



Court File No. **VLC-S-S-250797**

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996,
C. 241**

BETWEEN:

GARNET VALLEY AGRI-TOURISM ASSOCIATION and DOUGLAS RAFTERY

PETITIONERS

AND:

**CHIEF PERMITTING OFFICER OF THE MINISTRY OF MINING AND CRITICAL
MINERALS**

RESPONDENT

**Re: July 9, 2024 Decision by the Chief Permitting Officer to approve *Mines Act* permit G-
1000000442**

PETITION TO THE COURT

ON NOTICE TO: **The Chief Permitting Officer of the Ministry of Mining and Critical
Minerals**

PO Box 9380 Stn Prov Gov
Victoria, BC V8W 9M6

1440254 B.C. Ltd.

300 – 1465 Ellis Street
Kelowna, BC V1Y 2A3

Attorney General of British Columbia, pursuant to s. 16 of the *Judicial
Review Procedure Act*, R.S.B.C. 1996, c. 241

3rd Floor – 1001 Douglas Street
Victoria, BC V8W 2C5

The address of the registry is:

800 Smithe Street, Vancouver, British Columbia V6Z 2E1

The petitioners estimate that the hearing of the petition will take 1.5 days.

This matter is an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below by the entities named as petitioners in the style of proceedings above.

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 petitioners
 - (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 petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The ADDRESS FOR SERVICE of the petitioner is: NOAH ROSS LAW CORPORATION 3305 Kirk Road Denman Island, BC V0R 1T0 Fax number address for service of the petitioners: N/A E-mail address for service of the petitioners: noah@noahross.ca ; jriddle@arvayfinlay.ca
(2)	The name and office address of the petitioner's lawyer is: Noah Ross Noah Ross Law Corporation 3305 Kirk Road Denman Island, BC V0R 1T0

<p>Julia Riddle Arvay Finlay LLP 1512 – 808 Nelson Street Box 12149, Nelson Square Vancouver, BC V6Z 2H2</p>

CLAIM OF THE PETITIONERS

Part 1: ORDERS SOUGHT

1. An order quashing the decision of the delegate of the Chief Permitting Officer of the Ministry of Mines and Critical Minerals (the “CPO”) to issue the authorization known as Mine #2000391 dated July 9, 2024 granted to 1440254 B.C. Ltd. (the “Permit”) pursuant to section 10 of the *Mines Act* in respect of lands located at 27600 Garnet Valley Road and legally described as:

LOT 8 DISTRICT LOTS 3195, 3952, 3956 AND 3962 OSOYOOS DIVISION
YALE DISTRICT PLAN 34376

PID: 002-991-381

LOT 4 DISTRICT LOTS 3195 AND 3952 OSOYOOS DIVISION YALE
DISTRICT PLAN 34376

PID: 002-991-331

LOT 3 DISTRICT LOTS 3962 AND 3195 OSOYOOS DIVISION YALE
DISTRICT PLAN 34376

PID: 002-001-322

(the “Lands”).

2. An order pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 17 that the respondent, within 60 days of being served with this petition, provide the petitioners with the record that was before the CPO in deciding to issue the Permit.
3. Such other and further orders as counsel may advise.

Part 2: FACTUAL BASIS

Overview

1. The District of Summerland is a small municipality located in the interior of British Columbia. Within its boundaries is Garnet Valley, an ecologically protected area accessed by one narrow road and home to multiple wineries and farms that attract local tourism.
2. On July 9, 2024, a delegate of the Chief Permitting Officer under the *Mines Act* quietly approved a gravel pit to be located right on the edge of Garnet Valley. They did so in a decision that both failed to give the Garnet Valley community the opportunity to meaningfully provide input on the Permit, and failed to take into account the input the community did express.
3. The CPO's decision is procedurally unfair. The CPO's failure to disclose the technical reports that formed the basis for the Permit decision as part of the consultation process prevented the petitioners and other Garnet Valley residents from meaningfully understanding or providing input on the proposed decision. The CPO further breached their duty of procedural fairness by failing to provide written reasons that explained the deliberation process and instead, prepared reasons months later that attempted to retroactively justify the decision long after it had been made.
4. The CPO's decision is unreasonable. The CPO repeatedly stated they have no mandate to consider existing land use planning and zoning in the decision—an interpretation of the law unjustified in light of both the statute and this Court's jurisprudence. Further, the CPO failed to pay due regard to the seriousness of the concerns being raised with respect to slope stability, and the real risk of a landslide that would directly impact the homes located underneath the proposed gravel pit.
5. The decision is unreasonable and procedurally unfair and must be quashed.

The Parties

6. The Garnet Valley Agri-Tourism Association (the "GVATA") is a non-profit society incorporated pursuant to the laws of British Columbia with a registered office at 27218 Garnet Valley Road, Summerland, BC, V0H 1Z3.

7. The petitioner Douglas Raftery owns property and resides at 28214 Garnet Valley Road, Summerland, British Columbia, directly adjacent to the Lands and the proposed gravel pit (the “Proposed Gravel Pit”).
8. The respondent CPO is the person responsible for the issuance of permits on behalf of the Ministry of Energy, Mines and Low Carbon Innovation pursuant to s. 10 of the *Mines Act*, R.S.B.C. 1996, c. 293 (the “*Mines Act*”). The CPO is designated by the minister under s. 8.2 of the *Mines Act* and may delegate any of their powers to an inspector pursuant to s. 8.3 of that statute.
9. 1440254 B.C. Ltd. (the “Applicant”) is a company duly incorporated pursuant to the laws of British Columbia and has a registered office at 300 – 1465 Ellis Street, Kelowna, BC, V1Y 2A3. The directors of the Applicant are Darrell Grymonpre and Ruby Grymonpre.

The Permit Application and Consultation

10. On November 16, 2023, the Applicant applied to the respondent CPO for a permit under the *Mines Act* to allow for the construction and operation of the Proposed Gravel Pit. Marcus Grymonpre is listed as the Mine Manager on behalf of 1440254 B.C. Ltd. in the application.
11. The application sought to construct the Proposed Gravel Pit on three properties owned by Darrell Grymonpre and Ruby Grymonpre (the “Landowners”).
12. Notice of the application was published in the Summerland Review, the local newspaper, stating in relevant part:

Take Notice that Marcus Grymonpre of 1440254 B.C. Ltd., has filed with the Chief Permitting Officer, pursuant to Part 10.2.1 of the Health and Safety Reclamation Code for Mines in British Columbia, a Proposed Gravel Pit plan together with a program for the protection and reclamation of the land and water courses related to the proposed Sand and Gravel Pit located at 27410 Garnet Valley Road . . .

A copy of the permit application, including supporting documentation, is available for public viewing at the Summerland Public library located at 9533 Main Street. Any person affected by or interested in this program has 30 days from the date of publication to make written representation to the Chief Permitting Officer of Mines, Ministry of Energy, Mines & Low Carbon Innovation, South Central Region at 2nd

Floor, 441 Columbia Street, Kamloops, BC V2C 2T3 or by email MMD-Kamloops@gov.bc.ca.

Please note that the Chief Permitting Officer does not have a mandate to consider the merits of the Proposed Gravel Pit from a zoning or a land use planning perspective.

[Emphasis in original.]

13. The petitioner Mr. Raftery and Mr. Steve Lornie, president of the petitioner GVATA, both viewed a copy of the notice of application posted at the Summerland Public Library in January of 2024.
14. The notice of application referred generally to technical details of the impact of the Proposed Gravel Pit, including the impact on wildlife, vegetation, and physiography, and generally to details of proposed reclamation. The notice of application did not append any technical reports or other substantive information in support of the application.
15. Mr. Raftery participated in the public comment period, sending comments to the specified email address on January 9, 2024. His comments included the following concerns:
 - a. The risk of slope instability: Mr. Raftery identified that the proposed location of this pit was on the edge of a 50-to-70-degree slope 200 feet directly above his residence, along with other residences. The Applicant proposed to dig a 40-foot-deep pit adjacent to the eastern boundary of Mr. Raftery's property. He raised the concern that the precarious location of the Proposed Gravel Pit would lead to falling debris or slope collapse onto his home.
 - b. Insufficient supporting documentation: Mr. Raftery indicated that the Proposed Gravel Pit would have to impacts on Eneas Creek and that a riparian study had not been provided. Mr. Raftery indicated that Garney Valley Road was not suitable for heavy commercial vehicle traffic on a regular basis and showed signs of shoulder collapse. He pointed out that a transportation study which would analyze the impacts of traffic related to the Proposed Gravel Pit had not been provided. Mr. Raftery also noted that no hydrology or geotechnical report had been provided in the notice of application.
 - c. Non-compliance with municipal zoning: Mr. Raftery raised the concern that the Applicant's directors and owners of the Lands had a history of disregard for municipal zoning. He specifically referenced a stop work order which had been

issued on account of unpermitted logging on the Lands by Darrell and Ruby Grymonpre.

16. The President of the GVATA, Mr. Steve Lornie, sent comments to the email address specified in the notice of application on behalf of the GVATA on January 10 and 17, 2024. These submissions raised concerns about, among other things:
 - a. The risk of slope instability: Mr. Lornie highlighted concerns about the impact of slides and sediment on the ecosystem of Eneas Creek.
 - b. Land use and infrastructure: Mr. Lornie raised concerns about the inability of the narrow, winding road to handle the contemplated volume of truck traffic, and the safety impacts of adding that type of traffic to a road frequented by cyclists, horse riders, and pedestrians. He further highlighted the impact of the Proposed Gravel Pit on local businesses and jobs in this tourism-heavy neighbourhood.
17. The Proposed Gravel Pit was further opposed by the wider local community.
18. On January 16, 2024, the District of Summerland Council voted unanimously to oppose the Proposed Gravel Pit and provide comments to the Ministry raising their concerns. On January 24, 2024, Council recommended the CPO refuse the application. In its submission, it highlighted, among other things:
 - c. The known land slippage and geotechnical stability concerns of the property: a potential gravel operation could generate significant land vibrations and lead to a hazardous land slide event. Existing residences located downslope from the proposed operation would be placed at risk by the Proposed Gravel Pit.
 - d. Impacts to existing District infrastructure would be substantial if the Proposed Gravel Pit was approved. Specifically, Garnet Valley Road was not built to safely allow for the regular passage of heavy gravel trucks, especially north of Wildhorse Road. Further, the existing driveway on the Lands is too steep to allow for gravel trucks and Summerland Fire Department fire trucks to travel on it without modifications.
 - e. The Landowners had a history of noncompliance with District work orders, including through engaging in unauthorized works (tree-cutting) within an environmentally sensitive development permit area.
 - f. Concerns about various non-compliance of the Proposed Gravel Pit with local land use planning and governance zoning and established priorities, including that:

- i. The Applicant quoted the incorrect municipality (Regional District of Okanagan Similkameen) and the incorrect Official Community Plan (Okanagan Lake West Greater West Bench OCP – Electoral Area “F”) in the application.
 - ii. The existing driveway is too steep and narrow to comply with the District’s Driveway Access Bylaw.
 - iii. That the Landowners, who are also the directors of the applicant company, stated in their application that they were attempting to “develop flat, useable areas on the lands which can be later used for agricultural purposes” by means of the Proposed Gravel Pit, thereby evading the rezoning process of the District. The District noted that the Landowners had previously submitted and then withdrawn an application for rezoning to change the zoning of the largest property of the Lands to Agriculture.
 - iv. That the use of the land contemplated in the application is not in conformance with the District of Summerland Zoning Bylaw, Bylaw Number 2000-450, which designates the 72-acre parcel as Forest Grazing – FG, and the two smaller parcels as Agricultural Small Acreage – A1. Forest Grazing zoning and Agricultural Small Acreage zoning do not permit natural resource extraction such as the Proposed Gravel Pit.
 - v. The District of Summerland Official Community Plan, Bylaw No. 2014-002 (the “District OCP”) designates the 72-acre parcel as “Open Lands” and the two smaller parcels as “Agricultural.” Natural resource extraction such as a gravel pit is not permitted within Open Lands or the Agricultural designation, making the Proposed Gravel Pit not compliant with the District OCP.
 - vi. The District OCP designates the Lands as Environmentally Sensitive Development Permit Area (“ESDPA”). These lands are highly environmentally sensitive habitat areas. Additionally, the majority of the Lands are viewed as highly sensitive habitat area known as Environmentally Sensitive Area 1 (“ESA 1”) by the District. ESA 1 criteria means that the Lands are either critical habitat for ecosystems or of critical importance to rare wildlife species. Due to the operation of the *Mines Act* the Proposed Gravel Pit is exempted from the typical requirement to obtain this development permit.
19. The Penticton Indian Band also opposed the Proposed Gravel Pit. In a letter dated January 14, 2024, it emphasized that the Syilx (Okanagan) Nation holds unextinguished Aboriginal title and rights to the land in question, as recognized in *Tsilhqot’in* and the United Nations *Declaration on the Rights of Indigenous People*. It noted the Proposed Gravel Pit is located in the vicinity of an important and sacred place for the Syilx people, and that the area is an

important place for food, social, and ceremonial activities as well as providing habitat for species at risk.

The Decision

20. On July 9, 2024, the CPO issued the Permit.
21. Approximately six weeks later, on August 23, 2024, the CPO sent each of Mr. Raftery, Mr. Lornie, and the District emails notifying them of the decision to issue the Permit.
22. The CPO's August 23, 2024 emails appended a document titled "Garnet Valley Engagement Responses" (the "Engagement Responses"). This six-page document identified that 341 written responses had been received to the published notice and contained a table with two columns: "Concerns" and "Ministry Responses".
23. The Engagement Responses provided very brief commentary on each of the identified "Concerns". In doing so, the Engagement Responses:
 - a. Relied on details in reports that were not made available to the public as part of the engagement process, including a "Water Management Including Erosion and Sediment Control Plan", a geotechnical assessment, and a "Noise and Dust Plan". Specifically, in response to the concern summarized as "Geotechnical issues/ slope stability, concerns about properties below the mining area", it simply stated "[t]he permit includes a geotechnical assessment and monitoring conditions by a qualified professional".
 - b. Stated, in response to the concern summarized as "Zoning, and land use", that "The province has exclusive jurisdiction over mining" and "Local zoning, land use, and bylaws are not enforceable within the mine site because of the Provinces' [sic] exclusive jurisdiction." Similarly, in relation to a concern summarized as "road infrastructure" and "city infrastructure" the Ministry Response stated that "EMLI's jurisdiction applies to the mine site only."
 - c. Stated, in response to a concern summarized as "Tree removal incident on property", that illegal logging on the Lands by the landowners is "... between the private landowner and The District of Summerland."

The Permitting Officer's Retroactive Reasons

24. In August 2024, Mr. Raftery exchanged emails with the CPO in which they responded to questions about the Permit. The CPO did not provide any formal reasons for issuing the Permit, or suggest that such reasons existed or would be written.
25. On October 8, 2024, the Mayor of the District of Summerland wrote to the Executive Director of the Mining and Competitiveness Division, Regional Operations Branch of the Ministry of Energy, Mines, and Low Carbon Innovation and reiterated the District's concerns about the Permit. The Mayor stated that in a recent meeting between the Ministry and the District, the Ministry had asserted it had no authority to overturn the Permit.
26. The Mayor's letter noted:

. . . since our meeting it has come to our attention that it is the practice of permitting officers under the Mines Act to provide reasons for the issuance of permits. If there are stated reasons for this decision relating to the Garnet Valley pit permit, we would request that a copy be provided to us. If there aren't reasons, it would be greatly appreciated if you could confirm that in writing.
27. On October 24, 2024, the Executive Director responded, confirming that the Permit cannot be overturned by the Ministry. The response stated that "[t]he Statutory Decision Maker is finalizing a 'Reasons for Decision' document, which I hope to share next week."
28. On October 30, 2024, the CPO provided the District with a document titled "Reasons for Decision" dated October 29, 2024 (the "October Reasons"). In that document, the CPO for the first time set out a reasoning process for the decision where they:
 - a. Placed heavy reliance on reports that had not been disclosed to the public as part of the consultation process;
 - b. Stated they are "aware of concerns" raised in relation to "general land use", but did not otherwise address the interaction between the Proposed Gravel Pit and the existing zoning, OCP, bylaws, or land use planning, apart from briefly addressing concerns around traffic and road safety; and
 - c. Made no reference to any history of non-compliance with municipal laws by the Landowners.

29. The CPO concluded the October Reasons by stating they were satisfied the process in the *Mines Act* “was followed” in relation to the decision and that thus they had exercised their delegated authority to issue the Permit.

Part 3: LEGAL BASIS

30. The petitioners rely on the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, as amended (the “*JRPA*”).
31. The CPO’s power to issue the Permit is a statutory power conferred under the *Mines Act* and reviewable as such under the *JRPA*.
32. The petitioner Douglas Raftery is directly impacted by the construction and operation of a mine directly next to his home, including in that it may create a risk of a landslide occurring onto his home.
33. The petitioner GVATA is comprised of businesses that operate in the vicinity of the Proposed Gravel Pit and will thus be directly affected by the construction and operation of the Proposed Gravel Pit. Further, it has a genuine interest in the resolution of the issues raised by this petition, this petition raises serious justiciable issues, and this petition is a reasonable and effective means of bringing those issues before the court.

The Decision Is Procedurally Unfair

34. The CPO owed the petitioners a duty of procedural fairness in issuing the Permit. The sufficiency of the duty of procedural fairness afforded to the petitioners in the process leading up to the decision is reviewable on a standard of fairness or correctness.
35. The decision to issue the Permit was made in a context that required a heightened level of procedural fairness. The decision:
- a. Was final, without a statutory or other mechanism of appeal. Indeed, there is no authority for the CPO or the Ministry to revisit a s. 10 *Mines Act* decision once a permit has been issued;
 - b. Was made with the legitimate expectation that the CPO would consider and respond to the perspectives of the community impacted by its decision;

- c. Disproportionately affected the fundamental interests of Mr. Raftery and other residents who could, in particular, be impacted by landslide and slope instability risk created by the Proposed Gravel Pit.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paras. 20-27

The Decision to Issue the Permit Failed to Provide the Public with a Meaningful Opportunity to Be Heard

36. The CPO failed to fulfill the duty of fairness by depriving the petitioners of the opportunity to make meaningful submissions on the substance of the application. The petitioners were not provided, as part of the public comment period, the reports that formed the evidentiary foundation for the application. The petitioners had no opportunity to review, test, or make submissions on any of the evidence on which the CPO eventually relied to make its decision.

Baker at para. 28

The Decision to Issue the Permit Was Made Without Adequate Reasons

37. The CPO's decision was made without adequate reasoning. The decision is one that required the issuance of written reasons, given the nature of the decision being made; the fact that it is made under a regulatory scheme that requires it to be based on extensive input from the public; and the importance of the decision to the community, including those whose health and safety is most directly impacted by the proposed project.

Vavilov at para. 77

38. An essential component of procedural fairness is the duty of decision-makers to review and consider the evidence before them with an open mind in fulfilling their functions. The reasonable person must be satisfied that any decision reached reflects this deliberative process.

R. v. Teskey, 2007 SCC 25 at para. 18

39. A decision-maker is presumed to carry out the duties they are sworn to uphold. However, where a decision-maker engages in results-driven reasoning that is, when viewed in

context, appropriately seen as “in effect an after-the-fact justification . . . rather than the articulation of the reasoning that led to the decision”, that presumption will be displaced.

Teskey at paras. 21, 23

40. In the circumstances of this specific case, the evidence demonstrates the CPO’s October Reasons were crafted as after-the-fact justification for the decision. In particular, it is apparent that:
- a. The complexity of the evidence called for a detailed consideration and analysis before any decision could be reached;
 - b. Despite this, the decision was made without formal reasons;
 - c. Requests from members of the Summerland community were made for additional reasoning in August and September and no such reasons were provided at the time;
 - d. There was an inordinate delay of more than three months between the decision and the delivery of the October Reasons, with no indication that the reasons were ready at any point in this period; and
 - e. The October Reasons were only written after considerable public outcry had occurred in relation to the decision.
41. In the absence of the retroactively issued October Reasons, the other reasoning provided by the CPO, such as the Engagement Responses, lacks the intelligibility or coherence required to justify the CPO’s decision. On this basis the decision should be set aside.

The CPO’s Decision Is Unreasonable

42. In the alternative, the petitioners say that the decision should be set aside because it is unreasonable.
43. In order to determine if an administrative decision is reasonable, a reviewing court must ask whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility.

Vavilov at para. 99

44. An administrative decision is unreasonable when it is untenable in light of the relevant factual and legal constraints that bear on it or when there is a failure of rationality internal

to the reasoning process. The CPO's decision contains each of these indices of unreasonableness.

Vavilov at para. 101

45. The CPO enjoys a broad discretion under s. 10 of the *Mines Act* to approve or deny application for permits to commence work on a gravel pit. The courts have confirmed this discretion includes the ability to consider the community planning, zoning, bylaw, and other aspects of municipal governance that may be affected by a *Mines Act* permit.

Anning v. British Columbia (Minister of Energy and Mines), 2002 BCSC 896 at para. 117

46. Despite this, the CPO repeatedly indicated that they would not and in fact did not consider the many community planning and zoning concerns raised in the consultation process in its decision. The CPO stated at the outset of the consultation, that in their view, the CPO “does not have a mandate to consider the merits of the Proposed Gravel Pit from a zoning or a land use planning perspective”. In doing, the CPO improperly fettered their discretion and adopted a fundamentally unreasonable interpretation of its enabling statute.

Delta Air Lines Inc. v. Lukács, 2018 SCC 2 at para. 18; *Vavilov* at para. 108

47. The CPO's decision fails to account for the seriousness of the potential consequences that could flow from the decision to authorize a gravel pit on the top of a steep slope. As the Court emphasized in *Vavilov*, the need for a coherent, rational decision that considers the evidence before the decision-maker is heightened in the context of decisions with particularly serious consequences for those involved. The Engagement Responses are dismissive of the risk of slope instability raised by the petitioners and the District, despite the severity of the potential consequences of the decision for Mr. Raftery and other individuals living directly below the Proposed Gravel Pit.

Vavilov at para. 134

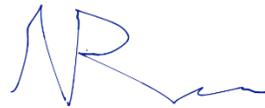
48. While the CPO's October Reasons should properly be disregarded as results-driven reasoning, in the alternative, if they are considered, they further underscore the unreasonableness of the decision in that they:

- a. Rely on irrelevant considerations;
- b. Demonstrate failures of internal logic;
- c. Unjustifiably minimize the severity of the potential consequences of the potential terrain instability;
- d. Demonstrate a lack of understanding of the CPO's statutory authority and function;
and
- e. Are otherwise unreasonable in light of the legal and factual constraints bearing on the decision.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Steve Lornie made 23 Jan 2025.
2. Affidavit #1 of Douglas Raftery made 23 Jan 2025.
3. Affidavit #1 of Kim Woytowich made 29 Jan 2025.
4. Such other affidavits as counsel will advise and serve.

Dated: 30 January 2025



Signature of lawyer for petitioners
Noah Ross and Julia Riddle

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 Associate Judge

No. _____

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
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RESPONDENT

**Re: July 9, 2024 Decision by the Chief Permitting Officer to approve *Mines Act* permit G-
1000000442**

PETITION TO THE COURT

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