



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Standing Authority for the City Solicitor to Commence Legal Proceedings to Challenge the Annual Payments made to Ontario Municipalities by Stewardship Ontario

Date: July 13, 2018
To: City Council
From: City Solicitor
Wards: All

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City and advice that is subject to solicitor-client privilege.

SUMMARY

The City Solicitor seeks standing authority to commence, settle, or terminate, where appropriate, legal proceedings, including arbitration, if appropriate, either alone or jointly with the Association of Municipalities of Ontario (“AMO”) and/or other Ontario municipalities, to challenge the amount of payment to be made to Ontario municipalities, including the City of Toronto, pursuant to the Ontario Blue Box Program Plan, as established under the Waste Diversion Act, 2002 (the “WDA”) and continued under the Waste Diversion Transition Act, 2016 (the “WDTA”).

The matter is urgent because the City may need to commence proceedings before Council resumes in December 2018.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council authorize the City Solicitor to commence, settle or terminate, where appropriate, legal proceedings, including arbitration, if appropriate, either alone or jointly with AMO and/or other Ontario municipalities, to challenge the amount of annual payment to be made to Ontario municipalities, including the City of Toronto, pursuant to

the Ontario Blue Box Program Plan, as established under the WDA and continued under the WDTA;

2. such authority includes the authority to settle such proceedings without commencing formal legal action where appropriate, to commence the legal proceedings where appropriate, to discontinue or settle such legal proceedings once commenced where it is concluded that it is reasonable to do so, to appeal any decision where warranted, to take any enforcement proceedings where necessary, and to otherwise deal with such matters in consultation, where appropriate, with the General Manager, Solid Waste Management Services;
3. such authority includes the authority to challenge previous years' payments, where appropriate;
4. such authority includes the authority to respond to a challenge that may be commenced by Stewardship Ontario;
5. City Council authorize City staff to provide such support as may be required, including the execution of any necessary document, to give effect thereto; and
6. City Council direct that the confidential information contained in Confidential Attachment 1 to the report remain confidential in its entirety as it relates to potential litigation and contains advice that is subject to solicitor-client privilege.

FINANCIAL IMPACT

There are no financial implications resulting from the approval of the Recommendations in this report.

DECISION HISTORY

At its meeting on July 4, 5, 6 and 7, 2017, City Council, among other things, authorized the General Manager, Solid Waste Management Services, to continue to consult and negotiate with provincial officials with respect to future regulations under the WDTA, and to vote on all appropriate matters of the Resource Productivity and Recovery Authority's Municipal Industry Program Committee. The City Council decision can be found at: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.PW22.4>

COMMENTS

Background

Since 2002, an Ontario corporation established under the WDA known as Stewardship Ontario – on behalf of certain consumer goods producers and packagers (the “Producers”) – has been required to make an annual payment (the “Steward Obligation”) to Ontario municipalities, including the City, to partially cover the cost to those municipalities of running their Blue Box/Bin programs. This approach is often referred to as partial extended producer responsibility (“Partial EPR”).

In 2014, after years of disagreement between Producers and municipalities over the amount of the annual payments, Stewardship Ontario and AMO/the City were involved in an arbitration to determine the 2014 Steward Obligation. As a result of the arbitration, Ontario municipalities were paid 50% of their reported net costs.

In November 2016, the Province repealed the WDA and replaced it with the WDTA and a companion act entitled the Resource Recovery and Circular Economy Act, 2016 (“RRCEA”). Together, these two new statutes are intended to eventually transition the Ontario recycling programs, including the blue bin program, from the current Partial EPR (pursuant to which municipalities incur collection and processing costs and receive the Steward Obligation payment to offset some of those costs) to full extended producer responsibility (pursuant to which producers would handle collection and processing entirely and municipalities presumably would not incur any costs at all). These statutes have also established the new Resource Productivity and Recovery Authority (“RPRA”) to continue certain administrative tasks previously handled by Waste Diversion Ontario (“WDO”) under the WDA, while taking on additional regulatory and enforcement-related responsibilities.

In the years following the arbitration, the annual Steward Obligation was set by these agencies, initially by WDO under the WDA and then subsequently by RPRA under the WDTA.

Despite the repeal and replacements of the WDA, the same partial EPR approach is still in use for blue box/bin programs. Now RPRA, instead of WDO, administers the payments to municipalities and oversees the resolution of payment disputes. In 2015, WDO set the Steward Obligation following the methodology determined in the 2014 arbitration.

Starting in 2016, WDO (and then subsequently RPRA) decided to resolve these payment disputes by having a payment model developed and then applying that payment model to cost data from municipalities for the year in question. In 2016, the Steward Obligation was set at \$121,552,551.00, representing approximately 48.3% of municipalities' reported costs. In 2017, the Steward Obligation was \$123,669,745.00 or 47.7% of municipalities' reported costs.

For the reasons set out in the confidential attachment, the City Solicitor is asking City Council for the appropriate standing authority to challenge, where appropriate, the amount of the annual Steward Obligation that is paid to Ontario municipalities, including the City.

The General Manager, Solid Waste Management Services, has reviewed this report and supports the recommendations.

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SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Standing Authority for the City Solicitor to Commence Legal Proceedings to Challenge the Annual Payments made to Ontario Municipalities by Stewardship Ontario