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COST APPORTIONMENT FOR CN CROSSING ELGIN MILLS ROAD EAST OF YONGE STREET, TOWN OF RICHMOND HILL

The Transportation and Works Committee recommends the adoption of the recommendation contained in the following report, December 17, 2004, from the Commissioner of Transportation and Works and Regional Solicitor:

1. RECOMMENDATION

It is recommended that:

1. The following report be received for information by the Transportation and Works Committee and Regional Council.

2. PURPOSE

This report is provided as an update to a report submitted to Regional Council on February 19, 2004 which, among other things, recommended that the Region's Legal Services Branch be authorized to represent the Region and defend the Appeal by the Canadian National Railway Company ("CN") to the Federal Court of Appeal bearing the Court File No. 03-A-45 (the "Appeal") from Decision No. 517-R-2003 (the "Decision") of the Canadian Transportation Agency ("CTA") on cost apportionment for the work completed at the CN railway crossing located on Elgin Mills Road east of Yonge Street in the Town of Richmond Hill.

The report dated February 19, 2004 also sought Regional Council's authorization to delegate authority to resolve the Appeal to the Regional Chairman and CEO and the Chief Administrative Officer in an effort to ensure the efficient conduct of the Appeal and in order to enable the Region to deal with any settlement prospects expeditiously.

3. BACKGROUND

3.1 Application to CTA

On March 14, 2003, the Region filed an application with the CTA for a determination of the apportionment of costs for the reconstruction of a grade road crossing at mileage 22.16 of CN's Bala Subdivision in the Town of Richmond Hill (the "Project") which had been completed in 2001. The application was vigorously defended by CN.

The dispute had originally arisen in 1999 when CN demanded that the Region pay all costs associated with the Project. In May, 2000, Regional Council adopted Clause No. 12 of Report No. 5 of the Transportation and Works Committee entitled "Widening and

Reconstruction-Elgin Mills Road, Regent Street to Bayview Avenue, CNR Crossing, Project 9122-Richmond Hill” which recommended that an additional purchase order be issued and that funds be distributed to CN to carry out the necessary work on the Project for operational and safety issues. At the same time Regional Council also directed staff to proceed with the CTA application for a ruling on the cost apportionment for the Project based on the fact that CN was the junior party at the crossing as the road allowance existed prior to construction of the railway and, traditionally, the junior party is responsible for the majority of the relocation costs.

3.2 CTA’s Decision

On September 10, 2003, the CTA rendered the Decision which stated that “...CN, as the junior party at this location, shall assume all costs of widening or reconstructing the crossing warning system at the relocation of the CTC switch and turnout”. The CTA also decided that CN and the Region “...shall equally share the costs of the modifications to the crossing warning system as well as its maintenance and operating costs. CN shall also continue to be responsible for the maintenance of the crossing surface within the original road allowance, and [the Region] shall maintain the road approaches to the crossing as per its agreement to do so”. As a result, the Region was entitled to payment from CN in the amount of \$640,637.64 plus applicable interest.

3.3 Appeal to Federal Court of Appeal

After receiving the Decision, CN sought and obtained leave to appeal to the Federal Court of Appeal which was granted on December 10, 2003. The primary ground for Appeal asserted by CN was that the CTA did not have the jurisdiction to determine the matter of cost apportionment as between the Region and CN on the basis that the parties had reached an agreement relating to the apportionment of costs of constructing or maintaining the road crossing. CTA also exercised its right to participate in the Appeal.

The Appeal was heard before a panel of three judges at the Federal Court of Appeal in Ottawa, Ontario on December 7, 2004.

4. ANALYSIS AND OPTIONS

4.1 Judgment of the Federal Court of Appeal

In rendering its Judgment, the Federal Court of Appeal determined that the issue in dispute was “...whether the existence of an agreement relating to apportionment could be inferred from orders signed on behalf of York, for the purchase of goods and services required for the completion of the work”. The Federal Court of Appeal also noted that CN had not taken issue with the actual apportionment ordered by the CTA.

In rendering its Judgment, the Federal Court of Appeal made the following findings:

“We are of the view that the CTA’s decision withstands the “somewhat probing examination” prescribed by the reasonableness simpliciter standard of review. It was reasonable for it to find that the purchase orders signed on behalf of York for goods and services required for the completion of the work, including three in which CN was the vendor, did not constitute agreements relating to the apportionment of costs. York’s willingness to agree to fund the work initially by signing purchase orders is explicable by its desire to get the job done without further delay”.

and

“The CTA’s conclusion that there was no agreement relating to apportionment is further supported by the fact that York twice failed to sign documents (a letter of acknowledgement of responsibility for costs and a standard form agreement on apportionment) that were put to York on behalf of CN, both before and after it signed the purchase orders.”

Ultimately, the Appeal was dismissed with costs to the Region.

4.2 Status of Relationship between the Region and CN

The Judgment of the Federal Court of Appeal is clearly favourable to York Region. Unfortunately, Regional staff are concerned that the Judgment may further negatively impact upon the future dealings between York Region and CN in regards to railway crossing issues on future Regional construction projects.

On past projects Regional staff have found that railway crossing cost allocation disputes with CN have been a significant cause of delay and increased expense. The Appeal matter is an example of this type of delay where, after prolonged discussions, the Region agreed to “front” the costs which CN was demanding, and then to appeal to the CTA to review the cost-apportionment. Regional staff estimate that delays associated with CN railway crossing cost apportionment could affect a further seventeen Regional projects in the current ten-year roads reconstruction program.

The current relationship between York Region and CN is not conducive to the timely and economical completion of Regional projects. Regional staff believe that there may be value in developing an agreement with CN which would assist in setting timelines and governing the process for cost allocations on railway crossings for future Regional projects.

Now that the Appeal has been dismissed, Regional staff will engage in discussions with CN to see if a reasonable agreement to govern future negotiations relative to changes at road/rail crossings can be proposed for execution by the two parties.

5. FINANCIAL IMPLICATIONS

As a result of the Judgment of the Federal Court of Appeal, the Decision, which awarded York Region costs as against CN in the amount of \$640,637.64 plus applicable interest, is upheld. The Region is therefore entitled to payment from CN in the amount of \$640,637.64 plus applicable interest, along with its costs of the Appeal which shall be determined by the Federal Court of Appeal if the parties cannot otherwise agree. Thus far, the Region has paid \$44,174.68 in legal costs for the Appeal matter, not including the costs associated with preparation for and argument of the Appeal. It is likely that the Federal Court of Appeal will award costs to the Region on a partial indemnity scale which is estimated to be in the range of 50-60% of the Region's actual costs.

The Region continues to be represented by the law firm of Willms & Shier LLP with respect to this matter. Counsel for the Region has indicated that they shall follow up with CN's counsel in order to secure payment of the amounts owing.

6. LOCAL MUNICIPAL IMPACT

There is no local municipal impact as a result of the decision of the Federal Court of Appeal. However, railway crossing disputes with CN are expected to impact on seventeen Regional construction projects within the Region's ten-year road construction program. This could have an impact on local area municipalities as the disputes will likely have a negative effect on the time for completion of these projects.

7. CONCLUSION

The Judgment of the Federal Court of Appeal entitles the Region to a substantial payment from CN and can also be used as a precedent in future situations where circumstances are similar.

The Judgment does not, however, resolve the outstanding issues between the Region and CN and may ultimately have the effect of further distancing the parties and negatively impacting future Regional projects involving CN crossings.

Regional staff propose to engage in discussions with CN in order to explore whether a reasonable agreement to govern future negotiations relative to changes at road/rail crossings can be reached by the parties so as to avoid the unnecessary delay and expense generally associated with railway crossings on Regional projects.

The Senior Management Group has reviewed this report.