

File No. 1814
Board Order No. 1814-1

August 30, 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

**DISTRICT LOT 12054 CARIBOO DISTRICT
DISTRICT LOT 12053 CARIBOO DISTRICT
DISTRICT LOT 5727 CARIBOO DISTRICT
DISTRICT LOT 8139 CARIBOO DISTRICT
DISTRICT LOT 10 GROUP 4 CARIBOO DISTRICT, EXCEPT PLAN
22094
DISTRICT LOT 11 GROUP 4 CARIBOO DISTRICT**

(The "Lands")

BETWEEN:

**William Larry Amey and
Dave Reginald Chamberlain**

(APPLICANTS)

AND:

**William Charles Lawrence Stafford and
Virginia-Lyn Ann Stafford**

(RESPONDENTS)

BOARD ORDER

Heard: August 27, 2013 in Williams Lake
Appearances: Larry Amey for the Applicants, Larry Amey and Dave
Chamberlain
Alan E. Vanderburgh, Q.C., for the Respondents, William
Stafford and Virginia-Lyn Stafford

[1] On August 27, 2013, I rendered an oral decision with reasons dismissing this application. I am now putting in writing my decision and reasons as required by section 50 of the *Administrative Tribunals Act*.

[2] Mr. Amey is a free miner and holds a placer claim on the Lands owned by Mr. Stafford and members of the Stafford family. Mr. Amey seeks to invoke rights under the *Mineral Tenure Act* and the *Mining Right of Way Act* to access his claim via a road on the Staffords' Lands for the purpose of mineral exploration. These Acts deal with the rights of miners to access private land and provide the dispute resolution mechanisms for the resolution of issues between miners and private landowners when they cannot agree on access, its terms and conditions, or the compensation payable. Mr. Stafford denied permission for Mr. Amey to use the road on the Lands to access his claim, and Mr. Amey seeks to invoke the authority of the Surface Rights Board to resolve the dispute.

[3] Following presentation of evidence from Mr. Amey, counsel for Mr. Stafford moved that the application be dismissed on the grounds that the Board did not have jurisdiction. He argued that Mr. Amey had not provided evidence to establish that the road is an "existing road" within the meaning of the *Mining Right of Way Act* as that term has been interpreted by the BC Court of Appeal in *Imasco v. Vonk*, 2009 BCCA 100.

[4] In accordance with section 10 of the *Mining Right of Way Act*, a recorded holder has the right to use "an existing road, whether on private land or Crown land or both and whether built under this or another Act" for mining activities. The recorded holder must serve notice on the owner or operator of the road, and compensate the owner or operator for use of the road if the road was not built under the mining *Right of Way Act*. If compensation for use of the road cannot be agreed, the Surface Rights Board has the jurisdiction to settle compensation. Section 10 of the *Mining Right of Way Act* provides:

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.

[5] I am satisfied that Mr. Amey is a recorded holder and that he seeks to use the road on the Lands to explore for minerals on his placer claim. The material provided with his application to the Board discloses that he provided Mr. Stafford with notice of his intended use of the road.

[6] In *Imasco, supra*, the Court of Appeal found that an “existing road” within the meaning of the *Mining Right of Way Act* is a road that is built under statutory authority. If it cannot be demonstrated that the road over which a recorded holder seeks access was built under statutory authority, then the Board does not have jurisdiction to resolve issues between the parties respecting the recorded holder’s use of a road.

[7] In *Imasco*, 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 the Vonks. When the Vonks purchased the property, they declined permission for Imasco to continue to use the road. Imasco applied to the Surface

Rights 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 to 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. On an application for judicial review, the Supreme Court upheld the Board's decision. On further appeal, the Court of Appeal also upheld the Board's decision. The Court of Appeal determined 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."

[8] The Court of Appeal's interpretation of the words "existing road,...whether built under this or another Act" in section 10(1) of the *Mineral Right of Way Act* is binding upon this Board.

[9] Mr. Amey sought to distinguish the *Imasco* decision on the basis of the differing circumstances between this case and that one. None of those differences operate to distinguish the case if it cannot be shown that the road in question was built under statutory authority.

[10] The road Mr. Amey seeks to use has two parts. The first part extends from Highway 20 to a gravel pit operation on the Lands. It is a fairly substantial and well maintained gravel road. It is used to access the gravel pit operated and to haul gravel from the pit. The rest of the road accessing the bench where Mr. Amey holds mineral tenure is extremely rough and not much more than vehicle tracks through pasture and wooded areas. It is used principally by farm equipment to access hay fields and pasture. Mr. Stafford's evidence was that the gravel road was constructed in 1971. He characterized the road as a private road. His evidence was he maintains both portions of the road himself. Clearly, the part of the road that accesses the gravel pit is maintained to a higher standard than the very rough road used to access the hayfields and pasture area. The gravel pit is operated as a business. On the basis of Mr. Stafford's acknowledgement that farming, ranching, and gravel operations are all industrial activities, Mr. Amey argued the whole of the road was industrial in nature and not a private road.

[11] The use of the road, and its characterization as industrial, commercial, or private is not the determining factor, however, to invoke the Board's jurisdiction

under section 10 of the *Mining Right of Way Act*. The determining factor is whether the road was built under the authority of an Act. Whether the road was built under the authority of an Act is not something that can be assumed or presumed, but something that must be shown to be so on the evidence. Even in *Imasco*, the road was clearly used for an industrial purpose, and had been so used by Imasco for many years. It could not be shown, however, that the road was built under statutory authority.

[12] Mr. Amey argued the road was built under the authority of the *Land Title Act*. As the *Land Title Act* gives Mr. Stafford the rights of an owner to the Lands, he argued that Act gives him the right to construct a road. I do not think a landowner's rights generally under the *Land Title Act* were what the Court of Appeal had in mind in interpreting the words of the *Mining Right of Way Act*. I am not aware of any specific authority in the *Land Title Act* that authorizes the construction of roads. Subject to any restrictions set out in law, a private landowner can use their property as they see fit including the building of roads for their own purposes. Such a road is not a road built under the specific authority of an Act. Indeed, it was contemplated in the *Imasco* case that the road could have been built as a private road for private purposes. The Court of Appeal was clearly of the view that the legislative intent in describing "an existing road,... whether built under this or another Act", was not to include private roads in the class of roads that could be used by a recorded holder.

[13] The evidence before me does not demonstrate that the road over which Mr. Amey seeks to access his placer claim, or any part of it, was built under the authority of the *Mining Right of Way Act* or any other statute. It is, therefore, in accordance with the interpretation of the Court of Appeal that is binding on me, not an "existing road" within the meaning of the *Mining Right of Way Act*, and not within the jurisdiction of this Board to resolve the issues respecting its use.

[14] During the course of his evidence, Mr. Amey indicated the road was just a preferred route and that access to his claim could be obtained over the Lands via another route. If such other route is a road, it is subject to the same interpretation set out in *Imasco* in that it must be demonstrated to be a road built under the *Mining Right of Way Act* or another Act. I have no evidence that any alternative access road was so built, and consequently the Board does not have the jurisdiction to determine the compensation payable for any alternative road. If it is not an "existing road", but access via a right of way that Mr. Amey seeks, then such access is covered in section 2 of the *Mining Way Act*, which provides that the *Expropriation Act* applies. The Surface Rights Board does not have jurisdiction under the *Expropriation Act*.

[15] I understand Mr. Amey does not agree with the Court of Appeal's interpretation of what constitutes an "existing road" in section 10(1) of the *Mining Right of Way Act*. However, until the Court of Appeal interprets the words

differently, or until the legislature amends the words of the *Mining Right of Way Act* to provide for a different result, the Court of Appeal's interpretation is the law and I am bound to follow it.

[16] It follows that the Surface Rights Board does not have jurisdiction to resolve the dispute between Mr. Amey and Mr. Stafford with respect to rights claimed by Mr. Amey to use the road on the Staffords' Lands to access his placer claim. This decision does not make any findings about the respective rights of Mr. Amey as a miner to access private land or of Mr. Stafford as a landowner. This decision merely finds that the Surface Rights Board does not have the authority to resolve this dispute with respect to Mr. Amey's use of the road on the Staffords' Lands to access his placer claim.

DATED: August 30, 2013

FOR THE BOARD



Cheryl Vickers, Chair