

T.C. 01-00050A

In the Territorial Court of Yukon
(BEFORE HIS HONOUR JUDGE LILLES)

WHITEHORSE,

APRIL 09, 2009

REGINA

v.

THE CITY OF DAWSON

PROCEEDINGS AT REVIEW

APPEARANCES:

John Cliffe and Noel Sinclair

Tony Crossman

Jan Graham

Appearing for Crown

Appearing for City of Dawson

Court Recorder

Transcriber

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Whitehorse, Y.T.
May 6, 2008

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THE CLERK: ... [recording starts] Her Majesty the Queen in the matter between Regina versus the City of Dawson, Your Honour.

MR. CLIFFE: Your Honour, John Cliffe for the Crown. That's C-l-i-f-f-e. And also with me is Noel Sinclair.

MR. CROSSMAN: Your Honour, Tony Crossman for the City of Dawson. That's C-r-o-s-s-m-a-n.

THE COURT: Well, let me just say that we're here for a review of progress being made on the Dawson City, pardon me using this expression, but sewage plant matter, and I should indicate for the record that I met with counsel and some of their support team briefly in chambers prior to this open court session where I was briefed on several confidential matters, which, because of their nature, can't be disclosed publicly at this time, but will be disclosed in due course, when it's possible to do so without affecting commercial interests.

MR. CLIFFE: Your Honour, just before my friend continues I should just indicate for the sake of the matters relating to the Crown, in the court is Mr. Vic Enns, who is a professional engineer with Environment Canada; he's been before Your Honour on all the appearances in this matter. And the individual who is to Mr. Enns' right is a Martin Guilbeault, G-u-i-l-b-e-a-u-l-t, who's also a professional engineer with Environment Canada here in Whitehorse. And to his right is Mr. Eric Soprovich, who is also in Environment Canada here in Whitehorse. And between the three of those individuals from Environment Canada, they work, as Your Honour is aware, in conjunction with the representatives of the Yukon government and the City of Dawson with respect ensuring compliance with Your Honour's order.

THE COURT: And Mr. Crossman, you also have some people with you. Perhaps you could introduce them as well.

MR. CROSSMAN: Thank you, Your Honour. With me is Mayor Steins from the City of Dawson, and with him is the chief administrative officer of the City of Dawson, Eldo Enns. From the Yukon government, apologies from Mr. Mike Johnson. Mr. Johnson was here on the last occasion. He's the deputy minister for Highways and Public Works. Unfortunately, he is away and could not be here, but in his place is acting deputy minister Leslie Anderson. As well as Catherine Harwood. She's the acting senior advisor to the deputy minister's office, with Highways and Public Works. And also Teri Cherkewich, who's the acting managing counsel for Natural Resource and Environment Law Group for the Department of Justice with the Yukon Government.

THE COURT: Thank you.

MR. CROSSMAN: Thank you.

THE COURT: Go ahead. I think what I'm looking for then is an overview of what's happened since we met last, and with some indication of where we intend to go in the immediate future.

MR. CROSSMAN: Thank you, Your Honour, I'm happy to do so. Before we start

1 I just want to make sure that Your Honour has the materials for this
2 hearing. There was a court update report binder, a white binder. Thank
3 you. And there was also a letter to the Court dated April the 2nd which
4 contained some additional materials.

5 THE COURT: Yes. There's actually two packages, one from you, and then in
6 addition, two additional packages from Mr. Cliffe's office which postdate
7 those materials. I've reviewed all of those.

8 MR. CROSSMAN: Thank you, Your Honour.
9

10 **SUBMISSIONS BY MR. CROSSMAN:**

11
12 MR. CROSSMAN: The background to this hearing, of course, is that the last
13 time there was an update to the Court was on September 22, 2008. I
14 won't go into the details of that hearing. There were some concerns
15 expressed by my friend at that time and unfortunately we didn't have time
16 to respond to them. I just refer Your Honour to a letter which is part of the
17 package. It's Tab 8 of the binder. I won't go into the details because I
18 think events have overtaken the issues that were raised.

19 After September 22nd, there was a hearing on October the 30th,
20 2008. This was a joint application to the Court to vary the court order to
21 allow more time for the completion of the new facility. And the order was
22 granted by Your Honour so that this new facility is to be completed by
23 December 31, 2011. At that time the matter was adjourned till February
24 the 19th for an update hearing. The Court's varied order was entered in
25 the interim.

26 The February 19 date, at that time the City of Dawson sought an
27 adjournment to April the 6th. The reason being was that there was more
28 time required to allow the request for proposal process, or the RFP
29 process, to be completed. The process had taken longer than anticipated
30 and a brief update to the Court was provided on the February the 19th,
31 and the matter was adjourned to April the 6th. Perhaps I can just again
32 reiterate for the record, that RFP RFQ process -- sorry, perhaps -- I will go
33 into that when we deal with the RFP process. The April 6th hearing date
34 was changed to today, April the 9th, at the request of the Crown and with
35 the consent of the City of Dawson.

36 Let me take Your Honour to the court update report and the body of
37 that report, which is contained at Tab 1 of the materials. And I will just hit
38 the highlights for Your Honour's benefit here, having heard that you've
39 read the materials. And by way of background I think it's worth mentioning
40 that where we are today is as a result of a referendum brought on March
41 6, 2008. As a result of that, the preferred option at that time, an aerated
42 lagoon at lot 1058 and 1059 was not able to proceed because of the result
43 of the referendum vote, because a bylaw was required to be passed by
44 the City of Dawson prohibiting a wastewater facility at that location. As a
45 result of that, the Dawson team has pursued a variety of options, the main
46 one being the mechanical treatment option, which you heard of on the last
47 occasion, but in parallel the lagoon options.

1 At page 3 of the court update report is a list of the people involved
2 in the project team. You'll see that there are senior people involved in this:
3 Mr. Mike Johnson, deputy minister of Highways and Public Works; Mr.
4 Ron McMillan, Department of Community Services, who had this file --
5 who took the lead on this file previously; Mr. Dale Drown, chief of staff; Mr.
6 Steve Nordick, the MLA for the Klondike, and Leslie Anderson, who I'd
7 mentioned before, the assistant or now acting deputy minister of Highways
8 and Public Works. Supporting that team, Ms. Catherine Harwood, who is
9 here today. She's an engineer by training and background and has been
10 doing a lot of the day-to-day work, together with Mr. Pat Habiluk, who is
11 also a professional engineer. He's actually situated in Dawson.

12 THE COURT: I noticed that, and I thought that was a very good move, actually,
13 help facilitate that interface.

14 MR. CROSSMAN: And he has something like 30 years experience in
15 infrastructure development. Actually, I think he, in fact, is on secondment
16 from the federal government, so.

17 Now, as part of the team you'll see a new face in Mr. Eldo Enns.
18 Mr. Paul Moore was the chief administrative officer. Mr. Enns took over
19 that position in November of 2008, and he's become part of the project
20 team. As well, working with Mr. Enns is Mr. Norm Carlson. Mr. Carlson
21 has been the superintendent of Public Works and involved in this project
22 for many, many years. I mention these people because these people are
23 part of the team that deal with this matter on a day-to-day basis and spend
24 a considerable amount of their time doing so.

25 One of the issues from the last update hearing was an issue of
26 communication between Environment Canada and the project team. And
27 at that time there was a concern expressed. There was -- certainly every
28 effort was made after that hearing, and actually before that hearing, just
29 before that hearing, to try and address that issue when those concerns
30 were made known. There have been regular meetings and if you go to
31 page 4 of the court update report you'll see that there's regular meetings
32 taking place as well as communications by email and telephone, and the
33 input of Environment Canada has been sought on all aspects of the
34 project. They've been kept informed, updated on key developments,
35 communication strategies, told in advance of media announcements,
36 things like that.

37 Minutes have also been taken of these meetings so that the issues
38 that have been discussed have been tracked; questions that are raised
39 can be tracked, and feedback given can be tracked as well. And those
40 are contained in Tab 12 of the binder. The minutes show that
41 Environment Canada have been encouraged to ask questions and to give
42 feedback and that they have done so. My understanding is that the
43 communication is working well.

44 The next topic I'd like to take Your Honour to is the regulatory
45 process update. Once again, we're at page 4 of the report update, and
46 officially the project was withdrawn from the YESSA process. This is the
47 project regarding lots 1058 and 1059. However, with the new project

1 being either a mechanical plant or other lagoon options at different
2 locations, work is still continuing with the regulators in terms of what is
3 required for those to make sure that they're fully informed and engaged
4 prior to a decision being made as to which option.

5 One of the other issues that has come up is that the mechanical
6 plant, if that is the option that is chosen, will be built at the existing
7 screening plant location, but also on some land adjacent to that, a works
8 yard, which has some contamination issues which are being addressed,
9 and there's a report there from Ms. Harwood --

10 THE COURT: I understood that any concerns are limited to a very small area,
11 under and perhaps immediately contiguous to that concrete slab that was
12 described in her report, and that that slab is physically located where it
13 would not interfere with the project. Is that correct?

14 MR. CROSSMAN: That is correct, Your Honour.

15 THE COURT: So, yes, there may be some things that need to be done but it will
16 not impact on the project should it go forward there.

17 MR. CROSSMAN: Precisely. Yes.

18 The other -- the next issue is the communication with the residents
19 of Dawson. Communication has been extensive and was -- particularly
20 over the last six months. There has been a communication strategy put in
21 place, and we're, again here, still at page 4 of the court update report,
22 Your Honour. The communication strategy has guided this
23 communication with the residents. The protocol and plan is at Tab 9 of
24 the binder. There was a notice sent to the Dawson resident, which can be
25 found at Tab 15, and there were communication or discussions with
26 specific Dawson groups. In February, there was a public -- sorry, there
27 were targeted meetings in February 2009, a public information session
28 February 24th, and then additional targeted meetings with particular
29 groups. The groups are listed at page 5 of the court update report. You
30 will see they involved the Tr'ondek Hwech'in, government staff, the
31 Renewable Resource Council, the Dawson office staff for YESAA,
32 YESAB, the Dawson Chamber of Commerce, the Klondike Visitors
33 Association, the Klondike Placer Miner's Association.

34 Now, of course all of this communication was to keep people
35 informed of what was developing in terms of the options, but also to get
36 their feedback on concerns. And what has been expressed certainly is
37 concerns about the fiscal burden on Dawson residents, being, of course,
38 and as Your Honour knows, one of the highest in Canada already,
39 additional burdens with the new facility will create additional burdens for
40 the residents. Some other concerns were noted but nothing that appears
41 to be of significance.

42 THE COURT: Tab 15 sets out some of the communications. They're very
43 professionally done. When I reviewed that tab in particular, I found it very
44 instructive, particularly those parts that describe the aerated lagoon, the
45 facultative lagoon, the operation of those various alternatives, the
46 mechanical treatment plant, set out in a way that lay people, and in
47 particular Dawson City citizens, would be able to understand with minimal

1 effort. I thought that was very, very well done.

2 MR. CROSSMAN: Thank you, Your Honour, I'll pass that on to the team that is
3 being responsible for that.

4 The next topic I'd like to address is the mechanical facility and to
5 give you an update of where that stands. As you will recall, on the last
6 occasion, there was -- we were in the midst of the RFP process. The RFP
7 or request for proposal process is a two-step process, the first step being
8 to qualify proponents to get into the second step of the process. The
9 RFQ, the request for qualifications process, finished in November 2008.
10 There were five proponents that qualified as a result of the RFQ. And
11 those proponents are listed in the RFP. You'll see that the RFP is listed at
12 Tab 7. The RFQ and the RFP advertisements are found in Tab 6 of the
13 binder. You will see that it went out to a wide range of people, *The Globe*
14 *& Mail*, the *Vancouver Sun*, the two Whitehorse newspapers and the BC
15 Bid website. As I mentioned there were five qualified proponents who
16 were invited to submit proposals. The initial hope of the RFP process was
17 that the RFP process would be completed a little earlier than March 5th,
18 which was the ultimate completion date. Let me just explain some of the
19 reasons for that.

20 For example, the RFQ was open for one week longer than planned
21 due to a request from one of the proponents. The RFP writing stage took
22 two weeks longer than planned due to the complexity of the project and
23 the number of technical experts and reviewers. This included
24 Environment Canada and the Yukon Department of Justice. The RFP
25 issue period was intended to be shortened because of this use of the RFQ
26 to screen the proponents, and the initial thought was that could be
27 shortened to six weeks. However, the technical experts assisting the
28 Dawson team recommended that it should be eight weeks, which would
29 be a fairly standard sort of term, and particularly given the complexity of
30 this project, that was seen to be the optimum time. So -- and if you may
31 recall that the RFP says that the proponents must complete 30 percent of
32 the design of the project. So a considerable amount of technical work has
33 to be done to put into the proposal.

34 THE COURT: It's a very substantial document. In fact, I will confess that is the
35 one tab I did not read. It looks like it's 150 pages of technical information
36 and to respond to it in six weeks would be quite an effort.

37 MR. CROSSMAN: And I understand, Your Honour, in fact that there some
38 addenda that's in additional to that. Another 100 pages, is it? There are
39 some further addenda, as well.

40 So when the RFP had been out for three weeks, there was a
41 request for an extension of two weeks from one of the proponents, again,
42 because of the complexity. After consideration the request was granted,
43 because it was early enough in the process. There was a mandatory site
44 visit. That is referred to in the RFP. That actually had to be put off by a
45 week due to extremely cold weather. At the site visit, two of the
46 proponents asked for an extension of the RFP closing date, to the end of
47 March. That request was turned down. There was I think in the week of

1 February the 19th there was a request by two of the proponents for a
2 further extension of a week due to the need to incorporate answers to
3 earlier questions into the proposals, and that resulted in the ultimate date
4 of March 5, 2009 being the end of the RFP or the closing date for the
5 RFP.

6 Let me just dwell a little bit more on the details of the RFP in terms
7 of what it required, because I think it's important to understand that. The
8 RFP calls for a design-build approach to providing a mechanical
9 wastewater treatment facility that is tailored to the City of Dawson's unique
10 circumstances. I won't go into those characteristics that you've heard
11 before, but of course the first and foremost requirement is to meet the
12 court order, as well as current and future regulatory requirements. And
13 we've heard that there are certain CCME standards that will be changing
14 in the future, and I'll come to that in a minute, but they are incorporated
15 into the RFP. The design criteria also calls for a high priority on dealing
16 with the high operation and maintenance costs, because, as Your Honour
17 has heard before, that is one of the significant challenges of the City of
18 Dawson is, with already high costs for the citizens of Dawson, this is
19 something that needs to be addressed in a capital cost way, if it can, to try
20 and reduce the ongoing operation and maintenance cost, which is a
21 responsibility of the City of Dawson.

22 The RFP also called for a 12-month commissioning stage. Now,
23 that's important too because normally it would be something like a 28-day
24 commissioning. The 12 months was because of ensuring that the facility
25 was operating through all of the seasons, and particularly the summer
26 season, which is the season that is problematic for the city. But also so
27 that there was confidence in the City of Dawson in being able to operate
28 this. That time would also allow training by the proponent of the staff of
29 the City of Dawson in operating this new facility.

30 And as you can at page 6 of the court update report, and this is
31 taken from page 91 of the RFP which is at Tab 7, but I won't take Your
32 Honour to that unless you'd like to go there, but you will see the evaluation
33 in terms of the technical proposal, a hundred points; the annual operation
34 and maintenance costs, 75 points; so that's showing the high priority given
35 to the O&M costs. Long term maintenance costs, capital costs, and, of
36 course, Yukon content, they're all added into the mix. Now, there were a
37 number of questions that were raised, even though the RFP is quite
38 detailed. More questions were asked about the complexities of the
39 circumstances, and answers were provided.

40 The RFP closed on March the 5th. And proposals were received,
41 two proposals were received. Since that time the RFP evaluation team
42 has been working on reviewing the two parts of the proposal, and as you
43 will see from the RFP, it's divided up into two parts, the technical and then
44 financial. I should also say that the -- putting in a proposal also requires
45 some significant -- not only significant work from the proponent but also a
46 deposit of \$150,000, by way of letter of credit or similar, to show the
47 sincerity of the proposal. As I'd mentioned before the qualified people

1 before had been qualified in terms of technical competency, experience
2 and things like that. The -- and so the project team -- I'm sorry, I should
3 say, the RFP evaluation team has been evaluating those proposals and is
4 still in the midst of evaluating them.

5 What I can say is that the team is optimistic that it has received a
6 proposal that meets the project requirements, that is, that it will meet the
7 requirements of the court's order, that it will meet the current and future
8 regulatory requirements, including the CCME requirements that will come
9 in play in the future. And of course the design and construction
10 requirements which are specifically set out in the RFP, and that's Part 3 of
11 the RFP, the details there.

12 Now, the next step in this RFP process, and as I mentioned it isn't
13 complete yet, is that there's further review and clarification of the proposal
14 required. If an acceptable proposal is found, after this further review, then
15 it is anticipated that this RFP process would be completed by the end of
16 May. Unfortunately, I can't say to Your Honour in court any more about the
17 details of the RFP due to the sensitive nature and the confidential nature
18 of the RFP and the proposals that have been provided.

19 THE COURT: I take it that once a contract is completed, a contractual
20 arrangement has been entered into, that information, apart from any
21 commercial proprietary information, obviously, would be available to the
22 citizens of Dawson City and anyone else.

23 MR. CROSSMAN: That's right. Once that process is completed and part of the
24 public process, then, yes, that information will be available.

25 THE COURT: And of course you can't say exactly when that's going to happen,
26 but when do you estimate that to be?

27 MR. CROSSMAN: I believe by the end of May, Your Honour.

28 So, Your Honour, leaving the mechanical treatment facility now. As
29 you are probably aware, there's been a parallel process for the lagoon
30 options. We spoke on the last occasion of three sites that were on that list
31 that were being assessed and investigated and developed, and a fourth
32 one was added at the request of Environment Canada. This was the
33 Callison C site. And perhaps I can take you through just a little bit of the
34 detail, although what has happened essentially in the last six months is
35 that these parallel options have been pursued, have been developed, by
36 the project team. They've addressed issues such as land tenure,
37 mapping, the placer claims, if they're involved in some of these options. In
38 particular the site C; this is the Callison C information, has been updated
39 to the level of information that we had in regard to the other three sites.
40 The Callison C site was one that suggested back in I think in 2004, and so
41 there was a bit of a gap in the information, and that has been developed
42 up to the same level of detail. Of course, numbers and information has
43 been confirmed and refreshed and developed for all of these options. And
44 as well, a parallel options plan has been put into place and developed,
45 and that's contained at Tab 13. That sets out, essentially, what
46 information we have at the moment, what information needs to be
47 obtained, and what is the work plan in terms of timing. I don't intend to get

1 into the detail of that unless Your Honour wishes to.

2 THE COURT: No, I don't need you to do that. But you have clearly -- the work
3 team clearly has addressed these issues. They may not be as advanced
4 at the current time as the mechanical plant but that doesn't surprise me in
5 light of the fact that there are four of these projects proceeding in parallel.
6 So that work obviously is being diluted somewhat because of the number
7 of alternatives, whereas we're focussing essentially on a single pathway,
8 the mechanical plant pathway is a single pathway and it's not diluted in the
9 same way. I've reviewed those and I was very pleased to see that that
10 work was being done in parallel.

11 MR. CROSSMAN: Thank you, Your Honour.

12 And as you probably can see, there's some further considerable
13 work that is anticipated in the spring and summer of this year to further
14 develop those options, and I understand that work is probably in the
15 hundreds of thousands of dollars, perhaps around about half a million
16 dollars just on the geotechnical work alone. So thank you for those
17 comments about those options.

18 Of course, the various options have also been discussed with
19 Environment Canada as well, and there's a table that summarizes this
20 very succinctly, which will be page 9 of the court update report. It shows
21 the various options and compares them. Again, I won't go into any detail
22 of that.

23 THE COURT: No, it's set out -- the chart is very helpful in terms of comparing
24 the alternatives. It's interesting that the facultative lagoon, Callison site A,
25 that process requires a lot more land, 33 hectares, as opposed to four
26 hectares on the other lagoon systems. I understood - I'm just going by
27 recollection now - there's reference to the Whitehorse system here. It's a
28 facultative lagoon system, isn't it, the Whitehorse system?

29 MR. CROSSMAN: Yes, I understand so.

30 And Your Honour will see that the next page also sets out the -- a
31 timeline, if you like, for -- if these lagoon options were pursued, it would be
32 a five year period to complete a lagoon project, and it's set out in terms of
33 which -- what would happen in each of the, you know, year 1 to 5. That
34 schedule is consistent with the schedule that was in place for the aerated
35 lagoon at lot 1058 and lot 1059, with an extra year because of an extra
36 construction window required because of the additional distance and
37 infrastructure required for these other lagoon options. I just mention that
38 in passing. Obviously, we're -- if we have to go there, but -- I think we
39 should wait for the next update hearing to talk further about -- anything
40 about time.

41 Let me turn now to the question of funding. It's obviously always an
42 important question. As you know there is funding obtained from the
43 federal government through the Canada Strategic Infrastructure Fund for
44 the aerated lagoon at lot 1058. The bulk -- and some of that funding was
45 also provided by the Yukon government, but the majority from Canada,
46 certainly. Now, that fund has been replaced by the Build Canada fund.
47 This is in recognition of a priority from the federal government for

1 infrastructure, particularly for infrastructure like wastewater treatment
2 facilities.

3 THE COURT: This Build Canada fund was created, proposed, prior to the more
4 recent discussions concerning the need for fiscal stimulus related to
5 recessions.

6 MR. CROSSMAN: Yes, that's right.

7 THE COURT: And is there a possibility that more funds might, in fact, become
8 available through a financial stimulus plan, or is that just totally speculative
9 at this point?

10 UNIDENTIFIED FEMALE SPEAKER: From my understanding, Your Honour,
11 there is always some possibility but I'm not aware of anything that would
12 be beyond speculative at this point.

13 THE COURT: Certainly, there is a very significant amount of money that's being
14 proposed or set aside for those stimulus packages, but I understand this
15 Build Canada priority fund precedes the stimulus package. There may or
16 may not be some ability to tap into those funds.

17 MR. CROSSMAN: And in terms of the way the fund works, there has been an
18 approval for funding for the Yukon government, and within the Yukon
19 government there's been approval for the funding of this particular
20 wastewater facility from a capital cost perspective. And that has
21 happened. Tab 5 of the binder refers to the Build Canada priority was for
22 Yukon.

23 The next item I'd like to talk about is the CCME strategy, the
24 Canada-wide strategy for managing wastewater effluence. I raise it really,
25 again, just for information purposes. That's been the purpose in past court
26 update hearings as well, because this is a strategy we have to keep an
27 eye on, to see if it will affect the project, and to affect what is built in
28 Dawson. We've had a draft strategy in place for a number of years. This
29 year, in February, here in Whitehorse, the final document --strategy, I
30 should say, was released. It's a little different to the draft strategies that
31 we had been reviewing up until that time. One of the things that I noticed,
32 and my friend I expect will talk about, is this question about -- a statement
33 in the report that the strategy recognizes that the construction and
34 operation of a wastewater facility represents an unreasonable financial
35 burden for most municipalities, and that federal funding provided would
36 need to be prioritized, equitable and aim to reduce risks over the next
37 twenty to thirty years.

38 THE COURT: I think your friend is concerned a little bit about the wording, the
39 particular wording. He may be happier if it wasn't stated quite as
40 definitively as that. Perhaps it may represent unreasonable financial
41 burden for many municipalities.

42 MR. CLIFFE: Not my words, Your Honour, Environment Canada's words.

43 THE COURT: I know. You've made that very clear in your reply document. But,
44 sure, it's axiomatic that a major capital project like this will impact budgets
45 on municipalities. Most municipalities in Canada, over the last twenty
46 years, have been taxed - wrong word maybe - have found it very difficult
47 to meet the commitments that, ironically, the provincial government, the

1 parent body, has imposed upon them. It's called downloading, but I think
2 it's fair to say that are very few municipalities in Canada who have excess
3 dollars floating around in their bank accounts. So, sure, a major project or
4 major statutory requirement like this is going to be difficult for many or
5 most, and I know your friend, Mr. Cliffe, will have a few words to say about
6 this so I won't say them at this point, but go ahead.

7 MR. CROSSMAN: Thank you, Your Honour. And perhaps it is. It was certainly
8 not our intention to divert attention away from the real issues, which were,
9 I believe, just that we have a new system coming in place; we have a
10 strategy that is recognizing that there should be a national strategy,
11 consistent criteria and standards across the country, and in fact some of
12 these will be more stringent than we have at the moment. And that we are
13 meeting those through the work that we are doing to develop the new
14 facility for the City of Dawson.

15 THE COURT: It's certainly not my role to interfere with the technical
16 development or the technical information, but if we are putting into place
17 something that will have a lifetime of 25 to 50 years, the system clearly
18 has to be flexible enough to anticipate possible additional changes down
19 the road. It seems to me the way environmental concerns are going these
20 days, things will be made more rigid, things will be tightened up in future,
21 rather than made more lax. So I'm sure your technical people are very
22 concerned about that. Make sure that they don't lock this technology into
23 2010, which may fall far short of what will be required for 2025.

24 MR. CROSSMAN: And I will take Your Honour just to a couple of passages of
25 the strategy just to give Your Honour a flavour of this, but in response to --
26 before I do that, just in response to my friend, and one thing is that
27 perhaps there is some confusion because I think the reference that we
28 had made in the original court update report was to the old strategy or the
29 draft strategy, whereas we now have a new strategy which has different
30 wording. As I said, I don't want to get too hung up on that issue but let me
31 just turn to -- just a couple of, just to give you a quick overview of what's
32 happening with this new strategy. I think it's important to understand
33 where things are headed. If Your Honour turns to that tab.

34 THE COURT: Is that Tab 16?

35 MR. CROSSMAN: Yes, Your Honour. Inconveniently located at the back of the
36 binder. And I'll take you to the executive summary. It's page roman ii, and
37 the first paragraph there, three lines from the end of the first paragraph.
38 Says:

39
40 Interested parties have consistently indicated the need for all levels
41 of government to develop a harmonized approach to better manage
42 wastewater being discharged from more than 3,500 wastewater
43 facilities in Canada, many of which are currently in need of repair
44 and upgrading.

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46 The second paragraph goes on, and the second sentence of the second
47 paragraph says:

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The Strategy articulates the collective agreement reached by the 14 ministers of the environment in Canada to ensure that wastewater facility owners will have regular clarity in managing municipal wastewater effluent under a harmonized framework that is protective of human health and the environment.

Just as the things as Your Honour was mentioning. And then in the third paragraph, three lines from the bottom of that one, it says:

Implementation of these standards and objectives will be based on risk over a maximum time period of 30 years.

There's a time period anticipated by this strategy. There's a recognition, if I can put it that way, that not everything can happen overnight, not for the 3500 wastewater facilities in Canada.

On the next page, on page iii of the executive summary, in the second full paragraph from the top, it says:

To ensure that regulatory clarity is achieved through a one-window approach, the requirements of the Strategy will be incorporated into federal, provincial and territorial regulatory frameworks. Agreements will be negotiated between the federal and provincial governments and the Yukon.

And further -- and the next paragraph talks about the total costs, and it says:

The total cost over 30 years to implement the Strategy, including capital and non-capital costs, is at least to \$10 to \$13 billion, depending on inflation. It is estimated that approximately 50 per cent of the estimated costs will be expended in the first 10 years of implementation, primarily to address high-risk facilities.

And then it goes further down, the third line -- sorry, the fourth line from the bottom of that same paragraph:

The Strategy's economic plan identifies that implementation of the Strategy is affordable if governments make wastewater infrastructure an investment priority. For many small and very small communities, with limited fiscal capacity, it will be a challenge to implement the Strategy without senior government assistance.

And then two paragraphs further down from there it talks again about small and declining communities, and I'll read that. It says:

It is recognized that for especially small and declining communities,

1 investment in wastewater treatment infrastructure may not be
2 economically feasible. For these communities, alternatives to
3 wastewater treatment infrastructure investment will be determined
4 on a case by case basis in order to give these communities the
5 flexibility to meet the new standards.

6 THE COURT: I note that the word -- connective word is "and"; and Mayor Stein,
7 I think, would object strongly if you suggested that Dawson was a
8 declining community. I certainly understand that view with respect to
9 declining communities, small communities, that populations are dwindling
10 and it just doesn't make any sense to invest significant dollars for a short-
11 term result.

12 MR. CROSSMAN: And certainly the intention of referring Your Honour to these
13 passages is not to say that the City of Dawson is going a different
14 direction. In fact, it is fully committed, and we'll hear from Mayor Steins in
15 a minute about that continuing commitment, as is the Yukon government,
16 to assisting the city to build this new facility. The purpose of referring Your
17 Honour to those passages is just to give Your Honour a flavour of this
18 strategy, to say there is a need for consistency; there is a need for an
19 overall plan, but there's also a recognition that there will be financial
20 challenges for many of these communities, and that the ministers of the
21 environment and the Government of Canada is cognizant of that.

22 THE COURT: Well, I am going to interject here because I know that if you
23 continue on this vein, Mr. Cliffe will speak for half the afternoon on this
24 particular point, and I just want to make this point, and that is -- and I don't
25 disagree with what is said here. I, and many other people, no doubt, and
26 most citizens of Canada, would be pleased to see this initiative spear-
27 headed by senior governments in Canada, but those words are all
28 directed towards voluntary initiatives to improve wastewater. We're
29 dealing with Dawson City meeting a court order, and yes, it's interesting
30 background information but it doesn't impact on what we're saying, apart
31 from making a point which you've made on other occasions. Obviously, in
32 order to get this done we've got to get the money into place.

33 MR. CROSSMAN: Yes. And that's simply the point, Your Honour. I'm not
34 proposing that it go any further than that.

35 One other point that I would mention, though, is -- it's just the
36 question of a regulatory regime in the future. As you can see, that there is
37 going to be some changes in the regulatory framework, and that is being
38 anticipated by the Dawson team for this project. It also, the strategy also
39 mentions explicitly, and this is at page 6 of the strategy, and it is about
40 two-thirds of the way down that page. It's under the heading,
41 "Governance," after the bullet point, first full paragraph. It says:

42
43 Jurisdictions will amend applicable regulatory frameworks to
44 include all the required elements of this strategy. The federal
45 government will development regulations under the authority of the
46 *Fisheries Act*, and that will include the same standards.
47

1 Again, this is simply for information purposes, to see where we're going in
2 the future. We've heard in the past about future or anticipated or perhaps
3 changes to the *Fisheries Act* concerning wastewater treatment. It seems
4 that it may becoming more definitive, and I haven't seen those, what those
5 may look like, but the good news is that it looks like something will be
6 happening and that it will be consistent across the country.

7 THE COURT: With the exception of the Northwest Territories and Nunavut.

8 MR. CROSSMAN: That's right. The northern parts of Canada, there are certain
9 exceptions provided, yes.

10 Your Honour, let me take you back to the court update report after
11 dealing with that, and this is back on page 11 of the court update report.
12 We're about two-thirds of the way down that page and under the heading,
13 "Water Quality and Testing." If you may recall there was a concern
14 expressed on the last occasion about certain sampling that had taken
15 place by Environment Canada and certain results arising from that
16 sampling. At the same time the City of Dawson took samples as well.

17 THE COURT: I'm going to say, at this point, I don't know that we want to get into
18 this, and I've read the City of Dawson's report, and I've read the response
19 from Environment Canada. I'm not a technical person in the sense of
20 environmental issues, and what I see here is the possibility and indeed
21 probability of continuing debate in relation to: where were the samples
22 taken, what kind of samples, did they account for back eddies, did they
23 account for vertical, lateral water flows, et cetera, et cetera, and, quite
24 frankly, it won't get us anywhere. I take note of the fact that the City of
25 Dawson did take some samples, had them analyzed. There seems to be
26 a significant difference, at least difference of opinions between City of
27 Dawson and EC with respect to integrity of the testing processes, the
28 timing of the testing processes, the issue of intermittent discharge from the
29 existing plant, and when the samples were taken. We could go on
30 forever. My view is that that's really not very productive and I really don't
31 want to go there. I have absolutely no doubt that if at a particular time of
32 the year or day, if Environment Canada went out and took samples from
33 particular locations, they would find the City, at least for part of the year,
34 they would find the City of Dawson in violation of the existing standards.
35 The question of when they take the sample, where they take it; it's a
36 continuing issue. It's never been characterized as a problem that exists
37 during the winter months. To my recollection it's always been presented
38 to me as a major problem during the summer months.

39 Now, even if that has changed somewhat, it doesn't really impact
40 on the order that's in place and the requirements that the City of Dawson
41 and the Yukon government have to meet. So I'm going to just pre-empt
42 that discussion; I don't want to raise it, and we'll move on, shall we.

43 MR. CROSSMAN: Thank you, Your Honour, happy to do so.

44 THE COURT: All right. And it would be -- I would add that it would be good if we
45 could stop killing those little baby salmon.

46 MR. CROSSMAN: That are being tested for the --

47 THE COURT: Exactly. Exactly. They're part of the test.

1 MR. CROSSMAN: -- in the sampling; yes, I agree.
2 THE COURT: Ten per sample.
3 MR. CROSSMAN: Let me then just turn to the future. Let me conclude.
4 THE COURT: And I should apologize. They're not salmon, are they. They're
5 trout, sorry.
6 MR. CROSSMAN: Trout.
7 MR. CLIFFE: All part of the same family, Your Honour, I understand.
8 THE COURT: They are. You're quite right, quite right.
9 MR. CROSSMAN: The next six months for this, I think will bring us certainly closer
10 to having a viable solution, an alternative to the lot 1058 aerated lagoon.
11 You've heard that we are in the midst of the RFP evaluation process. We
12 will have more information about that very soon. The Dawson team will
13 certainly continue its communication with Environment Canada about that
14 process, and also generally with what has happened with the other options,
15 developing the parallel lagoon options. And if it is, a decision is made to go
16 with this mechanical treatment facility as a result of the RFP process, then
17 work would begin with that successful proponent to prepare for the
18 regulatory requirements. And as Your Honour has said before, we need to
19 go through the YESAA process and we'll need to start that --
20 THE COURT: Let's address that YESAA process a bit. We -- if the process,
21 mechanical plant process that you're engaged in now is successful and it
22 turns out that that's the way you go on that, what's your latest estimate as
23 to the delay that would be incurred as a result of having to complete the
24 YESAA process as well, and, indeed, does that process have to be
25 completed in its entirety before construction could begin on the plant? I
26 know you mentioned, just in passing, as we were finishing our *in camera*
27 meeting upstairs, that the timeframe on the mechanical plant could be
28 quite quick, rapid, except there is no accounting for the YESAA process
29 and whether that would delay the construction or approvals. Do you have
30 any sense of that? Can you speak to that at all?
31 MR. CROSSMAN: I think I can, Your Honour. The YESAA process has become
32 clearer as a result of work with the aerated lagoon for lot 1058, and in fact
33 the RFP process incorporated I think 18 months for the YESAA process,
34 which was seen to actually be probably more -- very conservative, that is,
35 longer than probably is needed. I think it may be, you know, it may be a
36 process that would last only about 12 months, but, again, that's
37 speculative; we won't know. But that is already -- but the important thing
38 to know is that is incorporated, in terms of the timeline, so that that
39 process can take place and construction can take place in the summer of
40 next year. So.
41 The other part, of course, in the regulatory process that will need to
42 be engaged is the water licence application. That is something that would
43 happen after the YESAA process, but, again, groundwork or preliminary
44 work would happen in parallel or in conjunction with that.
45 The other thing that would happen, and this is more of just a
46 housekeeping matter. It's certainly nothing of concern, as I'm instructed,
47 is this memorandum of agreement between the Yukon government and

1 the City of Dawson. You've seen drafts of this agreement.
2 THE COURT: Yes. And Mr. Cliffe has raised the question, why has it not been
3 completed. It's been floating around in draft form for some time. I'm
4 anticipating his question but since you're on your feet, why don't you
5 respond to that?
6 MR. CROSSMAN: Yes. My understanding is that there's certainly nothing
7 sinister or nothing to be interpreted from the fact that it hasn't been signed.
8 There's been a number of iterations of this. We've also had some timing
9 difficulty. Mr. Enns is just on board as of the end of last year; something
10 that he's getting up to speed with. In fact, I'm also involved in -- personally
11 involved in this memorandum of agreement. I know that I have a role in
12 playing -- in putting this together. So some of that responsibility or delay
13 lies with me in terms of getting some of that done.
14 There is -- what I can say, though, is that both parties are
15 committed to this process. There is an agreement in principle that yes,
16 this is going to proceed. And I think the other important point to bear is
17 that the work is actually occurring. It's not unusual that, in fact, sometimes
18 the agreement itself between the parties, and this is more like a
19 memorandum of understanding, that is, it's saying, at a fairly high level,
20 what are the roles and responsibilities of the parties. That seems to have,
21 frankly, been overtaken by the actually practical work on the ground by the
22 Dawson project team, which is actually getting the work done. And
23 Dawson and the Yukon government are working together, cooperatively,
24 on this project. I'll ask --
25 THE COURT: Yeah, and I don't think we -- if Mr. Cliffe wants more information
26 on that, he can ask it. I'm just going to reiterate the point that, of course,
27 the court order applies to the City of Dawson and not the Yukon
28 government, at least directly, and it will continue to apply to the City of
29 Dawson, and they will have to sort that out. It's -- from my point of view,
30 that agreement is background noise, and my concern is, as you've pointed
31 out, that the work is being done, and it is being done. It appears, there's
32 an opportunity now, with the mechanical plant, that may meet some of
33 Dawson's needs. So I'll leave it at that unless Mr. Cliffe wants to pursue it
34 any further.
35 MR. CROSSMAN: Yeah. Perhaps I can ask Mayor Steins to address that as a
36 point to, Your Honour, to complete, if that's --
37 THE COURT: What I'm going to propose to do is hear from Mr. Cliffe first, and
38 then if Mayor Steins and others wish to address the Court, I'll hear from
39 them at the end.
40 MR. CROSSMAN: Certainly.
41 THE COURT: And are you're done?
42 MR. CROSSMAN: I am done, Your Honour, unless you have a question.
43 THE COURT: I don't.
44 MR. CROSSMAN: Thank you.
45 THE COURT: I hope that in the process we've answered many of Mr. Cliffe's
46 concerns or questions.
47

1 **SUBMISSIONS BY MR. CLIFFE:**

2
3 MR. CLIFFE: Thank you, Your Honour. I just wanted to thank the Court at the
4 outset for its indulgence in adjourning this matter until today. I've had a
5 continuation of a three-day trial in Yellowknife for Monday, Tuesday and
6 Wednesday, and that was the reason why the matter was adjourned, and I
7 appreciate the Court's indulgence.

8 THE COURT: No, it created no difficulty for me or for the court, so there's no
9 reason to -- it was an accommodation we were able to make very easily,
10 with no inconvenience.

11 MR. CLIFFE: And I appreciate that, Your Honour.

12 And Your Honour indicated, with respect, at the opening of my
13 friend's submissions, that you'd received the materials from the Crown. I
14 believe there were two letters that came to the attention of Ms. Proctor
15 and were obviously forwarded to you. I intend to be relatively brief but
16 there are some points I want to cover, but at least for the sake of letting
17 Your Honour know, Environment Canada staff has read the report back to
18 court prepared by the City of Dawson and the Yukon government, and it's
19 replied to it in one of the formats that Your Honour has before you that
20 was sent to you by my office. The Crown, that is myself, I've also read the
21 report back to court.

22 The other point I want to leave with Your Honour is a confirmation
23 that I've been advised by Environment Canada staff, and in particular
24 Messrs. Enns, Guilbeault and Soprovich, that Environment Canada
25 continues to work with the City and the Yukon government with respect to
26 this matters, and, of course, as Your Honour is quite well aware,
27 Environment Canada has been working with those parties for the past six
28 years and will continue to do so, I am told.

29 What I want to set back, because it doesn't appear in the reports
30 back to court, and never really has over the past six years and doesn't
31 appear in the present one, is just stating the obvious, and that is, and I say
32 this because Your Honour already knows this, and we all know this, but
33 we can't forget the obvious and the background, that the City continues to
34 dump untreated sewage into the river. The City is still in the situation of
35 having a water licence that it does not comply with. The City remains the
36 only municipal entity in the Yukon whose sewage does not meet what the
37 current law is, and that is the provision of s. 36(3) of the *Fisheries Act*,
38 and, of course, it's Your Honour's order is now six years after the fact.

39 Now, that's the background, and I don't say that in a negative way
40 but those are the facts, so to speak.

41 Where I want to go, really, then, is to sum up what Environment
42 Canada's reply is, of course, Your Honour has read it, and I don't intend to
43 read it to Your Honour, but at the high points, I'm advised, and is the Court
44 is advised, Environment Canada is encouraged by the renewed efforts of
45 the City and the Yukon government that have occurred since October the
46 8th. It looks like a very positive sign, in my view, as a layman, looking at
47 it, but those are the comments coming from Environment Canada.

1 Environment Canada also says, Your Honour, that there has been some
2 progress to advance the mechanical treatment option, and to keep
3 Environment Canada and the stakeholders informed and updated, and
4 that is noted, and that's noted in a positive way.

5 There has been, as Environment Canada notes, some work
6 completed on the lagoon option, but it appears, and I'm just going to
7 pause here because, Your Honour, this Court has been down that road
8 again but the other side, that is, where we've looked to a parallel situation
9 of the same options: lagoon versus mechanical plant option, with a focus
10 on lagoon and kind of a step-back from the mechanical plant option,
11 notwithstanding the many times that Environment Canada and the Crown
12 has told Your Honour, we've got to be working these options at the same
13 time because of what could possibly happen, and regrettably, as we know
14 in the history of this, we had that difficult situation happen where the focal
15 option really went off the rails, that is, the lagoon option, where there was
16 so much positive support, by Environment Canada even, with respect to
17 the lagoon option at the time, with the hope that was going to be the way
18 we were going to go.

19 So the point that I want to leave you with on this point with respect
20 to Environment Canada's comments about the lagoon option is an
21 observation, and I think we're all hearing it today, and I'm not saying this
22 isn't a good thing that we're moving down this road to the mechanical
23 plant, but the point being is that we can't lose sight of what could happen,
24 given what we were told in the *in camera* meeting, on the negative end of
25 things. So that said --

26 THE COURT: One could say that if you take a longer retrospective view, the
27 emphasis on mechanical plant now, if you take, in a way, everything
28 together, it sort of averages out that they perhaps spent, over the six
29 years, equal amounts of time on lagoon and mechanical.

30 MR. CLIFFE: Yes.

31 THE COURT: I know your point being that let's not forget about the lagoon
32 systems just because we're really excited about the mechanical system at
33 the current time.

34 MR. CLIFFE: Exactly, because we were very excited about the lagoon system.
35 And I say we, and I don't mean that in a - you know, if there's people from
36 the press here - in a sarcastic or cynical way. I say that in a very positive
37 way, that -- and you may recall we had a very positive meeting, in my
38 recollection, although it kind of falters here a little bit, in the sense of taking
39 you back to the summer of 2007, when we were in Dawson, and there
40 was a presentation made to the Court, and I think that many of us, after
41 court, were very positive with respect to that lagoon's option being, you
42 know, having a very - what can I say - a very positive future to deal with
43 compliance with Your Honour's order. In the same vein my learned friend
44 advises this Court on how positive we should be with respect to a
45 mechanical option in this case. We are positive about it, but let's not
46 forget what's happened in the past, and I always go back to tried and true
47 expressions about, let's not keep all our eggs in one basket, and I'll just

1 leave it with that.

2 THE COURT: And we've discussed this before, and I've made it very clear to the
3 City of Dawson in this public forum, that I expected them to work on these
4 alternatives in parallel, and certainly I'm satisfied; I can say I'm satisfied,
5 that they been working on them in parallel. They have not ignored the
6 lagoon system. Obviously, the nature of the mechanical system process,
7 in recent months, required a lot of their attention.

8 MR. CLIFFE: No, there's no --

9 THE COURT: The nature of that beast, what they've been involved with required
10 everyone's attention, so I do understand if, in the last three or four months,
11 not much work has been done in that area. Everybody was pre-occupied
12 because of the RFP process.

13 MR. CLIFFE: Yes, and the Crown obviously notes that, but the Crown also says
14 that, and I say the Crown, I mean Environment Canada's obvious note to
15 Your Honour in its report back to court, is that notwithstanding Your
16 Honour's comments that yes, time has been spent on the mechanical
17 plant option, is that -- and I don't want to dwell on the past but for just one
18 point, and that is, there was a missed opportunity last summer to do the
19 geotechnical work, and that was our - I'll just leave it at that - that was the
20 difficult time period last summer, that six-month period, from March until
21 September, when nothing substantial was done. So that opportunity was
22 missed, and we know that in this jurisdiction, in the North, there are limited
23 working seasons. So I leave that. I know that the body of technical
24 people on the government's side, on the City of Yukon -- City of Dawson
25 and Yukon government's side are here. I'm hoping that they just pick up
26 that point.

27 The final point I'll leave with respect to the lagoon system is that if
28 Your Honour looks at page 11 - I don't ask you to do it now - page 11 of
29 the report back to court, it speaks of compliance with that option in the
30 year 2013, which is two years after Your Honour's order would expire. So
31 what I would be noting at this particular time, two and a half years before
32 Your Honour's order expires --

33 THE COURT: Thank God it's the order and not me that expires.

34 MR. CLIFFE: Well, I'm afraid that it might be me.

35 THE COURT: Could be a close race, I know.

36 MR. CLIFFE: But in any event, the -- what I want to say on that is, a comment
37 that I've said in earlier submissions in these proceedings, is that this can't
38 be looked at as a government project; it's a compliance with an order, and
39 I'm certain that there can be efforts to quicken the pace and work towards
40 it. So I'll leave it at that by just making those two points.

41 Now, I want to, if I may, just note that, of course, the Environment
42 Canada's comments to Your Honour are relatively brief; they're a little
43 short of two pages, and Your Honour can't forget, and Environment
44 Canada doesn't intend to do so, begin to file its notes and its -- of its
45 various meetings it has with the Yukon government and the City of
46 Dawson project team and so on, but that's a big part of what their work is,
47 is that they go to these meetings, they have a discussion, they provide

1 technical critique and suggestions, and they discuss, and that's where we
2 want them to be. We want to be there, doing that, hence a relatively brief
3 report to Your Honour, and of course its focus is on the specific document
4 that's being filed, that is, the report back to court that you have before
5 Your Honour.

6 Now, let me just move to few comments and say this. They are
7 some that I have mentioned in the past, and I'm not talking about going
8 back to the past and dealing with the past. I'm talking about the future, the
9 present and the future, but with respect to topics that have been raised in
10 the past, in previous report back to court documents. And the first one,
11 and I want to deal with it relatively concisely, is the issue of funding, and I
12 have indicated to this Court, and I'm certain that the Court is quite well
13 aware because it is obvious, that compliance with Your Honour's order is
14 not conditional in any way upon the Yukon government or the City of
15 Dawson getting funding from the federal government. This is a court
16 order. This is a court order that we understand the Yukon government
17 has said publicly to this Court that it is committed - that's their words -
18 committed to deal with the capital expenditures here. So as a result, with
19 all due respect, yes, the Crown's not standing in the way of that entity or
20 the City of Dawson making representations to the various funding sources
21 there can be. Of course, make the application, but if those applications
22 fail, there's an obligation upon the government, and the City of Dawson,
23 presumably working together, to ensure that there is sufficient funds to
24 comply with this order.

25 Now, if that means there's got to be budgeting, so be it, because
26 there's a court order. And the concern the Crown has with the present
27 report back to court, like previous ones, is that behind the words, appears
28 to the Crown that there's a reservation about complying. There might be a
29 commitment but there's always a reservation on the commitment and the
30 references to, well, Build Canada, other funding. Let's get it clear. The
31 clear point is Your Honour's order is outstanding; it's not subject to or
32 conditional upon getting funding from the federal government, and I'll just
33 leave it at that.

34 Now, just branching from that, and the Crown has made this
35 position known in the past; it's raised again because it comes from the
36 citizens of Dawson themselves, that is, their concerns about operational
37 and maintenance costs. And the Crown has suggested, for consideration
38 only, not so much by the Court but by the parties, that the Yukon
39 government, if it is so committed, this is a situation where, as I understand
40 municipal financing here, is that because the City of Dawson is a legal
41 artifice of the Yukon government, and there's transfer payments made
42 between the Yukon government and the various municipalities, that it is
43 open for the government to deal with this issue of operating and
44 maintenance costs. Now, I say that as an outsider looking in. There's
45 probably processes that have to be followed, but surely these kinds of
46 things should not necessarily have to be mentioned and re-mentioned in
47 reports back to court when this is something that surely can be dealt with

1 between the parties. And that goes to, in my respectful submission, to the
2 issue of the memorandum of understanding between the two levels of
3 government. I don't know why -- I'm not going to, again, dwell on that,
4 why it hasn't been signed, but surely these are matters, in those
5 discussions, that that can be dealt with. I say that just as some kind of an
6 encouragement so we don't have this problem.

7 With respect to the memorandum of understanding, I'd only say
8 this, that in the materials, the draft that's in the materials is dated
9 November of last year, and we're now into April. I don't know what's going
10 on. I only ask why isn't it signed, because Your Honour may recall, in the
11 history of this we've had other memoranda of understanding, and you may
12 recall where we've had discussions between counsel and the Court with
13 respect to what was actually said in that memorandum of understanding
14 with respect to the actual commitment, when there were submissions
15 made about how many committed they were, but then there was a 30 day
16 shotgun date, if they weren't going to get along with each other, one
17 party's out. You may remember that. So memorandums of understanding
18 between the parties isn't anything new, but surely, you know, five months
19 after the fact, things like that, if it's not so serious, they can be signed,
20 moved on, because it sometimes can be a guiding, a guiding point in --

21 THE COURT: Although, I suppose, to be consistent, you might also say,
22 whether it's signed or not, we don't care, do we. It's the City of Dawson
23 and they've got to sort it out, and how they sort it out is their business.

24 MR. CLIFFE: Well, Your Honour, I listened with respect to Your Honour's
25 comments about that point, about, well, it is, of course, it's a very obvious
26 point, that the City of Dawson is bound by Your Honour's order. But I was
27 very interested -- I have on many occasions referred to Your Honour's
28 judgment in the first variation, and in Your Honour's judgment in the first
29 variation with respect to the high priority issue, and your focus was,
30 because you had heard submissions, at that time, about the involvement
31 of the Yukon government, and you had made comments with respect to
32 the legal artifice that's there.

33 THE COURT: Of course.

34 MR. CLIFFE: And I'm not trying to -- I'm not trying to be --

35 THE COURT: And I'm being a bit facetious. I mean there's a legal requirement,
36 but then we're all aware of the practical aspects of it too.

37 MR. CLIFFE: Absolutely.

38 THE COURT: And the two, in terms of getting the job done, the two blend
39 together.

40 MR. CLIFFE: The two blend together, of course, and, you know, I don't look at
41 these things, particularly this case, as that we're going to be somewhere
42 down the road and there's going to be a prosecution for non-compliance
43 with Your Honour's order; I don't look at it that way, because I see a
44 positive. I'm going to look at it, the glass is half full; it's not half empty;
45 we're not going to go there. But at the end of the day, if we're ever going
46 to go there, well, then, there may be issues with respect to the
47 involvement of the Yukon government.

1 But let me say this, that the funding point, I think I've made myself
2 clear. I'll just leave it with this one recollection that I do have, and the
3 Crown is respectful; there's got to be a process because we're dealing
4 with public funds here, that is, the process that occurs in this jurisdiction
5 with the Management Board. You've got to through the process. It's
6 mandated by law, and so on; you've got to go through the process. But I
7 remember the words, and you may recall, again, back to the summer of
8 2007 in Dawson when Assistant Deputy Minister Eric Magnusson of
9 Community Affairs made a commitment to Your Honour, made a
10 commitment to Your Honour about fast tracking the process and having
11 the funds available to deal with it. So I'm assuming that if the government
12 has said it at one stage, that continues to be the situation today, that they
13 are standing behind this and that monies will be provided and we're going
14 to move on; we're not going to have a problem.

15 Now, let me briefly comment upon my friend's CCME strategy
16 points. I only say this, that the word strategy is an important word here.
17 This is not the law. The law is today as it was when the City of Dawson
18 was investigated and when the City of Dawson pled guilty to this charge,
19 that is, the law is founded in s. 36(3) of the *Fisheries Act*. Will there be
20 changes? Well, when one looks down through the telescope here, yes,
21 the strategy document points to changes, but there have yet to be any
22 changes to the law. It is proposed, yes, but it hasn't happened yet, and
23 we all know what can happen between now and then. Sometimes
24 something, sometimes nothing. The most important thing to realize is
25 what is the state of the law as we sit in this courtroom.

26 I leave the point and re-emphasize the point that Environment
27 Canada made with respect to the CCME strategy, and that is, as my friend
28 quoted from the document, that so many years to fund this project and so
29 on, 20, 35 years, and so on, to 40 years. We can't forget - so it'll be the
30 last time I talk about the past - that it has been 25 years, and there has
31 been money spent. So I leave it at that.

32 The Crown agrees with Your Honour's comments with respect to
33 the water quality testing. There's a difference of opinion and I think we
34 just leave it at that. And the only thing that the Crown would say, that
35 when you're dealing with the sewage in the environment, there's these
36 obvious fish concerns; I'll call it that to be rather short and sweet to it, that
37 is, it affects, as we know, the fish and the fish habitat in an aquatic
38 environment. That's why we're here in court, that's why there's a
39 conviction, and so on, but there's also health issues. We leave it at the
40 parties differing in their opinion but with the hope that in the public interest,
41 the Yukon government will look into it further, and I'll leave it at that.

42 The next point is just a very brief comment with respect to my
43 learned friend's letter to myself that finds its way into the materials. I'll just
44 say that Your Honour has the Crown's reply to that, very brief reply. I also
45 just make the point that the letter sent by my friend is now six months after
46 the fact, and we now know things are moving down a different road.

47 With that, Your Honour, I'm going to say this just in closing. I've

1 repeated the concerns about Environment Canada having -- feeling
2 somewhat encouraged as to what's going on here, and the Crown, that is
3 the Public Prosecution of Canada who I represent, share a similar
4 encouragement here. There is some room to be encouraged. There are,
5 of course, the concerns that I've repeated back to Your Honour here
6 today, they are ones that I have advised the Court in the past that we have
7 to cognizant of, and whether it's the funding issue, whether it's the parallel
8 treatment options issue, whether it's CCME and some kind of reliance
9 upon that, noting, of course, that I don't have to be an engineer to realize
10 that if I'm looking down the future and I'm building a plant that's going to
11 affect the environment, then I want to have as much information as to
12 what the current law is and where the law may go, that at the end of day,
13 considering those points in mind, the only thing I would suggest - I
14 shouldn't say suggest - the only thing I would say is that the Crown
15 encourages the professional people and the staff that are involved,
16 representing the City of Dawson and the Yukon government and
17 Environment Canada, that they continue to work together to get to
18 ensuring that Your Honour's order is complied with, so that we're not here
19 past December of 2011.

20 And I say that maybe, not that I don't want to come back to
21 Whitehorse every six months, but I say that in all sincerity, from the point
22 of view of there's absolutely no reason why, physically, this project, no
23 matter what option, lagoon or mechanical, could not have been built,
24 approved, constructed and online years before today, quite frankly. When
25 you look at the time period, it's six years, and when you look at the time
26 frame here that's being proposed, it's going to get done. And I've made
27 that point in the past, that when we look at the history of this jurisdiction,
28 and in other northern jurisdictions in this country, building capital projects,
29 this is not a complex situation. Your Honour made a point of that back
30 when the order was varied in 2004, that this was complex for its various
31 economic, political and social issues, and that was very true at that time.
32 And of course at that particular juncture, you said, well, I appreciate that; I
33 appreciate that complexity point, because we were very early on in Your
34 Honour's order. And then you said, well, what I'm going to give you, I'm
35 going to give you another four years to deal with that. The complexities, in
36 the Crown's respectful submission, they're gone now. It's been studied
37 and re-studied. We've looked at the lagoon locations; we've looked at the
38 mechanical options. It's been canvassed in the community. We must
39 have a significant knowledge base here to move forward, and move
40 forward quickly. So I just leave it with that, that --

41 THE COURT: I think that is a good point to leave it, because certainly my -- I'm
42 with you on that. I think a lot of basic groundwork has been done. The
43 options now are pretty clear. They're limited but they're clear, and the
44 expectation is that everyone's going to put their shoulders to the wheel
45 and get it done.

46 MR. CLIFFE: Absolutely, and with that I have no further submissions, Your
47 Honour. Thank you.

1 THE COURT: Mr. Crossman, I'll give you a couple minutes to respond to any
2 key points made.

3
4 **REPLY BY MR. CROSSMAN:**

5
6 MR. CROSSMAN: Just a couple, Your Honour. Just perhaps dealing with the
7 first point last, my friend's point about the plant being built within the last
8 six years. There's obviously -- there's a long history and I'm not going to
9 get into that, and I don't think that was my friend's point either, in terms of
10 getting me to respond to that, but I just set that out for the record, that
11 there is a long history here. If we need to go there --

12 THE COURT: We want to shorten it as quickly as possible.

13 MR. CROSSMAN: We do, yeah. But I would reiterate that it is still complicated
14 from a technical perspective.

15 THE COURT: Sure it is, but you're on that track now. You're on that track now,
16 and hopefully the alternative that you're pursuing aggressively will result in
17 a contract relatively soon, and failing that, you've now got some fallback
18 positions that you're going to have to pursue very quickly. I mentioned in
19 our *in camera* session that my original order was for a mechanical plant,
20 and it was pressure from the City of Dawson that resulted in the variation
21 of that order to permit you with greater leeway to explore other options.
22 Perhaps that, in retrospect, was a mistake; I don't know, but at the current
23 time we're back to a mechanical plant as being, potentially, option number
24 one, and I sincerely hope that we're able to pursue that to fruition, for all of
25 our sakes. We have other things to do too.

26 MR. CROSSMAN: Yes. Your Honour, I think that certainly the Dawson team is
27 optimistic about this particular one, and, of course, as Your Honour may
28 be aware, there are differences between different mechanical treatment
29 plants --

30 THE COURT: Oh, of course.

31 MR. CROSSMAN: -- technologies, and I think -- I'm not going to get into that --

32 THE COURT: Yeah, not going to get into that.

33 MR. CROSSMAN: -- in terms of why an SBR plant in 2003 may have worked,
34 whereas --

35 THE COURT: Or why this particular system, which has been around for quite a
36 while, wasn't identified at that time.

37 MR. CROSSMAN: Exactly.

38 THE COURT: We won't go there.

39 MR. CROSSMAN: We can talk about that on another occasion, perhaps, if it
40 arises. But, again, yeah, the history is complicated.

41 My friend mentioned about the water quality issue and I don't want
42 to get back into that, but he mentioned about dealing with it from not only
43 a fisheries perspective but a health perspective as well. I just wanted to
44 leave Your Honour and the Court with the understanding, certainly from
45 the project team, that this is an issue which they are following up on, so.

46 My friend also mentioned the funding issue and took us back to the
47 time we were in Dawson and Mr. Magnusson had made certain

1 statements. My friend's recollection, I'm sure, is better than mine. I
2 haven't had the opportunity to review the transcript in terms of the context
3 of what Mr. Magnusson was saying.

4 THE COURT: No, but I don't know that we need to. Certainly, it's my
5 recollection that every time I've heard from the Yukon government,
6 representatives of the Yukon government, they have assured that they
7 consider this to be important, a very high priority, and they would do
8 whatever they could, as quickly as they could, to make it happen. Now,
9 those aren't necessarily contractual words but that's my expectation from
10 the Yukon government. I can't say that I can point to anything that would
11 indicate that they have not been doing that. So I believe that undertaking
12 continues.

13 MR. CROSSMAN: Thank you, Your Honour.
14 My friend mentioned the memorandum of agreement as well.
15 Again, I can just say that part of the fault in terms of the draft not moving
16 as quickly as possible actually lies with me. So I would take some
17 responsibility for that.

18 THE COURT: You've fallen on your sword now.
19 MR. CROSSMAN: I have.

20 THE COURT: So we'll expect things to happen.

21 MR. CROSSMAN: And I will endeavour to get it finalized as soon as possible,
22 because I understand it is of concern for the Crown and Environment
23 Canada.
24 The operation and maintenance costs, again, this is another issue
25 which has been brought up again in terms of the Yukon government
26 perhaps helping out in that regard.

27 THE COURT: You don't need to go there. You don't need to go there. I think
28 the bottom line is this Court, Environment Canada, everyone involved in
29 this process has been supportive of the City of Dawson finding the most
30 economical solution. I think what Mr. Cliffe has been saying, yes, but
31 we're not going to wait another 25 years to put that into place. This Court
32 has, as well, been very supportive. That's why the original order was
33 amended, we recognized that there are those difficulties, but when push
34 comes to shove, we come to the end of our road, this has to be done even
35 if we can't meet the fiscal requirements that we hope and believe we will
36 be able to meet, and I agree with that. We have been flexible. Time is
37 running out, however. And I think you agree with that.

38 MR. CROSSMAN: Certainly, Your Honour.

39 THE COURT: We want to get this job done; we want it done as best we can,
40 recognizing some of the practical realities of the City of Dawson and its tax
41 base, but, in the end result, it has to be done.

42 MR. CROSSMAN: It's interesting, and I won't take Your Honour to it, but the
43 strategy actually deals with this economic plan in terms of how do you
44 finance these new facilities that will be required. And I know that is, you
45 know, dealing with other facilities and not with the Court's order here, but
46 it's just illustrative of the fact that when it comes to capital costs, there's a
47 -- you know, the suggestions for municipalities are, obviously, you know,

1 federal government, provincial or territorial government, own funds, and
2 things like that. When it comes to the operation and maintenance, it's a
3 recognition, it seems, in the strategy, that the governments are actually
4 not in that equation; that is, the federal or provincial or territorial, but rather
5 it's an own financing. It's a cost recovery through the residents of that
6 municipality. And I just mention that in --

7 THE COURT: But your friend has also pointed out, there are also transfer
8 payments made between senior provincial/territorial governments and
9 municipalities all the time, and those are quite flexible. But no, I
10 understand the expectation. No government wants to tie its hands with
11 respect to ongoing fiscal responsibilities. So that's why everyone is very
12 happy to kick in capital costs if they have to, but not commit themselves to
13 ongoing costs. That's the reality.

14 MR. CROSSMAN: Yes. And perhaps one of the points I take away from my
15 friend's point is being -- is looking at flexible or creative options, and that's,
16 again, one of the things that the strategy talks about, is looking at
17 innovative financing to help deal with that ongoing operation and
18 maintenance, and I'm sure that is being looked at in the context of this
19 project.

20 THE COURT: I think the timing, Dawson City's timing now, I think, is
21 coincidentally very good. We've certainly got the Build Canada emphasis
22 on environmental issues across the country, politically, at all levels of
23 government. We've got the emphasis on infrastructure, supporting
24 infrastructure, recognition that infrastructure across Canada has been
25 deteriorating and requires significant attention, and then on top of that, we
26 talked briefly about the stimulus issues. A lot of that money is also going
27 to be directed towards infrastructure. So I think the time is ripe. Let's take
28 advantage of it and let's move on, and we wish you and your colleagues
29 all the best in terms of finalizing the option that you're working on now. It's
30 clearly, if you're able to finalize it, it has a lot of advantages over other
31 options. So I will wish all of you the best in finalizing that and hope to hear
32 from you by way of some formal communication when it is finalized.

33 MR. CROSSMAN: Thank you, Your Honour. Your Honour, I'm not sure if it's -- if
34 you'd like to hear from Mayor Steins today.

35 THE COURT: Yes, I would. I would. And I just want to say, Mayor Steins, I've
36 made a commitment for 12 o'clock sharp, so --

37 MAYOR STEINS: Okay. So if I'm to fall on my sword I should do it right away.

38 THE COURT: Got to get up there and get out of my robe.

39 I've mentioned previously how pleased I am that you come to these
40 sessions. It indicates to me your commitment and interest in resolving
41 this. So --

42

43 **REMARKS BY MAYOR STEINS:**

44

45 MAYOR STEINS: Well, thanks, Your Honour, thank you very much, and, you
46 know, I want to reiterate that there is no dissension in our council or
47 anywhere else in respect to this project, and I'm referring to the MOA, or

1 MOU's that was brought forward, the concerns about that aspect, of things
2 being stalled. I don't think we have to worry about that too much.
3 THE COURT: No, we've got our scapegoat already, so.
4 MAYOR STEINS: Yeah, we do, yeah. I forgot, he already fell on his sword.
5 THE COURT: One scapegoat at a time.
6 MAYOR STEINS: I just would also like to reassure the Court that, from my point
7 of view, and I think I speak for council, I view this project as bigger than
8 any one of us, and I think it will go ahead; obviously, it has to. I don't hear
9 anyone arguing against having a secondary sewage treatment plant. The
10 money will be there; it will come. It has to. As far as the O&M goes, I
11 realize and I understand that it's not part of the equation. It's not part of,
12 as Mr. Cliffe pointed out, not a part of your court order; it's not contingent
13 on that at all. However, I'm glad that the Court does recognize the
14 potential for difficulty down the road, depending on what we end up with.
15 However, it's not going to be a deal breaker, is it? I mean we are --
16 THE COURT: No. No.
17 MAYOR STEINS: Yeah, we are going to get a plant, and I think everybody's on
18 the same page there.
19 So basically, I just would like to reiterate that commitment, and I'd
20 also like to congratulate the team, the project team. After the referendum,
21 you'll remember there was a bit of a lull and a bit of a depression on all
22 sides. And it was my personal preference to go ahead with 1059 and
23 1058.
24 THE COURT: I know that.
25 MAYOR STEINS: I was very disappointed, but of course we do have to respect
26 the democratic process. Consequently, there was a depression, there
27 was a lull in activity, but since that time, the new project team has gone
28 gangbusters, basically, since October, and have produced incredible
29 results, and it looks very, very promising. And again, you know, from my
30 point of view, from the City's of view, we're totally behind it and committed
31 to the project, in whatever iteration it takes. And you pointed out that we
32 have covered a lot of ground in terms of investigating all the different
33 technologies. Well, I think now we've come to a place where all those
34 questions have been answered and we can move forward.
35 THE COURT: Well, I hope so.
36 MAYOR STEINS: Yeah.
37 THE COURT: And I think, as Mr. Cliffe says, I think he hopes so too, but we
38 have to be realistic. There's always a possibility that our first choice will
39 not materialize, at least at this stage, until we get it nailed right down. So
40 let's be realistic but still optimistic.
41 MAYOR STEINS: And, Your Honour, I might remind the Court that Dawson City
42 has a reputation for being contrary, so hopefully that won't -- that's a joke,
43 by the way, Your Honour.
44 THE COURT: Yes. Well. I'm not sure what you were alluding to by saying that.
45 MAYOR STEINS: Preparing the Court for an unpleasant surprise, but I say it in
46 jest, though.
47 THE COURT: I recognize we're in a particular legal negotiating position with a

1 particular company, commercial company, and I would not lay the blame
2 on the City of Dawson should that negotiation not materialize for some
3 good commercial reason. So I wouldn't hold that against the City of
4 Dawson. But if alternative processes or procedures don't -- are unable to
5 get off the ground as a result of actions by the City of Dawson, then we're
6 going to have some trouble and we may actually have to test the legal
7 principle of court order versus municipal plebiscite or referendum vote. I
8 wouldn't want to go there. I've indicated earlier that my preference would
9 be to follow the democratic route but only so far as that democratic route
10 and the democratic process appears to be concerned with legitimate
11 considerations, but that may be getting ahead of myself. I want to say that
12 I'm very, very optimistic, based on what I've heard here today. I actually
13 see things coming to -- I see closure around the corner. The technology
14 that was described to me earlier today sounds very interesting, very
15 exciting. I think it's going to happen.

16 MAYOR STEINS: Your Honour, I'd also like to say that I think in your reference
17 to the referendum, I think this project, if it goes ahead and becomes the
18 acceptable solution, I think the potential for a referendum is very slim
19 indeed.

20 THE COURT: Yeah. And as I mentioned earlier, I was very impressed with the
21 communication strategy developed with respect to the citizens of Dawson,
22 and perhaps -- are you done on that point?

23 MAYOR STEINS: I am.

24 THE COURT: Okay. Well, thank you very much, and thank you to everyone
25 else. I've asked the trial coordinator to come up so we could talk about
26 when we might meet again, and again, I raise the question, would it be
27 appropriate to have our next session in Dawson?

28 MR. CLIFFE: The Crown's got no objection to that, Your Honour.

29 THE COURT: Do you see some merit to it? Are you're just neutral?

30 MR. CLIFFE: I'm neutral. I've always taken the view, obviously, because this
31 involves the City, that -- and we dealt with the sentencing in the City for
32 three days, back six years ago. And you'll recall that, in any event. So
33 I've got no objection with being there, and it may be very useful for the
34 citizens of the City to be present in our next court appearance, to find out
35 what the next development is.

36 THE COURT: Can you just briefly consult with your technical people and see if
37 we can identify a time frame that would be productive; in other words, let's
38 not meet for the sake of meeting but in terms of what's happening now
39 and what we foresee happening in the future. What would be a good time
40 frame where we might actually go to Dawson and do something, hold a
41 hearing where the citizens of Dawson would be interested in coming; we'd
42 have something to communicate to them?

43 MR. CROSSMAN: Thank you, Your Honour. We have actually started to have
44 that discussion amongst ourselves before the hearing. But I should also
45 add that Dawson sees the merit in having the next hearing in Dawson.
46 We would encourage the Court to sit in Dawson on the next occasion.
47 In terms of dates, we thought it might be appropriate time in August

1 to do that in Dawson. Now, depending on the Court's schedule, obviously.
2 I don't know if that works or not. We were thinking perhaps towards the
3 end, although I think my friend has some commitments, the 17th to the
4 21st of August.

5 THE COURT: As counsel know, I'm not located here, and I've indicated that I
6 really don't want to come just to do one thing. And when I come up to do
7 Dawson City, I want to be able to do other things and help out. I'm
8 advised that the week of August 11th, is it?

9 TRIAL COORDINATOR: Dawson City is August 11th to August 13th..

10 THE COURT: Is August 11th, and I could be some assistance to the court if we
11 were to do it that week.

12 TRIAL COORDINATOR: I would suggest the last day of the circuit --

13 THE COURT: And the last day of the circuit is?

14 TRIAL COORDINATOR: The 13th.

15 THE COURT: The 13th.

16 MR. CLIFFE: If I could [indiscernible/too fast], please, Your Honour?

17 THE COURT: Yes, please.

18 MR. CROSSMAN: Your Honour, that would work for the City of Dawson team.

19 THE COURT: I'm just speaking to the clerk. We're marking that file, along with
20 the supplementary information, all as Exhibit 15 in this ongoing
21 proceeding.

22 MR. CROSSMAN: Thank you, Your Honour.

23 MR. CLIFFE: That includes the Crown material?

24 THE COURT: It includes the Crown -- the two Crown materials and the one
25 addendum from the City of Dawson.

26
27 EXHIBIT 15: Crown materials and material from City of Dawson
28

29 THE COURT: Sorry, you were checking about that week, the August week, Mr.
30 Cliffe?

31 MR. CLIFFE: The Crown can do August 11th to the -- what are the days; is it the
32 11, 12, 13 that the court is here?

33 THE COURT: With some flexibility, but it might make sense to put it to the
34 afternoon of the last day of the circuit. We're usually cleared up by then.

35 MR. CLIFFE: Yes.

36 THE COURT: And --

37 MR. CROSSMAN: That would work, Your Honour.

38 THE COURT: That's the 13th.

39 TRIAL COORDINATOR: The 13th at 2:00 p.m.

40 MR. CLIFFE: My colleague, Mr. Sinclair, is likely going to be Crown counsel on
41 that circuit, and since this is on circuit, I'll probably assist him during the
42 course of the circuit. He had a suggestion. Of course, Your Honour
43 knows equally well as my learned colleague, maybe it should be at the
44 beginning of the circuit as opposed to the end of the circuit, so that in case
45 there's any kind of spillover toward the end of the week. I leave it with
46 your thoughts -- I know that we dealt with it --
47

1 THE COURT: No, I'd rather do it at the end.

2 MR. CLIFFE: I know that when we were here -- we were there in the summer of
3 2007, I think we let it go at the end day.

4 THE COURT: Yeah.

5 MR. CLIFFE: And it all worked out.

6 THE COURT: Yeah, my preference would be to put it at the end. There's just
7 too much happening at the beginning.

8 MR. CLIFFE: Very well.

9 THE COURT: We'll have all kinds of people arriving at the beginning because
10 they think that that's when they should be there, and just create too
11 much....

12 MR. CLIFFE: Very well, Your Honour, the 13th at two o'clock.

13 THE COURT: The 13th at two o'clock. Again, thank you to all of you for
14 participating. This is a very high-powered group and I must say that, as a
15 judge, I'm increasingly getting spoiled having this expertise in my
16 courtroom. I now feel badly, when I deal with other matters, that you're
17 not there helping me out. So be warned; you may be subpoenaed, but I
18 understand that word is out that spring might yet arrive this year. So I'll
19 keep my fingers crossed for you. I'm told that when I go back to Salmon
20 Arm on Friday I can expect temperatures in the 20s.

21

22 (PROCEEDINGS ADJOURNED TO AUGUST 13, 2009 AT 2:00 P.M.)

23

24

25 This is to certify that the foregoing is a true and
26 faithful transcript of the contents of the record
27 prepared in the above named proceeding.

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31 _____
32 Jan Graham, Transcriber

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