SUPREME COURT OF YUKON

Citation: *Victoria Gold Corp v Yukon Water Board,* 2024 YKSC 49

Date: 20240925
S.C. No. 22-AP006
Registry: Whitehorse

BETWEEN:

VICTORIA GOLD CORP.

PETITIONER

AND

YUKON WATER BOARD

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Petitioner	Meagan Lang, Jana McLean and Sebastian Ennis
Counsel for the Respondent, First Nation of Na-Cho Nyäk Dun	Alexander DeParde
Counsel for the Intervenor, Yukon Water Board	Joanna Vince and Sydney Smith
Counsel for the Government of Yukon	Kimberly Sova

REASONS FOR DECISION

Overview

[1] The Petitioner, Victoria Gold Corp., was the owner and operator of the Eagle Gold Mine. It was located in central Yukon, close to Mayo, in the traditional territory of the First Nation of Na-Cho Nyäk Dun ("FNNND").

[2] As a part of its mining operations, Victoria Gold held a water licence, which was issued by the Yukon Water Board. As a part of the water licence, Victoria Gold was

required to have a Reclamation and Closure Plan ("RCP") and provide security for restoration and remediation of the mining site. The Water Board conducted a review of the RCP every two years and would determine if the security for restoration and remediation of the mining site should be adjusted. If so, it would provide an order requiring Victoria Gold to provide security in accordance with its decision.

[3] In 2020, the Water Board began a review of Victoria Gold's RCP. In 2022, at the conclusion of its review, it ordered Victoria Gold to provide approximately $105,000,000 in security.

[4] Victoria Gold sought leave to appeal the Water Board's decision to order that amount of security, alleging the Water Board breached procedural fairness and its decision was inadequate. I heard the application for leave to appeal and the merits of the appeal on May 24-25, 2024. The parties involved were Victoria Gold, the Water Board, FNNND, and the Government of Yukon.

[5] Then, on June 24, 2024, a major heap leach failure occurred at the Eagle mine site. About 4 million tonnes of ore material slid down the edge of the heap embankment; it generated a slide that pushed it outside the containment of the heap leach facility. Heap solution, containing cyanide and other contaminants, drained through the heap into the ground and into a nearby creek. As a result of this event, and Victoria Gold's subsequent response to the heap leach failure, the Government of Yukon brought a petition to put Victoria Gold into receivership. The Government of Yukon's petition was granted on August 14, 2024 (*Government of Yukon v Victoria Gold Corp.* (15 August 2024), Ont Sup Ct, CV-24-00725681-00CL, (endorsement with reasons)). These events have rendered Victoria Gold's appeal moot. I will, however, decide one issue raised with

regard to procedural fairness. Additionally, in my opinion, none of the parties, either separately or cumulatively, provided a full response to Victoria Gold's arguments. I will discuss how that occurred and provide suggestions so that, in the future, judicial review applications and appeals of administrative decisions are fully argued.

Findings

[6] I find that the Water Board breached procedural fairness by not providing Victoria Gold with documents it had before it during the proceedings.

Issues

A. Should the appeal be heard?

B. Did the Water Board breach procedural fairness by not giving documents to Victoria Gold?

C. What steps may be taken so judicial review applications and administrative decision appeals are fully argued?

Analysis

A. Should the appeal be heard?

[7] In this case, I have discretion about whether to decide the merits of the appeal. This is because a party seeking to appeal a decision or order of the Water Board must first obtain leave from the court (s. 26, *Waters Act*, SY 2003, c 19). As well, the appeal is moot. I have, however, concluded that it is appropriate to grant leave to appeal and will decide whether the Water Board breached procedural fairness by not disclosing to Victoria Gold all the documents it relied on in reaching its decision.

Law

[8] The court may consider a number of factors in determining whether to grant leave to appeal. In the case at bar, the factor most relevant is whether there is a clear benefit to be derived from the appeal (*Utilities Consumers' Group v Yukon Utilities Board*, 2006 YKCA 2 at para. 17).

[9] Turning to the question of mootness, generally, the court will only consider matters in which its decision will resolve a controversy between the parties or will affect their rights. On the other hand, it should not hear matters that are moot, that is, where there is no longer a tangible and concrete dispute between the parties (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353).

[10] There are exceptions to this rule, however. The court may, for instance, decide a moot case where some of the parties continue to have an interest in the outcome of the proceedings.

[11] In my opinion, in the case at bar, the analysis is similar for both whether I should grant leave and whether I should exercise my discretion to decide the appeal although it is moot. I will therefore consider both issues together.

Analysis

[12] Victoria Gold raised a number of issues which would have had an impact only on its interests. One issue, however, went beyond the particulars of the case. Victoria Gold alleged that the Water Board breached procedural fairness by not disclosing to Victoria Gold expert evidence it had before it when reviewing the RCP. It was uncontroverted that the Water Board received expert reports which it did not disclose to Victoria Gold. The Water Board states its decision not to disclose the reports was because it has a

policy not to disclose reports obtained from external experts to parties in proceedings before it. A decision here, then, would have not only affected Victoria Gold, but could affect more generally the Water Board's policy about disclosure to parties of expert evidence it receives. For this reason, it is worthwhile deciding this issue.

B. Did the Water Board breach procedural fairness by not giving documents to Victoria Gold?

[13] I conclude that the Water Board breached the procedural fairness it owed to Victoria Gold by not providing Victoria Gold with information the Water Board had from an external expert.

Facts

[14] On October 23, 2020, as required under the water licence, Victoria Gold provided an update to its RCP and security estimate to the Water Board. On April 13, 2021, the Water Board, along with the Yukon government, issued a document containing a list of questions for Victoria Gold to respond to about its RCP and security estimate. Victoria Gold provided a response by November 5, 2021.

[15] The Water Board also retained a technical consultant, Northland Earth and Water Consulting Inc., to provide it with a review of Victoria Gold's estimates. Northland provided the Water Board with an analysis of Victoria Gold's submissions on December 5, 2021, and, following discussions, on December 10, 2021, a document outlining requests for information that could be issued to Victoria Gold.

[16] The Water Board did not give the analysis to Victoria Gold but provided it with the follow up questions Northland had suggested on December 17, 2021. Victoria Gold did not provide answers within the timeframes required by the Water Board, indicating to the Water Board that it required more time to do so.

[17] Northland then provided the Water Board with a further analysis, dated March 25, 2022, the "Review of IR#1 Responses and Associated Documents". The Water Board did not give this document to Victoria Gold (the documents from December 5, 2021, December 10, 2021 and March 25, 2022 are collectively referred to as the "Northland Documents").

[18] There is no dispute that the Water Board used the Northland Documents in coming to its decision.

Law

[19] Procedural fairness is a variable concept; the degree of procedural fairness a decision-maker owes to parties depends on the decision-making context and issues involved. Nevertheless, unless otherwise specified in the legislation, at a minimum, parties are entitled to know all the adverse material facts being considered by the decision-maker and have a right to respond to the facts (*Gladman v Canada (Attorney General*), 2017 FCA 109 at para. 40).

Arguments

[20] Victoria Gold submits that decision-makers are required to disclose extrinsic expert evidence they have to parties in a timely fashion. Parties must also be given the chance to respond to the materials. The Northland Documents contained substantive opinions and information about issues that were central to the question of how much security should be ordered. The Water Board relied heavily on the Northland Documents in determining the security order. It was therefore obligated to provide the Northland Documents to Victoria Gold and give it an adequate opportunity to respond.

[21] The Water Board submits that administrative tribunals are entitled to rely on staff reports in the decision-making process (*Sommers v Ontario Civilian Commission on Police Services,* [2005] OJ No 1838 at para. 28 ("*Sommers*")). Decision-makers are also not obligated to disclose staff reports to parties to the proceedings. The Water Board states that it treats the reports it obtains from external experts it hires in the same manner as staff reports. Thus, it is not required to provide to parties the full reports the Water Board's external experts produce.

[22] The Water Board furthermore submits that its obligation is to release to parties "reasonable information" provided by external experts (*Silverthorne v Ontario College of Social Workers and social Services Workers*, [2006] OJ No 207 at paras. 18-19 (*Silverthorne*)). In the review of the RCP, the Water Board asked Victoria Gold to address almost all of Northland's suggested requests for information. The Water Board submits that it fulfilled its procedural fairness obligations in providing Victoria Gold with the requests for information.

[23] FNNND submits that Victoria Gold was owed only minimal procedural fairness. It and the Water Board also argue that the onus was on Victoria Gold to provide an RCP and security estimate that was complete; the Water Board was under no obligation to highlight deficiencies or provide advance notice of a negative decision (*Chowdhury v Canada (Citizenship and Immigration)*, 2019 FC 1417 at para. 10). FNNND also raises the concern that the procedural fairness requirements cannot be so onerous that the RCP review process becomes bloated, thus delaying the provision of adequate security.

Analysis

[24] In general, the first step in assessing whether a decision-maker breached procedural fairness is to determine the level of procedural fairness required. In the case at bar, however, this is not necessary. A party's right to know the adverse material facts the decision-maker has before them and to respond is a basic element of procedural fairness. The *Waters Act* does not derogate in any way from that principle. Thus, even if Victoria Gold was entitled to minimal procedural fairness, it was entitled at least to know the case against it, and the chance to respond.

[25] The Water Board's argument that it fulfilled its procedural fairness obligations is not convincing. First, *Silverthorne*, which it relies upon for the proposition that it is obligated to provide only "reasonable information", is distinguishable. *Silverthorne* concerned the professional regulation of social workers. The "reasonable information" standard, moreover, was set by legislation. The Water Board operates in a different context. Its procedural fairness obligations with regard to disclosure of documents or information is governed by the common law. *Silverthorne* and the "reasonable information" standard are not applicable to the Water Board.

[26] Second, the Water Board incorrectly describes the principles arising from *Sommers*, the other case it relies upon. *Sommers* does state that the decision-maker in that case was not required to disclose an employee's summary of the case to the parties. Its analysis was limited on this issue, however. It also referred to *Toshiba Corporation v Canada (Anti-Dumping Tribunal)*, [1984] FCJ No 247 ("*Toshiba*"), in coming to this decision. *Toshiba*, in turn, provides the parameters for the rule that an employee's report does not need to be disclosed. It states that it is not necessary to

disclose a staff report which contains only matters of public knowledge or is based on facts that are later brought to the attention of parties, with a chance to reply (at para. 5). In accordance with *Toshiba*, therefore, the determination of whether a document should be disclosed in not based on who produces it, but whether it contains new information that is not otherwise provided to the parties.

[27] Under the common law, the rule is simple: procedural fairness requires a decision-maker to disclose to the parties any adverse material facts it has before it and give the parties a chance to respond, regardless of the source of information.

[28] Here, the Northland Documents analysed Victoria Gold's submissions and information and provided alternative ways and numbers to calculate security costs. This was adverse material information that should have been disclosed to Victoria Gold; and Victoria Gold should then have been given adequate time to respond.

[29] The FNNND and Water Board's submission that the onus was on Victoria Gold to provide a complete and accurate RCP, and that, when it failed to do so, the Water Board was entitled to make reasonable assumptions to reach an appropriate security is problematic for two reasons. First, that is not what occurred. The Water Board did not make the best decision it could on the materials provided by Victoria Gold. Rather, it sought additional information and then based its decision on that information. While it was entitled to do so, it was still required to disclose the information to Victoria Gold and provide Victoria Gold with the opportunity to reply.

[30] Second, it is not clear that the case law FNNND and the Water Board rely on is applicable here. In the cases FNNND and the Water Board refer to, the decision-maker could either accept or reject the applicant's application; the applicant would thus either

be permitted to do something, or not. Here, however, the Water Board's responsibilities were not equivalent. It could not simply reject Victoria Gold's submissions and therefore deny its application; it was required to make an order for security that was based on facts. Whether the facts were drawn from an external expert, an employee, or from its own expertise, the Water Board was required to put the facts to Victoria Gold; and Victoria Gold should have been given a chance to respond before the decision was made.

[31] This does render the Water Board's task more difficult if it determines that a water licence holder is not providing sufficient information to allow it to make an order for security. However, I will not weigh in on the Water Board's options when this occurs. In this case, although there are suggestions in some of the documentation, such as from Northland, that Victoria Gold's RCP materials were lacking, the Water Board did not come to this conclusion in its decision, nor is there any indication that its decisions about disclosure were made as a result of this concern.

[32] Finally, I agree with FNNND's submission that the Water Board must be able to issue security orders in a timely fashion. Again, however, the Water Board did not state in its decision that concerns about delay prompted it to act as it did.

[33] I therefore conclude that the Water Board was required to provide to Victoria Gold the Northland Documents and give Victoria Gold a chance to respond. It breached procedural fairness when it did not do so.

C. What is the role of the parties in an appeal of a decision of the Water Board?

[34] Four parties took part in the appeal. These parties were Victoria Gold and three respondents: the Water Board, FNNND, and the Government of Yukon. The three

respondents participated in the proceedings to varying degrees. Because the Water Board was the decision-maker, the parties agreed to an order prohibiting the Water Board from making arguments on the merits of the appeal. FNNND, properly, represented its own interests and provided arguments on only some issues. The Government of Yukon took no position. No party responded to the entirety of the appeal. As a result, some of the issues were not thoroughly argued and the public interest was not advanced at all times.

[35] It seems that the Water Board attempted to fill some of the gaps created while still abiding by the order restricting its role. It did this by providing arguments about procedural fairness and the merits of the decision while at the same time taking no position on the relief Victoria Gold sought. In doing so, it inadvertently became the principal respondent to the appeal.

[36] Having the Water Board as the principal respondent was, however, unsatisfactory for two reasons. First, despite its best intentions, the Water Board did make submissions that went beyond what was permitted by the order. At the same time, the Water Board could not fully respond to Victoria Gold's arguments. Thus, some of the issues Victoria Gold raised were not fully canvassed.

[37] Second, the order limiting the Water Board's role was in place to protect the principles of impartiality and finality. Impartiality is an important component of decision making. When a decision-maker takes part in a judicial review or appeal, there is a danger that its submissions will "… descend too far, too intensely, or too aggressively into the merits of the matter", thus affecting the decision-maker's impartiality should the matter be remitted to it for reconsideration (*Ontario (Energy Board) v Ontario Power*

Generation Inc, 2015 SCC 44 at para. 50, citing *Canada (Attorney General) v Quadrini*, 2010 FCA 246 at para. 16). Finality is the principle that a decision-maker should not be permitted to augment or change its decision after it is delivered. A decision-maker who makes submissions on the merits of its decision may seek to supplement a deficient decision with new arguments on appeal (*Ontario (Energy Board)* at para. 64). Limiting the decision-maker's involvement prevents this from occurring.

[38] A decision-maker's role on appeal or judicial review is not always as limited as the order provided here; the court has discretion in determining the nature of the submissions the decision-maker can advance (*Ontario (Energy Board*) at para. 59). As a practical matter, a decision-maker who seeks to provide arguments on the merits should raise the issue early so that its involvement can be decided before the hearing. Additionally, a decision-maker who is permitted to make substantive arguments should not provide new explanations for its decision. Rather, it is the decision or record that must provide the decision-maker's rationale. The decision-maker should also not make statements about whether a decision was made fairly or was based on all the evidence. Assurances from the decision-maker after-the-fact are not helpful and can lead to concerns about partiality (*Ontario (Energy Board)* at para. 72).

[39] In the end, however, oftentimes the principal respondent should not be the decision-maker. Here, in my opinion, the Government of Yukon was ideally suited to respond to the appeal. It is the party best able to represent the public interest. Moreover, similar to the Water Board, it granted a quartz mining licence to Victoria Gold for the Eagle mine, which included an RCP and security order that was reviewed every two years. For the RCP and security order under appeal, as well, the Government of

Yukon and the Water Board worked together during part of the process. In granting licences, the Government of Yukon and the Water Board are not required to use the same procedures and their jurisdiction is different. However, the Government of Yukon could, it seems to me, provide more insight on the issues here because of its own role as regulator.

[40] The Government of Yukon's position was not discussed at all during the proceedings. My comments should not, therefore, be taken as criticizing the Government of Yukon's decision to take no position in the appeal. Nevertheless, as government represents the public interest in circumstances such as these, the Government of Yukon should take part in judicial review applications and appeals of decisions by administrative bodies where warranted.

Conclusion

[41] I therefore conclude that the Water Board breached procedural fairness by not providing Victoria Gold with the Northland Documents along with the opportunity to respond to them. As the matter is moot, I will not make any order.

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WENCKEBACH J.