



File No. S219179  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**SM'OOYGIT NEES HIWAAS, also known as Matthew Hill, on behalf of the  
SMGYIGYETM GITXAALA, AND GITXAALA NATION**

PETITIONER

AND:

**CHIEF GOLD COMMISSIONER OF BRITISH COLUMBIA, LIEUTENANT GOVERNOR  
IN COUNCIL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH  
COLUMBIACHRISTOPHER RYAN PAUL, OLIVER JOHN FRIESEN,  
GMR GLOBAL MINERAL RESOURCES CORP., and  
JOHAN THOM SHEARER**

RESPONDENTS

**NOTICE OF APPLICATION**

**Name of applicant: Human Rights Commissioner for British Columbia**

**To:** Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the  
Smgyigyem Gitxaala, and Gitxaala Nation, Petitioners  
c/o Ng Ariss Fong, Lawyers  
8th Floor, 555 West Georgia Street  
Vancouver, BC V6B 1Z5  
Attention: Lisa Fong, KC, Gavin Smith and Ruben Tillman

**And to:** Chief Gold Commissioner of British Columbia, Lieutenant Governor in  
Council of British Columbia, 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:** Christopher Ryan Paul and Oliver John Friesen, Respondents  
c/o Benson Law LLP  
270 Highway 33 West  
Kelowna, BC V1X 1X7  
Attention: Terrence McCaffrey

**And to:** GMR Global Mineral Resources Corp., Respondent  
715 West 68<sup>th</sup> Avenue  
Vancouver, BC V6P 2T8  
Attention: Wayne Stubbington and David Amar

**And to:** Johan Thom Shearer, Respondent  
c/o McLean & Armstrong LLP  
300 - 1497 Marine Drive  
West Vancouver, BC V7T 1B8  
Attention: Curtis Simmonds

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 21<sup>st</sup> 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 page 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 United Nations Declaration on the Rights of Indigenous People's (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. Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the Smgyigyem Gitxaala, and Gitxaala Nation ("Gitxaala") allege that the registration of seven mineral claims via B.C.'s mineral titles online registry, established pursuant to the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 and the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 (together the "Mineral Grant Regime"), violated Gitxaala's right to be consulted prior to B.C. granting those mineral claims in lands over which Gitxaala has asserted aboriginal title.
14. Gitxaala are an Indigenous People, including but not limited to under s. 1 of the *Declaration Act*. Gitxaala are also known as *Git lax m'oon*. They are the "People of the Salt Water": Further Amended Petition at paras. 2.1-2.3. Gitxaala law (*ayaawx*) creates and guides the hereditary system of Gitxaala governance: Further Amended Petition at para. 2.7.
15. It is undisputed that the Gitxaala Nation asserts aboriginal rights and title to territory on B.C.'s northern coast, including Banks Island (referred to by the Gitxaala as their "bread-basket" or "table") and that the Provincial Crown has knowledge of same: Further Amended Petition at paras. 2.15 and 2.19, AGBC's Response to Petition at para. 60.
16. It also appears undisputed that Gitxaala was not notified or consulted by the Provincial Crown prior to the registration of the impugned claims on Banks Island: Provincial Crown's Response at para. 65.
17. The respondents are the Chief Gold Commissioner of B.C., the Lieutenant Governor in Council of B.C., and its legal representative the Attorney General of B.C. (together, 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 Lieutenant Governor in Council of B.C. has the statutory power to make regulations in regard to the Mineral Tenure Regime: *Mineral Tenure Act*, s. 65.
20. The individual respondents - Christopher Ryan Paul, Oliver John Friesen, GMR Global Mineral Resources Corp., and Johan Thom Shearer – were granted mineral claims via B.C.'s mineral title online registry on Banks Island between May 12, 2018, and November 13, 2020: Further Amended Petition at para. 1.2.

### **The legal issues**

21. The legal basis on which Gitxaala advances its petition for judicial review includes:
  - a. the common law precedents and principles relating to the honour of the Crown and duty to consult found in cases like *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Mikisew Cree First Nation v. Canada*, 2018 SCC 40 (Further Amended Petition at para. 3.5);
  - b. how the honour of the Crown is informed by the *Declaration* and *Declaration Act* (Further Amended Petition at para. 3.10);
  - c. the *Declaration*, appended to the *Declaration Act* as a schedule (Further Amended Petition at paras. 3.14-3.15); and
  - d. s. 3 of the *Declaration Act* (Further Amended Petition at paras. 3.16, 3.18-3.19).
22. In brief, amongst other relief, Gitxaala seeks a declaration pursuant to s. 3 of the *Declaration Act* that the Mineral Grant Regime is inconsistent with the *Declaration* and/or "a declaration that the Provincial Crown has a statutory duty to consult and cooperate with Gitxaala concerning measures necessary to ensure the laws of B.C. are consistent with the *Declaration*" as those laws relate to territory over which Gitxaala asserts rights and title: Further Amended Petition at paras. 1.5 and 3.15.
23. Gitxaala argues that the Provincial Crown's duty to consult is informed by the rights in the *Declaration* and says that the Mineral Grant Regime is inconsistent with the *Declaration*, including preambular paragraph 4, Articles 3, 4, 8(2), 12(1), 18, 19, 23, 26, 29, 32, and 46: Further Amended Petition at para. 3.10.
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 *Declaration*" but does not "give independent legal force to the articles of the *Declaration*": AGBC Response to Petition at paras. 67 and 69.

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 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: AGBC Response to Petition at paras. 74-75.
26. The individual respondents Messrs. Paul and Friesen say they complied with the legislation in B.C. for staking and maintaining mineral claims in B.C. They do not appear to take any position on the duty to consult, the *Declaration*, or the *Declaration Act*: Paul and Friesen Response to Petition at para. 2.
27. The Respondents GMR Global Mineral Resources Corp and Johan Thom Shearer have not filed 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)* 41<sup>st</sup> Parl., 4<sup>th</sup> 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.

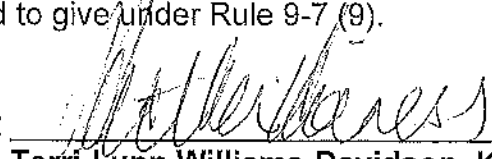
[ X ] **This matter is not within the jurisdiction of a master.**

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

Address for Service:

BC's Office of the Human Rights Commissioner

#536, 999 Canada Place

Vancouver, BC V6C 3E1

Telephone: 1-844-922-6472

Facsimile: (604) 681-0559

Email: [tlwd@whiteravenlaw.ca](mailto:tlwd@whiteravenlaw.ca)

[Heather.Hoiness@bchumanrights.ca](mailto:Heather.Hoiness@bchumanrights.ca)

*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
- none of the above