IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2023 BCSC 29

Date: 20230106
Docket: S219179
Registry: Vancouver

Between:

Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of Smgyigyetm Gitxaala, and Gitxaala Nation

Petitioners

And

Chief Gold Commissioner of British Columbia, Lieutenant Governor in Council of British Columbia, Attorney General of British Columbia, Christopher Ryan Paul, Oliver John Friesen, GMR Global Mineral Resources Corp., and Johan Thom Shearer

Respondents

- and -

Docket: S224680
Registry: Vancouver

Between:

Ehattesahet First Nation and Chief Simon John in his capacity as Chief of the Ehattesahet First Nation on behalf of All Members of the Ehattesahet First Nation

Petitioners

And

His Majesty the King in Right of the Province of British Columbia, as represented by the Chief Gold Commissioner of British Columbia; Attorney General of British Columbia; Privateer Gold Ltd.; Almehri Mining Inc.; GMR Global Mineral Resources Corporation; Lieutenant Governor in Council of British Columbia; Andre Lyons, Calvin Manahan, and Forest Crystals Ltd.

Respondents

Before: The Honourable Justice A. Ross

Reasons for Judgment on Intervenors

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Place and Date of Judgment:	Vancouver, B.C. January 6, 2023

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[1] These reasons address the applications for intervener status in respect of two petitions that have been joined. As described below, with some exceptions, the parties are in significant agreement that the applicants should be granted status to intervene. The main arguments relate to the terms upon which the potential intervenors will participate.

[2] The two underlying petitions challenge parts of the mineral tenure regime in British Columbia. Under the current system ("free-entry"), there is no duty on any miner to consult with any Indigenous Nation prior to staking a claim for mineral rights on a parcel of land. The two petitions assert that this system is unconstitutional because it does not meet the Crown's obligations to consult. If successful, the challenge would have a significant impact on a number of (non-party) groups within the province. Not surprisingly, several groups have applied for intervenor status.

[3] The hearing of the two petitions is scheduled for a seven-day period commencing April 3, 2023. By agreement, all initial affidavit material will be filed by Mid-January 2023. I understand that the parties agreed on this date so that each receiving party would have an opportunity to prepare response material in a timely fashion that would not put the hearing date in peril.

[4] Also, by agreement, all of the potential intervenors brought their applications before me on December 15–16, 2022. Again, that date was booked so that I could provide these reasons in sufficient time for the intervenors to deliver their material and meet the agreed-upon deadlines.

[5] I am indebted to all counsel for their cooperation on this matter to date, along with their well-reasoned submissions on the terms of any intervenor's involvement.

Issues to be Decided

[6] The main issues for me to decide are:

a) Should any or all of the applicants be granted status to intervene in these petitions?

b) If granted status, what terms should apply in relation to length of written and oral submissions?

c) Should any intervenor be granted the right to tender evidence in relation to the substantive issues in the petition?

[7] In respect of the last issue, I note that each petitioner tendered affidavit evidence in support of its application to intervene. The issue for me relates to the admissibility of that evidence on the hearing record. In other words: Should an intervenor's evidence be admissible to form the basis of my decision, either on the substantive issue, or on the remedy? I discuss this issue in more detail below, specifically in relation to the application of the mining industry coalition (described below).

History and Nature of the Litigation

[8] As noted, the two petitions challenge the mineral tenure regime in the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 [*MTA*], and the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 [*Regulation*], as well as the policies and procedures established by the Chief Gold Commissioner of British Columbia on behalf of the Crown. Those policies allow for the free-entry system of staking claims.

[9] The two petitions contain slightly different claims. However, in very general terms, the petitioners assert that the free-entry system does not respect the Crown's "duty to consult" and breaches the test set out in *Haida Nation v. British Columbia (Minster of Forests)*, 2004 SCC 73. The petitioners assert that the ability to stake claims without consultation has an adverse effect on their rights or title. Further, they assert that that the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the subsequent *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 [*Declaration Act*], give rise to justiciable standards against which this Court may invalidate legislation.

[10] The petitioners have tendered evidence regarding the adverse effect of mining in their territories. The Crown has responded to that evidence. The Crown

defends the current system on several grounds, including the position that the staking of a mineral claim, as opposed to the later development of a mine, does not adversely affect any Aboriginal right or title. The Crown further argues that UNDRIP and the *Declaration Act* do not create justiciable standards.

[11] The first petition (BCSC Vancouver Registry No. S219179) is brought by Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the Smgyigyetm Gitxaala and Gitxaala Nation (the "Gitxaala Petition"). It was filed October 25, 2021, and later amended. The current version of that petition was filed September 28, 2022. The provincial respondents filed their response on March 17, 2022. The individual respondents also filed material. At present, the evidence in the Gitxaala petition comprises 25 affidavits (15 filed by the petitioner, nine by the provincial respondents, and one by the individual respondents).

[12] The second petition (BCSC Vancouver Registry No. S224680) is brought by Chief Simon John, in his capacity as Chief of the Ehattesaht First Nation on behalf of the members of the Ehattesaht First Nation (the "Ehattesaht Petition"). It was filed June 9, 2022, and later amended. The current version of that petition was filed November 30, 2022. The provincial respondents filed their response on September 23, 2022. The corporate respondent, Privateer Gold Ltd., filed its response on September 22, 2022. At present, the evidence in the Ehattesaht Petition comprises ten affidavits (three filed by the petitioners, six by the provincial respondents, and one by the corporate respondent).

[13] The two petitions were joined pursuant to Rule 22-5(8) of the *Supreme Court Civil Rules* by consent order dated September 15, 2022. The evidence in each petition is evidence in the other petition.

[14] Because the remedy sought by the petitioners is relevant to my discussion on the terms of the intervenors' involvement, I set out the broad strokes of that relief here.

[15] Each petition seeks relief in the form of various orders and declarations, some in the alternative. There are slight differences in two petitions. Portions of the relief sought relate to specific mineral claims on the specific territory of each petitioner. However, whether by injunctive or declaratory relief, each petition seeks a declaration that the legislative and regulatory scheme that allows the free-entry system is unconstitutional and an order striking it down in its entirety. Such an order would, of course, leave a vacuum in the mineral tenure system. For context, I am informed by counsel for the Crown that replacement legislation is currently being considered. However, that is not my concern.

[16] If I ultimately rule that the current system should be struck down, the next question will be whether I should delay the implementation of that order to allow the legislature to enact corrective provisions. The parties have significant opposing positions on each side of this "remedy" debate:

a) The petitioners submit that if an order is made, but implementation is delayed, then their territories, and all of British Columbia, will be turned into a claim-staking free-for-all, wherein every miner will stake all possible claims before a duty to consult is legislated.

b) The Crown responds (with the support of the applicant mining industry coalition) that the striking-down of the existing legislation, with immediate effect, would create a vacuum in an important, income-generating industry within the province.

[17] It will be evident from the preceding paragraph that, although the mining industry coalition applies to be an intervenor, it presents a position that is substantially in alignment with the provincial respondents and supports the existing free-entry system. The mining industry coalition submissions do not purport to address the substantive issues raised by the petitioners. Instead, its submissions focus on the remedy. As discussed below, the mining industry coalition seeks a greater share of the intervenor stage, both in submissions and in the evidentiary record. The petitioners oppose the granting of a "louder voice" to any intervenor.

Proposed Intervenors

[18] There are eight separate groups applying to intervene in the Gitxaala petition:

a) Gitanyow Hereditary Chiefs ("Gitanyow") and Nak'azdli Whut'en First Nation ("Nak'azdli");

b) Nuxalk Nation, as represented by its Chief and Hereditary Chiefs ("Nuxalk Nation");

c) Ts'kw'aylaxw First Nation, as represented by its Chief and Counsel ("TFN");

d) BC Assembly of First Nations, First Nations Summit, and Union of British Columbia Indian Chiefs (together, "FNLC");

e) Human Rights Commissioner for British Columbia ("HRC");

f) First Tellurium Corp. and Kingston Geoscience Ltd. ("First Tellurium/Kingston");

g) Mining Watch Canada, the B.C. Mining Law Reform Network, Wildsight, SkeenaWild Conservation Trust, Kamloops Moms for Clean Air, and Western Canada Wilderness Committee (the "ENGO Coalition"); and

h) Association for Mineral Exploration British Columbia, the Mining Association of British Columbia, and the Prospectors and Developers Association of Canada (collectively the "Mining Industry Coalition" or "MIC").

[19] Three of the applicants (HRC, First Tellurium/Kingston, and MIC) filed mirror applications in both the Gitxaala and Ehattesaht petitions. The other five applicants only filed in the Gitxaatla petition. However, given the terms of the joinder order, each intervenor will intervene in both petitions.

[20] It will become evident that:

a) four of the applicants:

   i. Gitanyow, Nak'azdli,

   ii. Nuxalk Nation,

   iii. TFN, and

   iv. First Nations Leadership Council

   are Indigenous governing bodies which take positions substantially in line with the petitioners.

b) one applicant, HRC, also takes a position that aligns with that of the petitioners.

c) one applicant, First Tellurium/Kingston, brings a perspective on other mining tenure systems. It argues, that the model under which it conducts business could be a reasonable alternative to the first-entry system.

d) one applicant, the ENGO Coalition, brings the perspective of several conservation groups.

e) one applicant, MIC, seeks to bring the perspective of the mining and prospecting industries.

[21] Although intervenors do not "take sides" in the litigation, it is evident that:

a) the positions of the Indigenous governing bodies, HRC, and First Tellurium/Kingston align with the position of the petitioners. For the sake of brevity, I refer to these applicants collectively as the "Petitioner-Aligned Applicants";

b) the ENGO Coalition does not align with either party; and

c) MIC's position aligns with the position of the provincial respondents.

[22] Following a discussion of the applicable legal tests, I address the applicants in the groupings listed above.

Applicable Legal Tests

[23] All parties to this application agree that the granting of intervenor status is a discretionary order and that it derives from the inherent jurisdiction of the court. There are two alternative bases:

a) where the decision will have a direct impact on the applicant; and

b) where the applicant offers a special perspective on an issue of public importance.

(*Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at paras. 5–9.)

All applicants and parties agree that the proposed intervenors fall into the second category.

[24] There is no dispute on the questions to be addressed in an intervenor application. In *BC Civil Liberties Association v. Canada (Attorney General),* 2018 BCCA 282 at paras.14 –15, Garson J.A. re-stated the list of criteria:

> [14] … The legal criteria that apply to intervenor applications under this second route are well settled and may be summarized as follows:
>
> a) Does the proposed intervenor have a broad representative base?
>
> b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
>
> c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
>
> d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?
>
> …
>
> [15] I would add to these established criteria that the court may, where appropriate, give consideration to factors relating to the orderly and efficient administration of justice. Clearly the number of intervenors ought not to overwhelm the appeal in a manner that may be overly burdensome for the parties or the court. I have given consideration to this factor in my assessment of the totality of the applications.

[25] I also note that there is a potential for inherent conflict between criteria c) and d). An intervenor that presents a perspective not already before the court may broach the fourth criterium by seeking to expand the litigation by raising new issues. I address that issue below.

[26] Further, our courts have recognized that in cases involving the determination of constitutionally protected Aboriginal rights, the scope of intervenors can be expanded to include everything that could reasonably assist me in reaching my decision. In *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2018 BCCA 413 [*Ahousaht*], Justice Fisher discussed both the importance of, and the constraints, that should be placed on, intervenors in these cases:

> [18] I recognize that in cases such as this, which involve constitutionally protected Aboriginal rights, it is important for the court to have everything before it that could reasonably assist in its ultimate determination: *Stoney Creek Indian Band v. Alcan Aluminum Ltd.*, 1999 BCCA 293 at para. 8; *Maple Trust Company v. A.G. (Canada)*, 2007 BCCA 195 at para. 5. However, repetition is to be avoided and the appeal must remain focused on the issues raised by the parties: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2012 BCCA 330 at para. 32; *British Columbia Civil Liberties Association* at para. 14. Given the number of applications before me, I must consider the orderly and efficient administration of justice. The number of intervenors should not overwhelm the appeal in a way that is a burden for the parties or the court: *British Columbia Civil Liberties Association* at para. 15.
>
> [19] It is important to note that the role of an intervenor is not to support the position of a party. While an intervenor's submission may support one party's position, its purpose is to make principled submissions on pertinent points of law: see Araya at para. 12, citing *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28.

[27] My decision below relies on these principles.

[28] As I discuss below, there is significant overlap in the positions taken by some of the proposed intervenors. The applicants submit that the prospect of repetition can be addressed by:

a) limitations on the length of submissions (written and oral); and

b) co-operation between counsel for intervenors who take overlapping positions.

[29] I noted above the cooperation between counsel in preparing the petitions and applications to date. On that basis I have no hesitation in accepting the submission that like-minded intervenors will dovetail their submissions to avoid repetition. I address the time and page limits below when addressing the different groupings of applicants.

[30] I also address below the issue of intervenors adducing evidence. As noted, MIC seeks an order that its affidavit material be evidence on the petition record. The law is clear that intervenors adducing evidence is only allowed in "rare" cases. The question is whether MIC's situation fits into that small sub-set of cases.

[31] I return to discuss the individual criteria below. I also apply the umbrella consideration that the proposed intervenor should be in a position to assist me in coming to my decision on the issues between the parties.

Positions of the Parties

[32] Next, I address the overall position of the petitioners and the provincial respondents.

[33] The petitioners' overall position (with respect to all applicants) can be summarized as follows:

a) All of the eight applicants should be granted intervenor status.

b) The written and oral submissions should be limited in the manner described below.

c) The intervenors' affidavit material should not form part of the petition record.

d) No costs should be sought by, or awarded against, an intervenor (subject to the position on MIC's application.)

[34] The provincial respondents take different positions for different groupings of applicants:

a) With respect to the Petitioner-Aligned Applicants (defined at para. 21 above):

   i. These six applicants should be granted intervenor status.

   ii. Written and oral submissions should be limited in the manner described below.

   iii. Intervenors must cooperate to avoid duplication.

   iv. Intervenors should not be permitted to refer to matters not in evidence or raise new issues.

b) The ENGO Coalition should not be granted intervenor status.

c) MIC should be granted "more pages" and more time, than the other intervenors. I discuss this "Equality of Arms" issue below.

[35] The provincial respondents further submit that, to the extent that (only) FNLC and HRC argue the application of UNDRIP and the *Declaration Act*, the submissions of those two intervenors should not overlap on that issue.

Discussion

[36] First, I must address the practical issues relating to the time allowed for all intervenors at the hearing. As noted above, the hearing is scheduled for seven days. There is general agreement (not including MIC) that the portion of the hearing reserved for the intervenors should not exceed one-half day. Given that there are eight intervenors, that would allow for an average submission of approximately 15 minutes per intervenor.

[37] In relation to the Petitioner-Aligned Applicants, I have reviewed the submissions of the parties and those applicants. I accept that each organization presents a lens upon the issues that will assist me in making my ultimate determinations. Each has sufficiently broad representation. The two petitions clearly engage their interests. While there is some overlap, I am satisfied that each

intervenor in this group will bring a different perspective. None of them seek to expand the scope of the hearing. They will not overwhelm or take over the hearing.

[38] Insofar as the parameters to be placed on each intervenor in the group of Petitioner Aligned Applicants:

a) Each will be allowed written submissions of 15 pages.

b) Each will be allowed oral submissions of 15 minutes.

c) To the extent possible, they should cooperate to avoid repetition.

[39] I note that one counsel represents both TFN and Nuxalk. Counsel submits that those two intervenors should have additional time because they are putting forward the positions of two separate entities. However, I am satisfied that those positions can be forward within the limitations set out above.

[40] There is an evidentiary issue that must be addressed in respect of the Petitioner Aligned Applicants (and with MIC as discussed below). The material of some Petitioner Aligned Applicants includes references to the intervenors' negative experiences with mining operations on their territories.

[41] The question is whether, or to what extent, the intervenors should be permitted to refer to their negative experiences in support of their positions at the hearing. In other words: Should the intervenors be entitled to adduce evidence on the petition record for the purpose of influencing my ultimate decision?

[42] The petitioners propose that there should be a "hybrid approach" to the evidence and submissions of the intervenors. They propose that each intervenor's submissions should be allowed to refer to its own affidavit material, solely for the purpose of explaining the basis for its intervention, but that such affidavits are not admissible with respect to issues of adjudicative fact and do not form part of the evidentiary record in the petition.

[43] The petitioners note that the BC Court of Appeal very recently adopted this hybrid approach in *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2022 BCCA 415. Justice Griffin ruled that the intervenors' affidavits were admissible so that the division of the hearing panel would understand the basis for their intervention. I note that the same order provided that no evidence from an intervenor would be admissible without further order of the court.

[44] The provincial respondents submit that there is a "murky danger" in the hybrid approach. They submit that the line between the two purposes will be nebulous. In other words, there will be inherent overlap if I allow intervenors to refer to their individual experiences in order to explain the basis for their intervention. Those experiences will inevitably slop over to form the basis for submissions on "issues of adjudicative fact."

[45] The provincial respondents submit that the distinction is unclear and would allow intervenors to introduce disputed or controversial factual evidence through the back door that would not be admissible through the front door (*i.e.*, the "rare" cases where intervenors are permitted to adduce evidence on the hearing record).

[46] Specifically, the provincial respondents dispute certain issues stated as fact in some of the applicants' materials. As an example, the provincial respondents point to the material of one applicant which criticizes the province's role in the regulation of a since-shuttered mining operation on their territory. The provincial respondents note that the same intervenor commenced litigation against the province (and others) regarding the closure of that mine. The province has denied any liability in that proceeding. Hence, the provincial respondents submit that allowing that evidence to be admissible at any level in the hearing may require the provincial respondents to adduce further evidence to address the intervenors' allegations.

[47] I have considered the submissions of counsel on this issue. In my opinion, I will be able to disabuse my mind of material adduced by the intervenors when reaching my ultimate decision. I am not concerned that the intervenor's material will sneak into my decision-making process on the underlying issues.

[48] On that basis, I accept the "hybrid approach" proposed by the petitioners.

[49] I am hopeful that the provincial respondents will take me at my word and that they will not feel any need to address, or respond to, the intervenors' material. I accept, for the purpose of these petitions, that there are at least two sides to every story, and in the circumstances of the intervenors, I am getting only one of those sides.

[50] I further see the value in Griffin J.A.'s decision in *Saik'uz First Nation* to reserve the right of intervenors to apply to adduce further affidavit material, or rely on affidavit material already filed for a different purpose. The hearing of these petitions has not yet commenced. I cannot anticipate all of the twists that may present. I am reticent, at this stage, to make an omnibus order that could ultimately result in the hearing proceeding in a manner that does not allow me to consider all evidence that would assist me in coming to my determination.

[51] It follows that each Petitioner Aligned Applicant, in submissions, may refer to its own affidavit material, solely for the purpose of explaining the basis for its intervention and, subject to further order of this Court, such affidavits are not admissible with respect to issues of adjudicative fact and do not form part of the evidentiary record in the petition proceeding.

[52] I return to this issue below when addressing the position of MIC.

The ENGO Coalition

[53] As noted above, the ENGO Coalition seeks to put forward the position of several environmental groups.

[54] The petitioners both consent to the application of the ENGO Coalition. The provincial respondents oppose their inclusion as intervenors.

[55] To be frank, the provincial respondents raise valid concerns:

a) Any environmental issues, while of concern generally, cannot have an impact on the central question of the duty to consult, nor on the issues relating the proper remedy.

b) These petitions are not a wide-ranging investigation into the benefits and detriments of mining in British Columbia. The court has no jurisdiction to determine multifactorial policy matters.

c) The ENGO Coalition's draft submissions raise two completely new issues, including:

i. The rights of "private property owners".

ii. The alleged adverse effects on communities and the environment including the alleged failure to use land use plans.

I accept that neither of these issues are raised in the pleadings.

[56] I agree with the provincial respondents that the ENGO Coalition's draft submission does not comply with the parameters of a public interest intervenor. It does not refer to the pleadings or the issues raised by the parties. The submissions are supported by hundreds of pages of affidavit material.

[57] While I accept the provincial respondents' submissions regarding the current state of the ENGO Coalition material, I believe that there may be a proper role for this coalition as an intervenor. As noted above, I am unable to foresee all of the potential developments and all the assistance I may require in the hearing of the petitions. On that basis, I am inclined to allow the ENGO Coalition application.

[58] However, any submissions from the ENGO Coalition must conform to the proper role of an intervenor in this proceeding. A wide-ranging critique of the mining industry and mining regulation in the province will neither be helpful nor admissible.

[59] When addressing the specific criteria set out in *Ahousaht*,

a) I am satisfied that the ENGO Coalition has a sufficiently broad representative base.

b) The issues raised in the petitions legitimately engage the coalition's interests.

c) I find that the third and fourth criteria are in conflict. While the ENGO Coalition could bring a different perspective, its current submissions raise new issues that are not before the court.

[60] Again, at this stage of the proceeding, it is too early for me to say that the ENGO Coalition does not have a proper voice in this proceeding. Hence, I allow its application for intervenor status on the following terms:

a) Written submissions of 15 pages.

b) Oral submissions of 15 minutes.

c) Both written and oral submissions will focus on providing a unique lens on the issues raised in the pleadings and will not raise new issues.

d) No affidavit material will be admissible on the hearing record.

The Mining Industry Coalition

[61] All parties consent to MIC's application for intervenor status, but differ on the terms of that intervention.

[62] I have considered the criteria, and I am satisfied that MIC has a broad representative base. Its members are interested in the issues raised. MIC brings a unique perspective. On the fourth criterium, the petitioners submit that MIC may attempt to raise new issues or expand the litigation. I deal with that issue below.

[63] The three main issues to address on MIC's application relate to:

a) whether there should be "Equity of Arms";

b) whether MIC's affidavit material should be admissible on the hearing record;

c) the raising of new issues and the prospect of overwhelming the proceeding.

[64] First, on the "Equity of Arms" issue, MIC submits (with the support of the provincial respondents) that all of the other intervenors take positions that align with the petitioners. Hence, MIC submits that it should be provided with more pages and more time for oral submissions. In its written submissions, MIC proposed that it be provided with 30–60 pages of written submissions and 60–90 minutes of oral submissions. I note that counsel reasonably tempered those submissions during the course of the application.

[65] The petitioners submit that the intervenor's position in the litigation does not require that it "respond" or argue against the parties and other intervenors' positions. Instead, the proper role is to put forward the intervenor's unique position on the issues before the court. Hence, there is no need for MIC to have 60 pages and 90 minutes to put its position forward.

[66] In addressing this issue, I note that MIC's position, and submissions, largely address the remedy sought in the petitions. MIC's position is that any ruling that strikes down of the current system, without an order staying the implementation to allow the legislature to introduce a new system, would result in significant financial hardship to MIC's constituents. Hence, the MIC's submissions focus on the remedy, as opposed to the underlying substantive questions relating the duty to consult.

[67] Of course, any discussion of remedy presupposes a ruling in favour of he petitioners on the substantive issues. Should that occur, I believe it will be helpful for me to have the perspective of the MIC in relation to the potential effects of any ruling on the industry. In that respect, I expect that MIC's position will require wider scope.

[68] I find that the appropriate limitation on MIC's submissions is:

a) 30 pages; and

b) 30 minutes.

[69] In placing these restraints on MIC, I am mindful that my plan is that the entirety of the intervenors' submissions will take one half-day of the seven-day hearing. I am further mindful that MIC should not be in a position to overwhelm the proceeding. With the limitations placed above, all of the intervenor submissions should be able to be completed within one morning.

[70] The second issue relates to MIC's application to have its affidavit material admitted into the hearing record. I have addressed above the "hybrid" approach which I have ordered for the Petitioner Aligned Applicants.

[71] MIC submits that its affidavit material will assist me, particularly on the issue of remedy. In response, the petitioners note that MIC's submission expands the concept of "remedy" by including MIC's evidence and submission on issues that are not raised by the parties. I discuss that expansion below.

[72] For context, the MIC's affidavit material comprises 828 pages of material. The material filed by the parties comprises approximately 7,000 pages.

[73] The petitioners raise the following objections to MIC's affidavit material being admitted on the hearing record. For obvious reasons, some of these objections overlap:

a) The nature of the material, as evidence on the record, is problematic. The vast majority of the material constitutes industry advocacy. The actual bodies of the affidavits submitted by MIC comprise less than ten pages of sworn material. Exhibited to those affidavits are more than 800 pages, including (among other things):

i. policy papers,

ii. information circulars and publications aimed at Indigenous organizations relating to engagement in the mining industry,

iii. the positioning of Canada's mining sector to benefit the entire global community on the issues of climate change and a low-carbon future,

iv. the importance of the mineral tenure system.

b) Following from the paragraph above, the exhibited material constitutes inadmissible hearsay and opinion. The exhibits that were not written by the affiants. There would be no effective method of cross-examining the affiants. Further, there is no method to divine the underlying facts upon which the documents are based. In this regard, both petitioners note that the affidavits and the exhibits quote statistics regarding the monetary and other benefits of the mining industry to the province's economy. If admitted into the record, the court will be forced to either accept those figures submitted in MIC's material, or allow the petitioners to bring forward other evidence that is in conflict.

c) It follows from the paragraph above that MIC's material has the prospect of delaying and significantly expanding the hearing. The main force of the petition relates to the (potential and actual) negative effects of the failure to consult and the mining activities on their communities. Hence,

i. the petitioners may be forced to respond to the MIC affidavit material, either with further affidavits, or through cross-examination of the deponents; and

ii. given the wide-ranging nature, and the advocacy contained within the MIC material, it may not be possible to provide a cogent response.

d) Further, the petitioners note that MIC's material extolls the benefits of mining in the province. Admitting this evidence raises the prospect that this evidence will be "unchallenged". The court will be forced to address,

and perhaps accept, MIC's evidence to determine the proper remedy. If this occurs, then the intervenor has, in effect, taken the litigation away from the parties.

e) To the extent that MIC seeks to submit evidence of how the system works "on the ground", a similar argument can be made for admitting (presumably opposing) evidence from First Tellurium/Kingston, which makes submissions about another type of regime that is workable.

[74] The petitioners also submit that the MIC materials are duplicative of the evidence adduced by the provincial respondents' affidavits including the addressing of the following issues:

a) the economic benefits,

b) the valuation of mineral claims,

c) the importance of access to land for mineral exploration pathways from early-stage to advanced-stage development and the timeline for progression.

[75] In support of its application, MIC says that the remedies sought by the petitioners would effectively suspend the operation of the mineral claims registration system in British Columbia.

[76] MIC submits that, in considering the broad issues raised by the petitions, I should avail myself of all helpful evidence and specifically, evidence relating to:

a) the way mineral exploration and development industries operate; and

b) their potential for interactions with Indigenous groups.

It says that those issues are addressed in its material.

[77] MIC acknowledges that the primary purpose of its affidavit material (if allowed on the record) would go to the appropriate remedy (in the event of a ruling in favour of the petitioners). MIC submits that its material will provide:

a) a better understanding of the claims staking process and its relationship to the economic viability of mineral development in the province;

b) the economic benefits of mining, including rural and Indigenous communities; and

c) the necessity of the mining industry to accomplish the provincial government policy goals relating to climate change and the transition to a low carbon energy future.

[78] MIC submits that the issue of appropriate remedy is already before the court. Further, it says that its submissions are not premised on the admissibility of its own affidavit evidence, but that that the MIC evidence would provide greater context.

[79] On the issue of duplication, the MIC submits that its affidavit material provides further detail than the provincial respondents' material. In the words of the MIC submission, the existing material is not "co-extensive" with the MIC affidavit material.

[80] I note that the provincial respondents support the position of the MIC. (In turn, MIC supports the provincial respondents. This is not rocket science.)

[81] I have considered the submissions of both sides. For the reasons set out below, I dismiss the MIC application to adduce evidence on the hearing record.

[82] I begin from the starting point that allowing intervenors to adduce evidence should only be allowed in rare circumstances.

[83] In my opinion, the bulk of the MIC material, which consists of exhibits to affidavits, is *prima facie* inadmissible on the hearing record. It is unsworn material, much of it promotional, published by organizations. Most of that information will be hearsay or inadmissible opinion in the hearing proper. It is possible that portions of

the printed information in the material are verifiably "true". However, it should not be the job of the petitioners to winnow that material down to its admissible components, then attempt to respond to those components. Further, to the extent that the admissible components consist of statistical information, the presentation of those statistics falls into the realm of inadmissible opinion. The writers of the papers were required to research, obtain, and select the relevant figures. That process is subject to manipulation. Further, the purpose of each paper is manipulation. I do not use that term in a pejorative manner. However, the papers themselves constitute advocacy on behalf of an element of the mining industry (including the affiliated ministry).

[84] I further accept the petitioners' submission that the MIC material would have one of the following two-end results:

a) The petitioners would be required to (attempt to) respond to the MIC material. To the extent that response would require cross-examination, the writers of the bulk of the material are not the affiants.

b) It is possible that the petitioners could attempt to "disprove" some or all of the underlying facts. However, that effort portends the delay of the hearing. Further, it would be hard to identify anything close to an executive summary given the numerous publications appended to the MIC affidavits.

[85] I also accept that, to the extent that the MIC material seeks to provide an "on the ground" lens, fairness would dictate that First Tellurium/Kingston be given an opportunity to establish that another paradigm can operate successfully.

[86] Finally, I accept the submission that the MIC material is, to a large extent, duplicative. Not surprisingly, the provincial respondents have set out many of the same points in their affidavit material. The primary point made by the province's material (as it relates to remedy) is that the mining industry is important to the BC economy and many individual aspects of that economy. When I drill down to the core (please excuse the expression) of the MIC material, it is an attempt to persuade me that any remedy should be delayed because of the economic and other benefits

that mining provides to various elements within the province. In my opinion, the provincial respondents, as one would expect, have already addressed those points.

[87] On that basis, my ruling regarding the use of the MIC material will be consistent with the hybrid approach discussed above with respect to the other intervenors. MIC can refer to its affidavit material to indicate the basis for its status as an intervenor, but the material will not form part of the petition record.

[88] The final issue relating to the MIC submissions relates to the allegation that MIC seeks to expand the issues before the court.

[89] Specifically, the petitioners submit that MIC seeks to add the following two issues:

a) The role of mining in providing economic benefits to Indigenous and other communities, as well as the province.

b) The role of mining in advancing climate policy.

[90] The petitioners submit that neither of these issues are raised in the underlying litigation.

[91] I pause to note that, on this topic, the petitioners' general submission is that the breadth of their petitions relate only to the mineral claims on their respective territories. On that basis, the petitioners (on this application) suggest that there will be a limit to the overall impact of any order that may follow the hearing. MIC, in response, points to the relief sought by the petitioners that would have the effect of striking down the entire mineral staking process throughout the province. On this issue, I accept the points made by the MIC. There is little doubt that any striking down of legislation would have wide impact. The constituents of MIC would be significantly affected.

[92] I view the two issues as distinct.

[93] The first issue raised by the petitioners relates to the MIC arguing the economic benefits provided to Indigenous communities by the industry. In my opinion this issue is engaged by the pleadings. The main force of the petitioners' pleadings in this litigation relates to the adverse effect of mining on their communities. It would seem one-sided to hear from the petitioners regarding the adverse effects of mining on their territories, but to reject any submissions from an intervenor regarding the benefits (as perceived by MIC) that may accrue to those same communities.

[94] On the second issue, however, I accept the submission of the petitioners. In my opinion, the role of mining in advancing climate policy is clearly an issue that is not raised in the litigation.

[95] Further, in my opinion, with all due respect to MIC, the concept of the mining industry arguing that it will be advancing the province's climate policy is, at best, speculative. MIC raises potential future events that are not sufficiently tangible to form the basis of any decision. I mentioned above that it is early in the proceeding and it is hard to predict what will, or will not, be useful information for me in my determinations. However, with that said, it is hard to imagine a hypothetical judge writing a paragraph (in a decision granting a stay of any injunctive relief) on the basis that the relief must be delayed because the mining industry is hopeful that it will find minerals that will assist with the goal of reducing global warming.

[96] On that basis, I am satisfied that MIC's submissions should be restricted. The MIC submissions may not address issues relating to climate change.

[97] However, I find that MIC submissions relating to benefits of mining within Indigenous communities will be allowed.

[98] On that basis,

a) the MIC submissions will comprise:

i. 30 minutes of oral submissions;

ii. 30 pages of written submissions.

b) MIC may reference, in its submissions, its own affidavit material, solely for the purpose of explaining the basis for its intervention and, subject to further order of this Court, such affidavits are not admissible with respect to issues of adjudicative fact and do not form part of the evidentiary record in the petition proceeding.

c) The submissions will not address the issue of climate change.

Costs Implications

[99] With one exception, all parties agreed that the intervenors should not be entitled to, or responsible for, an award of costs.

[100] The one exception related to the MIC. The petitioners submit that if MIC was permitted to include its affidavit material in the petition record, then they would pursue a costs award against the MIC because of the additional work required to respond. Given that I have ruled against the MIC on that issue, the petitioners' costs issue does not arise.

[101] As a result, subject to any future order varying the terms of the intervenors' positions, I order that no intervenor will be entitled to, or responsible for, an award of costs.

Summary

[102] In summary, I make the following orders:

a) All applications are allowed and petitioner status granted.

b) With respect to the Petitioner Aligned Applicants and the ENGO Coalition,

i. each will be allowed written submissions of 15 pages;

ii. each will be allowed oral submissions of 15 minutes;

iii. to the extent possible, they should cooperate to avoid repetition.

c) With respect to MIC,

i. it will be allowed:

a. 30 minutes of oral submissions, and

b. 30 pages of written submissions.

ii. The submissions will not address the issue of climate change.

[103] Regarding the admissibility of any affidavit evidence, the same hybrid approach will apply to all intervenors:

> Each petitioner may reference, in its submissions, its own affidavit material, solely for the purpose of explaining the basis for its intervention and, subject to further order of this Court, such affidavits are not admissible with respect to issues of adjudicative fact and do not form part of the evidentiary record in the petition proceeding.

[104] No intervenor will be entitled to, or responsible for, an award of costs (subject to any future order varying the terms of the intervenors' positions).

"A. Ross J."