

# SUPREME COURT OF YUKON

Citation: *Fellhawk Enterprises Ltd v Yukon Water Board*  
2023 YKSC 42

Date: 20230718  
S.C. No.: 22-AP007  
Registry: Whitehorse

BETWEEN:

FELLHAWK ENTERPRISES LTD.

PETITIONER

AND

YUKON WATER BOARD  
in its own capacity and as CHIEF OF PLACER LAND USE

RESPONDENT

Before Justice A. Kent

Counsel for the Petitioner

Meagan Lang

Counsel for the Respondent, Yukon Water Board

Joanna Vince

Counsel for the Government of Yukon

Julie DesBrisay

## REASONS FOR DECISION

### Introduction

[1] Fellhawk Enterprises Ltd. (“Fellhawk”) is owned and operated by Derek Fellers and his mother. Fellhawk has been in the business of placer mining since 1974 when Mr. Fellers’s father started the company. To do placer mining, a water licence and a land use approval are required. Both are issued by the Yukon Water Board (the “Board”). Fellhawk holds two placer claims on the North Henderson Creek in the Dawson Mining District. H.C. Mining Ltd. (“H.C.”) holds 53 placer claims, 46 of which are included in a water licence and mining land use approval issued in June 2016 for a 10-year term.

[2] The 53 H.C. claims and the two Fellhawk claims make up a block of claims which Fellhawk has worked for three years with the approval of H.C. Because H.C.'s claims are set to expire in 2025, Fellhawk made an application for a water licence and land use approval from the Board. H.C. gave written consent to Fellhawk's application. Both the water licence and the land use approval were refused. Fellhawk applies for judicial review of the denial of the land use approval and applies for leave to appeal and appeals the refusal of the water license.

[3] Since 2013, the Board has handled between 100 and 200 applications for land use approval. This is the first time there has been a judicial review of a decision. There have been approximately the same number of applications for water licences. There have been a couple of times when those decisions have been appealed. That tells me that the Board is a busy Board, its process generally seems to be working and its decisions valued.

### **Land Use Approval**

[4] Pursuant to s. 99(5) of the *Placer Mining Act*, SY 2003, c 13 ("*PMA*"), the Yukon government transferred the role of Chief of Placer Land Use to the Board. As a result, the Board not only decides on water licences but also land use approvals. Section 100 of the *PMA* sets out the purpose as being "to ensure the development and viability of a sustainable, competitive and healthy placer mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon and respects the aboriginal and treaty rights referred to in section 35 of the *Constitution Act*, 1982".

[5] Section 9 of the *Placer Mining Land Use Regulation*, OIC 2003/59 (the “*Regulation*”), passed pursuant to *PMA* sets out the factors that the Board must consider when deciding whether to issue a land use approval. Those include:

- whether the operation may cause adverse environmental or socio-economic effects;
- whether the operation may have adverse effects on existing or asserted aboriginal or treaty rights;
- whether the operation as set out in the operating plan will appropriately mitigate any adverse effects.

[6] In the Board’s Operations and Administration Manual, the Board sets out some guiding principles including considering the precautionary principle; protecting public health and safety; issuing licences and approvals that are clear, enforceable and administratively consistent; avoiding, minimizing and mitigating adverse environmental effects from the water licences and approvals it authorizes; and considering the impacts on other applicants and authorized water users.

[7] On its website, the Board has a Frequently Asked Questions (“FAQ”) page which includes a portion about overlapping authorizations. It says:

Will the Board issue a water use licence for a placer operation if a water licence has already been issued to someone else for the same placer grants?

The Board will consider an application that overlaps on grants where there is an existing water use licence; however, applicants must provide a letter of agreement with the existing Licensee and provide details/scheduling to show how the two operations will operate at the same time. With this information, the Board will make the final decision whether to approve the second licence.

### **The Water Licence**

[8] The *Waters Act*, SY 2003, c 19 (the “WA”), directs the Board not to issue a water licence unless the application satisfies the Board that the use of waters of the deposit of wastewater does not adversely affect the use of waters by an existing licensee or by any other applicant who may have precedence over the applicant (s. 12(4)(a)(i)(A)).

### **The Fellhawk Application**

[9] Fellhawk submitted its applications in October 2021. On July 17, 2022, the Board denied both. Fellhawk’s applications were paper-based with no hearing. Fellhawk identified H.C. as the nearest upstream and downstream water user. It provided H.C.’s written consent for Fellhawk’s application and H.C.’s written agreement to operate separately from Fellhawk and its confirmation that its operations would not overlap with Fellhawk’s operations.

[10] The Board received interventions from two parties: the Yukon government and Department of Fisheries and Oceans (“DFO”) of the Federal government. The Yukon government said that so long as Fellhawk followed the approved operating plan and complied with all applicable legislation, it had no concerns.

[11] DFO had two concerns, one of which was resolved with further information. However, an ongoing concern was the issuance of a second water licence on claims that were already licensed. Even though H.C. had agreed to Fellhawk’s operation on the same claims and the two operators planned to separate their operations by five miles, DFO was concerned first, that the agreement from H.C. could be rescinded at any time and second, that the two could in fact end up working on the same ground. DFO was concerned that monitoring of the activity would be difficult and there may be work done beyond what was permitted.

[12] Because of these concerns, DFO suggested that there be confirmation that the two operations be kept separate, there would be no shared infrastructure and that both operators provide pre-season and post-season reports on their activities in terms of where they worked and what work took place.

[13] During the period that the Board was considering the applications, they made two requests for further information from Fellhawk. The first included the following:

I note that it appears that 46 out of the 55 claims in your application overlap with another active licence (PM15-088) and mining land use approval (AP15088). Please provide a rationale as to why it is necessary to have this overlap.

[14] Fellhawk's responded on October 24, 2021, as follows:

The necessary overlap is to allow for the two companies to work contiguously in the North Henderson Creek valley. The two operations work differently, and will remain separate geographically and temporally. Scheduling will allow for FellHawk Enterprises to explore and develop the creek at the upper end, while HC Mining would like to keep the claims as part of their larger license in the creek valley as an option for future years, while they are currently working further down the creek successfully. HC Mining is aware of FellHawk plans for the claims as laid out in this application and have (sic) signed an agreement for the proposed work to advance. The two operations operate in a different manner and in different areas of the creek with communication and agreement between the two parties.

[15] The second request was made on November 8, 2021. It began with a reference to the Board's manual referred to above, and particularly the portion that says that a guiding principle is that its actions and decisions including issuing licences that are clear, enforceable, and administratively consistent. It went on to say that the Board's preference was to have only one approved operating plan due to potential for challenges with compliance and enforcement, and that it was reluctant to consider requests for approval where an approval already existed.

[16] It then requested five things so that it could “understand how the distinct operating plans will not conflict with each other”. Those five items were enhanced maps and site plans, a description of how the operations relate and whether there was shared infrastructure, what activities were to taking place concurrently, a detailed narrative about how the proposed operation would affect HC’s approved plan and additional information to help the Board understand the potential project effects in the area of overlap.

[17] In response, on November 19, 2021, Fellhawk provided a detailed map, and in response to the other questions, replied as follows:

- the two operations are separated by more than five miles, with an unlikely scenario developing where HC’s work would reach Fellhawk’s.
- there is no shared infrastructure.
- there will only be a 3-year overlap since HC’s license is set to expire in 2025.
- there will be concurrent activities until HC’s licence expires but the activities will be separated by 9 kilometres.
- a detailed narrative on how the proposed operation will affect HC’s plan which provided that:
  - the two approved plans will be responsible for their own work;
  - it would allow for water usage levels to more accurately reflect the separate operations individually and allow HC to work without having to worry about any changes;
  - it would allow for two separate approved operating plans for two separate areas with no geographic overlap on planned operations

where each company can be responsible for following their separate approved operating plans.

- as for additional information, Fellhawk stated HC's operation was 9 km downstream and focusing on work under a different licence but did occasionally test and prepare on the lower end of this license. The two operations had discussed and agreed upon these plans and terms.

[18] As set out above, in the Board's FAQ section of the website, it acknowledged that overlapping licences can be granted. At a November 3-4, 2021 meeting of the Board, minutes show that "Issues around overlapping licences were discussed; LO to request info from both operators on 'how they plan to operate together'. LO to provide wetland guideline to and request more wetland information from the applicant". There is no information about whether H.C. was ever contacted in relation to this direction from the board. During a March 2, 2022 meeting, the Board identified continuing concerns with overlapping authorizations and decided to request information from Compliance Monitoring and Inspections ("CMI") of the Government of Yukon regarding compliance and enforcement.

[19] CMI's response on April 28, 2022, indicated that there would be challenges monitoring the activities. It said that the two operators may operate close to each other, and it would be difficult to assign responsibility if problems arose. Therefore, CMI recommended that there be no overlapping approvals, but if the Board was inclined to approve them, the Board should identify which activities should occur and when they should occur.

[20] In response to CMI's concerns, Mr. Fellers sent an email to CMI which was then forwarded to the Board. The email said in part:

... Thank you Briar for your response on this issue and I do see the validity in your points and the reasoning behind them for enforcement but I would just like to say one thing. The upper end of Henderson creek where we are currently mining is about 200 feet wide and we are mining limit to limit not leaving anything behind or beside us, progressing up stream until either the pay drops off or we to the end of the claims in our lease. With this said I don't see any way possible that HC mining could ever mine anywhere near us even if he wanted too (sic), there is no where for them to go.

[21] During a June 2022 meeting of the Board to consider Fellhawk's application, it was noted that overlapping licences, while not common, were permitted.

[22] The Board did not approve the application for the land use plan because of the existing operating plan for H.C. on 46 of the claims. It said that "Overlapping operations has (sic) the real potential to cause issues with compliance and enforcement, which was a concern noted by both CMI and DFO". It also acknowledged the existence of an agreement between H.C. and Fellhawk, but said that "this could change or H.C. Mining Ltd. could rescind the agreement and exercise its right to mine on the 46 grants".

[23] The Board denied the application for the water licence. Citing s. 12 of the *WA*, the Board said that Fellhawk did not provide sufficient evidence to the Board that the proposed uses for the water that Fellhawk had identified "would not adversely affect, in a significant way, the use of waters by the existing licensee".

[24] The materials before the Board included two previous applications where there were overlapping claims. One was approved and the other was not. In the case where approval was not given, the existing licensee could not be contacted so there was no input from that party.

[25] During argument, counsel for Fellhawk also presented other applications where there were overlapping claims. Some were granted; one was refused because the overlapping claimholder was not informed of the application.

### **Judicial Review of the Land Use Decision**

[26] There is no dispute about the standard of review for the Board's denial of Fellhawk's application for land use approval. The standard is reasonableness.

[27] Fellhawk argues that the Board failed to follow the statutory regime. By s. 9 of the *Regulation*, the Board is required to determine adverse effects of the plan and consider whether the plan contains sufficient mitigation of any adverse effects. Here, Fellhawk alleges that the Board created a *de facto* prohibition that there cannot be overlapping licences. It says that the Board cannot do that.

[28] Further it argues that the Board failed to identify the adverse effects; all it did was speculate about what might happen. It also did not consider whether there was satisfactory mitigation of any adverse effects. It misapprehended the evidence before it including the enhanced information provided by the November 19 submission. It failed to appropriately consider past decisions or the impact upon Fellhawk.

[29] In response, the Board argued that it was a busy, specialized tribunal entitled to considerable deference. The entire package of materials from Fellhawk and the intervenors needed to be considered along with the process that was followed over the months that the applications was under consideration. The reasons are transparent and reasonable.

[30] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”), sets out the guiding principles for judicial review. In its opening, the majority confirms that the purpose of judicial review is to maintain the rule of law while giving

effect to legislative intent, and that there is a need to “develop and strengthen a culture of justification in administrative decision making” (para. 2).

[31] I need go no further into *Vavilov* to find that the Board’s decision is not reasonable. It speculated what could happen but gave no reasons why that speculation was possible or reasonable. This is in the face of a clear acknowledgement from both Fellhawk and H.C. that they would be operating separately and in the face of suggested mitigation approaches by both DFO and CMI. It did not explain why those possible mitigation approaches would not work.

### **Application for Leave to Appeal and Appeal of the Water License Decision**

[32] The Board does not object to Fellhawk’s application for leave to appeal. There is agreement between the parties that the standard of review for the Board’s denial of Fellhawk’s application for a water licence is correctness. The question is whether the reasons are adequate.

[33] Section 24 of the *WA* states the Board must issue written reasons. Fellhawk raises four errors that the Board made. The first is that there are no adequate reasons that articulate their process of analysis. It is not sufficient simply to set out the facts and arguments and then state a conclusion (*Vavilov* at para. 102).

[34] *Via Rail Canada Inc v National Transportation Agency (CA)*, [2001] 2 FC 25, explains what reasons need at para. 22:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its finding of facts and the principal evidence upon which those findings were based. **The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.** [citations omitted, emphasis added]

[35] Fellhawk argues that the Board failed to consider the evidence provided in Fellhawk's November response, it placed a burden on Fellhawk when it should not have, and it did not give adequate notice that it was not planning to follow past similar decisions.

[36] The Board argues that the decision is consistent with the length and analysis of prior decisions, it is a specialized decision maker which operated within the legislative framework that it was given. Considering the entire process, Fellhawk did not provide adequate detailed responses, thereby failing to meet its burden. On the sliding scale set out in paras. 23-27 of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, this Board provided adequate reasons for denying the water licence.

[37] In my view, the reasons for denying the water licence are not adequate. As with the land use approval, the Board engages in speculation in the face of Fellhawk's package of information, the consent of H.C. and proposed methods of mitigation by DFO and CMI. Speculation about what might happen in the future can be appropriate so long that as that speculation is accompanied by reasons why it is likely to occur, or even if it is less than likely to occur, why the risk that it could occur is significant. Here there is nothing.

### **Conclusion**

[38] The application for judicial review is granted on the land use approval, leave to appeal the water licence refusal is granted and the appeal is allowed. Both decisions are remitted back to the Board for reconsideration.