

T.C. 01-00050A

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

WHITEHORSE

NOVEMBER 21, 2005

REGINA

v.

THE CITY OF DAWSON

PROCEEDINGS

APPEARANCES:

John H. Cliffe
Edward J. Horembala, Q.C.
Colleen Henry
Amanada Irving

Appearing for Crown
Appearing on his own behalf
Court Recorder
Transcriber

1 THE CLERK: This Territorial Court stands open
2 in the name of Her Majesty the Queen. Your Honour,
3 we'll begin with the matter of the review of City of
4 Dawson.

5 MR. CLIFFE: Your Honour, John Cliffe, that's --

6 THE COURT: Yes, welcome back, Mr. Cliffe.

7 MR. CLIFFE: Thank you, Your Honour, will be
8 Crown in this matter. With me in the gallery is Mr.
9 Vic Enns, who's a correctional engineer in Environment
10 Canada. He's been involved in this matter since its
11 commencement in the courts and he will be instructing
12 me, if required this morning, and he is available to
13 Your Honour if Your Honour has any questions from a
14 technical nature, from the Crown's perspective.

15 MR. HOREMBALA: E.J. Horembala for the City of
16 Dawson and with me is Mr. Hayes, the Public Trustee,
17 Mr. Paul Moore, who is the Chief Administrative
18 Officer of the City, and Mr. Kriss Sarson's on your
19 far right, Your Honour, who is the program manager for
20 this project. He is with Community Services; he is an
21 environmental engineer.

22 THE COURT: Thank you and welcome to everyone
23 in the gallery. I've had a chance to review these
24 documents, some of them -- parts of some are quite
25 technical and I told you that I flipped through them
26 fairly quickly because I didn't understand them
27 necessarily; you'll also appreciate that. But I've --

1 in terms of the verbal normal written material, I have
2 reviewed them. I think it would be helpful, however,
3 to place on the record a brief summary of where we're
4 at and what is expected to happen in the future.

5 Just before you start, Mr.
6 Horembala, it strikes me that since we last met, over
7 six months ago, there seems to be a change in
8 carriage, that is to say it looks like to me, reading
9 the documents, the Yukon Government Community Services
10 has taken over carriage of the building of this,
11 whereas when we last spoke, it was the City of Dawson
12 that seemed to have carriage of the construction
13 issues. Is that just a misperception on my part or?

14 MR. HOREMBALA: No -- well, yes and no. The
15 materials, that were quite extensive last time, were
16 all prepared by YTG, and together with Mr. Hayes and
17 with officials from YTG the brief was put together.
18 So they've had an involvement --

19 THE COURT: Yes, they have, I do recall that.

20 MR. HOREMBALA: -- since and including up to when
21 the application was made to extend. There were
22 extensive meetings with YTG with respect to their
23 commitment at the time the application for extension
24 was made, in August of 2004, I believe.

25 THE COURT: In reading the material, I now
26 understand that the construction is going to be done
27 by them and that once it's finished, it will be turned

1 over to the City of Dawson. I have inferred from that
2 that they're also paying for it, and then they'll turn
3 it over and Dawson will be responsible for the
4 operating costs. That seems to me to be a little
5 shift in gears. I recognize they were involved
6 before, and I'm not suggesting that that's a bad
7 thing; I'm merely clarifying that for the record to
8 make sure I understand what's happening.

9 MR. HOREMBALA: I guess they've always been
10 involved, Your Honour, because the City of Dawson,
11 even prior to their financial problems at the surface,
12 would never be able to afford to build the plant, the
13 capital costs of the plan, and at the time that the
14 extension was applied for, not only were the capital
15 costs gone up but the O&M costs had become
16 unmanageable.

17 THE COURT: For the SBR plant, the O&M costs
18 were too high, okay.

19 MR. HOREMBALA: Yes. Since we were here before
20 Your Honour in February, and speaking to my friend, he
21 has indicated that the communications has improved 100
22 percent. The review on the materials you have
23 indicate that the -- it would appear as though the
24 aerated lagoon is a viable option. The material -- at
25 that time, there was still being left open a fine
26 screening option; that now has been discarded.

27 Short of some new technological

1 invention, it appears as though we're on the path of
2 either the aerated lagoon or the SBR option, which, of
3 course, is something that becomes extremely
4 problematic, but I believe that the eight-page summary
5 that you received indicates that the results from the
6 testing indicate that the aerated lagoon is viable,
7 and it's the intention of the City, and in cooperation
8 with YTG, to proceed on that path.

9 At page 7 of the brief project
10 update, the short version, what has to happen now is
11 the finalization, the submission to the Canada
12 Strategic Infrastructure Fund application where the
13 Federal Government would pay 50 percent of the costs
14 and YTG would bear either 50, or ultimately 40 percent
15 of the costs, and I think probably they would bear 50
16 percent of the start-up and construction of it.

17 THE COURT: I take it that application can't be
18 made until a final decision is made with respect to
19 which alternative is going to be chosen and where that
20 will be located?

21 MR. HOREMBALA: That's correct. So there are --
22 that's a decision that has to be made before the next
23 review and the acquisition of the land for the
24 project.

25 There's also been considerable
26 public consultation with the community. They've
27 involved the school in a school experiment. And it's

1 my client's intention to continue that consultation
2 with the public, to press forward with this project,
3 so that when the next review takes place, we will be
4 in a position to indicate that we're down the road and
5 we're on this path and hopeful to meet the timeline.

6 I have passed up to Your Honour
7 this morning just a -- I asked on Friday that the
8 approximate costs be calculated, and you will see that
9 since the February review, some \$213,000 has been
10 spent, and since the extension was granted in August
11 of '04, over half a million dollars has been spent in
12 attempting to move this project along.

13 THE COURT: Madam Clerk, mark that as an
14 exhibit, and I think we'd better mark the other
15 documents that have been filed as exhibits, as well.

16 EXHIBIT 8: LIST OF COSTS INCURRED TO DATE

17 EXHIBIT 9: TAB 1 - WATER LICENCE MN02-045

18 TAB 2 - NEW SERVICE TREATMENT FACILITY PRELIMINARY
19 REPORT NOVEMBER 2005

20 TAB 3 - LAGOON PILOT PLANT PROGRAM DRAFT REPORT
21 NOVEMBER 2005

22 TAB 4 - SEWAGE TREATMENT PROJECT UPDATE REPORT
23 NOVEMBER 2005

24 THE COURT: Sorry to interrupt, I just want to
25 make sure we don't lose sight of that. When is it
26 proposed to make a final decision as to which
27 alternative to pursue, and the location? Is there a
28 time frame for that?

29 MR. HOREMBALA: There isn't a time frame, but I
30 think I can safely say, on behalf of my clients, that

1 the aerated lagoon option is going to be aggressively
2 pursued.

3 THE COURT: I understand that; I'd be very
4 surprised. Nevertheless, there's a -- there are other
5 people who have to be brought along in that decision
6 making, and I guess the question is whether or not
7 there's a date. Clearly, there has to be in the
8 chart. At the current time, are there still two
9 viable lagoon sites that are being considered?

10 MR. HOREMBALA: Yes.

11 THE COURT: But C is the preferable site?

12 MR. HOREMBALA: Yes.

13 THE COURT: I have the impression that, looking
14 at this time line, that the final decision is going to
15 be made before the end of this year?

16 MR. HOREMBALA: Well, my friend just had -- which
17 one does this come from, John?

18 MR. CLIFFE: Your Honour, the Crown's
19 understanding with the materials file, there is a
20 figure nine in the summary documents, Your Honour?

21 THE COURT: Yes.

22 MR. CLIFFE: And it's a -- the action plan of
23 the location milestones. The way I and Mr. Enns have
24 read it, if Your Honour has that document, there is a
25 heading, "Pilot Testing Aerated Lagoon Option," that
26 says, "Decision milestone for aerated lagoon option,"
27 and it marks it as being the end of February of 2006.

1 That's the way that the Crown reads the materials.

2 MR. HOREMBALA: Yes. So clearly we'll be working
3 towards that deadline.

4 THE COURT: I read, with interest, minutes of
5 some of the meetings including the most recent meeting
6 with citizens of the City of Dawson and there are
7 obviously concerns expressed from citizens with such a
8 project; that's understandable. Ultimately, there has
9 to be some working through some of those concerns.

10 MR. HOREMBALA: Well, aside from making the water
11 -- the sewage conform with the legislation, there are
12 obviously with a lagoon, odour concerns --

13 THE COURT: Yes, that's, I think, primarily the
14 issue with the citizens. But I take it, ultimately,
15 the Yukon Government has the final say. There's no
16 referendum, there's no vote, they have to listen to
17 the people in Dawson, make the adjustments that are
18 possible and then they make a decision and go ahead.

19 MR. HOREMBALA: That's correct. The experience
20 appears to be in North Pole, Alaska, that odour,
21 although one could understand it would be a concern,
22 has not been a problem there.

23 THE COURT: What's the population of North
24 Pole?

25 MR. CLIFFE: 1500, 1700, Your Honour, I believe
26 --

27 THE COURT: So it's the same range then as

1 Dawson. Okay, go ahead, Mr. Horembala.

2 MR. HOREMBALA: The action plan is set out at the
3 bottom of page 7 and 8, Your Honour. My friend has
4 asked that in -- when we come together again, that the
5 materials, that he have the materials that we are
6 going to present to the Court at least seven days in
7 advance and I think that's reasonable.

8 But the two major hurdles now, the
9 two major things that have to be dealt with, is to
10 acquire the funding and to acquire the land.

11 Obviously, at some point they're going to be, I think
12 it would be unrealistic to think they're aren't going
13 to be some issues arise with respect to the
14 construction of this, but we'll deal with them and --

15 THE COURT: I was left with the impression that
16 acquiring the land was not going be a significant
17 problem. What are the issues in terms of acquiring
18 the land? Site C, is that not Yukon land?

19 MR. HOREMBALA: There's one of the claims --

20 THE COURT: There's some placer claims --

21 MR. HOREMBALA: That one requires some negotiation
22 with the people who own the claims.

23 THE COURT: Yes. No, no I understand that.

24 But what, three or four claims? More than that?

25 There are. I see Mr. Hayes nodding in the
26 affirmative.

27 MR. HOREMBALA: I would rather not say too much

1 about that Your Honour --

2 THE COURT: I understand that.

3 MR. HOREMBALA: -- because the government has to
4 negotiate for that.

5 THE COURT: So there is an issue there even on
6 site C?

7 MR. HOREMBALA: Unless there's something specific,
8 I think it's all in those nine pages, of where we're
9 at.

10 THE COURT: I'll hear from your friend as well.
11 I was left with the impression, in reading the
12 materials, that there are obviously still some hurdles
13 to overcome, but at this point you perceive yourself
14 as still being on track?

15 MR. HOREMBALA: Yes.

16 THE COURT: It's still doable, that's the
17 impression I was left with. Mr. Cliffe?

18 MR. CLIFFE: Thank you, Your Honour. Just to
19 echo what my friend was indicating on communications.
20 You may recall, when we were here in February before
21 Your Honour, that I addressed the Court with respect
22 to communications weren't as good as we would have
23 liked them to be. I can tell Your Honour, and Mr.
24 Enns has confirmed, that he's very pleased with the
25 communications, and they're principally between Mr.
26 Sarson and Mr. Enns. They meet once a month, Your
27 Honour. As understand it, there's a full exchange of

1 information both in their conversations and also in
2 material form. The materials are given to Mr. Enns.
3 So that is working fine, and Environment Canada wants
4 it to continue; they're prepared to work with the
5 parties in that regard, as far as communications are
6 concerned.

7 Just to echo again, with respect to
8 the next report back to court day, that if there are
9 going to be any reports filed, it would be appreciated
10 that they're filed seven days in advance just so that
11 there's more of an opportunity to look at those before
12 court, so we can properly address you.

13 Substantively, with respect to what
14 my friend has been saying, the status of things,
15 Environment Canada, with respect to my instructions
16 from Mr. Enns, recognize that the aerated lagoon
17 option is one that's being pursued by the parties
18 here, the YGT and the City, but it takes a view that
19 it's got to be further investigated, which we
20 understand is going on. Characterized by Mr. Enns,
21 essentially it's not necessarily clear sailing with
22 that option because of some of the concerns Your
23 Honour has raised, that is, whether it's getting the
24 land in the case of site C, site conditions at both
25 the sites, and there's issues about, ultimately,
26 operating and maintenance costs, whichever site is
27 chosen. So there are difficulties, and those are

1 things that we anticipate, that is Environment Canada
2 anticipates, they're going to be working towards to
3 solve.

4 Environment Canada wants to advise
5 the Court that it is hoped that the YTG and the City
6 still be mindful of two things. One, is if I can call
7 it and use the words, I believe the technical folks
8 use this expression, Your Honour, the "drop dead
9 date," if I can call it that, of the end of February
10 of 2006. If they are working diligently towards that,
11 and it would appear that they are, but just to remind
12 them of that date. I'm certain that's forefront in
13 their thoughts.

14 Secondly, the SBR option, and that
15 shouldn't be forgotten, and we don't think it has
16 been, that is, Environment Canada doesn't think so.
17 Your Honour, back in July, Mr. --

18 THE COURT: You have plans for a SBR plant
19 already --

20 MR. CLIFFE: Yes, they've got that set up in
21 their critical path, as I understand, critical path
22 scheduling. And that really resulted from a letter
23 Mr. Enns wrote to Mr. Sarson back in July of this year
24 where Mr. Enns addressed some concerns he had about
25 the aerated lagoon option, asking them to work towards
26 things. They're working towards some of his concerns,
27 or to his concerns, but also he repeated to them,

1 listen, you still have to be thinking about SBR. And
2 the SBR concerns that Mr. Enns wanted addressed was a
3 schedule for that as well, and the YTG's consultants
4 have produced that. So that's still on the table as
5 far as the understanding of Environment Canada is
6 concerned.

7 So all in all, the -- at this
8 particular point in time, Environment Canada, as I
9 say, are there to be spoken with, and as the project
10 moves on, they want to be involved, they want the
11 communications, and secondly, they realize that
12 there's a movement towards the aerated lagoon as a
13 result of the pilot project, but they also want to
14 have them still keep in mind this date, this critical
15 date. Because there's two critical dates, the end of
16 February, and in Your Honour's compliance, which is
17 December 31, 2008, and that if it's not working, the
18 SBR has got to be, as my learned friend says, there's
19 two options, the aerated lagoon or SBR.

20 I have nothing further, unless Your
21 Honour has some questions right now?

22 THE COURT: I don't think Mr. Horembala would
23 disagree with what you've observed. It's laid out in
24 the materials filed with the Court.

25 I have a couple of questions and
26 Mr. Enns or someone else may be able to answer it.
27 It's not so much a legal question; it's more of a

1 technical question. I noted with interest that if we
2 proceed with the lagoon system, there's clearly a lot
3 of work that needs to be done, including, at the site,
4 including removal of permafrost from the site. I just
5 wondered what that involved, the removal of permafrost
6 from the site?

7 MR. ENNS: Primarily, in the winter time, you
8 go in with a large dozer, you rip the permafrost, you
9 remove all that permafrost until you get to the stable
10 material (indiscernible) the gravel. So typically
11 it's about three metres of permafrost you'd remove and
12 infill with gravel and prepare the pad for the
13 building area of the lagoon.

14 THE COURT: If you were going to proceed with
15 the lagoon option, when would that work have to be
16 done, this winter or next winter?

17 MR. ENNS: It probably would be next winter
18 because we'd have to finalize our design, so we
19 actually have the footprint that we require. We can
20 do that work either in the summer or the winter time.
21 The winter time is easier because everything remains
22 frozen. So you could start next winter on site
23 preparations.

24 THE COURT: So you could start when?

25 MR. ENNS: You could start next winter.

26 THE COURT: Next winter. And is that
27 consistent with your flow chart?

1 MR. ENNS: I think so. We have construction
2 starting June of 2007. Some of that work would be
3 related to putting the force beam gravity main in
4 during the summer plans and then construction through
5 the winter time in 2007. So you could build the
6 lagoon in 2008.

7 THE COURT: You want to issue construction
8 tenders in the second quarter of 2007?

9 MR. ENNS: Your Honour, which chart are you --
10 are you in this one?

11 THE COURT: The one that's in the big book. Is
12 that not up to date?

13 MR. ENNS: Yes.

14 THE COURT: Now, just sort of assuming that --
15 suppose if this work can also be done in the summer;
16 it's not going to be a problem. I picked up on the
17 fact you said initially that it would be done in the
18 winter time, and that means there would be a jump to
19 the next winter if it couldn't be done in the latter
20 part of 2007.

21 MR. ENNS: The construction of the lagoon is
22 kind of comprised of two separate construction
23 aspects. One is the required piping to get the waste
24 water from the town out to the site. That can be done
25 in the summer.

26 THE COURT: Yes.

27 MR. ENNS: And then in the winter, you would

1 strip all the permafrost, basically prepare for the
2 placement of gravel that spring. So you do all the
3 pipe work that summer, remove the permafrost in the
4 winter time, and then in the spring, you basically
5 build your lagoons.

6 THE COURT: And again, I don't any sense at all
7 in terms of how much time that would take, but I take
8 it you're satisfied that if that happened, there'd be
9 sufficient time to finalize --

10 MR. ENNS: If -- you know, if everything's
11 available and in tendering costs, the building,
12 contractors, and equipment.

13 THE COURT: Yes, that is of concern, and it
14 would be for you, as well. The -- we don't have a
15 parallel graph, do we, for SBR? Is there one, Mr.
16 Enns? Which tab in the big book is that?

17 MR. CLIFFE: Your Honour, that was in the -- in
18 my materials, it was in this kind clear folder. I
19 don't know whether Your Honour has that one.

20 MR. HOREMBALA: Yes, he has that one. The
21 memorandum --

22 THE COURT: I do have that one but I should
23 tell you I left that up on my desk, inadvertently.

24 MR. CLIFFE: I can give you my copy of it for
25 reference.

26 THE COURT: Well, just tell me. Well, perhaps
27 I could have a look at it. It would be easier just to

1 --

2 MR. CLIFFE: Mr. Enns has got one and perhaps he
3 can address Your Honour, even Mr. Sarson, but I'll
4 just give you my -- thank you, Madam Clerk. Just
5 towards the bottom of the chart, Your Honour.

6 THE COURT: Yes. Pretty well the same "drop
7 dead date," if I can use that phrase for this project,
8 as well. Obviously, the lagoon system is the
9 preferred system from a financial, ongoing financial
10 cost point of view. I take it the initial capital
11 costs may be higher as well, but in the long term, the
12 operating maintenance cost issue is going to be
13 critical for a town the size of Dawson.

14 Mr. Enns has cautioned us, has
15 cautioned Yukon and the City of Dawson, not to put all
16 their eggs in that one basket. But Mr. Enns, at the
17 same time, do you have a reasonable confidence level
18 with respect to the lagoon system?

19 MR. ENNS: I think the evidence to date
20 suggests that it's encouraging. I don't think the ink
21 is dry on the design of it.

22 THE COURT: No, no, I agree with that. What do
23 you see, Mr. Enns, as the biggest challenge for the
24 City of Dawson and for Yukon Government, and -- what
25 about the biggest challenge, technically, what is the
26 thing that concerns you the most?

27 MR. ENNS: I think the challenges are

1 technical and financial. From a financial point of
2 view, if we're left with site A, then the capital
3 costs are going to very high, the operating costs are
4 going to be significant; not as expensive probably as
5 an SBR, but still high. We don't know exactly how
6 high, at this point in time. That's the major concern
7 from a cost point of view.

8 THE COURT: So it's really the site issue?

9 MR. ENNS: It's a site issue, yes. I think
10 technically there's a reasonable expectation that the
11 technology will work under existing conditions. The
12 pilot plant test program was not as unequivocal as
13 everyone would have liked, but, you know, the Yukon
14 Government seems to be satisfied, based on experience
15 elsewhere, that this technology is -- should be
16 continued to be pursued.

17 THE COURT: Mr. Hayes, always a pleasure to see
18 you, but I thought your game plan was that you'd be
19 retired again by now?

20 MR. HAYES: It was.

21 THE COURT: Your retirement is contingent on an
22 election in Dawson?

23 MR. HAYES: That's correct.

24 THE COURT: Is there a date set for that yet?

25 MR. HAYES: No, there is not.

26 THE COURT: So there's some suggestion in the
27 material that we might meet again on May 21st. Has

1 counsel talked about that day?

2 MR. HOREMBALA: I spoke to my friend. I have a
3 problem with that date. It's in the middle of a
4 murder trial and I was going to suggest the first week
5 in June, but I know my friend has a scheduling problem
6 with that, so.

7 THE COURT: Well, at this point, my schedule is
8 fairly open, as you probably know. Why don't you
9 speak to your friend later --

10 MR. HOREMBALA: I would suggest mid-June.

11 THE COURT: Well, why don't the two of you sort
12 it out and just advise the trial coordinator and then
13 I'll confirm it. I guess I'm suggesting we don't need
14 to take everyone's time here; the two of you can sort
15 it out after court, advise the trial coordinator, and
16 --

17 MR. HOREMBALA: Let me just indicate to Your
18 Honour, I'd be available the first full week in June,
19 which starts the 5th.

20 MR. CLIFFE: That's agreeable, Your Honour. If
21 I have a problem, I will instruct counsel from my
22 office here in Whitehorse to appear at that time. So
23 I will be in Your Honour's hands and Mr. Horembala's
24 hands on that.

25 THE COURT: I'm looking for a calendar here; I
26 can't see a 2006 one. Would the Monday date normally
27 be better for you, Mr. Cliffe?

1 MR. CLIFFE: Monday would be the best, I think,
2 Your Honour; that would be June 5th.
3 THE COURT: June 5th at ten o'clock, is that --
4 MR. CLIFFE: That's agreeable, Your Honour.
5 THE COURT: Subject to someone discovering in
6 the next day or two some problem in their scheduling,
7 we'll assume we'll proceed on June 5th, 10 o'clock.
8 And, Mr. Hayes, is it likely I'll see you then, as
9 well?
10 MR. HAYES: It's possible.
11 THE COURT: Sometimes reports are prepared and
12 received during the interval. Could I suggest that
13 those be filed, if that occurs and if there are
14 reports, that those be filed when they're available,
15 filed with the Court and as well with the other side.
16 So that -- even seven days in advance, depending on
17 what's happening in that seven days, when you get a
18 pile of material like this, it is a little tougher to
19 get through it. So I would certainly appreciate it if
20 there are some technical reports, or other reports, to
21 have them filed as they become available.
22 MR. HOREMBALA: I'll attempt to do that.
23 THE COURT: Okay. That would be helpful, I
24 think.
25 MR. CLIFFE: Your Honour, just with respect, my
26 -- the Crown's request for the seven days, in any
27 event --

1 THE COURT: Yes, that makes great sense, and in
2 addition, I agree with that suggestion. Although,
3 some of the concern might be reduced if material is
4 filed as we go along. No doubt there will be
5 substantial material filed for the hearing as well,
6 and Mr. Horembala has indicated that he'd speak to his
7 clients and will make sure that we get that in seven
8 days in advance.

9 MR. CLIFFE: All the request is, whatever
10 information they want to rely on, on the next
11 appearance, just have it filed and served on the Crown
12 office, it would be appreciated, seven days in
13 advance.

14 MR. HOREMBALA: Your office or this office?

15 MR. CLIFFE: My office, and it would go through
16 Mr. Crossman.

17 THE COURT: Thank you, counsel.

18 MR. CLIFFE: Thank you, Your Honour.

19 MR. HOREMBALA: Thank you.

20 (Proceedings adjourned to June 5, 2006 at 10:00 a.m.)

21 This is to certify that the foregoing
22 is a true and faithful transcript of
23 the contents of the record prepared in
24 the above named proceeding.

25
26 _____
27 Amanda Irving, Transcriber