

T.C. 01-00050A

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

WHITEHORSE,
FEBRUARY 28, 2008

REGINA

v.

THE CITY OF DAWSON

PROCEEDINGS AT REVIEW

APPEARANCES:

John Cliffe
Tony Crossman
Lana Lacroix
Jan Graham

Appearing for Crown
Appearing for City of Dawson
Court Recorder
Transcriber

INDEX

	<u>PAGE</u>
Submissions by Mr. Crossman	1
Submissions by Mr. Steins	10
Submissions by Mr. Cliffe	11
Reply by Mr. Crossman	17

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
S	Letter dated February 27, 2008 from Community Services to Environment Canada	2

Whitehorse, Y.T.
February 28, 2008

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE CLERK: This Territorial Court stands open in the name of Her Majesty the Queen. Calling the matter of the City of Dawson, Your Honour.

MR. CLIFFE: Your Honour, John Cliffe, that's C-L-I-F-F-E, on behalf of the Crown on this matter.

THE COURT: Mr. Cliffe, good morning.

MR. CROSSMAN: Your Honour, Tony Crossman, last name is C-R-O-S-S-M-A-N, on behalf of the City of Dawson.

THE COURT: Mr. Crossman, welcome.

MR. CROSSMAN: Thank you.

MR. CLIFFE: Your Honour, with me, as has been the case for the number of the report back to court appearances are Mr. Vic Enns, who's the gentleman immediately behind me --

THE COURT: Mr. Enns.

MR. CLIFFE: -- a professional engineer from Environment Canada, and Mr. Dan Lindsey to his right, who is the local manager here in Whitehorse for the Environmental Protection Service for Environment Canada. Both these gentlemen have been offering technical advice to the project, what has been termed the project team in dealing with the technical compliance with Your Honour's order.

MR. CROSSMAN: And Your Honour, introductions would not be complete without introducing the Dawson team, and Your Honour will probably recognize the mayor, John Steins.

THE COURT: Mr. Mayor, nice to see you again.

MR. CROSSMAN: The chief administrative officer, Paul Moore.

THE COURT: Mr. Moore.

MR. CROSSMAN: Our technical expert, Kriss Sarson, from Community Services, and a new person to introduce the court to. Mr. Magnuson is no longer with Community Services and in his place is Ron MacMillan, that's M-A-C-M-I-L-L-A-N, and Mr. MacMillan is the assistant deputy minister with Community Services, responsible for this project.

THE COURT: Welcome, Mr. MacMillan.

MR. CROSSMAN: Thank you, Your Honour.

SUBMISSIONS BY MR. CROSSMAN:

MR. CROSSMAN: Your Honour, we're here this morning to report on the progress of Your Honour's court order. A quick overview of what I'll be presenting, and I don't believe I will be long this morning, but is to give the Court a quick update of what has occurred since the last court update report, and that was a hearing in Dawson on June 28, 2007. We have filed with the Court the court update report, it's in a binder, and I believe Your Honour has that. My friend has also submitted a response to that court update report. I understand that is with Your Honour. I have also provided to my friend --

1 THE COURT: Much briefer, I might add.

2 MR. CROSSMAN: Mr. Cliffe is much more concise than I.

3 I also have a response from the project team to that document from
4 Environment Canada, from my friend, and from my friend Mr. Cliffe, and I
5 have provided a copy just to him last night. This was the date, actually,
6 that the letter was sent, and I have copies for Your Honour which I can
7 hand up --

8 THE COURT: Please.

9 MR. CROSSMAN: -- right now.

10 THE COURT: Madam Clerk, we'll mark that as an exhibit in this proceeding.

11

12 EXHIBIT S: Letter dated February 27, 2008 from Community
13 Services to Environment Canada

14

15 THE COURT: Madam Clerk, mark this one a court copy, an official exhibit, and
16 I'll hold this, hold on to this one.

17 MR. CROSSMAN: Your Honour, this morning, I plan to just touch the highlights
18 of the court update report, to give the progress that's been made to
19 comply with the court's order. At the end of my submissions, I'll ask, as it
20 has been the tradition in the past, to ask Mayor Steins to give a quick
21 update to the court as well. I didn't think it was fair to ask Mr. MacMillan,
22 seeing as he's only been in his role for six weeks, to give any update, but
23 perhaps we'll hear from Mr. MacMillan on a later occasion.

24 THE COURT: We'll give him a respite this time, but give him full notice that he'll
25 be front row centre next time.

26 MR. CROSSMAN: Thank you, Your Honour.

27 THE COURT: I hope that doesn't scare him away.

28 MR. CROSSMAN: Your Honour, perhaps I can start with the background. As
29 you know, the City entered a guilty plea to the charges under the federal
30 *Fisheries Act* for depositing deleterious substances in the Yukon River.
31 These are charges under s. 36(3) of the *Fisheries Act*. As a result, one of
32 the penalties imposed was a court order that the City build a secondary
33 sewage treatment plant, because that was the cause, if you like, of the
34 failure to comply with that provision of the *Fisheries Act*, and the original
35 order was to have the secondary sewage treatment plant in operation by
36 September of 2004. As Your Honour knows, the cost estimates came in
37 much higher than originally anticipated. The City went into financial
38 difficulties. In fact, a trustee was appointed to the City and the Court
39 varied that order to allow the City to explore more affordable and
40 sustainable options for a wastewater facility and extended the time of
41 compliance with the court order to December 31, 2008.

42 The opportunity to explore other more affordable options was taken
43 up and the City and project team moved to explore those different options
44 and came up with the present option, which is the aerated lagoon at lots
45 1058 and 1059 in the City of Dawson. This, to the project team, after
46 considering something like 16 sites and various different types of
47 technologies to comply with the court order, this was seen as being the

1 most sustainable for the community. And, of course, one of the parts of
2 that sustainability equation was the cost of operation and maintenance,
3 and through exploring options, the yearly operation and maintenance
4 costs have been able to be reduced from the previous plant, which had
5 been ordered to be built, of something like \$731,000 per year, down to
6 \$293,000 per year. So a significant cost savings, although, of course,
7 unfortunately, the City of Dawson does have the unfortunate problem of
8 having some of the highest rates that taxpayers have to pay for dealing
9 with wastewater, and that's a function of history and the system that they
10 have in place.

11 Just before I get into the discussion of the progress that's been
12 made, perhaps I can also confirm, just for the record, that my friend, on
13 previous occasions, had brought an application to vary the most recent
14 court order and to extend the time for compliance, together with other
15 things, and I understand that that application is not before the Court today
16 but may be brought on at a later time.

17 THE COURT: Yes.

18 MR. CROSSMAN: So let me turn to the question of what's happened since June
19 of last year, and I'll take you through the various topics, such as the
20 project implementation, communications with Environment Canada,
21 regulatory approvals, the Canada-wide strategy for managing municipal
22 wastewater, what effect does that have on the project, implementation of
23 this aerated lagoon facility, land acquisition, public consultation, and
24 finally, the work plan, going into the future.

25 In terms of project implementation, as you know, the Yukon
26 government, a number of years ago, began to take a very active role in
27 this as a result of the financial difficulties of the City of Dawson and the
28 capacity, the issues which the City had. And as you know from previous
29 court appearances, both the Yukon government and the City of Dawson
30 remain committed to compliance with the Court's order, and with this
31 particular aerated lagoon project at this particular location, lot 1058. We'll
32 hear more from Mayor Steins to confirm that.

33 Since August of 2004, about \$1.394 million has been spent on this
34 project, and since the last court update hearing, of June last year,
35 \$298,000 has been spent on advancing this project. As you know, the
36 Yukon government has obtained capital funding for this project. At the
37 moment the estimate -- sorry, in 2004, the estimate was \$14.7 million. In
38 2007 dollars, it's estimated at about \$17 million.\

39 THE COURT: Is that just inflation or have there been some add-ons?

40 MR. CROSSMAN: Inflation?

41 MR. SARSON: In the process of refining the project itself, there's been some
42 cost increases. Some of it is obviously due to construction, costs have
43 increased over the years.

44 MR. CROSSMAN: So a combination of both, Your Honour.

45 Obviously, there have been concerns expressed by my friend and
46 Environment Canada about trying to come in within the approved budget
47 and the \$17 million will be over that budget. Perhaps I can -- what I can

1 say about that is a couple of things. Firstly, we are at a class A estimate --
2 sorry, at a class C estimate, which is plus or minus 30 percent. The
3 funding is also in an envelope which is funding two projects, the Dawson
4 project and the Carmacks project, and the Carmacks project is
5 progressing ahead of the Dawson project, and there may be cost savings
6 there. More importantly, though, is that as time progresses and the
7 project advances, there will be refinements in the estimated cost of the
8 project, because we'll get to a detailed design, and we'll have more
9 accurate numbers. So there are opportunities that the numbers -- the final
10 number may come in within the budget envelope that we have.

11 If not, you heard on the last occasion, Your Honour, from Mr.
12 Magnuson about the commitment to go back to Management Board to
13 seek additional funds as soon as possible, if that situation occurred.

14 As you know, there is a memorandum of agreement, in terms of
15 managing this project, between the Yukon government and the City of
16 Dawson. In previous court reports, what was provided was a signed copy
17 of that agreement. What we have in the current court update report is a
18 proposed revision to that original agreement, and you'll see the red-lining
19 in that agreement. They're the proposed changes. That's still under
20 consideration by the City of Dawson, but I can say, though, that --

21 THE COURT: These proposals came from the Yukon government or from the
22 City of Dawson or both, those proposals for change?

23 MR. CROSSMAN: I believe it was primarily from the City of Dawson.

24 THE COURT: That was my recollection. You don't have a reaction from the
25 Territorial government to these changes? I recognize they haven't been
26 signed yet, but are there some obstacles to proceed?

27 MR. CROSSMAN: I believe they're acceptable to the Yukon government and it's
28 still -- it's just under consideration by the City of Dawson.

29 THE COURT: Okay.

30 MR. CROSSMAN: Let me turn now to the question of communications with
31 Environment Canada. As Your Honour knows --

32 THE COURT: Just before you leave the MOU document, the general gist of the
33 proposed amendments is to make the process a little more of a
34 partnership than it was before? I say this, I see that there's some media
35 people here, clarify for them that there's nothing dramatic about it except
36 to make it more of a joint venture than it may have appeared on paper
37 beforehand. Is that a fair summary?

38 MR. CROSSMAN: Yes, it is a very fair summary, Your Honour. And this has
39 come about -- perhaps I can -- the history is, of course, that this council is
40 a relatively new council because there was a trustee in place governing
41 the affairs of the City of Dawson for a number of years, and once -- and as
42 this new council has become more comfortable as with the operations and
43 understanding this particular issue, they felt more comfortable in taking on
44 more responsibility and becoming true partners in this process.

45 So then moving on to the question of communications. There
46 continue to be regular and monthly -- regular communications and monthly
47 meetings between the project team and Environment Canada. At the last

1 hearing there were a number of concerns raised by my friend as a result
2 of Environment Canada concerns, and I understand that there were
3 meetings soon thereafter our last court appearance to address those
4 issues. I think we also see those concerns outlined in the letter that has
5 been filed by my friend, Mr. Cliffe. You'll see in the response that I've just
6 provided this morning, the responses and some of the confirmation of
7 discussions that occurred about those issues. I'll get into some of those
8 issues later on, but I just wanted to take Your Honour to that.

9 Let me turn next to the question of regulatory approvals. As you
10 know, one of the things that has caused, for want of a better word, a delay
11 in this project is the new YESSA process. This was something that was
12 unanticipated at the time of the original order, but what I can say is that it
13 is currently progressing through the YESSA process, within the anticipated
14 timelines. As you know, the project team took steps to try and expedite
15 and accelerate this process. They met with and provided documents,
16 preliminary documents, to the YESSA board ahead of time, so that they
17 could be vetted, could be reviewed, with the aim of trying to save time in
18 this process. And as you see from the court report, they are certainly
19 within the timelines, in fact, well within the timelines provided.

20 THE COURT: Well, let me just comment as well. You've included a couple of
21 tabs where there have been obvious technical communications from
22 YESSA, not only the filed things there but there's been back and forth with
23 them. So clearly this is moving forward. I understand from the material
24 that there's been a community consultation by YESSA as well?

25 MR. CROSSMAN: Yes, Your Honour, there's been much consultation, and as a
26 result of that, stakeholder comments have gone into the YESSA process.
27 As a result of that, there've been some questions which have come back
28 from YESSA to the project team about this particular project. And some of
29 those issues I can touch on but I don't want to get into the technical --

30 THE COURT: No, no, I didn't necessarily want to get you there as well; I just
31 wanted to make the point that -- expand on the point that you were
32 making, as I understood, that YESSA has been sort of triggered in a
33 preliminary way, but more than that, they've gotten engaged and are
34 actually -- they're back and forth, going -- information flowing back and
35 forth, which clearly is designed to expedite the process.

36 MR. CROSSMAN: Yes, Your Honour, thank you.

37 And perhaps what I can say is that, and it's a usual part of this
38 process, that there'll be requests for further information. And you'll see in
39 the materials that there have been those requests. Again, these are usual
40 things in this process, and you'll see that, again, the response has been
41 prompt. The project team has obtained the information from usually the
42 particular expert or consultant that's required. You'll see that there are
43 issues, for example, noted about -- there were issues raised by
44 stakeholders concerning odour, about perhaps leakage of the membranes
45 for the lagoons, and also the question about the drinking water.

46 Now, if you recall from previous court updates, as well as I can also
47 say that there have been responses, specifically to these issues, by the

1 project team. Now, those responses, as I said, have been provided by
2 independent technical experts. Earth Tech is one of those experts, and
3 we've provided the Court in previous sessions with the various reports,
4 and as you know, they are many, many inches thick. They're recognized
5 as being experts in this area.

6 All of the issues that have been raised have been responded to and
7 the project team is very comfortable that they have a very good project
8 and these issues have been satisfied.

9 The information, I can also say to the Court, is available on the
10 YESSA website -- the YESSA registry as public information. So it's
11 available.

12 What I can also say is that the latest response, you'll see from the
13 court update report there was a request for further information as recently
14 as January of this year. As recently as February 26th, though, just two
15 days ago, there was a response to that.

16 In terms of timelines, it looks like we are on track, but of course we
17 don't know exactly when the YESSA process will finish. That is out of our
18 hands, out of the project team's hands, and that is the YESSA process.
19 We're still anticipating a decision in June of this year, but of course there
20 are many things that may conspire against that.

21 Once the YESSA process or YESSA decision has been made, then
22 we can move on to the Water Board process. As Your Honour knows, we
23 require a licence from the Water Board for this new facility. Also, what I
24 can say is that, again, the project team are taking all measures to try and
25 expedite that process, and you'll see from the timetable that's attached in
26 the last tab that they are doing things ahead of schedule to try and
27 expedite the process.

28 Unless Your Honour has any questions about regulatory approval,
29 I'd like to move across to the Canada-wide strategy for managing
30 municipal wastewater. We've heard about this strategy for a number of
31 years and I suppose what we have been doing is trying to speculate on
32 what this might mean. There have been the Canadian Council of
33 Ministers of the Environment that have been working on national
34 guidelines for wastewater so that there is some consistency of approach
35 across the country. What we have seen most recently, though, is very
36 encouraging, what I think we're coming closer to the end of that process in
37 actually coming out with out some new guidelines, but also some new
38 regulations under the federal *Fisheries Act* that will deal with wastewater.
39 And a document was issued by Environment Canada in October 2007. It's
40 called "Proposed Regulatory Framework for Wastewater," and it
41 anticipates new regulations under the federal *Fisheries Act* dealing with
42 municipal wastewater effluent that will be published as proposed
43 regulations in December 2008, and those regulations will be finalized in
44 December 2009, with anticipated implementation in 2010.

45 Now, the question that we are, of course, always asking ourselves
46 is we want to make sure that we're going to be building a plant that will
47 anticipate and be able to comply with future regulatory requirements. So

1 we have some more direction on this. What we see from this document is
2 that, and it is at page 7 of the court update report, at tab 1 in the court
3 update report, is that certainly under this new regulation and new
4 framework that there will be secondary treatment required for all
5 wastewater from municipalities across Canada. That's what we do know.
6 And on page 8, table 3, these are the Environment Canada proposed
7 effluent requirements. And you'll see the table shows the different
8 substances that have to be dealt with in the wastewater facility, the
9 proposed limits, and then the third column is the proposed performance of
10 the Dawson aerated lagoon system. And you'll see that there will be
11 compliance, anticipated compliance with all of those future requirements.
12 So that is good news.

13 THE COURT: It proposes to continue the use of the LC50 test. It refers to it
14 there in brackets. Just refresh my memory, the LC50 is the fish test?

15 MR. CROSSMAN: It is, Your Honour. My hesitation is I'm not sure how the
16 LC50 test will apply to the new -- under the new proposed regulations.
17 Perhaps that's a question which the technical people can discuss.

18 THE COURT: That's fine. It's not -- merely glancing at that, it jumped out at me
19 because, of course, the LC50 test has been somewhat controversial over
20 the years and I see it was specifically referred to, so I merely asked. I
21 don't have any concern about it myself, merely an information item.

22 MR. CROSSMAN: Yeah. I understand, from the project team, that compliance
23 with these parameters will give compliance with the LC50 test.

24 Perhaps I can move, then, on, Your Honour, to the implementation
25 of the aerated lagoon facility. As Your Honour knows, this has progressed
26 from a pilot project, which was tested to see if this would be a viable
27 technology in this situation, and it was proven to be so. There has been a
28 movement from a one cell to a two cell to now we have a three cell
29 aerated lagoon facility. Most recently, the engineering firm of EBA has
30 completed an in-depth geotechnical investigation of the proposed site and
31 the force main route. They have identified, essentially, just one small
32 issue, which was a permafrost issue, and my understanding and advice is
33 that that can be dealt with through the construction process.

34 THE COURT: Again, just to be clear, my understanding was that they identified
35 a permafrost issue in one small part of the -- not a general permafrost
36 issue but something that can be dealt with relatively easily. That was my
37 understanding of it.

38 MR. CROSSMAN: Correct, Your Honour, yes.

39 So what we see from the regulatory process that we're doing
40 through, and also from the -- all the engineering and consulting reports
41 and investigations that have been done, and they're very extensive, as
42 Your Honour knows, in terms of the reports that have been provided, that
43 there appears to be a low risk that there will be substantial changes to the
44 project as a result of the YESSA and Water Board processes. Now, on
45 that thinking, the project team has decided that they would like to
46 accelerate the detailed design and preparation of the class A estimate.
47 This would be ahead of the usual time that that would be done, but, again,

1 they're very conscious of compliance with the Court's order and having
2 this project developed as quickly as possible, because they're very
3 conscious about the history of this matter.

4 At the moment, as I said, we're at a class C level, so 30 percent
5 variation in the price. We want to get it to a class A level, and we're
6 hoping that that can bring it within the funding envelope that has been
7 approved for this project.

8 THE COURT: Do you have timeframes for this process, moving to a class A?

9 MR. CROSSMAN: We do, Your Honour, and it's in the last tab of the court
10 update report, tab 15. You'll see the chart there which lists it.

11 THE COURT: Have someone with younger eyes look at the small print.

12 MR. CROSSMAN: Indeed, Your Honour.

13 THE COURT: Even with these reading glasses I'm in trouble.

14 MR. CROSSMAN: I'm struggling with the size of the print. Mr. Sarson informs
15 me the spring of this year.

16 THE COURT: And the class A estimate will be plus or minus what percent?

17 MR. CROSSMAN: Five to ten percent, Your Honour. Of course, there are no
18 guarantees in this world, but it will give us a much better idea.

19 THE COURT: No, no, give you a much better idea.

20 MR. CROSSMAN: Your Honour, as part of the, and perhaps I can just say,
21 before I get back into the project schedule here, you also see in the court
22 update report public consultation, and there has been a lot of public
23 consultation on this project. Mr. Sarson has been up there on a number of
24 occasions, with public open houses, meeting with people, explaining the
25 proposed facility and project, and answering questions. And that will
26 continue, as it has in the past.

27 So going back to the question of the work plan --

28 THE COURT: Let me just say again, for the benefit of people who don't have a
29 copy of your submission, that since March 2005 you've identified 15
30 different consultations in the City of Dawson.

31 MR. CROSSMAN: Thank you. Yes. I understand Mr. Sarson is quite a regular
32 up in Dawson now.

33 THE COURT: Has he invested in his own condo?

34 MR. CROSSMAN: I think he should, Your Honour.

35 The last item before I ask Mayor Steins to say a few words is to talk
36 about the future work plan. As you know, as this project advances we're
37 able to get a better sense of timing. We're still, though, in the dark in a
38 number of respects because we're still in the regulatory process; we're still
39 in the YESSA and then we have the Water Board process. These are
40 processes outside of the control of the project team. However, our best
41 estimates at this stage is that completion of this project would be by mid-
42 2011. Now, of course, we understand that the Court's order, Your
43 Honour's order, is for completion by December 31 of this year, 2008. So,
44 unfortunately, we're not going to get there, and we do anticipate that we
45 will need to bring an application to extend the time for compliance, and we
46 anticipate that at the next regular court update session, whenever that is
47 scheduled.

1 I can also -- of course, I've referred Your Honour to the project
2 schedule which sets out the steps to get there and explains why it will take
3 that long. I don't propose to get into the detail of that at this time, but I can
4 say, again, that the project team is taking every effort, is making every --
5 taking every step to try and expedite the process so that it can be
6 completed as fast as possible.

7 THE COURT: Let me just -- the uncertain area -- well, there are a number of
8 uncertain areas, but one of them that you've identified, of course, is the
9 regulatory review and approval, which would be the YESSA and Water
10 Board processes. You indicate here that it will require 21 months.
11 Twenty-one months from when?

12 MR. CROSSMAN: Sorry, Your Honour, is it --

13 THE COURT: I'm looking at page 12 of your tab 1, "Work Plan for Aerated
14 Lagoon." As I would normally read this, when I see a report like this, 21
15 months from today or from the time of the preparation of the report. But it
16 seems to me, with work that you've already been doing with YESSA and
17 the fact that you've initiated the Water Board process, being perhaps a bit
18 naïve about this, sort of thinking that this is a process that should move
19 faster than that, although I understand the need to put outside limits on it
20 and err in that direction. But do you have any comment on that, or
21 perhaps your technical people; 21 months from when?

22 MR. CROSSMAN: No, thank you, Your Honour, for the opportunity to clarify that.
23 It is -- it's 21 months since the beginning of the YESSA process, which
24 was July of last year.

25 THE COURT: Okay.

26 MR. CROSSMAN: And as you -- again, that's the best estimate --

27 THE COURT: Yeah. No, no.

28 MR. CROSSMAN: -- from the project team.
29 Your Honour, unless Your Honour has any questions, I propose to
30 ask Mayor Steins to say a few words, just to update the Court on what --

31 THE COURT: I don't have any questions that jump out at me at this point, but I'll
32 hear from others and Mr. Cliffe and some questions may arise at the end.
33 So I'll save my questions until then.

34 MR. CROSSMAN: Thank you, Your Honour.

35 THE COURT: Now, Mayor Steins, is it just sort of an optical illusion or is there
36 more grey hair in that head of yours since I saw you last?

37 MR. STEINS: Many more grey hairs, many more wrinkles, many sleepless
38 nights.

39 THE COURT: I'm not surprised. But I see you still have a sense of humour and
40 there's still a smile there, so that's a good sign.

41 MR. STEINS: I do. I do, because I believe that the glass is half full, not half
42 empty.

43 THE COURT: Right. Very good, sir.

44

45 SUBMISSIONS BY MR. STEINS:

46

47 MR. STEINS: Well, Your Honour, thank you very much, and I would like to thank

1 you for showing your commitment to this file and your interest in helping
2 us find a resolution to this problem. That certainly hasn't gone unnoticed
3 from the City of Dawson. And all I can say really, basically, in my little talk
4 is that Dawson continues to be supportive of the project. You know,
5 considering that 25 years have gone by where various things have
6 happened and we all know the history, some of it good, some of it bad, but
7 the fact that remains is that today we're on the brink of finally building a
8 secondary wastewater treatment plant, and the credit to arriving at this
9 stage largely goes to our team. YTG has done a great job of showing
10 leadership and offering resources, and not to mention the bottom line, the
11 money aspect of it, which we all know Dawson cannot afford. We just
12 don't have \$17 million or \$20 million to build a facility of any kind. So a
13 large recognition must go to the other levels of government for assisting
14 us in this project.

15 And I think if we look at how things have progressed, like I said,
16 we're on the brink here and I think we embrace the sewage lagoon option
17 over anything else, mainly because of its sustainability. I think other
18 technologies that are out there question whether or not it's sustainable for
19 Dawson. So the lagoon option is certainly something that we wish to
20 continue to pursue. And unless I've missed anything else, I think that's
21 pretty well it.

22 THE COURT: Let me just make an observation based on the information
23 provided in the reports and the oral references this morning. It seems to
24 me that by 2011, the Canada-wide strategy is going to require you to do
25 this, in any event. So what's happened in the meantime is that you've got
26 a bit of a jump on the process as a result of what's occurred in the past
27 few years. In terms of eventual cost and so forth, it seems to me that's a
28 good thing. I think being able to develop your treatment facility in a
29 cooperative way that's been happening over the past years, and being
30 able to work out some of the wrinkles and to ensure that you have
31 maximized consultation, it's bound to be better than having an edict come
32 under federal legislation which you must perhaps, depending on its form,
33 rush to meet. So while this process is certainly not an easy one; one
34 might even describe it as somewhat onerous, it's probably better than the
35 alternative in the sense that you've, both the Yukon and the City of
36 Whitehorse, has had a fairly lengthy period of time to look carefully at the
37 alternatives and to, with the cooperation of the federal authorities, develop
38 something that suits your needs. I hope I'm not overstating that, but that's
39 my impression at this point. You're going through a process now that
40 you're going to have to go through, except if you'd been sitting on your
41 hands all this time, you might be going through it a lot faster with a gun at
42 your head, or a cannon, as opposed to a little pistol that I might have.

43 MR. STEINS: Yeah. Well, I certainly agree, Your Honour; what you're saying is
44 absolutely accurate, and I think in our case we're fortunate because for
45 once in Dawson's history the stars are aligned and we are virtually on the
46 brink of making this happen. And you're quite right, I've been reading the
47 draft report on the Canada-wide strategy and it's obvious that these

1 infrastructure deficits that exist across the country will be addressed and
2 we will be well ahead of the game.

3 THE COURT: Yeah. I don't have any additional questions from you. Mayor
4 Steins, again, thank you for being here. I have been made aware of your
5 leadership on this file and it has not gone unnoticed on my part.

6 MR. STEINS: Thank you.

7 THE COURT: It's always nice to see you. And I can perhaps give you this
8 advice, the drugstore does sell some fluids that can darken that grey hair.

9 MR. STEINS: Well, I'll look into it; I'll drop by the drug mart. I do think of myself
10 as being vain at times, but maybe I can ramp it up a little bit.

11 THE COURT: Well, if you need some additional advice, I do want to say that the
12 grey is very distinguished and it becomes you, sir.

13 MR. STEINS: Well, thank you very much, Your Honour, thank you.

14 MR. CROSSMAN: Your Honour, that's the close of the Dawson submissions.

15 THE COURT: And I'll hear from Mr. Cliffe, and that may trigger my wanting to
16 hear further from you or from your technical people, but I'll see what Mr.
17 Cliffe has to say.

18 MR. CLIFFE: Your Honour, if I can just -- I haven't asked for an adjournment, at
19 least at this point in time, but there's been things said. I just want to
20 consult very briefly, if I may, in court, as to whether I should address
21 anything that my friend specifically has said.

22
23 (DISCUSSION OFF RECORD)

24
25 SUBMISSIONS BY MR. CLIFFE:

26
27 MR. CLIFFE: Your Honour, I can proceed. I'm just going to have an instruction
28 note. I know that Mr. Enns is preparing something for me to reply to, but I
29 can start now and move along.

30 Your Honour, I can advise the Court that the report back to court
31 that has been filed in this case by the City of Dawson and the Yukon
32 government has been read and reviewed by Mr. Enns and Mr. Lindsey
33 and myself, and in that vein, a report by Environment Canada indicating
34 their comments with respect to the report back to court's been filed with
35 this Court, and I can confirm that the Crown has received the February
36 27th letter with respect to the reply by the City of Dawson and the Yukon
37 government with respect to the comments filed by Environment Canada in
38 this matter. They've been read and I'll have a very brief comment about
39 that.

40 Your Honour, the Crown is quite well aware that there is going to be
41 a referendum in Dawson. I understand an advance poll is today and the
42 actual poll is scheduled for March 6th of 2008, with respect to a bylaw
43 regarding the current site. And the Crown, in that regard, it being mindful
44 of this referendum, is also respectful of the democratic process that
45 surrounds the referendum and the vote in it.

46 In addition, the Crown, and when I say the Crown, I'm of course
47 including Environment Canada, which is the federal regulatory agency that

1 is front and center with respect to ensuring compliance with the order that
2 was made by Your Honour that requires the City of Dawson to construct
3 and operate a secondary sewage treatment plant, at this point in time, by
4 the end of this year. The Crown is hopeful that the citizens of Dawson will
5 make an informed, and I stress an informed, decision when they do vote
6 today and they vote next Thursday.

7 The Crown also understands that there's going to be an
8 opportunity, at a future report back to court date that will be scheduled in
9 the month of April, and in that regard it thinks it appropriate, that is the
10 Crown thinks it's appropriate, that its comments that it's filed with the Court
11 in the interests of the pending referendum be really left to that next report
12 back to court date. So I don't intend to go into any particular detail in reply
13 to my learned friend. The Crown is accepting that there has been
14 progress here since June, the June 28, 2007 report back to court, and in
15 that regard the progress has been, as the Crown recognizes it, two-fold,
16 and that is, firstly, that there has been now the movement into the
17 regulatory approval process with respect to the aerated lagoon project that
18 is planned for what's been termed the baseball diamond lands or publicly
19 known as lots 1058 and 1059.

20 So there's been progress there. There's been also included in the
21 materials various reports that have been completed as of the middle to
22 late -- latter part of January of this year on technical aspects. So things
23 are moving along. But as I say, the Crown wants to reserve its opportunity
24 at the next report back to court to canvas the comments that Environment
25 Canada has presented in its report to the Court.

26 The Crown wants to stress today, Your Honour, because of the
27 pending referendum, what it says are some well-founded background
28 facts here. And it's in the context of those facts that the Crown would
29 have been sharing with the Court its comments with respect to the report
30 back to court that's presently before the Court. My friend alluded to these
31 background facts very briefly in his submissions, and I just want to spend
32 just a little bit more time and elaborate.

33 Firstly, there was why we are here. Why this court appearance is
34 happening is as a result of a prosecution under the federal *Fisheries Act*
35 that charged the City of Dawson with depositing its raw sewage, a
36 deleterious substance to fish, into the waters of the Yukon River. The City
37 of Dawson, in 2003, acknowledged its responsibility for that offence by
38 entering a guilty plea. And the circumstances with respect to that offence,
39 although charged on one specific day in August of 2000, it was agreed
40 between the parties that the history of non-compliance that pre-dated that
41 offence was relevant to the sentence that Your Honour imposed in that
42 case.

43 It's also important to note that the sentencing hearing that was
44 before Your Honour in 2003 lasted three days. The City of Dawson took a
45 position against the imposition of the order that Your Honour ultimately
46 made. The Crown sought that order. Your Honour, you no doubt recall,
47 reflected or what we term reserved your decision and gave a lengthy and

1 considered set of reasons why this court order should be imposed. So the
2 order was made, and it's important, as one thinks back and thinks of the
3 evidence that was before Your Honour at the time of that sentencing, it
4 was about, in many respects, what Mr. Mayor has said about the 25-year
5 period. That is, for a number of years prior to the offence in 2000,
6 approaching 20 some years, there was indifference by the City of Dawson.
7 I'm not talking about the citizens per se; I'm talking about the municipal
8 government.

9 THE COURT: Indifference to Water Board orders and directions.

10 MR. CLIFFE: Water Board orders, the protection of the Yukon River, as a result
11 of the deposit of raw sewage, ongoing raw sewage deposits. Twenty
12 years of failed promises to regulatory agencies like the Water Board, like
13 Environment Canada, that things would be done, a secondary treatment
14 plant would be built, and was never built, and little or no action taking
15 place in that vein. At the end of the day it is about the protection of the
16 water and the fish and the fish habitat in the Yukon River to be protected
17 from the deposit of raw sewage by the City of Dawson into the river.

18 The public, Your Honour, should be quite well aware that in a lot of
19 respects regulation was done, as Your Honour has said, through the
20 Yukon Water Board, and what's important here, that the Yukon Water
21 Board is not comprised of federal government bureaucrats; it's comprised
22 of Yukoners. And that board directed, in four consecutive Water Board
23 licences, that a secondary sewage treatment plant should be built. Yet the
24 city government chose not to. And it's with that evidence, and other
25 evidence, that Your Honour dealt with this matter in the way you did. This
26 was a serious environmental infraction. It was not a one-off. It wasn't
27 something that happened specifically on August the 16th, I believe, 2000,
28 where Environment Canada inspectors attended and took samples. Your
29 Honour was dealing with a history of many years of non-compliance, that
30 is, the deposit of raw sewage, at certain times of the year, being the
31 summer and fall months, where that raw sewage is harmful to fish. So I
32 stress that.

33 Environment Canada, and I will make this point, Your Honour, in
34 Your Honour's considered judgment, you were, in fact, critical of
35 Environment Canada and perhaps -- and no doubt, rightly so, that they
36 chose not to prosecute. They chose to look to other ways to get
37 compliance. But notwithstanding, the Court looked at the conduct of the
38 regulator and signalled what message are you sending; if you aren't out
39 there actively investigating and ensuring compliance by, with this history,
40 prosecuting. So in your judgment not only did the accused get criticized
41 but also the regulators as well, and you formulated a fit and proper
42 sentence - it's never been appealed - a fit and proper sentence in this
43 case, that being an order that a secondary sewage treatment plant be
44 constructed and operated.

45 My friend talked about your order being varied. It was varied and it

46 --

47 THE COURT: Will have to be varied yet again.

1 MR. CLIFFE: -- and will have to be varied yet again; you're, of course, very
2 correct. That there was an anticipation that this work could be done by
3 2004. It became clear that it wasn't going to be and Your Honour varied
4 that order in March of 2003, and gave another period of time, to the end of
5 this year, to comply with the order. And I think it is most apt, and I've done
6 this, read from your judgment with respect to varying the order, and I want
7 to read it again for the sake of the public, not only who's in this court, that
8 may, in fact, read about these proceedings, and Your Honour said this,
9 when you varied the order:

10
11 As indicated above, compliance with s. 36(3) of the Fisheries Act by
12 the City of Dawson involves significant complexities, both technical
13 and political. The new timeline [the end of this year] is not
14 generous but it is realistic. If it is to be achieved, the City of
15 Dawson and the Yukon Territorial Government must maintain
16 compliance with this order as a high priority.
17

18 So the point is that at this time, of course, we all know, there is yet
19 to be constructed a sewage treatment plant. And as we all know, as a
20 result, the City of Dawson continues to pump raw sewage into the Yukon
21 River. Nothing has changed. Nothing has changed from the date of that
22 offence in 2000 to this date. And we know, both sides know because both
23 sides have tested the raw sewage at the material months, in the summer
24 and fall, that this sewage, at that time, is harmful to fish. And going back
25 to your point that you made in your judgment, that here Environment
26 Canada is not going out and investigating and prosecuting, it is open, or
27 was open, and probably would still be open but for a qualification I'll
28 mention in a moment, for the City of Dawson to be charged again with
29 respect to the days of non-compliance, that is, the days when that raw
30 sewage is deleterious to fish.

31 Instead, what Environment Canada has done to facilitate
32 compliance with Your Honour's order has been to make a concession to
33 the City of Dawson. And the concession was entered into back in 2003,
34 when this order was made, so long as the City of Dawson is working
35 towards compliance with this order, Environment Canada will not
36 investigate and prosecute. It's not turning a blind eye to pollution. It's
37 saying, if you are diligent in these efforts, we will not investigate and
38 prosecute.

39 There have been remarks by this Court with respect to the work
40 that is being done. No one has found yet that the City has been duly
41 diligent. That might be at some other time and some other forum. But
42 that explains an aspect of the role of Environment Canada, and I say this
43 because Mr. Mayor made a point about the hard work of the project team.
44 There's no doubt that the Yukon government project team has worked
45 hard, but a second phase of the Environment Canada's role in this matter,
46 a most important role, has been offering technical advice and working
47 with, in a consulting capacity, with that team, that working team. And in

1 some respects, they should get some credit as well, with all due respect,
2 as a signal to we're moving along; we've moved slowly; we've moved a
3 little faster; we've maybe slowed down a little bit, and so on, but the
4 movement towards compliance with Your Honour's order has been
5 facilitated by the position that Environment Canada has taken regarding
6 enforcement and also working with the project team.

7 It's important, in the Crown's respectful view, to make it very clear
8 that this is a project of the City of Dawson and a project of the Yukon
9 government. It's not Environment Canada's project. Environment Canada
10 is not there to give a capital A approval to the project.

11 The project is very aptly defined and described, Your Honour, in the
12 report back to court, and I could just direct Your Honour to it. It's at page
13 10 of the tab 1, I believe, Your Honour.

14 THE COURT: I have it.

15 MR. CLIFFE: Yes, tab 1. My learned friends, the project team, at page 10, in the
16 Crown's respectful submission, aptly describes the project that is being
17 contemplated and for which Environment Canada has offered its technical
18 advice, and which there's been a lot of planning and a lot of effort to, and
19 it's defined at the third paragraph on page 10.

20
21 Based on the work completed to date, aerated lagoon technology
22 continues to represent the most viable sustainable secondary
23 wastewater treatment option for the City to comply with the court
24 order and other regulatory requirements. The City and Yukon will
25 continue to advance this project through the regulatory assessment
26 and review process over the next six months.

27
28 And to very clear, of course, that project, that technology in that project is
29 the baseball diamond lot 1058 and 1059 project.

30 Now, I make a comment about credit be given to Environment
31 Canada because I say this, and I wouldn't normally comment upon it in a
32 court, and that is with respect to some of the public media covering this
33 matter, and that is criticism of Environment Canada in this regard because
34 it's all Environment Canada's fault here that the City is facing the situation
35 that it's facing, that is, having to comply with an order, and it's far from it.
36 If there were concerns about the propriety of the charges, that should
37 have been raised back in 2003, and instead, the City chose to
38 acknowledge its responsibility for this matter.

39 Now, with respect to the role --

40 THE COURT: Let me just make a comment that's only sort of tangentially related
41 to what you're speaking of. It was precisely because the City
42 acknowledged its responsibility and indicated its willingness to work
43 diligently to solve the problem that I set aside the numerous precedents
44 that you placed before me that could have resulted in a fine between
45 \$100,000 and \$250,000 in this particular case and instead imposed what I
46 would call a rather nominal fine of \$5,000, with the requirement that they
47 build the treatment facility.

1 MR. CLIFFE: Yes, Your Honour.

2 THE COURT: And -- so in terms of acknowledging their responsibility, that also
3 resulted in quite a different order than the one that I could have made at
4 that time.

5 MR. CLIFFE: And when -- if I could just comment upon that, that notwithstanding
6 the position the Crown took with respect to a high penalty as being one
7 possible disposition, the Crown is also mindful, was mindful at the time,
8 that we're talking about a level of government and the citizens that are
9 represented by that level of government, and also looking at a broad
10 picture here, that here we have a community in the northern part of the
11 Yukon, in a near pristine environment, a natural river running by it, and yet
12 the city government at the time, and still today, is dumping raw sewage
13 into that river. So a submission, and at the end of the day, Your Honour's
14 considered judgment, making an order that you did does satisfy, in the
15 Crown's respectful submission, the capital P, Public, capital I, Interest, in a
16 broad way and in a long-term way, that will benefit, at the end of the day,
17 all of the citizens, not only of Dawson but also of the Yukon.

18 But let me move on.

19 THE COURT: Not to mention the people of Alaska who are downstream.

20 MR. CLIFFE: Absolutely. Absolutely.

21 I want to say this, that --

22 THE COURT: I might add, many of whom, in the little villages, take their drinking
23 water from the river.

24 MR. CLIFFE: Yes. Yes. And I suppose we can all get out and say things like
25 "not in my back yard," the common expression, the NIMBY syndrome, but
26 we have to be mindful of our neighbours, particularly in the 21st century,
27 and when we're dealing with protection of the environment.

28 I say this, I'm emphasizing how this order came about. The fact of
29 the matter is there is still Your Honour's order; it is outstanding; it still has
30 to be complied with. That is certain. That is a fact. It's not a conditional
31 order. It's not conditional upon getting funding from government. It's not
32 conditional upon certain technologies. It's very clear, that you must
33 construct this facility and operate it so it meets the provisions of the
34 federal *Fisheries Act*. The order, and it's important to note, in the Crown's
35 respectful submission, and as I said earlier, it is hoped that the citizens,
36 when they exercise their franchise, make informed decisions, but when
37 one looks at the court -- the referendum materials, that is, the request for
38 the plebiscite, and ultimately the bylaw, my reading of those documents
39 gave me some concern, because the fact of this court order is not
40 mentioned. In the Crown's respectful view, to be fully informed, the
41 citizenry should know, and I'm going to assume that they do because
42 there's been appearances in -- well, me step back.

43 The sentencing took place in 2003 in the City of Dawson for three
44 years. We've been back to court I believe at least twice with respect to
45 appearances regarding reports back to court, at least once, and I'm sure,
46 in my fading recollection of things, last year, and I think we were there
47 once before. The point being is that this has to be front and center that

1 Your Honour's order is there; it has to be complied with.

2 As I say, with respect to other comments, I'm of the respectful
3 submission that, given that we may be scheduling a report back to court
4 appearance some time in the month of April, that it may be appropriate
5 here to forego comments at this time and raise those at a more relevant
6 time, being in April, regarding the report back to court filed by my learned
7 friend. And I say that because this has been an ongoing process. When
8 Your Honour varied the order, Your Honour said we should be coming
9 back to court to update the Court, and we know things are there that are
10 happening in the background, and I say that Environment Canada doesn't
11 lose anything by waiting until the next report back to court to deal with its
12 comments that it's presented to the Court.

13 So if I could just have one moment to speak to Mr. Enns and I
14 should complete my remarks.

15
16 (DISCUSSION OFF RECORD)

17
18 MR. CLIFFE: Your Honour, I have nothing further to add at this time.

19 THE COURT: Just give me a moment and I'll see if my questions have been
20 answered. You may want to say something in response, in any event, but
21 I'll....

22 I do want to thank you, Mr. Cliffe, for reminding us of the history of
23 this, because it's been such a long time that even I had not been adverting
24 my mind to the question of why we're here, in fact, and you did well to
25 remind us all that my initial decision was not based on one incident of
26 effluent discharge not meeting Environment Canada requirements.
27 There's a very significant history there that lead to the decision that was
28 finally made.

29 Mr. Crossman, anything you want to say in reply to Mr. Cliffe, and is
30 there anything any of your people wish to raise in addition? I'm happy to
31 hear directly from them, if they wish to do so.

32
33 REPLY BY MR. CROSSMAN

34
35 MR. CROSSMAN: Thank you, Your Honour. I think just two short points; I think
36 that will probably do it for us.

37 Firstly, on the question of the continuing dumping of sewage into
38 the Yukon River. As Your Honour may recall, there was some steps
39 taken, initially, to take some measures to try and reduce, if you like, some
40 of the intensity of the dumping; for example, the trucks that were dumping
41 at the screening plant were directed elsewhere and things like that. I won't
42 go into the detail of that; I don't think that's --

43 THE COURT: I do recall that.

44 MR. CROSSMAN: -- but you do recall that.

45 And the other second point is on the referendum issue, and my
46 friend pointed out that those who were proposing the referendum, and
47 perhaps I can just go back one step here. The referendum process, as

1 Your Honour knows, is a democratic process under the *Municipal Act*; it is
2 the right of citizens of that municipality to bring issues forward. And in this
3 case, and the process is that they bring a petition forward, and if that
4 petition is supported by an appropriate number of people, then a
5 referendum is called for. So the proponents of the referendum did obtain
6 the appropriate number of people for the petition and then they have -- it
7 has now been set for a referendum. It is those proponents or the
8 petitioners who prepare the materials and the proposed bylaw that they're
9 seeking. I just want to -- it's just a point of clarification, that that's not
10 within the control of the City or the mayor and council.

11 THE COURT: I understand what you're saying and why you're saying it, but it
12 never concerned to me that it should in any way reflect on the City. But
13 nevertheless, the fact is, as stated, there may be a few people who might
14 not fully appreciate the fact that there's a longstanding court order behind
15 this process.

16 MR. CROSSMAN: No. And I did not have any concerns with the statements
17 made by my friend in that regard. I just wanted to point that out. And
18 perhaps, the last point, just on this point about the referendum is that, as
19 Your Honour knows, may or may not know, and the court report does
20 touch upon this, that there have been public information sessions in
21 relation to the referendum question, and in fact, information that has gone
22 out to the community about the referendum, and I'm holding in my hand
23 just one of those leaflets that have gone out, and in this case, and this is
24 from the City of Dawson, about the referendum but explaining. It does
25 refer, for example, about the court order. So we hope people are
26 informed, is my point.

27 THE COURT: You don't say, certainly, some of the media reports that you've
28 brought to my attention, in one of the tabs, also refer to the fact or refer to
29 a court order in the background. So hopefully - hopefully - people will
30 recognize that there's more to this than just a not in my back yard kind of
31 response to an issue.

32 MR. CROSSMAN: Thank you, Your Honour.

33 THE COURT: Thank you. Any of the consultants or experts who are here wish
34 to add anything. Mr. Enns?

35 MR. ENNS: Nothing from Environment Canada, Your Honour.

36 THE COURT: Everyone's content with what's transpired then so far. Thank you.
37 Mr. Cliffe has referred to the fact that there is likely to be a further
38 review not too far in the future, and I look forward to that. I would say that,
39 based on the materials filed today and the review by Mr. Crossman, that I
40 continue to be satisfied that significant efforts are being made to move this
41 file forward in a way that I'd hoped would happen. Mr. Cliffe referred to a
42 paragraph in my earlier decision where I referred to the need for diligence.
43 I continue to emphasize that. He also referred to the fact that I refereed --
44 that I made mention of the fact that this was a complex political economic
45 legal issue. I can tell you that when I articulated those words, I had no
46 idea how complex it would be, but I've learned a lot in the meantime;
47 together we've learned a lot, but it is absolutely essential that this matter

1 be brought to a conclusion as quickly as possible.
2 Thank you everyone, and for those of you who are travelling back
3 to Dawson, travel safely.
4

5 (PROCEEDINGS CONCLUDED)
6

7
8 This is to certify that the foregoing is a true and
9 faithful transcript of the contents of the record
10 prepared in the above named proceeding.
11

12
13 _____
14 Jan Graham, Transcriber
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47