Citation: *R. v. City of Dawson*, 2003 YKTC 16 Date: 20030305
Docket: T.C. 01-00050A
Registry: Whitehorse
Heard: 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 Counsel for the Attorney General of Canada
Brett Webber

Edward Horembala, Q.C. Counsel for the City of Dawson

**REASONS FOR SENTENCING**

**Introduction:**

[1] The City of Dawson entered a guilty plea to a single count alleging that on August 16, 2000, it did deposit or permit to be deposited a deleterious substance, sewage, contrary to s. 36(3) of the *Fisheries Act (*R.S.C 1985, c.F-14), an offence contrary to s. 40(2) of that *Act*.

[2] The relevant sections of the *Fisheries Act* are set out below:

> **s.36(3)** Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that

> results from the deposit of the deleterious substance may enter any such water.
>
> . . .
>
> **s. 34(1)** For the purposes of sections 35 to 43, "deleterious substance" means
>
> > (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of [sic] fish that frequent that water, ….

[3] The *Fisheries Act* was amended in 1991 to substantially increase the maximum fines for violations of s.36(3) which prior to that date was $5,000 for a first offence and $10,000 for a second offence. These increases are representative of the public recognition of the gravity of such offences. The penalty section now provides as follows:

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> > (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
> >
> > (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[4] At the same time, the *Fisheries Act* was augmented by giving the court the ability to impose a variety of prohibitions and directions. Some are preventative in

nature, others rehabilitative, but all are concerned with protecting the environment either directly or indirectly.

> **79.2** Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
>
> (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
>
> (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
>
> (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;

> (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Act.

**The Facts:**

[5] On August 16, 2000, enforcement officers executed a search warrant and attended at the Dawson City sewage treatment plant to take samples of the sewage just prior to it being pumped into the Yukon River. The samples were tested by way of a static LC50 bioassay, a standard test for determining the toxicity of effluent to fish. Fish, usually rainbow trout, are placed in the sample and observed. The sewage is considered toxic or deleterious to fish if 50% or more of the test fish die during a 96-hour period. Within five minutes of being exposed to the sewage sample seized from the Dawson City sewage plant, the LC50 bioassay confirmed that the sewage was harmful to the test fish.

[6] Sewage is comprised of domestic wastes originating from toilets, sinks, dishwashers, laundry machines and bathtubs/showers. It includes feces, urine, food wastes, detergents and water, as well as any other waste that may be discharged into the system. In a more technical sense, sewage contains oxygen-depleting substances, ammonia, solids, pathogenic microorganisms and detergents. The Dawson City sample was tested to reveal the presence of all of

the above agents. It is well established (and not disputed by the defendant) that sewage containing these agents may be deleterious to fish.

[7] The Dawson City sewage plant is a primary treatment plant. It receives sewage principally from two sources: the underground sewage system connected to the buildings in the City and, in the summertime, sewage from recreational vehicles, tour buses and RV Park holding tanks. Due to the increased population and influx of tourists, the plant receives substantially more sewage during the summer.

[8] To describe the Dawson City sewage plant as a “treatment plant” overstates the situation considerably. The sewage received by the plant is passed through a screen that removes all the sewage solids greater than .75mm in diameter. The screened-out solids are not fecal materials, and are dumped into the City’s landfill. The sewage with “lumps removed” is then pumped through a pipe that extends into the Yukon River adjacent to the City where it is naturally diluted by the river’s flow. The discharged sewage flows downstream in the Yukon River, past the First Nation community of Moosehide and into Alaska.

[9] The waters of the Yukon River are frequented by many species of fish. In the late summer, Chinook and Chum Salmon, Arctic Grayling, Inconnu and Whitefish inhabit the waters of the Yukon River. Both aboriginal and commercial fishermen fish the water of the Yukon River at or near the City of Dawson. The river is also used for recreation in the summer by canoeists and kayakers.

[10] Although the City of Dawson was charged with one offence on a specific date, August 16, 2000, it is important to understand the regulatory regime governing sewage discharge into the Yukon River, the history leading up to the violation before the court and the events subsequent, including the City’s current plans to correct outstanding deficiencies. I am grateful to counsel for filing a lengthy and detailed Statement of Fact (Ex. #1).

[11] During the period May 26, 1983 to January 29, 2000, the City of Dawson's sewage discharge into the Yukon River was regulated by a series of water-use licenses issued by the Yukon Territory Water Board pursuant to the provisions of the former *Northern Inland Waters Act*, R.S.C. 1985, c.28 and the current *Yukon Waters Act,* S.C. 1992, c.40. These licenses were administered and enforced by officials of the Department of Indian and Northern Development (D.I.A.N.D.). At the material time, Environment Canada was responsible for the administration of s. 36(3) of the *Fisheries Act*.

[12] Dawson City was subject to its first water-use license from May 26, 1983 to September 15, 1993. Among other things, it regulated the discharge of the City's sewage into the Yukon River. One of the conditions of the water-use license was that sewage discharge from the City's plant must not be toxic to fish as measured by the static LC50 bioassay. In the event that the City failed the test, the license required the City within two years of the failure, to submit plans to and for the approval of the Water Board that would reduce the sewage effluent toxicity to an acceptable level. That license further required the City to implement these plans within five years of the discovery of toxic effluent, to the satisfaction of the Water Board.

[13] During the ten-year term of the first water-use license, Dawson City's sewage failed the LC50 bioassay 18 out of 20 times it was tested by D.I.A.N.D.. The failures took place in the spring and summer months at the peak times for tourism and city population. It is common ground that the City of Dawson did not submit the plans required by the license to the Water Board.

[14] Nevertheless, on September 15, 1993, the City was issued a second water-use license, valid until June 30, 1996. This license also included the condition that the City's sewage not be toxic to fish when tested by way of a static LC50 bioassay. It also required the City to conduct some studies and file

several reports. These studies were completed and the reports were submitted to the Water Board.

[15] In its application for the second license, the City of Dawson asked the Water Board not to include the static LC50 bioassay condition. This request was turned down. In its Reasons for Decision upon issuance of this license, the Water Board noted:

> … the board is disappointed that, except for the last two to three years, so little attention appears to have been paid to the potential effect of the Dawson sewage system on the Yukon River. However, the board does acknowledge that the City now appears to be committed to compliance with license requirements….

[16] During the term of the second license, September 15, 1993 to June 30, 1996, the City's sewage failed the static LC50 bioassay seven out of 15 times it was tested. Each of the failures occurred during the summer months.

[17] On January 16, 1997, Dawson City was granted a third water-use license, valid until January 29, 2000. Like the previous licenses, it included the condition that the City's sewage not be toxic to fish when tested by way of a static LC50 bioassay.

[18] It is apparent from the Reasons for Decision in granting the third water-use license, that the Water Board was beginning to lose patience with the City. The following are several extracts from these Reasons:

> The Board has found that the level of sewage treatment currently achieved by the City of Dawson is not acceptable….
>
> …

> In the past, the City does not appear to have adopted a pro-active approach to their sewage issue….
>
> …
>
> More than ten years have passed since the Dawson City sewage effluent was first raised as an environmental concern. The City now proposes, in essence, that the solution to their problems is to move the discharge point to the center of the River….
>
> …
>
> It does not appear, at this time, that the City of Dawson will voluntarily pursue the development and construction of a sewage treatment system that would meet those standards.

[19] In the result, the Water Board directed the City to submit a proposal for a system that will achieve these standards. In addition, it directed that the new system must be designed, constructed and in operation within three years.

[20] During the period of the third water-use license, the City's sewage was tested on two occasions, both in 1998. The test conducted in July of 1998 was a failure.

[21] In January 1997 (the same month that the third Dawson City water-use license was granted), the City embarked on a course of conduct that suggested that it was finally taking the conditions of the water-use license seriously. It contracted with the engineering firm Shiltec Alaska Limited for assistance in meeting the license requirements. Shiltec Alaska Limited provided the City of Dawson with plans for a secondary sewage treatment facility in April 1998. The Tr'ondëk Hwëch'in Hän Nation was consulted with respect to proposed sites for a sewage lagoon treatment facility. Funding for the plant was sought from the Yukon Territorial Government (YTG) as well as from federal sources. Cost estimates were prepared for both a sewage lagoon system and a mechanical plant.

[22] In March 1997, the Tr'ondëk Hwëch'in Hän Nation advised the City that it did not support a sewage lagoon system on its land claim selected lands. Federal government sources advised the City to look to YTG for funding of the secondary treatment plant.

[23] In August 1997, YTG advised that it had no capital funding set aside in its 1997-1998 capital budget for a secondary sewage plant in Dawson City. This response was not surprising, as the request was made by the City part way through the fiscal period without any advance notice. The City should have approached YTG for funding during the term of its first water-use license, 1983-1993, when its sewage effluent failed the LC50 bioassay 18 out of 20 times. Its failure to act diligently and prudently earlier contributed to the predicament it found itself in towards the latter part of 1997.

[24] The City contracted for and received a report from McLeay Environmental Ltd. in April 1998 which suggested that the sewage effluent from Dawson City was not, in fact, toxic to fish in the Yukon River due to water flows and dilution. This report modeled output data for the sewage system and was not based on actual sampling.

[25] Based on the McLeay report, the City applied for an amendment to its water-use license, taking the position that the discharge of sewage did not have a harmful effect in the Yukon River. It requested an exemption from s. 36(3) of the *Fisheries Act*. Clearly, this was a delay tactic by the City of Dawson. The Water Board held hearings in December 1998 and required the City to conduct additional testing which resulted in a delay of one year, to December 1999. It did not approve the amendment requested by the City, but proposed to extend the license which expired in January 2000 to December 1, 2005. It also required the City to construct a secondary sewage treatment plant so that all effluent quality standards are met by December 1, 2002.

[26] On June 7, 2000 the Minister of D.I.A.N.D. advised the Water Board that the proposed amendment would not be approved. As a result, the third water-use license for the City of Dawson expired on January 29, 2000. The City has been discharging sewage effluent since that date without a valid water-use license.

[27] As indicated above (para. 2), sewage samples taken on August 16, 2000 failed the LC50 bioassay and resulted in the charge before the court. Additional failures were recorded in June and September of 2000 and in September of 2001.

[28] The construction and operation of a secondary sewage treatment facility entails considerable expense of a magnitude that would be beyond the means of the City of Dawson. In April of 1998, YTG announced a commitment of $9 million dollars towards the capital cost of the plant. This commitment was confirmed in a Capital Funding Agreement dated September 20, 1999 and further amended by agreement in May of 2001 to provide for accelerated payments. This agreement provided for $5.6 million from YTG towards a $6.3 million recreational project and $4.8 million towards a $5.3 million sewage plant.

[29] It was suggested by Crown Counsel that the City of Dawson gave higher priority to the completion of the recreational project, to the detriment of the sewage treatment plant. It is clear to me that the recreational project was also a priority of YTG as a winter works project. As a result, I am unable to accede to Crown's suggestion that the City sacrificed the construction of the sewage plant in favour of the recreational project.

[30] In addition to the design of the treatment plant, it was necessary to install individual water meters and "bleeders" in houses in Dawson City. It was important to reduce the water consumption rates in order to concentrate the effluent to increase the biomass so that the biological system will work properly.

Epcor Water Services Inc. started this work in 2000 and it was finished in 2002, at a cost of $533,426. Further design work, reports and studies related to the sewage treatment plant cost an additional $1.3 million. The City of Dawson claims that it expended a further $900,000 in prior years on account of the sewage treatment plant.

**Sentencing Factors:**

[31] The often cited decision of Judge Stuart in *R. v. United Keno Hill Mines Limited* (1980), 10 C.E.L.R. 43 (Terr. Ct.) remains the leading Canadian decision in sentencing for environmental offences. That decision emphasizes the need for adopting a special approach in sentencing environmental offenders, one that is effective in preventing future environmental offending by way of both education and deterrence.

[32] Most of all, sentencing in environmental cases must be flexible. Fines, and increasingly substantial fines are imposed to achieve deterrence, both general and specific. Such monetary penalties may not always have the desired effect, as corporations are often able to pass the cost of the penalty on to consumers of the products manufactured or, in the case of municipal corporations, to the taxpayers. Imposing fines, even substantial ones, on corporations may leave those individuals who are most culpable, the senior decision-makers, relatively unscathed. Fines may also reduce the funds available to remedy the harm done or to undertake substantial capital undertakings which would serve to prevent similar environmental harm in the future. Deterrence may be enhanced by fining or incarcerating senior corporate officials, but this remedy should be confined to repeated, willful actions or omissions which have contributed to significant environmental damages.

[33] The addition of s.79.2 of the *Fisheries Act* permits the making of remedial and preventative orders, including the construction of public works: See *R. v. Bowers* (2000), YTTC 24, 34 C.E.L.R. 105 (Terr. Ct.). It also permits a court to

direct the payment of monies, not as a fine to disappear into the general accounts of government, but payable for the specific purpose of promoting the proper management, conservation and protection of fish habitat.

[34] In this case, the defendant is a municipal corporation, while in the *United Keno Hill Mines Limited, supra,* case the defendant is a commercial corporation. Some reported cases suggest that municipal corporations should be treated differently, more leniently. For example, in *R. v. City of Quesnel*, [1987] B.C.J. 726 (Prov. Ct.) the court observed:

> The next point that is made is that we are here dealing with a municipal corporation. I had occasion to mention this in an exchange with counsel earlier this morning and I take it that the Crown's position is that no distinction should be made. I agree that it is a difficult point, but I am rather inclined to view that one should be somewhat more circumspect when you are dealing with a municipal corporation because the fact is it is the taxpayers who have to pay in cases of that kind and I do observe that in one or two of the cases that were referred to me that the type of corporation who is the offender is a relevant consideration to be kept in mind. I will readily concede that there doesn't seem to be any specific case where the point was made that a municipal corporation might be considered to be in any sort of different position for purposes of mitigation but a municipal corporation of course doesn't earn any profits and it is not a commercial venture and so I give that some weight.

[35] The *Quesnel, supra,* decision was cited with approval in *R. v. 100 Mile House* (1993), 38 C.R. (4th) 109 (B.C. Prov. Ct.). In that case, the court observed that the municipal corporation only had 375 taxpayers, that it had been a good corporate citizen and had attempted to abide by the law and cure the problem with a new million-dollar treatment facility. It was not a business for profit and taxpayers would have to pay the penalty. In the result, the court imposed a recognizance with conditions rather than a large fine.

[36] Other cases have not made a distinction between commercial corporations and not-for-profit municipal corporations. In *R. v. Corporation of the District of North Vancouver*, (unreported) July 9, 1982 (B.C. Prov. Ct.) the court observed that two levels of government can have conflicting policies: one level is concerned with depleting salmon stock while the other is concerned with providing essential services to citizens in a manner that is not unreasonably costly. How that conflict can or should be resolved is not for the courts to decide. The court was not prepared to distinguish between different kinds of corporations.

> Thirdly, as to the offender, in this case the offender is the district municipality. Now, I think it is important to refer immediately to the argument made that imposing a fine on a municipality for an offence of this kind results in money simply going from one government pocket to another. However, in my view, municipalities budget according to priorities and even though a fine is tax-payers money going from one level of government to another it may have the effect of forcing a change in the municipal budgeting priorities. In other words, it may still act as a deterrent on the municipality and certainly on others.

[37] There are numerous cases where no distinction is made between municipal and commercial corporations: *Canada (Environment Canada) v. Canada ((Northwest Territories (Commissioner))* (1994), 15 C.E.L.R. (N.S.) 114 (N.W.T.S.C.); *R v. Town of Gibsons,* (unreported) November 26, 2001, Sechelt Registry Number 11797 (B.C. Prov. Ct.); *R. v. City of Iqaluit,* (unreported) August 8, 2002 (Nun. Ct. of Justice), are merely several examples.

[38] There is another major reason why municipal corporations should not be treated differently, meaning more leniently than commercial corporations. Municipalities are major polluters of the environment in Canada: See *Nutrients in the Canadian Environment: Reporting on the State of Canada's Environment,*

Environment Canada (2001). Dawson City is cited by the Sierra Legal Defence Fund as one of five Canadian cities that dumps untreated sewage directly into the environment: *The National Sewage Report Card (Number Two),* Sierra Legal Defence Fund (1999). Based on the data in Dawson City's Water License application, the City pumps on average one million cubic meters of sewage into the Yukon River annually, about one billion litres each year. See: Secondary Waste Water Treatment Design Report, Shiltec Northern Engineering, April 1998 (Ex. #1, Tab 17).

[39] Nor does the *Fisheries Act* distinguish between commercial and municipal corporations. The question raised in *R. v. Township of Richmond* (1983), 4 D.L.R. (4th) 189 (B.C.C.A.) was whether a municipal corporation is a corporation within the meaning of the *Fisheries Act*. The court concluded:

> I think it is only common sense that Parliament, in providing for the protection of waters from pollution, intended that that should apply to all persons in Canada and could not, unless there was some specific language, exclude a municipal corporation. Otherwise that would mean that a municipal corporation would be able to pollute at will any waters coming within the purview of this all-embracing Act to protect the environment. In my view, a corporation includes a municipal corporation.

[40] In fact, the landmark decision of the Supreme Court of Canada that established "strict liability" in the case of public welfare offence, *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299, is a municipal pollution case. The court does not distinguish between municipal and commercial corporations when it makes the following observation:

> Natural streams which formerly afforded 'pure and healthy' water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions.

[41] I have concluded that municipal corporations should not be treated more leniently than commercial corporations when sentenced for environmental offences, and in particular, for offences pursuant to the *Fisheries Act*. A municipal corporation may, however, be treated differently in recognition of its different size, organizational structure, objectives and responsibilities. The principles articulated in *R. v. United Keno Hill Mines Ltd*., *supra,* provide a helpful framework for evaluating the available options. Relevant considerations include, but are not limited to: the nature of the environment affected by the offence; the degree of damage and the deliberateness of the offence, together with the accused's attitude and any indication of remorse; evidence of efforts made to comply; the size of the corporation and any advantage gained from the offence; previous criminal record; and other evidence of the character of the convicted corporation or individual. Whether the defendant is a municipal or commercial corporation, the primary sentencing objectives should be to correct any harm to the environment and to ensure the corporation takes all necessary steps to ensure the offence is not repeated.

**Sentencing Factors Applied:**

[42] The Nature of the Environment: The Yukon River is a major salmon spawning river and it is also home to a variety of other fish species including Arctic Grayling, Inconnu and Whitefish. Subsistence fishing is still carried on, although a major commercial fishery based in Dawson City has been inactive for a number of years due to low salmon runs. I take judicial notice of the fact that the northern ecosystem's natural biochemical processes are slowed by cold, extreme seasonal variations in light and ice cover for a significant part of the year.

[43] Extent of Injury: In this case, there was no evidence of fish killed or damage to fish habitat. Dumping of raw sewage directly into the Yukon River on a daily basis over the period of many years will contribute incrementally to the

gradual deterioration of the environment, and will impact negatively on fish stocks already stressed by other factors. The immediate harm may not be measurable. I take judicial notice of the fact that some harm is inevitable. However, the gravamen of the s.36(3) offence is not the actual harm done, but the potential for harm resulting from the deposit of deleterious substances in water frequented by fish. Had actual damage been proven, I would have considered it an aggravating factor.

[44] Culpability of Conduct: The City of Dawson became aware of the need to ameliorate its sewage discharge by the mid-1980s. The 1983 water-use license required the City to submit plans to reduce sewage effluent toxicity to acceptable levels within two years of failing the LC50 bioassay and these plans were to be implemented within five years of the discovery of the toxic effluent. During the period of the license, the City's effluent failed the LC50 bioassay repeatedly. According to the water-use license, a proper sewage treatment plant should have been operational by 1990 at the latest. The City of Dawson ignored this requirement and a new water-use license was issued in 1993, valid until June 30, 1996, with similar conditions. Again, there were numerous failures of the LC50 bioassay. Nevertheless, in early 1997, a third water-use license was granted, until January 29, 2000, requiring the City to comply with the LC50 bioassay standard. Again, several failures of the LC50 bioassay were recorded. The City's culpability is premised on ignoring the requirements of its water-use license for over a decade.

[45] The City did begin to take concrete steps towards the eventual construction of a sewage treatment facility in early 1997. But at the same time, it was looking for ways to avoid doing so. The McLeary Environmental contract, in my opinion, is an example of such avoidance of responsibility (see paras 24-26 above). Although the Water Board was persuaded to grant an extension to the third water-use license to December 1, 2005, this recommendation was not accepted by the Minister of D.I.A.N.D.

[46] In my opinion, The City of Dawson should not bear full responsibility for the current state of affairs. The conduct of the Water Board in granting a second and then third water-use license to the City of Dawson in circumstances where the City was in substantial breach of the first and then the second, constituted passive encouragement of non-compliance by the City. The Water Board's willingness to extend the third water-use license for five years, until 2005, is consistent with this message. In the *United Keno Hill Mines Limited, supra,* case, the court states:

> If the responsible government agency is not pressing for compliance, or it's actually encouraging non-compliance through tacit or explicit agreements to permit non-compliant operations, the corporations cannot be severely faulted.

[47] Similarly, the government department responsible for enforcing the provisions of the *Fisheries Act* (currently the Ministry of the Environment, Canada) ignored and failed to prosecute the numerous breaches of the *Fisheries Act* since 1983 as evidenced by the repeated failures of the LC50 bioassay. This lack of action over a period of almost 20 years sent only one clear message to the City of Dawson: non-compliance is not a serious matter. It is a message that the City of Dawson received in clear and unequivocal terms, and goes some way in explaining its somnambulistic attitude for the better part of 20 years.

[48] The Water Board did recommend extending the license to 2005, and it was the unilateral refusal of the responsible federal minister to accept that recommendation that left the City of Dawson without a water license in January 2000. As I stated earlier (para 21), the City had started taking concrete steps towards dealing with its sewage effluent in 1997. The Minister's action was without notice and left the City in an impossible situation. There was insufficient time to build the secondary treatment plant prior to the summer season when sewage levels were certain to increase. But as the history of this case demonstrates, this impossible situation was largely of the City's own making.

[49] Remorse: I am satisfied that the current officers of the City of Dawson are committed to addressing the sewage effluent problem as quickly as practicable. Significant funds have already been expended. Relevant studies and plans have been undertaken. A necessary “bleeder” system has been installed and tested. The location for the sewage treatment plan has been identified. Timelines for construction and getting the plant operational are part of its current submission to the Water Board (See Ex. #1). These actions indicate both corporate contrition and a renewed sense of responsibility.

[50] Both the mayor of the City of Dawson, Glenn Everett, and its Administrative Officer, Mr. Scott Coulson, attended court and gave evidence. Both testified that the City is committed to upgrading its sewage treatment facility in accordance with the plan included in the new water-use license application.

[51] Size of the Corporation: The City of Dawson is a small, incorporated municipality with less than 1900 permanent residents. I am satisfied that its financial means are limited, in part because of the down-turn in the region’s economy, but also because of the considerable amounts already expended in preparing for the construction of the sewage treatment plant. Moreover, the City is dependent on the Yukon Territorial Government (YTG) for assistance with capital projects. Normally, it bears only 10% of the cost, with YTG assuming responsibility for 90%.

[52] I am satisfied that the ability of the City of Dawson to pay a substantial fine is limited. A substantial fine might also reduce its ability to construct the sewage treatment plant, something that would be contrary to the public interest. Arguably, a small fine may not promote general deterrence. On the other hand, requiring the defendant to expend millions of dollars on an improved sewage treatment plant within specified timelines will be a clear signal to other municipalities that these kinds of charges are serious, that water quality and fish habitat are

important environmental concerns and that nothing will be gained by delay. In light of the history in this case, full compliance can be better achieved by imposing significant financial consequences for failing to use reasonable diligence in meeting the timelines for construction and implementation set out in the City's water-use license. In my view, this approach would be much more effective than imposing up-front fines or penalties.

[53] Profits Realized by Offence: Although not commercial corporations, municipalities do "profit" from delaying major capital projects. This "profit" can be conceptualized by considering the deferred capital cost as money sitting in the bank, earning interest. That interest is the "profit". Or the capital funds can be used for other projects more popular with voters, resulting in political gains for elected officials, perhaps with an eye to the next municipal election.

[54] Where these economic or political gains are the reasons underlying the offence before the court, every effort must be made to quantify and expose them.

[55] I am not satisfied that economic or political gains were the primary reasons for the delay in construction of the secondary sewage treatment plant. As YTG bears 90% of the cost of such capital projects, the savings due to delay accrue primarily to YTG. On the other hand, there will be a significant increase in the annual operating costs of the new plant that the citizens of Dawson City must bear.

[56] The duty elected officials have to the citizens of Dawson City to keep expenditures and taxes low, will almost always conflict with duties to the environment. In the short term, taxpayers will notice tax increases, but may not be aware of incremental damage to fish or fish habitat. When the damage to the environment becomes obvious, it may be too late or at least very difficult to recover the harm done. The purpose of environmental legislation such as the *Fisheries Act* is to ensure that the financial interests of current taxpayers do not

take precedence over the interests of future generations in protecting the environment.

[57] Criminal Record: The City of Dawson has one prior conviction for an environmental offence, an offence contrary to the *Fisheries Act*. This conviction was recorded on January 19, 1996, for which the City received a total monetary penalty of fifteen thousand dollars. The circumstances of that offence were entirely different from the one at bar. It involved the construction of two berms into the Yukon River for the purpose of containing an overflow from an underground drain. I place little weight on it as an aggravating factor.

**Conclusion:**

[58] In summary, the following facts are, in my view, relevant to the sentencing of the City of Dawson.

1. The charge before the court relates to one sewage sample taken on August 16, 2000 that failed the LC50 bioassay. Nevertheless, I am satisfied that the City of Dawson's discharge of sewage into the Yukon River during the spring and summer months since 1983 was frequently, if not continuously, in violation of the standards established by its water-use licenses.
2. Although knowingly in violation of both the water-use license and the *Fisheries Act*, the City of Dawson did almost nothing to reduce the toxicity of its sewage effluent until 1997.
3. In 1997, the City of Dawson began addressing the sewage effluent problem by entering into contracts and studies directed towards a new treatment facility. At the same time, it funded a study to demonstrate that its sewage effluent was not harmful to fish or fish habitat. It used this information for the purposes of delay.
4. During the past three years, the City of Dawson has demonstrated a renewed commitment to improving its sewage effluent. It has expended considerable monies and has detailed plans in place for the

construction of a new sewage plant by September 2004. These detailed plans form part of the City's current water-use license application (Ex. #1).

5. Dawson City's culpability is reduced, in my opinion, by the failure of the responsible government agencies to press for compliance with the City's water-use license and prosecute under the *Fisheries Act* over a period of 15 years.
6. Apart from the repeated failure of the LC50 bioassay, there was no evidence of actual harm to fish or fish habitat.
7. The City of Dawson has limited financial resources, such that a significant financial penalty could reduce its ability to implement its sewage treatment improvements in a timely fashion.
8. The Mayor and Chief Administrative Officer were present and gave evidence during the sentencing hearing. They stated in the clearest terms that the City intended to build the sewage treatment plant in accordance with the City's pending submission to the Water Board. The City entered an early guilty plea. These actions are consistent with corporate remorse.
9. This conviction has received a considerable amount of publicity in the media. As in the case of individuals, the arrest and conviction of the wrongdoer can have both a specific and general deterrent effect. The City of Dawson is known around the world as a popular tourist destination not only for its history but also pristine wilderness. The facts underlying this conviction – 20 years of pumping one billion litres of raw sewage annually into the Yukon River – will certainly impact negatively on this perception and on local tourism. It is a negative consequence or stigma that is a direct result of the City of Dawson's conduct and I have taken it into account in the sentence I impose today.

[59] Based on the unique circumstances of this case, I have concluded that the principles of sentencing and the public interest are best met by imposing a sentence that requires the City of Dawson to construct a sewage treatment plant that will remedy or avoid any harm to fish or fish habitat in the Yukon River. This will require a substantial additional expenditure of several millions of dollars. In addition, considering the history of delay leading up to the charge before the court, the sentence should impose monetary penalties if the City does not meet the timelines set out in their plan submitted to the Water Board as a result of lack of due diligence. I am satisfied that a significant monetary fine payable "up front" would make it difficult for the City of Dawson to complete this project on time:

1. Pursuant to s.40(2), I impose a fine in the amount of $5,000 with three months to pay.
2. Pursuant to s.79.2(b), I direct the City of Dawson to construct a secondary sewage treatment plant, including commissioning, start-up and process optimization as outlined in and in accordance with the timelines set out in the City of Dawson's Water License Application dated July 31, 2002 (4.2 Detailed Project Schedule), as incorporated into the City of Dawson's water-use license by the Yukon Water Board and amended from time to time by the Water Board. The current proposal provides the following timelines:

    - Construction of Secondary Sewage Treatment Plant: May 1, 2003 – March 15, 2004.

    - Commissioning, Startup and Process Optimization: March 1 – June 30, 2004.

    The Crown suggested that the sewage plant should be fully operational by September 1, 2004. I agree.

3. Pursuant to s.79.2(i), I direct that the City of Dawson pay into court the amount of $5,000 for each month or thirty-day period that it fails to meet the timelines set out in its current water-use license application for the construction, startup and operation of the proposed secondary

> sewage treatment plant as adopted or amended by the Water Board from time to time. To the extent that the City establishes that it acted with due diligence it will be excused from this financial penalty. This direction expires on March 1, 2006. 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 probation orders, 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 from and in addition to any penalties imposed as a result of any future breach of territorial or federal statutes, including the *Fisheries Act*.

[60] I am open to counsel's suggestions as to the wording of the foregoing orders.

LILLES C.J.T.C.