



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachments**

Goods and Services Tax Appeal Settlement

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| Date: | January 30, 2012 |
| To: | City Council |
| From: | City Solicitor |
| Wards: | All |
| Reason for Confidential Information: | This report is about litigation or potential litigation that affects the City or one of its agencies, boards, and commissions. This report contains advice or communications that are subject to solicitor-client privilege. |
| Reference Number: | |

SUMMARY

This report seeks instructions relating to the proposed settlement of a tax appeal filed in the Tax Court of Canada by Republic Services of Canada Inc. ("Republic") against a GST assessment by the Minister of National Revenue on the waste and wastewater disposal fees paid by the City and other municipalities during the period from February 1, 2003 to August 31, 2005. Under the agreements with Republic the City was responsible for payment of GST.

A draft settlement agreement was not provided to the City until January 23, 2012 and the Tax Court has ordered that any settlement **must be finalized by the end of February, 2012**. In order for the City to meet this deadline it was necessary to bring this report directly to Council for consideration at its February 5 and 6, 2012 meeting.

This report also seeks authority to continue the retention of outside counsel until all the documentation and final matters for the settlement have been concluded, and to authorize up to \$10,000 in additional legal fees for that purpose.

RECOMMENDATIONS

The City Solicitor and the General Manager of Solid Waste Management Services recommend that:

1. City Council adopt the confidential instructions to staff in Attachment 1;
2. City Council authorize the continued retention of Fraser Milner Casgrain until all documentation and final matters for the settlement described in Attachment 1 have been concluded;
3. subject to the approval of Recommendation No. 2, City Council authorize a further budget amount of \$10,000 for any additional legal fees or expenses related to final settlement of the Tax Court appeal;
4. Council direct that the confidential information and recommendations in Confidential Attachments 1 and 2 not be released publicly as they concern litigation matters and contain advice which is subject to solicitor-client privilege, provided that the final Minutes of Settlement in Attachment 2 may be released publicly once executed.

Financial Impact

The financial impact is as discussed in Confidential Attachment 1.

DECISION HISTORY

A confidential report (January 31, 2006) from the General Manager of Solid Waste Management Services and the City Solicitor including discussion of this issue was considered by Council (Motion J(26)) at its meeting of January 31, February 1 and 2, 2006. At that time Council adopted a number of recommendations including a recommendation to retain outside counsel to represent the City of Toronto with respect to the potential application of the Goods and Services Tax on the Republic-Wilson Contract: <http://www.toronto.ca/legdocs/2006/agendas/council/cc060131/cofa.pdf>

ISSUE BACKGROUND

GST Assessment Appeal

Republic was contracted by the City in 2000 to dispose of residual solid waste, wastewater treatment by-products and street sweepings at its Carleton Farms Landfill in Michigan. In November of 2005 the Canada Revenue Agency ("CRA") notified Republic that it had failed to collect GST from the City and other municipalities for the period from February 1, 2003 to August 31, 2005.

Republic's counsel presented arguments against a GST assessment to CRA but in November of 2006 CRA issued a GST assessment notice, including penalties and interest. As a result of this notice, Republic invoiced the municipalities for their respective shares of the GST (to the end of 2006) including penalties and interest imposed by CRA.

Staff, in accordance with the Financial Control By-law (Chapter 71 of the Municipal Code), paid the amount assessed for GST, penalties and interest to Republic on several conditions outlined in an agreement dated January 31, 2007 (the "GST Payment Agreement"). One of these conditions was that Republic file a notice of objection to the assessment.

Republic's Notice of Objection was filed on February 13, 2007. On March 24, 2009 the Minister of National Revenue disallowed Republic's objection and confirmed the assessment.

Republic filed an appeal to the Tax Court of Canada on June 19, 2009.

Although a settlement outline was discussed in April and May, 2011, a draft settlement agreement was not provided to the City until January 23, 2012 and the Tax Court has ordered that any settlement must be finalized by the end of February, 2012. In order for the City to meet this deadline it was necessary to bring this report directly to Council for consideration at its February 5 and 6, 2012 meeting.

Retention of Outside Counsel

Council, through adoption of Motion J(26) at its meeting of January 31, February 1 and 2, 2006, approved the retention of Fasken Martineau DuMoulin LLP ("Fasken Martineau") to represent the City with respect to GST matters related to the Republic contract. It subsequently became apparent that the City should retain separate counsel, since Fasken Martineau represented Republic and the City's and Republic's interests were likely to diverge.

The City retained Neil Bass of Fraser Milner Casgrain LLP in early 2007. The retainer has now been extended for a total of five years. Council approval is needed for an extension beyond five years. The budget allocated for legal fees with respect to Fraser Milner Casgrain LLP's retainer was \$50,000, and there is only a small amount left. A further \$10,000 is requested in the event that there is further work necessary for the finalization and approval of the settlement documentation.

COMMENTS

Comments are contained in Confidential Attachment 1.

CONTACT

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SIGNATURE

Anna Kinastowski
City Solicitor

ATTACHMENTS

Attachment 1 – Confidential Information: Goods and Services Tax Appeal Settlement
Attachment 2 – Draft Minutes of Settlement