File No. S224680
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EHATTESAHT FIRST NATION and CHIEF SIMON JOHN in his capacity as Chief of the Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation

PETITIONER

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the CHIEF GOLD COMMISSIONER; ATTORNEY GENERAL OF BRITISH COLUMBIA; PRIVATEER GOLD LTD.; ALMEHRI MINING INC.; and GMR GLOBAL MINERAL RESOURCES CORPORATION

RESPONDENTS

NOTICE OF APPLICATION

Name of applicant: Human Rights Commissioner for British Columbia

To: EHATTESAHT FIRST NATION and CHIEF SIMON JOHN in his capacity as Chief of the Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation, Petitioners
c/o Ratcliff LLP
500 – 221 West Esplanade
North Vancouver, BC V7M 3J3
Attention: Lisa C. Glowacki

And to: Her Majesty the Queen in Right of British Columbia, and Attorney General of British Columbia, Respondents
c/o Ministry of Attorney General
Legal Services Branch
POB 9270 STN PROV GOVT
1405 Douglas Street
Victoria, BC V8W 9J5
Attention: Leah Greathead, Rebecca Dickinson and Sarah Bevan

And to: Privateer Gold Ltd., Respondents
c/o Owen Bird Law Corporation
733 Seymour St.
Vancouver, BC V6B 0S6
Attention: Jonathan Williams

And to: Almehri Mining Inc., Respondent
4720 Kingsway
Burnaby BC V5H 4N2

And to: GMR Global Mineral Resources Corporation, Respondent
715 West 68th Avenue
Vancouver, BC V6P 2T8
Attention: Wayne Stubbington and David Amar

TAKE NOTICE that an application will be made by the applicant before Justice A. Ross, assigned Judicial Management and Trial Judge in this petition, at the Vancouver Law Courts, 800 Smithe Street, Vancouver, B.C. on December 15, 2022 at 9:45 a.m. for the order(s) set out in Part 1 below.

PART 1: ORDER(S) SOUGHT

1. The Human Rights Commissioner for B.C. (the "Commissioner") is granted intervenor status in this proceeding.

2. The Commissioner may file written submissions not exceeding 20 pages in length.

3. The Commissioner may make oral submissions at the hearing of the Petition.

4. The Commissioner will not be entitled to costs from any party nor will she be liable for costs to any party.

PART 2: FACTUAL BASIS

The Applicant, the Human Rights Commissioner for British Columbia

1. From 2002 until 2019, B.C. was without a Human Rights Commission or Commissioner. In 2017 the provincial government announced its intention to re-establish a human rights commission for B.C. and tasked Mr. Ravi Kahlon, Parliamentary Secretary for Sport and Multiculturalism, with making recommendations for re-establishing a commission.

2. PS Kahlon conducted extensive stakeholder engagements and a scan of human rights commissions in other jurisdictions before making recommendations in his report to the Attorney General, dated December 11, 2017, and entitled "A Human Rights Commission for the 21st Century: British Columbians talk about Human Rights" (the "Kahlon Report"): Affidavit #1 of Kasari Govender, Exhibit "A".

3. Among other things, the Kahlon Report recommended that the Commissioner should have the power to intervene in disputes involving "human rights matters with a systemic aspect": Affidavit #1 of Kasari Govender, Exhibit "A" at p. 33.

4. Additionally, the Kahlon Report recommended the Commissioner's mandate extend beyond the four corners of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "Code"), to include promoting compliance with international human rights obligations. The Kahlon Report further recommended the Commissioner be independent of government, in part to ensure government fulfills its responsibility to "bring the [the Declaration's] principles into action": Affidavit #1 of Kasari Govender at paras. 16-19.

5. On November 27, 2018, Bill 50 (the *Human Rights Code Amendment Act, 2018*) was passed amending the Code to, amongst other things, establish the role of Human Rights Commissioner as an independent officer of the Legislature: Code, s. 47.01. The legislative amendments in Bill 50 closely reflected the recommendations made in the Kahlon Report.

6. Pursuant to s. 47.12 of the *Code*, the Commissioner is responsible for protecting and promoting human rights in B.C. The breadth of this statutory mandate requires equally broad powers. The Code expressly sets out a non-exhaustive list of powers to be exercised by the Commissioner, including promoting compliance with international human rights obligations and intervening in complaints before the Human Rights Tribunal, as of right, and in any proceeding in any court: Code, s. 47.12(1)(i)-(j).

7. This is the Commissioner's fourth application for leave to intervene since she assumed the position of B.C.'s Human Rights Commissioner in 2019. All previous applications have been granted, including two proceedings brought under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and one appeal of a judicial review: Affidavit #1 of Kasari Govender at para. 34.

8. In her first application for intervenor status and the only case in which a decision on the merits has been issued, the Commissioner sought to make submissions on the legal test to be applied to complaints regarding discrimination on the basis of family status in employment: *Gibraltar Mines Ltd. v. Harvey*, 2021 BCSC 927 (*Gibraltar Mines I*). The chambers judge found that the Commissioner had a genuine interest in the legal issue she proposed to address and further found:

> 25 The Commissioner's interest in the issue is direct and obvious. It is within the Commissioner's mandate to be concerned about the interpretation of the Code and the systemic impact of the test for family status discrimination and to seek to address these matters by intervening in this proceeding.

9. At paras. 34 and 36 of *Gibraltar Mines I* the chambers judge concluded the Commissioner's proposed submissions would likely assist the court and that she would not expand the litigation or change its focus.

10. The chambers judge who heard the judicial review described the Commissioner's submissions as "highly nuanced and persuasive": *Gibraltar Mines Ltd. v. Harvey*, 2022 BCSC 385 at para. 92 (*Gibraltar Mines II*).

11. The Commissioner seeks leave to intervene in these proceedings in order to fulfil her statutory mandate to protect and promote human rights in B.C., including B.C.'s compliance with its international human rights obligations.

12. As discussed further below, The Commissioner seeks leave to make submissions solely on the narrow issue of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (the "*Declaration Act*") as a human rights statute that has quasi-constitutional status.

The Petition for Judicial Review

The factual basis

13. Ehattesaht are an Indigenous People under the *Declaration Act*, part of the Nuu-chah-nuth cultural and linguistic group located on the West Coast of Vancouver Island: Petition at para. 3.

14. Ehattesaht assert Aboriginal and Indigenous rights within and title to an area of the West Coast of Vancouver Island between Kyuquot Channel and Mozino Point, including the north half of Esperenza Inlet and Hecate Channel, Zeballos Inlet, Espinosa Inlet and Arm, Port Eliza, Queen's Cove, Rugged Point, and lands north of and surrounding these features ("*Ha-Hahoulthee*"): Petition at paras. 5-6.

15. Ehattesaht uses the name Ehattesaht/Chinehkint to refer to their nation, but their official government name pursuant to their status as a "band" under the *Indian Act*, R.S.C. 1985, c. I-5, remains Ehattesaht First Nation: Petition at para. 1.

16. Simon John is the elected Chief Councillor of Ehattesaht: Petition at para. 2.

17. The respondent His Majesty the King in right of the Province of British Columbia, includes its agents the Chief Gold Commissioner and the Lieutenant Governor in Council, and its legal representative the Attorney General of B.C. (the "Provincial Crown").

18. The Chief Gold Commissioner has extensive responsibilities under the Mineral Grant Regime, including establishing and maintaining a mineral titles online registry: *Mineral Tenure Act*, ss. 6.2(1).

19. The named corporate respondents - Privateer Gold Ltd., Almehri Mining Ltd., and GMR Global Resource Mineral Resources Corp. – hold a total of 32 registered mineral claims in *Ha-Hahoulthee*, granted via the Provincial Crown's mineral title online registry between January 2020 and April 2022 (the "Recent Claims"): Petition at paras. 37-39.

20. It appears undisputed that Ehattesaht has asserted aboriginal rights and title to *Ha-Hahoulthee*, and the Provincial Crown has knowledge of same: Petition at para. 13, AGBC's Response to Petition at para. 64. It also appears undisputed that Ehattesaht was not notified or consulted by the Provincial Crown prior to the registration of the Recent Claims: Petition at para. 41, Provincial Crown's Response at para. 37.

The legal issues

21. In brief, Ehattesaht asserts that the Provincial Crown violated its duty to consult by maintaining a mineral tenure registration system that did not and does not require any consultation with them before a claim is registered in its *Ha-Hahoulthee* or elsewhere on the territory over which it asserts rights and title, and by registering the Recent Claims without consultation. Ehattesaht relies on the following legal basis:

    a. The duty to consult and accommodate and the honour of the Crown, as grounded in ss. 35(1) and 52(1) of the *Constitution Act, 1982*, (*Haida Nation v. British Columbia*, 2004 SCC 73, *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, *Ross River Dena Council v. Yukon*, 2012 YKCA 14);

    b. The rights set out in the *Declaration*, including free, prior, and informed consent, as affirmed by the *Declaration Act*;

    c. The *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241; and,

    d. The *Supreme Court Civil Rules*, Rule 2-1(2) and 16-1.

    [Petition at paras. 58-80]

22. In brief, and amongst other relief, Ehattesaht seek a declaration that the mineral titles online registration system allowing for registration of a mineral claim on land over which Ehattesaht assert rights or title without consultation is inconsistent with the rights recognized in the *Declaration* and the *Declaration Act*: Petition at Part I para. d.

23. The Provincial Crown submits, among other things, that the online system for registration of mineral claims does not trigger the duty to consult and that it has acted honourably: Response to Petition at para. 69.

24. Regarding the *Declaration* and *Declaration Act*, the Provincial Crown submits, that the "*Declaration Act* provides a process aimed at achieving consistency of the laws of British Columbia with the *UN Declaration*" but does not "give independent legal force to the articles of the *UN Declaration*": Response to Petition at paras. 71 and 73.

25. The Provincial Crown further says that the *Declaration* can be used as an interpretative aid to assist in interpreting provincial laws and s. 35 of the *Constitution*

Act, 1982 but it cannot be used as an interpretive aid to amend the clear working of the *Mineral Tenure Act* or subordinate legislation. The Provincial Crown submits that the *Declaration* does not alter the obligations or legal test established by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 74 and applied in subsequent cases: Response to Petition at paras. 76-78.

26. The corporate respondent, Privateer Gold Ltd., says it complied with the legislation of B.C. in staking and maintaining its mineral claims. It does not take a position on the duty to consult, the *Declaration*, or the *Declaration Act*: Privateer Gold Ltd.'s Response to Petition at para. 3.

27. The corporate respondents GMR Global Mineral Resources Corp and Almheri Mining Inc. did not file a Response to Petition.

PART 3: LEGAL BASIS

The Test for Granting Intervenor Status

28. The Supreme Court of British Columbia can grant intervenor status in appropriate circumstances as an exercise of its inherent jurisdiction: *Gibraltar Mines I* at para. 9.

29. The well-known principles governing applications for leave to intervene were set out in *British Columbia v. Imperial Tobacco Canada Ltd*, 2016 BCCA 203 (in Chambers) rev'd on other grounds, 2016 BCCA 363 ("*Imperial Tobacco*").

30. Simply put, the court may grant intervenor status either where the applicant has a direct interest in the proceeding or where the proceeding raises public law issues that legitimately engage the applicant's interests and the applicant brings a different and useful perspective to those issues that will be of assistance to the Court: *Imperial Tobacco* at para. 8.

31. The Commissioner seeks intervenor status on the basis that the present judicial review raises public law issues that engage her statutory mandate. In applications such as the Commissioner's, the chambers judge will consider the nature of the proposed intervenor and the nature of the issue: *Imperial Tobacco* at para. 9.

32. An intervenor's role is not to support the position of a particular party or to make submissions on the outcome of the proceeding. Rather, the role of an intervenor is to make principled submissions on pertinent points of law: *Imperial Tobacco* at para. 15, citing *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para. 15 (in Chambers).

33. Submissions from intervenors should not broaden the *lis* between the parties, expanding the scope of the litigation: *Imperial Tobacco* at para. 10.

34. These principles apply to intervention applications in the Supreme Court of British Columbia as well as the Court of Appeal (where they were developed pursuant to that Court's Rules): see, for example, *Gibraltar Mines I* at para. 9.

The Commissioner meets the test for intervenor status

35. The Commissioner submits that the analysis and conclusion of the chambers judge in *Gibraltar Mines I* is applicable in this case.

36. The Commissioner's interest is clear and direct. It is within her statutory mandate to be concerned about the Provincial Crown's compliance with its international human rights obligations and, by extension, can assist this court to understand, interpret, and apply those laws, including where, as here, the Provincial Crown has made statutory commitments to fulfilling its obligations under international human rights law.

37. The Commissioner has a demonstrated interest in advancing the human rights of Indigenous Peoples, in particular as evidenced through the work her Office has done pursuant to her priorities to address decolonization during her term: Affidavit #1 of Kasari Govender at para. 33.

38. The Commissioner is an experienced intervenor who understands the particular role that intervenors play before the courts and will make principled submissions: Affidavit #1 of Kasari Govender at paras. 34-37.

39. The Commissioner seeks to intervene to address public law issues about the status and interpretation of the *Declaration Act* as human rights legislation, based on and incorporating an international human rights instrument, including how it is binding on B.C as an expression of fundamental law.

40. As an officer of the Legislature with a statutory mandate to ensure B.C. complies with its international human rights obligations, including by intervening in court proceedings, the Commissioner has a strong and clear interest in assisting the court to understand the complexities of international human rights law, how it is received into domestic law, and how the *Declaration Act* should be interpreted.

41. The Commissioner's interest is particularly acute in relation to the present judicial review because it is the first case that relies extensively on the *Declaration Act* to ground its claim. Accordingly, this is a case of first instance where the human rights of Indigenous Peoples, as enshrined in international and domestic law, are at issue. There is limited precedent that goes to a central issue in this case: what is the scope and effect of the *Declaration Act* on the laws of B.C.? The Commissioner is uniquely suited to make submissions on these issues that will be of assistance to the court.

The Commissioner's Proposed Submissions

42. It is the Commissioner's position that the Declaration Act is a human rights statute that must be interpreted as such. The Commissioner seeks to intervene in these proceedings to make the following submissions:

    a. The Legislature intended to and did, enact the *Declaration Act* as a piece of extraordinary legislation specific to the human rights of Indigenous Peoples: see, for example, British Columbia, *Official Report off Debates of the Legislative Assembly (Hansard)* 41st Parl., 4th Session, Issue No, 280 (24 October 2019) at p. 10222 (Hon. S. Fraser), and *Declaration Act*, Schedule at Annex. Like the *Human Rights Code*, the *Declaration Act* is "fundamental law" of "vital importance" that is quasi-constitutional in nature: *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at paras. 34-35, *British Columbia Human Rights Tribunal v. Schrenk*, 2007 SCC 62 at para. 31;

    b. Given the broad and purposive interpretation required of human rights legislation, and read in its entire context, the *Declaration Act* creates a justiciable standard for the alignment of provincial laws with the Declaration;

    c. Article 3 of the *Declaration* protects the right of Indigenous Nations to self-determination. Integral to self-determination, as a human right, is the right to promote, develop and maintain laws: *Declaration*, Article 34. Canadian Courts have a duty to not only learn Indigenous legal traditions, but a duty to act and make space for Indigenous legal traditions, reconcile them with the Canadian legal system, and shield them from further damage. The *Declaration* provides a framework for repairing the disconnect between Canadian law and Indigenous legal traditions.

    d. Statutes must be interpreted to comply with the *Declaration Act*. Absent the ability to construe the impugned statute such that it complies with the *Declaration Act*, like other human rights statutes, the *Declaration Act* has primacy: *Canada (Attorney General) v. Druken*, [1989] 2 FC 24 (FCA) leave to appeal den'd [1988] SCCA No 433; and,

    e. It is open to the courts to make declarations of inoperability and/or inapplicability when an otherwise valid statute cannot be construed so that it complies with human rights legislation like the *Declaration Act*: John Helis, *Quasi-constitutional Laws of Canada*, (Toronto: Irwin Law, 2018) at pp. 123, 126-128, *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras. 36 and 53.

43. In sum, the Commissioner's submissions, as described above, will be of assistance to the Court on important issues of public law and will not expand the *lis* between the parties.

44. The Commissioner will coordinate with other intervenors to ensure that her submissions are not duplicative.

Costs

45. The usual rule is that intervenors are not entitled to, or liable for, costs associated with a proceeding: see, for example, *Faculty Association of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56 at para. 4 (In Chambers). The present case presents no reason to depart from the usual rule and the Commissioner accordingly seeks an order that costs be neither awarded for or against her both with respect to this application for leave to intervene and with respect to the Petition.

PART 4: MATERIAL TO BE RELIED UPON

1. Affidavit No. 1 of Kasari Govender, made on November 10, 2022.

The applicant estimates that the application will take forty-five (45) minutes. Per the order of Ross J. made August 12, 2022, this application will be heard together with other applications for leave to intervene in this judicial review on December 15-16, 2022.

[ ] This matter is within the jurisdiction of a master.

[X] **This matter is not within the jurisdiction of a master.**

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

a) file an application response in Form 33,

b) file the original of every affidavit, and of every other document, that

   i. you intend to refer to at the hearing of this application, and

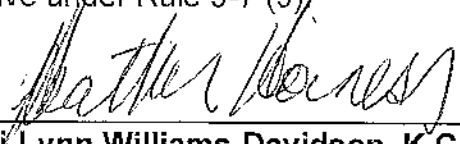
   ii. has not already been filed in the proceeding, and

c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

   i. a copy of the filed application response;

   ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9)

Date: November 10, 2022 

Terri-Lynn Williams-Davidson, K.C. and Heather D. Hoiness
Counsel for the Applicant, Human Rights Commissioner for British Columbia

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To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application
[ ] with the following variations and additional terms:

_____

_____

_____

Date: _____

_____
Signature of [ ] judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery

[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts
[x] none of the above