**File No. M 024**
**Board Order No. 413.**
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**MEDIATION AND ARBITRATION BOARD**
**Under the Petroleum and Natural Gas Act**

**BEFORE THE MEDIATOR:**

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED
AND THE MINIG RIGHT OF WAY ACT, R.S.B.C., C. 224 AS AMENDED
AND IN THE MATTER OF Nelson Trail Assessment Area,
P.I.D. 012-386-987,
District Lot 9785, Kootenay District
(The ALands≅)

BETWEEN:

IMASCO MINERALS INC.

APPLICANT

AND:

KEITH AND CAROL VONK.

RESPONDENTS

**ARBITRATION ORDER**

**BOARD ORDER**

## I. INTRODUCTION

This decision arises out of an application by Imasco Minerals Inc. ("Imasco") under Sections 6(4) and 10(4) of the ***Mining Right of Way Act***, R.S..B.C. 1996 c. 294 (the ***Act***), in respect of road access to a quarry. The quarry is located on:

> Nelson Trail Assessment Area
> P.I.D. 012-563-463
> District Lot 12478
> Kootenay District
> ("District Lot 12478")

More particularly, the quarry is located on Lot 15699 which is part of District Lot 12478.

The road access that is sought is on land owned by the Vonks:

> Nelson Trail Assessment Area
> P.I.D. 012-386-987
> District Lot 9785
> Kootenay District
> ("District Lot 9785" or the "Lands")

The Respondent Vonks opposes the application on the grounds that the Mediation Arbitration Board (the "Board") is without

jurisdiction in this matter and, in even event, should defer to the Supreme Court of British Columbia where a law suit has been commenced with respect to the road.

This matter came before me as a preliminary objection to the Board's jurisdiction, or exercise of same. While the parties have not specifically referred to this, I am of the view that I have the powers under the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, to dismiss all or part of an application for a number of reasons, including "that the application is not within the jurisdiction of the tribunal" after allowing the parties an opportunity to be heard (Section 31(1)(a)). The parties have made full submissions.

## II. FACTS

Imasco asserts that it is the recorded holder of mineral title located on and under Lot 12478. It is not in dispute that Imasco operates a limestone (calcium carbonate) mine, commonly known as Lost Creek Quarry on the property (the "Quarry"). The Quarry has been in production for more than 20 years and employs a number of people.

Access to District Lot 12478 and the Quarry is along a provincial highway, Highway 3, and the road in dispute between Parties, called Lost Creek Road by Imasco, and the Disputed Road by the Vonks (the "Road"). Both the highway and the Road traverse District Lot 9785, owned by the Vonks. The distance from the highway and the Quarry along the Road is approximately 2.4 kilometers, of which about 250 meters is on Lot 9785, according to the Applicant. The Vonks say that approximately 440 meters is on the Lands. Imasco has a road

use agreement with the owner of the adjoining lot (Lot 9784). Imasco had an agreement with the previous owners of District Lot 9785 for the use of the Road. The agreement provided, *inter alia*, for annual payments of $1,000.00. There is no dispute that there was gate at the entrance to the Road from the highway.

In October 2003, the Vonks purchased District Lot 9785. While the previous owners had left it unoccupied, the Vonks intended to homestead there. In addition, they planned to operate a business which would include seasonal "community days," school group tours, eco-tours and camping and lifestyle education. In September 2004, the Vonks moved their mobile home onto the Lands. They intended to build a home near the Road. They say that they selected the particular location in part for the amount of sunlight there.

After the Vonks moved onto the Lands they noticed Imaco's trucks using the Road. They contacted various government ministries and agencies regarding the status of the Road. The Vonks say that the ministries of highways, forestry and mining, as well as the Regional District of Central Kootenay informed them that the Road was private. They were also contacted by a representative of Imasco who explained that it had had a road use agreement with the previous owner of the land. Negotiations between the Parties failed to yield an agreement with respect to Imasco's use of the Road. As I understand it, Imasco was prepared to offer compensation for the use of the Road based on the position that it had the legal right to do so; the Vonks were not prepared to allow this and, in any event, did not believe that Imasco had the right to use the Road. They proposed alternative access roads

to the mine site. Imasco's view was that these were impractical or expensive. In early February, the Vonks told Imasco that they would allow it to use the Road up to and including May 31, 2005.

The following day, on June 1, 2005, the Vonks barred access to the Road by locking the gate. On June 2, an employee of Imasco came to the Vonks' home and told them to unlock the gate. They refused to do that. Subsequently, the gate posts were cut and the gate removed. The Vonks barred access by parking a van across the road. On June 6, the Vonks later installed a new gate.

Subsequently, on June 15, 2005 Imasco commenced an action in the Supreme Court of British Columbia, claiming, *inter alia*, a declaration that the Road is a provincial public highway, and, in the alternative, a declaration that Imasco may use the Road for the purpose of operating the mine. Imasco also sought an interlocutory and final injunction restraining the Vonks from interfering with access the mine site. I am not aware of any developments in this law suit, or the current status of it, other than it appears to be pending. However, on or about June 4, 2006, Imasco's counsel filed an application with the Board under Sections 6(4) and 10(4) of the ***Act*** seeking access across the Vonks' property. Through their counsel, the Vonks took issue with the application on the basis that the Board did not have jurisdiction over the matter or, in the alternative, should decline jurisdiction because of the pending legal action in the Supreme Court. The Board allowed parties the opportunity to make full submissions.

**III. ISSUE(S)**

The issues before me is (1) whether the Board has jurisdiction with respect to the matter in dispute, and (2), even if the Board does, should it decline jurisdiction because of he pending legal action in the Supreme Court.

## IV. RELEVANT STATUTORY PROVISIONS

As mentioned above, Imasco initially made its application to the Board under Sections 6(4) and 10(4) of the ***Mining Right of Way Act***. Imasco subsequently withdrew the application under Section 6(4).

Section 10 provides:

> 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.
>
> (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 mediation and arbitration board has jurisdiction to settle the issue of compensation and the terms of the settlement are binding on the parties.

**V. ARGUMENTS**

The Vonks argue that 10(4) deal with the issue of compensation once a right to use has been established as set out in Section 10(1). In that regard, the Vonks say that there is no evidence that Imasco is a "recorded holder." More importantly, they say that that the provision only applies to "an existing road built under this ***Act*** or another Act" and that there is no evidence of that.

Section 10(1) incorporates a reference to Section 2 of the ***Act***. Section 2 allows a recorded holder to use private property without the consent of the owner. In general terms, a mining operator may take and use private land for purposes related to the operation of a mine, including securing a right of way across such land. In that case, the ***Expropriation Act***, R.S.B.C. 1996, c. 125, provides significant and substantive

procedural protection for an owner of private property. A recorded holder must establish that the right of way is necessary and as well, under Section 4, obtain the Minister's written approval. The right to enjoyment of private property is a fundamental right in which government will only interfere reluctantly and only after due process of law.

The Vonks argue that Imasco elected to pursue its rights to use the Road though the proceedings filed in the Supreme Court of British Columbia, and has continued to so for well over a year. It should be bound by that election. Until Imasco establishes a legal right to use the Road, the Board does not have jurisdiction.

Imasco asserts that it is a "recorded holder" under the ***Act*** and the regulations under the ***Mineral Tenure Act***, R.S.B.C. 1996, c. 292, as evidenced by the documents issued under the ***Land Title Act***, R.S.B.C. 1996, c. 250, and the ***Mineral Act***, R.S.B.C. 1948, c. 213. Imasco holds the subsurface rights to "minerals precious and base" in, upon or under Lot 15699 within the boundaries of District Lot 12478.

Imasco argues that the Vonks fail to distinguish between the creation of legal interests in land versus contractual and statutory right to use land. Sections 2 and 4 of the **Act** apply to the creation of a right of way, an interest in land that runs with the land and binds subsequent purchasers. Sections 2 and 4 have no application to the statutory or contractual right of use sought by Imasco. Section 10 deals with "statutory and contractual rights" to use existing roads for limited purposes and limited amounts of time. The interests of the Vonks are protected by the compensation

provisions in Section 10. The important consideration is that the Road exists as a piece of physical infrastructure. Any issue surrounding the creation of the creation of the road (e.g. expropriation of a right of way, cost-sharing for construction) must be presumed to have been resolved with the land owner at the time the road was constructed, and any unresolved issue is out of time based on the ***Limitation Act***, R.S.B.C. 1996, c. 266. It is unreasonable to presume that the Road was not built under statute and require Imasco to prove its origins. It is not clear how the Road could have been built other than pursuant to a statute. Imasco also states that there is no basis for distinguishing between existing roads whose origin is known and existing roads whose origin is not known. As well, Imasco says that the Lands were originally granted by the crown (April 17, 1912) subject to several reservations, including an exemption for "traveled streets, roads, tails [sic.], and highways over or through the lands at the time of the grant."

Imasco takes issue with the Vonks' interpretation of Section 10(1). The clause "whether on private land or Crown land or both and whether built under this or another Act" is a subordinate clause and is not essential to the essential structure of the provision and merely serves as clarification of the expansive nature of the right, not as a restriction or conditions precedent of the right. All the same, because the Board has been given the jurisdiction to settle the issue of compensation, it must have the jurisdiction to determine (1) whether the applicant is a "recorded holder," (2) whether the thing to which access is sought constitutes an "existing road," and, (3) if so, whether it was built under the ***Act***. The essential elements "must all be determined as part of

MAB's decision regarding appropriate compensation."

Imasco filed an action the Supreme Court of British Columbia, seeking, inter alia, to enjoin the Vonks from barricading the Road. In the action Imasco made alternative allegations. Imasco denies that it has elected to pursue one remedy over another. As well, Imasco says, it cannot deprive the Board of its statutory jurisdiction by filing a claim in court. The jurisdiction of the court does not depend on the conduct of the parties. Similarly, the court is not entitled to assume the jurisdiction of a matter within the jurisdiction of an inferior tribunal until it has rendered its decision. Where, as here, the legislature has conferred the issues of access and compensation, neither the parties nor the court can deprive the Board of its jurisdiction.

The Vonks agree that the Board is entitled to determine compensation only after the right to use the Road has been established. Imasco must establish that it meets the requirements of the ***Act***. Imasco's evidence fails to establish that it is a recorded holder. Moreover, Imasco's interpretation of Section 10(1) wrong. The phrase "...whether on private land or Crown land or both and whether built under this or another Act," must have some meaning and, therefore, the applicant Imasco must establish that the road was built under statute, either the ***Act*** or some other statute. The Vonks further submit that Imasco expressly acknowledge this. Imasco is unable to satisfy the requirement that the road be built under statute. There is no evidence of this. Specifically, with respect to the original Crown grant (April 17, 1912), the Vonks say that there is absolutely no evidence that the Road existed prior to April 17, 1912.

The Vonks disagree that interference with their rights to enjoy their property can be considered contractual and say, in any event, that distinction is without meaning. Their use of the property will be permanently impacted and their plans totally disrupted. Imasco's application amounts to expropriation without any input in the process, other than with respect to compensation. Not surprisingly, they do not agree that any issues surrounding the creation of the road must be presumed to have been resolved at the time the road was constructed, or are time barred. There is no reason for such a presumption, especially if the road was not expropriated as a right of way or built under public authority.

Finally, concerning the respective jurisdictions of the court and the Board, this is not a question of conferring jurisdiction, but rather Imasco's election to pursue the matter thought the courts rather than the Board and, lacking success there, is attempting to use the Board. This is not a matter of the Board having exclusive jurisdiction over access, as evidenced by the fact that Imasco initially elected to commence proceedings in court. The issue here is access, and the right to use the Road.

## VI. DECISION

I have carefully considered the submissions of the parties. I am of the view that Imasco's application must be dismissed for the reasons set out below.

Ultimately, both parties appear to agree that the Board is

entitled to determine compensation under Section 10 only after the right to use the Road has been established. Section 10 establishes a procedure for a "recorded holder" who wishes to use an "existing road," involving written notification of the owner, settlement of compensation for the use, and compliance with legislation governing the use of the road. Under Section 10(4), a party may apply to the Board to settle the issue of compensation. Section 10 provides as follows:

> 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.

In my view, this establishes three basic requirements:

1. the party seeking use must be a "recorded holder;"

2. the use must be with respect to an "existing road;" and

3. the use of the road must be for the purposes referred to in section 2.

I am of the view that I must be satisfied that these requirements are met before I can deal with issues of compensation under Section 10(4). Whether that jurisdiction is exclusive to the Board is immaterial to the present dispute and I make no decision in that regard.

Turning briefly first to the third requirement, Imasco seeks to use the Road for the purposes of operating its mine.

Section 2 of the Act notes that use must be for the

> "purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title, or for the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title"

There is no dispute that the use sought by Imasco relates to the operation of the mine and, thus properly meets the purposes set out in Section 2. This case turns on whether Imasco meets the first two requirements of Section 10 of the Act.

Despite the fact that Imasco has operated a mine on the property for in excess of 20 years, the issue of whether it is a "recorded holder" is regrettably far from obvious. The undisputed evidence before me is that Imasco is the registered owner of District Lot 12478 and is the (current) registered owner of "all minerals precious and base (save coal, petroleum and any gas or gases) in, upon or under Lot 15699 surveyed as "L.F. No. 12 Fraction" mineral claims Kootenay District ... lying within the boundaries of District Lot 12478. The subsurface rights to Lot 15699 which is part of District Lot 12478 were granted in 1953 under the then ***Mineral Act***, R.S.B.C. 1948, c.213, and subsequently transferred to Imasco and the question is whether the evidence supports Imasco's claim to be a "recorded holder." The Vonks "fail to see how Schedule "A" [the September 17, 1953 Crown grant under the

***Mineral Act, above***] and Schedule "B" [the April 18, 1996 Form C under the Land Title Act transferring subsurface rights to Imasco] … establishes Imasco as a "recorded holder" as defined in the ***Mining Right of Way Act***." Indeed, the Vonks do not see any connection between the two documents, the Crown grant and the transfer of subsurface rights.

The ***Act*** defines a "recorded holder" with reference to the ***Mineral Tenure Act, above***. A "recorded holder" in the ***Act*** "has the same meaning as in the ***Mineral Tenure Act*** and includes the holder of a Crown granted 2 post claim." The ***Mineral Tenure Act*** defines "recorded holder" follows: ""recorded holder" means a person whose name appears as the owner of the mineral title on the record of that title in the gold commissioner's office …." It is not suggested that Imasco meets the narrow definition in the ***Mineral Tenure Act***, and, instead, Imasco argues that it is the "recorded holder" because it is a holder of a "Crown granted 2 post claim."

A "Crown granted 2 post claim" is defined in the ***Mining Tenure Act Regulations***, BC Reg 529/2004, as "a mineral title that was issued under a former Act and subsequently converted to a Crown grant." The Crown grant here was issued in 1953 under the mining legislation then in effect, the ***Mineral Act***, R.S.B.C. 1948, c.213. The September 17, 1953 Crown grant provides that the Crown "give and grant" onto three named individuals (in fractional shares) the mineral deposits, with certain exceptions that are not relevant for the present purposes, in, upon or under Lot 15699 within the boundaries of

District Lot 12478. By legislation, the Crown grant was abolished in 1957 and was replaced by mineral leases (***The Annotated British Columbia Mining Tenure Act, above***). Under Section 57(1) of the legislation then in effect, the ***Mineral Act***, R.S.B.C. 1948, c.213, the lawful holder of a mineral claim was entitled to convert a mineral claim into a crown grant upon the payment of a sum of money. For Crown grants on private land, the Crown grant passed all rights to the claim to the grantee(s), except as reserved. A mineral claim or a fractional mineral claim under that legislation included the "minerals and the personal or interest therein." At that time, a "2 post claim" was the only type of claim provided for in that Act. Only in the 1970s, does the legislation begin to distinguish between "2 post" and "4 post" claims (see also ***The Annotated British Columbia Mining Tenure Act***, Aurora, Ont.: Canada Law Books, loose leaf, 2006). The ***Mineral Act***, R.S.B.C. 1979, c.259, defined a "2 post claim" as "a mineral claim or fractional mineral claim located on or before February 28, 1975 or a post 2 claim located after January 1, 1978." The mineral claim is a Crown granted 2 post mineral claim.

As noted by Imasco, at the time the only claims provided for in the legislation were "2 post claims," and only in the 1970s were "2 post claims" replaced with "4 post claims." In short, the basis for the Crown grant in 1953 was, and could only have been, a "2 post claim." That claim was converted into a Crown grant and, therefore, in my view meets the definition of a "Crown granted 2 post claim" under the ***Mining Tenure Act Regulations, above***. The property rights in the original Crown grant passed to the subsequent owners, currently Imasco. It

follows, that I do not agree with the Vonks on this point, and I accept that Imasco is the "recorded holder" for the purposes of the ***Mining Right of Way Act***.

However, in my view, this case really turns on the interpretation of what constitutes an "existing road" and, more particularly, whether the ***Act*** requires that an "existing road" is built under statute?

In plain and ordinary language, a "road" may be a piece of existing physical structure used in a certain manner, e.g. a "strip of ground used for travel by motor vehicles." ***The Canadian Oxford Dictionary***, Toronto: Oxford University Press, 1998, defines it more broadly as "a path or way with specially prepared surface used by motor vehicles, cyclists etc." In ***Black's Law Dictionary***, St. Paul, Minn.: West Publishing Co., 1979) a "road" includes a "strip of land appropriated and used for purposes of travel and communication." In the legislation before me, however, the language has been given a more technical or restrictive meaning. Here, for example, an "access road" is not simply a "path or way" that provides access between two or more points; it "means a road built on Crown land as a facility under this ***Act***."

A "road" is defined in the ***Act*** as having the same meaning as in the ***Industrial Roads Act***, R.S.B.C. 1996, c. 189, where it is defined as "strip of ground used for travel by motor vehicles that is not a highway." The ***Industrial Roads Act*** gives "highway" the same meaning as in the ***Transportation Act***, R.S.B.C. 2004, c. 44, namely: "a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land improvement that

becomes or has become a highway by … [including] (b) a public expenditure to which Section 42 applies." There is nothing before me to suggest that the Road this is a highway and, in any event, that is beside the point because the ***Act*** does not apply to roads that are highways. The extent to which the Road has been traveled by motor vehicles has not been argued before me. There is not much in the way of particulars before me as to the state of the Road, its surface etc. It is, I think, common ground that access to the Road was, and is, gated, and that Imasco trucks, at least, used it for many years up until the present dispute. In the case at hand, there is no dispute that Road exists as a piece of physical infrastructure. In the circumstances, I accept that the Road is, in fact, a road.

Is that sufficient for the purposes of Section 10? Imasco says that the clause "whether on private land or Crown land or both and whether built under this or another Act" is a subordinate clause that is not essential to the essential structure of the provision, and merely serves as clarification of the expansive nature of the right, not as a restriction or conditions precedent of the right. The Vonks's position is that one of the issues is whether the Road is built under the "***Act*** *or some other statute*" (emphasis added). The inclusion of the phrase "…whether on private land or Crown land or both and whether built under this or another Act," must be given meaning, and Imasco's reading of the statute ignores its express language.

I agree with the Vonks on this point. Regrettably, the parties did not provide me with any authorities in support of their respective positions or Section 10 generally, and I was

unable to locate any. In any event, I am of the view that the legislature intended that the "existing road" be built under statute for Section 10 to apply.

First, in my view, the legislature would not have included the words "...whether built under this or another Act" unless it intended those words to have meaning. Imasco's primary submission would largely have me ignore those words. I do not accept that the subordinate clause -- "whether on private land or Crown land or both and whether built under this or another Act" - merely serves to clarify the expansive nature of the right. Every word in a legislative text must be given its own meaning. "This follows from the assumption that the legislature avoids tautology and that every word has a sensible reason for being there" (Sullivan, ***Statutory Interpretation***, Irwin/Quicklaw, 1997, Ch. 4.F). The use of "whether" indicates "that a statement applies whichever of the alternatives mentioned is the case" (***Oxford Compact English Dictionary***, 2nd ed. Oxford: Oxford University Press, 2003). The provision specifically mentions "private land or Crown land or both" and "built under this or another Act."

Second, similar language, references to the ***Act*** or another Act, is used elsewhere in Section 10 and the ***Act***. Section 10(3) deals with procedure and compensation in relation to use of an "existing road" in different contexts. If the road is an "access road," i.e. a road built on Crown land as a facility "under this ***Act***," the procedures under Section 6 apply (Section 10(3)(b)). An "access road" may be owned by the Crown or by a "deemed owner," i.e. the owner of the facilities placed in a right of way "under this ***Act***." A "deemed owner" may be entitled to reasonable compensation for

maintenance costs in respect of the use and, in some instances, reimbursement for actual capital costs. If the road was not built "under this ***Act***," the user must compensate the owner in the amount and manner agreed, subject to an application to the Board (Section 10(3)(c)). From Imasco's position, is only then that the question of whether the road was built under the ***Mining Right of Way Act*** is relevant. I do not agree. Recorded holders are constrained by all lawful conditions that govern the use of an existing road "under this or any other Act" (Section 10(3)(d)), i.e. similar language as is found in Section 10(1). The fact that a road exists as a "strip of ground used for travel by motor vehicles" (not a highway) is not sufficient to bring it within the scope of the ***Act***. In my view, the legislature clearly intended to distinguish between "this ***Act***" and "any other Act." Roads are governed by a number of different statutes, e.g. ***Industrial Roads***, ***above***, and the ***Transportation Act***, ***above***. It is not unreasonable to assume that the legislature intended to include roads built under statute, e.g. public authority. Legislation such as the ***Act*** is expropriatory in nature and ought to be read in a restrictive manner: see for example ***Statutory Interpretation***, ***above***, Ch. 12.B). I find that it is not possible to ignore the words "any other Act."

Third, as a whole, the ***Act*** provides for access to public or private land in British Columbia for mining purposes as defined in the legislation. Under Section 2, a recorded holder may be entitled to a right of way on private land without the consent of the land owner for specified purposes. Certain safeguards apply, the ***Expropriation Act***, ***above***, and Section 4. Under the ***Expropriation Act***, landowners are

entitled to notice of a proposed expropriation, with certain particulars; they may be entitled to an inquiry as to whether the proposed expropriation is necessary to achieve the objectives compared with alternatives; they may be entitled to compensation based on market value and disturbance damages. Under Section 4, the power to take a right of way "under this ***Act***" requires the approval of the minister. Under Section 2(2), the recorded holder may, subject to Section 10, use an existing road." Sections 3 and 5 deal with public land. Section 6 deal with compensation for the industrial use of an "access road," defined as a "road built on Crown land as a facility under this ***Act***." Such a road may be operated by a "deemed owner' entitled to compensation for the use in accordance with the principles set out there, which may include actual maintenance costs, capital costs and expenditures related to the use. There are no similar provisions in Section 10(4). In my view, the opportunity to negotiate, and failing agreement, settlement of compensation by the Board does not provide much protection for the landowner. The use by the recorded holder here would seriously interfere with the Vonks' enjoyment of their private property. There is nothing contractual about what Imasco is seeking, unless, of course, the parties agree.

Moreover, of course, Imasco is not precluded from accessing the mine site. It can do so under Section 2, with the procedural protections that entail under the ***Expropriation Act***, ***above***, and Section 4. However, on Imasco's reading of Section 10, a mining operator could take *any road* and use it for the purposes in Section 2(1), subject simply to payment of compensation. If that construction was correct, there would be little reason to go though the presumably more cumbersome

expropriation route.

Fourth, unlike some of the other statutes dealing with access to property, there is little guidance in Section 10(4) as to compensation. Under Section 21 of the ***Petroleum and Natural Gas Act, above***, the Board may set "terms" for an order for entry and my consider a number of factors:

> 21(1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16 (1), the board may consider
>
> (a) the compulsory aspect of the entry, occupation or use,
>
> (b) the value of the land and the owner's loss of a right or profit with respect to the land,
>
> (c) temporary and permanent damage from the entry, occupation or use,
>
> (d) compensation for severance,
>
> (e) compensation for nuisance and disturbance from the entry, occupation or use,
>
> (f) money previously paid to an owner for entry, occupation or use,
>
> (g) other factors the board considers applicable, and

(h) other factors or criteria established by regulation.

Similarly, under the ***Mineral Tenure Act***, ***above***, the legislature has set out guiding principles:

> (7) If an owner of private land opposes entry on the land by a recorded holder on the grounds that the intended activity would obstruct or interfere with an existing operation or activity on the land or with the construction or maintenance of a building, structure, improvement or work on the land, the Mediation and Arbitration Board must determine the impact of the intended entry and must determine which parts of the land would be affected by that entry.
>
> (8) If, under subsection (7), the Mediation and Arbitration Board determines that it is not possible to enter the land or a part of it without obstruction or interference, in addition to any other order it makes, the board must make an order
>
> (a) specifying conditions of entry that will minimize the obstruction to or interference with the existing circumstances of the land, and
>
> (b) specifying compensation for obstruction to or interference with enjoyment of the land.

(9) Without limiting the factors that the board may consider in making a decision under this section, in making a determination under subsections (7) and (8) the board must take into account the extent of the obstruction or interference with respect to the following:

(a) land occupied by a building;

(b) the curtilage of a dwelling house;

(c) orchard land;

(d) land under cultivation.

In the legislation quoted, the Board has been given some powers to deal with both terms of entry and compensation. The Vonks argue that the compensation provided for in Section 10 is clearly not sufficient, and that Imasco's use of their Land amounts, in effect, to expropriation that fundamentally impacts on their plans for the property. I agree to the extent that Section 10 does not provide much guidance as to compensation. I also agree that, at least on the face of it, the proposed continued use by Imasco would interfere with the Vonks' plans for their property.

In short, in my view, Section 10 applies to roads built under the ***Act*** and roads built under some other statute. As argued by the Vonks, there is no evidence before me to support that the Road in question was built under the ***Act*** or under some other statute. *As the Applicant, Imasco bears the burden of proof to establish that the Road was built under the* ***Act*** *or some other statute.* Imasco has not provided any authority for the presumption that any issue surrounding the creation of the

creation of the road must be presumed to have been resolved with the land owner at the time the road was constructed, or that those issues are somehow time barred. It is not unreasonable to require that Imasco prove its right to use the Lands.

Finally, with respect to the original Crown grant (April 17, 1912), I agree with the Vonks that there is no evidence to support that the Road that existed prior to April 17, 1912.

In short, Imasco's application is dismissed.

DATED: February 12, 2007, Burnaby, British Columbia

per I.S.P.

Ib Skov Petersen
VICE-CHAIR

Mediation and Arbitration Board
114, 10142 101 Avenue
Fort St. John, BC V1J 2B3

Fourth, the section relied upon by Imasco requires an

"existing road." "Road" is defined in the ***Act*** as having the same meaning as in the ***Industrial Roads Act***, R.S.B.C. 1996, c. 189, where it is defined as "strip of ground used for travel by motor vehicles, that is not a highway." The ***Industrial Roads Act*** gives "highway" the same meaning as in the ***Transportation Act***, R.S.B.C. 2004, c. 44, namely: "a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land improvement that becomes or has become a highway by … (b) a public expenditure to which Section 42 applies." The Vonks say that the Road is not a public highway.