

# SUPREME COURT OF YUKON

Citation: *Victoria Gold (Yukon) Corp. v Yukon Water Board*,  
2022 YKSC 46

Date: 20220928  
S.C. No. 22-AP006  
Registry: Whitehorse

BETWEEN:

VICTORIA GOLD (YUKON) CORP.

PETITIONER

AND

YUKON WATER BOARD

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Petitioner

Jana McLean and  
Meagan Lang

Counsel for the Respondent

Richard A. Buchan

Counsel for the First Nation of  
Na-Cho Nyäk Dun, Interested Party

Nuri G. Frame and  
Marc Gibson, by video

Counsel the Government of Yukon,  
Interested Party

Elaine Cairns,  
Agent for Kimberly Sova

Yukon Conservation Society,  
Interested Party

No one appearing

## REASONS FOR DECISION

### Overview

[1] The applicant, Victoria Gold (Yukon) Corp., owns and operates the Eagle Gold Mine, which is located on the traditional territory of the First Nation of the Na-cho Nyäk Dun. It holds a quartz mining licence and a water use licence. Under the quartz mining licence, the Government of Yukon may order Victoria Gold to provide security, while

under the water use licence, the Yukon Water Board has the authority to order Victoria Gold to provide security. The purpose of security is to ensure proper closure of the site once the mining project is completed or if the mine is abandoned.

[2] In an order dated June 17, 2022, the Water Board ordered Victoria Gold to furnish security in the amount \$104,903,628 by September 15, 2022, inclusive of any amount ordered by Yukon. On June 27, 2022, Yukon ordered Victoria Gold to furnish \$68,662,300 in security. In the result, the Water Board's order requires Victoria Gold to furnish \$36,241,328, in addition to that required by Yukon.

[3] Victoria Gold seeks leave to appeal the Water Board's security order. It also seeks a stay of the requirement that it pay \$36,241,328 of the order pending the appeal. The hearing before me was the stay application.

[4] Along with the Water Board, the two other parties to the litigation are Yukon and Na-cho Nyäk Dun. The Water Board seeks standing to make submissions on the stay application. Yukon and Na-cho Nyäk Dun take no position on the Water Board's standing or on the merits of the application.

[5] For the reasons below, I grant the Water Board standing on the stay application. I also conclude that Victoria Gold's application for a stay should be granted.

### **Issues**

1. Should the Water Board have standing on the stay application?
2. Should the Water Board's order that Victoria Gold pay security be partially stayed?

## Analysis

1. Should the Water Board have standing on the stay application?

[6] The Water Board seeks standing to make submissions on the merits of Victoria Gold's stay application. Victoria Gold opposes giving the Water Board standing. I conclude that the Water Board should have standing.

[7] "Standing" is the right to be a party or play a role in a legal proceeding. A board or tribunal does not have automatic standing in an appeal of its decision. Rather, the court has the discretion to grant a board standing.<sup>1</sup>

[8] The decision to grant standing to a board is done on a case-by-case basis. Three factors may assist the court in determining whether to grant a board standing:

- a. the court may benefit from a board's submissions if the proceeding would otherwise be unopposed;
- b. if other parties are available who have the knowledge and expertise to respond to arguments, it may be less important to hear the board's submissions; and
- c. the role of the board may also have an impact on the court's assessment. Concerns about impartiality may arise where the board adjudicates between two adversarial parties. On the other hand, such concerns may not arise where the board has a regulatory role.<sup>2</sup>

[9] The court can also consider other factors when determining standing, such as the tone of the board's submissions. Tone can be a factor because a board's role in an

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<sup>1</sup> *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 at para. 57 ("*Ontario (Energy Board)*").

<sup>2</sup> *Ibid.* at para. 59.

appeal of its decision is different than that of other litigants. Thus, a board should provide a “helpful elucidation of the issues”<sup>3</sup>, rather than engage in “aggressive partisanship”<sup>4</sup>. While the court will not deny standing because of a board’s tone, it may affect the weight given to submissions.

[10] Turning to the first and second *Ontario (Energy Board)* factors, the two other parties to the proceedings, Yukon and Na-cho Nyäk Dun, are sophisticated and capable of fully responding to Victoria Gold’s application. However, they took no position on the application. Thus, the application would be unopposed if the Water Board did not make submissions. This factor supports the conclusion that the Water Board should be given standing.

[11] Regarding the third factor, the Water Board has a regulatory role: it does not resolve conflicts between adversarial parties. However, Victoria Gold and the Water Board are in a continuing relationship. Under the water licence, Victoria Gold is required to revise and submit a reclamation and closure plan to the Water Board every two years. Additionally, the issues the Water Board identified in its submissions are likely to be addressed in the next review of Victoria Gold’s reclamation and closure plan. Therefore, despite the Water Board’s regulatory role, the perception of impartiality is important.

[12] The final factor to take into consideration is the tone of the Water Board’s submissions. Victoria Gold says that the Water Board should not be granted standing

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<sup>3</sup> *Ontario (Children’s Lawyer) v Ontario (Information and Privacy Commissioner)* (2005), 75 OR (3d) 309 (CA) at para. 61, referenced in *Ontario (Energy Board)* at para. 71.

<sup>4</sup> *Ibid.* at para. 61, referenced in *Ontario (Energy Board)* at para. 71.

because its position and submissions are highly adversarial, and its tone is inappropriate. I agree that the Water Board's approach is overly adversarial.

[13] Although the Water Board claimed to take no position, its submissions amounted to clear opposition to the application. It sought to take on the role it believed Yukon or Na-cho Nyäk Dun should have played. In doing so, it overstepped its mark and became too partisan.

[14] This can be seen not only in the Water Board's positions, but also in some of its arguments. For instance, the Water Board suggested that if Victoria Gold were denied the stay application, it would likely have "incentive" to comply with its water licence and compliance would put it "in better standing" with the Water Board. This is exactly the form of advocacy the Supreme Court of Canada warned could lead to concerns about lack of impartiality in *Ontario (Energy Board)*.<sup>5</sup>

[15] To his credit, counsel to the Water Board took responsibility for the tone of the written submissions, stating that they were his words. However, it is also the Water Board's general approach that is problematic. The Water Board must be careful: it is not an adversarial party and should not act like one.

[16] Balancing these factors, I grant the Water Board standing and will consider its submissions. However, as the Water Board has approached the issues in an overly adversarial way, I will consider its submissions with caution.

2. Should the Water Board's order that Victoria Gold pay security be partially stayed?

[17] I conclude that the security order should be partially stayed.

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<sup>5</sup> *Ontario (Energy Board)* at para. 72.

[18] The Water Board says that I should not consider Victoria Gold's application at all, because it is not coming to court with clean hands.

[19] If a stay is available to Victoria Gold, it must meet the test for a stay. Victoria Gold must prove:

- (a) there is a serious question to be tried;
- (b) the applicant would suffer irreparable harm if it were not granted the stay;
- (c) the balance of convenience favours granting a stay.<sup>6</sup>

*Does the doctrine of clean hands apply?*

[20] The Water Board says Victoria Gold has flouted the conditions of its water licence, specifically, the terms requiring it to re-contour slopes and to make a plan for snow removal. Because it has violated the terms of its water licence, Victoria Gold is not coming to court with clean hands, and the Court should dismiss its application without considering it on the merits.

[21] I conclude that the doctrine of clean hands does not apply in the case at bar.

[22] The doctrine of clean hands prevents the applicant from using their bad behaviour to obtain equitable relief, such as a stay. However, it is not aimed at addressing an applicant's general bad behaviour. Rather, the wrongdoing must have "an immediate and necessary relation to the equity sued for"<sup>7</sup>. There must be a clear nexus between the applicant's behaviour and the basis upon which they are seeking relief. Otherwise, the doctrine of clean hands does not apply.<sup>8</sup>

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<sup>6</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*") at 334.

<sup>7</sup> *DeJesus v Sharif*, 2010 BCCA 121 ("*DeJesus*") at para. 85, citing *Snell's Equity*, 30<sup>th</sup> Ed. (London: Sweet & Maxwell, 2000) at 32.

<sup>8</sup> *Ibid.* at paras. 84-86.

[23] What that means in this case is that Victoria Gold's violation of the water licence, if there was a violation, must have a direct relation to its request for a stay of the security order.

[24] The Water Board says the link here is that the Water Board ordered an increased amount of security because Victoria Gold violated the water licence and Victoria Gold is now seeking that the security order be stayed.

[25] Victoria Gold disputes that it violated any terms of the water licence. More importantly, however, it says that whether it violated the water licence is immaterial. Victoria Gold is seeking a stay because it is appealing the Water Board's decision on the basis that the Water Board violated the procedural fairness it owed to Victoria Gold, and that it made errors of fact that amounted to errors of law. Victoria Gold argues that it is not relying on its compliance with the water licence as a basis for seeking a stay. It is therefore not precluded from the relief of a stay.

[26] I agree with Victoria Gold. The issues in appeal are about the Water Board's conduct of its proceedings and its decision. Victoria Gold's compliance with the water licence is irrelevant to those issues. Therefore, the doctrine of clean hands does not apply.

*Is there a serious question to be tried?*

[27] The Court assesses the strength of the applicant's case in determining if there is a serious question to be tried. However, the threshold for this prong of the test for stay is low. If the issues are neither frivolous nor vexatious, then the applicant will meet the threshold.<sup>9</sup>

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<sup>9</sup> *RJR-MacDonald* at 337.

[28] In this case, the Water Board concedes that there is a serious issue to be tried. I find, as well, that, at the very least, the issues of procedural fairness raise an arguable case. Victoria Gold meets the first prong of the test.

*Would Victoria Gold suffer irreparable harm if it is not granted a stay?*

[29] I conclude that Victoria Gold would suffer irreparable harm if it were not granted a stay.

[30] Irreparable harm is about the nature of harm and not the extent or magnitude of the harm. It is harm that cannot be remedied or cured if the applicant is successful on the merits of the proceeding. On the other hand, if the applicant can be compensated for the harm, then the harm is not irreparable.<sup>10</sup>

[31] Victoria Gold argues that it would suffer irreparable harm if the stay were not granted. It says that, when it is required to furnish security, it does so by providing reclamation bonds. The interest rate on a bond purchased for the Water Board's June 17, 2022 security order will likely be at 1.15%, with a portion charged possibly at a rate of 1.5%. Victoria Gold estimates that this would cost \$400,000-\$500,000 per year, which it could not recoup, even if it is successful on the appeal.

[32] The Water Board does not dispute this evidence. Rather, it says that Victoria Gold will not suffer irreparable harm because it saved money when it did not re-contour slopes as required by its licence. The Director of the Water Board, Roger Lockwood, attests he estimates Victoria Gold has saved more than \$4,000,000 through non-compliance with the conditions of the water licence. The Water Board submits that

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<sup>10</sup> Ibid. at 341-342.

Victoria Gold would therefore not suffer irreparable harm if it were required to comply with the security order.

[33] Mr. Lockwood's evidence is impermissible opinion evidence, and I therefore do not take it into consideration. Moreover, the submission is not relevant. The question before the Court is whether Victoria Gold would be able to recoup its costs if the stay is not granted and it were successful on its appeal. The evidence provided does not assist in this analysis.

[34] I therefore conclude, based on Victoria Gold's evidence, that it would suffer irreparable harm if it were not granted the stay.

*Does the balance of convenience favour granting a stay?*

[35] I find that the balance of convenience does favour granting a stay.

[36] The third part of the stay test addresses which party will suffer greater harm if the stay is granted or refused. At this stage of the analysis, the court may also consider whether the public interest would be harmed if the stay were granted or refused.

[37] Security orders are made to ensure that reclamation costs are covered when a mine closes. Thus, it is in the public interest that security be provided to ensure that the mine will be properly cared for when the mine stops running.

[38] Victoria Gold recognizes this interest, but says that the public interest would not be compromised if the security order is partially stayed. It says that the security, which Yukon assessed at \$68,662,300, will remain in place as will most of the security ordered by the Water Board. Victoria Gold is seeking a stay of \$36,241,328, or 34% of the security order. Other regulatory oversight also remains in place to ensure the mine is operating safely. Finally, neither the Water Board nor Yukon have identified any risk of

closure, abandonment, or significant adverse environmental effects that require immediate reclamation. It is not likely that the security would need to be accessed between the granting of the stay and the final outcome of the appeal.

[39] The Water Board, however, states the public interest would be harmed if the stay is granted. The Water Board argues that, if the stay were granted, the Water Board would be prevented from being able to exercise its statutory powers. In accordance with the Supreme Court of Canada's decision in *RJR-MacDonald*<sup>11</sup>, restraining the Water Board from performing its role would, in itself, harm the public interest.

[40] Victoria Gold has provided compelling arguments that the public interest would not be harmed if a stay is granted. On the other hand, in my opinion, the Water Board has misapplied *RJR-MacDonald*. In *RJR-MacDonald* the applicant sought a stay during a *Charter* challenge to legislation. The Supreme Court of Canada's analysis was limited to that context.<sup>12</sup>

[41] In *Harper v Canada (Attorney General)*, 2000 SCC 57 at para. 9, the Supreme Court of Canada further explained why harm to the public interest is generally assumed where an interlocutory stay is sought in a *Charter* attack on legislation. It stated:

... Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

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<sup>11</sup> *RJR-MacDonald* at 346.

<sup>12</sup> *Ibid.* at 346.

[42] The same considerations do not apply to a Water Board making an order in the regular course of business.

[43] I therefore conclude that the public interest will continue to be protected, even if a partial stay is granted. The balance of convenience favours granting a stay.

### **Conclusion**

[44] I conclude that it is appropriate to grant the Water Board standing on the stay application and that a stay should be granted.

[45] My order is as follows:

The Yukon Water Board order dated June 17, 2022 (Licence No. QZ14-041 Amendment 1, Order No. 2) shall be stayed, insofar as that Order requires Victoria Gold to furnish an additional \$36,241,328, until 30 days after a decision is released in this appeal.

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WENCKEBACH J.