

Citation: *R. v. The City of Dawson*, 2004 YKTC 69

Date: 20040831
Docket: T.C. 01-0050A
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

The City of Dawson

Appearances:

John D. Cliffe

Edward Horembala, Q.C.

Counsel for the Attorney General of Canada

Counsel for the City of Dawson

REASONS FOR DECISION

Introduction

[1] The City of Dawson has applied to amend this court's order which was made on March 5, 2003 in the sentencing decision of *R. v. City of Dawson*, 2003 YKTC 16. The City of Dawson had entered a guilty plea to a single count alleging a violation of s. 36(3) of the *Fisheries Act* (R.S. 1985, c. F-14), which prohibits the deposit of deleterious substances into water frequented by fish. The City discharges its raw sewage directly into the Yukon River. Problems usually arise in the spring and summer months during peak times for tourism and city population. Although the conviction related to a specific date, August 16, 2000, it was acknowledged that these problems go back as far as 1983 when the City was subject to its first water-use licence.

[2] On March 5, 2003, this court imposed the following sanctions on the City of Dawson:

1. A fine of five thousand dollars;

2. A requirement to build and complete a secondary sewage treatment plant, to be fully operational by September 1, 2004. This part of the order was consistent with the City's plan as submitted to the Water Board in an application then pending; and
3. A further penalty of five thousand dollars for each 30-day period that it is in breach of the September 1, 2004 timeline unless the City of Dawson establishes that it acted with due diligence.

[3] The five thousand dollars has been paid.

[4] The required sewage treatment plan has not been constructed, for the following reasons. Several weeks after this court made the order referred to above, the City of Dawson received updated, hard figures for the costs of construction and operation of the proposed treatment plant. The construction costs increased by over 100% from nine million dollars to almost 19 million dollars. The annual operating and maintenance costs increased by 70% to over \$400 per resident per year. In addition, about the same time, it became apparent that the City of Dawson was in a financial crisis. Pursuant to the *Municipal Act*, the Yukon Government appointed a trustee to take over the management of the City. During the last fiscal period, the City of Dawson incurred an operating deficit of 1.4 million dollars.

[5] During the past 12 months, the City of Dawson has been actively engaged in exploring alternative technological solutions to their sewage disposal problem with a view to identifying the most effective and economical approach. Meetings and discussions with representations of other governments have also taken place. A letter from the Honourable Glenn Hart, Minister of Community Services, dated August 13, 2004 stated that the Territorial government is prepared to commit a further six million dollars to this project and will attempt to use these monies to leverage a further equivalent amount from the federal Canadian Strategic Infrastructure Fund. Discussions are also taking place with the Tr'ondek

Hwech'in First Nation regarding the use of their land for a long-term sewage lagoon alternative. In addition, a substantial document has been prepared for the purpose of an application to the Yukon Water Board for amendments that reflect the unexpected difficulties encountered by the City of Dawson in bringing its sewage discharge into compliance with s. 36(3) of the *Fisheries Act* (Water Licence Amendment Application Report, July 20, 2004).

[6] The City of Dawson has taken a number of steps to comply with the conditions of the existing water licence. These are summarized on page 1 of their Water Licence Amendment Application Report and need not be repeated here. In addition, the City has upgraded their water treatment process to raise the sewage temperature from 4 degrees Celsius to 6 degrees Celsius and has limited the discharge of septage at the screening plant by third parties.

[7] This court recognizes that the City of Dawson faces a number of unique challenges in dealing with its sewage problem. Some are related to its northern location:

- the need to bleed water lines in the winter
- one of the largest per capita sewage flows in Canada
- a very low sewage temperature due to the low temperature of the water supply.

[8] In addition, the City encounters large increases in sewage in June, July and August due to the influx of tourists. Dawson City's location in a narrow valley at the confluence of two rivers limits the sewage treatment options available to it.

The Law

[9] The application before the court is made pursuant to s. 79.5 of the *Fisheries Act* which provides as follows:

79.5 (1) A court that has made an order under section 79.2 or 79.3 may, on application by the Attorney General or the person to whom the order applies,

require the person to appear before it and, after hearing the person and the Attorney General, vary the order in any of the following ways that the court considers appropriate because of a change in the circumstances of the person since the order was made:

- (a) change the order or any prohibition, direction or requirement mentioned in the order;
- (b) relieve the person, either absolutely or partially and for any period that the court considers appropriate, of compliance with any prohibition, direction or requirement mentioned in the order; or
- (c) extend or decrease the period during which the order shall remain in force.

(2) Where an application has been heard by a court under subsection (1), no other application may be made in respect of the same order except with leave of the court.

1991, c. 1, s. 24.

[10] The essence of the application is to change the completion date for the sewage treatment plant to December 31, 2008. The main consideration in considering this application is whether there has been a significant change of circumstances since the order was made.

[11] Another consideration is whether the City of Dawson has acted reasonably and with due diligence since the court rendered its decision on March 5, 2003. That decision stated, at paragraph 59:

... the sentence should impose monetary penalties if the City does not meet the timelines set out in their plan ... as a result of lack of due diligence.

[12] Finally, as an application to amend is not an appeal, any amendment should retain the spirit and objective of the original order.

Decision

[13] In this case, I am satisfied that there have been significant changes in circumstances beyond the control of the City of Dawson since the original order of this court. They include significantly higher capital costs for the proposed sewage treatment plant (from 9 million to almost 19 million); an increase in the projected annual operating and maintenance costs of the proposed plant (\$372K to \$626K); and a change in the financial circumstances of the City (its affairs are now run by a trustee).

[14] I am also satisfied that the City of Dawson has proceeded with reasonable diligence in addressing these changes in circumstances.

[15] The application to amend merely affects the original timeline for completing the sewage treatment plant. The amended timeline also provides flexibility to consider other more effective and efficient options. Any new option will require testing prior to implementation. Construction in the north is often affected by winter temperatures with the result that much of it will be seasonal. The new timeline must reflect these realities.

[16] The amendment comes before me as a joint submission, supported by counsel for the City of Dawson and the Attorney General of Canada. It has been discussed with and received the approval of the federal department, Environment Canada.

[17] For the reasons indicated above, I accept the proposed amendment. Paragraph 59 (2.) of the original order will be replaced with the following:

[59] 2(a) The City of Dawson (“the City”) shall construct a sewage treatment plant, facility or system and have it in operation by December 31, 2008. The final effluent from this sewage treatment plant, facility or system shall meet the requirements of section 36(3) of the *Fisheries Act* prior to its discharge to the Yukon River or other water frequented by fish.

The City shall not add water to its sewage waste stream or final effluent for the primary purpose of achieving compliance with the requirements of section 36(3) of the *Fisheries Act*.

2(b) The City shall report back to the court once every six months or as directed by the court for the purpose of advising the court as to its progress regarding compliance with paragraph 2(a) of this order. This report shall be made in court by the City upon reasonable notice to the Attorney General of Canada.

[18] As a result of the change in timelines for the construction of the sewage treatment plant, facility or system it will also be necessary to amend paragraph [59] 3. of the original order. This is most easily done by replacing it with the following:

[59] 3. Pursuant to s. 79.2(i), if the sewage plant, facility or system is not operational by December 31, 2008, I direct that the City of Dawson pay into court the amount of \$5000 as a further penalty for each 30-day period that the startup has been delayed, to a maximum of \$90,000, provided, however, that if the City satisfies this court that it acted with due diligence, it may be excused from some or all of the these further penalties. Any such payments shall be made to the Territorial Court of Yukon in trust for Her Majesty The Queen in Right of Canada as represented by the Minister of Environment for the purpose of promoting the conservation and protection of fish or fish habitat in the Dawson City region. By analogy to a probation order, this court will retain jurisdiction, upon application, to resolve any differences or disputes as to the interpretation and application of this direction. For the sake of clarity, the financial penalties in this section are separate and in addition to any penalties imposed as a result of any future breach of territorial or federal statutes, including the *Fisheries Act*.

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

Lilles C.J.T.C.