No. VLC-S-S-250797
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

WRITTEN SUBMISSIONS OF THE PETITIONERS, GARNET VALLEY AGRI-TOURISM ASSOCIATION and DOUGLAS RAFTERY

RE: HEARING OF PETITION

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Date and Time of Hearing: 7-8 Oct 2025, 10:00 am
Place of Hearing: Vancouver BC
Time Estimate of the Petitioners: 2 days
Time Estimate of the Respondents: 2 days
To be heard before: ☒ Judge ☐ Associate Judge ☐ Registrar

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WRITTEN SUBMISSIONS OF THE PETITIONERS, GARNET VALLEY AGRI-TOURISM ASSOCIATION and DOUGLAS RAFTERY

PART I. OVERVIEW

1. This case concerns the decision of the Inspector of the Ministry of Mining and Critical Minerals to authorize the construction of a gravel pit in the Garnet Valley, a small community within the District of Summerland.

2. This decision was made despite the significant concerns raised about the project's impacts on the unique ecosystem, geological instability and economy of the Garnet Valley. There is no question the Inspector had the authority to grant a permit despite these concerns. However, there is also no question the Inspector had a legal responsibility to explain her decision in a clear, intelligible way that addressed the concerns raised. Simply put, she did not do that, and her decision is fundamentally flawed as a result.

3. The decision is unreasonable on four bases. First, the Inspector failed to justify her decision in light of the evidence and submissions before her, or even address the core concerns raised. Notably, the Province's own ecosystems expert opined the harms of the mine to the ecosystem would be so significant and irreversible that mitigation measures would likely not prevent them from happening. Without even mentioning this report, the Inspector inexplicably concluded the mine's environmental harms could be mitigated by permit conditions. Second, the Inspector's reasons suggest she wrongly thought that local land use planning and bylaws were irrelevant to her decision—particularly concerning in circumstances where the mine was dramatically at odds with the current land use and land use plan. Third, the Inspector summarily concluded the permit should be issued despite the mine being located on a steep hill that had recently suffered a landslide, with no evidence before her to speak to future landslide risks. Finally, the Inspector's reasons for the decision should not even be considered by the Court as they were written months later, under immense public pressure and the threat of judicial review, giving rise to a strong appearance that they were written to retroactively justify the decision.

4. The decision was procedurally unfair, as the decision-maker failed to ensure complete information on the application was available to the public. This failure, exceptional for such an application, prevented the petitioners from giving meaningful input. The decision must be quashed.

PART II. FACTS

A. The Decision

5. This judicial review is of the decision of the delegate of the Chief Permitting Officer (the "**CPO**") of the Ministry of Mining and Critical Minerals (the "**Ministry**") to issue the authorization known as Mine #2000391 dated July 9, 2024 (the "**Permit**") pursuant to s. 10 of the *Mines Act*, R.S.B.C. 1996, c. 293 (the "***Mines Act***" or the "**Act**").

6. The Permit authorizes work to be commenced as described in a Notice of Work for the Garnet Valley Road Pit Sand & Gravel Project (the "**Gravel Pit**" or "**Proposed Gravel Pit**") filed with the CPO on November 15, 2023 (the "**Permit Application**").[1]

7. The Permit was issued 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 "**Site**").

8. The Permit Application was submitted by 1440254 B.C. Ltd. (the "**Proponent**"), a company 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 Proponent are Darrell Grymonpre and Ruby Grymonpre.

9. The CPO is designated by the minister under s. 8.2 of the *Mines Act* to make decisions to issue permits for mines under s. 10 of the Act. The CPO may delegate any of their powers to an inspector pursuant to s. 8.3 of the Act. In relation to the Permit, the CPO has filed evidence that

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[1] Affidavit #1 of George Pietrusinski, made 20 Jun 2025 ("**Pietrusinski #1**"), Ex. Z

their powers were delegated to Nicole Jones, P. Eng., an inspector of mines and a permitting officer with the Ministry (the "**Inspector**").[2]

10. On July 9, 2024, the Inspector issued the Permit (the "**Decision**" or "**Permit Decision**"), for a term of 30 years.

B. The Petitioners

11. 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.[3]

12. The GVATA's members are all business operators in the Garnet Valley: it represents "farms, vineyards, wineries, horse stables and tourist accommodations in Garnet Valley" who together "have tens of millions of dollars invested in our properties and businesses, with plans to invest more."[4] All of these businesses are located in close proximity to the Proposed Gravel Pit.[5]

13. The purpose of the GVATA is to act as a voice for these Garnet Valley businesses, who seek to promote Garnet Valley as an agri-tourism destination.[6] Garnet Valley has an increasing number of tourists coming to the valley for recreational and cycling tourism who patronize the businesses that make up the GVATA, including by visiting the wine tasting rooms in the valley.[7]

14. The petitioner Douglas Raftery owns property and resides at 28214 Garnet Valley Road, Summerland, British Columbia, directly adjacent to the lands on which the proposed mine is to be built.[8]

C. The Statutory Scheme

15. The issuance of a permit is governed by the *Mines Act* and the *Health, Safety and Reclamation Code for Mines in British Columbia* (the "***Code***") established under s. 34(1) of the

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[2] Pietrusinski #1, para. 12
[3] Affidavit #1 of Steve Lornie, made 23 Jan 2025 ("**Lornie #1**"), Ex. B-C
[4] Lornie #1, para. 6, Ex. F at p. 27
[5] Lornie #1, para. 6
[6] Lornie #1, para. 6
[7] Lornie #1, paras. 2-3, 13-14
[8] Affidavit #1 of Douglas Raftery, made 23 Jan 2025 ("**Raftery #1**"), paras. 1-2, 8(e)

Act. The *Code* provides detailed requirements for mining activities, including the issuance of permits, in British Columbia.

16. The specific power to issue the Permit comes from ss. 10(1) and 10(3) of the *Mines Act*:

> **Permits**
>
> **10** …
>
> (1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief permitting officer and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.
>
> **...**
>
> (3) If the chief permitting officer considers the application for a permit is satisfactory and if the applicant has complied with the regulations, if any, made under section 38 (2) (l) respecting applications for permits, the chief permitting officer may issue the permit, and the permit may contain conditions that the chief permitting officer considers necessary.

17. The *Code* sets out specific requirements the CPO or their delegate must follow in deciding whether to issue a permit under s. 10(1), addressed further below.

18. Once a permit has been issued under s. 10(1), decision-makers under the Act have continuing jurisdiction to modify the permit conditions or the term of the permit, or enforce breaches of the permit.[9]

19. However, significantly, the statutory scheme provides no authority to revisit the decision to issue a permit, or revoke a permit issued under s. 10(3) once the decision to issue it has been made.

D. The Permit Decision Process

20. The CPO or their delegate has broad powers to obtain the information necessary to making an evidence-based decision on a permit application. They have the power to request further

[9] See e.g. Act, ss. 10(6)-(7)

information or evidence from a proponent for the purposes of assessing an application. Under s. 10.2.6 of the *Code*, they may refer an application or notice of work to the mines advisory committee established under s. 9 of the *Mines Act*. Under s. 10.2.7 of the *Code*, they may alternatively refer an application to other ministries and agencies.

21. Under s. 10.3.1 of the *Code*, the decision-maker may require notice of an application be published in the Gazette and in local newspapers. Under s. 10.3.2 of the *Code*, if notice is required to be published, a person affected by or interested in the application has 30 days in which to view the application and make written representations to the decision-maker.

22. Where the decision-maker has gathered submissions and evidence from ministries, agencies, and those affected by the permit, the *Code* makes it mandatory that they consider this information:

> **10.2.8** Before issuing a permit under section 10 (1) of the *Mines Act*, the chief permitting officer must consider the following:
>
> (a) any recommendations made by a committee under section 10.2.6 of this code [*submissions by the committee*];
>
> (b) any written representations received under section 10.2.7 of this code [*submissions by other ministries and agencies*];
>
> (c) any written representations received under section 10.3.2 of this code [*submissions by interested or affected persons*].

23. In the case of the Permit, the Inspector gathered submissions and evidence both from referrals under s. 10.2.7 and from persons affected by and/or interested in the decision under s. 10.3.2 of the *Code*.

i. Referral Submissions

24. The respondent CPO's evidence is that on December 8, 2023, the Inspector referred the Permit Application, along with the Permit Application Materials, to: (a) First Nations and Indigenous communities, including the SnPink'tn (Penticton) Indian Band ("**SIB**" or "**PIB**" or "**SnPink'tn Band**"); (b) the Ministry of Water, Land and Resource Stewardship - Ecosystems Section; (c) the Regional District Okanagan-Similkameen ("**RDOS**"); and (d) the District of Summerland ("**Summerland**").[10]

[10] Pietrusinski #1, para. 33

25. The Permit Application stated that the Proposed Gravel Pit was located in RDOS and subject to Okanagan Lake West Greater West Bench Official Community Plan (Bylaw 2790, 2018), and that pursuant to those instruments, the development of the Gravel Pit was compatible with the permissible land uses on the Site.[11]

26. In an email dated January 11, 2024, RDOS responded to the referral from the Inspector stating that the Site was not in the RDOS.[12]

27. In a letter dated January 11, 2024, SIB responded to the referral explaining the proposed project was located within its traditional territory, over which it asserts Aboriginal title. Chief Gabriel stated that SIB forcefully opposed the issuance of the Permit given the risk of harm to the fragile ecosystem of the area, located in a sacred area. He explained the band had been working with the ecosystems branch of the Province to restore and enhance that ecosystem. Chief Gabriel explained that given the project's potential impact on wildlife habitat, it would also affect Band members' constitutional right to harvest ungulates and other wildlife for food, ceremonial and social purposes.[13]

28. The CPO did not include any of the submissions from the SnPink'tn Band in the material it filed with the court, stating it does not generally share submissions from First Nations publicly.[14] In response, Chief Gabriel provided an affidavit explaining the SIB's view that it was important their perspective be included in the record before the court on judicial review.[15]

29. In a letter dated January 24, 2025, Summerland responded to the Inspector expressing its opposition to the Permit. Summerland identified environmental concerns with the creation of a mine in the fragile Garnet Valley ecosystem. It also explained that the Proponent had incorrectly identified the zoning bylaw and official community plan applicable to the Proposed Gravel Pit, and that the introduction of a mine to this ecologically sensitive region was incompatible with the municipality's land use planning. It further identified incompatibility between the proposed project

[11] Pietrusinski #1, Ex. I at p. 695
[12] Pietrusinski #1, Ex. U at p. 821
[13] Affidavit #1 of Chief Greg Gabriel, made 04 Sep 2025 ("**Gabriel #1**"), Ex. B
[14] Pietrusinski #1, para. 49
[15] Gabriel #1, para. 3

and the road infrastructure, road safety and the agritourism-based economy of the region, which it submitted would be threatened by the introduction of a mine in the area.[16]

30. In a letter dated February 5, 2024, RDOS responded to the referral a second time noting that though the Proposed Gravel Pit was not located in the RDOS, it had nonetheless decided to comment, as the Site was located in immediate proximity to the RDOS. It expressed its opposition to and concern about the Gravel Pit due to impacts on the environment (i.e., wildlife habitat), agriculture, recreational trails and road network, echoing the concerns raised by Summerland in its January 24 letter.[17]

31. In a letter dated February 14, 2024, an Ecosystems Biologist from the Ministry of Water, Land and Resource Stewardship - Ecosystems Section responded to the referral. In his letter, the biologist stated the proposed works were likely to have "substantial negative effects" on the local ecosystem, including critical habitat for species at risk, and that these negative impacts "are likely to be permanent or long term and irreversible regardless of the level of mitigation attempted."[18]

32. In a letter dated April 11, 2024, the CPO personally responded to the SnPink'tn Band's January 11, 2024 submission, explaining that "[t]he Ecosystems Biologist has advised the Decision Maker that due to the significant risk of long-term negative impacts to these ecosystems values they do not recommend authorization of this proposed mining operation."[19]

33. The CPO also received submissions from the Lower Nicola Indian Band that it declined to file in the record before the court. However, the CPO's affiant states that the Band similarly raised concerns about impacts to its rights and title, impact to sensitive critical habitat for at risk species and impacts to archaeological sites.[20]

34. There is no record of the CPO responding to any of these submissions or requesting any further information from any of bodies to which she referred the Permit Application and Permit Application Materials, apart from the April 11, 2024 letter to SIB.

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[16] Pietrusinski #1, Ex. V
[17] Pietrusinski #1, Ex. W
[18] Pietrusinski #1, para. 43, Ex. X
[19] Gabriel #1, Ex. C
[20] Pietrusinski #1, para. 44

ii. Public Submissions

35. On December 21, 2023, notice of the Permit Application was published in the Summerland Review (the local newspaper) (the "**Public Notice**"). The Public Notice stated:

> 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 mine 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 mine from a zoning or a land use planning perspective.**
>
> [Emphasis in original.][21]

36. The initiating petition in this proceeding noted that the bolded statement above addressing the CPO's mandate to consider zoning and land use was legally incorrect, as the CPO is indeed both able and, where submissions are made on the issue, required to consider zoning and land use—an argument set out further below.[22] In response, the respondent CPO's affiant gave evidence that the Public Notice was not reviewed for accuracy by anyone at the Ministry.[23]

37. Per s. 10.3.2 of the *Code*, a copy of the Permit Application was also made available in the Summerland Public Library. The copy available at the library contained the Public Notice above.[24] However, the affidavit evidence shows that the Permit Application Materials, which provided the evidentiary basis for the statements in the 14-page Permit Application, were not available in the library for review.[25]

38. Mr. Steve Lornie, president of the petitioner GVATA, viewed the copy of the Permit Application posted at the Summerland Public Library in January of 2024. On January 10, 2024,

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[21] Pietrusinski #1, Ex. S
[22] Petition to the Court, filed 31 Jan 2025, para. 46
[23] Pietrusinski #1, para. 38
[24] Lornie #1, Ex. D
[25] Raftery #1, para. 4; Lornie #1, paras. 8, 24

Mr. Lornie emailed the address in the Public Notice to provide submissions on behalf of the GVATA, submitting the businesses of the valley were "unanimous" in their strong opposition to the Proposed Gravel Pit. He highlighted the "major negative consequences" of the proposed project "for farming, tourism, road safety, water quality, wildlife, and other key things we value."[26]

39. On January 17, 2024, Mr. Lornie sent a second comment on the Permit Application, submitting for the Inspector's consideration the statements of other bodies that the GVATA endorsed. First, the conclusion of Summerland staff as reported to Council the night before: "***Based on the previous application efforts initiated by the landowners, it is staff's belief that the intent of this mining application is to remove known environmentally sensitive habitat on the subject properties, through the auspice of a gravel operation, in order to allow for a potential rezoning justification to residential and/or agricultural uses.***" Second, Mr. Lornie also highlighted a press release from the BC Wildlife Federation stating that they are "**absolutely opposed**" to this permit application, and that it "**threatens to undo millions of dollars of investment and years of conservation work in Garnet Valley**" and "**The downsides of this project are almost too numerous to list**" [emphasis in original].[27]

40. On January 9, 2024, the petitioner Mr. Raftery also emailed the CPO at the address provided in the Public Notice to provide comments on the Permit Application. In his submissions, he explained his concerns about the Permit Application, which included concerns about traffic safety with trucks on a narrow road, damage to infrastructure of the road and damage to sensitive habitat in the mine area. He also raised concerns specific to effects on him as the immediate neighbour to the Proposed Gravel Pit, submitting the proposed project posed a risk to his family and his property's safety as it contemplated digging on the very steep slope overlooking his property, and the application did not have sufficient evidentiary backing to show that digging would be safe. As he stated, "[w]e've already had a Penticton engineering firm advise us that this slope should not be disturbed due to the steepness of the terrain and the nature of the material. No Hydrology report or geotechnical report has been provided by the applicant."[28]

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[26] Lornie #1, Ex. F at p. 27
[27] Lornie #1, Ex. F at p. 29
[28] Raftery #1, Ex. A at p. 1

41. The Ministry received an additional 341 comments with respect to the Proposed Gravel Pit. Of these, the CPO's affiant states 128 were form letters and the remaining 213 were unique submissions from members of the public, the majority of whom identified themselves as living in the area of the proposed mine.[29] Only 2 of the 213 supported the Proposed Gravel Pit, and the remainder were opposed to any permit being granted.

42. There is no record of the Inspector responding to any of these submissions or requesting any further information from any of the affected and/or interested persons who provided submissions on the Permit Application.

43. Thus, the entirety of the record before the Inspector in making the Permit Decision was made up of:

a. the Permit Application;

b. four documents submitted to the Inspector along with the Permit Application on November 15, 2023: an Archaeological Chance Find Procedure; a Noise and Dust Control Plan; a Mining Development Plan; and a Water Management, Including Erosion and Sediment Control Plan;[30]

c. an Environmental Assessment Report submitted to the Inspector on December 4, 2023, along with an email from the Proponent supplementing the information in the Permit Application (together with b., the "**Permit Application Materials**");[31] and

d. evidence and submissions from local governments, the SIB, provincial experts and the public, described further below.[32]

E. The Permit Decision

44. On July 9, 2024, the Inspector issued the Permit.[33]

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[29] Pietrusinski #1, para. 46; Affidavit #1 of Janine Silk, made 22 Jul 2025 ("**Silk #1**")
[30] Pietrusinski #1, para. 29
[31] Pietrusinski #1, paras. 29, 31-32, Ex. N, O-P
[32] Pietrusinski #1, para. 29; Gabriel #1, Ex. A-C
[33] Pietrusinski #1, Ex. Z

45. On August 23, 2024, the Inspector notified some or all of those individuals who had provided submissions on the Permit Application that the Permit had been issued a month and a half prior. Mr. Raftery and Mr. Lornie both received this email.[34] The Inspector included with this email a chart she described as "[a] summary of the concerns submitted… along with mitigations that were implemented" (the "**July Reasons**").[35]

46. In response to the announcement of the Permit Decision, there was significant negative publicity with respect to the Decision in the press in Summerland.[36] The public backlash culminated in further letters from Summerland and the SIB to the Ministry in September and October 2024 demanding the Permit be revoked, to which the Ministry responded the Permit was irrevocable.[37]

47. In Summerland's October 2024 letter to the Ministry, it asked the Ministry representative to either provide it with reasons for the decision, or confirm no such reasons had been drafted, stating that "[r]egardless, we remain completely opposed the project and reserve the right to challenge it using any legal means necessary."[38] In response to this, the Ministry representative stated that the Inspector would be "finalizing" a "Reasons for Decision" document, which they would share in due course.[39]

48. On October 29, 2024, the Inspector provided a "Reasons for Decision" document (the "**October Reasons**") that purported to summarize what she considered in reaching her July 9, 2024 decision.[40]

PART III. ISSUES

49. This petition raises the following issues:

a. Is the Permit Decision unreasonable because:

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[34] Lornie #1, para. 23; Raftery #1, para. 17
[35] Pietrusinski #1, Ex. AA
[36] Affidavit #1 of Kim Woytowich ("**Woytowich #1**"), Ex. 14-27, 29, 32
[37] Woytowich #1, Ex. 28; Gabriel #1, Ex. D-H
[38] Woytowich #1, Ex. 28
[39] Woytowich #1, Ex. 30 at p. 459
[40] Pietrusinski #1, Ex. BB

i. It fails to meaningfully and rationally grapple with serious issues relevant to the Decision, including the evidence of the Province's own ecosystems expert?

ii. It is founded on the Inspector's erroneous view of her own ability and responsibility to consider conflicts with local land use planning, local resources and the local economy?

iii. The Inspector's reasons on key issues are irrational and have no or an insufficient evidentiary basis?

b. Is the Petition Decision unreasonable because it was made without proper reasons, as the October Reasons give rise to a reasonable apprehension they were written to retroactively justify the Decision?

c. Is the Petition Decision procedurally unfair because the Permit Application Materials were not made available through the public comment process, and misleading information was provided in the process?

50. The petitioners submit that each of the concerns above can and should be answered in the affirmative, and that each is an independent basis on which the Decision can and should be set aside.

PART IV. LEGAL BASIS

A. Preliminary Issues

i. The Petitioners' Standing

51. The respondent CPO, without taking any position on standing, raises the petitioners' standing as an issue.[41]

52. The petitioners both have private interest standing to bring this judicial review.

[41] Response to Petition, filed 25 Jun 2025 ("**Response to Petition**"), paras. 15-19

53. The British Columbia *Judicial Review Procedure* Act is silent on the question of standing, which is consequently decided by reference to the common law in this province.[42] The law of private interest standing on judicial review has commonly recognized individuals and groups living in proximity to a mine as having private standing to seek judicial review of a permitting decision.[43] It permits those who are particularly or uniquely affected by an administrative action to seek judicial review of the action in question:

> At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an "aggrieved person," an "affected person", or someone who is "exceptionally prejudiced" by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness.[44]

54. Mr. Raftery has a clear interest in the subject matter of this petition as the owner of the property directly adjacent to and below the site of the Gravel Pit, where he has lived for many years.[45] His affidavit and his submissions to the decision-maker elaborate on his specific interest in this judicial review: ensuring that the project's risks are properly identified and considered by the decision-maker, including the risk to his safety, family's safety and property from a landslide on the slope above his house; the risk of harm to the environment surrounding the Site; and risk of harm to the economy, quality of life, and governance of Garnet Valley.[46]

55. Mr. Raftery's interest in these issues is not remote: he lives directly next to the mine site and will be exceptionally affected by each of these risks, in a manner different from a member of the public who does not live in the Garnet Valley or directly next to the Proposed Gravel Pit.

56. The Garnet Valley Agri-Tourism Association has also identified its specific interest in the subject matter under judicial review, and stands to be closely affected by the permit under review. The GVATA, as its president Mr. Lornie attests, is an incorporated society whose members are all businesses located in the Garnet Valley.[47] Six of the businesses that form part of the GVATA are

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[42] *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2021 BCSC 2091 [***Gonzales Hill***], para. 57; *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2

[43] See e.g. *Highlands District Community Association v. British Columbia (Attorney General)*, 2020 BCSC 2135, para. 25 [***Highlands***], aff'd 2021 BCCA 232, leave to appeal ref'd [2021] S.C.C.A. No. 259

[44] Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2021) at 4:14; *Gonzales Hill*, para. 60, quoting the identical passage in the 2014 edition of Brown and Evans

[45] Raftery #1, paras. 12-16

[46] Raftery #1, Ex. A

[47] Lornie #1, Ex. B-C

located within approximately two kilometres of the Proposed Gravel Pit and one, What the Fungus Mushroom Growers, is located approximately five kilometers away. All of these businesses rely on Garnet Valley Road, which the Proposed Gravel Pit would also utilize and around which serious concerns have been raised about the impact of heavy industrial traffic.[48]

57. As Mr. Lornie explained in his affidavit and in his submissions to the decision-maker, the "homes, families and businesses" of the GVATA's members all stand to be "directly and negatively affected" by the construction and operation of the Gravel Pit.[49] Similarly to Mr. Raftery, the GVATA's members are concerned about the risk of road safety, environmental concerns, infrastructure damage to themselves and their businesses; the GVATA also raised concerns about the negative economic impacts of the Gravel Pit, which it submitted risk putting many agri-tourism jobs in jeopardy.[50]

58. The GVATA's interests are unique and exceptional; it and its members have an interest far more proximate to this Garnet Valley permit than other members of the public. It satisfies the test for direct standing.

59. In the alternative, both Mr. Raftery and the GVATA plainly satisfy the test for public interest standing as:

a. the petition raises serious justiciable issues regarding the reasonableness and fairness of the Permit Decision;

b. as shown by the evidence referenced above, both petitioners have a genuine interest in the subject matter of the petition; and

c. this petition is a reasonable and effective means to bring the matter before the court.[51]

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[48] Lornie #1, paras. 6, 11
[49] Lornie #1, Ex. F at p. 27
[50] Lornie #1, Ex. F at p. 27
[51] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, para. 16

ii. The Record on Judicial Review

a. Admissible Evidence

60. On reasonableness review, the reviewing court may consider "the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body."[52] The record generally does not include evidence that was not directly before the decision-maker. As explained by Justice Groberman in *Air Canada*, "[i]n determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court."[53]

61. Apart from information that was before the decision-maker in making her July 9, 2024 decision, or that explains the information before her, the remaining evidence filed in this petition is either inadmissible or admissible for specific purposes that are not reasonableness review.

62. Evidence relevant to establishing standing is admissible for this purpose.[54] Raftery #1 and Lornie #1, addressed above, both contain evidence relevant to establishing the petitioners' standing on judicial review.

63. Evidence is admissible on judicial review to establish procedural fairness defects not apparent from the record before the decision-maker.[55] Evidence relevant to understanding the procedure followed by the Inspector is found in Raftery #1, Lornie #1, Woytowich #1 and Grymonpre #1 (at paragraphs 20 and 26).

64. Exhibits 14-30 of Woytowich #1 and Exhibits D-H of Gabriel #1 contain news articles and correspondence between the Ministry and Summerland, and the Ministry and the SIB, which is relevant and admissible to the petitioners' reasonable apprehension of impropriety argument: specifically, that the October Reasons must not be considered on judicial review because the context in which they were prepared give rise to a reasonable apprehension that they were written to retroactively justify the decision, rather than reflecting the decision-maker's contemporaneous

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[52] *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65 [***Vavilov***], para. 94
[53] *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 [***Air Canada***], para. 39
[54] *Air Canada*, para. 37
[55] *Vandenberg v. Vancouver (City) Fire and Rescue Services*, 2023 BCSC 2104, para. 104

reasoning. To understand this argument, it is necessary for the Court to understand the public pressure placed on the Ministry to justify the decision given its controversy in the Summerland region.

b. Evidence Inadmissible as Hearsay, Irrelevant and/or Argumentative

65. Grymonpre #1 contains evidence not found in the record before the decision-maker, which is plainly improper on judicial review. Mr. Grymonpre at paragraphs 10-12, 33-39 and 40-50 uses his affidavit to argue with the submissions made by Summerland and petitioners to the decision-maker in the months leading up to the July Reasons and (on one occasion) the October Reasons. This evidence is plainly irrelevant. It was not before the decision-maker and is inadmissible in reviewing the adequacy of the Inspector's reasons in issuing the Permit.

66. Grymonpre #1 at paragraphs 13-19, 51-52, and Exhibit A provides general descriptions of his intentions for the project and the process of applying for the Permit. This is plainly irrelevant to the issues on judicial review.

67. Grymonpre #1 at paragraphs 22-26 and 27-31 and Exhibits B-D describes and attaches a series of screenshots he took of posts others made on the internet, which he submits as evidence of the truth of their contents. This evidence is double hearsay and inadmissible for the truth of its contents, and irrelevant for any other purpose.[56]

68. Pietrusinski #1 contains some evidence not before the decision-maker that the petitioners accept is admissible as evidence to the extent it "briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator."[57] Unusually, the affidavit filed by the respondent CPO in this proceeding was not prepared by the decision-maker herself, and relies on statements from another employee of the Ministry to establish the process followed by the decision-maker. The petitioners accept that, this being the record filed by the decision-maker on judicial review, the hearsay evidence filed by the respondent CPO is generally relevant and necessary to these proceedings, and therefore

[56] *Supreme Court Civil Rules*, Rule 22-2(13)
[57] *Delios v. Canada (Attorney General)*, 2015 FCA 117, para. 45

can be admitted. However, the petitioners reserve the right to object to any impermissible reliance on this evidence.

B. The Permit Decision is Unreasonable on the Reasons and the Record

69. It is undisputed that the Inspector's decision must be reviewed on a standard of reasonableness. A reasonable decision is one that "bears the hallmarks of reasonableness—justification, transparency and intelligibility" and "is justified in relation to the relevant factual and legal constraints that bear on the decision."[58]

70. The Court in *Vavilov* described two categories of unreasonable decisions. The first are decisions that lack internally coherent reasoning: absent from these decisions are the "statements of fact, analysis, inference and judgment" inherent to the reasoning process.[59] It must be clear to the reviewing court how the decision reached flows from decision-maker's analysis.

71. The second category of unreasonable decisions are those that are unreasonable in light of their factual and legal constraints.[60] The decision-maker must deal with, and justify their decision in light of, the evidence before them, the potential impacts of the decision, and relevant statutory and common law constraints.[61] Importantly, the decision-maker's reasons must be *responsive* to the issues raised before them:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (Newfoundland Nurses, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16).... However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.

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[58] *Vavilov*, para. 99
[59] *Vavilov*, paras. 102-04 generally, specifically quoting para. 102
[60] *Vavilov*, paras. 105-35
[61] *Vavilov*, para. 106

[Emphasis added][62]

72. In this case, the petitioners of course do not submit the decision-maker was required to respond to each and every unique concern raised in the many submissions made to her. However, in reviewing both the public and referral submissions made to the Inspector it is apparent that repeated, serious concerns were raised around the same key issues throughout the decision-making process, and that her reasons (or lack thereof) repeatedly fail to acknowledge or grapple with these concerns. The petitioners focus their submissions on three of these issues:

a. risks to the unique local ecosystem of Garnet Valley, harm to which could have ripple effects throughout the region;

b. fundamental incompatibilities between the proposed project and the land use planning of the region, which would have significant effects both for the people and the economy of the region; and

c. serious landslide risk, given the mine's location on a slope vulnerable to landslides.

73. As set out below, the petitioners submit that the October Reasons ought not to be considered by this Court given they were not written contemporaneously with the Permit Decision, and in the context they were written, there is real doubt that they demonstrate the decision-maker's actual reasoning process. However, the analysis below nonetheless begins by addressing both the July and October Reasons. In the petitioners' submission, both display significant failures of internal coherence and fail to grapple with the actual record before the decision-maker, and are thus unreasonable.

i. The Inspector Failed to Grapple with the Severe Ecosystems Impacts of the Proposed Mine

74. The comments from the public, including the petitioners, Summerland and the SIB, all highlighted that the proposed project posed serious risks to the ecosystem of the Garnet Valley.

75. These submissions did not raise generalized environmental concerns related to gravel pit operations, but rather potential risks specific to the uniquely fragile and environmentally

[62] *Vavilov*, paras. 127-28

significant area in which the project was proposed (the "**Ecosystems Impacts**"). As the SIB, long-term stewards of the land, stated:

> ... the project is located within the vicinity of *n?amtiώs*, an important and sacred place for the syilx people. The syilx people have used, inhabited and occupied the Garnet Valley area for hundreds of generations. The proposed development and its operation will have a significant impact on syilx Title, Rights interests and economy, and therefore would infringe on our exercise of syilx rights and title, to this area. In particular, our syilx Elders strongly advise that this area is an important place for Food, Social and Ceremonial activities and the valley is a well-known and important place for ungulates and other important wildlife. In fact, there is substantial overlap with Critical habitat for Species at risk...
>
> We have been working with the Provincial government's ecosystems branch and others to restore and enhance habitat within the Garnet Valley, the proposed operation is counter to this objective. The Garnet Valley has some of the highest value ungulate winter range in the Okanagan, in large part due to a lack of industrial activity.[63]

76. Significantly, the Ecosystems Impacts were supported not only by the submissions of those listed above, but by the February 14, 2024 report from an Ecosystems Biologist at the Ecosystems Section of the Ministry of Water, Land and Resource Stewardship ("**WLRS**"), which states it was referred the mine Permit Application for comment (the "**Ecosystems Report**").

77. The Ecosystems Report stated, among other things, that:

a. the Proposed Gravel Pit will pose "significant risks… to both the habitat and individuals of the following species at risk", listing 5 species at risk from the region;[64]

b. the Proposed Gravel Pit will pose significant risks at a similar level to mule deer, as "the Garnet Valley contains some of the highest value mule deer winter range in the Okanagan Valley and is an area critical to the winter survival of mule deer populations";[65] and

c. the Proposed Gravel Pit will pose significant risks to the ecosystem in which it is located, which is "sensitive to disturbance, primarily from the threat of land

[63] Gabriel #1, Ex. B
[64] Pietrusinski #1, Ex. X at p. 835
[65] Pietrusinski #1, Ex. X at p. 836

> clearing and development." The Proposed Gravel Pit will affect plant species that are already "declining in the Okanagan due to land disturbance and development."[66]

78. Remarkably, the Ecosystems Report emphasized that these risks were likely to happen *regardless of any mitigation measures put in place*, meaning they could not be ameliorated by adding conditions to the Permit. As it stated:

> Gravel pit development and extraction of gravel is generally not compatible with conservation of critical habitat for these species. The loss of habitat is likely to be relatively permanent, the proposed mitigation does not clearly indicate how well it will reduce impacts, and likely the effects of mitigation will be minor.
>
> ...
>
> Based on the description of works and proposed mitigation, negative impacts on ecosystems and species at risks are likely to be permanent or long term and irreversible regardless of the level of mitigation attempted.
>
> Due to the significant risk of long-term negative impact to these ecosystems values we do not recommend authorization of this proposed mining operation.[67]

79. To make a reasonable decision, the Inspector was required to explain why issuing the Permit was justified despite these concerns.

80. The Inspector's reasons simply did not do this.

81. First, the July Reasons consider the Ecosystems Impacts in two brief paragraphs. Inexplicably, the Inspector concludes that the Permit should be issued by reference to adding permit conditions—the precise mitigations that her own expert told her would not significantly alter the harm caused by the mine:[68]

Concerns	**Ministry Responses**
Species at risk, wildlife conservation efforts in the area (ex. Mule deer project, Western Screech owls, American Badgers, etc...), wildlife (ex. Birds, deer, bear, mountain goats, etc...), ungulate winter range.	The permit includes a condition for an environmental assessment for animal sweeps and vegetation removal by a qualified professional.

[66] Pietrusinski #1, Ex. X at p. 836
[67] Pietrusinski #1, Ex. X at pp. 835-36 [emphasis added]
[68] Pietrusinski #1, Ex. AA at p. 859

Concerns	**Ministry Responses**
Environmental damage, ecosystem disruption, and loss of habitat.	Mining will alter the landscape, however, the reclamation plan for the site includes adding 3 terraces on the property and land use will be returned to agricultural. The permittee must follow the *Health, Safety and Reclamation Code for Mines in British Columbia* for reclamation and their permit conditions.

82. These paragraphs are unreasonable in both senses contemplated by *Vavilov*: they lack internal logic and they fail to grapple with the facts and evidence put before the decision-maker. The decision-maker does not even acknowledge the existence of the Ecosystems Report, let alone grapple with it.

83. At most, the July Reasons appear to suggest that some "alter[ation] of the landscape" is justified to allow the construction of the mine. But alteration of the landscape was not the concern raised: the concern is the effects to five specific threatened species, to already sensitive species of plants, to mule deer relied on for Indigenous sustenance, and to the wider environment. Justification of causing these environmental harms was particularly necessary given the severity of the potential impact outlined in the evidence before her: not just habitat and biodiversity loss, but loss that the Province's own expert stated was likely to be irreversible.

84. This same failure of reasoning is echoed in the October Reasons written over three months later, which largely reiterate the same incomplete reasoning as the July Reasons:

> I acknowledge the concerns expressed regarding the removal of vegetation and the impact on wildlife and wildlife habitat. To address these concerns, permit conditions have been incorporated which require wildlife and vegetation surveys to be conducted by a Qualified Professional and mitigation measures to minimize impacts
>
> As well, the permitted mine area boundary includes a buffer from Eneas Creek. Also, the permit restricts the amount of disturbance to 6 hectares at a time, with a requirement for progressive reclamation to be completed prior to further disturbance.[69]

[69] Pietrusinski #1, Ex. BB at p. 866

85. Once again, it is fundamentally unclear how the decision-maker could conclude that her decision was justified by "mitigation measures to minimize impacts" when the evidence before her unequivocally stated those were likely to be irrelevant.

86. The decision-maker's record does not contain a further report from the Ecosystems Expert, or countervailing evidence on the question of ecosystems impacts. The only other report in the record speaking to environmental impacts is an environmental assessment report dated April 18, 2022, commissioned by the mine proponents, which is plainly immaterial. That report states in its opening that it is actually assessing the potential environmental impacts of a different, earlier project proposed by the same Proponent:

> The intended use of the subject properties is for a mix of residential and farm-use as defined under the Agriculture Land Commission Act. The specific development proposal on a small portion of Lot 4 is for a cannabis micro-cultivation facility and the construction of a single family residence.[70]

87. If there had been conflicting evidence in the record, the decision-maker's obligation would have been to consider, weigh and explain her reliance on each of them—an obligation she still would not have met on these reasons. However, this obligation was not even engaged here, where the evidence before her of Ecosystems Impacts, particularly as summarized in the Ecosystems Report, was undisputed.

88. On the failure to consider Ecosystems Impacts alone, the Decision is unreasonable and must be quashed.

ii. The Inspector's Treatment of Municipal Jurisdiction and Land Use Planning Concerns Was Neither Intelligible Nor Reasonable In Light of Its Legal Constraints

89. The Inspector's treatment of the second major issue—zoning and land use—raised in the submissions suffers from the same failure of justification explained above.

90. However, it also suffered from a second significant issue: a repeated misunderstanding on the part of the Inspector of what she was both able and required to consider in making her decision. The Inspector's reasons in multiple places suggest that land use and zoning concerns are not within

[70] Pietrusinski #1, Ex. N at p. 769

her jurisdiction as a decision-maker. This is simply incorrect, and her failure to consider these relevant and important considerations fundamentally taints the reasonableness of her decision.

91. Concern about the incompatibility between how the people who live in the Garnet Valley have planned for the use of this valley and the existence of a gravel pit in the space were summarized in Summerland's January 24, 2024 submission, which stated [emphasis in original]:

- The subject property is designated Open Lands in Summerland's Official Community Plan (OCP). The intent of this designation is for forestry, grazing, open land recreation and conservation management. Natural resource extraction is not a permitted use within the Open Lands OCP designation. **Therefore, this proposed application is not in conformance with the District's Official Community Plan.** Relevant policies in the OCP state the following:
    - S. 7.3.3.4 - Retain **open land areas** to complement the rural image of the community
    - S. 7.3.4.14 - Continue to restrict urban forms of development in **open land areas**, through considering subdivision of properties in these areas to those greater than 20.23 ha.
- The subject property is zoned Forestry Grazing (FG) in District of Summerland's Zoning Bylaw 2000-450. Forestry Grazing zoning does not allow for *natural resource extraction* operations as a permitted use. **Therefore this proposed application is not in conformance with District's Zoning Bylaw 2000-450.** As well, agricultural uses are limited to only grazing of livestock in the Forestry Grazing zone - so the creation of flat arable benches for the proposed end use of agricultural planting would also not be in conformance with District's Zoning Bylaw 2000-450.
- The applicant has 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"). The subject property is within the District of Summerland and therefore subject to the District's Official Community Plan.
- It is clear from the proponent's submission that the intent of the gravel operation is to "*develop flat, useable areas on the lands which can be later used for agricultural purposes*". The subject property should be considered for a potential rezoning application to the potential use of agriculture or residential (if desired), **prior to** the consideration of work to create usable areas for an unauthorized use in the District's Zoning bylaw.[71]

92. In essence, Summerland's concerns were around governance: its ability to plan for land use, as it is required to do, without that planning being frustrated by the Ministry; and its ability to

[71] Pietrusinski #1, Ex. V at p. 830

regulate land such that the *Mines Act* process could not be used to circumvent local governance. These concerns were echoed by the residents of the Valley, who emphasized they have tied their livelihoods and other key life choices to the planned use of the Garnet Valley as an environmentally protected, non-industrial area. As Mr. Lornie stated on behalf of the valley's businesses (in a submission echoed by Summerland),[72] "GVATA members employ (and plan to employ) many more workers than the two or three that this gravel pit will employ. These agritourism jobs are being put in jeopardy."[73]

93. Summerland also raised the fact, related to its concern that the Proponent was trying to avoid local laws, that the directors of the Proponent have a history of noncompliance with District laws. It noted Summerland has outstanding enforcement proceedings against the Proponents' directors for conducting unauthorized tree cutting within an environmentally sensitive development permit area and forcing Summerland to issue a Stop Work Order.[74]

94. The Inspector's July Reasons address "Zoning, and land use" briefly:

Concerns	**Ministry Responses**
Zoning, and land use.	The province has exclusive jurisdiction over mining. Local zoning, land use, and bylaws are not enforceable within the mine site because of the Provinces' exclusive jurisdiction. [*sic*] The Earthwork Control Bylaw Number 2000-290 from District of Summerland affirms: "This bylaw does not apply to any person engaged in earthwork that meets any of the following conditions: ... d) within a commercial gravel pit or quarry permitted pursuant to the Mines Act. …" [Emphasis added][75]

[72] Pietrusinski #1, Ex. V at p. 831
[73] Lornie #1, Ex. F at p. 27
[74] Pietrusinski #1, Ex. V at p. 829
[75] Pietrusinski #1, Ex. AA at p. 860

Tree removal incident on property.	This did not occur on a mine site. This is between the private landowner and The District of Summerland.[76]

95. The July Reasons fail to "meaningfully grapple" with the key issues raised by Summerland and the petitioners, as residents of Summerland.[77] The Inspector does not address, let alone respond to, the actual zoning concern raised by Summerland and others—incompatibility between the subject property's intended use and the Zoning Bylaw. Nor does it address the incompatibility between Summerland's OCP and the use of the land for resource extraction. There is no mention at all of the serious governance concern that, in the circumstances of this specific Permit Application, the *Mines Act* process is being used to avoid the oversight of a local government.

96. This failure to engage with Summerland's submissions is particularly concerning in this case, where the Permit Application erroneously identified the Site as being located in the RDOS and in an area where resource extraction is permissible under the OCP.[78] It is not even clear from the Inspector's reasons or the record what zoning or OCP she thought applied to the Site—while she references a different Summerland bylaw in the segment of July Reasons above, she does not correct the erroneous information in the Permit Application and Application Materials, which claimed the zoning of RDOS applied and there was no conflict between zoning, the community plan and the Permit. Further, the July Reasons contain inconsistent reasoning around land use, suggesting in relation to ecosystems (quoted above) that the lands will be "returned to agricultural" after the mine use is complete. This concerningly suggests the Inspector did not understand or review Summerland's submission, which clearly states the lands are not currently being used and are not zoned for agricultural purposes; this is the basis for Summerland's concern that the Proponent is attempting to avoid a rezoning application.[79]

97. Further, the Inspector's statement that "[l]ocal zoning, land use, and bylaws are not enforceable within the mine site because of the Provinces' exclusive jurisdiction [over mining]"

[76] Pietrusinski #1, Ex. AA at p. 859
[77] *Vavilov*, para. 128
[78] Pietrusinski #1, Ex. K at p. 714; Ex. I at p. 695
[79] Pietrusinski #1, Ex. V at p. 830

appears to dismiss land use concerns as irrelevant to her decision-making process.[80] This reflects a concerning misunderstanding of her responsibilities under the Act and the *Code*.

98. Section 10 conveys a broad discretion to approve or deny applications for permits to commence work on a gravel pit, and it is apparent that the decision-maker on a permit must consider regional land use regulations and zoning in their decision making.[81] Indeed, the Ministry's own "Guide to Preparing Mine Permit Applications" suggests that regional district and municipality processes should be followed by mine proponents, regardless of the Ministry's jurisdiction:

> Regional districts and municipalities may require approvals for rezoning land and issuing special development permits if applicable bylaws exist. The municipality or regional district in which the proposed pit or quarry is located should be contacted to determine specific local requirements.[82]

99. Further, as set out above, in making a permit decision, the Inspector is not only permitted to consider local zoning and land use, but *required* to consider the information provided to her by agencies she has referred the application to and by members of the public.[83] Zoning and land use concerns featured prominently in the comments of Summerland, RDOS and members of the public: it is simply incorrect to suggest these were irrelevant to her Permit Decision.

100. This same failure to understand or engage with the land use issues is found in the October Reasons, which do not reference any bylaws, and instead say only this about land use:

> **USE OF LAND**
>
> I am aware of the concerns raised in relation to visual impacts, property values, and general land use.[84]

101. These reasons, again, do not respond to the actual concerns raised, or leave the reader with any confidence that the Inspector understood her legal responsibilities and the legal context in which she was making her decision.

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[80] Pietrusinski #1, Ex. AA at p. 860
[81] *Anning v. British Columbia (Minister of Energy and Mines)*, 2002 BCSC 896, para. 117
[82] Pietrusinski #1, Ex. E at p. 554
[83] *Code*, s. 10.3.2
[84] Pietrusinski #1, Ex. BB at p. 865

102. Summerland and the public, including the petitioners, also raised concerns to the decision-maker over the incompatibility between the Gravel Pit and the road infrastructure servicing the Site. Residents' concerns were not just based on the inconvenience of having truck traffic on an otherwise quiet road, but safety risks stemming from the fact that the narrow rural road is simply not built to accommodate heavy industrial truck traffic. As summarized by Summerland:

> Impacts to existing District infrastructure would be substantial if this gravel pit operation was to be approved. Garnet Valley Road is a rural road, with narrow sections and poor visibility around corners and will not be conducive to regular heavy truck traffic from gravel trucks and trailers, especially north of the intersection with Wildhorse road.
>
> [Emphasis added][85]

103. These concerns were echoed throughout the submissions of many other impacted residents, who emphasized that the issue of increased heavy truck traffic on the one narrow road through the community would meaningfully impact their lives.[86] As one submission put it:

> Hello,
>
> Please do not set up a gravel pit on my road. I am really scared that there will be an accident with those large trucks. I walk with my kids a few days a week and can't imagine how a vehicle like that could stop for us, especially if they are getting paid by the load and going too fast. There are a lot of spots in this valley without cellular signal also, so I am concerned for the safety of myself, my family and the workers of this pit.
>
> Thank You,
>
> [Redacted][87]

104. As the courts have recognized, government policy that impacts road safety is not trivial: it may seriously impact individuals' safety and well-being.[88]

105. In response to these concerns, the Inspector stated the following in her July Reasons:[89]

Concerns	**Ministry Responses**
Road safety, road infrastructure, city infrastructure, and traffic congestion.	EMLI's jurisdiction applies to the mine site only. There are a number of other agencies that

[85] Pietrusinski #1, Ex. V at p. 830
[86] See e.g. Lornie #1, Ex. F at p. 27; Raftery #1, Ex. A at p. 1
[87] Silk #1, Ex. A, 2024-01-09-1312_Public_Comment_Redacted
[88] *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397, para. 179
[89] Pietrusinski #1, Ex. AA at p. 857 [emphasis added]

	ensure the safety of the road including the District of Summerland and RCMP. All traffic must obey the rules of the road and any posted restrictions.

106. Once again, the Inspector's reasons fail to engage with the actual concerns raised, and fail to logically justify the conclusion that the Permit should be issued notwithstanding these concerns. The concern repeatedly raised around the road was not that there are no traffic safety laws on the road or the RCMP will not enforce them: the concern is that adding heavy traffic to a narrow, twisting road not designed for that traffic would inherently make life more dangerous for the many cyclists and pedestrians using the road, notwithstanding the existence of traffic laws. There is no internal logic to this response.

107. Further, by responding to these serious road safety concerns with an explanation that the Ministry does not govern roads, the Inspector appears to be once again wrongly equating a lack of jurisdiction over areas outside the mine with a lack of responsibility to consider the mine's effects outside of its boundaries. The court, and the public, once again cannot have confidence she understood the law applying to the Decision.

108. The October Reasons on road issues are one of the areas in which the decision-maker's purported explanation of why she issued the Permit changed significantly in the four months after the Decision was made. In them she said:

> I considered the many concerns that were raised regarding traffic and safety on Garnet Valley Road. To address these concerns, I limited the area that can be mined at any one time to 6 hectares, which limits the volume of truck traffic that will be generated from the operation. As well, I restricted the operating hours to Monday to Friday, from 7AM to 5PM. No work will be permitted outside of these hours, including on statutory holidays. This restriction further limits the amount of traffic that will be generated on Garnet Valley Road, in consideration of the residents and recreational users.[90]

109. The October Reasons, as set out above, should not be considered given how belatedly they were written. Indeed, this passage is a good example of why the law does not permit decision-makers to engage in retroactive reasoning: in this case, the court, and the public, are left in the dark as to which set of reasons truly animated her decision.

[90] Pietrusinski #1, Ex. BB at p. 866 [emphasis added]

110. Even if considered, the October Reasons fail to justify the Decision. The reasons do not explain if limiting mine operation hours to 7 AM – 5 PM on weekdays will actually change the intended traffic on the road, given those would be typical operating hours for many operations in any event. The Proponent is still permitted to extract from over 1/3 of the mine's area at any given time, and when operating over the 30-year life of the mine, may well generate the same amount of daily vehicle traffic by mining a smaller area more intensely. There is no indication in the record that the Inspector gathered any further information on the road or its traffic patterns to understand how these conditions may or may not materially reduce the risk. Simply put, the Inspector's reasons and record do not explain how much risk she thinks will be mitigated by these conditions, and why the remaining risk to safety, infrastructure and the economy from road damage is justified.

iii. The Inspector's Conclusions on Slope Stability Risk Had No Evidentiary Foundation

111. In addition to the Decision's failure to respond to serious concerns raised in submissions and its misstatements of the legal context, the Decision is also unreasonable in its lack of an evidentiary basis for significant conclusions.

112. A unique feature of the Site, as set out above, is that it is located on a slope that suffered a landslide in 2018, five years before the Permit Application was made to excavate a mine on the same site; and that residences are located directly adjacent to the mine site.

113. A brief description of the fact that a "land slippage" occurred previously on the Site appears in the Permit Application and the Proponent's "Noise and Dust Control Plan", though that document does not contain any opinion on the risk of future landslides and no actual data or studies on land stability are included in the plan.[91] In a follow-up email to the Inspector, the consultant hired by the Proponent references remedial work being done on the site post-landslide and asserts that "the historical slippage will have no affect [sic] on the mining area."[92] However, no evidence or data on the current geotechnical status of the land are referenced or included in that email.

114. Summerland summarized a very different view of the land stability issue as follows:

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[91] Pietrusinski #1, Ex. K at p. 714, Ex. I at p. 695
[92] Pietrusinski #1, Ex. P at p. 812

> The subject property has known land slippage and geotechnical stability concerns. A potential gravel operation could have significant land vibrations and lead to a hazardous event of land slippage/slide. There are existing residences that are located downslope from the proposed operation that would be at risk.[93]

115. The petitioner Mr. Raftery, whose home is located immediately adjacent to and downslope from the Site, wrote to the Inspector to communicate the work he had done to understand slope stability as someone who stood to be seriously personally impacted should the Proposed Gravel Pit trigger another landslide. As he stated:

> **Most importantly**, the applicant is proposing in the second phase of his project, digging a 40 foot deep pit on the edge (eastern boundary of his property adjacent to my property) of a 50 to 70 degree slope 200 feet directly above the residences at 28000, 28214 and 28412 Garnet Valley road. We've already had a Penticton engineering firm advise us that this slope should not be disturbed due to the steepness of the terrain and the nature of the material. No Hydrology report or geotechnical report has been provided by the applicant. [Emphasis in original][94]

116. Mr. Raftery in his submissions and the Proponent in the Permit Application provided competing figures as to the degree of the slope that falls below the mine, ranging from 42%-75%.[95] As set out below, there is no indication the decision-maker engaged with or attempted to reconcile these measurements. However, the slope is, by any account, a steep one.

117. Thus, the Inspector was confronted with differing views that excavating on the site of a previous landslide may either be safe, or could cause serious risks, including life safety risks. However, there was no actual geotechnical evidence before her, only submissions, and one reference by Mr. Raftery to a recent engineering opinion having been given that the slope was not safe for construction.[96] The Inspector did not gather further any evidence to better understand this risk, to test the submissions before her, or arrive at a rational, scientifically backed conclusion on what the actual risk was.

118. Instead, in her July Reasons, the Inspector said only this:

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[93] Pietrusinski #1, Ex. V at p. 830
[94] Raftery #1, Ex. A at p. 1
[95] Raftery #1, Ex. A at pp. 1-2; Pietrusinski #1, Ex. I at p. 696
[96] Raftery #1, Ex. A at p. 1; Pietrusinski #1, Ex. P at p. 812

Concerns	**Ministry Responses**
Geotechnical issues/ slope stability, concerns about properties below the mining areas, and hydrology.	The permit includes a geotechnical assessment and monitoring conditions by a qualified professional.[97]

119. These reasons, again, completely fail to grapple with what the Inspector had actually been asked to decide in making the Permit Decision. First, what is the likelihood that a landslide or other slope instability event might occur as a result of mining activity? Second, how serious is the risk to life, safety, property and the environment stemming from such a landslide? And third, is there enough information to suggest this risk can be made so minimal that issuing a permit for the mine is justified?

120. The Inspector's July Reasons suggest she did not ask herself any of these questions, nor did she answer them. Instead, she issued an irrevocable permit for a mine for a 30-year term. This is fundamentally unreasonable.

121. Extraordinarily, when the Inspector wrote the October Reasons three months later, her rationale for the decision to approve the permit notwithstanding slope stability concerns changed dramatically. She states:

> **TERRAIN STABILITY**
>
> Consideration of slope stability is normal practice in the planning and review of mining applications, particularly where benches are being proposed. Concerns about landslides and their potential impact on the environment and safety were also raised through public comments.
>
> I am aware that a debris flow occurred on the boundary of the proposed development property and that an analysis identified the source of the failure to be "*water flowing down the historic access road*". The submitted water management plan, which was accepted and incorporated into the permit, includes mitigation measures for the management of surface and groundwater and the movement of sedimentation.
>
> The EMLI geotechnical reviewers recommended permit conditions that would attempt to mitigate the risk of further geotechnical incidents, including a monitoring plan to be developed by a qualified professional which I have accepted. In addition, permit conditions around mine design and storage of overburden can also address stability issues and concerns raised. The Code also includes regulations for designing roads, and the permit

[97] Pietrusinski #1, Ex. AA at p. 857

> requires regular mine plan updates. Any new information from the monitoring plan or other sources can be evaluated to determine if changes to the permit are required.
>
> Based on all of the required professional plans, and combined with the regulatory requirements of the Code, I am satisfied that the highly qualified technical experts from EMLI's review team have conducted a comprehensive review of the application, and that the permit conditions provide enough requirements to ensure that the stability of the site is carefully managed and the risk is reduced.
>
> [Italicized emphasis in original, underlined emphasis added][98]

122. First, it is notable that the first sentence of the Inspector's reasons simply repeats what she was told by the Proponent in an email—without, apparently, having had any actual evidence before her of the cause of the last landslide and how that might relate to future landslide risk. The water management plan she references, which was not made available to the public but was disclosed in the record in judicial review, does not describe or opine on slope stability risk or contain any data about that risk.[99]

123. Second, and importantly, this is the first and *only* point at which the record of decision includes any reference to a "comprehensive review" and recommendation prepared by "highly qualified technical experts from EMLI's review team" in relation to landslide risk. The record the Inspector filed in this Court includes no such recommendation, no information about the identity or qualifications of any reviewers, and no record of a referral to EMLI geotechnical reviewers. The July Reasons contain no reference to such a referral, review or recommendation. The CPO's affiant on judicial review, in describing and providing the record of decision to the court for the purpose of review, includes no such document. Heading into a judicial review hearing, the petitioners continue to have no assurance that any such record was even prepared for the July decision, apart from a passing reference in reasons written almost four months after the fact.

124. It would be self-evidently unreasonable for the CPO to have relied on technical advice she did not receive in making a decision on this permit. However, to the extent any such recommendation report does actually exist, it cannot be relied on to justify the Decision. As the court stated in *Vavilov*, it would be "unacceptable for an administrative decision-maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its

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[98] Pietrusinski #1, Ex. BB at pp. 864-65
[99] Pietrusinski #1, Ex. M

decision would be upheld on the basis of internal records that were not available to that party."[100] This principle applies with particular weight where the first time those alleged internal records are even described or referenced happened long after the decision was made.

125. As *Vavilov* tells us, "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes.... if a decision has particularly harsh consequences for the affected individual, the decision-maker must explain why its decision best reflects the legislature's intention." In particular, "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" require a high degree of responsive justification.[101]

126. For the Ministry, the decision to authorize a gravel pit may be a relatively routine matter, and understanding, researching and responding to concerns of the public an exercise in paperwork. For members of the public such as Mr. Raftery, however, this decision is fundamentally important: a slope collapsing on himself, his family or his house is undoubtedly a harsh consequence, and the Ministry official with the authority to authorize such a potential consequence wields "an extraordinary degree of power" over him as an ordinary person.[102] Administrative law says Mr. Raftery was entitled to have that consequence carefully considered and transparently justified before any decision was made on July 9, 2024. The record shows it was not, and the Decision is unreasonable as a result.

C. The Permit Decision is Unreasonable as it is Tainted by Retroactive Justification

127. In the petitioners' submission, the Decision can and should be quashed as unreasonable on the basis of the decision-maker's reasons, given the many frailties they contain.

128. However, the decision may also be set aside on the basis that the October Reasons, when viewed by a reasonable and right-minded party, gives rise to the inference that they do not reflect the decision-maker's actual reasoning process. The evidence shows the October Reasons were drafted months after the fact, in a context of intense public pressure and the threat of a possible impending judicial review. Further, the October Reasons contain analysis not only absent from the

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[100] *Vavilov*, para. 95
[101] *Vavilov*, para. 133
[102] *Vavilov*, para. 135

July Reasons, but in some cases completely different than the rationale in the July Reasons, raising serious questions about what the Inspector actually relied on in making her decision.

129. These flaws further support the Decision being set aside. While the October Reasons are in themselves unreasonable, the sparse July Reasons viewed on their own also do not provide a rational or intelligible basis for the Decision—particularly in light of the confusion created by different and contradictory reasoning being provided in October.

130. Decision-makers both administrative and judicial are presumed to be acting fairly and with integrity. However, in exercising their authority, "fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer."[103]

131. As a majority of the Court concluded in *Teskey*, where the informed and reasonable observer may suspect that a decision-maker's reasons were written to justify a decision already made, this gives rise to a reasonable apprehension of results-driven reasoning.[104] Where circumstances creating such an apprehension exist, reviewing reasons as if they did reflect the actual reasoning process would be unfair.[105] In these circumstances, the October Reasons should not be treated as *reasons* for the purpose of administrative review, but stand only as evidence that further supports the petitioners' concerns about the reasoning and process followed here.

132. *Teskey* concerned a judge who convicted an accused person on a detailed evidentiary record, giving only brief oral reasons for doing so at the time of conviction.[106] The judge stated he would issue written reasons "within a short period of time."[107] However, the reasons were not released promptly. Only after counsel's requests for reasons for the purposes of an appeal were any reasons produced, 11 months after the decision.[108] Justice Charron concluded the reasons should not be considered by a reviewing court on appeal, as in the circumstances there was a

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[103] *R. v. Teskey*, 2007 SCC 25 [***Teskey***], para. 21
[104] *Teskey*, paras. 2, 18
[105] *Teskey*, para. 2
[106] *Teskey*, paras. 4-5
[107] *Teskey*, para. 7
[108] *Teskey*, para. 10

reasonable apprehension that the judge was attempting to justify his previously made decision, rather than describing the reasoning process of making the decision.[109]

133. While *Teskey* was a criminal and not an administrative law case, the rationale underlying it applies equally, and in some ways even more forcefully, to an administrative law case. Though administrative decision-makers are not dealing with the presumption of innocence, they do operate in a framework that places an immense amount of trust in them to accurately describe their contemporaneous reasoning process in the documents they title "reasons". Reasons are the cornerstone of judicial review, as they "are the primary mechanism by which administrative decision-makers show that their decisions are reasonable—both to the affected parties and to the reviewing courts."[110]

134. Throughout the process of reasonableness review, courts show deference to the views of an administrative body, giving the content of the reasons particular import.[111] On judicial review, a decision-maker's holding on a question of law is only required to show a rational chain of analysis and reach a reasonable outcome—not to be correct. In administrative law, it is fundamentally important that a decision-maker not only give reasons that accurately reflect their contemporaneous decision-making process, but also maintain the appearance of doing so.

135. The belatedly issued October Reasons, to the contrary, give rise to the appearance that they were drafted to support a decision long since made. While the 4-month delay here is less significant than that the 11-month delay *Teskey*, the reasoning in that case tells us that what is most important to creating a reasonable apprehension of retroactive reasoning is not the existence or length of delay, but rather the entire circumstances in which reasons were eventually written.[112]

136. A unique and particularly troubling aspect of this case is that the October Reasons in many places include completely different rationales than the July Reasons. To take one example, in response to the concern that a mine would reduce the value of nearby property, in July the Inspector's sole response was that "Imperial [*sic*] evidence throughout the province has shown that

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[109] *Teskey*, para. 21
[110] *Vavilov*, para. 81
[111] *Vavilov*, para. 85
[112] *Teskey*, para. 16

property values continue to appreciate next to a sand and gravel pit or quarry."[113] In October, however, she made no suggestion that property values would go up, instead stating that "[t]he issue of property values is outside the scope of the decision under the Mines Act."[114]

137. Both of these lines of analysis are problematic from a reasonableness standpoint—there is no evidence in the record supporting the Inspector's claim with respect to increasing property values, and it is again incorrect to suggest the Inspector could not consider property values in exercising her discretion. However, these statements are also problematic from a bias perspective, as they too give rise to a view that the October Reasons reflect a different, separate reasoning process than what took place in July.

138. Further examples of the divergent and incompatible lines of reasoning between the two decisions are set out above.[115]

139. In this case, as in *Teskey*, the Inspector was required to grapple with technically complex issues, such as geotechnical and environmental concerns, and with divergent facts and positions set out by the Proponents and respondents such as Summerland, SIB, and the petitioners. The volume of submissions she received and complexity of the material she should have gathered and contended with called for a detailed consideration and analysis before any decision could be reached. In other words, a reasonable person might suspect that this detailed consideration, if not drafted contemporaneously, may not be accurately reconstructed later on.

140. Further, as in *Teskey*, the October Reasons were written in circumstances where a reasonable person may apprehend the decision-maker felt compelled to justify a decision that had already been made—and one that was, under the statutory framework, irrevocable. From July to October, the decision was the subject of extensive public and media criticism in news outlets throughout the region.[116] Reports speak to members of the Ministry participating in a meeting in Summerland in September 2024, and meeting with representatives of Summerland in October 2024;[117] to a community bike ride by cyclists being organized to raise awareness of the Gravel Pit

[113] Pietrusinski #1, Ex. AA at p. 857
[114] Pietrusinski #1, Ex. BB at p. 865
[115] Written Submissions, *supra*, paras. 105-09, 118-21
[116] Woytowich #1, Ex. 14-27, 29, 32
[117] Woytowich #1, Ex. 24 at p. 428

and risks to road safety;[118] and to the subject of the Gravel Pit being a key provincial election issue in Summerland in September and October 2024.[119]

141. Public discontent crystallized in letters from Summerland and SIB to the Ministry written in early October 2024. On October 10, 2024, SIB wrote to the Ministry in a letter that forcefully restated SIB's opposition to the Proposed Gravel Pit, describing the Decision as "another brutal insult to [SIB] and an illustration of your lack of commitment to implementing DRIPA."[120]

142. On October 8, 2024, Summerland wrote to the Ministry expressing concern that "significant errors and omissions have been demonstrated" in the issuance of the Permit, and asking for a copy of any reasons that were written to support it.[121] The letter from Summerland expressly made reference to a possible legal challenge to the decision, stating "[r]egardless, we remain completely opposed the project and reserve the right to challenge it using any legal means necessary."[122] In response, on October 25, 2024, the Ministry stated that the statutory decision-maker "is finalizing" a Reasons for Decision document.[123]

143. These circumstances parallel, again, those the Court identified as so concerning in *Teskey*: the reasons were written in a context where the threat of review was already present, giving rise to the appearance that the reasons may have been, consciously or unconsciously, framed to respond to that threat. The decision-maker's affiant Mr. Pietrusinski gives evidence that the Inspector told him she was aware of the Summerland correspondence but had not reviewed it.[124] This evidence—which, as hearsay, should be treated with caution by this Court—regardless supports the petitioners' argument, as it confirms that the Inspector was aware of the letter, and presumably its contents.

144. Those affected by administrative decisions are entitled to decision-making that not only understands and addresses their concerns, but allows them to trust that any reasons given accurately reflect why the decision-maker did what they did. The circumstances of this decision,

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[118] Woytowich #1, Ex. 25 at p. 435
[119] Woytowich #1, Ex. 27 at p. 445, Ex. 29 at p. 455-57
[120] Gabriel #1, Ex. G
[121] Woytowich #1, Ex. 28 at pp. 453-54
[122] Woytowich #1, Ex. 28 at p. 454
[123] Woytowich #1, Ex. 30 at pp. 458-59
[124] Pietrusinski #1, para. 53

viewed by a reasonable person, do not create that trust. The October Reasons should be disregarded accordingly.

D. The Permit Decision Was Procedurally Unfair

145. The Inspector's decision-making process was procedurally unfair. By failing to provide affected and/or interested persons with copies of the Permit Application Materials, the Inspector failed to ensure the *Code* was followed, deviated from standard Ministry practice and failed to give the petitioners a full and fair opportunity to be heard on a decision consequential for them. The process of making the Permit Decision was also made unfair by the provision of inaccurate and misleading information to those with a right of input in the official decision-making process. Having been made by an unfair process, the Decision must be set aside.

146. It is a fundamental principle of administrative law that in order to provide meaningful submissions on a decision, an individual must be able to present their perspective "fully and fairly" to the decision-maker.[125] In this case, where so many of the critical concerns lay around what evidence existed to support the Proponent's application, it was imperative the petitioners have access to the full application materials on which the decision is based.[126]

147. Yet the evidence is that the only information shared in the Summerland Public Library to notify Mr. Raftery, Mr. Lornie and other affected individuals like them of the process was the 14-page Permit Application, without the Permit Application Materials included.[127] The only purported evidence to the contrary is an affidavit from one of the Proponent's directors who appends screenshots from a social media post where a person claims to have seen some of the supporting documentation on a given day in the library.[128] This evidence is not only contrary to the petitioners' evidence but, as addressed above, double hearsay and plainly inadmissible.

148. The CPO's first response to the petitioners' concerns around the lack of information they had is that the petitioners had no right to view the materials. This is both inaccurate and beside the point.

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[125] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [***Baker***], para. 28
[126] *Baker*, para. 28
[127] Raftery #1, para. 4; Lornie #1, para. 8
[128] Affidavit #1 of Darrell Grymonpre, made 15 Aug 2025 ("**Grymonpre #1**"), Ex. C at p. 31

149. As a matter of statutory interpretation, the *Code* provides a right to persons affected to both receive notice and view "the application" submitted for a permit:

> **Publication**
>
> 10.3.1 When required by an inspector, notice of filing an application under section 10 (1) of the *Mines Act* must be published, by the person filing it, in the Gazette and in local newspapers.
>
> **Written Response**
>
> 10.3.2 If a notice of filing has been published under section 10.3.1 of this code, a person affected by, or interested in, the application has 30 days after the last date on which the notice was published to view the application and make written representations to the chief permitting officer.[129]
>
> [Emphasis added]

150. The word "application" in s. 10.3.2 is not defined, but clearly references s. 10(1) of the Mines Act. This section requires the filing of

> ... a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.
>
> [Emphasis added][130]

151. In other words, s. 10(1) of the Act draws no distinction between the notice of work and supporting material documents, all of which must be provided to the minister as part of the plan. In this context, the word "application" in s. 10.3.2 must be taken to refer to the entire package of materials sent to the Minister, not just the Notice of Work form and maps.

152. Further, the CPO's argument ignores the fact that it is not just statutory obligations, but the legitimate expectations of the petitioners that were not met here. The Ministry's own "Guide to Preparing Mine Permit Applications for Aggregate Pits and Quarries in British Columbia" plainly contemplates significantly more information-sharing with the public than occurred in this unusual case. Under the heading "4.6 Notification Requirements", it details the process that members of the public can expect to see followed when an application is made to permit a new mine that could affect them and states:

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[129] *Code*, ss. 10.3.1 and 10.3.2 [emphasis added]
[130] See also *Code*, s. 10.1.2

The following public notification measures are generally required:

- A 30-day advertisement of an approved application in a local newspaper and the British Columbia Gazette. Proponents should contact the appropriate Regional Office (see APPENDIX 3) for guidance on advertising requirements
- A **completed application package** should be available during the 30-day review period in a locally accessible facility, such as a library, where the public can access the documentation.
- A public meeting or meetings to communicate the intend of the application, and to provide information on issues (e.g., environmental concerns) pertinent to the project. The format for public meetings is often an "open house" with opportunities for attendees to pose questions to proponents, agents and experts. [Ministry] staff attend public meetings to provide information o the Mines Act process, but not to answer specific questions about projects. Notification of public meetings should be co-ordinated through the appropriate Regional Office.
- A public notice posted on the property advertising that the property is the subject of a Mines Act permit application.

  [Emphasis added][131]

153. Along with the lack of materials being made available, there is no evidence of any public meetings or open houses being held to discuss the project.[132] Mr. Raftery attests that, despite living next to the property in question, he never saw a public notice posted there.[133]

154. The fact that the procedure that took place here did not meet the standard of fairness required is supported by the *Baker* factors, which point to a higher level of procedural fairness being required in this case. The decision:

a. Was final, without a statutory or other mechanism of appeal, and has a 30-year term that will not expire until July 9, 2054. Indeed, there is no authority for the Inspector or the Ministry to revisit a s. 10 *Mines Act* decision once a permit has been issued.

b. Was made in a statutory scheme that not only allows submissions from those affected, but in fact *requires* the decision-maker to consider those submissions—they "must" do so under s. 10.2.8 of the *Code*.

[131] Pietrusinski, Ex, E at p. 555
[132] Raftery #1, para. 10
[133] Raftery #1, para. 10

c. Was made with the legitimate expectation that the Inspector would consider and respond to the perspectives of those most impacted by her decision, and the legitimate expectation of the full application being shared with the public.

d. 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; and the interests of those who could, like the GVATA's members, have their livelihoods affected by the Proposed Gravel Pit.[134]

155. To the extent the Inspector relied on the Permit Application Materials—which would make her decision unreasonable, per *Vavilov*[135]—her decision is procedurally unfair because that material was not made available to the petitioners and others in their circumstances. The petitioners could have provided independent expert reports to the decision-maker commenting on the content of the Permit Application Materials, or otherwise addressed the frailties in that evidence that have become all-too-apparent now that they have been given the record on judicial review. Without access to the materials, they were deprived from making submissions that could have been important to the decision reached.

156. The respondent CPO submits that the question of the procedural fairness "applicable to the issuance of a *Mines Act* permit under the *Mines Act*" has been conclusively decided by previous court decisions that considered the *Baker* factors in the context of other, different permitting decisions.[136]

157. This submission fundamentally misunderstands the law of procedural fairness. The degree of procedural fairness required in any given case is flexible and depends on the context of the particular rights and interests affected by any given decision.[137] In *Highlands* and the cases set out therein, the courts concluded a low duty of fairness was applicable to neighbours of a mine or other resource extraction development on the specific facts of those cases, where the concerns of the

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[134] *Baker*, paras. 20-27
[135] *Vavilov*, para. 104
[136] Response to Petition, para. 44; *Highlands*
[137] *Baker*, para. 22

neighbours were grounded on the "broader environmental impacts" of the proposed development.[138]

158. In this case, while the petitioners' concerns do involve the impact of the decision on the broader environment and residents of the valley, the concerns are also very direct and personal. The GVATA's concerns relate to the personal livelihoods of its members, who will be attempting to successfully operate tourism-oriented winery patios and organic farms in close proximity to gravel crushing operations if the Permit is upheld. Mr. Raftery's concern relates to the personal safety of himself, his wife and his property given the risk of a landslide from a gravel pit built on the hill above his house. These highly specific concerns give rise to an elevated duty of procedural fairness in the highly specific circumstances of this case.

159. Regardless, *Highlands* is nonetheless distinguishable because of the much higher level of procedural fairness accorded to the (less affected) petitioner, a residents' association protesting the permitting of a gravel pit on the basis of broad environmental impacts. In that case, the petitioner was provided with full access to information, including being provided a detailed environmental effects and mitigation report 11 months before the permit was issued.[139] A thorough consultation process was conducted, including the holding of an open house in the community with a comment box available to send comments to the decision-maker. The process culminated in a 36-page set of reasons being issued at the same time as the permit.[140]

160. Indeed, the CPO's reference to *Highlands* serves to underscore the degree to which this decision has departed from the Ministry's past practices of procedural fairness, upending the legitimate expectations of the public and further supporting the argument that the opportunity to provide input was inadequate here.

161. The CPO's other response to the procedural fairness concerns of the petitioners is to suggest the petitioners "could have requested the technical reports, but did not do so", suggesting they could have been requested from the entities to whom the Inspector referred the Permit

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[138] *Highlands*, para. 46
[139] *Highlands*, paras. 15, 53-54
[140] *Highlands*, para. 17

Application.[141] This argument improperly attempts to shift the blame for the Inspector's failure to provide an adequate process to the petitioners.

162. The 24-page Permit Application that was placed in the library for public review did not say anything about affected individuals being able to request more information, from any source. It did not list which entities had been referred to the Permit Application and had copies of the materials, and suggest interested persons contact them. It did not include a list of supporting documents or identify where these documents could be found. Most people, including people closely affected by a project like Mr. Raftery and Mr. Lornie, are not lawyers and cannot be expected to have familiarity with the intricacies of the *Mines Act* and the *Code*. The reasonable assumption from a reader in their circumstances would be to think, as Mr. Raftery expressed in his submissions to the Inspector, that no such documents existed.[142]

163. Indeed, the notice of the Permit Application published in the newspaper and online further stated that "[a] copy of the permit application, <u>including supporting documentation</u>, is available for public viewing at the Summerland Public library located at 9533 Main Street" [emphasis added].[143] It was particularly reasonable in those circumstances for the petitioners to expect that the material in the library they were viewing was the entire application.

164. The CPO's attempt to blame the petitioners, and assert they could have just asked for documents they did not know existed, rings particularly hollow in this case given that after the July Reasons—which referenced supporting documents—were released, both Mr. Raftery and his counsel *did* ask for the supporting documents. The Inspector refused to provide the Permit Application Materials and told them that to see the documents, they needed to file a freedom of information request.[144] There is little credibility to the CPO's assertion that the documents would have been made available to the petitioners before this judicial review even if the petitioners had thought they existed, and knew they could ask.

165. Finally, the record shows misleading and inaccurate information was provided to those making submissions on the Permit. The provision of misleading and inaccurate information in a

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[141] Response to Petition, para. 47
[142] Raftery #1, Ex. A at p. 1
[143] Pietrusinski #1, Ex. S
[144] Woytowich #1, Ex. 3 at p. 4; Raftery #1, Ex. D at pp. 10-11

decision-making process is a breach of the duty of fairness, as it affects the ability of individuals to give full and fair submissions on the contemplated decision—as well as affecting the reasonableness of the decision by potentially depriving the Inspector of relevant information.

166. For example, the public notice shared in the newspaper and at the library stated that "**the Chief Permitting Officer does not have a mandate to consider the merits of the proposed mine from a zoning or a land use planning perspectiv**e" [emphasis in original].[145] As explained above—and as is incontrovertible based on the *Mines Act*, the *Code*, and the Ministry's own guidance documents—this is not just misleading, but wrong.

167. While of course, many individuals nonetheless raised concerns about zoning and land use in the decision-making process despite this notice, it is unknown whether a different result would have come about had affected and/or interested individuals been properly informed of the Inspector's mandate. The very real possibility that relevant information or evidence did not make it to the decision-maker undermines this decision-making process.

168. The CPO affiant states, in response the petitioners' concerns about this erroneous notice, that it was not vetted by the Ministry prior to publication.[146] Yet it is no defence to a breach of the duty of procedural fairness to assert the duty to was delegated to another who failed to perform it correctly. The duty is the decision-maker's, and it is their decision that must be set aside as a result.

169. A similar concern arises in the record from the CPO's April 2024 letter to SIB, responding to the Band's concerns about the Permit Application where they stated they did not consent to the Permit as it would be deeply harmful to them and their rights. The CPO's letter emphasized the Ministry's respect for free, prior and informed consent of Indigenous peoples, and told SIB that "[t]he Ecosystems Biologist has advised the Decision Maker that due to the significant risk of long-term negative impacts to these ecosystems values they do not recommend authorization of this proposed mining operation."[147] As Chief Gabriel attested, PIB understood this letter to be saying the Permit would not be approved.[148]

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[145] Pietrusinski #1, Ex. S
[146] Pietrusinski #1, para. 38
[147] Gabriel #1, Ex. C
[148] Gabriel #1, para. 7

170. It is unclear from the record why such a letter was sent to the Band, and what role in or knowledge of the letter the Inspector had. Yet again, it is the integrity of the process the court is concerned with—and the integrity of the process that has been undermined here.

E. Costs

171. The petitioners seek their costs.

172. An award of costs as against the CPO is warranted in this case. As the Court of Appeal recently confirmed, while the usual rule is that costs will not be awarded in a judicial review against a statutory decision-maker, that rule does not apply in cases where a decision is marred by procedural unfairness:

> [82] The default under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 is that costs of a proceeding are awarded to the successful party. In this case, the District Director was the successful party. The chambers judge decided that costs should be awarded against the Board. The alternative would have been either that the petitioner (the District Director) bear his own costs, or that the respondent (GFL) pay costs to the District Director.
>
> [83] Generally, an administrative tribunal will neither be entitled to nor ordered to pay costs in the context of judicial review. One of the exceptions to the general rule is where the tribunal exhibited misconduct or perversity in the proceedings before it: *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para. 2. This Court has made it clear that conduct that gives rise to a reasonable apprehension of bias can amount to "misconduct or perversity" sufficient to justify an award of costs against a tribunal, even without evidence of actual bias…[149]

173. In this case, the Inspector's decision to issue reasons months after the Decision was made, in circumstances where the Ministry was facing intense public pressure to justify her Decision and had already been threatened with legal action, gives rise a reasonable apprehension of impropriety. Like a finding of reasonable apprehension of bias, this conduct disturbs the presumption of integrity given to decision-makers, and justifies an award of costs.[150]

174. Similarly, the decision-maker's failure to make the Permit Application Materials available to the petitioners was procedurally unfair, grounding a costs award. Indeed, her failure to even provide the materials to the petitioners when asked exacerbates the unfairness, forcing the petitioners to file a judicial review to even see the underlying documents for the Permit. The

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[149] *Environmental Appeal Board v. District Director, Metro Vancouver*, 2025 BCCA 303, paras. 82-83
[150] *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494, para. 62

petitioners have been forced to incur the costs of a complex judicial review based on the failures of a provincial decision-maker to either make an intelligible decision or be transparent about the decision-making process, as she was required to. In the circumstances, it would be unjust to require the petitioners to bear their own costs.

PART V. ORDERS SOUGHT

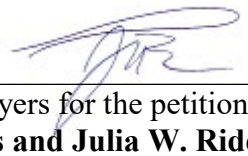
175. The petitioners seek:

a. an order quashing the decision of the delegate of the Chief Permitting Officer of the Ministry of Mines and Critical Minerals to issue the authorization known as Mine #2000391 dated July 9, 2024; and

b. Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 05 Sep 2025



Signature of lawyers for the petitioners
Noah Ross and Julia W. Riddle

List of Authorities

Description

CASES

Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 BCCA 387 [***Air Canada***]

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

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 [***Baker***]

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18320 Holdings Inc. v. Thibeau, 2014 BCCA 494

R. v. Teskey, 2007 SCC 25 [***Teskey***]

Vandenberg v. Vancouver (City) Fire and Rescue Services, 2023 BCSC 2104

STATUTORY PROVISIONS

Health, Safety and Reclamation Code for Mines in British Columbia (the "***Code***"), s. 10

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 2

Mines Act, R.S.B.C. 1996, c. 293 (the "***Mines Act***" or the "**Act**"), ss. 8.2-8.3, 9-10, 34(1)

Supreme Court Civil Rules, Rule 22-2(13)