

S-132348



No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN

**PACIFIC BOOKER MINERALS INC.**

PETITIONER

AND

**MINISTER OF THE ENVIRONMENT and MINISTER OF ENERGY, MINES, AND  
NATURAL GAS**

RESPONDENTS

**PETITION TO THE COURT**

**ON NOTICE TO:**

The Attorney General for British Columbia  
Ministry of Attorney General for British Columbia  
11th Floor – 1001 Douglas Street  
Victoria V8V 1X4 (as required by *JRPA* s. 16)

Minister of the Environment  
Parliament Bldg, Rm 128  
Victoria, BC V8V 1X4 (as required by *JRPA* s. 15)

Minister of Energy, Mines and Natural Gas  
Parliament Bldg, Rm 112  
Victoria, BC V8V 1X4 (as required by *JRPA* s. 15)

**This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.**

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

### **Time for Response to Petition**

A response to petition must be filed and served on the petitioner(s),

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

- |  |
|--|
| <p>(1) The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1</p> <p>(2) The ADDRESS FOR SERVICE of the petitioner(s) is: Hunter Litigation Chambers, 2100 – 1040 West Georgia Street, Vancouver, BC V6E 4H1</p> <p>Fax number address for service (if any) of the petitioner(s): 604-647-4554</p> <p>E-mail address for service (if any) of the petitioner(s):<br/><a href="mailto:jhunter@litigationchambers.com">jhunter@litigationchambers.com</a></p> <p>(3) The name and office address of the petitioner's(s') lawyer is:</p> <p>Hunter Litigation Chambers, 2100 – 1040 West Georgia Street, Vancouver,<br/>BC V6E 4H1</p> |
|--|

## Claim of the Petitioner

### Part 1: ORDER(S) SOUGHT

1. The Petitioner Pacific Booker Minerals Inc. (“Pacific Booker”) seeks the following relief:
  - a. an order in the nature of *certiorari* quashing and setting aside the decision made in late September 2012 (the “Decision”) of the Minister of the Environment (“MOE”) and the Minister of Energy, Mines, and Natural Gas (“MEM”) (collectively, the “Ministers”) to deny Pacific Booker’s application for an Environmental Assessment Certificate (“Certificate”) in connection with Pacific Booker’s proposal to construct and operate an open pit copper and gold mine near Morrison Lake in north-central British Columbia (the “Morrison Copper/Gold Mine” or the “Project”);
  - b. an order remitting Pacific Booker’s application for a Certificate to the Ministers for reconsideration with directions from the Court;
  - c. costs; and
  - d. such further and other relief as this Court considers just and appropriate.

### Part 2: FACTUAL BASIS

#### Overview

2. Pacific Booker is a company duly incorporated under the laws of British Columbia, with a records and registered address of 20th Floor, 250 Howe Street, Vancouver, British Columbia, V6C 3R8. Pacific Booker is publicly traded on the TSX Venture Exchange under the symbol BKM and on the NYSE MKT Equities Exchange under the symbol PBM.
3. Pacific Booker owns mineral tenures located 65 kilometers northeast of Smithers and 35 kilometers north of the Village of Granisle, British Columbia, on the eastern shore of Morrison Lake (the “Morrison Property”), on which it is proposing to construct and operate an open pit copper and gold mine known as the Morrison Copper/Gold Mine.
4. The Morrison Property is within 30 kilometers of two former copper/gold/silver producing mines that are now closed. The previous owner of the Morrison Property engaged in drilling on the site from approximately 1963 to 1973.
5. Pacific Booker’s proposal to construct and operate the Morrison Copper/Gold Mine has undergone a thorough environmental assessment by provincial and federal environmental assessment agencies over an almost ten-year period. Both the British Columbia and the federal environmental assessment agencies concluded that the Project is not likely to have any significant adverse environmental effects.

6. If the Project proceeds as planned, it is expected to have significant economic benefits to the province of British Columbia, including:
  - a. approximately 1,117 jobs created during the approximately two year construction period, plus a total of approximately \$71.6 million in tax revenue, broken down as follows:
    - i. approximately \$12.7 million per year in direct tax revenue to the province and approximately \$9.5 million per year in direct tax revenue to the federal government; and
    - ii. approximately \$7.1 million per year in federal tax revenue, \$5.7 million per year in provincial tax revenue, and \$0.9 million per year in municipal tax revenue from the supply industry;
  - b. during the 21 year operational life-span of the mine, approximately 601 jobs per year and a total of approximately \$245.7 million in tax revenue, broken down as follows:
    - i. approximately \$2.5 million per year in direct tax revenue to the province and \$2.9 million per year in direct tax revenue to the federal government; and
    - ii. approximately \$3.0 million per year in federal tax revenue, \$2.5 million per year in provincial tax revenue, and \$0.7 million per year in municipal tax revenue from the supply industry; and
  - c. provincial mineral taxes in an amount to be determined based on the profits generated by the Project.
7. Despite the Project's economic benefits and the fact that the environmental assessments concluded that the Project is not likely to have significant adverse environmental effects, in September 2012 the Ministers denied Pacific Booker's application for a Certificate to proceed with the development of the Project.
8. For reasons set forth below, Pacific Booker contends that the Ministers' Decision to deny its application for a Certificate was unauthorized or otherwise invalid, failed to comport with the requirements of procedural fairness, was an abuse of discretion, was unreasonable, and breached Pacific Booker's legitimate expectations as to the procedure to be followed in assessing its application.

### **The Environmental Assessment Process**

9. The *Environmental Assessment Act*, SBC 2002, c 43 (the "Act") is a provincial statute that creates a mechanism for reviewing major projects, including mining projects, to assess their potential impacts on the environment.

10. Pursuant to the *Act*, environmental assessments of “reviewable projects” (as defined in the *Act* and its regulations) are conducted by the provincial Environmental Assessment Office (“EAO”), which has been given broad powers to conduct environmental assessments and make recommendations on whether a proposed project should proceed and under what conditions.
11. There are various steps in the provincial environmental assessment process mandated by the *Act*. Broadly speaking, the process has three stages, as follows:
  - a. The Pre-Application Stage: The purpose of this stage is to ensure that when an application for a Certificate is reviewed it contains the necessary information to allow the EAO to undertake its assessment and make recommendations to the ministers making the decision. This stage includes the following steps:
    - i. review of the project description to determine whether the project is reviewable;
    - ii. issuance of an order pursuant to section 10 of the *Act* confirming that a proposed project is reviewable;
    - iii. issuance of an order pursuant to section 11 of the *Act* specifying the scope, procedures, and methods by which a review must be conducted;
    - iv. establishment of a working group composed of representatives of First Nations and various government agencies;
    - v. preparation of draft terms of reference that specify the matters that must be studied and information that must be included in an application;
    - vi. review and comment on the draft terms of reference by the working group, First Nations and the public. This stage typically includes an open house where the terms of reference (and the project generally) are discussed;
    - vii. finalization of the Application Information Requirements, a document that specifies the information that must be included in an application for a Certificate;
    - viii. completion by the proponent of studies and information gathering as specified in the terms of reference;
    - ix. submission of the application by the proponent; and
    - x. evaluation by the EAO to determine whether the application provides information on all matters required by the Application Information Requirements (including proposed commitments by the proponent to address any potential adverse effects).

b. The Application Review Stage: During this stage, the EAO reviews the application and prepares an Assessment Report documenting the findings of the assessment, including the extent to which concerns have been addressed and whether any issues remain outstanding. This stage includes a second public comment period. At the end of this stage, the Executive Director of the EAO (the "Executive Director") must provide the MOE and another Minister responsible for that category of reviewable project (which in the case of a mine is the MEM) with the following materials in accordance with section 17(2) of the *Act*:

- i. A copy of the Assessment Report;
- ii. Recommendations from the Executive Director (with reasons) as to whether to issue a Certificate; and
- iii. A draft Certificate (in the event the ministers chose to sign and issue such).

c. The Ministers' Decision: The final stage involves the submission of the materials referenced in the preceding paragraph to the responsible ministers for a decision on whether or not to issue a Certificate. After the ministers receive this package, they have 45 days in which to make their decision (although that time period may be extended in accordance with the *Act*). Section 17(3) of the *Act* outlines the ministers' obligations with respect to this decision, as follows:

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

12. In addition to obtaining a Certificate from the provincial environmental assessment process, major projects must also receive approval from the Canadian Environmental Assessment Agency ("CEAA") pursuant to the *Canadian Environmental Assessment Act*. An agreement between the federal and the British Columbia governments provides for harmonized environmental assessments under both regimes, to be led by the provincial EAO.

13. Obtaining a Certificate is only part of the regulatory process that governs new mining projects. Among other things, after obtaining a Certificate, a proponent of a mining

project must also obtain various permits under the *Mines Act* and the *Environmental Management Act* and submit environmental management plans on a wide range of topics.

### **Pacific Booker's Participation in the Environmental Assessment Process**

#### The Pre-Application Stage

14. Pacific Booker began working towards obtaining a Certificate for the Morrison Copper/Gold Mine in 2002 when it started collecting baseline data regarding water quality in Morrison Lake and other factors relevant to an environmental assessment.
15. In September 2003, Pacific Booker submitted a Project Description to the EAO.
16. The EAO determined that the Project constituted a reviewable project and on September 30, 2003, issued an order under section 10(1)(c) of the *Act* (the "Section 10 Order"). The Section 10 Order stated that a Certificate was required for the Project and that Pacific Booker could not proceed with the Project without an environmental assessment.
17. After issuing the Section 10 Order, the EAO established a multi-agency working group (the "Working Group") to provide advice on the potential effects, mitigation measures and conditions required in the environmental assessment. The Working Group included various provincial and federal agencies, the Village of Granisle, as well as the Lake Babine Nation, and the Gitanyow Nation and the Gitksan Nation as represented by the Skeena Fisheries Commission.
18. On October 14, 2005, Pacific Booker submitted draft terms of reference to the EAO specifying the matters to be studied and information to be included in its application for a Certificate. This marked the beginning of over three and a half years of negotiations between Pacific Booker, the EAO, and the Working Group regarding the Terms of Reference.
19. On January 18, 2008, the EAO issued an Order pursuant to section 11 of the *Act* which defined the scope of the proposed Project and the procedures and methods for conducting the review (the "Section 11 Order").
20. On May 21, 2009, the EAO approved the Terms of Reference for the Project. The final Terms of Reference totaled over 75 pages and required Pacific Booker to collect and analyze technical and scientific data, to undertake feasibility studies, and to compile various other types of information about a wide range of issues, including: surface and ground water quality, aquatic resources, fish and fish habitat, ecosystems and wetlands, wildlife and wildlife habitat, terrain hazards and soils, economic impacts, social effects of the mine, heritage effects of the mine, health effects, and impacts of the mine on First Nations.
21. On September 28, 2009, Pacific Booker submitted its initial application for a Certificate to the EAO. The EAO determined that the initial application did not contain all the information required by the Terms of Reference and refused to accept it.

22. Over the next eight months, Pacific Booker worked to address the concerns raised by the EAO regarding the content of its application, including gathering additional information and conducting further technical studies. On May 28, 2010, Pacific Booker submitted a revised application for a Certificate to the EAO, which the EAO accepted for review on June 28, 2010 after soliciting input from the Working Group.

#### The Application Review Stage

23. The Application Review period for Pacific Booker's application for a Certificate formally began on July 12, 2010.
24. During the Application Review period, comments were received on the proposed Project from members of the Working Group as well as from the public. Pacific Booker and the EAO also engaged in consultations with the affected First Nations.
25. Pursuant to Section 24(1)(b) of the *Act* and the *Prescribed Time Limits Regulation* (B.C. Reg. 370/2002), the EAO must ordinarily complete its review of applications for a Certificate and communicate its findings to the responsible ministers within 180 days. However, the Executive Director may suspend this time limit in accordance with section 24(2) of the *Act*.
26. In this case, the EAO's review of Pacific Booker's application ultimately took over 760 days, as the EAO suspended the 180 day time limit on multiple occasions.
27. During the Application Review stage, Pacific Booker agreed to various conditions and agreed to implement various changes to the Project—many at the request of the EAO—in order to address concerns that had been raised by the EAO and the Working Group, in particular concerns relating to the impact of the Project on water quality in Morrison Lake and on the salmon fishery. The design changes necessitated further technical studies, surveys and reports by Pacific Booker regarding environmental effects, which Pacific Booker carried out at significant financial expense to itself.
28. Throughout the process, the EAO led Pacific Booker to believe that it would ultimately be granted a Certificate if it could satisfactorily address the concerns that had been raised during the environmental assessment process. Pacific Booker relied on this understanding in deciding at various stages to continue with the process and in agreeing to various design changes requested by the EAO, notwithstanding the significant costs of doing so.
29. On September 29, 2011, at day 176 of the 180-day review period, the EAO suspended the review of the Project because the EAO determined that it was unable to develop conclusions on the potential for adverse effects to water quality and fish, in particular sockeye salmon.
30. Following the September 29 suspension of the review period, the EAO commissioned an external, third-party review (the "Third Party Review") of Pacific Booker's water quality, hydrogeology and fisheries effects assessments by two external consulting firms, Robertson GeoConsultants Inc. ("RGC") and Solander Ecological Research Ltd. ("Solander").



31. The initial Third Party Review report by RCG concluded, among other things, that the baseline data provided by Pacific Booker was adequate for an environmental effects analysis, but that further analysis and modeling was necessary to demonstrate that the Project would not have significant adverse long-term effects on water quality. The initial report by Solander concluded, among other things, that some additional field work or modeling was required to fill knowledge gaps relating to changes in water quality.
32. On January 31, 2012, Pacific Booker's environmental consulting firm, Klohn Crippen Berger ("KCB"), an environmental consulting firm with extensive experience in the mining sector, submitted a report entitled "3<sup>rd</sup> Party Review Response Report" in response to the concerns raised by RCG and Solander in their initial reports from the Third Party Review.
33. However, the EAO advised Pacific Booker that it still had concerns regarding water quality issues after obtaining the views of RGC and a newly retained lake behaviour specialist on the Third Party Review Response Report. To address these concerns, Pacific Booker agreed at the EAO's request to change the Project's design to add a full geo-membrane lining to the tailings storage facility, to reduce groundwater seepage to a very low level.
34. In late April 2012, Pacific Booker submitted an Addendum to the Third Party Review Response Report to the EAO, which had been prepared by KCB and which outlined anticipated environmental effects in light of the addition of the geo-membrane lining.
35. On June 19, 2012, the EAO's lake behaviour specialist issued a report summarizing the results of his review of various issues relating to lake behaviour and water quality. He concluded, among other things, that with the addition of the geo-membrane lining to the tailings storage facility, changes in predicted lake metal concentrations due to the Project would be below British Columbia Water Quality Guidelines.
36. In June 2012, the EAO circulated a draft Assessment Report to members of the Working Group. The draft Assessment Report concluded that in light of the design changes and with the successful implementation of mitigation measures, the Project was not likely to have any significant adverse effects on water quality or any other matters.
37. In early August 2012, the EAO received correspondence from various members of the Working Group in response to the draft Assessment Report, including:
  - a. a letter dated August 2, 2012 from the Skeena Region Environmental Protection Division ("EPD") of the MOE, which noted that despite Pacific Booker's commitment to add a geo-membrane liner to the tailings storage facility and the other conditions to which Pacific Booker had agreed, the EPD believed that the Project nonetheless presented significant risks to Morrison Lake and Morrison Creek for various reasons described in the letter; and
  - b. a memorandum dated August 8, 2012 from the MEM, which noted that despite the design changes and commitments made by Pacific Booker to address

environmental concerns, the MEM believed that the Project presented significant risks for various reasons described in the letter.

38. On August 9, 2012, the EAO forwarded the EPD's August 2, 2012 letter and the MEM's August 8, 2012 memorandum to Pacific Booker and asked Pacific Booker to provide any final comments to the EAO by August 14, 2012 (three business days later) on the issues raised in those letters. The EAO gave no indication to Pacific Booker that it considered the concerns raised by the EPD and MEM in those documents to be of such significance that they might cause the EAO to recommend to the Ministers that the application for a Certificate be denied notwithstanding the conclusions of the draft Assessment Report that the Project would not cause any significant adverse effects.
39. On August 13, 2012, Pacific Booker sent a letter to the EAO outlining its response to the issues raised by the EPD in its August 2, 2012 letter and by the MEM in its August 8, 2012 memorandum.
40. On or about August 21, 2012, the EAO issued its final Assessment Report with respect to Pacific Booker's application for a Certificate (the "Final Assessment Report"). The Final Assessment Report totaled 205 pages and took into account the results of the Third Party Review of water quality issues. It concluded, among other things, that:
  - a. issues identified by First Nations, government agencies and the public, which were within the scope of the environmental assessment, were adequately and reasonably addressed by Pacific Booker during the review of the application;
  - b. the Project would not result in any significant adverse effects (with the successful implementation of mitigation measures and conditions); and
  - c. the provincial Crown had fulfilled its obligations for consultation and accommodation to First Nations.
41. By the time the EAO issued its Final Assessment Report, Pacific Booker had been involved in the environmental assessment process for the Morrison Copper/Gold Mine for almost ten years and had spent approximately \$30 million on the Project, including in excess of \$10 million on the environmental assessment process. Pacific Booker's application materials alone, including various supplemental submissions to the EAO such as its responses to the Third Party Review, consisted of approximately 16,000 pages.
42. Consistent with the Final Assessment Report, a September 2012 draft of the CEAA's Comprehensive Study Report also concluded that the Project was not likely to cause significant adverse environmental effects.

#### The Referral to the Ministers

43. On or about August 21, 2012, the Executive Director submitted Pacific Booker's application to the Ministers for a decision. The referral documents sent by the Executive Director to the Ministers at this time included:

- a. The Final Assessment Report;
  - b. A draft Certificate; and
  - c. The Recommendations of the Executive Director in relation to Pacific Booker's application for a Certificate (the "Executive Director's Recommendations");
44. The EAO has never informed Pacific Booker what other documents (if any) it provided to the Ministers when it referred Pacific Booker's application for a Certificate to the Ministers. For instance, the EAO has never confirmed whether it provided Pacific Booker's August 13, 2012 letter to the Ministers.
  45. The Executive Director's Recommendations was a thirty-two page document. The first thirty-one pages summarized the findings of the Final Assessment Report. The final page, entitled "Recommendation" contained a recommendation by the Executive Director that the Ministers consider a number of factors in addition to the Final Assessment Report (which additional factors were listed therein) and that the Ministers adopt a risk/benefit approach when weighing the conclusions of the Final Assessment Report against these additional factors. The Executive Director's Recommendations concluded with a recommendation that a Certificate not be issued to Pacific Booker in connection with the Project.
  46. Pacific Booker was not provided with a copy of the Executive Director's Recommendations on August 21, 2012 or at any time prior to the Ministers' Decision denying the Certificate.
  47. On or about September 20, 2012, the Executive Director issued an updated version of the Executive Director's Recommendations (the "Updated Executive Director's Recommendations").
  48. The Updated Executive Director's Recommendations was a thirty-three page document that was similar to the Executive Director's Recommendations and reached the same ultimate conclusion (that Pacific Booker's application for a Certificate should be denied), but some changes and additions had been made to the "Recommendation" section at the end of the document.
  49. Like the original Executive Director's Recommendations, the Updated Executive Director's Recommendations recommended that the Ministers consider a number of factors in addition to the Final Assessment Report and that the Ministers adopt a risk/benefit approach in deciding whether to issue a Certificate in connection with the Project.
  50. The Updated Executive Director's Recommendations contained factual errors, misleading statements and assertions that, had they been raised in the environmental assessment process could have been explained or clarified. For example, in the context of discussing potential effects of the Project on the sockeye salmon population, page 32 of the Updated Executive Director's Recommendations stated that Morrison Lake was at the "headwaters of the Skeena River". This is incorrect. Morrison Lake is at the

easternmost edge of the Skeena River watershed, approximately 160 kilometers from the Skeena River, and a long way from the headwaters of the Skeena River.

51. The Executive Director's recommendation that the Ministers adopt a risk/benefit approach was a departure from the Terms of Reference, which did not require that Pacific Booker undertake a risk/benefit analysis or provide the EAO with information sufficient to enable such an analysis to be undertaken. By recommending that the Ministers adopt such an approach in making their decision with respect to Pacific Booker's application, the Executive Director in effect changed the goalposts for the environmental assessment after the assessment had all but concluded and introduced a "net benefit" test into the environmental assessment process of which Pacific Booker had no notice.
52. Pacific Booker was not provided with a copy of the Updated Executive Director's Recommendations or any indication as to its content prior to the Decision denying its application for a Certificate.
53. At no time prior to the Decision was Pacific Booker made aware that its application would be evaluated under a risk/benefit (or net benefit) approach, and at no time prior to or subsequent to the Decision was Pacific Booker given an opportunity to provide data or make submissions to the EAO or to the Ministers in respect of a risk/benefit (or net benefit) approach.
54. Prior to the Ministers' Decision, the EAO never gave Pacific Booker any reason to believe that its ultimate recommendation to the Ministers was that the application for a Certificate should be denied, a conclusion that contradicted the conclusions of the EAO's own 205-page Final Assessment Report.

#### The Ministers' Decision

55. Sometime in late September 2012, the Ministers made the Decision to deny Pacific Booker's application for a Certificate.
56. By letter dated September 28, 2012, which Pacific Booker did not receive until October 1, 2012, the Minister of the Environment, Terry Lake, advised Pacific Booker of the reasons for the Decision. Minister Lake's September 28 letter stated the Decision was based on the Final Assessment Report, the recommendations of the Executive Director, as well as a number of additional factors outlined therein that he and Minister of Energy, Mines, and Natural Gas, Rich Coleman, considered to be in the public interest.
57. Minister Coleman had not read the Final Assessment Report and the Updated Executive Director's Recommendations before he made the Decision to deny Pacific Booker's application for a Certificate.
58. In making the Decision, Minister Coleman erroneously believed that he was required to approve or deny the application by early October 2012 and that there was no ability to obtain further information from Pacific Booker. In fact, it was open to Minister Coleman to order pursuant to section 17(3)(c)(iii) of the *Act* that further assessment be carried, or

to order pursuant to section 24(4) of the *Act* that the 45-day time limit for the Ministers' decision be extended.

59. In making the Decision, Minister Lake erroneously believed that the Project had been taken over by Americans. In fact, Pacific Booker is a British Columbia company, with approximately 65% Canadian shareholders (many of them British Columbians).
60. The Decision came as a shock Pacific Booker given that the Project had ultimately received a "clean" environmental assessment from the EAO in the Final Assessment Report after a very lengthy, costly, and at times difficult environmental assessment process.
61. Following the Decision, the EAO advised Pacific Booker that should it wish to proceed with a copper and gold mine on the Morrison Property, it could submit a new proposal to the EAO. This would, in effect, entail starting from scratch in the environmental assessment process, with no guarantee that the application for a Certificate would succeed in the end.

#### Effect of the Decision on Pacific Booker

62. Pacific Booker is a small company and the Morrison Copper/Gold Mine is its only proposed project.
63. The denial of Pacific Booker's application for a Certificate has caused significant harm to Pacific Booker and its shareholders, including but not limited to: loss of future revenue, harm to Pacific Booker's goodwill and reputation, and a decline in the trading price of Pacific Booker's stock.

#### Approval of Other Mining Projects:

64. Since September 2012, the Ministers have granted Certificates to other proposed mining projects, including but not limited to:
  - a. the Roman Coal Mine Project that the EAO concluded would have one significant adverse environmental effect; and
  - b. the Kitsault Mine Project, which was approved without consideration of a risk/benefit approach.

### **Part 3: LEGAL BASIS**

65. The Ministers' Decision to deny Pacific Booker's application for a Certificate violated section 17(3)(a) of the *Act*, and was therefore unauthorized, because at least one of the Ministers who made the Decision had not read and considered the Final Assessment Report and the Updated Executive Director's Recommendations prior to making the Decision as required by section 17(3)(a) of the *Act*.

66. The Ministers' Decision did not comport with constitutional and/or common law requirements of natural justice and procedural fairness, in that:
- a. under the circumstances, Pacific Booker was not given adequate notice of or a meaningful opportunity to respond to the August 2, 2012 letter from the EPD and the August 8, 2012 memorandum from the MEM, which raised new concerns for the first time in the final days of a multi-year environmental assessment process;
  - b. Pacific Booker was not given notice of or an opportunity to review and respond to the Executive Director's Recommendations or the Updated Executive Director's Recommendations prior to the Ministers' Decision, and as such:
    - i. Pacific Booker did not have an opportunity to correct factual inaccuracies or respond to misleading statements in the Executive Director's Recommendations and the Updated Executive Director's Recommendations;
    - ii. Pacific Booker did not have an opportunity to provide further information or make submissions to the Ministers in respect of the EAO's recommendation that the Ministers adopt a risk/benefit approach; and
    - iii. Pacific Booker did not have an opportunity to make submissions to the Ministers in response to the ultimate recommendation of the Executive Director that Pacific Booker's application for a Certificate should be denied notwithstanding the clean environmental assessment.
  - c. The Ministers employed a risk/benefit (or net benefit) approach that was inconsistent with the Terms of Reference that had been negotiated by the parties over a multi-year period, which in effect amounted to changing the goalposts for the environmental assessment after the assessment had all but concluded.
67. The Ministers acted unreasonably, or in the alternative abused their discretion, by, *inter alia*, considering irrelevant factors and/or failing to consider relevant factors in making the Decision, including as follows:
- a. The Ministers failed to consider Pacific Booker's August 13, 2012 response to the August 2, 2012 letter from the EPD and the August 8, 2012 memorandum from the MEM, respectively;
  - b. The Decision was based in part on an incorrect assumption that the Ministers were required to approve or deny the application by early October 2012 and that there was no ability to obtain further information from Pacific Booker or to take more time for the decision. In fact, it was open to the Ministers to order pursuant to section 17(3)(c)(iii) of the *Act* that further assessment be carried, or to order pursuant to section 24(4) of the *Act* that the 45-day time limit for the Ministers' decision be extended;

- c. The Decision was based in part on an erroneous understanding that Morrison Lake was at the headwaters of the Skeena River, which is not true;
  - d. The Decision was based in part on an incorrect assumption that the Project had been taken over by Americans, which is not true; and
  - e. to the extent the Decision was based on a risk/benefit (or net benefit) analysis, the Ministers failed to give due consideration to the fact that neither they nor the EAO had before them studies or other technical analyses of risks and benefits sufficient to enable them to undertake a proper risk/benefit (or net benefit) analysis;
68. The Decision violated the legitimate expectations of Pacific Booker that under the circumstances, given the amount of time and money that Pacific Booker had invested into the environmental assessment process in order to obtain a “clean” environmental assessment report from the EAO and in light of the conclusions of the Final Assessment Report, that:
- a. the Ministers would not deny Pacific Booker’s application for a Certificate without providing Pacific Booker with a meaningful opportunity to make further representations or submit further information to the Ministers; and
  - b. the Ministers would not base their decision whether to grant or deny the Certificate on a risk/benefit (or net benefit) approach that was inconsistent with the Terms of Reference that had been approved by the EAO after years of negotiations between Pacific Booker, the EAO, and the Working Group.
69. It was unreasonable for the Ministers to deny Pacific Booker’s application for a Certificate and to grant the applications for a Certificate for the Roman Coal Project (which, unlike the Morrison Copper/Gold Mine, was projected to have one significant adverse effect) and the Kitsault Mine Project (which was approved without consideration of a risk/benefit approach).
70. The Petitioner pleads and relies upon:
- a. the Supreme Court Civil Rules;
  - b. the *Judicial Review Procedure Act*, RSBC 1996 c 241 as amended;
  - c. the *Environmental Assessment Act*, SBC 2002, c 43, as amended;
  - d. the *Prescribed Time Limits Regulation* (B.C. Reg. 370/2002);
  - e. applicable constitutional and administrative law principles;
  - f. the inherent jurisdiction of this Court; and
  - g. such further and other authority as counsel may advise.

**Part 4: MATERIAL TO BE RELIED ON**

- 1. Affidavit #1 of Erik Tornquist, sworn April 2 2013;
- 2. Affidavit #1 of William G. Deeks, sworn April 2, 2013;
- 3. Such further and other materials as counsel may advise.

The petitioner estimates that the hearing of the petition will take 1 day.

Dated: April 2, 2013

"Hunter Litigation Chambers"

Signature of

petitioner     lawyer for petitioner

Hunter Litigation Chambers Law Corporation  
(John J. L. Hunter / Andrea A. Glen)

***To be completed by the court only:***

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge     Master