

**File No. 1822**  
**Board Order No. 1822-1**

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**December 5, 2013**

**SURFACE RIGHTS BOARD**

**IN THE MATTER OF THE MINING RIGHT OF WAY ACT,  
R.S.B.C., C. 294 AS AMENDED**

**AND IN THE MATTER OF**

**THE SOUTH WEST QUARTER OF SECTION 16 TOWNSHIP 26 RANGE 21  
WEST OF THE 5<sup>TH</sup> MERIDIAN KOOTENAY DISTRICT EXCEPT PART  
INCLUDED IN PLAN 11504**

**(The "Lands")**

**BETWEEN:**

**Nola Milum**

**(APPLICANT)**

**AND:**

**SMC Silicon Metaltech Corporation**

**(RESPONDENT)**

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**BOARD ORDER**

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Heard: By way of written submissions closing November 12, 2013  
Appearances: Robert Gunnarsson, Barrister and Solicitor, for the Applicant  
Maggie Melnychuk, Barrister and Solicitor, for the Respondent

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## **INTRODUCTION**

[1] The Applicant, Nola Milum (Mrs. Milum), is the sole owner of the Lands described as the South West ¼ of Section 16 Township 26 Range 21 West of the 5<sup>th</sup> Meridian Kootenay District except part included in Plan 11504. Mrs. Milum owned the Lands jointly with her late husband, Patrick Milum, since 1986 until Mr. Milum's passing in August 2012. Before Mr. and Mrs. Milum owned the Lands, they were owned by Mr. Milum's parents, Richard (also known as Dick) and Alice Milum, whose title to the Lands was registered in February 1978.

[2] The Respondent, SMC Silicon Metaltech Corporation (SMC) is a BC mining corporation registered in 1988. Hubert Miller, also known as Bert Miller (Mr. Miller), is the sole officer and director of SMC. Mr. Miller is also the sole shareholder, officer and director of Nugget Contracting Ltd. (Nugget), a BC mining corporation registered in 1985. Nugget has been the sole shareholder of SMC since 2004.

[3] Since 1989, SMC has held a mining lease mineral tenure over an area to the east of the Lands covering parts of Section 16, Township 26, Range 21, West of the 5<sup>th</sup> Meridian and Section 9, Township 26, Range 21, West of the 5<sup>th</sup> Meridian (the Mine Area). Prior to that, from 1979 to 1989, Warren Hunt (Mr. Hunt) held the registered mining claims to the Mine Area. Mr. Miller and/or Nugget have been contracted or sub-contracted to carry out mining activities in the Mine Area since prior to 1985. The mining activities have involved utilizing access to the Mine Area across the Lands.

[4] For many years, the parties agreed to terms of access and compensation for access by SMC and its contractors via a Road across the Lands more fully described below. There has never been a right of way securing use of the Road registered against the title to the Lands. In 2012, a dispute arose arising from Mr. Miller's desire to secure more permanent access via the Road as part of an agreement to transfer his mineral tenure and other properties to a third party. Mrs. Milum is willing to enter into an agreement with Mr. Miller for his use of the Road on reasonable terms but is not willing to agree to a statutory right of way being registered against title, as requested by Mr. Miller. SMC has commenced expropriation proceedings in accordance with the *Mining Right of Way Act* to expropriate a right of way over the Road to access its mineral leases. Mrs. Milum

submits that use of roads such as the one in issue in this case should not be subject to the expropriation process.

[5] Mrs. Milum seeks the assistance of the Board pursuant to section 10(4) of the *Mining Right of Way Act* to settle the compensation payable to her by the Respondent for its use of the Road. SMC submits the Board does not have jurisdiction arguing the Road is not an “existing road” within the meaning of section 10(1) of the *Mining Right of Way Act*. Mrs. Milum submits the Road is the type of road the legislature had in mind in enacting section 10(1) of the *Mining Right of Way Act* allowing for the use of “existing roads” on payment of compensation, and for the Board to decline jurisdiction would be to thwart the legislative intent.

[6] Section 10(1) 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.

[7] Section 10(3)(b) provides that if the road was not built under the *Mining Right of Way Act*, the recorded holder must compensate the owner of the road in an amount agreed between the parties. Section 10(4) provides that if the parties cannot agree, on the application of one of the parties, the Surface Rights Board has jurisdiction to settle the terms of compensation and the terms of the settlement are binding on the parties.

[8] The Court of Appeal, in *Imasco Minerals Inc. v. Vonk*, 2009 BCCA 100, has found that an “existing road” within the meaning of the *Mining Right of Way Act*, over which the Board has jurisdiction to settle compensation for use by a recorded holder, is a road that was constructed under an enactment. The Board has recently concluded it is bound to follow the Court of Appeal’s interpretation in circumstances where it has not been demonstrated that the existing road was constructed under an enactment (*Amey v. Stafford*, SRB Order 1814-1, August 30, 2013; see also *Comox Valley Gold Adventures Inc. v. TimberWest Forest Corp.*, SRB Order 1811-1, November 27, 2013).

[9] Mrs. Milum submits that in this case, there is evidence to support a finding that the Road, or at least a large portion of it, was constructed by BC Hydro under the authority of an enactment, and that the Road is, therefore, an “existing road” within the meaning of section 10(1) of the *Mining Right of Way Act*. SMC submits that even if a portion of the Road was constructed by BC Hydro, the whole of the Road that it seeks to expropriate in other proceedings is not an “existing road”.

## ISSUE

[10] The issue is whether the Road across the Lands is an “existing road” within the meaning of section 10(1) of the *Mining Right of Way Act*, or in other words, to determine whether the Road was constructed under an enactment. If it cannot be demonstrated the Road was constructed under an enactment, the Board does not have jurisdiction to settle compensation for its use (*Imasco, supra*).

## FACTS

[11] The Road in issue in these proceedings traverses the Lands, generally in a north easterly direction, from the western boundary just south of Horse Creek to the eastern boundary just south of Horse Creek. From the western boundary of the Lands, the Road follows Horse Creek in a northeasterly direction and crosses a BC Hydro right of way before doubling back about half way across the Lands along the eastern side of a gravel pit. It then turns once again to continue in a northeasterly direction to the eastern boundary of the Lands.

[12] At the eastern boundary of the Lands, the Road connects to a road that extends to the Mine Area. At the western boundary of the Lands, the Road connects to a road traversing across the adjacent property, currently owned by Babe Jean (Mrs. Jean). This road in turn connects to a road on adjacent property to the southwest currently owned by Merrill and June Graham (the Grahams), which in turn connects to a road traversing property owned by Mr. Miller. At the south-west corner of Mr. Miller’s land, the road crosses Highway 95 pursuant to authorization issued to Mr. Miller in 1985, connecting to another property also owned by Mr. Miller described as Plan 12946 on which Mr. Miller has a silica crushing plant. The Road is, therefore, part of a longer road extending from the Mine Area to the silica crushing plant.

[13] Prior to 1985, Mr. Hunt provided authorization to a company known as Hanna Mining Ltd. (Hanna Mining) to carry out mining activities on the Mine Area. Hanna Mining hired Mr. Miller to mine the Mine Area, and Mr. Miller hauled ore from the Mine Area to a silica plant in Wenatchee, Washington.

[14] From 1979 to 1985, Dick Milum, had an agreement with Hanna Mining allowing Nugget’s trucks to cross the Lands. Mrs. Milum’s evidence is that when her father-in-law acquired title to the Lands, there was already a road crossing the Lands from Hough Road in the south-west corner of the Lands, north towards Horse Creek, and then north-east along the creek to the site of a gravel pit and the BC Hydro power line which crosses the Lands from north to south. Her evidence is that “at some point” the pre-existing road was extended all the way

across the Lands and it was used to haul silica from the Mine Area. I find this pre-existing road to be the access that Nugget and Mr. Miller used prior to 1985.

[15] In 1985, Hanna Mining ceased to operate, and from 1985 until 1989, Mr. Hunt authorized an American company known as Silicon Metaltech Incorporated (SMI) to carry out mining activities on the Mine Area. SMI subcontracted with Nugget to do all of the hauling to and from the Mine Area. When SMC was incorporated in 1988, Mr. Hunt authorized SMC to carry out all of the mining activities in the Mine Area in place of SMI. SMC in turn subcontracted to Nugget.

[16] Mr. Miller's evidence is that in 1985, he negotiated on behalf of SMI and Nugget, with Patrick Milum, and the adjoining landowners, then Raymond Jean and Alexander Penno, to allow him to build and use a road so that he could cross over their respective properties to get to and from the Mine Area for the purpose of carrying out, hauling, and other mining work in the Mine Area. The portion of this road that traverses the Lands is the Road in issue in these proceedings. Mrs. Milum disputes that Mr. Miller built the Road in its entirety across the Lands. Her evidence is that in 1985, she and her husband entered into an agreement with Mr. Miller, permitting him to improve and maintain a portion of the existing road and to build a short connector to connect it to a road, which was to be built across the adjacent land then owned by Raymond Jean, and now owned by Mrs. Jean.

[17] The connector enabled Mr. Miller to bypass Hough Road and to provide a direct route from the Mine Area to the silica crushing plant. The improvements to the pre-existing road and the addition of the connector also enabled the use of larger trucks for hauling material from the Mine Area with greater loads than are permitted on public roads or that could have been safely transported on the pre-existing road.

[18] As to the origin of the pre-existing road, the evidence of Sandra Van Bolhuis supports that of Mrs. Milum that, at least as to part of that road, it provided access to BC Hydro power lines. Ms. Van Bolhuis, the daughter of Mrs. Jean, grew up during the 1960's and 1970's on the property now owned solely by Mrs. Jean. Ms. Van Bolhuis recollects that there was always a road through the Milum Lands to access a BC Hydro power line along the east side of the Columbia Valley. Her evidence is that the entrance for the road was at the end of Hough Road in the corner of her parents' property, and that the road travelled through the Lands towards the creek and then followed the creek to the hydro line. Ms. Van Bolhuis' evidence is that "at a later date" Mr. Miller extended the road from the hydro lines to the silica mine.

[19] Mr. Miller does not dispute the existence of a previous access road built by BC Hydro in the location described by Mrs. Milum and Ms. Bolhuis, that is from

Hough Road, north to Horse Creek, and then along Horse Creek to the power lines.

[20] I find a portion of the Road existed prior to 1985 as a BC Hydro access road, and that pursuant to an agreement with the Milums that portion of the Road was improved to a standard suitable for hauling loads from the Mine Area that otherwise would be too heavy for the pre-existing road and the public Hough Road. At the same time, a new section of road was constructed on the Lands to connect the upgraded portion of the pre-existing access road to a new road constructed across the adjoining properties, also for the purpose of carrying heavy loads from the Mine Area. The evidence is not clear as to when the portion of the Road from the hydro right of way past the gravel pit and on to the eastern boundary of the Lands was either initially constructed or improved to a level capable of carrying Nugget's trucks. However, I find it must have been initially constructed by 1979 at the latest, in order to provide access by Hanna Mining and its contractors to the Mine Area. I find it was likely upgraded in 1985, at the same time the rest of the Road was upgraded, the connector was built, and the other portions of road were built through the neighboring properties to facilitate access by Nugget from the Mine Area to the silica plant.

[21] Nugget began using the Road to access the Mine Area, as an agent and contractor of SMI with the authority of Mr. Hunt in mid-1985 and continued to use the Road as a contractor of SMC until 1999 for the purpose of mining activities at the Mine Area. Nugget's use of the Road during this time was pursuant to a private road use agreement with the Milums. In 1999, the plant in Wenatchee closed and mining in the Mine Area ceased. Also in 1999, Nugget entered an agreement with the Milums to mine gravel for them from a gravel pit located on the Lands. Nugget has been mining the gravel pit and using the Road for this purpose since 1999. Nugget has also used the Road since 1999 to haul stockpiled material from the Mine Area to the silica crushing plant. More recently, it has used the Road to access the Mine Area to carry out exploratory drilling, extraction and geologic testing with a third party company to determine if the Mine Area is stable and suitable for other types of mining.

## **ANALYSIS**

Is the Road an "existing road" within the meaning of section 10(1) of the *Mining Right of Way Act*?

[22] As indicated above, an "existing road" within the meaning of section 10(1) of the *Mining Right of Way Act* is a road constructed under an enactment (*Imasco, supra*). Mrs. Milum submits that as a portion of the Road was previously a BC Hydro access road, it was built under statutory authority.

[23] The evidence is that in 1965 BC Hydro was granted a right of way across the Milum Lands for a power line. The Indenture registered against the title to the Lands, and made among the Grantor and then owner of the Lands, the Director under the *Veterans Land Act*, and the Grantee, the British Columbia Hydro and Power Authority, gives BC Hydro the right in perpetuity “at all times to pass and repass along, over and upon the said land for any of the purposes aforesaid such rights not to be exercised unreasonably; and ... generally to do all acts necessary or incidental to the business of the Grantee in connection with the foregoing”. The “aforesaid” and the “foregoing” are: to construct and erect etc., towers and wires etc., for the transmission and distribution of electric energy and for telephone purposes along a right of way area; to clear the right of way; and to cut down trees outside of the right of way which are or may become dangerous to the things constructed and erected etc. Mrs. Milum submits this grant gives BC Hydro the right to travel over the Milum Lands and to build roads as necessary for the purpose of the power line project.

[24] When the right of way was taken and the Indenture was registered against the Lands in favour of BC Hydro, the statute giving BC Hydro the power to take an interest in private land was the *British Columbia Hydro and Power Authority Act, 1964*. Section 18 of that enactment authorized BC Hydro to expropriate real or personal property and to enter, take possession of, and use real or personal property, and “to erect, make or place thereon any structure, installation, excavation, or power plant” for any purpose related to the exercise of its powers. There is certainly no question that the right of way for the power lines was expropriated in accordance with the authority provided under this enactment. The expropriation authority does not specifically mention the construction of roads, and the Indenture does not actually expropriate land other than that required for the right of way. I am satisfied, however, that the statutory language is sufficiently broad to allow for the construction of roads for purposes related to the exercise of BC Hydro’s powers, and that the language of the Indenture is sufficiently broad to allow BC Hydro to pass over the whole of the land, against the title of which the Indenture is registered, and not just the expropriated portion. I accept, therefore, that the BC Hydro access road on the Lands was constructed under the authority of an enactment, namely the *British Columbia Hydro and Power Authority Act, 1964*.

[25] Only a portion of that access road, however, was improved and incorporated into the Road. The Road comprises not only the substantially improved section that was part of the pre-existing hydro access, but also the new connecting section to the adjoining property, and the improved previously existing section from the power line to the eastern boundary. I have no evidence that this eastern section of the pre-existing road was constructed under an

enactment, and I have no evidence that the connecting section of the Road was constructed under an enactment.

[26] The Road is part of a longer road constructed from the Mine Area to the silica plant, to a standard suitable for heavy loads beyond those permitted on public roads. I have no evidence that the whole of the longer road was constructed under an enactment. Rather the evidence is that, at least as to the Road and the other portions of road extending across the properties now owed by Mrs. Jean and the Grahams, those sections were constructed pursuant to private agreements. (I understand Mrs. Jean contests the validity of the agreement with her late husband and I make no findings in that regard.)

[27] I find that prior to construction of the Road, there was an access road on the Milum Lands initially constructed under the authority of an enactment. That road connected the BC Hydro right of way at a location just south of Horse Creek to Hough Road at the southwest corner of the Lands. A portion of that road was substantially improved in 1985 to allow larger trucks and heavier loads. Construction of the Road, therefore, involved substantially improving a portion of the BC Hydro access road, substantially improving the pre-existing section of road extending from the hydro right of way to the eastern boundary of the Lands, and constructing a new connector section to extend the improved portion of the hydro access road to the adjoining lot line for connection to a new road on the adjacent property. There is no evidence the pre-existing sections were improved under an enactment. Rather, the evidence is that the improvement was done pursuant to an agreement with the Milums.

[28] The Road in its three sections was part of the construction of a longer road between the Mine Area and the silica plant comprised of both new construction and significantly improved sections of pre-existing roads. The evidence does not support that the longer road, of which the Road is only a part, was constructed under the authority of an enactment.

[29] Although the middle section of the Road is comprised of improved pre-existing hydro access originally constructed under an enactment, there is no evidence that it was improved and incorporated into the Road pursuant to an enactment. Even if I were to agree that this middle section is an "existing road" within the meaning of the *Mining Right of Way Act*, I am unable to find that either the new connecting section or the improved pre-existing section east of the hydro lines is an "existing road". For the Board to assume jurisdiction to settle compensation respecting use of a portion of a road serves no useful purpose.

[30] I find the Road, in its entirety, was not constructed under the authority of an enactment.



**CONCLUSION**

[31] As I have found the Road was not constructed under an enactment, it is not an "existing road" within the meaning of section 10(1) of the *Mining Right of Way Act*. The Board, therefore, does not have jurisdiction to settle terms of compensation for Mr. Miller's use of the Road as requested by Mrs. Milum.

DATED: December 5, 2013

FOR THE BOARD



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Cheryl Vickers, Chair