Environmental Appeal Board

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DECISION NO. EAB-MA-21-A001(a)

In the matter of an appeal under the *Mines Act,* RSBC 1996, c. 293

BETWEEN:	Sunrise Resources Ltd.	**APPELLANT**
AND:	Chief Inspector of Mines	**RESPONDENT**
AND:	Paul Appleby	**INTERVENOR**
BEFORE:	A panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on April 11, 2022	
APPEARING:	For the Appellant:	Lars Glimhagen, Representative
	For the Respondent:	Greg Allen, Counsel Allison Morrell, Counsel
	For the Intervenor:	Self-represented

LIMITATION PERIOD PRELIMINARY DECISION

BACKGROUND

[1] Sunrise Resources, Ltd. ("Sunrise") owns the Candorado Mine (the "Mine"), a gold mine near Hadley, British Columbia. The Mine is able to operate under a permit issued under the *Mines Act*, R.S.B.C. 1996, c. 293 (the "*Act*"); however, Sunrise is dormant and the Mine has not been operational since 1996.

[2] Sunrise submitted an application containing a mine closure plan in 2000. It was rejected for reasons not made clear to the Board. Sunrise did not submit any further closure plans for approval.

[3] Starting in or around 2005, the Ministry of Energy and Mines (now called the Ministry of Energy, Mines and Low Carbon Innovation [the "Ministry"]) tried to achieve compliance with mine closure conditions set out in the Mine's permit, as well as the *Health, Safety and Reclamation Code for Mines in British Columbia* (the "*Code*").

[4] On October 26, 2005, a District Inspector, Mr. Rothman, wrote to the president of the Candorado Operating Company Limited (later renamed Sunrise,

and referred to throughout this decision as Sunrise for ease), which then owned the Mine. Mr. Rothman sent a copy of the letter to the then-Chief inspector of Mines (the "Chief Inspector"), Fred Hermann. The letter directed Sunrise to provide a plan and schedule for the clean-up of the Mine, including long term monitoring requirements for certain aspects of it. This plan and schedule were to be provided by November 7, 2005.

[5] The Board has not been apprised of any further communications about the Mine for several years, after October 2005. Then, on November 24, 2017, the Ministry re-engaged with Sunrise and reminded it of its obligations for mine reclamation, including under section 10.6.2 of the *Code*.

[6] In subsequent correspondence in November 2017, Ministry officials warned Sunrise that the Ministry could complete the work required to clean up the Mine and recover the costs from Sunrise.

[7] On December 19, 2017, the then-Chief Inspector, Al Hoffman, followed up on the correspondence from November 24, 2017. He issued an order for Sunrise to comply with section 10.6.2 of the *Code*, and to submit a plan and schedule to address its noncompliance by January 19, 2018. The Chief Inspector advised that failure to comply could result in the imposition of enforcement actions authorized under the *Administrative Penalties Regulation*, B.C. Reg. 7/2021 (the "*Regulation*").

[8] On January 14, 2020, an Inspector of Mines, Mike Olsen, issued two more orders to Sunrise, using authority from section 35 of the *Act*. The orders require that Sunrise comply with sections 10.6.2(1)(b) and 10.6.2(a) of the *Code* by September 15, 2020. Sunrise appealed these orders to the new Chief Inspector, Hermanus Henning, who denied the appeals on July 14, 2020.

[9] On August 12, 2021, Justyn Bell, the Director of Operational Support (the "Director") with the Office of the Chief Inspector of Mines, issued an administrative penalty equal to $150,000, pursuant to section 36.2 of the *Act*. He had been delegated the authority to do so by the Chief Inspector.

[10] This section allows the Chief Inspector, or their delegate, to impose an administrative penalty where a person has contravened or failed to comply with a prescribed provision in the *Act* or the *Code*, or an order made under the *Act*. For a penalty to be imposed, section 36.3 of the *Act* requires that the person at issue must be served with a notice of the decision.

[11] According to the Director, the Penalty was imposed in respect of two non-compliances with the *Act*, both committed on or about September 15, 2020:

- a contravention of section 10.6.2(1)(b) of the *Code*; and
- failure to comply with an order issued pursuant to section 35 of the *Act*, by failing to comply with section 10.6.2(2)(a) of the *Code*.

[12] Section 36.6(1) of the Act states that a notice of administrative penalty cannot be provided more than three years after "… the date on which the Act or omission alleged to constitute the contravention or failure to comply first came to the attention of the chief inspector."

[13] In imposing the penalty, the Director addressed the time limit under section 36.6(1) of the *Act*. The Director stated that historical non-compliance before 2017

was irrelevant, as the administrative penalty provisions under the *Act* came into effect at that time, with the enactment of the *Regulation*. The Director added that the January 2020 orders were not mere repetitions of the 2017 orders, but rather reflected the continuous nature of Sunrise's non-compliances. The Director stated that the continuous nature of the non-compliances meant that the requirement to comply continued, until it has been satisfied. Further, the Director stated that each order creates an independent requirement to comply, separate from any prior orders.

[14] Sunrise appealed the Penalty to the Board. Sunrise disagrees with the imposition of the penalty for a variety of reasons. The parties and the Board agreed to consider one of Sunrise's grounds of appeal in a preliminary decision: that the Penalty cannot have been issued at all because of the limitation period in section 36.6(1) of the *Act*. Sunrise argues that there is no concept of a "continuing offence" in the *Act* or in any prior case under the *Act*.

ISSUES

[15] The issue I must address in this preliminary decision is whether the Penalty was invalid because it violated the limitation period found in section 36.6(1) of the *Act*.

POSITIONS OF THE PARTIES

Sunrise's submission

[16] Sunrise says that limitation periods are useful to ensure judicial economy and to safeguard against losses of evidence, where records are lost, memories fail, and responsible individuals become unavailable. Sunrise says the circumstances of this appeal confront such issues, as several of its executives who were in place leading up to and including January 2020, have died. Sunrise argues that, by waiting 25 years after the closure of the Mine, the Ministry now engages in enforcement action in entirely different circumstances: there have been physical changes to the mine site, the environment, and different costs for monitoring, impact studies and reclamation.

[17] Sunrise references *Attorney General of Canada v. Steelhead Aggregates Ltd.*, 2022 BCSC 34 (CanLII), which discusses dismissals for want of prosecution. Sunrise also references *R. v. Boucha*, 2021 ONCJ 141 (CanLII), which addresses the importance of limitation periods in civil litigation.

[18] Sunrise argues that the concept of a "continuing offence" does not apply to Sunrise's case or to the limitation period established in section 36.6(1) of the *Act*. Sunrise says that, before the Penalty applied this novel concept, Sunrise could not have expected that such a thing were possible.

[19] Sunrise says that the *Act* and *Code* only mention "continuing offences" in three places:

- section 38(2)(o) of the *Act*, which allows the Lieutenant Governor in Council to make regulations authorizing administrative penalties to be imposed on a

daily basis for "continuing contraventions or failures", although no such regulations have been made;

- section 37(4) of the *Act*, which provides for additional penalties for continuing offences committed after the receipt of a notice of an administrative penalty; and
- Part 1 of the *Code*, which requires the Chief Inspector to consider whether an offense was repeated or continuous, when determining the appropriate penalty to impose.

[20] Sunrise notes that Part 1 of the *Code* does not specify additional penalties for each additional day of infraction, as does section 134(2) of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, for example. That section provides that each day of a continuing offence constitutes a new offence, and nothing of the sort appears in the *Act*. Accordingly, each new order made about the same set of facts does not restart the limitation period described in section 36.6(1) of the *Act*.

[21] Sunrise says that the legislature made amendments to "toughen up" the *Act* in 2020. According to Sunrise, the legislature did so after a "… scathing 2016 report by the BC Auditor on the terrible enforcement record of the [Ministry] and the [*Act*] …." Sunrise argues that the legislature amended the limitation period for the prosecution of offences under the *Act*, but opted not to allow the limitation period for administrative penalties to be renewed for persistent non-compliances or contraventions.

[22] Sunrise notes that *R. v. Sadolims Enterprises Ltd.*, 2014 BCCA 389 [*Sadolims*] provides guidance in assessing whether an offence defined under an enactment is singular or continuous, in the event of ongoing noncompliance. The Court stated that the correct approach is a purposive one, in which the objects of the relevant enactment are considered, rather than on a strict construction of the language of the enactment. Sunrise points out that in *Sadolims*, and earlier cases on continuous offences referred to within it,[1] the courts relied on provisions in the relevant enactments, saying that each day of ongoing noncompliance constituted an offence or that there was an incremental penalty that continued to accrue until compliance was achieved. Sunrise says neither is present here, at least before a notice of penalty is served.

[23] Sunrise also points out that *Sadolims* recognizes, at paragraph 18, that "… to treat the matter as a single offence … would require the respondent to issue a new order after another inspection when nothing has changed." Sunrise argues that this is what happened in this case, indicating that the contraventions were singular and not continuous.

[24] Furthermore, Sunrise also argues that, because there is no timeframe stipulated in the *Code* by which the monitoring and maintenance requirements must be met, the offenses are not continuous, but rather singular.

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[11] These cases include *R. v. Sadolims Enterprises Ltd.*, 2013 BCSC 2172 and *Bell v. The Queen*, 1983 CanLII 166 (SCC), 2 S.C.R. 471 and 488.

[25] Overall, Sunrise says the circumstances of this case are similar to those in *R. v. Newton-Thopmson*, 2009 ONCA 449 (CanLII), where the Court considered an offence of not submitting a report required under an enactment. There was no language to require that the duty to submit the report was ongoing until satisfied, or that there was any incremental penalty. The Court, in that case, concluded that the offence was singular and not ongoing.

[26] Sunrise adds that the circumstances of this case, in terms of the length of the limitation period and the quantum of the penalty, are distinguishable from those involved in *Sadolims*. In that case, there was a three-month limitation period and the penalty was for $1,300.

[27] Sunrise says that, even if the issue of Sunrise's noncompliance with the *Code* became known to the Chief Inspector only on December 17, 2017, the three-year limitation period expired before the January 2020 orders were issued, let alone the Penalty that followed. As a result, even if the limitation period only started to apply when the *Regulation* came into effect, this analysis holds.

[28] Furthermore, Sunrise says that Ministry staff should have informed Sunrise about the prospect of an administrative penalty, if it believed Sunrise's offences could be considered continuous. This was particularly so as Sunrise engaged in a prolonged exchange of correspondence and communication with Ministry staff about the applicability of the limitation period. Sunrise characterizes the Ministry's position during that period of communication as unresponsive and self-contradicting. Absent warning about the possibility of a penalty based on the concept of a continuous offence, Sunrise could not have known and did not know that its ongoing noncompliance would not be affected by the limitation period in section 36.6(1) of the *Act*.

[29] Lastly, Sunrise argues that the concept of a continuing offence should be introduced to the *Act* through the legislative process, not by a decision-maker, as was done in this case.

The Director's response

[30] The Director says that the noncompliance giving rise to the Penalty was Sunrise's failure to abide by the January 14, 2020 orders. Those orders gave Sunrise until September 15, 2020 to comply, so the limitation period began to run on that date. The Penalty was issued within three years of that date, and was based on noncompliance with the orders, not noncompliance with the *Code*. According to the Director, Sunrise is incorrectly arguing the limitation period began to run when the facts that gave rise to the January 2020 orders became known to the Chief Inspector. Rather, the noncompliance giving rise to the Penalty is the noncompliance with those orders, not any underlying issues of noncompliance with orders or the *Code*.

[31] The Director says that he did not rely on the concept of the "continuous offence" to determine that the Penalty could be imposed. The Director says he speculated that a penalty could still be imposed with respect to Sunrise's noncompliance with the 2017 orders and with the *Code* itself, but did not rely on that analysis in levying the Penalty.

[32] The Director says that even if he did rely on the concept of a "continuous offence" to justify the Penalty, the Board can confirm that the Penalty did not violate the limitation period in section 36.6(1) of the Act for different reasons. The Director also says that the Board should defer to him, as to whether Sunrise contravened the orders from January 2020.

[33] The Director says that the Appellant's concerns about correspondence with the Ministry and any associated fairness implications are beyond the scope of this preliminary decision. Furthermore, the Director says that any discussion of the facts underlying the January 2020 orders or the validity of those orders is not within the jurisdiction of the Board because it has been decided previously by a competent decision maker (the concept of "*res judicata*"). Moreover, these parties previously argued this matter before another decision maker (the concept of "issue estoppel"). Lastly, the Director says that Sunrise cannot use this proceeding to attack another binding decision (the concept of "collateral attack").

[34] The Director agreed with Sunrise that interpreting the *Act* involves a consideration of the entire context of a provision, including the objective of the statutory scheme and the intention of the Legislature. Here, the Director argues, the wording at issue in the appeal is not ambiguous, and the interpretation suggested by the Director is consistent with the scheme of the Legislature. The general public interest or other legal principles that support limitation periods cannot override the language of the *Act*.

[35] The Director says Sunrise's argument that the Director should have addressed the merits of the January 2020 orders is inconsistent with the statutory scheme, and Sunrise's concern about an indefinite risk of penalty is not implicated in this case. The Director adds, however, that Sunrise's position is further inconsistent with the statutory scheme because "… a permitee could excuse itself from compliance with obligations to protect and reclaim land upon closing a mine by simply doing nothing and resisting any enforcement action."

[36] For these reasons, the Director argues the Board should dismiss Sunrise's ground of appeal based on the limitation period.

Sunrise's rebuttal

[37] Sunrise says that the Director failed to address the key question of when the alleged contravention first came to the attention of the Chief Inspector. According to Sunrise, this was in 1996, as the same underlying issue was addressed in 1996, 2000, and 2005. Sunrise adds that the Penalty was based on noncompliance with orders expressed in December 2017, which in turn were based on noncompliance with the *Code* that had existed for even longer.

[38] Sunrise disagrees that the Board should not assess the correctness of the rationale for the Penalty, given that the Board owes the Director no deference on questions of law. Sunrise says that the Director should have considered all prior infractions and when they came to the attention of the General Inspector, before levying the Penalty. By respecting the limitation period provided in the *Act*, the obligations of the government are recognized to protect the land and enforce mine reclamation, as well as the obligations on the permitee.

[39] Sunrise further disagrees that the doctrine of *res judicata* applies, arguing that the no one had ever decided the question of the limitation period before the Penalty was imposed.

[40] Sunrise otherwise reiterated points from their earlier submissions, emphasizing in particular that an order made regarding a pre-existing contravention does not restart the limitation period from section 36.6(1) of the *Act*.

REASONS AND DECISION

[41] It is helpful, at the outset, to define the parameters of the appeal. The right of appeal in this case exists by virtue of section 36.7 of the *Act*. Subsection (2) describes the matters that can be appealed: "A person to whom a notice [of contravention or administrative penalty] has been given under section 36.3 may appeal to the appeal tribunal a decision which is the subject of that notice."

[42] The *Act* does not use the term "subject of" in respect of a notice of administrative penalty anywhere other than section 36.7(2). It is not a defined term in the *Act*. To understand its meaning, I must consider the plain and ordinary meaning of the words, in the context of the *Act*—including its object and scheme—and the intention of the legislature.[2] Both parties agree with this. I must also consider the Act to be remedial, and give to it "… such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[3]

[43] Neither party presented compelling evidence about the intention of the legislature in drafting the *Act*. Each party asserted what the object and scheme of at least portions of the *Act* are, but did not provide compelling detail. For example, Sunrise referenced legislative amendments to the Act following a "… scathing 2016 report of the BC Auditor …" but did not put that report into evidence or provide specific details about the amendments, excerpts from Hansard, or similar evidence that would support Sunrise's position. The Director asserted objects of the *Act* but likewise did not provide specific references to establish legislative intent, beyond the text of the enactment itself. As a result, I turn to the legislation itself as the main factor in interpreting the meaning of "subject of" in section 36.7(2).

[44] Section 36.3 describes what must be included in a notice of administrative penalty:

> **36.3** If the chief inspector finds that a person has contravened or failed to comply with a provision referred to in section 36.1 (1) or if the chief inspector imposes an administrative penalty on a person under section 36.2 (1), the chief inspector
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> (a) must give to the person a notice of the decision, and the notice must
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> (i). identify the contravention,
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> (ii). advise the person of his or her right to appeal the decision under section 36.7, and

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[2] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27.
[3] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

(iii). if an administrative penalty is being imposed, specify the amount of the penalty and the date by which the penalty must be paid, and

(b) may make public the reasons for the decision and the amount of the penalty, if any.

[45] This section defines decisions that must be made as part of the notice: a finding that a contravention occurred and the amount of any associated administrative penalty. Reading section 36.7 in the context of section 36.1(1), I conclude the required elements from section 36.1(1) must be included among the "… decision[s] which [are] the subject of the notice."

[46] This conclusion is based on the expansive definition of the plain and ordinary meaning of "subject". As "decision which is the subject of the notice" is not defined in the *Act*, nor does it appear elsewhere within the *Act*, the plain and ordinary meaning is persuasive. The *Cambridge Dictionary*[4] defines "subject" as "the thing that is being discussed, considered or studied". The *Oxford Dictionary* defines it as "A person or thing that is being discussed, described or dealt with."[5] The *Merriam-Webster Dictionary* defines it as "something concerning with something is said or done".[6] As such, the plain and ordinary meaning of the "subject of that notice" is whatever is discussed in the notice, including the elements required under 36.1(1).

[47] While the Director argues that the Board should defer to him on the question of whether Sunrise contravened the January 2020 orders, he did not provide any persuasive authority why the Board should do so. The Board has the discretion, in deciding the appeal, to confirm, rescind, or vary his decision.[7] The Board has broad substitutional authority that is incompatible with a standard of deference. Furthermore, the Board can accept new information that it considers relevant, necessary, and appropriate to decide the appeal.[8] Given that the Board has broad authority and discretion to accept new information and use that to make new orders, I find that the Board owes no deference to the Director and must come to its own conclusions in the circumstances.

[48] Section 36.7 of the *Act* limits the Board's jurisdiction to decisions that are the subject of a notice issued under section 36.3. The *Act* does not provide the Board with the authority to address any other decisions made by the Director under the *Act*. This includes whether an order made by an inspector under section 35, or any other section under the *Act* aside from section 36.3, is valid.

[49] This limit on the Board's authority is consistent not only with the explicit wording of section 36.7, but also with a right of appeal to the Chief Inspector. This right of appeal, found in section 33(1) of the *Act*, is conferred upon those who are "… adversely affected by a decision or order of an inspector or of an order of the chief auditor …." Allowing the Board to inquire into and make decisions on the validity of orders while simultaneously allowing the Chief Inspector to do the same

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[7] See section 36.7(4)(a) of the *Act*.
[8] See section 40(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

would run the risk of two appeal processes leading to divergent results. This would create confusion and unpredictability as to the enforceability of either of the appeal processes.

[50] Even where the Chief Inspector makes an order under section 35 (as Mr. Hoffman did in December 2017) in circumstances where no appeal to the Chief Inspector was available, this does not clothe the Board with authority to consider the matter. Rather, the remedy for anyone seeking to challenge would be through an application for judicial review.[9]

[51] The Board is a creature of statute and only has the jurisdiction given to it pursuant to that statutory scheme. The *Act* does not give the Board the authority to hear any appeals under section 35.

[52] For these reasons, the Board lacks the jurisdiction to address the validity of the Chief Inspector's orders from December 2017, or of Mr. Olson's orders from January 2020, all made under section 35 of the *Act*.

[53] Because the question of the underlying validity of the various section 35 orders can be resolved with reference to the Board's jurisdiction, I do not need to consider the doctrines of *res judicata*, issue estoppel, or collateral attack. Accordingly, I will not do so.

[54] Having determined that the Board's jurisdiction in this matter is to consider the elements of the Penalty, and not the validity of the underlying orders, I turn to the ultimate question for this preliminary decision: was the decision to impose a Penalty invalid because it violated the limitation period found in section 36.6(1) of the *Act*?

[55] Section 36.6(1) says, "[t]he time limit for giving a notice under section 36.3 is 3 years after the date on which the act or omission alleged to constitute the contravention or failure to comply first came to the attention of the chief inspector."

[56] In this case, there are two omissions alleged to constitute contraventions in the Penalty: a contravention of section 10.6.2(1)(b) of the *Code*; and failure to comply with Mr. Olson's January 2020 orders, as required by section 10.6.2(2)(a) of the *Code*. The Penalty clearly specifies that the amount of the administrative penalty reflects a combination of both contraventions. Paragraph 38, appearing under the header "**PENALTY CALCULATION:**", reads in part, "For the purpose of calculation, I will group Contraventions 1 and 2 in the penalty assessment." In setting the base amount of the penalty, the Director then describes the function and importance of section 10.6.2 of the *Code* generally, and notes having received submissions from local Indigenous Nations on both contraventions.

[57] I agree with Sunrise that contravention 1—the contravention of section 10.6.2(1)(b) of the *Code*—came to the attention of the Chief Inspector more than three years before the Penalty was issued. There is no dispute that the then-Chief Inspector outlined that contravention in letters he sent in December 2017. He was copied on earlier correspondence about the same contraventions.

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[9] See the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[58] The Director referred to contravention 1 as a "continuing offence", referencing *Sadolims*. While he stated that this was speculation on his part and did not constitute part of his rationale, I disagree. I have concluded, contrary to the Director's submissions on appeal, that the Penalty was based, in part, on Sunrise's contravention of section 10.6.2(1)(b) of the *Code*. It was entirely appropriate for the Director to consider whether this contravention could still be the subject of an administrative penalty, given that it first came to the attention to the Chief Inspector more than three years earlier. As such, I consider it necessary to address whether the contravention of section 10.6.2(1)(b) is a continuing offence, or one constrained to a singular point in time.

[59] As both parties noted, *Sadolims* indicates that, in a regulatory context, this quality of the offence is determined based on the purpose of the enactment that has been contravened. Here, there is no dispute that the *Code* exists to promote public welfare. It has four purposes that it describes. They are to:

> (1) [p]rotect employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines[,]
> (2) [s]afeguard the public from risks arising out of or in connection with activities at mines[,]
> (3) [p]rotect and reclaim the land and watercourses affected by mining[, and]
> (4) [m]onitor the extraction of mineral and coal resources and ensure maximum extraction with a minimum of environmental disturbance, taking into account sound engineering Practice and prevailing economic conditions.[10]

[60] It is with those purposes in mind that I must turn to consider the first contravention identified in the Penalty. That contravention is of section 10.6.2(1)(b) of the *Code*, which says that:

> If a mine ceases operation, the owner, agent, or manager shall
>
> (a) …
>
> (b) carry out a program of site monitoring and maintenance."

[61] This does not speak to an indefinite obligation, but rather for the creation and completion of a specific program in a specific context. Significantly, the program of site monitoring and maintenance does not have to be approved. Furthermore, the obligation for an owner, agent, or manager to operate the program without oversight operates for a defined period of time. I contrast this obligation with the one found in section 10.6.2(2)(a) of the *Code*, which provides that:

> If a mine ceases operation for a period longer than one year, the owner, agent, or manager shall

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[10] See *Code,* ___

> (a) apply for an amendment to the permit setting out a revised program for approval by an inspector …

[62] This section of the *Code* is distinct from section 10.6.2(1)(b) in two important ways: it requires approval by an inspector, and it is triggered when a mine is non-operational for a year. Under section 10.6.2(2)(a), the program of site monitoring and maintenance required under section 10.6.2(1)(b) undergoes revision after one year, and is subject to approval by an inspector. The permit may be amended under section 10.6.2(2)(a) to include aspects of the program that must be carried out under section 10.6.2(1)(b), but they are distinct processes that impose different obligations on a mine's owner, agent, or manager.

[63] Similarly, section 10.6.9, titled "On-going Management Requirements", imposes a requirement to submit a mine closure plan in circumstances in which the mine "… requires on-going mitigation, monitoring or maintenance …."

[64] The only contravention at issue, however, is of 10.6.2(1)(b), which functions for a limited period of time, until stricter requirements become required under section 10.6.2(2)(a) or 10.6.9. Significantly, the Penalty is not based on any contravention of those latter sections of the *Code*.

[65] It is unlikely that any "on-going need" for a plan for mitigation, monitoring or maintenance would be considered before one year of non-operation. The concept of "on-going need" is inconsistent with an anticipated need of less than one year, and at the one-year timeframe, any plan is subject to revision and must meet with the approval of an inspector.

[66] This shifting requirement is consistent with the stated objectives of the *Code*. They serve to protect individuals and employees, safeguard the public, protect the environment, and minimize environmental disturbance, but with an eye toward economic realities, both for the mine and for the regulator. Short-term mine closures lasting less than one year are not subject to the stricter requirements of section 10.6.2(2)(a), but merely the requirements specified by the mine's owner, agent, or manager under section 10.6.2(1)(b).

[67] Because the contravention at issue in this decision is 10.6.2(1)(b), and not 10.6.2(2)(a), I conclude that the contravention was a discrete offence at a particular period in time. At most, it was a "continuing offence" for one year, at which point Sunrise's obligation shifted to the one defined in section 10.6.2(2)(a). By that point in time, Sunrise's obligation under 10.6.2(1)(b) was of a historic quality and the submission of an acceptable maintenance and monitoring plan could not satisfy that obligation. As a result, it was not a "continuing offence" beyond some point in 1997. The Chief Inspector knew of this contravention more than three years before the Penalty was issued and, accordingly, it could not form a basis for the Penalty by function of section 36.6(1) of the *Act*.

[68] I turn to the second contravention described in the Penalty: Sunrise's non-compliance with the January 2020 orders that required compliance with section 10.6.2(2)(a) of the *Code*, already described above. As pointed out by the Director, this is a separate contravention from the underlying contravention of section 10.6.2(2)(a) of the *Code*.

[69] The key element of section 36.6(1) of the *Act* is that the limitation period starts to run on "… the date on which the act or omission alleged to constitute the contravention or failure to comply first came to the attention of the chief inspector." The legislation does not refer to any underlying facts or circumstances that lead to the noncompliance; section 36.6(1) states, clearly and unambiguously, that the limitation period begins when the alleged contravention or noncompliance first came to the attention of the Chief Inspector.

[70] The broader context of the Act is significant in understanding section 36.6(1). It can be distinguished from section 37(3.1) of the *Act*, which prescribes a limitation period in respect of the prosecution of regulatory offences under the *Act*. Section 37(3.1) sets a limitation period for "… laying an information to commence a prosecution for an offence under this Act". The limitation period is "… 5 years after the date on which the chief inspector learned of the facts on which the information is based." This limitation period begins earlier than the one under section 36.6(1), when the Chief Inspector learns of the underlying facts that lead to the laying of the information, to start the prosecution. Had the Legislature intended for the limitation period under section 36.6(1) to start running when the chief inspector became aware of underlying facts, it would have drafted section 36.6(1) in the same structure as it did section 37(3.1). It did not, and chose instead to have the limitation period in respect of administrative penalties start at a later point in time (but for the limitation period to be of a lesser duration).

[71] Furthermore, Sunrise has not provided sufficient evidence or argument to establish any intention of the Legislature or any context that is at odds with the clear and unambiguous language in section 36.6(1), which defines the starting point for the limitation period for the imposition of administrative penalties. Sunrise has described merits of a limitation period generally, but has not established why I should interpret section 36.6(1) other than how it was written, and to read into it a more stringent limitation period than appears on a plain reading of section 36.6(1).

[72] The noncompliance described in the Penalty was that Sunrise "… did fail to comply with an order …." This can form the basis for an administrative penalty separate from any noncompliance with provisions of the *Act*, its regulations, or the *Code*, according to section 36.1(1)(b) of the *Act*.

[73] As noted by the Director, the orders in question imposed a requirement of Sunrise as of September 15, 2020. It is unclear when Sunrise's noncompliance with those orders came to the attention of the Chief Inspector, but even assuming that the Chief Inspector monitored the situation and was immediately aware of the issue, any penalty associated with Sunrise's noncompliance with those orders must be levied by September 15, 2023. The Penalty was levied before that date, so does not violate section 36.6(1) of the *Act*, at least insofar as the second identified contravention is concerned.

[74] In reaching this conclusion, I recognize that the effect of this conclusion is that noncompliance with a provision of the *Code*, for which the limitation period has expired and no administrative penalty can be imposed, may yet form the basis for an administrative penalty if a person is ordered to comply with that provision and they fail to do so. That may be the case here, but I do not need to decide that question. Sunrise's contravention of section 10.6.2(2)(a) of the *Code* did not form a direct basis for the Penalty, so that concern is not implicated here.

[75] The contravention at issue is that Sunrise failed to comply with the January 2000 orders, not that it contravened section 10.6.2(2)(a) of the *Code*. The appropriate quantum of the Penalty may be impacted by this, as it was not based on any contravention of section 10.6.2(2)(a), and I have already found that the underlying contravention of section 10.6.2(1)(b) cannot be factored into the Penalty, by function of section 36.6(1) of the *Act*. I expect this issue will be canvased in detail when this decision is decided on its merits.

[76] In closing, I also acknowledge Sunrise's concerns about being subject to the Penalty when it did not predict that it might be. I do not need to address this argument for the purposes of this preliminary decision, however, as noted by the Director. I expect the parties will discuss this in their submissions as the appeal proceeds on its merits.

CONCLUSION

[77] For the reasons provided above, I conclude that the Penalty was partly invalid because the first identified contravention—that Sunrise contravened section 10.6.2(1)(b) of the *Code*—violated the limitation period found in section 36.6(1) of the *Act*. The second identified contravention, however—that Sunrise failed to comply with orders issued in January 2000, under the *Act*—is not invalid by operation of section 36.6(1).

[78] In reaching this conclusion, I have considered all information and submissions provided by the parties, even if not specifically referenced in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

June 10, 2022