



**For Action  
with Confidential Attachment**

## **Negotiation with Bombardier Transportation Canada Ltd. on Liquidated Damages due to Delays in Streetcar Deliveries**

**Date:** May 8, 2018  
**To:** TTC Board  
**From:** Chief Executive Officer

### **Reason for Confidential Information**

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This report contains advice that is subject to solicitor-client privilege, including communications necessary for that purpose, and/or litigation privilege.

### **Summary**

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This report provides an update on the progress of the TTC's dispute with Bombardier Transportation relating to TTC's claim for liquidated damages arising from the late delivery of streetcars.

At the October 28, 2015 Board meeting, the Board authorized TTC General Counsel to commence claims and/or legal action against Bombardier for damages sustained by the TTC arising from schedule delays and non-performance issues related to the delivery of new streetcars.

In February 2016, the TTC issued a Notice of Dispute claiming liquidated damages against Bombardier. The Notice of Dispute formally commenced the dispute resolution process as set out in the contract.

### **Recommendations**

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It is recommended that the Board:

1. Approve the recommendation as set out in the Confidential Attachment;
2. Authorize that the information provided in the confidential attachment is to remain confidential in its entirety as it contains information that is subject to solicitor-client privilege.

### **Financial Summary**

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Due to the slippage in the vehicle delivery schedule, as established in the procurement contract, cash flows have been adjusted to reflect the revised timelines.

The Estimated Final Cost (EFC) of the LRV Project, however, remains unchanged at \$1,186,503,000.

Refer to the Confidential Attachment for details.

The Chief Financial Officer has reviewed this report and agrees with the financial summary information.

## **Equity/Accessibility Matters**

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As raison d'être for the new streetcar project, accessibility is the guiding principle in the vehicle design.

Beginning with specification development, extensive consultation with the public and the Design Review Subcommittee of the Advisory Committee on Accessibility Transit (ACAT) has taken place. Four public consultation open house sessions took place between June 14 and July 31, 2007. An interactive website was created – 300,000 visits and over 10,000 people filled out survey forms. Two fully-furnished low floor LRV mock-ups (Bombardier and Siemens) were on display at the Canadian National Exhibition between August 17 and September 3, 2007.

## **Decision History**

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April 2006 - A Board decision was made to procure accessible streetcars to replace the streetcar fleet (ALRV and CLRV) that was approaching the end of its design life.

January 2008 - A Request for Proposal was posted on the TTC's Web site. Nineteen companies were issued copies of the proposal document out of which two submissions were received. Based on the review of each submission, it was determined that neither proponent had provided a proposal that complied with the TTC requirements as set out in the Request for Proposal documents. This decision was supported by an independent fairness monitor retained to oversee the procurement process. As a result, the TTC cancelled the Request for Proposal.

At the August 27, 2008 Board Meeting staff were directed to proceed with a Structured Multi-Phase Bid Process (SMPBP) with three car builders that had demonstrated experience in producing 100% low floor light rail vehicles. These companies were Alstom Transportation Inc. (Alstom), Bombardier Transportation Canada Inc. (Bombardier) and Siemens Canada Limited (Siemens). Refer to Board meeting highlight item 1 in the following link:

[http://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2008/Aug 27 2008/Highlights/index.jsp](http://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2008/Aug%2027%202008/Highlights/index.jsp)

At its April 27, 2009 meeting, the TTC Board approved a staff recommendation to award to Bombardier the contract for the supply of streetcars to replace the aging fleet and accommodate marginal future growth. Toronto City Council's approval of the Contract was, amongst other conditions, subject to a commitment of funding from the Province of Ontario. Refer to the Board meeting highlights item 1 in the following link:

[http://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2009/Apr 27 2009/Highlights/index.jsp](http://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2009/Apr%2027%202009/Highlights/index.jsp)

On June 19, 2009, the Province of Ontario announced funding of up to \$416,300,000.00 towards 1/3 of the eligible costs for the TTC's procurement of the new low floor streetcar fleet. Subsequently, in a special meeting on June 26, 2009, Toronto City Council approved the funds required to complete the purchase of 204 low floor streetcars. The TTC and Bombardier executed the Contract on June 30, 2009 for a total Contract price of \$993M inclusive of taxes but before foreign exchange. Subsequent Contract Amendment costs have not been included. The procurement documents were structured to reflect a minimum award of 204 vehicles. The procurement documents included an option to purchase up to 400 additional vehicles for use by the TTC for future growth requirements and in any approved Transit City projects (subsequently 300 option vehicles were assigned to Metrolinx based on a Board authority at the May 6, 2010 Board meeting.)

Refer to the Deferred from Last Meeting to Permit Debate/Public Presentation Item 8 in the following link:

[http://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2010/June 2 2010/Minutes/index.jsp](http://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2010/June%202%202010/Minutes/index.jsp)

On January 21, 2013 an agreement was established between the Province of Ontario, City of Toronto and the Toronto Transit Commission regarding Ontario's and Toronto's contribution toward the TTC's low floor streetcar fleet replacement project. City funding will be sourced through a combination of debt and the application of gas tax funding.

In 2013, Bombardier Transportation fell behind in their delivery schedule. A total of 13 vehicles slipped from the schedule by year end. The slippage increased to 34 vehicles in 2014 and then increased to 59 vehicles by the end of 2015.

On June 22, 2015, a status update report was provided to the Board outlining the status of the delivery of the new streetcars. At the June 22 meeting, the Board requested that staff report back to the July 29, 2015 Board meeting with respect to legal options against Bombardier available to the TTC based on poor performance and failing to meet contract delivery schedules.

[http://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2015/June 22/Reports/Board Report with Confidential Attachment New Streetcar.pdf](http://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2015/June%2022/Reports/Board%20Report%20with%20Confidential%20Attachment%20New%20Streetcar.pdf)

In response to the Board's motion, staff provided a report to the Board on July 29, 2015. This report was deferred to September 28, 2015 and then again deferred to the December 16, 2015 Board meeting. In the interim, on October 15, 2015, Bombardier confirmed that their schedule submitted in July 2015 was not achievable.

On October 28, 2015, a further report was provided to the Board reviewing options to exclude Bombardier from future bidding. At the October 28, 2015 meeting, the Board adopted staff's recommendation to commence a claim for liquidated damages against Bombardier. In addition, the Board adopted a number of other motions relating to Bombardier.

[http://www.ttc.ca/About\\_the\\_TTC/Commission\\_reports\\_and\\_information/Commission\\_meetings/2015/October\\_28/Reports/Board\\_Request\\_Staff\\_Review\\_of\\_Options\\_to\\_Exclude\\_Bombardier.pdf](http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2015/October_28/Reports/Board_Request_Staff_Review_of_Options_to_Exclude_Bombardier.pdf)

[http://www.ttc.ca/About\\_the\\_TTC/Commission\\_reports\\_and\\_information/Commission\\_meetings/2015/June\\_22/Reports/Board\\_Report\\_with\\_Confidential\\_Attachment\\_New\\_Streetcar.pdf](http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2015/June_22/Reports/Board_Report_with_Confidential_Attachment_New_Streetcar.pdf)

In February 2016, the TTC issued a Notice of Dispute claiming liquidated damages as against Bombardier. The Notice of Dispute formally commenced the dispute resolution process as set out in the contract.

At its meeting of March 23, 2016, the Board approved the overhaul of 30 Canadian Light Rail Vehicles (CLRVs) required as a result of the delay in the delivery of the new streetcars.

[http://www.ttc.ca/About\\_the\\_TTC/Commission\\_reports\\_and\\_information/Commission\\_meetings/2016/March\\_23/Reports/Overhaul\\_of\\_30\\_Canadian\\_Light\\_Rail\\_Vehicles\\_%28CLRV%29\\_and\\_Maint.pdf](http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2016/March_23/Reports/Overhaul_of_30_Canadian_Light_Rail_Vehicles_%28CLRV%29_and_Maint.pdf)

At its meeting of July 11, 2016, the Board received the TTC Legal Counsel's update on the Liquidated Damages claims against Bombardier

[https://www.ttc.ca/About\\_the\\_TTC/Commission\\_reports\\_and\\_information/Commission\\_meetings/2016/July\\_11/Reports/2\\_Bombardier\\_Streetcars\\_-\\_Claims\\_Update.pdf](https://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2016/July_11/Reports/2_Bombardier_Streetcars_-_Claims_Update.pdf)

## **Issue Background**

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At the October 28, 2015 Board meeting, the Board authorized TTC General Counsel to commence claims and/or legal action against Bombardier for damages sustained by the TTC arising from schedule delays and non-performance issues related to the delivery of new streetcars.

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## **Comments**

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In Q4 of 2017, Bombardier made significant investment into expanding its production line. Specifically, Bombardier converted its Kingston, Ontario plant to assemble TTC vehicles. As a result of this investment, Bombardier continues to state that they will complete deliveries of all 204 vehicles by the end of 2019.

A further update on the TTC's Liquidated Damage claim against Bombardier is provided in the Confidential Attachment.

## **Contact**

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## **Signature**

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Richard J. Leary  
Chief Executive Officer (Acting)

## **Attachments**

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Confidential Attachment 1 – Claims Negotiation Update