

T.C. 01-00050A

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

WHITEHORSE

JUNE 28, 2006

REGINA

v.

THE CITY OF DAWSON

PROCEEDINGS

APPEARANCES:

John Cliffe
Tony Crossman
Toni Welch
Sandra McMurphy

Appearing for Crown
Appearing for Defence
Court recorder
Transcriber

1 THE CLERK: Your Honour, this is the review of
2 the matter of Her Majesty the Queen and the City of
3 Dawson.

4 MR. CLIFFE: Your Honour, John Cliffe for the
5 Crown with Brett Webber, Your Honour.

6 THE COURT: Welcome back to Whitehorse, sir.

7 MR. CLIFFE: Thank you, Your Honour, and with
8 us in the public gallery is Mr. Vic Enns, professional
9 engineer with Environment Canada; he's appeared on
10 their other matters.

11 THE COURT: Yes, Mr. Enns, good to see you.

12 MR. CLIFFE: He's here for any questions that
13 Your Honour has.

14 THE COURT: And you must be Mr. Crossman?

15 MR. CROSSMAN: Yes, Your Honour. Good afternoon.
16 I'm taking over for Mr. Horembala on this part.

17 THE COURT: Yes, I gathered that from the
18 affidavit.

19 MR. CROSSMAN: Thank you. Mr. Horembala has been
20 acting for the City of Whitehorse -- the City of
21 Dawson, I should say, up until now. I've been acting
22 for the Yukon Government in relation to this file.
23 Just recently there seemed to be a common interest in
24 pursuing this and a streamlining of counsel, if you
25 like, and so I've taken over the conduct. I'm acting
26 for the City of Dawson today. And with me today is the
27 new Mayor of Dawson, John Steins.

1 THE COURT: Mr. Steins, congratulations on
2 your acclamation, I suppose.

3 MR. STEINS: Thank you, Your Honour.

4 THE COURT: I wish you a lot of luck, a big
5 challenge ahead for you --

6 MR. STEINS: I think so.

7 THE COURT: -- and welcome here.

8 MR. STEINS: Thank you, Your Honour.

9 MR. CROSSMAN: Of course, Mr. Steins, it's a
10 steep learning curve, having been inducted only on
11 Monday. With him is Mr. Paul Moore. Paul Moore is the
12 Chief Administrative Officer of Dawson.

13 THE COURT: M-o-h-r?

14 MR. MOORE: M-o-o-r-e.

15 THE COURT: Paul Moore. Yes, I'm sorry. I
16 saw your name in the file.

17 MR. CROSSMAN: Mr. Pat Molloy, who is with
18 Community Services, and Kriss Sarson, also with
19 Community Services.

20 THE COURT: That's K-r-i-s-s.

21 MR. CROSSMAN: Correct.

22 THE COURT: Mr. Sarson has had substantial
23 carriage of the file from the technical side.

24 MR. CROSSMAN: Exactly, and Mr. Molloy is -- Mr.
25 Sarson reports to Mr. Molloy and collectively, I think,
26 they -- well, Mr. Molloy probably spends 30 to 40
27 percent of his time on this file. Mr. Sarson spends

1 two-thirds of his time on this particular file.

2 THE COURT: Thank you. I can advise counsel
3 that I've reviewed quite carefully the material filed
4 by Mr. Crossman. I've not received anything from Crown
5 counsel, I take it because there's nothing to file and
6 that there's been nothing on file on your part.

7 MR. CLIFFE: Yes, nothing to file.

8 THE COURT: You're basically monitoring the
9 performance on the side of the City of Dawson.

10 MR. CLIFFE: That's correct, but I do have a
11 submission, Your Honour, with --

12 THE COURT: Oh, I'm sure you do.

13 MR. CLIFFE: -- with respect to the contents of
14 the report, but there's been no materials, except for
15 the study material and that, there's nothing like that.

16 THE COURT: I'm just confirming that I hadn't
17 missed anything.

18 MR. CLIFFE: No, you have not. Thank you.

19 THE COURT: Having indicated to you that I've
20 reviewed the material, I'm assuming that counsel also
21 have spoken to each other. Who would like to start?

22 MR. CLIFFE: Well, I think that probably -- my
23 respectful submission, it should be the City of Dawson
24 that --

25 THE COURT: Yes, that would be the normal
26 procedure.

27 MR. CLIFFE: Yes, and I'll reply to that. And

1 I might just say that Mr. Webber did remind me, Your
2 Honour, that in the materials that you have read, that
3 have been filed by my learned friend, there's some
4 correspondence that was -- that's included in it, and
5 it's correspondence between Environment Canada and the
6 Yukon Territorial Government; there's a number of
7 letters.

8 THE COURT: Yes, in fact I've got a couple of
9 them marked for questions.

10 MR. CLIFFE: Yes, and there is a letter in the
11 chain that is missing from the - I'm not suggesting
12 anything improper like that, but it's just a missing
13 letter that goes into the mix, if I can call it that,
14 the chain of communications between Environment Canada
15 and the Yukon Territorial Government. I've given
16 copies to my learned friend.

17 THE COURT: Let me put it in the right
18 position.

19 MR. CLIFFE: Just indicate, Your Honour, that
20 this is the letter of April the 19th, 2006. I think
21 that it should be a suitable place in the materials --

22 THE COURT: I assume it precedes the letter
23 dated June 9th, 2006.

24 MR. CLIFFE: Yes, and there's actually a letter
25 -- if I can just get to it. Yes, it comes after the
26 letter from Mr. Molloy of March 17th, and it comes
27 before June the 9th, 2006, yes.

1 THE COURT: Yes, that's precisely where I put
2 it.

3 MR. CLIFFE: Yes, thank you.

4 THE COURT: Mr. Crossman, I'll let you
5 proceed, and certainly there will be questions by
6 myself and issues raised, but most importantly, in
7 addition to what has transpired more generally, I take
8 it there may have also been some recent developments, a
9 reference in the material to a possible meeting on June
10 20th, with the placer mine individuals.

11 MR. CROSSMAN: Yes.

12 THE COURT: Thank you.

13 MR. CROSSMAN: I'll cover that in my submissions
14 to you, Your Honour.

15 There are a couple of
16 developments, Your Honour. That is one of them, and
17 another one that I want to flag right at the beginning
18 is this other option, which is flagged in the
19 materials, about having a single or dual cell system;
20 it's another option which has presented itself in the
21 last interim period. Why that's a positive sign is
22 because it provides, I think -- I believe, all signs
23 indicate at this preliminary stage, that at a
24 conceptual level, it provides a more sustainable option
25 for the City of Dawson.

26 THE COURT: Translated cheaper?

27 MR. CROSSMAN: More affordable, that's right.

1 Yes, it does the same effect.

2 THE COURT: I understood there may be some
3 advantage to a -- what was it you say, the single-cell
4 divided into two cells?

5 MR. CROSSMAN: It could either be a single-cell
6 or two cells, yes.

7 THE COURT: The material indicated that there
8 are advantages to having two cells --

9 MR. CROSSMAN: That's right.

10 THE COURT: -- in terms of cleaning one cell
11 out, and so forth.

12 MR. CROSSMAN: That's right, yes, and perhaps
13 I'll come to that in --

14 THE COURT: So when you talk about the single-
15 cell system, you're talking about both.

16 MR. CROSSMAN: Both, that's right, yes. Thanks,
17 Your Honour.

18 Your Honour, as I've mentioned,
19 and as you know it, the Yukon Government has been
20 dealing with this matter in the background until now,
21 and I think recently, certainly from a public
22 perspective, and it's been in the media as well as in
23 the report itself, there's written indication that the
24 Yukon Government is taking more active role in the
25 management of this new Waste Water Facility Project.

26 The -- there's a Memorandum of
27 Agreement, which is in the materials, dated 14th of

1 February, 2006.

2 THE COURT: Quite late in the game.

3 MR. CROSSMAN: Sorry?

4 THE COURT: Quite late in the game.

5 MR. CROSSMAN: The agreement?

6 THE COURT: Yes.

7 MR. CROSSMAN: I think it reflects what was sort
8 of happening in the background, Your Honour, and it's
9 really solidified, really, the relationship that was
10 occurring. As you know, Dawson was in financial
11 difficulties; a trustee was appointed and, really, for
12 a project of this magnitude, I mean we were talking
13 \$14.7 million, capacity was another issue in terms of
14 having --

15 THE COURT: Yes, there's no question, in
16 earlier occasions, I had occasion to comment on the
17 fact that this was not practicum -- practical
18 perspective, or indeed, even in a legal perspective,
19 Dawson City's sole responsibility. So I'm not
20 displeased to see that involvement. But I would
21 comment, perhaps, while I've interrupted you, that
22 this, of course, is a side arrangement between the City
23 of Dawson and the Yukon Government, which does not in
24 any way directly impact on the decision, the order, and
25 Dawson's responsibility. This happens to be one way
26 that they're moving towards meeting their
27 responsibilities.

1 MR. CROSSMAN: Precisely, that's right, and it's
2 a practical way of achieving the compliance with the
3 order, Your Honour. As you have seen -- as you've
4 probably read from that agreement, there's obviously a
5 joint desire and interest in having this project
6 completed, from Dawson's point of view and from the
7 Yukon Government's point of view.

8 Yukon Government will be
9 responsible for and undertake and deliver the project,
10 so the new plant. Yukon Government will manage and
11 administer the project to completion, and that's the
12 responsibility of Mr. Molloy and Mr. Sarson, who are
13 here today.

14 Dawson's responsibility relates to
15 the issue of public consultation, and of course,
16 assuming the full cost of ongoing operation and
17 maintenance of the plant once it's completed. As
18 you've heard before, those costs are not insignificant.
19 The initial SBR, the mechanical plant, the operation
20 maintenance costs were in the order of about \$640,000
21 per year. One of the reasons for varying the order was
22 because of the fact -- the cost factor. It was,
23 frankly, going to be not affordable to the citizens of
24 Dawson, and that's why the new option, which is the
25 aerated lagoon option, a three-cell system, presented
26 itself at about \$320,000 per year. Still a significant
27 cost for a population of about 1800 people.

1 The agreement is also important
2 because it shows the commitment of the Yukon
3 Government, and the City of Dawson, to delivering this
4 project and complying with the order, and complying
5 with the deadline that has been set by the Court, which
6 is the end of December 2008. I'll come back to the
7 issue of time later on. As you'll see, it creates a
8 community team, plus a project manager.

9 Yukon's responsibility is also to
10 deal with the funding aspect of this new plant. From a
11 capital cost perspective, we're talking about \$14.7
12 million for the aerated lagoon option, as opposed to
13 about \$19 million for the SBR mechanical plant.

14 So what's been happening since
15 November of last year, when the parties were last
16 before you? Firstly, there was a draft pilot study
17 report that was presented at that time, which was the
18 -- to do with the -- what had happened at the pilot
19 project. That was finalized in about January of this
20 year. As a result of that, and as a result of
21 submissions made to the Management Board of the Yukon
22 Government, the aerated lagoon was decided upon as the
23 preferable option for the new plant.

24 The funding aspect was also dealt
25 with. It's \$14.7 million, and funding here -- perhaps
26 just a word of sort of background here is helpful for
27 the Court. Obviously, it is a significant spending of

1 public funds and through any, you know, any significant
2 spending of public funds, there are internal government
3 processes that have to go through. Here, within the
4 Yukon Government, it's to the Management Board for
5 approval for those sorts of funds. From the Federal
6 side of things, it's at the Treasury Board level to
7 approve those sorts of funds. At Management Board,
8 anything in excess of one million dollars of public
9 funds requires the approval of Management Board, and,
10 of course, the reason behind that is to create
11 accountability, is to ask those hard due diligence
12 questions: Is this the right spending of money; is
13 this the right project; is this the right way to build
14 the plant, for example.

15 In particular, in light of some of
16 the recent events, such as at the federal level, the
17 sponsorship investigation, and with Dawson itself, with
18 the forensic ordered investigation there, as well, it's
19 important, obviously, when dealing with public funds,
20 that there be accountability. That's what the
21 Management Board process provides you.

22 Now, that process takes some time,
23 but the result of that is a positive result in
24 management board saying yes, you have approval to go
25 ahead with the aerated lagoon, the funds are earmarked
26 and to make the application for funding to Canada under
27 this Canada Strategic Infrastructure Fund Program.

1 Now, that program is designed for something exactly
2 like this. In fact, waste water plants, which this is,
3 is one of the priority items covered by that fund.

4 That application was made by
5 Community Services to Canada and they've been through
6 -- they believe at the end of the due diligence period,
7 which essentially is a question and answer format,
8 where Canada does its due diligence to ensure that the
9 funds are appropriately -- being appropriately spent
10 and that this is an appropriate project for the fund.

11 Everything is positive, and, in
12 fact, we're expecting an announcement, if not within
13 days, within weeks. We're perhaps a little
14 disappointed that we couldn't have some better news, to
15 say that that funding had been approved by Canada, but
16 all indications are that it would be approved by
17 Canada. So that's good news.

18 Just to put that in perspective,
19 though, as well, is that under this fund, the Yukon
20 Government was allocated about \$80 million, and \$18
21 million of that \$80 million is for sewage treatment
22 plants. Nearly \$15 million is for the Dawson plant and
23 the other three to four million was for the Carmacks
24 plant.

25 So, in terms of commitments and
26 priorities, the Yukon Government has committed
27 significant funds and made this a priority item,

1 obviously, in terms of funding. The other --

2 THE COURT: I'm sorry, the \$15 million is, as
3 I understood it, was not a commitment by the Yukon
4 Government, because the -- their funding and support is
5 contingent on getting the CSIF dollars.

6 MR. CROSSMAN: Well, it is a --

7 THE COURT: So I take it they're committed to
8 half of that, conditionally.

9 MR. CROSSMAN: My apologies, yes. It's
10 contingent in that sense, Your Honour, yes. That's
11 right. The fund works on a fifty-fifty split. So
12 there's a sharing of paying -- who pays for the new
13 plant.

14 The reason I raise this is the
15 fund and how that was allocated and the fact that so
16 much was allocated to this plant is because this is a
17 situation where, of course, the whole fund could have
18 been spent on other projects but was not in terms of
19 this infrastructure pot of money. Again, this shows
20 the commitment from the Yukon Government, and also
21 Dawson, in this regard.

22 The other -- as you'll recall, the
23 challenge that we had -- that we faced and indicated in
24 court last time, was in relation to land; where can we
25 put this new plant. Reserves had been secured for the
26 two Callison sites. There was --

27 THE COURT: A and C.

1 MR. CROSSMAN: A and C, that's correct, Your
2 Honour. There was a problem because one of those
3 sites, which was the preferable site, had a placer
4 mining claim on it. During this interim period,
5 Community Service people have been meeting with the
6 placer miners -- placer miner to see if we -- if
7 there's an option of being able to work in conjunction
8 with the mining operation, and at a conceptual level,
9 it appears the answer is yes. There was a meeting --

10 THE COURT: I'm always nervous of the
11 terminology, "conceptual level".

12 MR. CROSSMAN: We -- I'm told that a meeting last
13 week, for example, as most recent as last week, said
14 that the miner could conduct his mining operations on
15 the land, as well as have the sewage lagoons on the
16 land, so that they could occur on the same piece of
17 land, and that that would work.

18 Now, there's another meeting lined
19 up in July to further refine that. So in other words,
20 to get into more detail about how that could work. So
21 it is --

22 THE COURT: Can I just ask a question again?
23 We're reasonably casual here, so I may interrupt from
24 time to time. Does the Yukon Government -- is the
25 Yukon Government in a position to expropriate a placer
26 claim, which would appear on its face to be federal,
27 would it not? Do you know the answer to that?

1 MR. CROSSMAN: I don't know the answer off hand,
2 but I believe that it's one of the issues being
3 addressed and looked at, yes. It's hoped, though, that
4 with these negotiations with the placer miner, that
5 that option might have to be addressed.

6 THE COURT: Sometimes negotiations go better
7 if the expropriation process is initiated. But there
8 were a couple of other sites also --

9 MR. CROSSMAN: There were a couple of other sites
10 and --

11 THE COURT: -- the landslide area and was it
12 the baseball diamond area that was identified? Can you
13 speak to those?

14 MR. CROSSMAN: I can.

15 THE COURT: I take it -- again, I'm moving you
16 off that, but I'm assuming that with respect to
17 Callison C, there are discussions taking place; it's
18 hopeful that some resolution may occur relatively soon.

19 MR. CROSSMAN: Yes.

20 THE COURT: I guess the first question is, is
21 Callison C seen as preferable to the landslide area or
22 the other site? I described it as the baseball site.

23 MR. CROSSMAN: In the landslide area, meaning the
24 north end site?

25 THE COURT: Yes.

26 MR. CROSSMAN: Okay.

27 THE COURT: Is Callison C preferable to that?

1 MR. CROSSMAN: The north end site is preferable,
2 but on the basis of the single-cell option. That, in
3 fact, would be a very promising site.

4 THE COURT: You go ahead, I've -

5 MR. CROSSMAN: Yes. No, no, please interrupt.
6 I'm happy -- and before I perhaps get to the -- those
7 -- the north end site, perhaps I should mention,
8 there's also been confidential negotiations going on in
9 relation to another site, and, unfortunately, I can't
10 talk more about that, but I think the Court has been
11 told about that site in the past. Again, Community
12 Services are continuing negotiations on that, but they
13 are very sensitive, so, unfortunately, I can't say more
14 about that, but they are ongoing.

15 THE COURT: Is that a more preferable site
16 yet?

17 MR. CROSSMAN: No, I think the north end site is
18 the most preferable. Your Honour, I have a copy of a
19 map which shows the north end site which may help. My
20 friend has a copy of this, as well.

21 THE COURT: There are two copies; I just need
22 one, I take it. Thank you.

23 MR. CROSSMAN: Yes, that's right. Perhaps I can
24 -- I just want to tell you a little bit about the
25 background about this site and how this arose as being
26 a promising site and this --

27 THE COURT: Just before you start, this site

1 is currently owned by the City of Dawson?

2 MR. CROSSMAN: It is. That's right. It's about
3 5.96 hectares. As a result of the pilot testing that
4 was -- the pilot testing that was done on this pilot
5 test plant, which was finalized in January of this
6 year, and in conjunction with the problems that were
7 being experienced with the land issues, this Callison C
8 site, Community Services went back to the drawing
9 board, if you like, or had to sort of re-analyze as to
10 what if we don't -- we are not able secure the Callison
11 C site?

12 And when looking at the pilot
13 study, it appeared that most of the treatment occurred
14 in one of the cells out of a three-cell system, and so
15 the question then became, could we use a one cell
16 system or a dual cell system, maybe with some pre and
17 post treatment and in that way reduce the footprint?
18 So we wouldn't need a site as large as the Callison
19 site. That would create more options and also maybe
20 create more certainty for us in this project
21 implementation.

22 So that's what happened is that,
23 at that point, Community Services instructed Earth
24 Tech, an independent consultant, to review the pilot
25 study and to look to see if this single-cell system
26 might work. Is it an option? Is it possible? If the
27 answer was no, well, that's okay. The answer has come

1 back that yes, it is an option, and it's an option from
2 a technical point of view that would achieve compliance
3 with the order and with the *Fisheries Act*, with the
4 license requirements that we anticipate from the Water
5 Board.

6 The -- and it needs -- and that
7 sort of system would need about two hectares, which is
8 obviously within the north end site. The north end
9 site is obviously -- it's downstream from the water
10 intake for the city. That's good news. There's an old
11 gravel pit so this -- and it's owned by the city, so
12 it's a preferred option. Now, having said that, we
13 haven't looked at the geotechnical feasibility, so --
14 and that's scheduled to go ahead in July, to see if
15 this would be feasible, and we should know the results
16 fairly soon after that.

17 There also needs to be some
18 further work on this as a viable option. We expect
19 that all of this is going to take between about three
20 to six months to see if this is the preferred option.

21 What we know at the preliminary
22 stage, though, from -- is that it would actually
23 provide even a more affordable system for the citizens
24 of Dawson. Why it's more affordable is that, in terms
25 of operation and maintenance, instead of about -- well,
26 if we went with a mechanical plant, it's \$640,000 a
27 year. If we went with the 3-cell aerated lagoon, it's

1 about \$320,000 per year. If we went with this one cell
2 system, we are anticipating that it could be less than
3 \$200,000 per year.

4 It's more affordable, also, from a
5 capital perspective and so, therefore, from spending of
6 public funds. Again, the mechanical plant was about
7 \$19 million. The three-cell system is going to be
8 \$14.7 million, and again it is anticipated, and this is
9 all at a conceptual level, so this is very preliminary,
10 but it could be less than \$7 million.

11 So for those reasons, we think
12 that it's a promising and hopefully it's a good option.
13 It will also take into account the future regulatory
14 requirements, and that was the point of including in
15 the materials the CCME, the Canadian Council of
16 Ministers of the Environment report on waste water
17 which is dated April 2006. This gives us some insight
18 as to what the future might look like in terms of the
19 requirements for the plant; because, of course, we're
20 building it not just for today, but to be able to
21 comply with future regulations, as well, and future
22 populations.

23 Having said all of this, now these
24 options are there. As I said, the unfortunate part of
25 this is that, with this new option coming up so
26 relatively late in the day, it's going to take us
27 another three to six months. So we're hopeful that by

1 the time we report back to the Court in another six
2 months, we'll know about the feasibility of this new
3 option. But as I said, at this stage it looks very
4 promising.

5 There are three other headings I'd
6 like to touch on.

7 THE COURT: Just give me a second.

8 MR. CROSSMAN: The first one is the regulatory
9 context, and as you may be aware, on November 28th of
10 last year, the *Yukon Environmental and Social Economic*
11 *Assessment Act* came into operation, and it's referred
12 to in the court report, an explanation about that.

13 The reason I raise it is because
14 with this new process in place, there may be some
15 problems in terms of timelines, as well. We are still
16 in the early days of knowing how long this process
17 takes under YESAA.

18 THE COURT: Perhaps -- I hadn't heard of YESAA
19 until I read the material and I meant to find the
20 answer to this question myself, but I've been fairly
21 busy the last couple of days. Is YESAA a Yukon Act or
22 is it a Federal Act?

23 MR. CROSSMAN: It's a Yukon Act.

24 THE COURT: It's a Yukon Act.

25 MR. CROSSMAN: That's right. It's designed to
26 deal with all development in the Yukon, yes. So that
27 works in -- and that's, if you like, that process works

1 in conjunction with the Water Board licensing process.
2 It's a preliminary to Water Board making a decision
3 about deciding on the new plant.

4 So I just say that that's --
5 there's some uncertainty there. We're hoping again,
6 within the next six months, to have a better handle on
7 what that might mean in practice. The materials
8 provide you with some indication of the outline of the
9 process. In terms of timing, this is all very new and
10 frankly the YESAA Board is still dealing and trying to
11 deal and understand with its own procedures and how
12 things were going.

13 In terms of the timeline, as I
14 said, we want to be up front with the Court about this
15 and the report says that we're uncertain if we're going
16 to be able to make the December 31 deadline. Now, the
17 intention and the will is to reach that deadline.
18 They're certainly my instructions; it's the commitment
19 of the Yukon Government; it's the commitment of the
20 mayor -- of the new mayor, but also of the previous
21 trustee of Dawson; it's reflected in the Memorandum of
22 Agreement between the Yukon Government and Dawson.
23 They're committed to building the plant by December 31,
24 2008. But we thought it was appropriate because these
25 issues are starting to arise where we may not be able
26 to reach what was, even at that time, thought to be an
27 aggressive time table, and so we wanted to mention

1 that. Again, I have no further submissions on that at
2 this time, but to sort of flag that as an issue which
3 may arise on the next attendance.

4 The last issue I wanted to raise
5 was communications, and I know this is going to be an
6 issue raised by my colleague --

7 MR. CLIFFE: It was an issue that was raised,
8 as you know, the last time we did a review and at that
9 point it was an important issue for me, and I was given
10 assurances that it would be no further communication
11 issues.

12 MR. CROSSMAN: Yes, and it's unfortunate that it
13 has been raised again, and what I can say, Your Honour,
14 is from what I've been told from my clients is that
15 there had been monthly, regular, face-to-face meetings
16 between Community Services, particularly Mr. Sarson
17 with Mr. Enns. These were mainly on a technical basis,
18 you know. Will this work, will that work, et cetera.
19 And those were -- there was a free flow of information
20 on those technical aspects.

21 The last phase that we've been in
22 has been essentially on an approval process within the
23 Yukon Government and a funding process, but also
24 dealing with some confidential land negotiations, as
25 well. Yukon Community Services people have told
26 Environment Canada that they have been not able to
27 provide as much information about those issues because

1 of the confidential nature of, and the sensitive nature
2 of those discussions and what's been going on
3 internally, with Government, and confidentially in
4 negotiations with third parties.

5 They have been told, though, that
6 that's what was going on, but unfortunately,
7 Environment Canada were not satisfied with that
8 response. There was also an offer to meet to discuss
9 this. There was finally a meeting in June where,
10 again, more information was provided, because by that
11 time more information had come to light which could be
12 released to Environment Canada.

13 Now, I think in terms of going
14 forward, what I can suggest is that certainly, one,
15 there needs to be understanding in terms of there will
16 be technical information which -- there'll be that
17 continuing discussion about the merits of certain
18 technical aspects.

19 We certainly intend to continue
20 the monthly, regular, face-to-face meetings, and that
21 will include not only Community Services and
22 Environment Canada, but also Yukon Environment as well,
23 because they're part of this picture.

24 There -- but there will be -- I
25 suppose there needs to be an understanding, at least
26 from our client's -- my client's perspective, that in
27 some cases there may be confidential information which

1 can't be passed on. It's just the nature of that
2 information. As I said, the intention is --

3 THE COURT: Is it your position that -- I'll
4 probably hear more, as you say, about this from Mr.
5 Cliffe, but is it your position that, from your
6 client's perspective, that communication was full and
7 complete, with the exception of confidential matters?

8 MR. CROSSMAN: As much information as was able to
9 be provided was provided, yes, and that will continue.
10 The intention is -- because my client -- well, Yukon
11 Government, as well as the City of Dawson, had a
12 commitment to this project and would like to work
13 cooperatively with Environment Canada to get this done.

14 There are my submissions, unless
15 Your Honour has questions.

16 THE COURT: I don't have any at this time. I
17 may have some after I hear from Mr. Cliffe.

18 MR. CROSSMAN: Thank you, Your Honour.

19 MR. CLIFFE: As Your Honour knows, this is the
20 third report back to court appearance. We had
21 appearances in February of last year and in November of
22 last year, with respect to the updates here.

23 I may say that what I -- my
24 submissions, I have, briefly in some parts and in
25 detail in others, I have conveyed to my lawyer friend
26 prior to speaking to you or addressing the Court today,
27 once in Vancouver over the telephone and then just this

1 afternoon -- early this afternoon, so my friend knows
2 where I'm coming from. I can say this, that I have
3 read the project update report that's been filed, as
4 has Mr. Enns. I have met with Mr. Enns with respect to
5 its contents and I know this is the afternoon; I don't
6 intend to be overly lengthy, but I want to deal with a
7 few points here in a little bit of detail and say this
8 to Your Honour, that much can be said about this report
9 and what it says, and more importantly, what it doesn't
10 say, and I want to summarize and be candid, as I've
11 been candid with my learned friend, that the Crown and
12 Environment Canada are most disappointed and troubled
13 with the status of this matter.

14 And to be candid about what the
15 report says, it says a number of things. Firstly it
16 says to this Court: We don't have land sewn up here
17 for the proposed aerated lagoon, which the City and the
18 Yukon Government was moving towards as of the last
19 appearance."

20 Number two is the Yukon
21 Territorial Government and the City are still looking
22 at options.

23 THE COURT: Technical options.

24 MR. CLIFFE: Pardon me?

25 THE COURT: Technical options.

26 MR. CLIFFE: Technical options here. And that
27 has to be looked at in a very interesting, historical

1 background. Technical options here had been considered
2 since 1983, 23 years of consideration, consultants
3 retained by the City, now consultants retained by the
4 Yukon Government. It's been studied and studied and
5 studied.

6 Now I'll come back to the point
7 about the single-cell option in a moment, but it has to
8 be looked -- today is an update day and it's a day to
9 think of the past, the present, and the future.

10 So as well, and my third point is
11 that the YTG and the City are now saying that the four
12 year extension that was granted, as a result of your
13 variation of the order, appears not to be sufficient
14 time. That's one of the things they're saying in this
15 update report.

16 Keeping in mind that in 2003, the
17 Court said two years, the order was varied and another
18 four years on top of that to 2008; and it still
19 appears, according to the YTG and the City, not
20 sufficient.

21 It tells you as well that if the
22 estimates exceed \$14.7 million, that the YTG and the
23 City think they have to revisit other options. It says
24 that the YTG and the City think that they will have to
25 revisit other options if the strategic -- and the
26 strategic fund monies aren't forthcoming. I
27 parenthetically add that when you read the materials,

1 there's an inquiry and due diligence as late as the
2 middle of this month.

3 So I don't know where the decision
4 making process is. I trust what my learned friend
5 tells the Court, that he's expecting a word very
6 quickly, but due diligence as of a week ago, or two
7 weeks ago, was still being conducted by the Government
8 of Canada with respect to the project.

9 As well, it's telling you that the
10 YTG and the City appear hopeful that the standards and
11 the regulations are going to change. To be very clear
12 on that, there is no eve of change. They're hopeful
13 that it might change.

14 THE COURT: Some time.

15 MR. CLIFFE: Some time, and it may some time.
16 Like anything, something will change.

17 The Crown says that when you look
18 at this report and these high points that I've made out
19 to you, this situation is unacceptable. When you read
20 the report and consider these points, the Crown says to
21 you, this is just a basis for delay and avoiding
22 compliance with your order, and that is not clearly an
23 option.

24 I say further, Your Honour, that
25 there has been, in the Crown's respectful submission,
26 and after consultation with Mr. Enns and his
27 instructions to me, no meaningful progress as of this

1 date with respect to the options. Seven months ago,
2 seven months --

3 THE COURT: Meaning there's still options on
4 the table and not one of them has been identified as
5 the one they're going to proceed with. In other words,
6 everything is still sort of on the table.

7 MR. CLIFFE: Everything's -- well, I suppose
8 that's being fair to them, everything's still on the
9 table. You may recall, Your Honour, discussions in
10 November of the drop-dead date.

11 THE COURT: I do, February.

12 MR. CLIFFE: February, February of 2006 was the
13 drop-dead date, and there were two options on the
14 table. The SBR option, which was an option that Your
15 Honour, in the first order, directed them to deal with,
16 and as a result of consultation with my learned friend
17 and representative of his clients, and with
18 consultation with Mr. Enns, it thought -- the Crown
19 thought fair and reasonable, that why not open it up,
20 SBR is still on the table, and craft an order that
21 allows options to be considered. But implied in that
22 was a movement, a reasonable movement to an option, and
23 it may very well be it falls back to SBR.

24 But back to the point of the drop-
25 dead date. That was stressed by questions that you
26 asked counsel for the City on that day, and there was a
27 commitment to aggressive movement towards the drop-dead

1 date. The drop-dead date has come and gone and, quite
2 frankly, where are we at? We are left with a new
3 concept, the single-cell concept.

4 THE COURT: If I can interject along those
5 lines, Mr. Crossman; I was concerned to see that there
6 was no timeline or an SBR alternative. In other words,
7 it seems that all of the -- well, it seems that some of
8 the alternatives, including the original one that was
9 subject of the original court order, had been dropped
10 altogether. I would have thought that, at the very
11 least, that timeline would have been kept alive, but it
12 seems to have been abandoned altogether.

13 MR. CLIFFE: Well, in my respectful submission,
14 I can answer that question, Your Honour. In the update
15 report -- I'm sorry, I notice my friend standing; I'll
16 let him stand in a moment. I know he was anxious to
17 stand.

18 MR. CROSSMAN: I (indiscernible) the question.

19 MR. CLIFFE: Now perhaps I should let my friend
20 answer, but I do have a --

21 MR. CROSSMAN: I have a short answer for that.

22 MR. CLIFFE: A short answer, very well. I
23 didn't see my friend.

24 MR. CROSSMAN: The answer is that it is still an
25 option, Your Honour. It's not referred to in the
26 report, and perhaps that's an oversight on our part.
27 In the last report there was a timeline associated with

1 the SBR plant, and as you may recall, it's already been
2 through the regulatory process and the detailed design
3 process. So -- and in the timeline is in that last
4 report --

5 THE COURT: Is it identical to -- would it be
6 -- if I said to you, file a new timeline for me in a
7 month's time, can you do it, and two, would it be
8 identical to the old timeline?

9 MR. CROSSMAN: I would need to get instructions
10 on that, Your Honour, but I could do so.

11 THE COURT: Okay.

12 MR. CROSSMAN: It certainly is being considered
13 as an option still. If all these other options fail,
14 then that is still an option.

15 MR. CLIFFE: Just my point on that, Your
16 Honour, is that we were led to believe in November that
17 the SBR option was still on the table, so to speak, and
18 that they were moving towards that date, and on that
19 date there was to be a decision made one way or the
20 other, because there is a timeline here and that's
21 December the 31st of 2008. They've got to plan it;
22 they've got to build it; they've got to test it and
23 have it in operation, and that's not happening.

24 And it's not happening for -- at
25 least with respect to some of the sites, not all.
26 Because you may recall there's site A out on the
27 Callison. There's not a land issue with respect to

1 site A. There were some concerns raised about the cost
2 of operations and maintenance with respect to site A.
3 So site C was closer to town; so look at site C, but
4 they have the placer miner issue. Well, if you don't
5 have the land, you haven't got the project, and that's
6 trite, and Mr. Enns has been identifying that concern
7 for some time now.

8 So let me just move on and say
9 this, that the -- where we're at now is a conceptual
10 stage, another option, and what's important, Your
11 Honour, there, is that that option is untested,
12 unproven, not documented in the north. I am told by
13 Mr. Enns who has reviewed that, it can only be
14 described, the Earth Tech study, as a superficial
15 study, and that Earth Tech is not just saying it's a
16 single-cell system. There's more to it; there's more
17 added treatment in the front end, and on the back end,
18 I don't know what that means at the end of the day with
19 respect to more land. But it's not just a single-cell
20 approach. My learned friend makes mention of -- that
21 the -- as I understand it, the operating and
22 maintenance costs is some \$200,000. I didn't notice
23 that figure in the materials filed in the report. I
24 may have missed it but I didn't see it.

25 But more importantly -- more
26 importantly with respect to the history of this matter
27 is this: What happens in six months time, if we come

1 back to this Court at the end of December of this year,
2 two years left in Your Honour's order, and we are told
3 no, we can't do the single-cell approach? What is the
4 backup position? From what the Crown can see, as of
5 today, there's only one backup position and that's SBR.
6 As my learned friend has said, and I'll repeat it, SBR
7 has been studied; it has been looked at; it will
8 comply; it has -- they have the plans; they've got the
9 land; they've got the regulatory approval. All they've
10 got to do is beginning -- put shovels in the ground and
11 nail boards up and get on with it, to be very
12 simplistic.

13 So where are we at in December of
14 2006, if that is the situation? That's why the Crown
15 has such serious concerns of where we're at right now.
16 I appreciate that the Court cannot do a lot at this
17 stage. I will be asking you, once you weigh all the
18 submissions, to be reminding the City and the YTG of
19 your order, that it must be a priority for the
20 governments and that they have to get on with the job
21 in a meaningful way.

22 I'll just continue and say this,
23 that, and I think I've stressed this to Your Honour,
24 that we have gone from a certainty of compliance with
25 SBR and all the studies that had been doing, keeping in
26 mind that SBR was studied before the prosecution was
27 launched here. And we've gone from SBR to the multi-

1 cell aerated lagoon, with its problems over the land
2 issue, and continuing today, to the single-cell option,
3 which has not been studied, not been proven, and so on.

4 I want to deal very briefly, and
5 I'll come back in a moment, the standards and
6 regulations, you've heard me on that, that we're not on
7 this eve of change. The position of Environment Canada
8 has been made clear to the Deputy Minister of the
9 Environment for the Yukon, that the test is compliance
10 with s. 36(3) for sewage, discharges, and a stress,
11 again, from senior levels at Environment Canada, that
12 compliance with your order should be a priority for
13 you.

14 Now, it can't be forgotten that
15 when we consider this, because I think it is easy to
16 do, we can't forget what brings us to court today, and
17 that is the City of Dawson was convicted in what can
18 only be described, in the Crown's respectful
19 submission, given the background, a serious
20 environmental offence. And in the background, of
21 course, is it's not just the day they discharged. Your
22 Honour was invited to consider the history; Your Honour
23 was invited to consider the history of promises, of
24 failed promises, and the concern, why the Crown and
25 Environment Canada are troubled today, are we just
26 continuing a chapter in this book, of promises that go
27 nowhere.

1 There seems to be seeds of that.
2 I'm not disputing that -- that my friend comes to court
3 and he says these things are being done. I will accept
4 what he says, but I see the seeds of concern.

5 THE COURT: Well, there are two kinds of
6 concerns here. One is meeting the timelines, and then
7 the other seeds of concern relate to the apparent
8 practice of continually looking for cheaper
9 alternatives to a demonstrated, proven approach to
10 solving the problem. I'm not saying that's necessarily
11 a bad thing to look for, but to do it -- to keep doing
12 it means we might be done in a hundred years.

13 MR. CLIFFE: Well, that's --

14 THE COURT: Another hundred years.

15 MR. CLIFFE: That's the concern. And the
16 Crown's not saying -- and you know, we always use the
17 word -- well, some of us use the word cheap as being,
18 well, maybe it's not the best quality. That's not
19 necessarily the case, but I think that my -- I also
20 echo my learned friend's concerns that these are public
21 monies; they should be spent responsibly, of course.
22 The Crown prosecuting this case doesn't dispute that.
23 Of course we want that to happen. But this ever so, we
24 consider something cheaper, something less, something
25 maybe -- at some point in time, a management decision,
26 to use a private world concept, has to be made. A
27 commitment has to be made. And it may very well be

1 that, notwithstanding your consideration of many
2 options, that you're back to a very expensive option to
3 deal with this matter. Well, this Court was told about
4 that expensive option. This Court is mindful of the
5 various options here. Cheap is not necessarily going
6 to be the way it goes. It may be, but an open mind has
7 to be considered by the Yukon Government and, of
8 course, the City.

9 My point to you on the issue of
10 what brings us here today is not only the past with
11 respect to the prosecution, but it's also the present
12 today; and the present today is, just as we speak, the
13 City of Dawson is depositing a deleterious substance
14 into water frequented by fish, being the Yukon River.

15 Of course, due diligence as we all
16 know, is a defence, and of course one can argue, if the
17 City, along with the Yukon Territorial Government, is
18 being duly diligent in trying to find a way to deal
19 with the problem, of course they have a defence, and
20 one has to question, at this particular point in time,
21 are they being duly diligent?

22 So it behoves me, in some
23 respects, to remind the Court, as well, from those
24 early proceedings. You may recall the statements of
25 learned counsel for the defence, as the position of the
26 City was to oppose the Crown's submission that an order
27 be made, that counsel stated, "No worry. We're on it.

1 We are going to do it. We don't have to be ordered to
2 do this; we're doing it." Well, there's a court order.
3 The question is, and there's still time, of course,
4 left in this order, they've been allowed a lot of time,
5 are they doing it? Are we, even with a court order,
6 are the levels of government moving towards dealing
7 with this problem for which a court order has been
8 made.

9 Now, the Crown says, and I think
10 it's pretty clear from what I'm saying, is the Crown
11 has concerns about how serious the YTG and the City are
12 taking it, and it's inviting you to stress the
13 importance and the priority the order should take with
14 respect to compliance. I say that the City and the YTG
15 aren't taking it serious enough, and that, I think, is,
16 in the respectful submission of the Crown, is evidenced
17 by, firstly, a reluctance to commit to the only
18 existing, viable option, which is SBR; two, its delay
19 by considering all these options and so on, and it's
20 evidenced by the documents that Your Lordship has had
21 the benefit of seeing in this case.

22 The one that, quite frankly,
23 concerns the Crown considerably, just happens to be
24 buried well into the exchange of due diligence in the
25 first part of it. This is the Canada Strategic
26 Infrastructure Fund application, and I may be reading
27 this wrong; I hope that I am reading this wrong, and I

1 just direct your attention, Your Honour, to page 15.
2 It may be that since these are notes of somebody, I may
3 be misinterpreting it. As I say, I hope that I am.

4 If you look to -- this is the
5 first part of the materials filed, Your Honour, that
6 the material -- in mine it was kind of folded in half
7 --

8 THE COURT: Are you looking at the notes?
9 You're looking at the notes?

10 MR. CLIFFE: -- and it's right at the
11 beginning.

12 THE COURT: Is it right at the beginning or
13 right at the end?

14 MR. CLIFFE: No, it's right -- the reference
15 I'm making is at page 15, which is -- 15 and 16 is
16 right at the end.

17 THE COURT: Right, right. Yes.

18 MR. CLIFFE: Thank you. Just to kind of put it
19 in context, I'll just read it all, just with respect to
20 the question by the fund officer that's looking at
21 this. It's item number 40 and:

22
23 Given the election, is it still the situation
24 that in terms of financial capability to
25 operate a Dawson component of the project, the
26 Yukon Government has provided assurances that
27 the town will have the capacity to operate and
28 maintain the investment over the long term.

29 This sentence, as an aside, is
30 also important. The writer -- the officer writes,

1 obviously it's his understanding:
2
3

4 The Yukon Government has guaranteed that the
5 town of Dawson City will be able to
6 financially support the required O & M
7 costs.

8 But their answer from YTG is that:
9

10 Yukon Government ultimately has responsibility
11 for a municipality, as per the *Municipal Act*,
12 and should the municipality fail, Yukon would
13 be responsible to deal with it. Much like the
14 recent financial failings of the town, YG
15 stepped in after determining the situation,
16 was left with no choice but to fund the town
17 out of the situation. Further --

18 And this is what is of concern.
19

20 Further, YG will not build a plant unless
21 the O & M is affordable, as demonstrated by
22 the level of due diligence we are doing now
23 on finding alternative solutions to
24 treatment.

25 Now, I don't know how you read
26 that sentence but when I first read it, it was, "Unless
27 we think it's affordable, we're not going to get
28 involved." Now, I'm hoping that I'm wrong, and I was
29 troubled to find that buried in these questions and
30 answers. But I question, is that an indication that
31 they're not seriously interested in complying with Your
32 Honour's order? Again, I will stand -- if I need to be
33 corrected, I welcome to be corrected on that point. I
34 refer also to the fact that, and I'm ever so hopeful
35 that the Federal Government does come out and fund it
36 via the structure, capital infrastructure fund, but

1 most importantly, Your Honour's order was not a
2 conditional order. It was, "You find the money and you
3 deal with this."

4 Now, what concerns the Crown is
5 that there are indications in the Memorandum of
6 Agreement, and also in the letters going back and
7 forth, that state that the planning, the construction,
8 the -- and so on, of implementing this, is subject to
9 funding being received from the capital infrastructure
10 fund.

11 Environment Canada has made it
12 very clear, in that correspondence going back and
13 forth, this is a conditional; you've got to do it;
14 you've got to find the money. The Government of the
15 Yukon has been made aware of that since 2003, when you
16 made this order, that money would have to be spent to
17 comply with this, and, of course, it's going to be in
18 the millions of dollars. It's significant
19 infrastructure item.

20 So I say, that's one of these
21 seeds, if I can call it that.

22 Now I emphasize another seed, and
23 I've already talked about it, and that's this faint
24 hope. I'm going to call it the faint hope clause, so
25 to speak, and we all know what that means, but in any
26 event, in this particular case, it's the hope that
27 standards are going to change. As I said earlier, that

1 is referenced in the update report at pages 5 and 6.
2 One just has to look at that to see that the report,
3 the person reporting is talking about it, "Well, if
4 that happens, and that may do this, and that could
5 possibly be due to that." We can't live in a world
6 like that in respect to this order, because things
7 aren't going to change tomorrow.

8 With respect to -- the other seed
9 aspect, and it's more of a concern that it's being
10 addressed in such a lengthy fashion than it has been in
11 the updated report, and that's the reference to YESAA,
12 the *Yukon Environmental Socio-Economic Assessment Act*,
13 and the fact that it's being addressed in so much
14 detail with respect to, well, it could take so many
15 days. But the flip side is it could take 800 days, you
16 know, nearly three years? That's a mind-set issue,
17 with all due respect, because we don't know what's
18 going to happen. But if the mind set is out there
19 that, well, we got -- we could have another three years
20 to deal with this because YESAA is going to have it --
21 that's a wrong signal to send.

22 They've got to get to this; it's a
23 court order. This is not a construction project that,
24 you know, one can negotiate: Well, do we need, you
25 know, how many lines down the road do we need? Is it
26 going to be this wide, this long? How many rivers do
27 we cross? That kind -- it's not that at all; it's not

1 negotiating this. It's not something, subject of
2 negotiation. It's got to be complied with.

3 The -- I also emphasize as another
4 seed, of course, is the timelines that are set out in
5 the back of the document, the new, as they call them,
6 GANT (phonetic) charts that -- and this is of
7 particular concern, that although they are alerting the
8 Court what they think this may take in time, we are
9 looking at a potential, if it's a mind-set thing, well,
10 we can get it done by 2013. We're not building a city
11 here, you know, we're building a sewage treatment
12 plant, and we've seen the timelines, you know. From
13 the date of construction. They can get the facility up
14 and going relatively quickly, even with the seasons
15 that we have to be so concerned about in the north.

16 But a decision has to be made and
17 the proper work-up has to be done, and you have to
18 construct it, and we are fast running out of time on
19 that.

20 I -- as a very brief example, I --
21 the Memorandum of Agreement, I was caught by the fact
22 that the agreement typed on it references the date,
23 October the 5th of 2005. It is signed relatively
24 quickly, October the 7th, and I can't remember the
25 gentleman who was the receiver manager of the town at
26 the time. I think it was he that signed it; I couldn't
27 read the signatures.

1 THE COURT: I think it was Mr. Hayes.

2 MR. CLIFFE: Mr. Hayes, exactly, signed on
3 October the 7th. This is not such a priority for the
4 Yukon Territorial Government; they don't sign it until
5 four months later, in February. As well, I note, what
6 kind of commitment does one question with respect to
7 this agreement when the agreement itself, at page 6 of
8 7, speaks of the Yukon terminating the agreement
9 without cause, with written -- 30 days written notice.
10 I don't call that much of a commitment, quite frankly.
11 That might be the standard. I'm not a --

12 THE COURT: Well, I noted that as well, Mr.
13 Cliffe, and I was prepared to give Yukon the benefit of
14 the doubt and I assumed that it was standard clause
15 produced by their legal department.

16 MR. CLIFFE: I was going to just say that, that
17 I anticipate that probably somewhere, that's a -- but
18 the fact of the matter is, the parties put their names
19 to that document and signed -- executed that document.

20 THE COURT: Well, I'd be less concerned about
21 it if everything else was hunky-dory, and it isn't, at
22 the current time for the reasons you've indicated.

23 MR. CLIFFE: I might just as well say that the
24 Memorandum of Agreement presupposes the aerated lagoon
25 option as described at the update meeting in November,
26 and, as my learned friend has said, the pilot project
27 had ended and a report had been filed, as I understand

1 it, in January 2005, some weeks before the Yukon
2 Territorial Government signing off on this document.

3 But I say this, and I don't mean
4 to be hard-line about it; I just mean to alert the
5 Court and, of course, the representatives, and I'm
6 prepared to accept they're working hard to this, and
7 for whatever reason, I don't know why things aren't
8 moving as -- maybe as quickly as the Crown would like
9 to see it, but alert to them that this is of concern to
10 the Crown and to Environment Canada.

11 The last thing that I want to talk
12 about, and I say this and maybe I shouldn't be so
13 blunt, I should probably, more fairly, use the word it
14 "appears" to be a lack of commitment, in fairness.
15 Because obviously I don't know the whole story here,
16 but I say this about communications, and this is
17 something that I want to end on, Your Honour, because
18 communications were dealt with by Your Honour back on
19 -- in February, the first report back to court meeting.
20 You may recall that I stood up and addressed this was a
21 concern, and in fact, the Court's inquiry of me was
22 well, do you want -- should I order this? I said no,
23 you know, it's a hiccup, let's just -- you know, it's
24 just so many months into the new order, let's just do
25 it by way of more of a gentleman's kind of agreement,
26 if I can call it that. Those are my words. But in
27 effect, on the record, it was essentially, yes, we'll

1 work towards that and attend to that.

2 There may have been compliance up
3 until November, but -- compliance with the whole idea
4 of communicating. But the Crown takes a different view
5 than my learned friend over the issue of communications
6 and that's evidenced in that correspondence.

7 Mr. Enns asks some very basic
8 questions in his January -- I believe January the 9th
9 letter, January the 6th letter: Can you tell me what
10 the obstacles are? Yes --

11 THE COURT: They followed it up in the March
12 6th letter, yes.

13 MR. CLIFFE: Yes, and he says, "What are these
14 obstacles? Can you outline them for me?"

15 THE COURT: Have you got an answer to those
16 yet?

17 MR. CLIFFE: Oh, he gives an answer, yes.

18 THE COURT: Yes, but subsequently there's been
19 a face-to-face meeting.

20 MR. CLIFFE: Yeah, six months later.

21 THE COURT: Yes. No, no, I understand.

22 MR. CLIFFE: Yes, and he gets some answers,
23 yes, and that's evidenced in the letter of Mr. -- I
24 believe it's Mr. Molloy, on January the 9th, he sends a
25 letter. It's the last letter in the package.

26 THE COURT: Sorry, June 9th.

27 MR. CLIFFE: June the 9th, pardon me.

1 THE COURT: I know it's cold and not very much
2 like summer in the Yukon at the current time, but let's
3 not move the clock back to January.

4 MR. CLIFFE: I was going to say it's November
5 in Vancouver up here, you know, but what I say to you
6 is, the letters speak for themselves. Mr. Enns is
7 saying, "Can you just answer my questions?" He writes
8 letter after letter without a reply, a meaningful
9 reply, that is a reply to his questions. There are
10 things said that, again, for example, well, it depends
11 on the funding from the infrastructure fund, and Mr.
12 Enns keeps on replying back, well, that's not a
13 condition to compliance to the order.

14 But, as well, the -- my learned
15 friend, and I want to address this, the issues of
16 confidentiality. The Crown appreciates that there are
17 some aspects of confidentiality here, but Mr. Enns is a
18 professional engineer. Mr. Enns, in his work, deals
19 with corporate entities and government entities with
20 proposed plans to do things that may affect the
21 environment. Before they've gotten to a public stage
22 of evaluation, there are confidences that are being
23 expressed between himself and these proponents that
24 want to take on economic development. He deals with
25 that every day. As I say, he's a professional
26 engineer.

27 Now, we can appreciate there may

1 be the details of some of these confidential -- the
2 confidential (indiscernible) may not want to be
3 exchanged.

4 THE COURT: And generally they would relate to
5 dollars, specific dollars being offered or considered
6 to buy property or to -- I find it very difficult,
7 quite frankly, to understand what the confidences might
8 be outside the specific negotiation of dollars and
9 cents, which I can understand might -- but Mr. Enns
10 doesn't need that information.

11 MR. CLIFFE: Exactly, and you can think it from
12 a corporate point of view, that a company, a mining
13 company may come here and he may say, "Well, we have
14 this -- we have developed a new technology to deal with
15 arsenic, or a new technology to deal with this." Now
16 this is something that is not out there; this is our
17 plan. Of course, we're asking you to respect the fact
18 that, you know, at this particular point in time, this
19 is confidential, and he would, of course, respect that.
20 But there may be other aspects, I'm certain my learned
21 friend would say there may be -- well, who are the
22 parties that are the subject of these negotiations;
23 who's participating in the negotiations. That might be
24 confidential. But does -- Mr. Enns may not have to
25 know who are the parties, and he may not want to know,
26 necessarily, what the dollar value is, but at least
27 tell him we are negotiating over site X or site Y or

1 site Z, not just leave him in the dark.

2 So, the Crown says, this six month
3 period, and I might just add that the report speaks of
4 regular monthly meetings. There may have been regular
5 monthly meetings up to November. There have been
6 exactly two meetings in seven months; one in December
7 the 19th of 2005, which is referenced in Mr. Enns's
8 letter of January the 6th; and then there's the meeting
9 that is referenced in Mr. Molloy's letter of June the
10 9th. Two meetings. Then Mr. Enns saying, "What are
11 your obstacles? Tell me what's going on." He has to
12 write letter after letter to get that.

13 I go back to -- again, my friend
14 may be right, that maybe a lot of things from the point
15 of view of the YTG and the City, they weren't turning
16 ground, they weren't technical aspects; they were
17 trying to get approval, and so on and so forth. But if
18 there are obstacles in trying to get that approval,
19 that's what Mr. Enns is asking, "Are there obstacles
20 with respect to the project?" Because why Enns is
21 concerned about, and I've developed a respect unlike
22 the YTG and the City, he's concerned about the drop-
23 dead date. What's going to happen in February? What
24 are your obstacles? And the only thing that's told is
25 oh, well, the Canada Infrastructure fund, we're waiting
26 for funding from that, and of course, subject to that
27 is whether we are going to do this or not. That's not

1 a -- well, that's the -- that's an answer that comes to
2 him, but as I've made the point about that, this is not
3 a conditional thing.

4 So I say that and ask the Court --
5 and I'm not trying to knock anybody here, I'm trying to
6 just ensure, because the Crown wants not only
7 compliance with a Court order, but this prosecution was
8 launched for the purposes of protection of the
9 environment. This order is about protection of the
10 environment. This is why the order was made, in the
11 Crown's submission, and it wants to see this facility
12 constructed and operating, for the benefit of the
13 environment, the benefit of the people of Dawson and
14 those that live in the Territories, and others who may
15 come to Dawson, and those, we can probably say, those
16 downstream of Dawson.

17 So I'm hoping that all this is
18 today is perhaps a burp in the process, or a bump in
19 the road. But, in my respectful submission, the Court
20 has to signal to the City and to the Yukon Territorial
21 Government, about the priority this order has to take.
22 It has to signal that if they are going down the road
23 of looking at the single-cell approach, they have to
24 have a backup position. Because to come back here in
25 six months time, and to tell this Court, "Well, we
26 tried that and it didn't really work, so now we're
27 going back, Your Honour, and we're looking at that

1 mining claim where we want to, at site A, in the
2 Callison, and we're still negotiating about that."
3 We're running out of time because they've got to
4 construct it and we're running quickly out of time, and
5 to say, well, we've to 2013, this is just a repeat of
6 the -- you know, simple math, 1983 to 2013, it's 30
7 years. This cannot be. So I say that the order is --
8 has to be paramount in their minds. And I'm certain,
9 please don't get me wrong, I am certain in the minds of
10 Mr. Sarson's and Mr. Molloy, it is. But is it in the
11 minds of those that control the Management Board? Is
12 it in the minds of senior officials in the Yukon
13 Government? I'm certain that in the minds of Mr.
14 Steins, who's here today and hearing this, perhaps for
15 the first time, it must be in his mind too, what
16 happens in the future here. Those are my submissions,
17 Your Honour.

18 THE COURT: Thank you. I'm sure Mr. Crossman
19 wants to respond. And I'll be very honest with you,
20 I've made several pages of notes and many of the issues
21 raised by Mr. Cliffe, I made note of. Now, I'll be
22 very clear too, I've -- my notes were not nearly as
23 emphatic as Mr. Cliffe's submissions to me, but they're
24 recorded as points of -- and issues of concern.

25 MR. CROSSMAN: Your Honour, I can address some of
26 the points raised by my friend, Mr. Cliffe. Some of
27 them are new to me in terms of being issues raised and

1 so I'd need to get instructions on some of those. The
2 ones I can't address, would Your Honour prefer me to
3 get those instructions now or to just address the ones
4 I can address at this stage?

5 THE COURT: Well, why don't we -- it would
6 probably be a good time to take a break, in any event.
7 Why don't we break for 10 minutes and you may be able
8 to, in that time, add a little more to what you might
9 otherwise have said, and I think that would be helpful,
10 okay? So why don't we stand down for 10 minutes, Madam
11 Clerk.

12 (Proceedings adjourned)

13 (Proceedings reconvened)

14 THE COURT: Yes.

15 MR. CROSSMAN: Thank you, Your Honour. My
16 apologies for the delay in getting back, I just needed
17 a bit more time to get instructions. Thank you.

18 Your Honour, I'm going to go
19 through and address the points raised. I believe what
20 needs to be addressed were raised by my friend, Mr.
21 Cliffe.

22 One of the first points he raised
23 was about that it appears that the City of Dawson and
24 the Yukon Government are hopeful that the standards
25 will change and that this might create more options for
26 them and so they want to hold out for that change. I
27 can certainly indicate to the Court that that's not the

1 intention. The intention, and I think I might have
2 mentioned this in my submissions, is to know what the
3 future holds in terms of future regulatory standards.
4 When you're building a plant that will last for 20, 30,
5 or so years, you need to know what's going to be in the
6 future.

7 That's the reason for looking at
8 those CCME papers of April of 2006. The commitment, at
9 this time, is to build to the current regulatory
10 standards as a minimum, but to anticipate the future as
11 well. So those current standards are to comply with
12 the 36(3) of the *Fisheries Act*, and that's not --
13 certainly not in dispute.

14 My friend asked that -- we talked
15 about the February '06 date as being a decision date,
16 and it was a decision date. The decision that was made
17 by Yukon Government at that time was to go with an
18 aerated lagoon. That was the decision of Management
19 Board. The new option, that has presented itself
20 because of the challenges in getting land security
21 here, is a refinement of that aerated lagoon system.
22 So it's not a completely new option, it's a refinement
23 of that option, and, frankly, it looks to be a positive
24 thing, technically feasible, according to the Community
25 Services technical people that have reviewed this, and
26 according to their discussions with Earth Tech, which
27 is the independent consultant.

1 I'm told that a detailed report
2 will be coming from Earth Tech, setting out all of this
3 in the coming weeks. It's unfortunate that it wasn't
4 available for this court attendance. As a result of
5 that report, that's the technical information that can
6 be shared with Mr. Enns at Environment Canada, and if
7 there are questions about that, that can be addressed
8 at that time, through meetings.

9 In terms of the backup option of
10 whether, if this new option doesn't work out, it is the
11 aerated lagoon with the Callison site. That is the
12 backup option. So there is a backup option; there is
13 some certainty there.

14 The beauty, of course, of the
15 revised order, and this was the flexibility that the
16 City of Dawson and the Yukon Government wanted to
17 achieve here, is we need to comply with an effluent
18 standard that complies with the *Fisheries Act*.

19 As my friend rightly pointed out,
20 it doesn't matter how we comply with that, in the sense
21 of the system. We wanted to create flexibility so that
22 the most affordable option is achievable, affordable
23 because it's a community of 1800 people who are going
24 to foot the bill into the future. So if a system is
25 designed and built which is not affordable, the concern
26 is, certainly from the City of Dawson's point of view,
27 who has to take on that responsibility for operating it

1 and maintaining it, is how to do that if the cost is
2 significantly higher.

3 To put it in context, as I
4 mentioned, a mechanical plant with an operation and
5 maintenance cost of about \$640,000 per year, that's
6 just the O and M cost. The total budget, operation and
7 maintenance and capital, for the City of Dawson, at the
8 moment, is \$4 million a year. So that's the
9 perspective of the relationship there. So this would
10 be -- there would be a significant cost.

11 My friend was also concerned about
12 whether the existing operation, the existing plant, was
13 continuing to deposit deleterious substances in the
14 water, and if I understood him correctly, then -- in
15 other words, whether there was compliance with 36(3) of
16 the *Fisheries Act* today. My instructions are that the
17 City has not failed the LC50 tests, so it is in
18 compliance.

19 THE COURT: I want to know, since you've
20 raised that, when the last samples were taken. Perhaps
21 someone might know that. Mr. Cliffe, do you know that
22 or does Mr. Enns know that?

23 MR. CLIFFE: No, I don't, My Lord. I will just
24 check with Mr. Enns. Mr. Enns doesn't know, My Lord.
25 Excuse me; Your Honour, I'm sorry.

26 THE COURT: It's not critical. Since you've
27 raised it, there's something that we might flush out at

1 some later date, but I do note that in the past, the
2 critical time was the summer time, when the tourists
3 were in town, and during the winter, or the off-season,
4 which is more than the winter, there didn't seem to be
5 that much difficulty in meeting the LC50 tests. So
6 when those samples are taken, it would be very
7 important to know, if one were putting that forward as
8 a -- on the other hand I don't think -- that's really
9 not an issue before me; it's a side issue.

10 MR. CROSSMAN: Your Honour, I'm told it's sampled
11 on a monthly basis and has not failed.

12 My friend had raised concerns
13 about the regulatory process in extending the timeline.
14 We share that concern, as well, and I hope that I made
15 it clear that we wanted to be upfront about those
16 concerns about regulatory process. The process I am
17 talking about is the YESAA process.

18 My friend characterized it as a
19 mind-set that -- and the reason for putting in the best
20 and worst case scenarios was to give the Court a
21 realistic picture about what may -- what could possibly
22 occur. We're hopeful that we can work on the best case
23 scenario, obviously.

24 Unfortunately, though, the
25 regulatory process is a reality, and as hard as we may
26 try to get through that in the quickest time, it's a
27 process that's not controlled by City of Dawson or

1 Yukon Government; it's controlled by a third party
2 regulator who governs and supervises that process. So
3 despite the best efforts that we can make in that
4 process, we're at the whim of their process, and that's
5 the YESAA Board and that process, as well as the Water
6 Board, but we will make our best efforts to get through
7 it as quickly as possible.

8 THE COURT: The -- I don't necessarily expect
9 you to have an answer to this question. I will be
10 asking for this information to be given to me at a
11 later date, and that is, does the SBR option require --
12 does it also have to go through with the various
13 compliance steps with YESAA, and therefore, would it
14 also be stuck or delayed by that process?

15 MR. CROSSMAN: I'll look into that, Your Honour.
16 My friend mentioned the Memorandum
17 of Agreement between the City of Dawson and the Yukon
18 Government to manage this new plant and mentioned that
19 -- and concerned about the four month delay in signing
20 by the Yukon Government as somehow a sign that that was
21 a lack of commitment on the part of Yukon Government.
22 Again, perhaps a word of explanation there. This was
23 part of the internal processes of Yukon Government,
24 just as it would have been within the federal
25 government.

26 This is agreement -- this was an
27 agreement that came to -- that had to go through to

1 Management Board for approval, as part of that process
2 to approve the plant. So it rode the same timeline as
3 the approval process for the plant and the funding.
4 That's the reason for the four month difference in
5 signing; it's not a lack commitment by any stretch of
6 the imagination.

7 My friend also mentioned about
8 going back to the history of this matter, the fact that
9 for 20 odd years, or 23 years, there'd been no action,
10 and asking the question of what is the difference here,
11 what's the difference in the most recent past. I
12 believe the difference is that, up until this
13 Memorandum of Agreement, the City of Dawson was
14 essentially on its own in trying to deal with this
15 order and this problem. It had problems in terms of
16 financial problems; it lacked a mayor and -- an elected
17 mayor and council; it had the able body of Mr. Hayes as
18 trustee, but with the Memorandum of Agreement and with
19 the Yukon Government coming in, there is a change, and
20 a significant change, I respectfully submit.

21 And if -- again, I go back to the
22 financial situation, this was Dawson trying to deal
23 with a large future operation and maintenance cost,
24 even on the aerated lagoon, of \$320,000 out of O and M
25 and capital budget totalling \$4 million, so a
26 significant part of its budget.

27 The issue of confidentiality has

1 been raised, as well. It's perhaps sometimes a
2 difficult thing to understand, but there are certain
3 oaths given -- taken by public servants, obviously, in
4 terms of information, and particularly in the period
5 that we've been in, these are Cabinet confidences,
6 Cabinet information, which, unfortunately, could not be
7 shared with Environment Canada. It would be just the
8 same if Environment Canada was the subject of the
9 order. It's something they could not share with the
10 regulator or third parties.

11 So we will certainly work with
12 Environment Canada on trying to --

13 THE COURT: Well, just make to it clear, I
14 certainly understand the nature of -- scope of the
15 nature of Cabinet confidentiality. But very often a
16 lot of -- just because information is before cabinet
17 doesn't make it confidential. All kinds of public
18 information is placed before Cabinet and just because
19 they're looking at this public information at a
20 particular point in time doesn't make it a confidential
21 matter.

22 So my point is, and I'm not
23 suggesting that, I just want to make it very clear that
24 Cabinet confidentiality, I think we all know it and
25 respect it, but we also have to approach it
26 realistically, and it seems to me that most of the
27 technical information I've been privy to, generally,

1 throughout this process, is, even if it were placed
2 before Cabinet, would not make it confidential Cabinet
3 information.

4 I just made that observation, not
5 for your benefit, because I know you are certainly
6 aware of it, just to make sure that some of your
7 principals understand that I do make that distinction.

8 MR. CROSSMAN: Thank you, Your Honour. Perhaps
9 on the communication issue, I can let you know that one
10 of the suggestions I had, was that there seems to be
11 some, perhaps, misunderstandings about the
12 communication and what could or could not be revealed
13 to Mr. Enns, and I'd suggested before this hearing, if
14 we could get together to try and discuss that, and try
15 and work out perhaps a better understanding and a
16 better way of dealing with that issue. Unfortunately,
17 we weren't able to do that, but we hope that after this
18 hearing, that we'll have the opportunity to do so.

19 The last point I want to address
20 is going back to the commitment issue, which my friend
21 raised a number of times in saying, "Look, there seem
22 to be seeds of doubt or seeds of concern here, I have,
23 about the level of commitment here." My friend said he
24 doesn't have concern at the, you know, the ground
25 level, if you like. Mr. Sarson and Mr. Molloy are
26 doing a great job in terms of this project.

27 I thought it might be appropriate

1 if --

2 THE COURT: Let me just say that I have those
3 concerns too, because what you've presented me with is
4 a real possibility, I might even say probability, that
5 the amended timelines can't be abided by. So, yes.

6 MR. CROSSMAN: Yes, and we certainly are
7 concerned about that as well, but I hope that Your
8 Honour can take, with our being candid about that, is
9 -- and being open about that possibility, is addressing
10 it now and trying to deal with that, being mindful that
11 it's not a case of hiding that, and saying at the last
12 minute, "Well, sorry we didn't make the timeline."
13 We're trying to address it as best we can, and perhaps
14 it might be helpful, with Your Honour's consent, if I
15 could ask, firstly, Mr. Erickson, who's joined us, he's
16 the Assistant Deputy Minister with Community Services
17 for the Yukon Government, and he represents the senior
18 management who has an eye into the Premier's office and
19 that, to tell us what it is, the level of commitment at
20 that point. And then I would like to give Mr. Steins
21 the opportunity to address it from the City of Dawson's
22 point of view.

23 THE COURT: Certainly.

24 MR. CROSSMAN: Thank you.

25 THE COURT: That'd be very welcome. Mr.
26 Erickson, just ask you to come forward because the
27 microphones really don't necessary amplify, but they do

1 record, and so if you stepped up to the dais, and thank
2 you very much for attending. I know you must be very
3 busy, so taking time out of your day to be here is very
4 much appreciated.

5 MR. MAGNUSON: Thank you, Your Honour. Just a
6 correction for the record, my first name is Eric, my
7 last name is Magnuson. I appreciate the opportunity to
8 be able to address you, and I will try to kept his very
9 brief.

10 We have been engaged in this
11 project since the court order was varied, and we
12 appreciate the opportunity to be able to work
13 diligently on this project. I can assure you that I
14 personally have attended numerous briefings with
15 Cabinet, Caucus, Management Board, my minister,
16 Minister of Environment. We've met with federal
17 counterparts, both in the area of infrastructure and
18 infrastructure funding, and in the area of
19 environmental controls and the Yukon Government has
20 made this very much a priority. The Yukon Government
21 has committed funds to this project, and has spent
22 funds on this project through this period of time, with
23 respect to the work Mr. Molloy and Mr. Sarson are
24 carrying out, as well as a variety of consultative
25 experts. We're not suggesting that the project going
26 forward is conditional on the Strategic Infrastructure
27 Fund; however, the approval is conditional. What that

1 means simply is, it's a checkpoint for Management Board
2 to have control on spending of large amounts of money.

3 So at this point in time, the
4 Yukon Government has committed at 50 percent of the
5 project fully out of its treasury, and should the
6 project require more funding, that trigger in that
7 Management Board minute means you have to come back and
8 see us. It doesn't mean we're not committed.

9 I would also suggest to the Court
10 that, prior to this reporting at two o'clock, I had the
11 opportunity to be briefing my minister, and the premier
12 himself was engaged, and we did discuss this project
13 and they are very much aware of where we're going with
14 this project and they're committed to seeing it
15 through.

16 THE COURT: Thank you very much, Mr. Magnuson.

17 MR. MAGNUSON: Thank you.

18 MR. STEINS: Thank you, Your Honour. I wasn't
19 really wasn't expecting to be addressing you today.

20 THE COURT: Well, now that you're a
21 politician, you should not pass up any opportunity to
22 speak into a microphone.

23 MR. MAGNUSON: Exactly. I won't pass up an
24 opportunity to do a little grand-standing. I've been a
25 citizen of Dawson for 30 years and I must say that I
26 have been very concerned about the fact that we've been
27 putting deleterious materials in the water in the past,

1 you know, or this time span that we're talking about.

2 THE COURT: I think -- my recollection that
3 one million litres of sewage a year, I think --

4 MR. STEINS: Yeah.

5 THE COURT: -- something of that order.

6 MR. STEINS: However, having said that, I
7 think, you know, since we are a new council, I think
8 our first priority is to address this issue. I know
9 it's my priority and that's what I've been telling the
10 media, and I mean it. It's something that we have to
11 deal with. There's just no excuse for putting
12 untreated material in the water.

13 Unfortunately, though, we do have
14 a limited amount of money, and that is a reality, and
15 that's why I'm so excited by the potential for the
16 north end site. You know, I'm very excited by that.

17 THE COURT: I'm familiar with that site. It's
18 a -- I don't want to say it's a parking lot, but it's a
19 place where you can drive in and --

20 MR. STEINS: Yeah --

21 THE COURT: -- park and I don't know whether
22 people picnic there, but it certainly has an outlook
23 out onto the river, just before the mountain or the
24 slide.

25 MR. STEINS: Yeah, and it's not really used for
26 very much right now. We have our goldpanning
27 championship there and there are a few events, the mud

1 bog, you know, at Discovery Days, but other than that
2 it's not utilized, and to be honest with you, Your
3 Honour, I've been a bit depressed about some of the
4 other options, you know, the Callison sites --

5 THE COURT: How -- have you had a chance to
6 discuss this site with your now new colleagues on
7 council?

8 MR. STEINS: Only informally.

9 THE COURT: Any sense of how they might feel?

10 MR. STEINS: Well --

11 THE COURT: One of the drawbacks, of course,
12 is that this is much closer to town.

13 MR. STEINS: Yeah --

14 THE COURT: And if people are at all
15 apprehensive about odours or anything of that nature,
16 and I know what the reports say.

17 MR. STEINS: Right, yeah.

18 THE COURT: They might be concerned about it.

19 MR. STEINS: Well, the feedback that I've been
20 getting about the sites on Callison are that it's an
21 optical issue. People are nervous about having that
22 kind of material on the water aquifer, and the term
23 that comes up all the time is Waterton (sic). You
24 know, what happens if a pipe breaks or whatever and --

25 THE COURT: Contaminates the water supply.

26 MR. STEINS: Yeah. Although I'm sure that
27 that's not the case, but still, it's an optical

1 problem, and that's one of the reasons why, up until
2 now, I've been pretty depressed about the various
3 options, based on those reasons, as well as the cost of
4 an SBR solution.

5 Now that the Department of
6 Community Services has come up with the potential of
7 putting the single cell in the north end, to me is
8 very, very, very exciting, and I think there's a lot of
9 potential there. Unfortunately, it may cause problems
10 complying with your court order, but I hope that --

11 THE COURT: Well, we'll cross that bridge when
12 we come to it. Let me -- I don't know if you had a
13 chance to read my original decision, but I'm very
14 sensitive to the financial means, or lack thereof, of a
15 small community like Dawson, and that was very much in
16 the forefront of the final decision that I made, and I
17 will probably refer to that again later on.

18 MR. STEINS: Right. Well, I just want the
19 Court to know that as far as I'm concerned, and I think
20 I can speak for the council as well, that we are very
21 much committed to moving forward as quickly, as
22 efficiently as possible, to find a resolution to this
23 problem.

24 THE COURT: Thank you very much.

25 MR. STEINS: Thank you.

26 THE COURT: And thank you for that expression
27 of commitment. It certainly -- it's important for me

1 to hear and I'm sure it's important for Crown counsel
2 and the Federal Department to hear as well. And again
3 I want to repeat, thank you very much for being here.
4 You can pretend that you made a special trip to be here
5 and that's fine. I'll feel honoured that --

6 MR. STEINS: We did.

7 THE COURT: Well, then

8 MR. STEINS: Thank you.

9 MR. CLIFFE: Your Honour, I just wonder
10 whether, if my friend is finished --

11 THE COURT: Yes.

12 MR. CLIFFE: I just want to address very
13 briefly just a couple of points that he has raised and
14 perhaps the last point from Mr. Mayor, is the -- and as
15 Your Honour has said about the financial needs of a
16 small community, and I've referenced one part of the
17 question and answer period in the materials, and I want
18 to refer just to another part of that, that I didn't
19 refer to but the same drift, and it's found at page 5
20 of 16 in the materials, which makes me kind of
21 concerned about how much is actually going to come down
22 on the City of Dawson, no matter what option is
23 selected.

24 If you look to paragraph (c) on
25 page 5, and that's part of the heading on the previous
26 page, O & M, paragraph 6. Now this is talking about an
27 aerated system, at paragraph (c), a question is asked

1 by the fund officer with the Canadian Strategic
2 Infrastructure Fund:

3
4 Given the *Dawson Municipal Governance*
5 *Restoration Act*, can the Yukon Government
6 confirm that O & M costs will be met by the
7 City or the Province?

8 Presumably the Territory.

9 Answer, and this is coming from
10 the YTG:

11
12 As part of the financial restructuring for
13 debt management, the proposed O & M costs
14 are being factored into the overall
15 financing plan for Dawson. The *Dawson*
16 *Municipal Governance Restoration Act*
17 provides the minister with the required
18 controls to ensure that the town meets its O
19 & M obligations.

20 That's my point, that I asked the
21 question, and I don't think it's really necessarily
22 being answered as candidly as it can be. At the end of
23 the day, no matter what option is selected, does it all
24 come down on the, I believe, 1200 or 1800 residents of
25 the City of Dawson? In my respectful submission, that
26 it does not, that there is insurance in the background
27 here, and that's the YTG, so --

28 THE COURT: Well, we -- go ahead.

29 MR. CLIFFE: So I leave you with that point and
30 the answers that apparently are being given here. The
31 other thing I just wanted to address very briefly, and
32 that is there was a point about --

33 THE COURT: Maybe before you move on let me

1 just tell you what my understanding of this paragraph
2 is, and that is that it certainly was never my view
3 that YTG would totally leave Dawson to its own devices
4 in dealing with whatever contingency arises. The
5 municipality, of course, is a creature of the
6 Provincial Government and Territorial Government, in
7 this case, and has those responsibilities.

8 On the other hand, if the O and M
9 costs ended up being significantly higher than what was
10 expected, I'd be pretty naïve in thinking that the
11 Dawson citizens wouldn't bear some part of that
12 increased cost, not that it would all fall on their
13 shoulders.

14 MR. CLIFFE: Yes, and then --

15 THE COURT: So doesn't mean to say that or to
16 suggest that the Yukon Government will pick it all up,
17 and Dawson is home-free, I think is pretty simplistic.
18 I don't believe that.

19 MR. CLIFFE: I appreciate that, and in some
20 respects we can look at it territorial -- on a
21 territorial more broad basis, and as I'm instructed,
22 the budget for the Territory, I believe it's some \$800
23 million, it might be more, of which revenues towards
24 that being generated here in the Yukon is some \$90
25 million. And it's the same thing. I mean yes, of
26 course, the citizens of the Yukon, in this case the
27 citizens of the City, would bear some of that increase

1 tax loading. But how much, at the end of the day,
2 would it be? I'm certain that my friend --

3 THE COURT: Well, we don't know.

4 MR. CLIFFE: We don't know --

5 THE COURT: No. But your analogy is a good
6 one because, of course, the Territory is a creature of
7 the federal government.

8 MR. CLIFFE: Absolutely. So I make that point,
9 that surely, and as Your Honour is saying, the -- and
10 this is what the Yukon Government has done through its
11 statutes, through its sense of responsibilities to the
12 citizens of Dawson, have come and stepped behind them
13 and said, "We'll take care of this problem."

14 So that's always out there. I
15 don't think that it's so cut and dried then, when my
16 friend says, "Well, it's all going to be downloaded on
17 the citizens of Dawson." That can't be the situation.
18 Some will; how much we don't know.

19 The other point I just want to
20 address very briefly, is that my friend was mentioning
21 about, and on the same bane of funding that, in the
22 past the City was on its own, and so on and so forth.
23 You may recall, back at the sentencing, that we
24 discussed and there were questions asked of Mr.
25 Everitt, and I can't recall the name of the city
26 manager, about the \$9 million in capital infrastructure
27 money that came from the YTG to the City, and that

1 money, coming from the YTG, was to be used with respect
2 to the sewage treatment plant and it went to other
3 things in the City. So it's not as if the City has
4 been on its own on this; there have been Territorial
5 Court -- Territorial monies directed at infrastructure
6 at the City in the past.

7 The final -- the next point and my
8 final point is this; my friend says, "The backup
9 position is the Callison site," and that's my point.
10 It may be their backup position, but --

11 THE COURT: It's not yet. They don't have the
12 site.

13 MR. CLIFFE: Exactly, and that is still the
14 subject of negotiations and -- I would have been happy
15 to hear that the backup position is the SBR. They have
16 the land, they've got the system, they've got the
17 plans, it's all ready to go. But that's not what the
18 backup plan is; it's another variable. That's another
19 thing that is out there that might be, might possibly
20 be, may be, if be, an option. That has to be a concern
21 to all of us here. Those are my submissions in reply,
22 thank you.

23 THE COURT: I noticed you consulted with Mr.
24 Magnuson. Is there something that you just wanted to
25 speak to briefly? I'm happy to hear you.

26 MR. CROSSMAN: If I could, Your Honour.

27 THE COURT: Please.

1 MR. CROSSMAN: Thank you. Just to clarify, just
2 in response to my friend, the backup position is, we
3 have a technical, viable option. We choose this
4 single-cell and we have a viable site, which is owned
5 by the City. That is -- that's an option.

6 THE COURT: I just want to be sure I
7 understood the earlier representations. I viewed, at
8 this point, the single-cell alternative as a
9 potentially viable option. Did I misread the
10 information that I've read?

11 MR. CROSSMAN: My understanding is, the latest
12 information I have, Your Honour, is that technically
13 it's a viable option. We have the land --

14 THE COURT: What's going to be in the report
15 that we're expecting any day?

16 MR. CROSSMAN: The detail in terms of why it is a
17 viable option, and then what needs to happen is the
18 geotechnical, which will happen in July, next month.

19 THE COURT: That relates to the site opposed
20 to the -- yeah.

21 MR. CROSSMAN: That's right.

22 THE COURT: Well, no disrespect, but until we
23 see the detail, let's call it a potentially viable
24 option. I don't think it's a slam dunk yet.

25 MR. CROSSMAN: Okay, I'm happy to leave that
26 there.

27 THE COURT: All right.

1 MR. CROSSMAN: Thank you, Your Honour.

2 THE COURT: Okay.

3 MR. CROSSMAN: The other point I wanted to raise
4 was about the -- my friend mentioned about page 5 of
5 the (indiscernible) application and the responsibility
6 that the insurer is Yukon Government.

7 I think -- certainly my
8 instructions are that this is a case where, for the
9 operation and maintenance of these types of sewage
10 plants, it's the municipals -- municipality's
11 responsibility. Now certainly if what happened in
12 Dawson, where Dawson got into financial difficulties
13 and essentially a trustee was appointed. At that point
14 there is a bailout by the Yukon Government. But I
15 think what my friend is trying to suggest is that there
16 is going to be subsidization of the citizens of Dawson,
17 and I think what's clear in the written documents is,
18 in fact, it's responsibility of Dawson to deal with
19 those costs, and in fact, if you go to the next
20 paragraph of that application --

21 THE COURT: I recall reading that. I,
22 perhaps, put a more general slant on Mr. Cliffe's
23 comments, and that is that there is money flowing into
24 Dawson from the Territorial Government on an annual
25 basis for a variety of operations projects, and so
26 forth, and to the extent that there's money flowing in,
27 it provides flexibility. There's nothing that would

1 preclude, post agreement, the Territorial Government
2 assisting Dawson in relation to unanticipated costs
3 that might arise down the road.

4 MR. CROSSMAN: Perhaps -- I would like to --

5 THE COURT: I'm saying they've -- Dawson might
6 run into some extra costs and they might apply to the
7 Territorial Government, ask for assistance. The
8 Government may or may not provide it. I mean it's that
9 kind of relationship. It's a parent-child
10 relationship, and this child is just graduated from
11 high school and the Mayor is going to try to get this
12 child into college, hopefully.

13 MR. CROSSMAN: That's right. As with all good
14 parents, you want the child to stand on their own two
15 feet.

16 THE COURT: Exactly.

17 MR. CROSSMAN: Thank you, Your Honour.

18 THE COURT: It never really happens, by the
19 way. In case you have some young children, let me
20 assure you now, it never really happens.

21 MR. CROSSMAN: I'm disappointed to hear that.

22 THE COURT: Yeah, that was my intention, was
23 to disappoint you. I shouldn't suffer alone.

24 Counsel, I'm going to make a
25 suggestion; I'm going to make a few remarks at this
26 point, and I'm going to suggest that counsel join me in
27 chambers, and that Mr. Vic Enns and Kriss Sarson join

1 us for some technical. And what I'm going to propose
2 is that we -- I have some concerns; at the end of the
3 day, I have some concerns, and I think with the four of
4 you, we can work out a framework, relatively quickly,
5 that I can approve, possibly adopt as a direction or
6 merely approve as an agreement between the two of you
7 representing both sides, that will set out some
8 expectations for the short term that hopefully will
9 resolve the concerns.

10 That's what I have in mind, but I
11 do want to make some general comments. Firstly, I
12 appreciate every one being here, and I appreciate the
13 submissions made by both counsel, both parties, and I
14 certainly appreciated the written submission and the
15 information contained in it. It was very, very
16 helpful. I'm not saying there aren't any concerns,
17 because clearly there are some concerns. We're going
18 to talk about that when we retire to chambers and see
19 if we can't sort that out.

20 But they are serious concerns and
21 we need to -- we need to ensure that those concerns
22 that can be dealt with, are dealt with promptly, so
23 that at the end of the day, if we have to address the
24 question, has the City been acting with due diligence,
25 there won't be any question -- there won't be any
26 question as to what that answer will be. And we don't
27 want to, at that point, be raising all the kinds of

1 issues that Mr. Cliffe has alluded to here today, at
2 that point in raising. That's got to be clear; it's
3 got to be clean.

4 And if it turns out down the road,
5 that there is a delay, the Court might very well be
6 open to providing extra time. But that will be
7 contingent on the relationship between the parties
8 being full, open and consultative throughout the
9 balance of the time period.

10 I wanted to remind particularly
11 the non-lawyers here, because I know the lawyers have
12 reviewed the files, and Mr. Cliffe was present. But my
13 original decision, as I indicated to the Mayor, was
14 premised on the fact that I understood that Dawson's
15 means were limited. This was a case where I could have
16 imposed a fine in the range of several hundred thousand
17 dollars based on the precedents that were filed with
18 me, and many of them were from the North, the Northwest
19 Territories and Iqualuit. I remember some of them
20 quite clearly.

21 I chose not to do that. I chose,
22 instead, to take an approach that would provide for a
23 very nominal fine, up front, of \$5,000, hopefully
24 enough to keep Crown counsel from appealing my
25 decision, and imposing consequences at the tail end, to
26 help ensure that the matter proceeds expeditiously, the
27 assumption being, that if penalties were imposed for

1 delays, and if the parties knew that, they would
2 hopefully work harder at doing their very best to meet
3 the timelines.

4 So I think I wanted to make it
5 very clear that that's been my approach, but the fact
6 that -- but repeating this, I highlight the fact that
7 there can be some significant consequences, financial
8 consequences at the tail end. If at the end I'm not
9 satisfied, that if there are delays, those delays --
10 that if I am satisfied that the delays were caused by
11 lack of due diligence, then the financial consequences
12 to the City of Dawson could kick in. So you must
13 understand that that's the framework that we're working
14 with here. The intent of my decision was to support
15 the construction of appropriate facilities to treat the
16 water.

17 I'm surprised, Mr. Mayor, that you
18 haven't heard from your colleagues downriver in Alaska,
19 the Yukon River being an international waterway, after
20 all, and they do take water, drinking water, out of
21 that river downstream. Now I know it's a big river,
22 but nevertheless, I'm surprised. Perhaps they have but
23 I've not heard about it.

24 MR. CROSSMAN: There have been some peaks.

25 THE COURT: All right, so another reason why
26 we should move on.

27 Mr. Cliffe talked about contextual

1 concern and alluded to the history of this matter,
2 going back to 1983, and he was concerned that some of
3 these new initiatives might be cause for delay. I
4 think his concern was more that they might be an
5 instrument for delay. I just want to read to you the
6 context of paragraph 45 of my decision. I'm just going
7 to read a couple of sentences.

8 The City did begin to take concrete steps
9 towards the eventual construction of a sewage
10 treatment facility in early 1997. But at the
11 same time, it was looking for ways to avoid
12 doing so. The McLeary Environmental
13 contract, in my opinion, is an example of
14 such avoidance of responsibility.

15 I made a specific finding that the
16 City at that time was engaging, looking at other
17 opportunities to delay proceedings before the Water
18 Board. So that's the background of the context that
19 Mr. Cliffe was referring to. And so, as new ideas are
20 being developed now, he's concerned that could these be
21 some more examples of the kind of thing that happened
22 in past history. Now, he's very careful to say he's
23 not saying that, but that's the context he was
24 referring to.

25 Obviously, we're talking about a
26 political environment here. We've got a City of Dawson
27 political environment; we've got a Yukon Government
28 political environment; and, in a different way, a
29 federal government political environment. In that
30 decision, I talked about commercial corporations and

1 municipal corporations and, in fact, how each might
2 benefit from delaying projects of this kind, and I
3 said, although not commercial corporations,
4 municipalities do profit from delaying major capital
5 projects.

6 This profit can be conceptualized
7 by considering the deferred capital cost as money
8 sitting in the bank earning interest. That interest is
9 the profit. Or the capital funds can be used for other
10 projects more popular with voters, resulting in
11 political gains for elected official, perhaps with an
12 eye to the next municipal election. That could apply
13 to both the Territorial government, as well as to the
14 municipal government, and that's the concern I had, the
15 reference made earlier to information provided to me
16 during the sentencing hearing, and I can't recall the
17 specific dollars involved. Mr. Cliffe suggested it was
18 in the area of \$8 million. I do recall that there was
19 a significant amount of money given to the municipality
20 of Dawson, part of which, a significant portion of
21 which, was to go to the sewage treatment plant. Most
22 of it was not spent there; it was spent on two other
23 capital projects which clearly had a greater appeal to
24 the voters, or, it seemed to me as an outsider, would
25 have or should have had greater appeal to the voters.
26 I should say that one of them, those projects, resulted
27 in litigation, and I don't think that facility is being

1 used as of yet. So in a sense it was money diverted
2 but also thrown away.

3 I'm not suggesting for a moment --
4 I don't know enough, so I'm not suggesting for a moment
5 that this diversion was improper. I am merely saying
6 it was information that given to me and that the money
7 could have been spent on the treatment, but something
8 that, to me, appeared to be more popular, politically,
9 that's where the money went.

10 So that's the concern we have, and
11 as we're talking here about trying to find the cheapest
12 option, least expensive option, money, of course, being
13 of concern, I recognize there's a line to be drawn.
14 Yes, there's an obligation to spend money, the
15 taxpayers' money, carefully, prudently. But there's
16 also this other concern, and at some point there might
17 be some overlap and that begins when concerns about the
18 environment have to play second fiddle to the longer
19 term concerns of the environment. Then the Crown will
20 be concerned and he'll pass those concerns on to me.

21 Again, just to remind ourselves of
22 the -- of why we're here. Paragraph 56:

23 The duty elected officials have to the citizens
24 of Dawson City to keep expenditures and taxes
25 low will almost always conflict with duties to
26 the environment. In the short term, taxpayers
27 will notice tax increases but may not be aware
28 of the incremental damage to fish or fish
29 habitat. When the damage to the environment
30 becomes obvious, it may be too late or at least
31 very difficult to recover the harm done. The

1 purpose of environmental legislation such as
2 the *Fisheries Act* is to ensure that the
3 financial interests of current taxpayers do not
4 take precedence over the interests of future
5 generations in protecting the environment.

6 So that's again context and
7 background to the discussions that we're having here.
8 It's a balancing act but the scales don't tip clearly
9 one way or the other, and where to draw the line might
10 turn out to be very difficult, and it may be that at
11 some point down the road, I may have to draw that line.
12 And if I do, I want to tell you that I'll try to do so
13 fairly, but I won't be afraid to draw it.

14 Now, let me go back.
15 Notwithstanding Mr. Cliffe's submissions to me, I see
16 that there has been some progress made, and I
17 acknowledge that the Yukon Government's involvement,
18 although somewhat circumscribed by some of the terms of
19 their agreement with the City of Dawson, nevertheless
20 is a positive development. This plant cannot -- this
21 treatment plant, whatever form it takes, cannot and
22 will not be built without substantial support from the
23 Yukon Government. They are at the table; the
24 expectation is that they're going to move
25 expeditiously. I've received assurances that they
26 will.

27 There are some issues that
28 probably need to be dealt with, and I think they're --
29 I'm going to characterize them more as administrative

1 rather than substantive at this time, and I think if we
2 have a discussion with the individuals I indicated, in
3 chambers, that we'll be able to sort some of these
4 administrative matters out.

5 Just to indicate to the other
6 individuals who won't be joining us, what I have in
7 mind, and I'm going to ask both parties to lay their
8 concerns on the table too, but I'm -- I want to
9 explore, having filed with the Court and with the
10 Crown, an SBR option timeline, within a relatively
11 short period of time, possibly 30 days, but I'm open to
12 hearing what would be practical, practicable in the
13 circumstances.

14 I'd like to know as part of that
15 filing, whether the SBR option needs to comply with
16 YESAA, and what impact that -- if yes, what impact that
17 would have on the timelines. I want to know, more
18 specifically, what the City of Dawson and the Yukon
19 Government's plan would be if the CSIF application is
20 not successful. I hope it will be. Every one is
21 confident it will be. It should be successful, but one
22 never knows in these kinds of situations.

23 I heard one of my questions has
24 already been answered by Deputy Minister Magnuson, and
25 that is Yukon's commitment. I understood him to say
26 that Yukon's commitment exists and will continue,
27 notwithstanding the infrastructure fund success. But

1 will the plan possibly be modified as a result of that?

2 We'll need to have a better -- a
3 clearer understanding of what's secret and
4 confidential, so as not to artificially, unnecessarily,
5 bar or limit the exchange of information. When we meet
6 again, I don't want to hear anything about barriers to
7 communication.

8 Those are some of the things that
9 come to mind and when I meet with counsel there may be
10 some additional things as well. Can I suggest that we
11 meet upstairs in 10 minutes?

12 MR. CROSSMAN: Your Honour?

13 THE COURT: Yes?

14 MR. CROSSMAN: I wonder if I might suggest Mr.
15 Sarson would certainly be a good choice to have at that
16 meeting. It might be helpful to have Mr. Magnuson
17 there at that meeting, if he's available. He might be
18 able to assist us in some of these issues.

19 THE COURT: Does he want to be?

20 MR. MAGNUSON: I can be, Your Honour.

21 THE COURT: I don't see these as necessarily
22 being big issues. I see them as being more operational
23 kinds of issues, but if you want to be there, that's
24 fine.

25 MR. MAGNUSON: In fairness to Mr. Sarson, there
26 may be a couple of questions that he would be
27 appreciative of my help.

1 THE COURT: Yeah.

2 MR. CLIFFE: Just on that point, I just ask if
3 Mr. Webber can just be there.

4 THE COURT: Oh, I assumed that Mr. Webber
5 would be joining us.

6 MR. CLIFFE: And there's something else I was
7 going to say, but I'll -- I know what I was going to
8 mention, Your Honour, is that --

9 THE COURT: It's comforting to know that
10 you're in that age group too.

11 MR. CLIFFE: Oh yes. Anyways, Mr. Webber
12 isn't, but I am. I don't know whether we wanted to
13 consider a date for the next date on the record now --

14 THE COURT: Yes, we do. Well, we could do
15 that now.

16 MR. MAGNUSON: -- and then we can conclude court,
17 and then go to your chambers?

18 THE COURT: Well, why don't we -- I think we
19 can do this now, on the record, because I think that's
20 more substantive. On the assumption that we're able to
21 sort out these little administrative details in
22 chambers, my initial plan for an early review may not
23 be -- may fall by the wayside, may not be necessary to
24 meet earlier, so possibly something -- well, I'm open
25 to counsel, but November comes to mind.

26 (Discussion re scheduling)

27 MR. CLIFFE: I know that, Your Honour, in the

1 last order it indicated that information should be
2 exchanged, if possible, seven days before --

3 THE COURT: Yes, that same order will go, same
4 order will go.

5 Mr. Webber, I know you know the
6 way upstairs, so perhaps you could lead the way for the
7 guests.

8 (Proceedings adjourned to November 21, 2006 at 2:00
9 p.m.)

10

11 This is to certify that the foregoing is a
12 true and faithful transcript of the
13 contents of the record prepared in the
14 above named proceeding.

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Sandra McMurphy, Transcriber

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