

**January 2, 2024**

**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 A SECTION 59 LAND DISTRICT 55, SOOKE; SECTION 56 & 57 LAND DISTRICT 55, SOOKE; SECTION 62 LAND DISTRICT 22, GOLDSTREAM; SECTION 56 LAND DISTRICT 22, GOLDSTREAM; SECTION 57 LAND DISTRICT 22, GOLDSTREAM; SECTION 54 LAND DISTRICT 22, GOLDSTREAM; SECTION 53 LAND DISTRICT 22, GOLDSTREAM; DISTRICT LOT 58 LAND DISTRICT 22, GOLDSTREAM

(The "Lands")

BETWEEN:

Victoria Teleport Corporation

(APPLICANTS)

AND:

YMCA

(RESPONDENTS)

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**BOARD ORDER**

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Heard by way of written submissions closing July 17, 2023, and presentation of written submissions via Zoom hearing August 24, 2023.

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## **INTRODUCTION**

[1] This case concerns an application by Victoria Teleport Corporation (VTP) seeking a right of entry to the above-described lands, owned/leased by the YMCA. Victoria Teleport asserts in its application that it is entitled to use an 'existing road' on these lands pursuant to s.10 of the *Mining Right of Way Act (MROW Act)*. The YMCA challenges the application to this Board claiming that the Surface Rights Board (the Board) does not have any jurisdiction to entertain the application because the alleged road is not an 'existing road' under the *MROW Act*. This decision concerns the jurisdiction challenge.

[2] Both of the parties to this jurisdiction challenge have filed lengthy and extensive submissions together with volumes of evidence to support their respective positions. VTP admitted in the oral argument phase of this hearing that some of its argument was intended for other processes it is involved in, including an application to the Gold Commissioner (now under appeal) and the BCSC (pending trial). This became apparent when the VTP advocate was questioned as to the relief sought in the matter before this Board of which only one of the several claims for relief in the VTP submission was considered relevant and that is whether s.10 applies. Mr. Martin for Victoria Teleport agreed when questioned that the case for this Board's jurisdiction turns on s.10 of the *Mining Right of Way Act* and that arguments, such as, being a 'recorded holder' is not before this Board, but rather other proceedings currently in litigation. Therefore, I am left with the question posed above, namely, does s.10 of the *MROW Act* apply. In the course of this decision, I will not deal with arguments, submissions, and evidence that does not relate to this question.

## **THE FACTS & BACKGROUND**

[3] It may well be that due to the other proceedings involving these lands that there has been a conflation of some of the facts and evidence set out in the current submissions that are most properly relevant to other proceedings that the parties are involved in. I want to be clear that this decision will be based on the relevant evidence pertaining to the jurisdiction of this Board to accept the claim. In that regard the relevant legislation and s.10 thereof reads as follows:

### **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.

[3] The question put before me on this application solely relates to s.10(2).

## **THE LANDS**

[4] Without going into the detail of how the lands were acquired there is no dispute between the parties that the YMCA is the registered owner of seven lots in the Sooke and Goldstream District noted below, since at least 1935. Collectively the lands are known as Camp Thunderbird and have provided summer camp experiences for children since that time.

[5] The evidence before me discloses that one lot (Section 58) is occupied under lease from the Province of BC since 1988, while the other lots (Sections 53, 56, 57, lot 54 and part of sections 59 and 60) have been acquired since 1935. VTP, through its parent/predecessor company purchased a one-half interest in a land-locked portion of section 59 in 1975 with a partner and then purchased that partner's one-half interest in 1987. At the time of the purchase in 1975 it is alleged that the company's principal was aware that there were no roads/highways providing access to section 59.

[6] Since the purchase was consolidated in 1987, documents produced demonstrate that the company lobbied the provincial government to construct a highway through the YMCA lands to their property. At all times these efforts were opposed by the YMCA and to date have been rejected by the successive governments in power.

[7] VTP was established in approximately 1990 as a division of the corporation that purchased the interest in Section 59.

[8] In 2007 the principal shareholder transferred  $\frac{3}{4}$  of the company's interest in  $\frac{1}{4}$  amounts to three Alberta companies and maintained the last  $\frac{1}{4}$  interest. Since then, the

ownership has consolidated further into two remaining corporate interests, each with 50% ownership. As far as I know, the specific ownership of VTP has not been disclosed, but it is an extra provincially registered company in BC under the *Business Corporations Act* of the province.

[9] In 2010 the corporate landowner and then shareholders filed a civil claim in the BC Supreme Court against the YMCA, District of Metchosin, Capital Regional District and the Province alleging that since 1912 there was a road known as a 'Settlers Road' that traversed the properties to Section 59, that public funds were once spent on this 'road' and that therefore this 'road' was and is a public highway pursuant to the *Road Act*, the *Highway Establishment and Protection Act*, the *Transportation Act*, and the *Land Titles Act*. The Plaintiff argued and posited in the claim that as such the defendants had a duty to maintain the 'road' and allow access to it through the YMCA's lands. This claim is still pending and has not been heard or resolved by the courts.

[10] According to the material filed in this matter the 'road' as alleged in that civil claim follows the same route through the lands as the alleged road in this matter before the SRB.

[11] From 2005 to 2019 there was a series of Mineral Tenure Claims filed over the YMCA's lands. Those claims were eventually transferred to VTP as a result of the corporate changes referenced above. In 2022 the Chief Gold Commissioner in a separate proceeding canceled those claims as they were found to be held for non-mining purposes. That decision, as I have been informed by the parties, is under appeal.

[12] Following the Gold Commissioners decision, I have also been informed that this filing occurred which attempts to use the Surface Rights Board's jurisdiction to force the construction of an access road through the YMCA lands and to VTP's adjacent property

in Section 59. Counsel for the YMCA categorizes this as ‘an intentional abuse of the Surface Rights Board’s process’.

### **THE ISSUE(S)**

[13] VTP’s agent has stated that the application ‘raises a jurisdictional issue, namely, whether the subject road is an ‘existing road’ within the meaning of the *MROW Act*.’ Counsel for YMCA prefers to call the road an ‘alleged road’. Regardless, both parties agree that if the road is not an ‘existing road’, this Board lacks jurisdiction to entertain the application before it. Further and as set out in the Act, the ‘existing road’ must have been built under the *MROW Act* or another Act. Of course, the burden falls upon the Applicant to prove both points in issue.

### **DISCUSSION**

[14] Without going into all of the detail contained in the parties’ submissions, I believe it is fair to say that at some historical point in time there did exist a form of road or vehicle path or trail through the YMCA’s lands. The difficulty lies in determining from the lengthy material, whether the historical pathway was built by the Crown for public use or whether it was then a private pathway through an owner’s lands.

[15] What is clear from the records and photographs produced is that at this point in time and for many years prior to now, there is no road where at one time there may have been one. All that exists now are forests, grasslands, and hiking trails.

[16] As indicated by counsel for YMCA there is a public road (the Glinz Lake Road) that was formally established under the predecessor to the *Transportation Act* in 1944 and this road terminates at the gate entrance to the YMCA lands. The register of roads describes this as a 1.61 km road ending at the gate entrance. I have been informed that there is no government record of any public road beyond this point. The VTP claim that a ‘settler’s road’ was constructed by settlers through the YMCA lands but counsel for the

YMCA produced records that show there are no roads indicated on the plans annexed to the crown grants of the YMCA lands in the 1930's.

[17] The questions raised from this are perhaps twofold. If at one time there was some form of path or trail through the lands, is that path or trail now an 'existing road' so as to allow for this application to proceed under the s.10 of the *MROW Act*, and in that regard, if since it appears that today there is no pathway or road through the lands can a road that is now, at best, historical, constitute an 'existing road' within the meaning of s.10?

[18] Fortunately, there is some jurisprudence on the first question. In *Imasco Minerals v. Vonk*, both the BCSC at 2007 BCSC 1755 and the BCCA at 2009 BCCA 100 (*Imasco*), dealt with the issue of the meaning of the term 'existing road'.

[19] Before discussing this case, it is important to review the legislation as quoted above. If VTP is entitled to access as it alleges then it must qualify to do so under s.10(2) of the *MROW Act* as a free miner. Currently VTP has that designation, but the categorization I am told is under appeal. In any event, for the purpose of this application VTP qualifies as a 'free miner'. This leaves the consideration of whether there is an 'existing road' that was built under an enactment.

[20] 'Existing road' is not a defined term, but the Act says that the word 'road' has the meaning as defined in the *Industrial Roads Act* RSBC 1996, c. 189 which defines road to be;

'a strip of ground, used for travel by motor vehicles, that is not a highway.'

[21] Highway is defined as having the same meaning as in the *Transportation Act*. However, any road built or maintained under the *MROW Act* is not a 'highway', as defined in s.11:

## 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.

[22] In *Imasco*, the Surface Rights Board, the BCSC, and the BCCA all held that the ‘road’ in question in the case did not fall under s.10 (1) or (2) as it was a privately built road on private land that was not built under an enactment and was not subject to statutory regulation. Much like the instant case, the BCCA declared the difficulty arose because it could not be established as to how, when, or why the road in that case was established. As counsel for the YMCA argued, like in *Imasco*, it was not established in this current case by all the submitted evidence that the road was used for travel by motor vehicles, that it was a road as defined, and that it was built under some identifiable statutory regime. Several Surface Rights Board’s decisions have followed the *Imasco* decision and reasons.

[23] But *Imasco* dealt with operational roads as did the cases before this Board that adopted the reasoning. The instant case is further complicated by the evidence that I have seen in the documents and arguments before me which clearly show that any road or pathway that may have once existed is not now an existing road (in the ordinary sense), nor an operational road, nor used for travel by motor vehicles and has not been so used, if at all, for a very long time, perhaps over 70 years. I repeat that what exists according to all the evidence I have seen are hiking trails, creek beds, and forest walks.

[24] In these circumstances one might conclude that there is no ‘existing road’ on the YMCA lands. That potential conclusion requires an analysis of whether the road/pathway that at one time long ago was visible, was built under an enactment. And this case also raises a further unique issue. While the evidence does depict that at one time, many years ago, there was a form of passage on the current YMCA lands from the



area of the current gate through to a part of Section 59, ie, the YMCA lands, can it be legally concluded that such a historical road is an 'existing road' within the meaning of s.10 of the *MROW Act*?

## **ANALYSIS**

[25] I have determined that the answer to the three questions identified above will determine the outcome in this case.

[26] I will combine the first two issues into this question. Is there an 'existing road' and if so, was it built under an enactment. That determination will answer the third question concerning a historic road.

[27] This exercise involves the interpretation of the above words. We are directed by the modern principles of statutory interpretation and as directed by the case law, to read these words 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament'. (see *Rizzo*, 1 SCR 27). We are also reminded that legislation that deals with property rights should be interpreted strictly and narrowly (see *Imasco Minerals*). Having full regard to these principles of statutory construction I will now analyze the statutory words at issue.

[28] The term 'existing road' is not defined in the Act. However, the word 'existing' is defined by Collins English Dictionary as meaning 'something that is now present, available or in operation'. Road is not defined in the *MROW Act*, but is defined in the *Industrial Roads Act* as follows:

'road' means a strip of ground, used for travel by motor vehicles, that is not a highway.'

[29] From these definitions we could combine them to mean that 'existing road' means a strip of ground presently used for travel by motor vehicles or a strip of ground that is available for motor vehicle travel. Since the Act allows for third parties to access private lands, I believe it would not be correct statutory interpretation to allow the words 'existing road' to cover any historic situation that does not presently exist. That would defeat the purpose and intention of the legislation which would run afoul of the modern principles we are directed to apply.

[30] The evidence before me does establish that a road known as Glinz Lake Road which runs from Sooke Road to the YMCA gate was established under the *Transportation Act* in the 1940's and was maintained by government since then. This road is identified in the register of roads since 1951 and the government confirmed the road's termination at the YMCA gate in June of 1992. I have been informed, and indeed there is no evidence before me otherwise, that no public road was ever constructed or existed beyond the gate, notwithstanding the assertions of VTP that a road was constructed through the YMCA lands to VTP lands on Section 59 by early settlers and that this 'settlers' road' existed at the time the Crown granted the lands to the YMCA. But as counsel for the YMCA points out, the plans annexed to the original Crown grants do not show any existing private or public roads. The evidence that does exist to support the assertion of a settler's road, is a private survey prepared by VTP for use in the BCSC action, which is awaiting trial. This survey I am told by counsel for the YMCA closely resembles a map prepared by a representative of VTP. Other photographic evidence produced by YMCA shows a plethora of narrow trails with various names traversing the YMCA lands over the route depicted by the Applicant's survey. These pathways amount to walking/hiking trails, narrow and in steep terrain without demonstrative and probative evidence of any historical roadbed.

[31] There is some evidence of a 'historic' road that did provide access to timber on lands near, but not through the YMCA properties. In the late 1800's this road was known as Bernard's Road after a surveyor who surveyed the area in 1884. But that road is not

the road as submitted by VTP and is not relevant to the Application. Counsel for the YMCA submitted evidence that Bernard's Road was used by the owner of VTP's predecessor to harvest timber via a permit that authorized the use of Bernard's Road for the purpose. However, if there be any doubt, that road is not the alleged road which is the subject of this application. In the evidence that I have seen, I cannot determine that there is currently present or available any land that is used for travel by motor vehicles. Therefore, I conclude that there is no evidence of any existing road as alleged by VTP.

[32] That determination is sufficient to dispose of within the application. But if I am wrong in the assessment of the evidence before me, I do want to discuss whether the VTP has shown that the road alleged was built under an enactment as required by s.10 of the *MROW Act*. VTP asserts that the alleged road was built as a highway under the *Transportation Act*. There are two fatal problems with that assertion. First, I am informed that whether the road is a highway as alleged, is a live issue in the Supreme Court of BC action which has jurisdiction on that issue and, secondly, 'highway' as noted above is excluded from the definition of 'road' under the *MROW Act*.

[33] Is there any other legislation supporting the creation of the alleged road?

[34] VTP has asserted that the alleged road is a 'non-status road'. The definition provided by the government says these 'non-status roads' are 'resource roads on Crown land...' There are two problems with the assertion. First, we are dealing with private and not Crown land and secondly there is no evidence anywhere (apart from VTP's own map and resulting survey) that there is any road identified on maps or other plans relating to the YMCA lands.

[35] I understand that VTP has also asserted that the alleged road was constructed under the *Forest Act*. The evidence that is before me however (letters from government of December 8, 1997, and March 28, 2022), references the Glinz Lake road up to the

YMCA gate and not beyond. The road is noted in the correspondence to be private lands and not gazetted forest roads.

[36] I have therefore concluded that the alleged road was not built under any Act or enactment.

[37] With this ultimate conclusion on the applicability of s.10 of the Act, it is not necessary to discuss the fact that on September 6, 2007, a no registration reserve was established over the YMCA lands pursuant to the regulation known as the *Mineral and Coal Land Reserve Regulation*, BC Reg 280/2007. But I do make this observation. This regulation prohibits free miners, such as VTP from entering or crossing over the land for any exploration and development work. The regulation, in and of itself, seems to prevent the access being sought by VTP, as a free miner, to access or cross over the YMCA lands. But as I said it is not necessary to analyze and decide that issue, as the conclusion in respect of the s.10 application is determinative of this preliminary question.

## **CONCLUSION**

[38] I have accordingly determined that the Surface Rights Board does not have jurisdiction to hear the application of VTP.

DATED: January 2, 2024

FOR THE BOARD

Dale Pope, Panel Chair