Environmental Appeal Board

Citation: *Teck Coal Limited v. Chief Inspector of Mines*, 2024 BCEAB 45

Decision No.: EAB-EMA-22-A001(a)

Decision Date: 2024-12-30

Method of Hearing: Conducted by way of oral hearing concluding on January 24, 2023

Decision Type: Final Decision

Panel: Daphne Stancil, Panel Chair

Appealed Under: *Mines Act*, RSBC 1996, c. 293

Between:

Teck Coal Limited

Appellant

And:

Chief Inspector of Mines

Respondent

Appearing on Behalf of the Parties:

For the Appellant:	Gavin Cameron
	Julia Kindrachuk
For the Respondent:	Meghan Butler
	Bill Wagner

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FINAL DECISION

INTRODUCTION

[1] On January 28, 2019, a mechanic (the "Mechanic") suffered severe and life-altering injuries while installing a wheel on a truck in a workshop at a mine site operated by Teck Coal Limited (the "Appellant"). The Appellant appeals a determination of administrative penalty, sometimes referred to as an administrative monetary penalty, dated January 28, 2022 (the "Determination"), a delegate of the Chief Inspector of Mines[1] (the "Delegate") made under the *Mines Act*, RSBC 1996, c. 293 (the "*Act*") due to the circumstances that led to the Mechanic's injuries.

[2] After providing the Appellant an opportunity to be heard, the Delegate determined the Appellant did not adequately train workers, including the Mechanic, and found that this failure resulted in a contravention of part 1.11.1(1) of the *Health, Safety and Reclamation Code for Mines in BC* (the "*Code*"[2]). The *Code* is established under the *Act* by regulation. Part 1.11.1(1) of the *Code* requires mine managers to "ensure workers are adequately trained to do their job or are working under the guidance of someone who has competency both in the job and in giving instruction."

[3] The Delegate did not make a finding of a contravention of part 1.11.1(2) of the *Code*, which requires mine managers to "ensure that all employees receive thorough orientation and basic instruction in safe work practices."

[4] The Delegate imposed an administrative penalty of $140,000 on the Appellant for contravening section 37(2) of the *Act* by failing to comply with part 1.11.1(1) of the *Code*. The Appellant appealed the Determination to the Environmental Appeal Board (the "Board").

[5] In this appeal, the Appellant requests that the Board:

a. set aside the Determination in relation to part 1.11.1(1) of the *Code*;

b. if the Board decides a penalty is to be imposed, quash the penalty determination and remit it for redetermination on the basis that the contravention is "minor" due to the steps the Appellant took to prevent the contravention; or

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[1] Section 6 of the *Act* authorizes the Chief Inspector of Mines (the "Chief") to delegate any of the powers conferred on them. By correspondence dated May 20, 2020, the Chief delegated to Brad Cox, an A/Product Manager in the Ministry of Energy, Mines and Low Carbon Innovation, the powers of the Chief as set out in sections 36.1, 36.2, and 36.3 of the *Act*.

[2] Refers to the Code enacted in 2017 and in effect at the time of the Mechanic's injuries.

c. in the alternative, if the finding of contravention is upheld, reduce the amount of the penalty established in the Determination at $140,000.

[6] The Respondent seeks:

a. confirmation of the Delegate's Determination that the Appellant contravened part 1.11.1(1) of the *Code*;

b. variation of the Determination to include a finding of contravention of part 1.11.1(2) of the *Code*; and

c. confirmation of the Determination setting the administrative penalty amount at $140,000 or, if the Board finds a contravention of part 1.11.1(2) of the *Code*, the setting of an additional administrative penalty related to the new contravention.

[7] The Respondent also seeks an order for costs against the Appellant for $500.00.

[8] The Board is designated by regulation[3] as the appeal tribunal for appeals under section 36.7 of the *Act*. After hearing an appeal, the Board may confirm, vary, or rescind the decision that is the subject of the appeal. The Board has the power to require a party to pay all or part of the costs of another party in an appeal under section 47 of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the "*ATA*")

BACKGROUND

[9] The Appellant owns and operates a coal mine, Greenhills Operations ("Greenhills") located near Elkford, British Columbia, under a permit issued by the Ministry of Energy, Mines and Low Carbon Innovation (the "Ministry"). The Appellant contracted with MAXAM Explosives Inc. (the "Contractor") for explosives-related services, equipment, and supplies required for blasting at Greenhills.

[10] The Appellant and Contractor established this business arrangement by agreement. That agreement is conditional on the Contractor complying with all laws that apply to the mining operation, including health and safety laws, particularly the *Code*. Annexed to and adopted by the agreement is a responsibility matrix, which allocates responsibilities related to services the Contractor provides between the Appellant and the Contractor. These activities form the basis of an Environment, Health, Safety and Community Work Plan (the "Workplan"), developed by the Contractor and approved by the Appellant, to operationalize the assigned responsibilities. Section 5 of the Workplan, referred to as "Health and Safety Hazard Identification and Control Measures", identifies hazards associated with the work the Contractor performs and describes how the Contractor is to respond to them.

[3] *Administrative Penalties (Mines) Regulation,* BC Reg. 47/2017, section 9 (the "Regulation").

[11] In fulfilling the agreement, the Contractor transports and mixes components of explosives in trucks known as "prill" trucks. The Contractor employs drivers to operate the trucks, and mechanics to maintain and service the trucks. The Mechanic worked for the Contractor. Mechanics working for the Contractor perform much of their work in a workshop located in a secure facility at Greenhills.

[12] Mechanics employed by the Contractor remove wheels from the 20-ton prill trucks when the tires are flat and replace them with operational truck wheels. The tires contain inflatable tubes and are mounted on 24-inch multi-piece rims. A tire company located near the mine site picks up the wheels removed from the trucks, performs all maintenance work and repairs on the multi-piece rims and the tires as required at its offsite location, and returns wheels with fully operational rims and tires to the Contractor for installation on the trucks. Rims and tires are not repaired by the Contractor at Greenhills.

[13] The tire company delivered an installation-ready wheel to the Contractor in December 2018. On January 28, 2019, one of the Contractor's truck drivers drove into the workshop with a flat tire. The Mechanic proceeded to change the wheel on the truck using the replacement wheel delivered by the tire company. During installation, the replacement wheel exploded. Two other employees of the Contractor who were in an adjacent room heard the explosion and ran into the workshop to find the Mechanic on the workshop floor with severe injuries. They initiated an emergency response, as required for a critical incident by the Appellant's documented emergency response procedures. Once the Mechanic was cared for and transported off-site, the Appellant and Contractor began investigations and reporting to the Ministry as required.

[14] A commercial vehicle safety and enforcement inspector from the Provincial Ministry of Transportation examined the components of the wheel that exploded. The inspector determined, after noting impact marks on the locking piece of the multi-piece rim, that the tire company could have assembled it incorrectly.

[15] The Appellant retained an investigation, research, and testing business ("S-E-A") to investigate the wheel explosion. Technical specialists examined the rim parts of the wheel that exploded and conducted simulations and modelling based on the actual parts or using specifications of those parts. S-E-A includes the following conclusions in its report:

- a rim assembled properly with the parts as supplied (from the wheel under investigation) could withstand a tire pressure of 100 psi[4] when a lateral force of 5000 pounds was applied to exposed parts of the rim;
- damages to the rim components were not caused by the sledgehammer found in the workshop when the wheel exploded;

[4] Pounds per square inch.

- the wheel (tire and rim) with an improperly installed lock ring could remain conditionally stable when the tire was pressurized;
- a pressurized tire mounted on a multi-piece rim whose lock ring is improperly installed can easily become compromised and fail when subject to a lateral force; and
- the lock ring component of the rim was likely installed improperly (backwards).

[16] The Appellant submitted a summary report regarding its investigation of the wheel explosion to the Ministry on July 31, 2019. The Appellant's summary report relied on the conclusions of the S-E-A report to advise that the catastrophic failure of the wheel which exploded was due to an "incorrectly installed locking ring." The summary report also indicates that "[r]isks for…tire handling and installation had not been formally assessed to identify critical control requirements to safely manage tire installation work."

[17] By letter dated December 6, 2019, the Ministry accepted the summary report and supplemental information and noted that this completed the Appellant's report of its investigation into the circumstances of the wheel explosion. The "Ministry Report to Statutory Decision Maker in Recommendation of Administrative Hearing," dated January 17, 2020 (the "Report"), advised that the wheel explosion was due to an absence of:

- recognition of the hazards associated with wheel changes;
- education regarding the hazards associated with wheel changes; and
- training to avoid the hazards.

[18] The Report advised that the Appellant was responsible for identifying risks and hazards associated with wheel changes and ensuring the adoption of controls to prevent these risks and hazards. It states that the Appellant had not identified the risks or adopted controls for prevention of risk of harm arising from those hazards. The Report recommended that the Ministry proceed to assess the issuance of an administrative penalty against the Appellant for contravening section 37(2) of the *Act* by failing to comply with parts 1.11.1(1) and 1.11.1(2) of the *Code*.

The Determination

[19] On July 8, 2021, the Delegate gave the Appellant notice of an opportunity to be heard ("OTBH") in relation to the alleged non-compliance with parts 1.11.1(1) and 1.11.1(2) of the *Code* after the truck wheel explosion. After consideration of the *Code* and the submissions in the OTBH, the Delegate determined that the *Code*, under certain circumstances, places obligations on the Appellant for all workers on the mine site. The Delegate assessed the circumstances related to the Mechanic's injury and concluded, in the Determination, that the Appellant was obligated to ensure that the Mechanic, employed by the Contractor, received appropriate training under part 1.11.1(1) of the *Code*.

[20] The Delegate determined that the Appellant had contravened part 1.11.1(1) of the *Code* by failing to provide the Mechanic with adequate training and set the administrative penalty at $140,000 for this failure. The Delegate was "unable make a finding of a contravention" under part 1.11.1(2) of the *Code*.

ISSUES

[21] The parties' submissions require me to evaluate and consider: the Board's jurisdiction under the *Act*, interpretation of parts of the *Code*, the applicability of the defence of due diligence in this appeal, and the fairness and quantum of the administrative penalty.

[22] In these reasons, I evaluate and consider the matters raised in the parties' submissions by addressing the following issues:

- How will this appeal be considered and what are the Board's remedies?
- Does part 1.11.1(1) of the *Code* apply to the Appellant and, if so, did the Appellant contravene it?
- Does part 1.11.1(2) of the *Code* apply to the Appellant and, if so, did the Appellant contravene it?
- Does the defence of due diligence apply to a finding of contravention of part 1.11.1 of the *Code*?
- Was the Delegate procedurally fair in determining the penalty and did the Delegate establish the quantum of penalty consistent with regulatory requirements and within his statutory discretion?

[23] In addressing the issues listed above, there are other questions or sub-issues raised by the submissions that I answer or consider, which are noted in the table of contents and text of the analysis of each of the five main issues.

LEGISLATIVE SCHEME

[24] Three legislative elements make up the legislative scheme relevant to this appeal: the *Act*, the Regulation, and the *Code*.

Mines Act

[25] The *Act* is the primary statute establishing government authority and mine industry obligations for every stage of a mining operation. Of significance in this appeal, section 21 of the *Act* requires a mine to appoint a manager to have operational control of a mine and

who, under section 24, is given responsibility for compliance with the *Act*, Regulation, and *Code*.

[26] Section 25 of the *Act* establishes certain obligations for contractors, mine owners, agents, and managers:

> **25** (1) If work in or about a mine is let to a contractor, the contractor and the contractor's manager, as well as the owner, agent and manager of the mine, must take all reasonable measures to ensure compliance with the provisions of this Act, the regulations, the code, the permit and orders under this Act pertaining to the work over which they have control.
>
> (2) In a case of noncompliance with subsection (1), the contractor and the contractor's manager commit an offence that is punishable in the same manner as if the contractor and contractor's manager were the owner, agent or manager of the mine.

[27] Sections 36.1 to 36.6 of the *Act* provide the authority for an administrative process to determine contraventions and administrative penalties. Sections 36.1 to 36.3 adopt a process the Chief or, as in this case, the Delegate must follow to determine if there has been a contravention of the *Code* (or *Act* or regulations) and if so, what they must consider before imposing an administrative penalty:

> **36.1** (1) After giving a person an opportunity to be heard, the chief inspector may find on a balance of probabilities that the person has contravened or failed to comply with any of the following provisions:
>
> (a) a prescribed provision of this Act, the regulations or the code…
>
> **36.2** (1) If the chief inspector finds that a person has contravened or failed to comply with a provision referred to in section 36.1 (1), the chief inspector may, after considering the prescribed matters, impose an administrative penalty on the person in an amount that does not exceed the prescribed limit.
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> **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 the person under section 36.2 (1), the chief inspector
>
> (a) must give to the person a notice of the decision, and the notice must
>
> (i) identify the contravention,

(ii) advise the person of the person's right to appeal the decision under section 36.7, and…

[28] Once the Chief or their Delegate issues a decision finding a contravention, the person subject of that contravention may appeal the decision under section 36.7 to the Board which may, as indicated above, confirm, vary, or rescind the decision of the Chief or Delegate.

Regulation

[29] The Regulation provides the details necessary to give effect to sections 36.1 to 36.3 of the *Act*. Section 2 of the Regulation lists factors the Chief or Delegate must consider before imposing an administrative penalty. I consider these factors later in this decision.

[30] Part 2 of the Regulation prescribes the parts of the *Code* that, if contravened, can be pursued as an administrative penalty. Section 7(1) lists part 1.11.1 of the *Code* and sets a maximum penalty of $500,000 for a contravention of that part.

Code

[31] The *Code* is developed by a health, safety, and reclamation code committee which the minister establishes under section 34 of the *Act*, and which includes the Chief, who is chair of the committee. The Minister appointed representatives from the mining industry, labour, First Nations, and environmental consulting[5] to prepare revisions to the previous *Code,* resulting in the June 2017 *Code,* which was in effect on the date of the incident[6].

[32] I refer to and rely on the legislative scheme and three elements as summarized above in making this decision. If I rely on a provision not noted and summarized above when discussing a question in the following analysis, I include a reference to that provision as required.

[5] Message from Minister, February 2017, preamble to the June 2017 Code lists members as Highland Valley Copper Mine, Gibraltar Mine, Union of Operating Engineers, United Steelworkers Union, First Nations Energy and Mining Counsel, Arrowblade Consulting. Teck Coal was a member of a sub-committee.

[6] The *Code* has since been amended; the latest amendment was April 2024.

DISCUSSION AND ANALYSIS

How will this Appeal be considered and what are the Board's remedies?

The Parties' Submissions

[33] The parties make submissions about the nature of the appeal process the Board should adopt and also the scope of the Board's remedial authority in making its decision in this appeal.

Appellant's Submissions

[34] The Appellant says the legislative scheme establishes the Board as the appeal tribunal under section 36.7 of the *Act* and makes submissions about the role of the Board in deciding appeals, its procedural authority in hearing appeals, and its remedial authority.

[35] The Appellant submits that the Board has the jurisdiction to hear this appeal and further that this enables the Board to consider the conduct and process of the Delegate in making the Determination. The Appellant argues that the Delegate was not consistent by determining that the Appellant contravened part 1.11.1(1) of the *Code* while the Contractor did not. I address this submission when considering the interpretation of part 1.11.1(1) of the *Code*. The Appellant argues that inconsistent decisions lead to unfairness.

[36] The Appellant argues that this appeal is a "true" appeal and not a "new" hearing.[7] The Appellant says the Board is an appellate body and should apply a standard of review of correctness as provided by section 59 of the *ATA*[8] when assessing the Determination. The Appellant also submits that the Board's remedial jurisdiction is limited to confirming, varying, or setting aside a decision being appealed. Despite this submission, the Appellant also says if the Board conducts a new hearing for an appeal, this alone does not correct procedural unfairness by a decision maker in conducting an OTBH or determining a penalty.

[37] In its reply, the Appellant submits it would be unfair if this panel made a decision that results in further adverse consequences to it beyond those established in the Determination. The Appellant argues that since the Respondent did not provide notice that it intended to raise the issue of reversing the Delegate's Determination regarding part 1.11.1(2) of the *Code* in this appeal, the Appellant did not make full submissions on the Board's authority to do so. Allowing the Respondent to argue this issue before the Board in this appeal in this context would be procedurally unfair. In addition, the Appellant says the Board does not have the remedial authority to enable it to make the

[7] The Parties occasionally refer to a "new" hearing as a hearing *de novo* in their submissions. I have not adopted that terminology.

[8] Section 10 of the Regulation applies specific provisions of the *ATA* to the Board.

decision the Respondent requests of reversing the Delegate's Determination regarding part 1.11.1(2) and to set an administrative penalty for that contravention.

Respondent's Submissions

[38] The Respondent agrees with the Appellant that section 36.7 of the *Act* and parts of the Regulation establish the authority for the Board to hear this appeal. The Respondent argues that the role of the Board is unlike that of an appellate court, and also submits the standard of review established by section 59 of the *ATA* is one to be applied by a court on judicial review of a decision of this Board, not to a matter before the Board. Consequently, the Respondent argues the Board is not bound to apply an appellate standard of review in an appeal before it.

[39] Although the *Act* does not specify that the Board may conduct its appeals as new hearings, the Respondent argues relying on a decision of this Board, *Mountainside Quarries Group Inc. v. Ministry of Energy, Mines, and Petroleum Resources,* 2020 BCEAB 23 (CanLII) ("*Mountainside*"), distinguishing between appeals to a court and a statutory right of appeal to an administrative decision maker such as the Board, that the Board's authority is "not constrained" (para 84).

[40] The Respondent submits that the Board should assess if the Determination was reasonable by interpreting the language of the *Code* and applying the facts as raised by the evidence to that interpretation.

[41] The Respondent agrees that the parties determined, subject to an application to the Board to submit new evidence, that the evidence to be used for this appeal was the evidence disclosed during the submission process of the OTBH. However, the Respondent says the absence of fresh factual or expert evidence in this appeal does not change the nature of the appeal from a new hearing to one on the record: it remains a new hearing.

Panel's Findings

[42] The Parties' submissions raise two questions under this issue:

a. should this appeal be considered based on the record before the original decision-maker or as a new hearing?

b. what remedies can the Board provide in this appeal?

[43] A consideration of the Board's statutory authority to hear appeals and to apply remedies will provide the basis to answer these questions.

Should this appeal be considered based on the record before the original decision-maker or as a new hearing?

[44] As noted above, the Board first considered its jurisdiction under the *Act* in *Mountainside.* In that decision the Board noted the Regulation[9] establishes the Board as the appeal tribunal for the *Act* and commented:

> The Board is a body created by statute, and unlike superior courts, it does not have [inherent] jurisdiction. This means that all of its power and authority must be derived by a valid delegation of power by the Legislature which created it. For the purposes of the issue before me, this delegation is done by legislation and regulation (para. 26).

[45] While I am not bound by the decision of the Board in *Mountainside*, I consider the logic expressed in the decision and the reasoning provided to be sound, and I adopt the same logic and reasoning here. The Board has the powers given to it by the *Act* and the Regulation, which establish the Board as the appeal tribunal for appeals under the *Act.* Section 10 of the Regulation applies specific provisions of the *ATA* to the Board. This legislated framework is essential to providing the Board its authority and jurisdiction. For these reasons, I find, as the Board ultimately determined in *Mountainside*, the application of the authority granted under Part 4 of the *ATA* enables the Board to establish processes and procedures it requires. The Board has established the rules for its processes and procedures through the development and publication of the rules found in the Board's Practice and Procedures Manual (the "Manual"). I find that the Manual indicates that the Board usually will conduct its hearings as new hearings by hearing all evidence afresh, though the Board can overcome this presumption by making a specific ruling in relation to an appeal. In this case, the Board did not decide to alter that presumption, and I find this hearing proceeded as a new hearing.

[46] I also find, relying on the logic expressed at paragraph 48 of *Mountainside*, that the rules in the Manual grant the Board the discretion to conduct hearings based on evidence presented afresh at the hearing, based on the record of evidence that was before the original decision-maker, or based on a combination of both. The Board also has the discretion to rely on written or oral evidence, or on a combination of both. In a true appeal, this discretion would not be available to the Board.

[47] I find that the Board has the authority to conduct an appeal as a 'hybrid' appeal, enabling the parties to rely on the evidence that was before the Delegate and included in the record of the proceedings below, and introduced into evidence before me, and also to introduce new evidence. Within the context of this authority, however, the parties chose not to submit new evidence but agreed to submit supplemental documents, modifying

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[9] Section 9 provides "For the purposes of section 36.7 of the Act and this Part, the appeal tribunal is the Environmental Appeal Board continued under the *Environmental Management Act*."

their agreement to rely solely on the record of previous proceedings. Similarly, the Board's discretion enabled the parties who did not adduce any oral evidence in this appeal to provide oral closing submissions based on their written submissions.

[48] The Board in *Mountainside* commented in paragraph 42 that "defining the standard of review applicable to judicial reviews of Board decisions does not assist in determining the appropriate scope of review for appeals brought to the Board". This statement is consistent with the Respondent's submission that the standard of review established by section 59 of the *ATA* is applicable when a court reviews a decision of the Board but does not provide direction to this panel in determining if the Appellant contravened the *Code*. I agree with this assessment. For these reasons, I find that there is no standard of review established by the *Act* or the *ATA* to apply to the Delegate's decision. It is the role of the panel to determine the meaning of the *Code* provisions relevant to this appeal and to consider and apply the evidence within the meaning of those *Code* provisions in order to make a decision.

What remedies can the Board provide in this appeal?

[49] Turning to the scope of the Board's remedial authority, the Panel in *Mountainside,* after contrasting the extent of the powers granted to the Board under the *EMA* and the *Act*, determined that "the decision-making authority granted to the Board under the *Environmental Management Act* is broader than the scope of that authority granted under the *Mines Act*. …" (paragraph 35). The Board also established, at paragraph 35, the authority to "confirm, vary or rescind" as provided in the *Act* does not provide the Board the powers granted under the *EMA* of "sending the matter back to the person who made the decision, with directions" (section 103(a)) or "making any decision that the person whose decision is appealed could have made" (section 103(c)).

[50] As indicated above, while I am not bound by the decision of the Board in *Mountainside,* I have chosen to apply that reasoning in this case because as indicated above, I consider that the logic expressed in the decision and the reasoning provided regarding the interpretation of the *EMA* and the *Act* to be sound. Consequently, I find that although the Legislature provided the Board a range of powers on appeal under the *Act*—to confirm, vary, or rescind an order—these powers are not as broad as those provided to the Board for decisions under the *EMA.* I find the absence of the additional explicit authorities established in the *EMA* indicates a narrower ambit of remedial authority under the *Act*.

[51] Applying these findings to this appeal, the Board does not have the authority to reverse a decision of a decision maker under the *Act*; rather, it has the power to rescind one. I find the Board has no authority to make a decision that has the effect of reversing a decision by replacing that decision with one that changes the fundamental nature of the decision under appeal. It cannot make any decision that the person whose decision is appealed could have made. It has the authority to confirm or vary the decision of the person, in this case the Delegate, whose decision is appealed. In addition, the Legislature

has not provided the Board with the power under the *Act* to send the matter back to the person who made the decision with directions.

[52] Since I have found above that the Board's power to vary does not extend to reversing and replacing a decision, my authority to vary the decision before me is therefore limited. I find that the power to vary a decision includes the ability to adjust wording of the decision through altering some particulars of the decision, such as increasing or decreasing the amount of an administrative penalty. If I decide the Delegate determined the quantum of administrative penalty unfairly, I have the statutory authority to vary or adjust the quantum after considering submissions from the parties and after assessing the relevant evidence. I discuss the process the Delegate used to establish and determine the quantum of the administrative penalty more fully later in this decision to decide if I should order a variation to the amount of administrative penalty determined by the Delegate.

[53] The Respondent's application to include "a [determination of] contravention of section 1.11.1(2)" does not seek an alteration of the Determination by a minor adjustment to the wording of the decision. Rather, the requested alteration goes to the essence of the decision. I find that the Respondent's application, if granted, would amount to reversing the decision, which I have found that the Board has no authority under the *Act* to do. While I agree with the Respondent's submission that the Board is not constrained by an appellate standard of review, it is constrained by its legislated authority to provide remedies. I find the Board lacks the statutory authority to rescind the Delegate's decision regarding part 1.11.1(2) of the *Code* and substitute it with a related, but different, decision.

Does part 1.11.1(1) of the *Code* apply to the Appellant and, if so, did the Appellant contravene it?

[54] Part 1.11.1(1) of the *Code* provides:

> The manager shall ensure that
>
> (1) workers are adequately trained to do their job or are working under the guidance of someone who has competency both in the job and in giving instruction…

The Determination

[55] The Delegate concluded that part 1.11.1(1) of the *Code* applied to the Appellant because the Mechanic is a worker as defined in the *Act.* The Delegate concluded that the Appellant failed to ensure that the Mechanic was adequately trained in the safe removal and installation of wheels as required to service trucks used in the mixing and delivery of explosives, and therefore, the Appellant contravened the *Code*.

[56] The Delegate comments as follows:

> Maxam employees reported that they were not made aware of the inherent hazards in changing three-piece rim wheels. The interviews suggest that both mechanics and truck operators were changing tires without tire-specific training from Maxam. When asked about the 3-piece assembly tire, one Maxam employee that had changed wheels of the type involved in this incident reflected not only a lack of training but also a lack of awareness of the dangers associated with the work.
>
> "Maxam mechanics do not receive tire safety training to show them what to look for" and "Risks for medium duty tire handling and installation had not been formally assessed to identify critical control requirements to safely manage tire installation work."

[57] After referring to the purpose of the *Code* and reviewing several parts of the *Code* that apply to all workers at a mine site, the Delegate decided it would be unreasonable to conclude that the manager's obligations under part 1.11.1(1) of the *Code* would extend only to workers employed by the Appellant and not to other workers at the mine. In the Determination, the Delegate observes some implications of accepting an interpretation of "worker" that results in two classes of workers. For example, the Delegate noted that the mine manager would have no obligation under the *Code* to ensure that workers employed by a contractor:

- receive instruction on the use and maintenance of protective equipment, under part 1.8.1;
- benefit from all reasonable and practical measures to make the workplace free of potentially hazardous agents and conditions, under part 1.9.1; or
- are not exposed to ionizing radiation, under part 2.3.11.

[58] In answer to the Appellant's assertion that the intention of the *Act* could not be to extend the definition of worker to the Contractor's employees because the Appellant had no control over those employees, the Delegate found that the Appellant did have control over the Contractor's work, including the work of the Contractor's employees. The Delegate based this finding on the evidence that:

- the Appellant required the Contractor, through terms of an agreement, to comply with all relevant laws including those directed at ensuring safety at the mine site;
- the Contractor, in collaboration with the Appellant, operationalized this requirement by developing a Workplan for the services it agreed to provide to the Appellant; and
- the Contractor, as required under the agreement, included a category of work in the Workplan regarding safe work policies and training regimes.

The Parties' Submissions

[59] Both parties submit that discerning the meaning of "worker" within the *Act* is essential to a decision on this appeal. The parties also agree that I should apply the modern principle of statutory interpretation, as explained by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 1 SCR 27 ("*Rizzo*"), at paragraphs 20-41, and recently referred to and applied by that court in *Canada (Minister of Citizenship and Immigration) v*. *Vavilov*, 2019 SCC 65 ("*Vavilov*"), at paragraphs 118-121, to discern that meaning. They submit that "worker" must be interpreted within the text, context, and purpose of the statutory scheme by reading "the words of a statute… in their entire context and in their grammatical and ordinary sense, harmoniously with the statutory scheme and object." Despite agreement on the approach to statutory interpretation, the parties do not agree on the meaning of "worker" under the *Act* and, consequently, which personnel fall within that definition.

Appellant's Submissions

[60] The Appellant submits that in order to interpret the meaning of part 1.11.1(1) of the *Code*, I should begin with ascertaining the meaning of certain words as provided by the *Act*, specifically "manager" and "worker." They submit the meaning of these words as established by the *Act* will also apply to the *Code*. "Manager" is defined under section 1 of the *Act* as "the person appointed by the mine under section 21 to be responsible for the management and operation of the mine". "Worker" is defined under section 1 to mean "a person who is an employee but does not include a supervisor." I note that "supervisor" is defined in the *Act* to mean "a person who instructs, directs or controls workers in the performance of their duties and who is authorized by the manager to take or recommend disciplinary action against workers." I also note that "employee" is not defined in the *Act* but is defined in the *Code*.

[61] The Appellant says the express carve-out of "supervisor" from the statutory scheme's definition of "worker" weighs against the ordinary meaning of "worker" being an appropriate interpretation. Further, the Delegate's interpretation of part 1.11.1(1), that the Mechanic was a worker within the *Act,* as set out in the Determination, is divorced from the statutory definition of "worker" which refers expressly to "employee." The definitions in the *Act* are important for interpreting "worker" properly. Further, adopting the Delegate's interpretation of part 1.11.1(1) of the *Code* supports an interpretation which deems a contractor's employee an employee of the mine owner which neither the ordinary nor legal meaning of "employee" supports. The Appellant argues that the Delegate relied on the purpose clause of the *Code* in interpreting "worker" and allowed it to overly influence the meaning he attributed to "worker" rather than evaluating the meaning as intended by the *Act*.

[62] The Appellant asserts that "worker" is not intended to capture just anyone who happens to be working at the mine; "worker" includes individuals whose work is directly controlled and supervised by more senior persons within the hierarchy established by the

direct employer. Consequently, the Appellant says that both "worker" and "employee" refer to persons who are directly employed by, and in an employment relationship with, the mine owner. The Appellant argues that the Delegate failed to consider this statutory context properly and incorrectly concluded that the Appellant had control over the Contractor's employee: the Mechanic. The Appellant asserts the statutory scheme recognizes that not all persons working at a mine site will be the employees of the mine and therefore, by operation of the Legislature's use of "manager," "worker," and "employee" in the *Code*, those who are not employees of the mine will not be directly owed duties by the manager. The Appellant submits that in interpreting "employee" in a way that includes the Contractor's employees leads the Delegate to go beyond the jurisdiction provided by the *Act* to rewrite the legislation in a manner to provide broader application, which the Delegate has no authority to do.

[63] The Appellant relies on the language of section 25(1) of the *Act*:

> If work in or about a mine is let to a contractor, the contractor and the contractor's manager, as well as the owner, agent and manager of the mine, must take all reasonable measures to ensure compliance with the provisions of this *Act*, the regulations, the code, the permit and orders under this *Act* pertaining to the work over which they have control. [Emphasis added.]

[64] Based on the wording of section 25, highlighted above, the Appellant agrees it has an obligation to take all reasonable measures to ensure compliance with the regulations, but only if it has control over the work. Section 25 creates a separate obligation for owners and their contractors, it does not make the owner interchangeable with the contractor regarding the contractor's obligations. The Appellant argues neither the ordinary nor the legal meaning of "control" support the Delegate's interpretation of the Appellant being in control of the Contractor's employees. Determining that the Appellant's involvement in the Workplan constitutes control is not supported by a proper interpretation of section 25. The Appellant submits that the obligations established by section 25 for the Appellant and the Contractor should be considered and provide context for interpreting their respective obligations under the *Code*.

[65] The *Code* defines "employer" as an "owner, agent, or manager as defined in the *Mines Act*" and "employees" as "all persons employed at a mine." Referencing these definitions, the Appellant argues that it is only a person employed by an "employer" who can be considered an "employee" and therefore a worker. Further, the Appellant says that "employee" and "employer" are defined in the *Code*, but their meaning must be placed in the context of the *Act*. From this, the Appellant concludes, based on the definitional scheme of the *Act* and the legal meaning of "employee" requiring direct control by the employer over the employee, that only those persons employed by an owner, agent, or manager, representing the mine, can fall within the scope of "employees." They argue this narrower meaning is consistent with the obligations of mine owners, managers, or agents

imposed by the *Act* concerning their direct employees, in contrast to any obligations they may have for employees of contractors.

[66] Also, the Appellant contends that the legislative scheme expressly recognizes the reality of work where the engagement of subject matter experts is required. The Appellant's duties are different in those circumstances when a contractor and its employees are engaged, as compared to the duties the Appellant has to its own employees. The Appellant argues that they are not required to train their contracted specialists. The duties imposed on the Appellant in relation to their contractors are imposed by section 25 of the *Act* and not the *Code*. Section 25(1) of the *Act* obligates the Appellant to take all reasonable measures to ensure compliance with the regulations of the statutory scheme if it has control over the work.

[67] In the alternative, the Appellant asserts it was unnecessary to have provided the Mechanic with any training because the Contractor required the Mechanic to hold valid mechanic certification. The Mechanic earned red-seal certification to work as a heavy-duty mechanic in both British Columbia and Alberta and had worked in the trade for at least nine years at the time of the injury. The Appellant argues that because of that training and experience, the Mechanic should have been familiar with how to safely change wheels, and would therefore not require training as anticipated by part 1.11.1(1) of the *Code*. The Appellant submits the Delegate arrived at the incorrect conclusion in the Determination as he did not consider the full wording of part 1.11.1(1) of the *Code*. In the Appellant's assertion, to comply with the standard set in the Delegate's Determination, a mine would have to become an expert in every conceivable specialized field of work rather than rely on specialists under contract, which is contrary to the legislative intent.

[68] In summary, the Appellant asserts that reading the legislation harmoniously, as a whole, so that each provision sheds a light on the others, shows that the Appellant's duties in respect of a contractor's employees are not equivalent to the duties owed to its own workers at a mine site.

Respondent's Submissions

[69] The Respondent makes submissions regarding the interpretation of "worker" in the context of a purposive assessment of the legislative scheme and refers to the first objective listed in the purpose clause to the *Code*: to "[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." The Respondent argues this objective provides the necessary context for consideration of the meaning of "worker." After noting the *Code* defines "employees" to mean "all persons employed at a mine" and not all persons employed by the mine, and that section 1 of the *Act* defines a "worker" to be an employee, not including a supervisor, the first objective of the *Code* regarding health and safety will be met by an interpretation that a "worker" is an "employee" who works at a mine, irrespective of their employer.

[70] In contrast to the Appellant's submission, the Respondent submits that the legislative intention is to apply the *Code* to all employees to fulfill the objective of

protecting employees from undue risks to their health and safety. The Respondent argues that the legislative intent of the *Act* and the *Code* cannot be met if the *Code* is applied to one class of employees while excluding others. The Respondent points to the inclusion of the phrase "all other persons" in the purpose clause and submits that the purpose of the *Code* is to protect everyone at the mine site. The purpose clause of the *Code* does not limit its objective to protecting only individuals who are employed directly by the mine owner. Applying a similar approach, the term "employee" should also be interpreted consistently with a broad application of the health and safety objectives to all people at a mine, not only those specifically employed by a mine owner.

[71] The Respondent acknowledges the Appellant's submission that the Mechanic was certified and would be expected to know how to safely remove and replace multi-piece wheel assemblies on the Contractor's trucks. However, the Respondent submits that the training a worker received before working at the mine does not modify the express training requirement of the *Code* regarding worker safety at the mine. Some form of specific training for workers regarding this function was necessary under the *Code,* but no training or training materials were provided that warned of the inherent dangers of removing and replacing multi-piece wheel assemblies.

[72] The Respondent submits that the language of section 25 of the *Act*, which addresses contractors within a mine, does not limit the responsibilities of the mine that are found under the *Code*. Rather, the broad recognition of the responsibilities of a mine manager, through the language of section 25, supports an interpretation under the *Code* that the manager is responsible for all work at a mine. This includes responsibility for the work undertaken through a contractor.

Panel's Findings

[73] I now turn to the language of part 1.11.1(1) of the *Code* in the context of the parties' submissions. Both parties urge me to apply the modern principle of statutory interpretation, as described in *Rizzo*: the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This requires that I evaluate the relevant portions of the *Act*, the Regulation, and the *Code* to determine their plain meaning in a manner that can be understood harmoniously with the objectives of the scheme as a whole (*Rizzo*). In other words, as the court in *Vavilov* explains at paragraphs 188 through 121, I must give regard to the text of the *Code* provision, as well as the context and purpose the legislative scheme provides.

[74] In order to consider the context and purpose of the legislative scheme, I must consider the *Act* as a whole.

Legislative Objectives

[75] The *Act* applies to all stages of a mine's life, from exploration through to reclamation and closure, addresses many aspects of the mining process, and provides for:

- government oversight of mines;
- management of mines;
- setting operational standards;
- setting health and safety standards;
- setting environmental standards; and
- rulemaking and enforcement.

[76] Sections 32 through 36 of the *Act* provide for the development of health and safety standards and for their enforcement. As noted earlier, the health, safety, and reclamation committee is directed to develop a code to deal "with all aspects of health, safety, and reclamation in the operation of a mine" (section 34(3)). The *Code* establishes operational details on how this objective will be achieved. The enforcement of the *Code* through the administrative process established by the *Act,* including the issuance of administrative penalties, supports the achievement of the objectives of the *Code*.

[77] The 2017 *Code* describes its purposes to:

(1) protect employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines;

(2) safeguard the public from risks arising out of or in connection with activities at mines;

(3) protect and reclaim the land and watercourses affected by mining; and

(4) monitor 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.

[78] The first two objectives are relevant to this appeal, and I now turn to the language of the *Code* provisions under scrutiny and, where necessary, the language of the *Act* for the specific textual and contextual analysis, as part of the assessment of whether part 1.11.1(1) applies to the Appellant. The Appellant has expressed concern that describing or listing the purposes of the *Act*, and in this case the *Code*, early in analysis can lead to one being able to attribute a meaning to any of the words used by the *Code* to meet the purposes or objectives of the legislation, despite the intended meaning of those words, which could be different. It is a concern to be aware of. It is a "trap" that can be avoided by applying the modern principle of statutory interpretation to words, requiring regard to the text where the words appear, the context within which they are used, and the purposes of the legislative scheme (*Vavilov).*

[79] In undertaking my analysis, I am aware of this trap and take steps to avoid it. While I have set out the objectives of the *Code* first in this analysis, it is not for the purpose of discerning the meaning of the *Code* and *Act* provisions and then fitting the meaning of these provisions to the objectives. Rather, these objectives are set out first to ground an understanding of the *Code* as a whole. It is the textual analysis that comes first in interpreting legislation, and the legislative objectives are then layered over this analysis to provide a clearer understanding.

Interpretation of the Language of the Code: Part 1.11.1(1)

[80] The parties do not dispute that the introductory words of part 1.11.1 of the *Code*, "The manager shall…," make plain that the mine manager is responsible for fulfilling the training and instructional obligations established by this part. Also, the parties do not dispute that a manager, as defined and required by the *Act*, had been appointed and was in operational control of the mine when the Mechanic was injured. As I discuss in more detail later in these reasons, I find that the use of the word "manager" in part 1.11.1 establishes that contractors are not obligated to provide adequate training under part 1.11.1.

[81] The parties' disputed interpretation of the legislation concerns whom the manager is obligated to train under part 1.11.1 of the *Code*. I now address this question, through the following analysis, beginning with an analysis and determination of the meaning of "worker" and "employee".

The Meaning of "Worker" and "Employee"

[82] A determination of the meaning of "worker" is central to the outcome of this appeal. The inclusion of "employee" in this consideration is necessary because as the Appellant submits, "worker" is defined in the *Act* as an "employee". The Appellant's submissions, if accepted, would result in a meaning of "worker" which includes only those individuals directly employed by the Appellant. As the parties acknowledge, and as noted by the Delegate, this would lead to the *Code* treating those employed and working at a mine differently depending on whether the worker was employed by the mine directly or by a contractor. The Respondent accurately explains the implication of this would be the establishment of two classes of workers: those who have the protection provided by the educational components of part 1.11.1 of the *Code* because they are directly employed by a mine, and those who do not because they are employed by someone else while working at the mine.

[83] I agree with the Appellant's general proposition that words defined in a statute have the same meaning in a regulation made under that statute unless a contrary intention is provided, which is supported by section 13 of the *Interpretation Act,* RSBC 1996, c. 238 ("*Interpretation Act*"). I do not, however, accept the Appellant's submissions on the meaning of "worker" and "employee." The *Act* defines "worker" to be an "employee" but not a supervisor. The *Act* does not define "employee." I find the deliberate exclusion of a

definition in the *Act* for "employee" enables the *Code* to establish a definition of "employee" which applies to the *Code* without conflicting with any of the defined terms of the *Act*.

[84] The definition of "employee" found in the *Code* ("any person employed at a mine") does not differentiate individuals based on whether the person is employed by the mine owner or by a contractor. This results in a definition of "employee" which includes all personnel employed **at a mine, not simply those employed by a single, defined, employer**.

[85] The Appellant specifically argues that because the *Code* definition of "employee" relies on the word "employed", the meaning of "employee" is to be limited to those employed by an "employer" as defined in the *Code* (owner, agent, or manager as defined in the *Mines Act*).

[86] The word "employer" appears four times in part 2 of the *Code*: twice within the text of provisions (parts 2.13.1 and 2.13.15) and twice in marginal headings (parts 2.13.6 and 2.13.12). "Employer" is a defined term specific to part 2 and is not used anywhere else in the *Code*, including part 1. Part 2 of the *Code* addresses occupational health and part 2.13.1 begins with stating who the part applies to: employers and employees in respect of controlled products used, stored, or handled at a mine. Although "employer" is defined to include the manager, certain obligations throughout the *Code* and in parts 1 and 2 are assigned to the manager specifically. In the definition of "employer", a manager is clearly one of the types of persons who might be an employer, but not all employers are managers.

[87] I understand the Appellant's position that, in some circumstances, the meaning of one word can assist with determining the meaning of another closely associated word. In this case, the Appellant submits that the meaning provided in the *Code* for "employer" should assist with the meaning of "employee", even though "employee" is also defined by the *Code*. I do not find this argument to be useful because both are defined terms in the statutory scheme. The presence of the defined term "employer" in part 2 of the *Code* does not assist the Appellant with their submissions regarding the scope of the word "employee" or "worker".

[88] As noted above, "employee" is broadly defined in the *Code* to include, without constraint, all persons employed at a mine. This means that "employee" can include supervisors and possibly other categories of personnel. "Worker" is defined as a subset of employees that excludes supervisors. "Worker" and "employee" are used in several parts of the *Code*. I have noted above that "employer" is defined as a mine owner, agent, or manager, but its use is limited to part 2 of the *Code.* As noted above, obligations are imposed in part 2 on the mine manager, consistent with part 1. After considering the context provided by the provisions of the *Code* where the words "employee" and "employer" are used, I find that the definition and limited use of "employer" in the *Code* does not influence the meaning of "employee" as defined by and used in the *Code*. I find

the legislature intended to establish a broad definition for "employee" in the *Code* (any person employed at a mine) and establish a limited application for "employer".

[89] The definition of "employee" (any person employed at a mine), when applied to the provisions of the *Code*, supports the health and safety objectives of the *Code* as demonstrated by the *Code*'s purpose clause of addressing all, not some, aspects of health and safety in the operation of a mine and protecting all employees at a mine, including workers, from undue risks to their health and safety.

[90] The context of the use of the word "employee" in the *Code* provides guidance for how the term should be interpreted in the *Act*, absent a definition in the *Act.* The definition of "worker" in the *Act*, which references "employees", results in a meaning for "worker" that does not depend on who their employer is at the mine.

[91] As previously noted, the definitions for "employee" and "worker" the Appellant proposes would, if accepted, result in the creation of two classes of workers under the *Code.* The Respondent submits that an interpretation that results in two classes of workers would be inconsistent with the legislative objective identified in the first purpose clause of the *Code*—that of protecting "employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines." I agree. The language of the purpose clause, read in conjunction with the *Code* as a whole, emphasizes the importance of protecting employees' health and safety and clearly establishes that all employees should have the protection of the *Code* when working at a mine. The Appellant's proposed definitions for "worker" and "employee" would be prejudicial to those individuals who were not employed directly by a mine, and would be inconsistent with the broad intention of the legislative scheme regarding the application of health and safety requirements to all those employed at a mine, as made clear by the plain language of the *Code*.

[92] The Appellant says that accepting inclusive definitions for "worker" and "employee" conflicts with the language of the *Act* and the purpose of section 25 which establishes the obligations of contractors and mines.

[93] In considering the language of section 25 of the *Act,* provided in full earlier in this decision, while interpretating part 1.11.1(1) of the *Code*, I agree with the Respondent that there are no inconsistencies between the legislative expectations assigned to the mine by section 25 and those assigned by part 1.11.1 of the *Code*. The wording of section 25 makes plain that any contractor is obligated to take all reasonable measures to ensure compliance with "the provisions of this Act, the regulations, the code, the permit and orders under this Act pertaining to the work over which they have control."

[94] Part 1.11.1 of the *Code* pertains to the obligations of the mine in relation to training and education, which is more limited in scope than the obligations found in section 25. I find, however, there is no inconsistency between the requirements of the *Code* regarding training and the requirements of section 25 of the *Act* as they pertain to meeting the health and safety objectives of the legislative scheme. While section 25 of the *Act* imposes

a general requirement on contractors regarding compliance with the *Act,* Regulation and *Code*, as part 1.11.1 of the *Code* imposes a specific obligation on the manager, I must interpret the training obligations under that part as falling only on the manager.

[95] The Appellant argues that it does not fully control the work of the Contractor's employees as intended by the wording of section 25; therefore part 1.11.1(1) of the *Code* should not apply to it. I note, however, that section 25(1) says that if work in a mine is let to a contractor, the contractor and the contractor's manager, as well as the owner, agent and manager of the mine, must take all reasonable measures to ensure compliance with the provisions of the *Act*, Regulations, and *Code*. I understand these words to say that even though the Appellant has hired a contractor for specialist services, the owner, agent and manager of the mine are still required to comply with the *Code*. To be clear, the obligation for the training established under part 1.11.1 of the *Code* cannot be delegated. The obligation to ensure that the Contractor's workers, employed at a mine, were adequately trained remained with the Appellant.

[96] I agree with the Delegate that the management system the Appellant developed in collaboration with the Contractor provides the level of control over the Contractor's employees, including mechanics, necessary to enable the Appellant to discharge its obligations regarding training under part 1.11.1(1) of the *Code* if properly implemented. The management system the Appellant and Contractor adopted leads me to conclude, and I find, that the Appellant both intended to control and did control training of the Contractor's workers, including the Mechanic, under the *Code.* It was not necessary for the mine manager to directly train the Contractor's workers to discharge the Appellant's obligations.

[97] I have found, through applying the modern principle of statutory interpretation, that a "worker" under part 1.11.1(1) of the *Code* need not be employed by a mine (i.e. mine owner or manager); a worker need only be employed at a mine in order for the protections of part 1.11.1(1) to apply to them. This leads me to conclude that the Mechanic is a "worker" as intended by part 1.11.1(1) of the *Code*. The *Interpretation Act* also supports this outcome through the application of section 8 which states that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In this case, interpreting the definition of "worker" in part 1.11.1(1) of the *Code* as anyone employed at a mine, except supervisors, enables the legislative objectives of protecting the health and safety of those who perform nonsupervisory work at mines.

Adequate Training to do The Job

[98] I have considered the meaning of "worker" within part 1.11.1(1) of the *Code,* and now must address the language "adequate training to do the job," which I do by addressing two questions:

- What is "the job"?
- What is "adequate training"?

[99] The Report referred to the job as to "change tires pursuant to 4.9.14(3)." Part 4.9.14(3) of the *Code* provides that "[n]o person shall work on tires and rims unless qualified." The Delegate considered the alleged contravention on this basis.

What is the Job?

[100] "Job" is not a term defined in the *Act* or the *Code*, and neither party makes a direct submission regarding its meaning in this context. Since the legislative scheme does not provide a specific definition for "job", the grammatical and ordinary sense of the term, viewed through the context of the *Code*, should be used and applied to the evidence. The context of the purpose of the legislative scheme, in this case addressing the health and safety of employees at a mine site, should also be applied to this understanding.

[101] After applying the grammatical and ordinary sense to the term, I find that "job" in part 1.11.1(1) refers to the work that the worker is assigned to complete. The evidence provides the basis to determine the job, or work, that was assigned to the Mechanic in this case. The Delegate begins his analysis in the Determination by considering the job description used by the Contractor to hire the Mechanic. The job description lists the maintenance and repair of "a fleet of commercial trucks with rear mixing units consisting of electrical/hydraulic drive motors and augers" as work under 'Essential Job Functions.' The Delegate refers to the job that is part of the repair and maintenance of trucks within the commercial fleet and that forms the basis for the evaluation of part 1.11.1(1) of the *Code* in paragraphs 30 and 31 of the Determination in various ways: changing three-piece rim wheels, changing tires, changing wheels, tire handling and installation, and tire installation work.

[102] After considering the evidence before me of repairing and maintaining a truck with non-functioning wheels due to loss of tire pressure or complete tire failure through deinstalling a non-functioning wheel assembly and installing a functioning wheel assembly, and the Delegate's descriptions of the task in the Determination, I find the "job" in this case is the deinstallation and installation of wheel assemblies with three-piece rims and inflatable tires.

[103] While the parties, the Report, and the Determination all refer to the job in varying ways, I am satisfied that all these descriptions refer to the same work undertaken by the Mechanic. After careful consideration, I find that the job the Mechanic undertook, and that forms the basis for the alleged contravention, is the deinstallation and installation of

wheel assemblies with three-piece rims on the Contractor's trucks. For brevity, I also refer at times to this job as "changing wheels" on the Contractor's trucks.

[104] The contravention alleged under part 1.11.1(1) ties the work for which the Mechanic required training with the *Code* requirement under Part 4: Building, Machinery, and Equipment. Part 4.9 deals with "Mobile Equipment" and part 4.9.14 provides:

> Tires and Rims
>
> **4.9.14**
>
> (1) The manager shall ensure that procedures are in place for the inspection and any work on tires and rims of equipment.
>
> (2) A tire shall not be installed on any damaged, broken, bent or heavily rusted rim assembly and mismatched parts of rims and wheels shall not be used.
>
> (3) No person shall work on tires and rims unless qualified.

[105] The evidence of the Contractor's employees, alongside that of the employee of the tire company which supplied the wheels, is that the Mechanic, who in this case is a worker, performed different work than the employees of the tire company. The tire company picked up wheels deinstalled by the Mechanic and took them to its workshop, located off the mine site. There, the tire company removed tires from rims; inspected both tire parts and rim parts; maintained, repaired, or replaced tire or rim parts as necessary; mounted new or repaired tires to rims; and inflated tires mounted on rims. Based on a reading of part 4.9.14, taking into account the ordinary and grammatical sense of the words, I find this provision would apply to the work of the tire company if this work were performed at the mine site. In order to undertake work on tires and rims as anticipated by part 4.9.14(3), the tires and rims must be accessible for that work. The work of the Mechanic provides for this accessibility, making the deinstallation of the wheel from the vehicle intrinsic to the work referred to in part 4.9.14(3). Similarly, the Mechanic's work of installing a refurbished wheel is essential to the continued working operation of the Contractor's trucks. On this basis I find that part 4.9.14 applies to the Mechanic's work of deinstalling and installing wheels and would therefore require "adequate training" to do this job, which I address below.

What is Adequate Training?

[106] The *Code* does not define "adequate training"; therefore, I must determine the meaning of these words based on a plain language reading of the *Code* provision within its context. Relying again on the principles of modern statutory interpretation, the meaning of words can be determined by applying their ordinary and grammatical meaning within the context of their use. The context for provision 1.11.1 is provided by *Part 1 – Application of Code and in the General Rules* as a whole. Provision 1.1.2 of Part 1 states "Notwithstanding the absence of a specific code requirement, **all work shall be carried out without undue risk to the health and safety of any person**". Provision 1.6.9(1)(c) requires the mine manager to develop a Health and Safety Program to include

safe working procedures on a departmental basis. Without providing an exhaustive list, Part 1 also addresses the manager's responsibilities in connection with accidents or dangerous occurrences, personal protective equipment, and working conditions, in addition to training. In summary, Part 1 establishes the context for the rest of the *Code* to achieve the legislative objective included as the first purpose of the *Code,* "to protect employees…from undue risks to their health and safety arising out of or in connection with activities at mines." I find that part 1.11.1(1) must therefore be considered in the context of protecting employees, including workers, against undue risk. I find the purpose of any training, orientation, or instruction required by part 1.11.1(1) is to avoid undue risks to the health and safety of workers.

[107] Although I have decided that part 1.11.1(1) applies to the Mechanic in undertaking wheel changes on the Contractor's trucks, this is not limited to a specific job function or to a specific worker. It is intended to apply to a wide range of job functions and workers and sets an objective standard for managers to meet in ensuring that workers receive adequate training on how to perform their job without undue risk of harm. It does not provide discretion to the manager to apply the standard in some cases but not in others or to establish exceptions from the required adequate training.

[108] As to the meaning of the specific words, "adequate training" in connection with workers, in the absence of a specific meaning assigned by the *Code*, I adopt their ordinary and common sense meaning in the context of the objective of the *Code*. Since the objective of this part is to avoid undue risks to the health and safety of workers, for the training or education to be adequate I find the training must address the specific mechanical techniques that the worker uses to complete the work. The training and education must also inform the worker of any hazard associated with the work, the degree of risk associated with the hazard, the potential outcomes if the risk materializes, and how to perform the work in such a manner as to mitigate the risk of harm materializing.

[109] Whether the Appellant ensured the workers performing wheel deinstallation and installation were provided adequate training becomes a question to be answered from the evidence. As noted earlier, since the Contractor required the Mechanic to be certified as a condition of employment, the Appellant submits that if part 1.11.1(1) of the *Code* applies (which the Appellant disputes), there was no contravention of part 1.11.1(1) because training the Mechanic in wheel changes was unnecessary. I disagree. As noted above, part 1.11.1(1) establishes an objective standard for all workers. The plain language of the provision does not enable the manager to exempt certain workers from training or make other exceptions such as assuming that a job falls within the scope of the worker's professional certification.

[110] The evidence shows that the Mechanic received certification in British Columbia in 2010 as a journeyman heavy-duty mechanic. The Mechanic's resume also shows that, from 2011 to 2017—before the Contractor employed him—the Mechanic worked as a heavy-duty mechanic. There is no question that the Mechanic is a trained, experienced heavy-duty mechanic.

[111] Based on my finding above, however, the language of the *Code* requires that the Appellant ensure that workers understand not only the technical aspects of the job but also the nature of any hazards and risks associated with the particular work undertaken at the mine. This is to allow the worker to undertake that work in a way which avoids, as far as possible, hazards and risks materializing from the work. This is adequate training. It goes beyond ensuring that a worker possesses the mechanical techniques and capability necessary to complete their work. Based on the evidence presented in this appeal, the Mechanic demonstrated he had this capability.

[112] The Mechanic, when interviewed by the Delegate several months after his injury, informed the Delegate that he had not received warnings about the hazards associated with the types of wheels used on the Contractor's trucks and had not received training about how to change wheels to avoid those hazards. The Report also includes statements of other Contractor employees: a site supervisor, a truck operator, and another mechanic. The other mechanic employed by the Contractor indicated he had received some advice from another (third) mechanic regarding the potential hazards of multi-piece rim wheels which enabled him to report, when providing a statement, some knowledge of the care required in managing wheels with split rims. He explained that he briefly inspected wheels supplied by the tire company as they arrived and before storing them for future use. In doing so, he checked the rims for fractures or spider cracks around boltholes. However, all three of these Contractor employees indicated that they were not made aware of the hazards associated with wheel changes and had not received training on how to avoid the hazards associated with handling wheels with multi-piece split rims.

[113] In evaluating if the Mechanic had received training regarding the risks associated with the deinstallation and installation of wheels and how to mitigate those risks, the Delegate first assessed the training provided to the Mechanic. The evidence disclosed that when first hired, the Mechanic received training in many aspects of the Contractor's services, especially relating to health and safety. The Delegate next considered what is generally known in the industrial sector about dangers arising from the handling of wheels with multi-piece rims through information provided in the Report. In particular, the Delegate referred to WorkSafe BC's 2006 publication (first published in 1997), "Safe Work Practices for Large Vehicle Tire Servicing" which advises that: "[i]mproper handling and assembly of the tire or rim/wheel can cause the components to explode. The result may be costly damage, serious injury or death." The Delegate also referred to another publication from the Report, "Split Rim Safety Procedures", produced by the BC Forest Service, to explain the hazards associated with handling wheels with split rim assemblies and how to avoid them. After reviewing these references, the Delegate observed that the hazards and risks of wheel changing, and mitigations necessary to minimize the hazards such as identified in these publications, were not included in the Workplan. The Delegate also concluded that the management system the Appellant developed in collaboration with the Contractor enabled both to meet their statutory obligations regarding health and safety if fully implemented. The Delegate concluded that, because the hazards associated

with handling wheels with split rim assemblies were not identified in the Workplan, the Workplan did not identify training necessary to mitigate or prevent the hazards from materializing. I agree with the Delegate's assessment.

[114] The Workplan goes so far as to identify "working around bulk trucks" and "stored energy" as hazardous. I agree with the Delegate and find it does not, however, identify the function of deinstallation and installation of wheels with multi-piece rims and tires as a type of work that is risky and that requires mitigation and adequate training of workers to mitigate risks associated with that work.

[115] In addition, despite the training on many aspects of risks associated with the services provided by the Contractor, I find that the Appellant did not provide adequate training to the Mechanic undertaking wheel changes on the Contractor's trucks. I make this finding based on the evidence of the Mechanic that he had not been trained on the hazards and risks associated with wheel changing on the Contractor's trucks and the mechanical techniques to avoid the hazards.

Summary and Conclusion

[116] I have found above that the Mechanic is a "worker" as defined by part 1.11.1(1) of the *Code* and the Appellant was accordingly, through the mine manager, obligated to provide the Mechanic adequate training to safely deinstall and install wheels on the Contractor's trucks. I find further, after reviewing the evidence and applying the findings made in connection with that evidence, that it is more likely than not that the Appellant, through the mine manager, failed to ensure the Mechanic received adequate training to safely deinstall and install wheels on the Contractor's trucks. Consequently, I find that the Appellant contravened part 1.11.1(1) of the *Code*.

[117] This appeal arises from the Delegate's determination that part 1.11.1(1) of the *Code* obligated the mine manager to adequately train workers to do their job. The Delegate did not consider or base the Determination on the wording of part 1.11.1(1) that states "or are working under the guidance of someone who has competency both in the job and in giving instruction." The Appellant does not make submissions on the application of this wording in part 1.11.1(1) to the matter before me. The Respondent does not address or make any submission regarding this wording. Given the lack of submissions on this point and the evidence as presented to me that the site supervisor and two other employees at the worksite came into the workshop from an adjacent lunch room when they heard an explosion, I conclude that no other person, including the site supervisor, was present when the Mechanic was injured. I find it unnecessary to consider the remaining language of part 1.11.1(1) ("or are working under the guidance of someone who has competency both in the job and in giving instruction") in making this decision.

[118] These findings enable me to answer both questions posed above for this issue in the affirmative. Yes—part 1.11.1(1) of the *Code* applies to the Appellant and, yes—the Appellant contravened it. I now turn to the Appellant's submission that the Delegate came

to inconsistent decisions arising from the same incident when determining that the Appellant had contravened the *Code*, but the Contractor had not.

Was the Delegate unfair when deciding that the Appellant contravened part 1.11.1(1) of the *Code*, but the Contractor did not?

The Parties' Submissions

[119] The Appellant maintains that fairness requires consistency of decision-making and submits that this panel should assess if the Determination was consistent with the Delegate's decision that the Contractor did not contravene part 1.11.1(1) of the *Code*.

[120] The Respondent submits that the Delegate's determination regarding the Contractor is not relevant to the Determination. In the alternative, the Respondent argues that there is no inconsistency between these decisions because the same statutory interpretation does not apply to both decisions. Further, the Board is not bound by the Delegate's contravention decision about the Contractor in this case, as every case is decided based on its facts and the applicable law.

Panel's Findings

[121] I have considered the Appellant's submission that I should uphold the principle of consistency in decision-making and outcomes by finding that the Appellant did not contravene the *Code* because the Delegate did not find that the Contractor contravened part 1.11.1(1) of the *Code*. I agree with the Appellant that a consistent approach is important to sound and fair decision-making. I also agree with the Respondent that the Board's obligation is to consider the circumstances of each case independently and apply the law to those circumstances. Both principles apply here.

[122] The Respondent submits there is no inconsistency between the two decisions because the statutory interpretation of the *Code* does not apply to both scenarios in the same way. I agree with this submission. While a determination of whether the Contractor contravened part 1.11.1(1) of the *Code* is beyond the scope of this appeal, the Delegate's decisions regarding the Appellant and the Contractor arise from a common event. I find that the application of the *Code* to the circumstances relevant to the Appellant and the Contractor separately will establish if there should be different outcomes. I rely on the findings I make above that the obligations of part 1.11.1 (1) of the *Code* apply to the Appellant through the mine manager. They cannot apply to the Contractor, who is not a mine manager. This leads me to find that a consistent application of part 1.11.1(1) to the evidence can result in a finding of contravention in the case of the Appellant but not in the case of the Contractor, since the Contractor has no obligation under that part of the *Code* in connection with training. The law underpinning each Determination may be the same but, based on the facts relevant to each situation as applied to the law, the outcomes can be different.

[123] The Determination the Delegate made regarding the Contractor, which the parties provided during the closing submissions, is a separate matter and not part of this appeal, although I have had an opportunity to review it. The Delegate evaluated the law underpinning the question of contravention in both cases and, based on the application of the specific circumstances of each case to the meaning attributed to part 1.11.1(1) of the *Code*, decided the law did not result in a determination of contravention in both scenarios.

Does part 1.11.1(2) of the *Code* apply to the Appellant and, if so, did the Appellant contravene it?

[124] Part 1.11.1(2) of the *Code* provides:

> The manager shall …
>
> (2) ensure that all employees receive thorough orientation and basic instruction in safe work practices.

The Determination

[125] The Delegate provides brief reasons regarding the alleged contravention of this part of the *Code*. They are, in full:

> After considering the evidence before me in relation to Count 2[10], I am unable to make a finding of contravention.

The Parties' Submissions

[126] The Respondent submits the Delegate made an error when deciding the Appellant did not contravene part 1.11.1(2) of the *Code* due to the Appellant's failure to ensure that the Contractor's employees received basic instruction in safe work practices concerning tires and rims, including the handling of split-rim wheel assemblies.[11] The Respondent

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[10] Count 2: On 2019-01-28, at the Greenhills Operations mine site near Elkford, British Columbia, Teck did breach Section 37(2) of the *Mines Act* [RSBC 1996] Chapter 293 by failing to comply with Part 1.11.1(2) of the *Code* to wit: by failing to ensure that employees receive thorough orientation and basic instruction in safe work practices pursuant to those required in Part 4.9.14(1).

[11] The Report describes the alleged contravention for part 1.11.1(2) of the *Code* as "failing to ensure that employees receive thorough orientation and basic instruction in safe work practices pursuant to those required in part 4.9.14(1)."

> Part 4.9.14(1) The manager shall ensure that procedures are in place for the inspection and any work on tires and rims of equipment.

relies on the evidence of the Mechanic, the Mechanic's supervisor, and two other workers (a mechanic and a truck operator) who all stated that they received no instruction regarding safety practices when changing wheels on the Contractor's trucks.

[127] In essence, the Appellant's submission is that since this appeal is based on the Delegate's Determination of contravention under part 1.11.1(1) of the *Code*, the Appellant did not make submissions regarding the Delegate's decision regarding part 1.11.1(2). In reply, the Appellant says that the Respondent did not provide advance notice of making a submission regarding the Appellant's alleged contravention of part 1.11.1(2) of the *Code*.

[128] For these reasons, the Appellant did not make submissions on the Delegate's Determination regarding part 1.11.1(2) and it would be procedurally unfair for me to make a ruling regarding that decision without full submissions.

Panel's Findings

[129] I found earlier in this decision that the Board lacks the authority to reverse a decision or to rescind one decision and substitute another in its place under the *Act*. The findings I make above regarding the meaning of "employee" and "worker" to conclude that part 1.11.1(1) of the *Code* applies to the Appellant are pertinent to part 1.11.1(2) of the *Code* as well. The Appellant, through the mine manager, is responsible for workers at the mine and was responsible to the Mechanic for adequate training in wheel deinstallation and installation. Part 1.11.1(2) applies to training for supervisory personnel as well as workers. Based on this conclusion, part 1.11.1(2) could apply to the Mechanic, the site supervisor, and the other two workers (mechanic and truck operator) who provided evidence for the OTBH and whose statements are included in the evidence for this appeal.

[130] As indicated by the Appellant, however, the basis of this appeal is the Delegate's decision regarding part 1.11.1(1) of the *Code*. Hearing this appeal did not require submissions to be made on the statutory interpretation of part 1.11.1(2) of the *Code*. The Appellant was not expecting to make submissions regarding the Delegate's decision regarding part 1.11.1(2) and, reasonably, made no submissions on this point. Consequently, the Appellant did not prepare its case on the matter, including presenting evidence, expert or otherwise, and explaining how that evidence might apply to the application of part 1.11.1(2) of the *Code.* I agree with the Appellant that procedural fairness requires that the parties be given full opportunity to make their case.

[131] Further, neither party provided submissions regarding the meaning of "thorough orientation" or "basic instruction in safe work practices," to assist with discerning the legislative intention for the part. Under these circumstances, I find it would be unfair for me to make any findings about the Delegate's decision for part 1.11.1(2). For these reasons, I do not address the Delegate's decision regarding part 1.11.1(2) of the *Code*.

Does the defence of due diligence apply to a finding of contravention of part 1.11.1 of the *Code*?

The Determination

[132] The Appellant's submission in the OTBH describes the working relationship between the Appellant and the Contractor:

> The Appellant collaborated with the Contractor to create safe work policies and training regimes, required the Contractor by contract to follow through on its promises, and imposed vetting programmes to be confident the Contractor was following through on the promises it made.
>
> In those circumstances, the Appellant took all steps reasonably possible to develop and ensure policies and procedures were followed to protect the health and safety of the Contractor's workers. To put it in legal terms, **there was due diligence on the part of the Appellant, in the circumstances**. [Emphasis added]

[133] After noting the Appellant's submission, the Delegate indicated he would consider the information "in relation to the amount of any administrative monetary penalty imposed." The Delegate commented on the absence of a training requirement for wheel changes and the assignment of "all preventative maintenance and breakdown repairs to the … truck fleet" to the Contractor's mechanics in the Workplan. He stated:

> There is no evidence that a risk assessment was undertaken on maintenance tasks such as the installation of tires. A risk assessment may have led to a recognition of hazards and appropriate training to mitigate the risks. … the Appellant's failure to contemplate these risks and ensure they were controlled, given the obligations in Part 1.11.1(1) means that the Appellant cannot be said to have taken all reasonable measures.

The Parties' Submissions

[134] The Appellant submits the Delegate was unreasonable in concluding that the Appellant was not duly diligent in its attempts to avoid the contravention. If the Appellant is found to have an obligation to the Contractor's workers, the Appellant contends it took "all steps reasonably possible to develop and ensure policies and procedures were followed to protect the health and safety" of the Contractor's workers. The Appellant says that the legislature has not removed the defence of due diligence regarding the *Code* and therefore this defence exists for any alleged contravention of the *Code.*

[135] The Appellant asserts that the statutory characterization of the penalty as an administrative penalty is not relevant to the classification of a punitive provision. There is a presumption against absolute liability and, therefore, legislative direction is required to establish absolute liability offences. The Appellant argues that because this direction is

absent from the legislative scheme, part 1.11.1 of the *Code* should be interpreted as creating a strict liability offence with due diligence available as a defence. Having provided this groundwork to characterize the contravention as strict liability, the Appellant submits it was diligent as shown by its actions, which were summarized and submitted in the OTBH. The Appellant contends it took all reasonable steps to ensure the health and safety of the Contractor's employees, providing a full defence to the determination that it contravened the *Code*.

[136] The Respondent submits that the Appellant fundamentally misapprehends the administrative contravention process in seeking a due diligence exception to the liability that flows to the Appellant from a determination that it contravened the *Code*. A finding that the defence of due diligence applies contradicts an ordinary construction of the legislative scheme by treating administrative penalties as "punishments that flow from the commission of an offence." The legislative scheme, including the *Act* and Regulation, does not provide for the defence of due diligence in relation to *Code* contraventions pertaining to worker safety.

[137] The Respondent refers to the Delegate's conclusion in the Determination and submits that if the defence was established by the legislative scheme, "the Appellant cannot be said to have taken all reasonable measures" because the Appellant had not undertaken a risk assessment of the work of wheel deinstallation and installation. It follows from the Delegate's decision that if the defence of due diligence applied to a contravention of the *Code*, it was not available to the Appellant on the facts of this case.

Panel's Findings

[138] The parties refer me to authorities[12] dealing with the nature of regulatory offences and the analysis to be applied to determine if offences should result in absolute or strict liability. The Court in *Sault Ste. Marie* considered:

- the legislative intention of establishing if an infraction should be decided based solely on evidence of the act of wrongdoing;
- the purpose of the legislation;
- the overall pattern of the administrative scheme;
- the specific wording of the administrative enforcement scheme; and
- the impact of the penalty.

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[12] *R. v. Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299 ("*Sault Ste. Marie*"); *Canada (Attorney General) v. Consolidated Canadian Contractors Inc*. (C.A.), 1998 CanLII 9092 (FCA), [1999] 1 FC 209 ("*Consolidated Contractors*"); *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2002 BCCA 426 (CanLII) ("*Whistler*"); and, *R. v. Kanda*, 2008 ONCA 22 (CanLII) ("*Kanda*").

[139] Although the analytical framework arose from the judicial consideration of a regulatory offence, the approach has been applied to a law authorizing the calculation and issuance of an administrative penalty for failing to remit a tax payment on time (*Consolidated Contractors,* paragraph 24). The "analytical framework for identifying absolute liability offences is largely a reflection of what has become the modern approach to statutory interpretation. That approach involves a contextual and purposive analysis of legislation…" (*Consolidated Contractors*, paragraph 36). Another relevant factor established by the courts is the "importance" of the legislation, that is, the degree to which the legislative scheme protects public and social interests as compared with individual interests alone. This also includes an analysis of the range of penalties that can be imposed after an administrative process and the impact of the consequence of the penalty on the individual subject of the penalty (*Whistler*, paragraph 34).

Application of the Sault Ste. Marie Analytical Framework

1. Legislative Purpose and Intention

[140] The *Act* and the Regulation do not say if the defence of due diligence is available to an alleged contravener of the *Code*, either directly or through characterization of the administrative enforcement scheme as one of strict or of absolute liability. Consequently, I must consider the legislative scheme through the lens of the above case law. I adopt the analytic framework established by *Sault Ste. Marie* and apply it and the approach to statutory interpretation applied to identify absolute liability in *Consolidated Contractors* in the following analysis. This interpretive approach is consistent with the modern principle of statutory interpretation established by *Rizzo* and *Vavilov* which I adopted and applied earlier in this decision.

[141] The legislature added Sections 36.1 to 36.7, inclusive, to the *Act* in 2016 to provide for administrative penalties applicable to contraventions under the *Act*. These provisions came into force in 2017 to coincide with the enactment of both the Regulation and the regulation adopting the 2017 revised *Code*.

[142] Section 36.2(1) of the *Act* provides:

> If the chief inspector finds that a person has contravened or failed to comply with a provision … the chief inspector may, after considering the prescribed matters, impose an administrative penalty on the person in an amount that does not exceed the prescribed limit.

The prescribed matters for consideration are provided by section 2 of the Regulation.

[143] The Minister of Energy and Mines indicated the following, through the February 2017 message which accompanied the published 2017 version of the *Code*:

> The updated Code includes revisions that … strengthen health and safety requirements in the Code. The Code is used as the primary vehicle for regulation of the Province's mining industry. It includes regulatory standards that address all stages of a mine's life; from exploration

> through to mine development, and includes mine closure and reclamation.
>
> I would like to thank the Code Review Committees for the work they have completed on tailings management and worker safety. Their contribution has provided a high standard for the safety of workers and the public, as well as for the protection and reclamation of the environment.

[144] In support of the Respondent's submission that the *Code* should be interpreted to give effect to its purpose clauses, the Respondent has referred to the ministerial message accompanying the 2017 *Code* to emphasize government's ongoing commitment to strengthened health and safety requirements and worker safety. While the message does not form part of the text of legislative scheme, it introduces some context for purpose (1)[13] of the *Code,* which I referred to earlier when finding that part 1.11.1(1) of the *Code* obligates the mine manager on behalf of the mine owner to ensure that the Contractor's workers, employed at a mine, are adequately trained. The analysis I provide in support of that interpretation relieves any ambiguity as to how part 1.11.1(1) of the Code achieves the objective for workers requiring training by the mine owner.

[145] The effectiveness of a rule-based system such as the *Code* in achieving its objectives is, in part, determined by the effectiveness of the supporting enforcement regime. I find that an effective administrative enforcement regime supports the objectives adopted in response to broad public interests, those demonstrated by the composition of the committee. It expands the enforcement provisions under the *Act*.

[146] Based on these findings, I find that the addition of sections 36.1 to 36.7 to the *Act*—which must be construed as remedial in nature—alongside the subsequent enactment of the Regulation and the Minister's comments when releasing the 2017 version of the *Code* demonstrate a legislative intention to change the approach to enforcement of health and safety rules by providing an additional mechanism. The change enables the Province to pursue a range of infractions through an administrative enforcement regime.

[147] I agree with the Respondent that the ability to pursue infractions under the *Offence Act,* RSBC 1996, c. 338 (the "*Offence Act*"), persists under the *Act* through the continuing application of section 37 of the *Act*, resulting in two potential avenues for enforcement. The *Act,* in sections 36.2 (3) and (4), addresses the scenario where enforcement of an infraction is pursued through both enforcement regimes.

[148] While not directly related to my analysis regarding the application of due diligence to the alleged contravention in this case, I agree with the Respondent that unfulfilled obligations of the Appellant or Contractor may have been pursued as a violation of section 25 of the *Act*. An alleged contravention of section 25 is not prescribed by section 4 of the

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[13] "protect employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines"

Regulation as a provision that can be pursued as an administrative contravention. I also agree with the Respondent that the Ministry is not required to pursue an offence under section 25 regarding the Appellant's or Contractor's obligations and I accept the submission of the Respondent that it did not.

[149] In addressing the due diligence submission the Appellant made, the Delegate commented that he did not believe the Appellant took all reasonable measures as contemplated in section 25 and as applicable to the work in question. I do not find this comment demonstrates that the Delegate confused his task of determining if there was a contravention of the training provisions of the *Code* and establishing an administrative penalty with another type of proceeding under the *Offence Act*. Rather, the Delegate is clear in stating that any efforts the Appellant had made to address training requirements would be considered when establishing the administrative penalty as required by section 2 (g) of the Regulation. The Delegate considered the Appellant's efforts in that context, which I discuss later in these reasons. It is, therefore, not necessary for me to decide if due diligence provides a defence to a section 25 violation in an offence proceeding.

2. Administrative Enforcement Scheme and Precision of Language

[150] In support of the adoption of an administrative enforcement regime, which I noted above is one part of the overall enforcement scheme under the *Act*, the Ministry assigned officials to be responsible for investigating alleged contraventions of the *Code* under the *Act* (sections 3 to 8, inclusive). Ministry staff compile the results of investigations and report them with recommendations to other Ministry officials who are appointed as decision makers. The decision-making officials review the report and decide whether a determination regarding an alleged contravention of the *Code* is required. After providing an OTBH to a person who is alleged to have made a contravention, the decision maker reviews the evidence and determines, on a balance of probabilities, whether the *Code* has been contravened.

[151] If the decision maker finds there has been a contravention, section 36.2 (1) of the *Act* provides:

> …the chief inspector may, **after considering** the prescribed matters, impose an administrative penalty on the person in an amount that does not exceed the prescribed limit. [Emphasis added]

[152] Section 36.1 of the *Act* establishes that contraventions of prescribed *Code* provisions can be pursued as an administrative penalty, and section 7(1) of the Regulation prescribes contraventions of part 1.11.1 of the *Code* for pursuit of an administrative penalty of up to $500,000, the maximum amount established by the Regulation. Based on the evidence before him, the Delegate determined it was more likely than not that the Appellant contravened part 1.11.1(1) of the *Code* and imposed an administrative penalty that the Appellant should pay. Based on findings made earlier in this decision, I agreed with the Delegate's decision that the Appellant contravened part 1.11.1(1) of the *Code*.

[153] The Regulation, to be read in the context of section 36.2(1) of the *Act* as noted above, establishes the factors the Delegate must consider after determining a contravention:

> Assessment of administrative penalty
>
> 2 Before the chief inspector imposes an administrative penalty on a person, the chief inspector must consider the following matters, if applicable:
>
> (a) the gravity and magnitude of the contravention or failure;
>
> (b) the real or potential adverse effect of the contravention or failure;
>
> (c) previous contraventions or failures by, administrative penalties imposed on, or orders issued to the following:
>
> (i) the person who is the subject of the determination;
>
> (ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;
>
> (iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
>
> (d) whether the contravention or failure was repeated or continuous;
>
> (e) whether the contravention or failure was deliberate;
>
> (f) any economic benefit derived by the person from the contravention or failure;
>
> (g) the person's efforts to prevent the contravention or failure;
>
> (h) the person's efforts to correct the contravention or failure;
>
> (i) the person's efforts to prevent reoccurrence of the contravention or failure;
>
> (j) any other factors that, in the opinion of the chief inspector, are relevant.
>
> [Emphasis added]

[154] The Delegate considered these factors in the portion of the Determination called "Penalty Calculation." I consider the Delegate's application of all the factors to the facts of this case later in this decision, however, section 2(e) and (g) of the Regulation warrant further comment here in the context of the *Sault Ste. Marie* analysis.

[155] The wording of paragraphs (e) and (g) invokes comparisons with the language used in considering penal offences in *Sault Ste. Marie*. When considering true criminal offences, a decision regarding the mental element of intention or willfulness in the offender may be necessary. When considering public welfare offences, where the accused has taken all

reasonable care to avoid an infraction or where the accused has been duly diligent, a full defence to an alleged infraction may be available (*Sault Ste. Marie*). The use of words in the Regulation directing the decision maker to consider if a contravention was "deliberate" (paragraph (e)) or "efforts to prevent" (paragraph (g)) a contravention is similar to language used when explaining the presence of intention, often referred to as *mens rea*, or in connection with a due diligence defence. However, the Regulation does not direct the consideration of these factors listed in paragraphs (e) and (g) for the decision maker to determine if there is a *mens rea* requirement or if the offence is one of strict liability, it directs consideration of the matters for a single purpose: to establish the quantum of penalty. The quantum of the penalty is established only after the decision maker has first concluded there has been a contravention of the prescribed provision of the *Act*, regulations, or *Code*. The language is precise in authorizing and directing which steps the Chief must take before issuing an administrative penalty.

[156] The Appellant submits that section 6 of the Administrative (*Environmental Management Act*) Penalties Regulation[14] (the "APR") explicitly creates absolute liability and, because there is no similar provision under the *Act* and Regulation, the defence of due diligence is applicable here. I agree that section 36.2(1) of the *Act* and section 2 of the Regulation do not refer specifically to the words "absolute liability." However, the absence of the specific wording creating absolute liability does not mean that the contrary interpretation is true. Simply because the *Act* does not specifically state an absolute liability regime is created by the administrative enforcement regime, it does not necessarily follow that a strict liability regime is created. An analysis under the framework set out in *Sault Ste. Marie* must be undertaken.

[157] The Respondent contends that if the Legislature intended a defence of due diligence to apply to a finding of contravention under the *Code*, the language of the *Act* and Regulation would have been precise in doing so. For example, under the *Forest and Range Practices Act,* SBC 2002, c. 69 (the "*FRPA*"), where the administrative enforcement regime (Division 3, sections 71 to 77, inclusive) is similar to the one established by the *Act*, there is specific reference to a due diligence defence. Section 72 of the *FRPA* provides that, for the purposes of a determination of the minister under section 71 or 74, no person may be found to have "…contravened a provision of the Acts **if the person establishes that (a) the … person exercised due diligence to prevent the contravention**, [emphasis added]…". Also, the *Wildfire Act*, SBC 2004, c. 31, sections 25 to 33, which establish an administrative process to recover the costs of fire control and fire related losses, specifically provide a defence to a contravention under section 29: "For the purposes of an order of the minister under section 26, a person may not be determined to have

[14] A requirement that a person pay an administrative penalty applies even if the person exercised due diligence to prevent the contravention or failure in relation to which the administrative penalty is imposed. Section 6, B.C. Reg. 133/2014, made under the *Environmental Management Act,* SBC 2003, c. 53.

contravened a provision of this Act or the regulations **if the person establishes that (a) the person exercised due diligence to prevent the contravention**, [emphasis added] …"

[158] I agree with the Respondent on this point. Similar administrative penalty schemes in British Columbia make express allowance for due diligence defences, but this one does not. By contrast, I find the plain language of section 36.2(1), read together with section 2 of the Regulation, is precise and directs the decision maker to apply the factors in section 2 of the Regulation in setting the quantum of an administrative penalty only after finding that a contravention occurred—not to determine the nature of the wrongdoing which could lead to the existence of a defence of due diligence. This supports the conclusion that the exercise of due diligence may, in this context, serve to reduce a penalty but not to preclude its imposition.

[159] If the Legislature intended a decision maker to consider the same factors in deciding if a contravention occurred as when setting the quantum of penalty, it appears to me the legislative scheme would have been express in enabling the decision maker to do so. In the absence of words directing the decision maker to consider "efforts taken to prevent" a contravention to decide if there had been a contravention, the decision maker would have to imply that meaning from the legislative scheme read as a whole. Given the highly prescriptive direction to the decision maker in the existing language, I find this was not the intent of the legislature.

[160] I do not need to consider if persons can be found strictly liable for infractions under the *Act* that are not pursued through the administrative penalty regime because that analysis is not relevant to this appeal.

3. Importance of the Penalty

[161] In characterizing the nature of the wrongdoing, as noted above, courts (in *Consolidated Contractors* and *Whistler*) consider the objective of the legislative scheme, the precision of language of the scheme, the overall pattern of enforcement in an enactment, including the range of penalties it provides, and finally, the importance or impact of the penalty the decision maker may impose. From this list, I now address the range of penalties available to the decision maker to choose from and the importance of the chosen penalties.

[162] In *Whistler*, the decision maker had the legislated authority to choose from a range of outcomes, including issuing a fine against a liquor licensee or suspending or cancelling the licence. In other words, the legislation provided the decision maker some discretion in selecting a penalty when determining there was a violation. The decision maker cancelled the licence to operate, which created personal hardship due to the inability to derive income from the licensed establishment. The court on appeal, in considering this enforcement scheme, considered the range of discretionary outcomes available to the decision maker and concluded that the wrongdoing was a strict liability infraction and that the alleged wrongdoer could rely on the defence of due diligence.

[163] In contrast, in this appeal, the *Act* does not provide the Delegate with any discretion to select a penalty. The Delegate, in pursuing the administrative penalty regime, can only issue a monetary penalty in response to a contravention of the *Code*. While monetary penalties can and do have a deterrent effect, their purpose is not to eliminate or curtail the business of a licensee being penalized. The payment of a monetary penalty would ordinarily be of lesser impact than curtailing or eliminating a business operation. In the *Whistler* scenario, the penalty chosen imposed personal hardship on individuals by eliminating the source of their income: the operation of an establishment licensed to sell liquor. I find the penalty in this case is of a lesser impact than the one imposed in *Whistler*. On this basis I do not find *Whistler* to be of assistance to my finding here that the defence of due diligence does not apply to whether or not there is a contravention, but rather to the determination of quantum of penalty.

Summary and Finding

[164] Applying the *Sault Ste. Marie* framework, I concluded above that the purpose of the administrative enforcement provisions established by the *Act* is to support social, economic, and environmental objectives of the legislative scheme, including ensuring the health and safety of people at mines. I found that the precise language of the legislative scheme achieves this objective, in part, through directing decision makers to set an administrative penalty based on the range of factors established by section 2 of the Regulation once the decision maker determines there has been a contravention of the *Code*. In this context, the Delegate has no discretion over the form of the penalty. It is established by legislation to be a monetary penalty. The Delegate is granted limited discretion in establishing the amount of a penalty after applying the essential factors set out in the Regulation. I have noted the lack of language expressly giving rise to a due diligence defence and that sections 2(e) and 2(g) of the Regulation require a decision maker to consider intent and steps taken to avoid a contravention in considering the quantum of penalty, rather than whether there was a contravention in the first place.

[165] The legislation does not expressly provide the Delegate a basis to consider if the Appellant has established a defence of due diligence and apply that outcome to the determination of contravention—it would have to be implied. This is inconsistent with the highly prescribed administrative penalty process under the *Act*. Finally, while the imposition of an administrative monetary penalty can serve as a deterrent to wrongdoing under the *Code*, that effect is different to an outcome which curtails or eliminates the operation of a business and eliminates the operators' livelihoods. These findings support the conclusion that the enforcement scheme is one of absolute liability, with no defence of due diligence available. I, therefore, conclude the administrative enforcement scheme established by the *Act* in relation to contraventions of the *Code* is one of absolute liability. As a result, I find that the defence of due diligence is not available to the Appellant for this contravention.

[166] Even if the defence of due diligence were available to the Appellant for this contravention, I found earlier in this decision that the Mechanic did not receive adequate

training under part 1.11.1(1) of the *Code*. This was due to the lack of identification in the Workplan of the risks and hazards associated with wheel deinstallation and installation and the mitigation strategies available to address those risks and hazards. Without such steps having been taken, I do not conclude that the Appellant was aware of what training was required. When assessing the penalty quantum, the Delegate determined the Appellant had not taken all reasonable steps to avoid a contravention of part 1.11.1(1) of the *Code*. I agree. While I have found that the defence of due diligence is not available to the Appellant under the *Act* in this matter, even if it was available, based on my findings on the contravention of part 1.11.1(1), the Appellant did not act in a duly diligent manner in avoiding a contravention.

Was the Delegate procedurally fair in determining the penalty and did the Delegate establish the quantum of penalty consistent with regulatory requirements and within his statutory discretion?

[167] To answer this question raised by the Appellant's submission that the Delegate did not follow a fair process in establishing the administrative penalty and did not follow regulatory requirements in establishing the penalty, I first consider the Delegate's procedure in conducting the OTBH and then the process he followed in calculating the administrative penalty. I next consider the process before this Board to determine whether this subsequent process cures procedural defects, if any, in the Delegate's procedure.

The Delegate's OTBH Process

[168] The Delegate sent notice to the Appellant in advance of the OTBH. This notice, dated July 8, 2021, included the Report establishing the reason for the hearing and two documents explaining the procedure the Delegate intended to follow in making a determination: "Administrative Monetary Penalties – Opportunity to be Heard" (the "OTBH Document") and the "Administrative Penalty Factsheet" (the "Factsheet") explaining how a penalty would be calculated based on the Regulation if the Delegate determined that the Appellant had contravened the *Act*. The notice also included contact information should the Appellant require further information regarding the hearing and procedure.

[169] As indicated earlier in this decision, the Delegate proceeded with the OTBH on the basis of the Appellant's November 16, 2021, written submission and issued the Determination on January 28, 2022, finding that the Appellant contravened part 1.11.1(1) of the *Code* and established a penalty of $140,000.

[170] The Delegate addressed the penalty calculation in the Determination in the following manner:

> The penalty is assessed in consideration of the matters set out in s.2 of the Administrative Penalties (Mines) Regulation. The assessment establishes a base penalty to reflect the seriousness of the contravention or failure based on the gravity and magnitude of the contravention or failure and the actual or potential adverse effects. Using the base penalty as a starting point, additional mitigating or aggravating factors are then considered and adjustments may be made in the form of decreases or increases.

[171] The Delegate then calculated and reported the penalty using a format reflecting the regulatory considerations (Regulation, section 2, paragraphs (a) to (j))[15] and included in the Ministry's Administrative Monetary Penalties Handbook (the "Handbook"). The Delegate clarified that the Penalty Assessment Form referred to in the Report did not actually accompany the Report, as the Delegate did not receive it and therefore could not provide it to the Appellant.

[172] After recognizing that the Regulation associates the highest range of penalty ($500,000) with a contravention for failure to meet the training requirements of the *Code*, the Delegate assessed the gravity and magnitude of the outcome of the contravention as "major." The Delegate set out the factors he relied on in determining that this contravention was "major," including one of the main objectives of the legislative scheme: "Adequate training is a foundation of worker health and safety the importance of which cannot be overstated. Contravening the training requirements set out in Part 1.11.1(1) of the *Code* increases worker risk to injury related to the work being performed."

[173] After noting the significant injuries the Mechanic suffered due to the incident arising in an absence of training, the Delegate next determined that the adverse effects of the Appellant's failure to comply with the training requirements of the *Code* resulted in "very high" real or potential adverse effects of the contravention. The Delegate commented that "the adverse [effects] of failing to comply with the training requirements in Part 1.11.1(1) of the *Code* can be devastating including serious injury or death. In this case, the incident resulted in extremely significant injuries."

[174] After considering the factors of paragraphs (a) and (b) and establishing a base penalty, with respect to the factors identified in paragraphs (c) through (f), inclusive, the Delegate reported that "after considering the evidence in relation to this matter, no penalty increase will be made." The Delegate responded to the Appellant's submission at the OTBH regarding due diligence in relation to paragraph (g), the Appellant's efforts to

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[15] References to paragraphs (a) through (j) provided in the analysis for this issue regarding the calculation of administrative penalty refer to paragraphs of the Regulation, section 2, provided in full above for the discussion of the previous issue regarding the defence of due diligence.

prevent the contravention, by acknowledging the Appellant's "desire" to operate safely and referred to the steps the Appellant took by entering into an agreement with the Contractor and collaborating on the Workplan to achieve health and safety standards. As discussed earlier, the Delegate noted the deficiency in the identification of the risks associated with wheel changes and, therefore, an absence of adequate training to safely deinstall and install wheels on the Contractor's trucks. This led to the contravention finding. Despite this deficiency, after considering the evidence that the Appellant had adopted a management system to ensure adequate training and demonstrated an intention to operate safely, the Delegate indicated the Appellant's actions provided a basis on which to decrease the penalty.

[175] In assessing the factor found at paragraph (h), the efforts the Appellant took to correct the contravention or failure, the Delegate refers to the evidence of the Contractor's newly adopted training regime and the development of a standard operating procedure with respect to multi-piece rims. Regarding paragraph (i), efforts to prevent reoccurrence, the Delegate reported the evidence did not support a penalty decrease. To complete the assessment, and after considering paragraph (j), the Delegate reported there were no other factors to be considered. The Delegate summarizes that he "acted … within his statutory authority and gave due consideration to the factors prescribed by the *Regulation*" in determining a base penalty of $200,000, and then applied deductions based on the above considerations to arrive at a final penalty of $140,000.

The Parties' Submissions

[176] The Appellant says that the consequences of an administrative penalty process are potentially significant, and this should be reflected in the degree of procedural fairness afforded to the Appellant in this matter. In this context, the Appellant submits the Report introduced uncertainty as to the "pathways" to the Appellant's alleged liability. In reply the Appellant submits the Report did not make a clear recommendation grounded in an identified and enumerated pathway to liability. The Appellant asserts that it required clarity regarding the pathway to liability to understand the case it had to meet in the OTBH.

[177] The Appellant submits that, in establishing the administrative penalty, the Delegate breached the principles of procedural fairness because:

- the Delegate did not provide a form referred to in the Report as a Penalty Assessment Form with the notice of the OTBH. The Report indicated that the form was intended to disclose the "aggravating and mitigating factors" relevant to the Report's recommendation; and
- the Delegate did not grant the Appellant's request to make a second submission about the penalty amount in the event that the Delegate decided to establish a penalty and before making a full Determination.

[178] In addition, the Appellant submits that the Delegate's decision was flawed because the Delegate failed to explain, based on the evidence before him, the justification for both the base penalty and the reductions he chose and applied. The Appellant asserted during closing submissions that the Delegate took a "checklist" approach to establishing the penalty amount and did not apply a methodology underpinned or justified by some evidence on the record as established for determining monetary administrative penalties in *Canada v. Kabul Farms Inc.,* 2016 FCA 143 (CanLII) ("*Kabul*"). The Appellant requests that the Board quash the Determination with respect to penalty amount and remit the matter to the Delegate for redetermination on the basis that the reasons the Delegate provided were inadequate.

[179] The Respondent submits that procedural fairness did not require the Delegate to accede to the Appellant's request for a second submission during the OTBH. Further, the Respondent argues that absent specific statutory authority to conduct an OTBH in a two-step manner, the Delegate could not do so. The Delegate provided the Appellant two Ministry publications, the OTBH document and Factsheet, which disclosed the process the decision maker would follow to make a determination and to establish an administrative penalty. These provided the Appellant with all necessary and relevant information about the process to ensure a fair hearing.

[180] In summary, the Respondent says the Ministry documents referred to above notified the Appellant of the case it would have to meet, advised the Appellant of the potential maximum penalty the Delegate could set, and conveyed the factors the Delegate would consider in establishing a penalty, if any. The Respondent submits that the Appellant should have and could have made submissions regarding the penalty amount at the OTBH based on the information it was provided, but failed to do so.

Panel's Findings

The OTBH Process

[181] I begin this analysis with the Appellant's assertion that the Report created uncertainty for the Appellant as to the pathways for liability. The Appellant does not actually point out what caused the uncertainty around the pathway to liability, although suggested the recommendations are unclear. The Report recommended, in the context that the Appellant had obligations under part 1.11.1 of the *Code*, that the statutory decision maker, in this case the Delegate, review the recommendation and determine whether to impose an administrative monetary penalty after providing the Appellant an OTBH. The second recommendation was to impose an administrative penalty if the Delegate found a contravention occurred.

[182] The Delegate issued a notice of an OTBH to the Appellant dated July 8, 2021. The Appellant responded on November 16, 2021, with its submission to the OTBH, indicating "…we set out Teck Coal's position on the Report, and provide you with additional information that is relevant to the alleged contraventions of s. 36.1 of the *Mines Act* as well

as any proposed penalties arising therefrom." The Appellants' submission then repeats the contraventions in full as provided in the notice and says, "We note the Report makes passing reference to s. 25 of the *Mines Act*, though this section is not…a basis on which a penalty can be imposed." I have noted earlier in these reasons and agree with the Appellant, as did the Delegate, that non-compliance with section 25 cannot be pursued under the administrative penalties regime as it is not prescribed by section 4 of the Regulation. The Delegate pursued the Appellant's alleged contravention of parts 1.11.1(1) and (2) of the *Code* in accordance with the administrative regime of sections 36.1 through 36.3 of the *Act*. The Delegate made a determination about each alleged contravention and imposed an administrative monetary penalty accordingly. I find the Delegate did not raise any uncertainty about the "pathway" of liability he would consider through the OTBH, nor am I convinced that the Appellant was unable to provide its views to the Delegate on any alleged contravention.

[183] I next turn to the Appellant's submission that the Delegate's process was unfair because he refused to allow the Appellant to make a second submission about the quantum of administrative penalty. I begin this analysis by noting that the correspondence of July 8, 2021, which the Delegate sent to the Appellant, and which provided notice of the OTBH, indicated that the Appellant should advise if it intended to respond to the notice within 30 days of receipt of the notice. In response, the Appellant sought clarification on submission timing and the Delegate granted the Appellant the time requested, of about 60 days, to prepare and make its submission. The Appellant again sought further time to coordinate its submission with the timing of another OTBH and the Delegate granted an extension of about 60 days to November 17, 2021.

[184] The notice also included information as to where the Appellant could direct questions. The Appellant had sought clarification and a variation regarding the time frame within which to make a submission through correspondence with the Delegate before making the submission. There is, however, insufficient evidence before me to establish if the Appellant sought any further clarification of the OTBH procedure in advance of the OTBH. The evidence before me on this point is limited to the Appellant's request, included with the submission to the OTBH in mid November 2021, asking to make a further submission regarding the quantum of penalty at another time, should that prove necessary.

[185] The Respondent's submission that the Delegate did not have the discretion to make the procedural change the Appellant requested relies on the description of the procedure for the OTBH as provided by the OTBH document. The OTBH document advises a person making a submission as follows: "In your submission…you should also provide information in relation to the matters the SDM must consider before imposing an AMP… These matters are listed in the Administrative Penalties (Mines) Regulation found on the BC Laws website and are as follows." This is followed with a full listing of the factors set out in section 2 of the Regulation.

[186] It is clear to me that the information provided to the Appellant through the Delegate's notice and enclosures (the Factsheet and OTBH Document) plainly set out for the Appellant that the Delegate expected the Appellant to make submissions regarding penalty quantum as part of the OTBH.

[187] The Report disclosed some of the evidence that the Delegate would consider in making the Determination, including results of the various investigations into the event that led to the Mechanic's injuries and the results of interviews with the Contractor's employees. The Report mistakenly advised that it included a Penalty Assessment Review Form for the Delegate at page 21. The Report did provide the basis for pursuing administrative penalty enforcement of the *Code* and included a recommendation to the Delegate to hold a hearing because it appeared to Ministry inspection staff that the Appellant contravened the worker training requirements of the *Code*. Although the Appellant chose to explain in the hearing why there was no contravention, the Appellant ought to have known that a finding of contravention of the training requirements of the *Code* was a possible outcome of the hearing, as was the establishment of an administrative monetary penalty based on the recommendation in the Report and the Delegate's subsequent follow up with the OTBH.

[188] The OTBH Document provided an explanation of how a decision maker is expected to consider the factors established by the Regulation while considering the evidence. The Factsheet confirms similar information. These documents set out the potential maximum monetary penalty available under the Regulation that the Delegate may impose. While the Appellant submits that it did not receive the Penalty Assessment Form referred to in the Report, as I indicated before, the Delegate noted in the Determination that the Report did not include the form and therefore, the Delegate did not review it before making the Determination.

[189] In evaluating if the Delegate's OTBH process was procedurally fair, I consider the following factors to be relevant:

- the Delegate provided the Appellant the Report which disclosed the evidence produced at the time of the investigation into the incident, which Ministry inspection staff considered in formulating recommendations to the statutory decision maker;
- the Report provided a basis for a recommendation that a decision maker assess evidence and determine if the Appellant contravened the *Code* for failing to train workers and if so, impose an administrative penalty;
- the Delegate invited the Appellant to provide any additional evidence or information which the Appellant wished to rely on through the OTBH process; and
- the Delegate provided the Appellant with the OTBH Document and Factsheet, which outlined the procedure the Delegate planned to follow, and the factors

> listed in the Regulation he was required to consider if establishing an administrative monetary penalty.

[190] Based on the above summary, I find that the Appellant had a sufficient basis to understand the case it was required to make and how to make it, including the need to make submissions relevant to the establishment of a potential administrative monetary penalty, when making its submission to the OTBH. While I appreciate that a determination of penalty was not the Appellant's preferred outcome of the OTBH, I find that the Appellant had sufficient guidance to make effective submissions on the penalty quantum at the time of the OTBH if it desired to do so. In making this finding, I note that the Appellant could have sought further clarification of the OTBH process before making its submission, to avoid any uncertainty as it did with establishing timelines. However, I have not been provided evidence that the Appellant did so, or for that matter, that the Appellant was impeded in any way from doing so. Rather, the Appellant sought, through its November 16, 2021, submission to the OTBH, to have the process staged in two steps.

[191] Although the Delegate did not expressly consider this request or allow it, I find, for the reasons provided above, no procedural deficit arose from the OTBH procedure where the Delegate established the penalty quantum based on the Appellant's single submission. A process that does not proceed in the manner desired by the Appellant does not inherently render that process unfair. A fair process can be one that differs from that sought by the Appellant, so long as it conforms to the principles of administrative fairness and to the requirements of the authorizing legislation.

[192] The *Act* requires that a person be given an opportunity to be heard before a finding of contravention is made. Notably, the *Act* does not prescribe a process to which this opportunity must conform. It is therefore open to a decision maker to set a process, so long as it is a fair one. A party does not have the right to assert that a particular process be followed and must conform with any procedurally fair process set, and communicated, by the decision-maker—including one that gives a reasonable (but not absolute) right to present evidence and make arguments. As set out above, the Appellant was notified of the process for the OTBH, and did not, on the evidence before me, identify any significant barriers to participation in this process. Rather, the OTBH record indicates that the Delegate granted the Appellant's requests for additional time to make submissions. I find that the Appellant had a reasonable opportunity to make its views known to the Delegate, through the OTBH process, prior to the determination that a contravention occurred.

Establishing the Administrative Penalty

[193] The Appellant argues the Delegate failed to justify the base penalty established and should have referred to the contravention as "minor" as opposed to "major." Also, that the Delegate failed to justify the amount of reduction applied to the base penalty when establishing the quantum of the monetary penalty. The Appellant says that due to these inadequacies, the Board cannot assess the Delegate's reasons. The Appellant has referred me to *Kabul* in support of its submission.

[194] I find *Kabul* to be of assistance in the present appeal, though not for the reasons provided by the Appellant. In contrast to this appeal and decision, the decision in *Kabul* results from the court, on judicial review, applying a reasonableness standard. However, *Kabul* outlines that in imposing an administrative penalty, a decision maker must: provide justification for a penalty based on the evidence, identify any mandatory statutory criteria and apply them to the evidence, and explain how the mandatory statutory criteria support the objectives of the legislation. In essence, the decision maker must "exercise … subjective judgment informed by experience and knowledge" and "underpinned or justified by some reasoning or evidence in the record" (paragraph 26). I find the logic and reasoning provided in *Kabul* in establishing a methodology to assess the thoroughness of the reasoning in support of an administrative penalty to be applicable in this case and adopt it to assist in my assessment of the Delegate's Determination.

[195] I previously summarized the steps the Delegate took when reporting the results of assessing the regulatory factors in the part of the Determination entitled "Penalty Calculation." This assessment follows the considerations required by the Regulation. Based on Regulation factors (a) and (b), the Delegate determined that the gravity and magnitude of the contravention was "major". The Regulation places a contravention of the *Code* requirement for worker training in the highest category of penalty, of up to $500,000. As noted earlier in my decision, the Delegate reasoned this was because of the importance the legislative scheme placed on the objective of protecting worker health and safety. The Delegate reported that a contravention of the training requirements increases risk to worker injury and, in this case, resulted in serious worker injury, ultimately concluding that the potential and real adverse effects were very high. The reasons the Delegate provided in support of the classification of the contravention as "major" demonstrate a consideration of the health and safety objectives of the legislative scheme. The Delegate evaluated the evidence before him in this context when setting the base penalty. I find the Delegate fully justified his classification of the contravention as "major."

[196] For the Regulation factors (c) through (f), the Delegate reported that he found no evidence to support increasing the penalty. I find that the Delegate's response demonstrated that he considered the regulatory factors based on evidence before him to justify his decision to make no upward adjustment to the base penalty. However, had I received a submission on any of these factors, there may have been a basis for consideration of an upward adjustment to the base penalty.

[197] The Delegate summarized the evidence the Appellant submitted in support of its due diligence defence and applied it in assessing Regulation factor (g). The Delegate found that the Appellant's actions demonstrated its desire to operate safely, while noting the deficiency of identifying the hazards of the job and ensuring training required for making wheel changes to the Contractor's trucks. I find that the Delegate applied the evidence of the Appellant's due diligence in the manner contemplated by the Regulation, providing the Delegate a rationale to decrease the penalty.

[198] In assessing Regulation factor (h), the Delegate, after referring to the Contractor's newly adopted training regime and the development of a standard operating procedure applicable to multi-piece rims, accepted these actions as evidence indicating that the Appellant undertook efforts to correct the contravention or failure. I find the Delegate's assessment that the Appellant was entitled to the downward penalty adjustment because the Contractor took the corrective actions, not the Appellant, to be correct. Based on my previous analysis, it is clear that the Appellant retains the obligation to comply with the *Code*, specifically through the mine manager's obligation to ensure that workers are adequately trained to do their job. While the training is the responsibility of the manager, the planning and delivery of the training need not be performed by the mine manager. The Appellant's report of its investigation undertaken after the Mechanic's injury recommends the actions of developing and adopting a training regime and developing and adopting a standard operating procedure for wheel changes. The agreement between the Appellant and Contractor assigns the operationalization of these changes to the Contractor, as it is best placed to ensure compliance with all safety laws and regulations. The Contractor's response in undertaking the work to develop and adopt the training regime and the standard operating procedure is consistent with its contractual obligations to the Appellant and with the Appellant's management system.

[199] I do not agree with altering the penalty the Delegate established in connection with paragraph (i): efforts to prevent reoccurrence of adverse effects. The Appellant did not provide submissions either in the OTBH or in this appeal as to whether any of the Appellant's actions since the incident, such as implementation of newly adopted training measures, could be considered preventative. Absent submissions by the Appellant providing a rationale for a downward adjustment for this factor, I have no basis for or reason to adjust the Delegate's assessment of this factor.

[200] To complete the assessment, and in considering paragraph (j), the Delegate determined there were no other factors to be considered. Despite the brevity of the Delegate's comments on this point, I find the reasons indicate that the Delegate turned his mind to this factor. The Appellant has not demonstrated, nor suggested, that the Delegate erred in his assessment of this factor.

[201] Having considered the Delegate's reasoning using the methodology explained in *Kabul*, I find that the Delegate gave due consideration to the requirements of the Regulation and considered the evidence pertinent to those requirements before assessing a penalty amount and then provided his rationale in assessing the penalty. The Appellant asserts the Delegate simply ticked the boxes of a check list in coming to a decision on the penalty. While the Appellant did not elaborate on this assertion, it seems it may have arisen from the format the Delegate used to report on Penalty Calculation within the Determination. The format is a "tabular" design with headings relating to the relevant factors established by the paragraphs of the Regulation. I agree that the headings selected from the tabular format taken together amount to a type of checklist. They certainly would act to remind the decision maker of all the factors to be considered in

coming to a decision on the administrative monetary penalty while providing rationale for the Determination. This appears to me to be of value in preventing omissions when a decision maker considers the Regulation factors.

[202] However, it is also clear to me that the Delegate went beyond merely listing the regulatory factors and "ticking them" by providing a rationale for how he considered each factor in calculating the penalty. I find this approach to be entirely consistent with *Kabul* as outlined above, since the Delegate:

- explained how the Regulation supported the objectives of the *Code* of protecting "employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines;"
- used a decision-making format to ensure he listed and identified required regulatory criteria, including the establishment of a maximum penalty; and
- considered and relied on the evidence to justify any decisions about the mandatory regulatory factors in adjusting the calculation of the potential maximum penalty. The evidence provided in the Report includes the opinions of various experts and specialists which the Delegate considered and, where appropriate, exercised judgment in relying on them.

[203] Consequently, I find the Appellant's assertion that the Delegate simply ticked the boxes of a check list in coming to a decision on the penalty to be without merit. When considered as a whole, the record of the Delegate's decision and rationale clearly indicate he considered all required factors prior to setting the penalty quantum. I find that the Delegate's decision-making process and the reasons he provided to have been procedurally fair.

Calculation of Quantum of Administrative Penalty

[204] Turning to the amount the Delegate established for the penalty, the Delegate applied section 7 of the Regulation, which establishes maximum monetary penalties for categories of contravention of the *Code*. Contravention of part 1.11.1 of the *Code* falls within the category with the highest maximum penalty of $500,000. The inclusion of the Handbook and the Ministry penalty table dated March 11, 2020, as additional documents in this appeal deserves comment. The Delegate assigned $200,000 as the base penalty. The amount is well within the maximum amount prescribed by the Regulation and as noted by the Respondent, it is consistent with the amount shown in the Ministry penalty table. The table suggests a monetary penalty of $200,000 when the gravity of non-compliance is characterized as major. The table suggests this characterization is appropriate when, as in this case, the real or potential adverse effects from the non-compliance are very high.

[205] Even though the Delegate characterized the contravention as major and of very high real or adverse effects, he then adopted the amount suggested in the Ministry penalty table of $200,000 as the base penalty. It is the Regulation, not the Ministry penalty

table, which determines the range of penalties associated with a contravention. The maximum amount of the penalty in this instance was $300,000 higher than the base recommended by the Ministry penalty table. In this case, where the actual adverse effects were so significant, it is difficult to fully understand the rationale for setting the base penalty amount below the midpoint of the penalty range established in the Regulation. As I indicated before, had I received submissions on this point, there may have been a basis to increase the base penalty amount.

[206] If the table influenced the Delegate at all, it appears to have influenced the Delegate to begin the calculation of penalty with an amount substantially lower than the maximum penalty the Regulation establishes, resulting in a determination of penalty well below the maximum for the category of contravention prescribed by the Regulation. I find that the Delegate's use of the Ministry penalty table which was not made available to the Appellant for the OTBH, did not prejudice the Appellant. It served to set a comparatively low base penalty quantum.

[207] The Delegate assigns a total reduction amount of $60,000 from the base penalty based on factors (g) and (h) but does not specify the amount that is attributable to each of the two factors. After applying the prescribed adjustment factors to the base penalty, the Delegate established a penalty of $140,000. Despite the Appellant's assertion that the Delegate did not specify how each contributed to the downward adjustment, I find he justified the basis for the decrease in his reasons for decision. The Delegate exercised his judgment in determining the amount to decrease the penalty as is expected of him and I find insufficient basis to vary the amount.

[208] In summary, I find the Delegate considered the maximum penalty relevant to the *Code* contravention at issue as guided by the Ministry penalty table, and then applied the factors for which adjustments could be made to establish the administrative penalty of $140,000. While *Kabul* establishes that decision makers should not arbitrarily "pluck figures from the air" (paragraph 47), I find that the reasons the Delegate provided in the Determination demonstrate that the Delegate considered the requirements of section 2 of the Regulation. I find that the Delegate did not arbitrarily "pluck figures from the air" but instead followed a rational process which considered both legislated requirements and Ministry policy in considering the specifics of the alleged contravention before him.

The Appeal before this Board

The Parties' Submissions

[209] The Appellant argues that any process of this Board cannot cure a procedural defect in the OTBH. The Appellant submits that the failure of the Delegate to provide a two-step OTBH, as previously described, amounted to a procedural defect. The Appellant argues that as a result, I should remit the matter back to the Delegate for a determination on penalty quantum.

[210] The Respondent submits that since this is a new hearing, if the Appellant considered that the Delegate had made a procedural error by not permitting the Appellant to make a separate submission regarding penalty quantum, the Appellant could have taken the opportunity to make submissions to this panel regarding adjustments to penalty rather than seek to have the matter returned to the Delegate for redetermination. Any procedural unfairness of the OTBH process, if it exists, is cured by the new hearing before the Board.

[211] If the Appellant had made submissions on quantum in reply, the Respondent states that it would have requested the opportunity to make sur-reply submissions on quantum. Although, as I have set out earlier in this decision, the Board has the authority to establish its processes for a fair hearing, I was not required to make a ruling in this regard as the Appellant did not make submissions on the penalty quantum in reply.

Panel Findings

[212] The Appellant received, as additional documents for this appeal, a copy of the Handbook and Ministry penalty table. While the Appellant does not make a submission about not receiving these documents for the OTBH, the Appellant makes submissions which I have considered earlier about the need for the Delegate to follow the methodology of *Kabul* in determining a penalty and providing the rationale for the penalty in the reasons for the Determination.

[213] The court in *Kabul* provides "as part of procedural fairness, a party potentially liable for an administrative monetary penalty … needs to know about any formula, guideline or supporting analysis" used in assessing penalties (paragraph 44).

[214] The Handbook combines the information provided in the Factsheet and the OTBH document and describes the steps a decision maker will take and the considerations the decision maker will make, based on the Regulation, to calculate an administrative penalty. It includes the tabular checklist format for the decision maker's use, as described above. The Ministry penalty table conveys, in summary form, the upper and lower monetary limits for penalties associated with particular contraventions, categorized by their gravity and magnitude, and real or potential adverse effects. It shows the monetary consequences of applying the Regulation in an easily understood format and provides rationale for the application of the three descriptors for code contraventions (major, moderate, and minor) associated with the risks and consequences of effects. As noted above, it appears to me the Delegate had access to these additional documents when issuing the Determination, but the Appellant did not. The Appellant had both documents in advance of this hearing.

[215] I have compared the documents referred to the Appellant for the OTBH in the form of the OTBH document, the Factsheet, and the Regulation with the additional documents, the Handbook, and Ministry penalty table. I find, based on their content, that the first set of documents together provided sufficient information about the OTBH process to enable

the Appellant to know the case it had to make, the type of evidence that should be presented, and the type of submissions to support the Appellant's positions at the OTBH.

[216] The Regulation provides the categories of administrative penalties and establishes their maximums, while the Ministry penalty table suggests and provides guidance to a decision maker after considering the circumstances of the contravention details as to where in the range a penalty amount could be set. While I find the Regulation to be source that contains the penalty amounts and the factors to be considered in establishing them, I find that the Handbook and the Ministry penalty table were not required by the Appellant for it to make its case before the Delegate because the documents referenced for the OTBH met this objective. It is the information that is relevant to the assessment of the fairness of a process, not the form that the information takes.

[217] If, however, an unfairness occurred because the Delegate did not grant the Appellant a separate opportunity to make submissions regarding the quantum of the administrative penalty or because the Appellant did not have all the advisory documentation the Delegate had (i.e. the Handbook and Ministry penalty table) when making the Determination, the presence of an appeal process cures that defect. As indicated previously, the Appellant did not make use of this appeal to make submissions regarding the quantum of the administrative penalty.

[218] The Handbook, in addition to reviewing the OTBH process and providing a reporting format to be used in determinations establishing administrative penalties, includes a brief overview of the policy objectives of administrative penalties not provided in the OTBH document, the Factsheet, or Regulation. It provides, at page 20, that "the main purpose of an administrative penalty is to demonstrate that breaking the law has consequences, and to motivate the person to improve their standard of behaviour or performance level." It advises that an effective penalty should promote compliance through encouraging a higher standard of behaviour and deter a repetition of impugned behaviour. It should encourage the avoidance of repeat infractions and act as a deterrent to others. A penalty too high can be perceived as a punishment, and a penalty too low can fail to act as a deterrent and send the wrong message to others.

[219] The Handbook also implies the process of determining a contravention, as well as the establishment of a penalty, can also serve an educational function. Any misapprehension of how part 1.11.1(1) of the *Code* applied to the Appellant has been corrected by the Determination of the Delegate. The Determination serves as direction not only to the Appellant but to other mine operators in British Columbia. I do not find the absence of this policy analysis would have interfered with the Appellant's ability to meet the case of the Determination. Nor does this absence disrupt my earlier finding that the Appellant had sufficient information before it to provide meaningful submissions regarding the quantum of an administrative penalty in an informed manner, had it elected to do so.

Summary

[220] I have found that the process before the Delegate was fair; the Delegate applied the legislative scheme and Ministry policy in assessing the administrative penalty and exercised judgment based on those considerations. I also found no errors in the Delegate's setting of the administrative penalty at $140,000. In addition, I found that if there was a procedural deficiency in connection with the OTBH, which I specifically did not find, the hearing process before the Board has cured it.

[221] Based on the above findings that the Delegate acted according to legislative direction and followed the methodology explained in *Kabul*, I find the Delegate acted within the statutory discretion afforded him by the legislative scheme and fairly and appropriately established the administrative penalty at $140,000. In the absence of specific submissions on the regulatory factors and quantum, I find that the Appellant did not establish a basis to vary the Delegate's decision setting the administrative penalty at $140,000.

Costs

[222] The Respondent has made an application for costs against the Appellant in the amount of $500.00, suggesting that the conduct of the Appellant in making this appeal was improper. The Respondent submits that the appeal was fundamentally flawed from the outset and that the Board should consider this as a special circumstance on which to rely in awarding costs. The Appellant did not make submissions on the issue of costs.

[223] Under section 47(1) of the *ATA,* the Board has the authority to order a party, participant or intervener to pay all or part of the costs of another party, participant or intervenor in connection with the appeal. The Board's policy is to award costs in special circumstances as established by Section 13 of the Manual which lists the circumstances where costs might be warranted. This includes where the appeal is frivolous or vexatious, if a party fails to attend a hearing, if a party causes unreasonable delay, or fails to comply with orders of the Board. The Board does not follow the procedures typical to civil court practice of "loser pays the winner's costs."

[224] In previous decisions about costs, the Board has classified an award of costs in proceedings before the Board as an "extraordinary remedy, to be used at the Board's discretion to punish and dissuade abuses of processes or other forms of reprehensible conduct."[16]

[16] See Tho*mas H. Coape-Arnold v. Delegate of the Director, Environmental Management Act*, 2020 BCEAB 11 (CanLII)

[225] I find that there are no special circumstances that arise in this appeal that would warrant an award of costs, since the appeal raised several questions which I analysed in some detail, and therefore deny the application for costs.

DECISION

[226] I confirm the determination of the Delegate that the Appellant contravened part 1.11.1(1) of the *Code* and is liable for an administrative monetary penalty of $140,000. In making this decision, I have considered all the evidence before me, and the parties' submissions, whether or not I specifically refer to them in these reasons.

[227] Taking into account all the findings in this decision, I dismiss the appeal.

[228] I make no order for costs.

"Daphne Stancil"

Daphne Stancil, Panel Chair
Environmental Appeal Board