File No. 1811
Board Order No. 1811-1

November 27, 2013

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

THAT PART OF THE NORTH ½ OF NORTH EAST ¼ OF SECTION 24 TOWNSHIP 3 COMOX DISTRICT PLAN 552B INCLUDED IN PLAN 206RW; PARCEL A (DD 13528N) BLOCKS 94 AND 150 COMOX DISTRICT; BLOCK 29 COMOX DISTRICT PLAN 691F LYING SOUTHERLY OF PLAN 206 RW BEING PART OF THE AREA CONTAINING 10,440 ACRES MORE OR LESS AND SHOWN OUTLINED IN PINK ON PLAN DEPOSITED UNDER DD 10441N EXCEPT PART IN PLAN VIP70186, VIP72903, EPP9996 AND EPP9999; BLOCK 28 COMOX DISTRICT PLAN 691E EXCEPT THOSE PARTS IN PLANS 206 RW AND 376 RW;ALL THAT PART OF BLOCK 150 COMOX DISTRICT LYING TO THE SOUTH WEST OF THE SOUTH WEST BOUNDARY OF PARCEL A OF BLOCKS 94 AND 150 COMOX DISTRICT , AND BOUNDED ON THE NORTH WEST BY THE RIGHT BANKS OF PIGGOTT CREEK AND OYSTER RIVER, CONTAINING 1050 ACRES MORE OR LESS AS SHOWN OUTLINED IN BROWN ON PLAN 408R; BLOCK 914 COMOX DISTRICT AS SHOWN ON PLAN 44949; BLOCK 151 COMOX DISTRICT AS SHOWN OUTLINED IN RED ON PLAN 408R, EXCEPT PART IN PLAN 326R; BLOCK 1467 COMOX DISTRICT AS SHOWN ON PLAN 44947, EXCEPT THAT PART IN PLANS VIP64688 AND VIP71655; THAT PART OF THE SOUTH HALF OF SECTION 25 TOWNSHIP 3 COMOX DISTRICT PLAN 552B INCLUDED IN PLAN 206 RW; THAT PART OF BLOCK 28 COMOX DISTRICT PLAN 691E INCLUDED IN PLAN 206 RW; THE SOUTH EAST ¼ OF THE NORTH EAST ¼ OF SECTION 24 TOWNSHIP 3 COMOX DISTRICT PLAN 552B LOT 1 SECTION 19 TOWNSHIP 4 COMOX DISTRICT PLAN EPP6085 (The "Lands")

BETWEEN:

Comox Valley Gold Adventures Inc. and Ian Jensen

(APPLICANTS)

AND:

TimberWest Forest Corp.

(RESPONDENT)

BOARD ORDER

Heard: by way of written submissions closing October 7, 2013
Appearances: Brian Abraham, Barrister and Solicitor, for the Applicants
Lisa Martz, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] Ian Jensen ("Jensen") holds mineral and placer claims (the "Claims") located on Vancouver Island, west of Courtenay on Piggott Creek. The Claims are located on private land (the "Lands") registered in the name of TimberWest Forest I Limited and beneficially owned by TimberWest Forest Company, of which TimberWest Forest Corp. is the managing partner (collectively, "TimberWest").

[2] Jensen wishes to explore the mineral potential of the Claims as well as operate guided gold panning outings at the Claims. Jensen owns and operates Comox Valley Gold Adventures Inc. ("Comox Valley Gold Adventures"), which is his business arm.

[3] Jensen is requesting access to the Claims via a road (the "Road") which is also located on the Lands.

[4] TimberWest has not blocked Jensen's entry onto its lands to access the Claims. However, it will not allow Jensen to use the Road to access the Claims unless he:

(a) signs TimberWest's standard form Acknowledgment and Agreement for road access;
(b) signs TimberWest's standard form Mineral Operations and Road Use Agreement for work under the Permit (as defined below); and
(c) uses the Road only for the purposes of transporting personnel, equipment and minerals or mineral bearing substances necessary for the exploration, development and operation of the Claims.

[5] TimberWest has not allowed Jensen to use the Road to transport customers of his commercial gold panning tour business.

[6] Jensen asserts he has a right to use the Road pursuant to the *Mineral Tenure Act* and section 10 of the *Mining Right of Way Act*. He seeks an order from the Board allowing his access to the Road and settling the compensation payable to TimberWest for his use of the Road. TimberWest submits the Road is a private road, and that the Board does not have jurisdiction to authorize access or settle compensation under section 10 of the *Mining Right of Way Act*. TimberWest further submits that Jensen's commercial gold panning tour business is not a purpose within the meaning of section 2 of the *Mining Right of Way Act*. Jensen argues that his proposed use of the Road, including the guided

gold panning tours, fit within the definition of "exploration and development" in the *Mineral Tenure Act*, and therefore qualify as a purpose referred to in section 2 of the *Mining Right of Way Act*, and that any ancillary benefit to Jensen from the gold panning tours is irrelevant.

[7] Following unsuccessful mediation, this arbitration was set to determine whether Jensen has the right to use the Road under section 10 of the *Mining Right of Way Act*. The issue of compensation is deferred pending resolution of the access issue.

ISSUE

[8] The issue is whether Jensen, operating as Comox Valley Gold Adventures, has the right to use the Road pursuant to section 10 of the *Mining Right of Way Act*. Section 10 of the *Mining Right of Way Act* 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.

[9] There is no issue that Jensen is a recorded holder. His rights under section 10 depend on the answers to the following questions:

- Is the Road an "existing road" within the meaning of section 10 of the *Mining Right of Way Act*; and
- Is Jensen's intended use of the Road by his business arm Comox Valley Gold Adventures "for the purposes referred to in section 2" of the *Mining Right of Way Act*?

[10] If the answer to these questions is "yes", Jensen has the right to use the Road without TimberWest's consent and the Board has jurisdiction to settle the compensation payable pursuant to section 10(4) of the *Mining Right of Way Act*. If the answer to either of these questions is "no", Jensen may not use the Road for the requested purpose without TimberWest's permission, and there is no jurisdiction in the Board to determine the issues between the parties respecting use of the Road.

FACTS

[11] The parties filed an Agreed Statement of Facts. In addition to the facts set out above in the Introduction, the following facts are agreed to by the parties.

[12] Jensen holds tenure number 410388 (placer claim) issued May 8, 2004 and tenure number 847083 (mineral claim) issued February 20, 2011. Jensen submitted a notice of intention to commence work on tenure number 410388 to the Ministry of Energy, Mines and Natural Gas on May 15, 2012. An Approval of

Work System and Permit was issued to Jensen on October 2, 2012 pursuant to Section 10 of the *Mines Act* under permit number P-8-028 (the "Permit") for the period from October 3, 2012 to September 15, 2014.

[13] The Lands have been owned privately, in fee simple, dating back to the grant of lands to the E & N Railway by the government in the 1880's, and were purchased by TimberWest's predecessors over time.

[14] The Lands are currently administered under the *Private Managed Forest Land Act*.

[15] In 2010, when TimberWest first became aware of Jensen's activities at the Claims and plan to offer gold panning tours at the Claims via the Road, it advised him to submit an application so that it could consider his proposed use of the Road. TimberWest further advised Jensen that he was required to provide it with notice of entry under section 19 of the *Mineral Tenure Act* before entering onto the Lands to access the Claims.

[16] The gold panning outings offered by Comox Valley Gold Adventures are promoted through a website at www.vancouverislandgold.com . Trip packages are offered for prices ranging from $100.00 to $370.00 (excluding tax) per 8 hour day. In written communications, Jensen advised TimberWest of his plan to include groups of elementary school children in his gold panning tours.

[17] On January 24, 2011, TimberWest received an application from Jensen to access the Road for exploration work and sampling and to conduct "daily gold panning tours to and from the site".

[18] On February 21, 2011 and April 10, 2011, Jensen submitted Section 19 Notices to TimberWest regarding his entry on the Lands to install signage, carry out exploration work and conduct trail building at the Claims. No mention was made in the Notices to the operation of gold panning tours.

[19] As the largest private landowner on Vancouver Island, TimberWest receives many requests for access over its private lands by parties claiming mineral rights and it endeavours to deal with them consistently. TimberWest's longstanding practice is to require anyone who wishes to use TimberWest's roads in order to access their mineral claims to enter into standard form written agreements establishing conditions for their use of the roads.

[20] There are currently more than 80 free miners with recorded claims on TimberWest lands who have entered into agreements with TimberWest or are in the process of doing so.

[21] The agreements require that the applicant demonstrate that s/he has the required government authorizations for the proposed activities, require that the applicant give notice of his/her use of the roads in order to avoid safety issues as

a result of conflict with the use of the roads by TimberWest personnel and contractors, and confirm that the applicant uses the roads at his/her own risk and releases TimberWest from all claims. When an applicant proposes to engage in mining activity involving mechanical work pursuant to a *Mines Act* permit, TimberWest requires that the applicant enter into a further agreement confirming, in addition, that s/he will comply with applicable laws, including any Workers' Compensation Act requirements regarding the roads, follow appropriate safety practices, carry appropriate insurance and indemnify TimberWest.

[22] On June 16, 2011, Jensen executed TimberWest's standard form acknowledgement agreement for access to the Claims via the Road for the period from March 16, 2011 to March 15, 2012.

[23] On November 15, 2011, TimberWest denied Jensen's application to use the Road for gold panning tours, stating that "[d]ue to safety concerns regarding upcoming logging activities in the area, management has determined that access onto TimberWest land for commercial purposes would pose considerable liability risks".

[24] On December 19, 2011, Jensen submitted a Section 19 Notice to TimberWest regarding his entry on the Lands to carry out exploration work and sampling at the Claims. No reference was made in the Notice to the operation of gold panning tours.

[25] In e-mail correspondence dated December 20, 2011, TimberWest wrote to Jensen advising that it has come to its attention that he was "charging people to access your claims on TimberWest lands" and "running a business" on the lands, notwithstanding TimberWest's November 15, 2011 denial of his application "for commercial use on our lands". In response, Jensen took the position that the activity he was engaged in was "for the purpose of mining and the recovery of mineral bearing ore".

ANALYSIS

Is the Road an "existing road" within the meaning of section 10 of the *Mining Right of Way Act*?

[26] In *Imasco Minerals Inc. v. Vonk*, 2009 BCCA 100, the Court of Appeal found that an "existing road" within the meaning of section 10 of the *Mineral Right of Way Act* is a road "constructed under the provisions of an enactment of the Legislature". TimberWest submits that as it is conceded that it cannot be shown that the Road was built under any statute, the *Imasco* decision is determinative of this application.

[27] Imasco Minerals Inc. ("Imasco") was a mining company that had used a road on private property to access its mining operation for many years prior to

the property's purchase by Mr. and Mrs. Vonk. When the Vonks purchased the property, they declined permission for Imasco to continue to use the road. Imasco applied to the Surface Rights Board (then known as the Mediation and Arbitration Board) to resolve the dispute and set the compensation payable for its use of the road. The Vonks argued the Board did not have jurisdiction and the Board agreed. The Board found for it to have jurisdiction under section 10(4) of the *Mining Right of Way Act*, three basic requirements must be met. These are: a) that the party seeking use must be a recorded holder; b) the use must be with respect to an "existing road"; and c) that the use must be for a purpose referred to in section 2 of the *Mining Right of Way Act*. The Board found an "existing road" was a road built under the authority of the *Mining Right of Way Act* or another Act, and as it had not been demonstrated in that case that the road was built under the *Mining Right of Way Act* or another Act, the requirements were not met, and the Board did not have jurisdiction (Board Order 413, February 12, 2007). On an application for judicial review, the Supreme Court upheld the Board's decision (2007 BCSC 1755). Sigurdson, J. found "that it was the Legislature's intention to permit recorded holders to have access on private land on existing roads built pursuant to a statute." As there was no evidence that the road in question was built pursuant to a statute, the Court agreed it was not an "existing road" within the meaning of section 10 of the *Mining Right of Way Act*. On further appeal, the Court of Appeal agreed. Hall, J.A. wrote: " ...applying what I perceive to be the modern principles of statutory interpretation, as enunciated by the Supreme Court of Canada, I am left with no doubt that the interpretation of the relevant section of the Act urged on behalf of the respondent Mr. and Mrs. Vonk, and found applicable by the Board and Sigurdson, J. is correct."

[28] Jensen argues that *Imasco* can be distinguished on the facts. He argues that the Court contemplated applying a broader interpretation to the term "existing road" if supported by the facts to ensure the appropriate balancing of competing rights, and argues that it is open to the Board to interpret the legislation differently given the different factual circumstances. Jensen argues that distinguishing factors in this case support categorizing the Road as an "existing road" within the meaning of section 10 of the *Mining Right of Way Act*. These factors include: that the Road is already used for industrial purposes and its use is regulated under statutory authority; that Jensen's use of the Road would have minimal impact on TimberWest; and that it would be impractical to expropriate a right of way and build a new access road in the circumstances.

[29] For the reasons that follow, I am satisfied that the legislature could not have intended that section 10(1) of the *Mining Right of Way Act* would not apply to allow Jensen's use of the Road in this case. However, that intent cannot be implemented without reading words into the legislation that are not there. The Court of Appeal has held that the "correct" interpretation of section 10(1) of the *Mining Right of Way Act* is that an "existing road" is a road constructed under an enactment. Decisions of the Surface Rights Board on questions of law must be capable of being upheld on a correctness standard of review in accordance with

section 59 of the *Administrative Tribunals Act*. As the Court of Appeal has set out its view of the "correct" interpretation, this Board is bound by that interpretation.

[30] I agree the facts of this case are different from those in *Imasco*. Although the road in Imasco had been used for many years by Imasco for industrial purposes with the agreement of the previous landowners, the Vonks did not use the road for industrial purposes and the land owned by the Vonks was not otherwise used for industrial purposes. Imasco's use of the road in that case would have interfered with the Vonks' quiet enjoyment of the land for personal uses. In this case, the Road is used by TimberWest for industrial purposes, as are the Lands over which the Road traverses. As Jensen has agreed to give way to TimberWest's activity when using the Road, his use of the Road will not be disruptive to TimberWest's operations.

[31] Further, in *Imasco*, only a small portion of the road in issue was located on the Vonks' land, and an alternative route to avoid traversing the Vonks' land was feasible. In this case, the Road extends several kilometres from the public highway across the Lands. There is no other access to the Claims that avoids traversing the Lands.

[32] Jensen argues it would be impractical for him to expropriate alternative access pursuant to section 2 of the *Mining Right of Way Act*. He points to the reasons of Sigurdson, J. finding that requiring evidence that a road was constructed under statutory authority did not render section 10(1) absurd because section 2 of the *Mining Right of Way Act* provides an alternative for accessing private land via expropriation, and argues that Sigurdson J. did not consider possible circumstances where it would be unreasonable and economically impractical to require a recorded holder to expropriate access and build another road adjacent to an existing one. I agree that the reasons of Sigurdson J. do not contemplate the potential hardship and impracticality of requiring a recorded holder to exercise rights of expropriation in circumstances where a means of access already exists. Hall, J.A. envisages circumstances creating considerable hardship on a landowner if the term "existing road" includes a private roadway, and I do not disagree with that possibility. But if an "existing road" is limited to roads constructed under the authority of an enactment, a recorded holder's right to access already existing roads on private land is limited beyond private roadways that would significantly impact a landowner's use and enjoyment of land or otherwise cause considerable hardship to a landowner. Many roads, such as the Road in issue in this case, become unavailable to a recorded holder leaving the expropriation of a right of way over private land as the only means of access. This alternative is not only costly and difficult from the recorded holder's perspective, but provides a rather draconian and heavy handed approach for accessing private land for the purposes of developing mineral claims from the private landowner's perspective.

[33] Further, the policy objective of requiring a recorded holder to expropriate access adjacent to already existing access, thereby expanding the area occupied by roads, is contrary to the express forest management objective for private managed forest land set out in section 12 of the *Private Managed Forest Land Act*, under which the Lands in this case are administered. This section provides:

> 12. The forest management objective for private managed forest land with respect to conservation of soil for areas where harvesting has been carried out is to protect soil productivity on those areas by minimizing the amount of area occupied by permanent roads, landings and excavated or bladed trails (emphasis added).

[34] It is counterintuitive from the perspective of responsible land management practices, that a recorded holder would be forced to expropriate right of access and build another road adjacent to or in addition to an already existing road, where use of the already existing road would not significantly impact the landowner or is not inconsistent with the landowner's use of the road.

[35] Jensen argues that the following passage from Hall, J.A.'s reasons 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 Lost Creek 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).

[36] Jensen argues that regulations enacted under the *Private Managed Forest Land Act* regulate maintenance requirements for the Road. As well, the *Industrial Roads Act* and regulations enacted under that Act also apply to the Road to regulate the maintenance of ditches and drains, and the construction and maintenance of bridges and other structures on the Road. As the Road is subject to a regulatory scheme, it should be considered an "existing road" within the meaning of the *Mineral Right of Way Act*, given the purpose enunciated by Hall J.A. I agree this is a reasonable interpretation given the legislative scheme provided by the *Mining Right of Way Act* and *Mineral Tenure Act*.

[37] The *Mineral Tenure Act* gives recorded holders the right to enter, use and occupy the surface of a claim for the exploration or development of minerals or placer minerals (section 14(1)). The recorded holder must not conduct mining activity without a permit issued under the *Mines Act* (section 14(2)), and must serve notice of the intended work on the landowner (section 19(1)). The recorded holder is liable to compensate the landowner for loss or damage caused by the entry, occupation or use of land for the exploration or development of minerals or placer minerals (section 19(2)). The *Mining Right of Way Act* facilitates access to private land to give effect to the right of entry provided by the *Mineral Title Act* through section 2, providing for expropriation of a right of way, or section 10, providing for use of an "existing road".

[38] In the context of this legislative scheme, it appears the legislative intent was to enable access to mineral claims via roads already in existence, and otherwise to allow for the expropriation of right of access. It does not make sense that where there is an existing road that is not solely a private road, but that is appropriate for industrial use and subject to regulation in its use, that a recorded holder would not be able to utilize that access but would have to expropriate alternative access, thus creating two roads. I agree with Hall, J.A. that the legislature was likely trying to delineate a class of roads, to be distinguished from private roads, which would be subject to some regulation under statute. Giving effect to this intent, however, requires either substituting or adding words to section 10(1) of the *Mining Right of Way Act* that are not there. The words of section 10(1) are not "existing road regulated under this Act or another Act" and they are not "existing road built or regulated under this Act or another Act". Given that the Court of Appeal has determined that the "correct" interpretation of section 10(1) of the *Mining Right of Way Act* is that an "existing road" is a road that has been constructed under an enactment, I am not willing to effectively amend the words of the statute with an interpretation that substitutes the requirement of construction for regulation, or adds the requirement of regulation to that of construction.

[39] I am bound to apply the interpretation found by the Court of Appeal to be correct. As it cannot be demonstrated in this case that the Road was built under statute, *Imasco* is determinative and the Road is not an existing road within the meaning of section 10 of the *Mining Right of Way Act*. If the Court of Appeal's determination of the correct interpretation of section 10(1) of the *Mining Right of Way Act* does not give effect to the legislative intent, then it is up to the Legislature to amend the legislation accordingly. Alternatively, the Court of Appeal may reconsider its decision and determine if a contextual analysis allows for a broader interpretation as suggested by Hall, J.A.'s reasons and my analysis above.

[40] I find that the Road is not an "existing road" within the meaning of section 10(1) of the *Mining Right of Way Act*.

Is Jensen's intended use of the Road by his business arm Comox Valley Gold Adventures "for the purposes referred to in section 2" of the *Mining Right of Way Act*?

[41] Although not necessary to a disposition of this application given my conclusion above, I will nevertheless proceed with an analysis of this issue, in the event that conclusion is found to be in error.

[42] Jensen is invoking a right to use an existing road under section 10 of the *Mining Right of Way Act*. Under section 10 of the *Mining Right of Way Act* a recorded holder "may use the road for the purposes referred to in section 2". So, what are the purposes referred to in section 2? Section 2 of the *Mining Right of Way Act* provides:

> 2 (1) Despite any other Act, a recorded holder who desires to secure a right of way across, over, under or through private land 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, or for the transportation of machinery, materials and supplies into or from a mineral title may take and use private land for the right of way without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land.
>
> (2) The power of a recorded holder to take and use land for a right of way under subsection (1) does not include the power to take and use existing facilities or other improvements in a right of way except that a recorded holder may, subject to section 10, use an existing road.
>
> (3) If private land is taken under subsection (1) without the consent of the owner of the land or of a person having or claiming an estate, right, title or interest in, to or out of the land, the *Expropriation Act* applies.

[43] TimberWest argues the phrase in subsection 2(1) "for the purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of mineral title" imports the requirement of necessity into the recorded holder's intended use of a road under section 10. Jensen argues the requirement of necessity relates to the taking of the right of way under section 2, and that for the purpose of road use under section 10, "the purposes referred to in section 2" are:

- "the exploration, development and operation of mineral title",

- "the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title", and
- "the transportation of machinery, materials and supplies into or from a mineral title".

[44] I agree with Jensen's interpretation on this point. Under section 2, a recorded holder may secure a right of way by expropriating land for the purpose of constructing, maintaining and operating facilities (which include roads and other linear developments) that are necessary for the exploration, development and operation of a mineral title, or necessary for the other activities mentioned. Expropriation under section 2 must be for the singular purpose of constructing, maintaining or operating facilities necessary for the various activities listed. Section 10 refers to a recorded holder's right to use an existing road for purposes (plural) referred to in section 2. The definition of "facilities" includes roads. Use of an existing road under section 10 does not require construction of a facility necessary for the various activities stated. The use of an existing road, however, must be for the same purposes that construction of a road (or other lineal facility) is necessary for if a right of way is to be expropriated. Those purposes are the activities set out above.

[45] The question remains, however, whether Jensen's intended use of the road as Comox Valley Gold Adventures for operating guided gold panning tours fits within the meaning of one of these purposes. Jensen argues that the guided gold panning tours are further to "the exploration, development and operation of mineral title".

[46] For the reasons that follow, I find that the purposes referred to in section 2 of the *Mining Right of Way Act*, including the purposes of "exploration, development and operation of a mineral title" do not include the activities of Comox Valley Gold Adventures.

[47] The phrase "exploration, development and operation of a mineral title" must be read in its context and according to its grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature. The *Mineral Tenure Act*, *Mining Right of Way Act*, and *Mines Act* provide a complex scheme governing claiming and registering mineral title, accessing land for the purpose of the exploration, development and production of minerals and placer minerals, and regulating the exploration, development and production of minerals and placer minerals. The legislative scheme gives recorded holders of mineral title the right to "use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals or placer minerals, including the treatment of ore and concentrates, and all operations related to the exploration or development or production of minerals or placer minerals and the business of mining" (*Mineral Tenure Act*, section 14, emphasis added). The legislative scheme includes the rights of expropriation and access provided in sections 2 and 10 of the *Mining Right of Way Act* in order to access private land. The various Acts and their respective regulations

collectively provide for the regulation of mines and mining activity and establish the respective rights and obligations of landowners and the holders of subsurface mineral title. It is in this context that the phrase "exploration, development and operation of mineral title" is to be interpreted.

[48] Jensen argues that the phrase "exploration and development" is defined broadly and inclusively in the Regulations under the *Mineral Tenure Act* to include such exploration and development as "trenching, open cuts, adits, pits, shafts, and other underground activity for the purposes of collecting samples", "panning, digging or washing of gravels to test for the presence of economically significant minerals", and various surveying, prospecting and exploring activities. Indeed, the definition of "exploration and development" provided in the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004, includes both "physical exploration and development" and "technical exploration and development", and lists the qualifying activities of each. All of these activities are in the nature of exploratory, preliminary, or preparatory work that must be completed to determine the feasibility and suitability of a claim for further development. When read in conjunction with the right of entry provided by section 14 of the *Mineral Tenure Act*, however, a recorded holder's right to enter the surface of a claim to conduct these activities must be for the business of mining.

[49] According to the pages from Comox Valley Gold Adventures' web site, included with the Agreed Statement of Facts, Comox Valley Gold Adventures describes itself as a "Gold Prospecting/small scale mining company" and as "a seasonal Goldpanning/Prospecting Company that offers outings for groups during the summer months". It "offers a unique opportunity for people of all ages to try there [sic] luck at finding Gold", and offers gold panning as "a great way to see and enjoy the great outdoors". A full-day gold panning package includes: travel to and from the river; a one hour gold panning lesson; gloves, gold pans, shovel, crow bar and snuffer bottle (for sucking up gold); and a vial to put gold into. Customers may keep any gold they find as the "ultimate keepsake" from their adventure.

[50] I am not satisfied that Comox Valley Gold Adventures is engaged in the exploration and development of Jensen's mineral claim. The clients of Comox Valley Gold Adventures are provided the opportunity to learn about and experience gold panning and the opportunity to find their own gold. They are not "panning, digging or washing gravels to test for the presence of economically significant minerals" as part of the business of mining, but are engaged in recreational gold panning. They do not turn found samples over for analysis or testing, but keep them. I find that Comox Valley Gold Adventures is in the business of providing outdoor gold panning/prospecting adventures. It is engaged in the provision of outdoor adventures that allow people to recreationally hand pan, with permission of the recorded holder (as permitted by section 9 of the *Mineral Tenure Act*), and to keep any gold that they find. As such, it is not engaged in "the exploration, development and operation of a

mineral title" in furtherance of the business of mining. It is in the business of adventure tourism.

[51] Further, the right of access provided under section 10 of the *Mining Right of Way Act* is a right given a recorded holder. Comox Valley Gold Adventures is not the recorded holder of these Claims. Jensen is the recorded holder. Jensen, and presumably his employees and contractors, may use an existing road for the purpose of "exploration, development and operation of a mineral title" in furtherance of the business of mining. The customers of Comox Valley Gold Adventures are not Jensen's employees or contractors. Nor are they engaged in "the exploration, development and operation of a mineral title" in furtherance of the business of mining. They are engaged in recreational gold panning.

[52] I am not satisfied that the legislature intended to give a company in the business of adventure tourism, even adventure tourism that includes recreational gold panning, the right to enter private land for that purpose. The right to use and occupy the surface of a claim is for the "exploration and development and production of minerals and placer minerals...and for the business of mining". The legislature must also have intended that the right to enter privately owned land to develop a claim, without the landowner's consent, must also be for the business of mining and not for the business of providing paying customers a recreational gold panning experience.

[53] I find that Jensen's intended use of the Road by his business arm Comox Valley Gold Adventures is not "for the purposes referred to in section 2" of the *Mining Right of Way Act*.

CONCLUSION

[54] The Road is not an "existing road" within the meaning of section 10 of the *Mining Right of Way Act*. Consequently, there is no jurisdiction in the Board to settle the compensation payable for its use.

[55] In any event, Jensen's intended use of the Road is not for the purposes referred to in section 2 of the *Mining Right of Way Act*, and consequently not a purpose for which the legislature intended he should be able to use an existing road on private land without the consent of the landowner.

DATED: November 27, 2013

FOR THE BOARD

Cheryl Vickers, Chair