File No. 2171
Board Order No. 2171-1

March 23, 2021

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT
R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

BLOCK 486, MALAHAT DISTRICT, EXCEPT PARCEL A (DD H49709) AND EXCEPT PART IN PLAN VIP84270;
BLOCK 954, MALAHAT DISTRICT, EXCEPT PARCEL A (DD H53369) THEREOF, AND EXCEPT PART LYING NORTHERLY OF A STRAIGHT LINE JOINING POINTS ON THE EASTERLY AND WESTERLY BOUNDARIES OF SAID BLOCK DISTANT RESPECTIVELY 689.89 METERS FROM THE NORTH EAST CORNER BEING POST NUMBER 7, AND 601.34 METERS FROM THE MOST WESTERLY CORNER BEING POST NUMBER 4 OF SAID BLOCK (DD 235127I)
(The "Lands")

BETWEEN:

Kevin Reginald Parks

(APPLICANT)

AND:

TimberWest Forest Corp.

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing March 1, 2021

BACKGROUND AND ISSUE

[1] The Applicant, Kevin Parks, is a Free Miner and recorded holder doing business as Goldenheart Resources. He wishes to access his mineral claims using roads on the Lands owned by the Respondent, Timberwest Forest Corp. (Timberwest) and managed by Mosaic Forest Management Corp. (Mosaic). In January 2020, Mr. Parks served Mosaic with a Notice of Work as required by section 19 of the *Mineral Tenure Act* describing intended mineral exploration activities for which he required access over the Lands. Mosaic responded with a letter setting out options for access to and over the Lands together with an Agreement and Acknowledgment (the Agreement) to be signed by Mr. Parks prior to access, a Schedule outlining safe road and radio use procedures, and a list of tools and equipment required by the *Wildfire Act*.

[2] Mr. Parks did not and does not accept the Agreement or the terms and conditions imposed therein respecting use of roads on the Lands to access his claims. He asserts that he has a right to access his claims using the roads on the Lands pursuant to section 10(3) of the *Mining Right of Way Act*. He submits Mosaic does not have the authority to impose the Agreement on him and that the terms and conditions for road use to access his mineral claims are overreaching.

[3] Mr. Parks sought the assistance of the Chief Gold Commissioner who was unsuccessful in his efforts to resolve issues through consultation. Mr. Parks then applied to the Board for a Right of Entry Order.

[4] Mosaic and Timberwest submit the roads over which Mr. Parks seeks access are not “existing roads” within the meaning of the *Mining Right of Way Act* as established by the Court of Appeal in *Imasco Minerals Inc v. Vonk*, 2009 BCCA 100 (*Imasco*) and that,

consequently, the Board does not have jurisdiction. Mr. Parks submits that the interpretation of "existing road" in *Imasco* does not apply to section 10(3) of the *Mining Right of Way Act.*

[5] A threshold issue arises, therefore, as to the Board's jurisdiction to grant the relief sought by Mr. Parks. Specifically, the issue is whether *Imasco,* and its interpretation of the term "existing road", applies to section 10(3) of the *Mining Right of Way Act*.

DECISION

[6] For the reasons that follow, I find that the term "existing road" in subsection 10(3) of the *Mining Right of Way Act* has the same meaning as in subsection 10(1) of that Act as determined by the Court of Appeal in *Imasco*, namely, that an "existing road" is a road that has been built under the provisions of an enactment. I accept that sub-subsection 10(3)(c) refers to a subset of "existing roads" but it does not create separate access rights nor does it operate in this case to grant any jurisdiction in the Board to settle this dispute.

ANALYSIS

Does *Imasco* apply to the term "existing road" in subsection 10(3) of the *Mining Right of Way Act*?

[7] Section 10 of the *Mining Right of Way Act* is set out in full below:

> **Power to use existing road**
>
> 10 (1) A recorded holder who desires to use an existing road, whether on private land or Crown land or both and whether built under this or another Act, may use the road for the purposes referred to in section 2.
>
> (2) A free miner who desires to use an existing road, whether on private land or Crown land or both and whether built under this or another Act, may do so in order to locate a claim and need not serve notice on the owner or operator of the road of the intention to use the road and need not pay compensation for its use, but is constrained by all lawful conditions that govern its use under this or any other Act.
>
> (3) A recorded holder who wishes to use an existing road

> (a) must serve written notice on the owner or operator of the road of the intention to use the road,
> (b) if the road is an access road, must undertake use of the access road in accordance with the rights of the deemed owner and subject to payment of compensation in accordance with section 6,
> (c) if the road was not built under this Act, must compensate the owner or operator of the road in an amount or manner agreed on or settled between the parties, and
> (d) is constrained by all lawful conditions that govern the use of an existing road under this or any other Act.
>
> (4) For the purposes of subsection (3) (c), in default of an agreement between the parties and on application of one of the parties, the surface rights board has jurisdiction to settle the issue of compensation and the terms of the settlement are binding on the parties.

[8] In *Imasco*, the Court of Appeal found the Board had correctly determined it did not have jurisdiction over an application by Imasco Minerals Inc. to settle the compensation payable for use of an existing road on private land because it could not be demonstrated that the road in issue had been constructed pursuant to some enactment and was not therefore an "existing road" within the meaning of the *Mining Right of Way Act*. The effect of the Court's decision has been that the Board has found it does not have jurisdiction to settle terms of compensation for a recorded holder's use of an "existing road" for mining purposes if it cannot be demonstrated that the road in issue was constructed under an enactment. (See for example: *Amey, et al v. Stafford, et al*, Order 1814-1, August 30, 2013; *Comox Valley Gold Adventures Inc., et al v. TimberWest Forest Corp.*, Order 1811-1, November 27, 2013; *Milum v. SMC Metaltech Corporation*, Order 1822-1, December 5, 2013).

[9] Mr. Parks argues that the Court of Appeal's interpretation of "existing road" in *Imasco* does not apply to section 10(3) of the *Mining Right of Way Act*. He submits further that as section 10(3)(c) of the *Mining Right of Way Act* only references "this Act" and omits the phrase "whether built under this or another enactment" the board has jurisdiction to provide access to a road not built under the *Mining Right of Way Act*. There is no evidence that the roads in issue were built under the *Mining Right of Way Act*.

[10] Mr. Parks provides a chart and diagram entitled “Classification of roads defined under the Mining Right of Way Act [SBC 1996] Chapter 294”. The diagram and chart depict and describe four classes of roads. Mr. Parks submits that the *Mining Right of Way Act* and *Industrial Roads Act* classify four types of roads on crown or private property as:

> Property 1 – Lot A – No existing roads on property (no strips of ground that may be traversed by vehicles)
> Property 2 – Lot H – Existing roads under public highway R/W (Access is public)
> Property 3 – Lot B – Existing roads under R/W acquired under “This” The Mining Right of Way Act AND not Highway pursuant to section 11
> Property 4 – Lot C – Existing roads exist but not in a Mining R/W or Highway

[11] Mr. Parks submits an existing road is either built under the *Mining Right of Way Act* or it is not. Either it is a road as in the Lot B example (existing roads under R/W acquired under “This” The Mining Right of Way Act) or it is not, which he submits is a new classification of “Mining/Industrial road R/W” introduced in the *Mining Right of Way Act* for industrial use and access and not a highway pursuant to section 11 of that Act. Section 11 provides:

> **Not highway**
>
> **11** Despite the *Transportation Act*, a road built or maintained under this Act is not a highway within the meaning of the *Transportation Act* unless the Lieutenant Governor in Council orders that it is a highway within the meaning of that Act.

[12] I understand Mr. Parks to submit this new classification of road would be a road as in the Lot C example above to which access is granted under section 10(3)(c) of the *Mining Right of Way Act* as a road “not built under this Act”.

[13] Mr. Parks does not cite the source of the information in the chart and diagram provided. I do not accept that it provides any authority for the described classes of roads or for the proposition that subsection 10(3)(c) of the *Mining Right of Way Act*

conveys any rights of use on a “road not built under this Act”. As will be seen from the analysis below, subsection 10(3)(c) of the *Mining Right of Way Act* provides as a condition for a recorded holder’s use of an existing road, the requirement to compensate the owner or operator of a “road not built under this Act”. A “road not built under this Act” in subsection 10(3)(c) is a subset of “existing roads”, the use of which requires compensating the owner or operator in an amount agreed or settled between the parties.

[14] Mr. Parks has not provided any legal authority for the proposition that a judicial interpretation of a word or phrase in one subsection of an enactment would not apply to other subsections of that section or indeed throughout the entire enactment. Even so, the Court’s interpretation in *Imasco* cannot be distinguished for this reason.

[15] Section 10 of the *Mining Right of Way Act* sets out the right of recorded holders and free miners to use “existing roads, whether built under this or another Act”, and the obligations that go with those rights. Subsection 10(1) grants recorded holders the right to use “existing roads” for mining purposes. Subsection 10(2) grants free miners the right to use “existing roads” to locate a claim without notice to the owner or operator of the road and without compensation but subject to other lawful conditions governing the road’s use. Subsection 10(3) lists the requirements for “a recorded holder who wishes to use an existing road”. Those requirements include providing notice to the owner or operator of the road (subsection 10(3)(a)) and compensating the owner or operator of the road in an amount agreed or settled between the parties if the “road was not built under this Act” (subsection 10(3)(c)). Subsection 10(4) then gives jurisdiction to the Board to settle the issue of compensation for the purposes of subsection 10(3)(c) if the parties cannot agree.

[16] *Imasco* arose from an application to the Board by a recorded holder to settle the terms of compensation for use of a road on private land under section 10(4) of the *Mining Right of Way Act.* The landowners argued, and the Board, the Supreme Court

and the Court of Appeal agreed, that the Board's jurisdiction to settle compensation under section 10(4) was with respect to the right of access granted to a recorded holder in subsection 10(1). Applying the modern rule of statutory interpretation, namely that the words of an enactment 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, the Court of Appeal concluded that the right to use an "existing road" only applied to roads built under an enactment. The Court among other things specifically referenced use of the phrase "under this or any other Act" in subsection 10(3)(d) of the *Mining Way Act* in its reasoning coming to this conclusion. The Court of Appeal must have intended that its interpretation of "existing road" applied to every use of that term in the whole of section 10 and not just to its use in section 10(1), and I find there is nothing in the language of the statute itself to suggest that the term "existing road" in subsection 10(3) would mean something different than in subsection 10(1). I note that subsection 10(3) existed in the form it does now when *Imasco* was decided.

[17] Subsection 10(3) sets out various conditions or requirements when a recorded holder wishes to use an "existing road". Those requirements following as (a) through (d) in subsection 10(3) apply to a recorded holder who wishes to use an existing road, and "existing road" has the same meaning in subsection 10(3) as in subsection 10(1). If a recorded holder wishes to use an "existing road", namely a road built under an enactment, the conditions set out in sub-subsections (a) through (d) apply.

[18] It is true that *Imasco* did not consider the meaning for the word "road" in section 10(3)(c) of the *Mining Right of Way Act* as that issue did not appear to be argued at any level of the proceedings. The case proceeded on the basis that the Board could determine compensation after the right to use the road in issue had been established, and that the right to use the road arose from section 10(1). Having determined that the right to use an "existing road" in section 10(1) only applied to roads constructed under an enactment, the Board and both levels of Court agreed that the Board did not have

jurisdiction to settle compensation as it could not be shown with evidence that the road in question had been constructed under an enactment. No one took the position, and therefore the Court did not consider, whether the Board's jurisdiction to settle compensation under subsection 10(4) was specific to the obligation to pay compensation under subsection 10(3)(c) and whether that obligation to pay compensation "if the road was not built under this Act", had a different meaning.

[19] An "existing road" is a road built under an enactment, whether the *Mining Right of Way Act* or another enactment. That is the interpretation of "existing road" set out by the Court of Appeal in *Imasco* and that interpretation is binding on this Board. But a recorded holder who wishes to use an "existing road" must, according to subsection 10(3)(c) pay compensation to the owner or operator "if the road was not built under this Act", namely the *Mining Right of Way Act*. If the "existing road" was built under another enactment, therefore, subsection 10(3)(c) imposes an obligation to pay compensation. This interpretation is consistent with the phrase "whether built under this or another enactment" in subsections 10(1) and 10(2) and 10(3)(d). The right to use an "existing road" only applies to roads built under this or another enactment, as found by the Court of Appeal, but the obligation to pay compensation for the use of an "existing road" only applies to a subset of existing roads, namely those "not built under this Act". The Board's jurisdiction to settle compensation, therefore, does not apply to settling compensation for the use of all "existing roads", but only those "existing roads" built under an enactment other than the *Mining Right of Way Act*.

[20] While I accept Mr. Park's submissions that the phrase "road not built under this Act" is not the same as "existing road", I do not accept that subsection 10(3) or any part of it creates a distinct right for a recorded holder or free miner to access roads not built under the *Mining Right of Way Act* that are not otherwise "existing roads" as interpreted by the Court of Appeal. The rights of recorded holders and free miners to use "existing roads" is set out in subsections 10(1) and 10(2). Then subsection 10(3) sets out the conditions that apply to "a recorded holder who wishes to use an existing road".

[21] Mr. Parks also makes arguments respecting the term “access road” in subsection 10(3)(b). He imports the definition of “access road” from the *Industrial Roads Act*. The *Mining Right of Way Act* defines “access road” as “a road built on Crown land as a facility under this Act”. This is the definition that must be used for the term “access road” in subsection 10(3)(b). The obligations in subsection 10(3)(b) only apply, therefore, to those existing roads that are built on Crown land as a facility under the *Mining Right of Way Act*. Subsection 10(3)(b) does not apply to the roads in issue in this application as they are not built on Crown land. And, as discussed above with respect to subsection 10(3)(c) does not, in any event establish a right of use, only a condition for the use of a subset of existing roads.

[22] The Court of Appeal’s interpretation of the term “existing road” in *Imasco* applies to those words whenever used throughout section 10 of the *Mining Right of Way Act* including as they are used in subsection 10(3). An “existing road” within the meaning of the *Mining Right of Way Act* is a road built under an enactment. That interpretation is binding on this Board.

Are the roads that Mr. Parks wishes to use “existing roads” within the meaning of section 10 of the *Mining Right of Way Act*?

[23] The evidence does not establish that the roads over which Mr. Parks seeks access were built under an enactment. Mr. Parks references the *Industrial Roads Act*, which defines “industrial road” and “industrial road administrator” and provides for the maintenance and regulation of industrial roads. Whether the roads in issue are “industrial roads” under the *Industrial Roads Act* and subject to regulation under that Act is not for the Board to determine. Even if they are roads regulated under that Act, there is no evidence that they were constructed under that or any other Act.

[24] In *Comox Valley Gold Adventures, supra*, the Board considered the argument that the Court in *Imasco* intended that roads regulated under statutory authority fell into the

class of roads included in “existing roads”. It was argued in *Comox Valley Gold Adventures* that the following passage from Hall, J.A.’s reasons in *Imasco* show that the Court considered that the underlying purpose for requiring that an “existing road” be built under statutory authority was to impose some measure of regulation over the use of the road. Hall, J.A. wrote:

> If a roadway had been constructed under the provisions of an enactment of the Legislature, notwithstanding that it may not have the character of a public highway open to all, it would be at least, subject to the terms of the particular statute and presumably susceptible to some measure of regulation. It seems to me that when the Legislature employed the terminology “whether built under this or another Act”, it was endeavouring to delineate a class of roads, perhaps of lesser stature than a highway, to be distinguished from private roadways. The difficulty in the present case is that it apparently cannot be demonstrated that the portion of Road traversing the property of Mr. and Mrs. Vonk was constructed pursuant to some enactment, which would be subject to some regulation under a statute (emphasis added).

[25] The applicant in *Comox Valley Gold Adventures* argued that regulations enacted under statutes including the *Industrial Roads Act*, regulated maintenance requirements for the road he wished to use. As the road was subject to a regulatory scheme, the applicant argued it should be considered an “existing road” within the meaning of the *Mining Right of Way Act* given the purpose enunciated by Hall, J.A. The Board agreed this was a reasonable interpretation given the legislative scheme provided by the *Mining Right of Way Act* and *Mineral Tenure Act*, but given the Court of Appeal’s decision in *Imasco*, would require legislative amendment. The Board concluded that it was bound to apply the interpretation found by the Court of Appeal in *Imasco* to be correct. (See paragraphs 37-39 of *Comox Valley Gold Adventures*). As it could not be demonstrated that the road in issue in *Comox Valley Gold Adventure*s had been built under statute, the road was not an “existing road” within the meaning of section 10 of the *Mining Right of Way Act*.

[26] The only evidence before me with respect to the either of the roads in issue in this case is that provided by Mosaic with respect to the Boneyard Main Road. Mosaic says

it is one of TimberWest's more active logging roads. It does not know when the Boneyard Main Road was first constructed. Mosaic provided a survey from 1951 for Block 844. The Land is described in the survey as "E&N Railway Land". There is no mention of the name "Boneyard Main" in the survey, but Mosaic says that if Mr. Parks used the Boneyard Main Road to access his claims, he would have to go through Block 844 and five further Blocks. Mosaic says the area over which the Boneyard Main traverses has never been held under a Tree Farm Licence and was built as a road to support private logging operations by private landowners. Mosaic submits that as a private road, it can be "altered, moved or demolished at the owner's pleasure". I make no finding with respect to this last submission but can find that there is no evidence before me that demonstrates the roads that Mr. Parks wishes to use were constructed under an enactment. I cannot find, therefore, that they are "existing roads" within the meaning of the *Mining Right of Way Act*.

[27] Mr. Parks specifically references section 4 of the *Industrial Roads Act* to argue that Mosaic cannot restrict his access to the roads in issue for mining purposes and does not have the right to place locked gates on the roads. Section 4 provides:

> **Mines to be protected**
>
> **4** Unless authorized by the minister, an industrial road administrator must not locate or construct its proposed industrial road so as to obstruct, interfere with, or injuriously affect the working of or the access or entrance to any mine then open, or for the opening of which preparations are being lawfully and openly made.

[28] There is no evidence that Mr. Parks or Goldenheart Resources operates a mine or is preparing to open a mine. Section 4 is to protect operating and soon to be operating mines from obstruction, interference or injurious affect as a result of the construction or location of an industrial road. It does not grant any rights to persons conducting mining activities to use existing industrial roads.

[29] I am unable to determine that the roads that Mr. Parks wishes to use to access his claim were built under the provisions of an enactment. They are, therefore, in accordance with the Court of Appeal's interpretation that is binding on this Board, not

"existing roads" within the meaning of section 10 of the *Mining Right of Way Act*, and the Board does not have jurisdiction to settle compensation under section 10(4).

[30] I note as an aside, that even if I were to find that the roads in question were "existing roads", the Board's jurisdiction under the *Mining Right of Way Act* appears limited to settling issues of compensation with respect to the use of those existing roads that were not built under the *Mining Right of Way Act*. Unlike the *Mineral Tenure Act* which references Part 17 of the *Petroleum and Natural Gas Act* establishing the Board and empowering it to issue right of entry orders amongst other things, the *Mining Right of Way Act* does not expressly empower the Board to grant a right of entry order, but only to settle issues of compensation with respect to a recorded holder's use of an existing road that is not built under the *Mining Right of Way Act.* As this issue was not raised by the parties, my remarks should be considered obiter and not determinative of the issue if and when it is raised and argued by the parties to an application.

CONCLUSION

[31] I find the Board does not have jurisdiction in this dispute.

DATED: March 23, 2021

FOR THE BOARD

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Cheryl Vickers, Chair