person authorized by the legislation to issue the notice. Under the Act, only the "director" can issue a notice of assessment but there is no evidence that the notice was in fact issued by the director.
12. A notice of assessment for a "penalty imposed" is not valid unless and until a penalty has in fact been imposed. Under the Act, there must be a penalty imposed before the director can issue a notice of assessment.
13. There is no legislative authority to conduct an audit or to impose a penalty under the Act based upon an estimate. The penalty imposed, and the notice of assessment itself, is not authorized by the legislation.

14. Even if the legislation authorizes the imposition of a penalty based upon an estimate, the methodology used to obtain that estimate must be reasonably based on adequate, representative data. It is implicit in the Act that if the director is to make a determination under the Act based on an estimate then it is incumbent on the director to demonstrate that the estimate was made reasonably based on adequate, representative sampling periods and the data derived therefrom.
15. The purpose and scope of the audit that resulted in the notice of assessment exceeded the purpose and scope of an audit authorized by the Act.
16. A person can recover taxes paid under an unconstitutional statute when that payment has been made under compulsion or in circumstances where the payment by the person has been unjust or oppressive.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Bruce Charles Kidd made June 18, 2021

The Petitioner estimates that the hearing of the Petition will take one full day (subject to consultation with counsel for the Respondent after service of this Petition).

Date: 18 June 2021.



Signature of Dan M. Marcotte, Q.C.
Lawyer for the Petitioner*

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 Master

This **Petition** was prepared by Dan M. Marcotte, of the law firm Dan Marcotte, Law Corporation, whose place of business and address for delivery is 440 Brunswick Street, Prince George, British Columbia, V2L 2B6. Telephone: (250) 564-0052.

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Barrister and Solicitor
440 Brunswick Street
Prince George, B.C.
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