



ASCENDION LAW

Understanding Administrative Monetary Penalties Issued to Mining Companies Operating in British Columbia (2023)

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# INTRODUCTION

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Since February 2017, the *Mines Act*, R.S.B.C. 1996, c. 293, has empowered the Chief Inspector of Mines under the *Mines Act* (an official working under the authority of the B.C. Ministry of Energy, Mines and Low Carbon Innovation (EMLI)) to impose **Administrative Monetary Penalties (AMP)** for infringements of the *Mines Act*, regulations, Code or orders, when the Chief Inspector determines voluntary compliance cannot be achieved or when non-compliance presents significant risks, often to workers at mine sites, or to the surrounding environment.

The Ministry publishes the results of these administrative decisions. While the EMLI exercises discretion when making these decisions, it follows its published objective criteria in structuring them. The criteria items follow a grading system, usually grading a number of factors, aspects of a violation that the EMLI has defined, from a "low" impact to a "high" impact. Weighing these factors then produces a penalty imposed by the staff member. These decisions, and the scoring criteria expressed in these decisions, create a stable and measurable dataset that one can use to measure how the Chief Inspector's staff makes these decisions.

Ascension Law has studied thirty-nine **Determinations of Administrative Penalties**, representing a complete dataset of all decisions published by the EMLI. This dataset can help mining companies subject to administrative action by the Chief Inspector to predict the average fines and penalties they may receive if the Chief Inspector issues one. Our study can also help mining professionals understand the weight given to various factors in mitigating or aggravating penalties – such as due diligence, the compliance history of the companies or individuals involved, and the severity of the adverse effect of the violation.

Some of our key findings include:

- Decision makers tend to issue a monetary penalty **close to the base penalty** for the offence unless there are significant aggravating factors.
- Monetary penalties are **higher** for undertaking work without a permit or outside the scope of an existing permit than the penalties issued for violating a current permit.
- The highest penalties were imposed in cases involving **workplace injury, worker death, or a severe history of non-compliance**.
- Whether the gravity and amount of a violation are labelled "Major" or "Moderate" significantly impacts the potential fine. **"Major" violations attract fines three to five times higher than "Moderate" violations.**

- Similarly, suppose a violation is classified as having a "High" actual or potential adverse effect. In that case, the fine is **twice that of "Medium" violations**.
- Unexpectedly, whether the violator was a first-time or repeat offender was not always predictive of the size of the fine imposed.

## BACKGROUND

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The introduction of the AMP Regime coincided with widespread news associated with major mine failures, including the Mount Polley Mine and others. At the time, the Ministry of Energy and Mines (now the EMLI) sought to enhance the powers of officers in the EMLI to enforce mining regulations, beyond the existing environmental and workplace safety regulation. Before the introduction of the AMP Regime, the EMLI was restricted to remedial measures, ordering permittees to comply with the *Mines Act* and permits issued under the *Mines Act* with the threat of quasi-criminal prosecution or changes to their permit. The AMP regime allows the EMLI to issue monetary penalties along with remedial orders to enforce compliance with mining regulatory requirements.

### AMP REGULATORY REGIME

Under the *Mines Act* and the *Administrative Penalties (Mines) Regulations*, AMPs can be imposed on individuals and organizations found to contravene the *Mines Act* and regulations.

According to the Compliance & Enforcement Policy (Version 2.2) issued by the EMLI:

*An AMP may be an appropriate compliance tool when:*

- *An order does not adequately reflect the severity of the contravention and, therefore, would not be an effective deterrent;*
- *An order has already been issued but has not been effective in achieving compliance;*
- *An administrative sanction (e.g. permit cancellation or suspension) is disproportionate to the non-compliance or would cause undue hardship;*
- *The time and cost of court prosecution would not be in the public interest; and/or*
- *It is appropriate to recover an economic benefit the person received as a result of the non-compliance or to recoup government costs associated with the non-compliance.*

In the case of an alleged infringement or incident, the Mining Investigations Unit investigates and produces an Administrative Monetary Penalty Recommendation Report, which may include recommendations for enforcement action, such as an award by a Statutory Decision Maker (SDM) of an Administrative Monetary Penalty.

The SDM gives the person or company under investigation an "Opportunity to be Heard" under section 36.4 of the *Mines Act*. This is the best opportunity for those under investigation to mitigate the potential damage.

The EMLI need not prove that the licensee has violated a provision beyond a reasonable doubt. Instead, the decision maker must be satisfied that a breach of the *Act*, Regulations, Rules, or other policies was "more likely than not" or a balance of probabilities.

AMP fines have three tiers: (1) up to a maximum of \$40,000; (2) up to a maximum of \$100,000; and (3) up to a maximum of \$500,000.

These penalties are not exclusive of other penalties and remedial actions. Miners and their directors, officers, employees, contractors, and agents are still subject to quasi-criminal prosecution through the criminal courts and further civil remedies. These AMP decisions provide insight into how quasi-criminal or civil prosecutions may proceed.

## SAMPLE SIZE

Our sample comes from the set of AMP decisions published by EMLI on their website at [British Columbia Mine Information \(gov.bc.ca\)](https://www.bccm.gov.bc.ca). At the time of writing this article, the EMLI issued twenty-six decisions. When we compiled our data, a decision published on 16 May 2023 had not yet been issued, and we excluded that decision from our sample at the time of writing this article. Some of those twenty-six decisions involved multiple respondents. Often, a dominant shareholder or another responsible individual, such as a mine manager, was a respondent along with the permit holder, usually a B.C. corporation. The total sample size of our study involves thirty-nine decisions issued between 4 March 2019 to 31 December 2022. The Chief Inspector issued no published decisions in 2017 and 2018 despite having the authority to issue such AMPs.

We tabulated the results of these decisions. There were certain decisions involving the use of nonstandard outcomes. We attributed those findings as being administrative errors by the decision-maker in not choosing a standard category description. We normalized those factors by assigning to them a category appropriate that best matched the category outcome in the existing scheme. We also separated out data points for instances in which one decision dealt with two or more respondents.

This work produced a tabular dataset in which we could assign decision factors, outcomes, and monetary penalties to each respondent who received an AMP. By analyzing those outcomes, we produced the observations in this study.

This sample size used in this study is not large enough to apply any regression or other forecasting techniques. The number of variables that one must account for in this small dataset aggravates further the difficulty of using regression or other techniques to create any reliable forecasting tool. In other words, the model cannot produce typical forecast or quantitative predictions without more decisions. However, the dataset is large enough that with some judgment, one can discern some patterns in the way EMLI staff apply the penalty model with descriptive statistics such as maximums, minimums, medians, means, modes, and deviations. As the EMLI issues more decisions, and assuming it maintains the same decision criteria, we can expect the dataset to grow large enough to create a predictive model.

## FINDINGS

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Our findings suggest the EMLI will consider mitigating factors to reduce the published “base” penalties. Though, occasionally, there are aggravating factors that might increase the penalty over the base penalty.

With thirty-nine respondents penalized, we can observe some clear patterns.

### PENALTIES DISCOUNTED FROM THE MAXIMUM

As of July 2023, the EMLI has issued thirty-nine decisions and imposed penalties totalling \$1,073,250. When one sums up the potential penalties the EMLI could have given, the EMLI could have allocated up to \$1,265,000 in monetary penalties, or 85% of the total potential base penalties that EMLI could have issued, a discount of 15%. However, there are variations depending on the kind of mine involved. For example, in the twenty-four disputes involving placer mines, the actual penalty was 4% less than the fines that could have been issued.

Some mine types have sample sizes too small to make any meaningful inferences. We note, however, that the three disputes involving exploration mines resulted in a significant discount from fines that could have been issued, with EMLI giving only 17% of the total penalties that could have been published.

The comparison between the potential total fine that could have been issued (the sum of the total base calculated penalties that the EMLI could have issued) and the actual fines issued suggests decision-makers stay close to issuing the base penalty, rather than significantly discounting the amount based on mitigating factors. Conversely, the results show the EMLI is much less likely to increase a monetary penalty based on aggravating factors. As our results suggests, this finding is based on an aggregate result – looking at the total potential penalties that could be issued compared against penalties actually issued. However, a closer study of the data reveals important exceptions.

The EMLI has cited aggravating factors to increase the financial penalty from the base penalty. However, on average, the EMLI is much more likely to issue a lesser fine due to mitigating factors. These results suggest that one should emphasize the **mitigating factors** when faced with a request for the respondent's position about a proposed administrative monetary penalty.

EMLI has rarely increased fines from the base penalty. Our review found EMLI has only increased fines once, in the case of a mineral mine.

## FINE IMPOSED BY VIOLATION TYPE

So far, violations of an existing mines permit -- **section 15(4)** of the *Mines Act* -- constituted the most significant number of violations: 36% of all breaches. Usually, the violations were activities conducted by permit holders when the EMLI alleged the permit holder exceeded the permit terms. However, the average issued penalty was modest: only \$8,383. This is nearly the same as the total potential penalty that the EMLI could issue. The maximum issued penalty under s. 15(4) was \$10,000, while the minimum was \$2,500, producing a mean monetary penalty modestly higher than the median penalty.

Violations under **section 10(1)**, the requirement to hold a valid permit before engaging in mining work (including engaging in mining work out of an existing permit), was a close second in the number of violations.

Together, violations of sections 15(4) and 10(1) made up about **two-thirds** of all violations (26 out of 39). For sound policy reasons -- to encourage operators to mine with proper permits -- monetary penalties are significantly higher for operating without permits than AMPs for violating existing permit terms. The average penalty for unpermitted activities is nearly double that of violating an existing permit: \$15,750, with the lowest issued penalty of \$2,750. The maximum penalty issued for **unpermitted activities** was **\$32,500**, nearly a third higher than the maximum issued penalty given for violating an existing permit.

These results suggest that the EMLI has focused on ensuring permittees follow their licences. Participants in B.C.'s mining sector should ensure they have applied for the correct permits for the mining operation they wish to undertake. Further, as a project progresses, despite the size of the project, permittees should review their permits and understand whether their operations may require an amendment to the permit. In doing so, industry participants reduce their exposure to the most often issued penalty issued by the EMLI.

## HIGHEST FINES ISSUE FOR WORKER INJURIES AND REPEAT VIOLATIONS

Our study shows a handful of cases resulting in the highest fines. Those three cases represent the most statistically significant departures from the pattern of issuing penalties at or less than the base penalty.

In two cases, the penalties were issued after a severe incident. In the first case, a workplace injury was caused by an explosion on the mine site; the second case arose from a worksite death of a person. Those incidents resulted in fines of \$140,000 and \$220,000, respectively.

In both cases, the company under scrutiny did not provide adequate training. And, these companies did not implement adequate safety supervision systems.

In the third decision, EMLI found a pattern of repeated violations of orders. The mines investigation did not arise from an accident that caused worker injury, death, or significant environmental damage. However, in that case, a fine of \$150,000 was issued under s. 35 of the *Mines Act* for violating orders issued directly by the Chief Inspector. The history of non-compliance was a significant aggravating factor in the size of the penalty.

Notably, one might predict that cases involving larger penalties might attract regulatory prosecution. However, our study does not support such a forecast. The severe cases, defined as those attracting large penalties relative to the average penalty issued in the category, do not appear on the list of successful prosecutions under the *Mines Act* listed in: [British Columbia Mine Information \(gov.bc.ca\)](http://www.bccr.ca/industry/bcmi). However, omitting those cases does not mean that EMLI did not refer those matters to Crown Counsel for quasicriminal prosecution. In workplace injury or death, Crown Counsel may have prosecuted those offences under the Criminal Code, likely criminal negligence causing harm or death and would not necessarily be listed in the list of prosecutions as they would not involve violations under the *Mines Act*. For the case involving repeated offences, maybe such incidents were prosecuted, but omitting such a prosecution from the list might have been an administrative oversight.

Whether a quasi-criminal prosecution flowed from a serious incident is the subject of many factors, often outside the control of the permit holder. However, the study shows that having worker and mine safety plans, operations, and controls in place can significantly mitigate the financial penalty a permit holder might suffer. Penalties issued for worker injury or death or for patterns of non-compliance are magnitudes greater than base penalties.

## GRAVITY AND MAGNITUDE

The "Level of Impact" scale is vital to the EMLI Non-Compliance Decision Matrix (see Appendix A). Incidents can be classified as "Minor, Moderate, Immediate/Major, Certain, or Severe".

Whether the gravity and amount of a violation are labelled as a "Major" or "Moderate" violation significantly impacts the potential fine. Violations classified as having a "Major" gravity and magnitude have attracted average fines almost **fifteen times** those of "Moderate" gravity.



Even when correcting for the violation, we note that “Major” violations attract significantly higher fines. For example, a “Major” breach of section 15 of the Act, violating a permit, draws a penalty on average just over **three times higher** than that of a “Moderate” violation. Under section 10, mining without a permit or mining outside the scope of a permit, a “Major” violation attracts a penalty almost **five times higher** than a “Moderate” violation.

Our review included no AMPs for “Minor” incidents or “Severe” incidents. The sample size had no cases attracting these classifications.

| GRAVITY & MAGNITUDE | ALL      | SECTION 10 | SECTION 15 |
|---------------------|----------|------------|------------|
| MAJOR               | \$33,984 | \$16,932   | \$11,455   |
| MODERATE            | \$2,469  | \$2,750    | \$3,094    |

## ADVERSE EFFECTS

When considering the entire population of penalties issued, one would expect incidents classified as having “Very High” effect would attract penalties higher than others. However, our data shows penalties issued reflecting incidents as having “Very High” effects to be dramatically higher than even those classified as having “High” Adverse Effects, by orders of large magnitudes. Indeed, when looking at the data, we note that a small handful of these incidents, involving worker death, injury, or significant environmental harm, account for these large differences. Further, we see large differences between average penalties issued when the Adverse Effect is “High” versus “Medium”, more than twice greater whether one is looking at the whole population of cases, or just the subset of the larger samples of cases involving section 10 or 15 of the Act.

| ADVERSE EFFECT | ALL       | SECTION 10 | SECTION 15 |
|----------------|-----------|------------|------------|
| VERY HIGH      | \$139,375 |            |            |
| HIGH           | \$22,525  | \$29,250   | \$11,750   |
| MEDIUM         | \$8,626   | \$12,792   | \$5,438    |
| LOW            | \$13,438  | \$13,438   |            |

Curiously, there appears to be a single decision involving section 10, having a low Adverse Effect, whose penalty is larger than the average penalty given for cases involving a Medium Adverse Effect. Given the small sample size, we ought to see that result as a unique incident and not one challenging the overall pattern.

## HISTORY OF VIOLATIONS

An interesting result arises when considering whether the disciplined person had a history of past violations. Intuitively, one might have forecasted that a person with a history of past violations would be exposed to higher fines than not. However, our data does not bear this forecast out.

For section 10, prohibiting mining without a permit, whether a licensee was disciplined for past violations, does not seem to result in more significant penalties. The average AMP was significantly **lower** for those **with** a contravention history. However, for findings under section 15, where an existing permittee has contravened a part of the permit, the penalties follow a more predictable pattern, in which parties with a history of contraventions receive higher penalties than first-time offenders. Out of fourteen decisions involving section 15, the average issued penalty is more than twice the size when the operator has prior contraventions.

| AVERAGE PENALTY      | NO PRIOR HISTORY OF CONTRAVENTIONS | PRIOR HISTORY OF CONTRAVENTIONS |
|----------------------|------------------------------------|---------------------------------|
| SECTION 10 VIOLATION | \$18,531                           | \$10,188                        |
| SECTION 15 VIOLATION | \$6,898                            | \$15,525                        |

## REPEATED CONTRAVENTION

The EMLI distinguishes between past contraventions and repeated contraventions. In its decisions, the EMLI treats "prior contraventions" as earlier findings by EMLI staff that the permittee has contravened any provision of the *Mines Act*, regulations, or their permit. Repeated contraventions are more defined by time and location. So, for example, taking several small bulk samples within 24 hours from an area not allowed by a permit would be treated as a "repeated contravention" rather than a single incident of taking a single sample from that area. A similar finding made several months before this incident would be presented as a "prior" contravention rather than a repeated one.

One would intuitively infer that a person who engages in repeated acts that violate the *Act* would receive a more significant penalty than someone who has only broken the rules once. However, the cases in our sample do not follow that pattern.

Higher penalties are issued to respondents who have only violated section 10 once, as opposed to sanctions involving repeated violations. The same patterns hold for those respondents alleged to have violated section 15 of the Act – where a permittee contravenes a term of an existing permit:

| AVERAGE PENALTY      | NOT A REPEATED CONTRAVENTION | REPEATED CONTRAVENTION |
|----------------------|------------------------------|------------------------|
| SECTION 10 VIOLATION | \$32,246                     | \$18,065               |
| SECTION 15 VIOLATION | \$12,750                     | \$6,874                |

## ECONOMIC BENEFIT

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Finally, the data demonstrates operators who receive an economic benefit from violating the Act receive higher penalties. Average penalties issued when the operators is shown to have received an economic benefit are more than twice that of offenders where no economic benefit is proven: an average penalty of \$59,717 for those respondents who received an economic benefit versus an average penalty of \$24,836 for those who did not.

## CONCLUSION

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Since the EMLI introduced the system of administrative monetary penalties, the EMLI has issued thirty-nine AMPs, giving us a material body of decisions from which we can infer a statistically significant pattern of findings.

Generally, the penalty's monetary value in each decision aligns with what one would expect to see in a regulatory regime. Whether the gravity and amount of a violation are labelled "Major" or "Moderate" significantly impacts the potential fine. Unsurprisingly, penalties were higher for unpermitted activities than violations of existing permits.

Similarly, as expected, we found that serious incidents involving worker injury or death, significant environmental damage, or other serious aggravating factors resulted in higher monetary penalties. Further, when the gravity and amount of a violation are labelled "Major", fines are 3 to 5 times higher. And suppose a violation is classified as having a "High" actual or potential adverse effect. In that case, the fine is twice that of "Medium" violations.

The unexpected anomaly in the data was that a history of violations or repeated contraventions did not necessarily result in higher monetary penalties; in many cases, first-time offenders received higher penalties. This is an issue that calls for further review. We also noted that there appeared to be no meaningful pattern arising from whether incidents were labelled as being deliberate, whether steps were taken to prevent the incident, mitigate the incident, or mitigate future incidents. Those results seem anomalous. Intuitively, we would have expected Ministry officials to give some credit to those operators who engaged in preventative or remedial measures. Yet, the data needs to provide more conclusive evidence such credit is given. We disclaim any suggestion operators should not actively engage in preventative or remedial measures. However, the data suggests taking these measures will not necessarily result in lower administrative penalties.

To explain this anomaly, one might speculate that the Chief Inspector and Mines Investigation Unit are using other factors to determine their recommendations, such as the overall likelihood of compliance or cost-recovery of the investigation.

Mining industry participants can take several vital points away from our study:

- **The AMP regime is real and is here to stay.** Since the system became active in February 2017, the EMLI has issued forty AMPs against small and large participants. This AMP system operates alongside systems regulating environmental compliance under the Environmental Management Act, employment regulation such as the Labour Code (interestingly not WorkSafeBC, which does not regulate worker safety in mines), and quasi-criminal prosecution.
- **The critical protection from AMPs is to have a permit** – and to obtain a permit that is broad, descriptive, and will cover past and expected activities on site. Most AMPs are issued for violations of permits or for engaging in activity outside of the scope of an existing permit.
- **Serious incidents result in higher penalties.** While of course companies want to protect their workers and reduce the risk of injury or death on a mine site for its own sake, it is important to note that such events result in significantly higher penalties than other safety, environmental, and technical violations.
- **Focus legal budgets to argue for smaller impacts and less severe adverse effects.** Our data shows the most dramatic differences between factors consistent across violation types and mine types is the difference between events having a “Major” versus “Moderate” gravity and those between “Very High”, “High”, and “Medium” Adverse Effect. While other variables appear to be relevant, where budgets and resources are limited, our study suggests respondents will realize the most benefit by focusing on minimizing those two factors.

Though our results suggest AMP Penalties may not have a cumulative effect. We caution anyone from acting on this finding. The dataset is small, and our experience gained over years of defending individuals and companies in criminal and regulatory proceedings tells us such a conclusion is false.

In our experience, companies facing repeat proceedings can expect, at some point, a referral to Crown Counsel for potential criminal investigation and regulatory prosecution. That said, one can also expect referrals to other regulatory agencies at lower thresholds for enforcement of statutes outside the mining context, including the Environmental Appeal Board.

If you face an investigation by an EMLI staff or have been invited to provide submissions before a penalty is issued, our study suggests, especially if you have a very limited budget of time, money, or both, you can best maximize the value of your response budget by focusing on **lowering the gravity of the misconduct** and **reducing the effects on third parties and the surrounding environment**.

Understanding your rights and responsibilities during a regulatory investigation is critical. We always recommend contacting counsel early in the inspection or investigation process.

If you would like more information, about our findings, or would like to arrange a presentation for your team, contact us at [chilwin@ascendionlaw.com](mailto:chilwin@ascendionlaw.com).



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# APPENDIX A



**Table 1: Non-Compliance Decision Matrix**

|                          |           | LEVEL OF IMPACT                                  |  |  |   |
|--------------------------|-----------|--|--|--|---|
|                          |           | MINOR  | MODERATE   | IMMEDIATE/<br>MAJOR  | CERTAIN and<br>SEVERE   |
| LIKELIHOOD OF COMPLIANCE | HIGH      | <i>Warning*</i><br>Order<br>15(4)                | Order<br>15(4)   | Order<br>15(4.1)(a),(b),(c)<br>15(5)(a) and (b) or (c)                               | Order<br>15(4.1)(b),(c)<br>15(5)(a) and (b) or (c)<br>and<br>INVESTIGATION<br>CONSIDERED<br>(CONTACT MIU) |
|                          | UNCERTAIN | Order<br>15(4)                                   | Order<br>15(4)   | Order<br>15(4.1)(a),(b),(c)<br>15(5)(a) and (b) or (c)                               |   |
|                          | MODERATE  | Order<br>15(4)<br>35(1)                          | Order<br>15(4)<br>35(1)  | Order<br>15(4.1)(a),(b),(c)<br>15(5)(a) and (b) or (c)<br>35(1)<br>AMP               |   |
|                          | LOW       | Order<br>15(4)<br>35(1)<br>AMP                   | Order<br>15(4)<br>15(4.1)(a),(b),(c)<br>35(1)<br>AMP<br>Admin Sanction   | Order<br>15(4.1)(b),(c)<br>15(5)(a) and (b) or (c)<br>35(1)<br>AMP<br>Admin Sanction |   |
|                          | VERY LOW  | Order<br>15(4)<br>35(1)<br>AMP<br>Admin Sanction | Order<br>15(4)<br>15(4.1)(a),(b),(c)<br>15(5)(a) and (b) or (c)<br>35(1)<br>and<br>INVESTIGATION CONSIDERED<br>(CONTACT MIU) |  |   |

*\*Warnings should only be considered under the circumstances described in the C&E Policy*



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