Report - Executive Policy Committee - September 17, 2008

Item No. 3 Claim Settlement – Driskell et al. v. The City of Winnipeg
E-File GL-3

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 17, 2008, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submits the following to Council:

1. That a settlement of the Driskell v. City of Winnipeg law suit be approved by way of a payment of $1.61 million to Mr. James Driskell's legal counsel.

2. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

Report - Executive Policy Committee - September 17, 2008

DECISION MAKING HISTORY:

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 17, 2008, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submitted the matter to Council.

RE: Driskell v The City of Winnipeg, et al

FOR SUBMISSION TO: Executive Policy Committee

ORIGINAL REPORT SIGNED BY: David Laird, Acting Director of Internal Services

REPORT DATE: September 11, 2008

RECOMMENDATION: That City Council approve a settlement of the Driskell v. City of Winnipeg law suit by way of a payment of $1.61 million to Mr. Driskell's legal counsel

Report Summary

Key Issues:

- James Driskell issued a lawsuit against the City, the Province and various individuals after spending more than 13 years in jail as a result of a trial that involved improprieties and errors by Crown counsel and Winnipeg Police Service Officers. The failure to disclose those improprieties and errors caused Mr. Driskell's incarceration to continue.

- A settlement of the litigation was reached through a mediation process that took place in August but the settlement is subject to City Council approval.

- It is the opinion of Legal Services and outside counsel acting for one of the City's insurers, that this is a reasonable settlement for the City taking into account past payments to individuals who were wrongfully convicted and the circumstances surrounding those payments. The Province has accepted a 60% share of the total settlement payment.

- If the City does not approve this settlement, the litigation will continue and could drag on for years. The City may be subject to a higher award through the court process.

Implications of the Recommendation(s):

General Implications

( ) None

(x) For the organization overall and/or for other departments

( ) For the community and/or organizations external to the City

( ) Involves a multi-year contract

Comment(s): The settlement will garner some media attention affecting the City and the Winnipeg Police Service

Policy Implications

(x) No

( ) Yes

Comment(s):

Regulatory Implications

(x) None

( ) Eliminates or reduces regulatory impact

( ) Proposes regulatory impact

Comment(s):

Environmental Implications

(x) No

( ) Yes

Comment(s):

Human Resources Implications

(x) No

( ) Yes

Comment(s):

Financial Implications

(x) Within approved current and/or capital budget

( ) Current and/or capital budget adjustment required

Comment(s): Maximum claim payment of $1.61 Million from Police Services liability account 001-582011-220008-105-12308.

Report

REASON FOR THE REPORT:

City Council must approve any litigation settlement over $250,000.

HISTORY:

Conviction of James Driskell for the Murder of Perry Dean Harder

James Driskell was arrested on October 22, 1990 on a charge of first-degree murder of Perry Dean Harder. Driskell was denied bail. The Crown proceeded by direct indictment. As such, the matter proceeded to trial without a preliminary hearing. Driskell was convicted on June 14, 1991 and sentenced to mandatory life imprisonment. He appealed his conviction to the Manitoba Court of Appeal. Prior to the appeal, the Provincial Crown did not disclose information to Driskell's Defence lawyer that was relevant to his appeal. The appeal was unsuccessful.

In 1993, the Winnipeg Police Service conducted an internal investigation which resulted in an internal report with respect to the investigation and the police role in the prosecution of Driskell. It revealed that certain information had not been provided to Driskell which may have assisted him in the trial. Although most of the information was provided to the Crown, it was not forwarded to Driskell or his lawyer. This report was not sent to the Crown, Driskell, or his lawyer at that time. The report was sent to the Crown in 2003.

After spending more than 13 years in prison, on November 28, 2003, Driskell was released from penitentiary on bail, pending a review of his conviction by the Federal Minister of Justice. His release was the result of an application to the Court of Queen's Bench in which he established that enough information was not provided to him such that he may be able to convince the Minister of Justice for Canada that he did not get a fair trial and the unfairness could have resulted in a different verdict. The Ministerial review resulted in his conviction being set aside and a new trial was directed. On March 2, 2005, the Provincial Crown directed a Stay of Proceedings deciding not to proceed with a new trial.

The Commission of Inquiry into the trial and conviction of James Driskell in 2006

In 2006, the Province appointed Justice Patrick LeSage who conducted a commission of inquiry into the trial and conviction of James Driskell and considered the actions of the Winnipeg Police and the prosecution team. His report which was delivered on February 14, 2007 was very critical of the prosecution team, of specific members of the

Winnipeg Police Service and of Chief Jack Ewatski for failing to disclose certain information. Those findings were made public on February 15, 2007.

The Inquiry Report concludes that Driskell was wrongfully convicted. Justice LeSage concluded that the wrongful conviction and Driskell's incarceration came about as a result of several factors including failure to disclose information and intentional provision of misinformation to Driskell's lawyers which would have assisted in his defence of the prosecution against him. The basic information that was not disclosed was that one of the witnesses who testified against him had been paid and granted immunity by the Crown with respect to another prosecution. Specifically, Winnipeg Police officers were found to have misled the defence lawyer and provided him with false information. Justice Lesage also concluded that Chief Ewatski should have released the 1993 internal report to the Crown once he became Chief in 1998. In addition, Justice Lesage pointed to numerous errors and failures by the Crown Attorneys involved in the case to disclose information to Mr. Driskell and his lawyers.

The Lawsuit

When the Crown decided not to proceed with another trial, Driskell sued the RCMP, the Province of Manitoba, the prosecutors employed with the Province, The City of Winnipeg, some of the police officers who were involved in the investigation and the Police Chiefs over the thirteen year span both for vicarious liability for the alleged wrongdoings of the officers and in their personal capacities for failing to disclose information of which they were aware. The lawsuit is for false arrest, malicious prosecution, negligence, conspiracy and misfeasance in public office. The lawsuit claims damages of $20,000,000. Notice of the Claim was given by the City to its various insurers who had provided coverage over the relevant periods of time.

The claim is being defended on behalf of The City of Winnipeg and its police officers by outside counsel, Charles Sherbo of Fillmore & Riley, who is retained by one of the City's insurers, Aviva Canada. Mark O'Neill of Legal Services has worked with the City's Risk Management branch to provide procedural instructions on behalf of the City and the former police officers. Legal Services is involved as a portion of any settlement or award will not be covered by insurance.

The Province has already made a $200,000 contribution toward any final payment to Driskell. The City has not yet paid anything to Driskell but is aware there is risk of exposure from the lawsuit.

Examinations for discovery had been set for seven weeks starting in September, 2008. In the interim, the parties agreed to attempt to mediate a settlement with the assistance of former Supreme Court Justice John Major from Alberta who conducted a mediation process in Winnipeg on August 6 and 7. The CAO and Mark O'Neill attended the mediation along with Mr. Sherbo and a representative from Aviva Canada. As a result of the mediation, it was agreed, subject to City Council approval, that Mr. Driskell would

be paid the sum of $4 million and his mother would be paid the sum of $25,000 with the Province being responsible for 60% and the City responsible for 40% of that payment. The City's total payment, therefore amounts to $1.61 million under the proposed settlement. The payment is to be made by October 1, failing which interest will be added. If the settlement is not approved, the litigation will continue.

Insurance

The City had occurrence insurance policies with different insurers over the 13 year period. Legal Services has been working with the risk management team to try to obtain a commitment from the insurers with respect to the amounts they would be prepared to contribute to a settlement of this matter. At this date, the City's insurance broker has put forward a mechanism to establish contributions and the insurers are considering this. Aviva, the insurer on for the largest portion of time during which Driskell was incarcerated, is prepared to pay an amount consistent with the broker's recommendation. The City is currently negotiating with the other insurance companies to secure contributions from them. The amount contributed by Aviva and any amount recovered from the other insurers reduces the $1.61 million payable by the City under the settlement.

DISCUSSION:

The claim by Mr. Driskell against former police officers and chiefs of police includes allegations of negligence, intentional withholding of information, a failure of a duty to disclose information to Mr. Driskell and/or his agents. Although there are some statute of limitations defences available to the City, it is likely that the City would be responsible for some of the damages suffered by Driskell as a result of a wrongful conviction. Although wrongful conviction does not mean that Driskell was found innocent of the alleged crime, it does mean that he received an unfair trial. That has been acknowledged by the City already.

Counsel for the Province, the City and the City's insurer believe that a settlement of $4,000,000 to Mr. Driskell and $25,000 to his mother is a fair and reasonable settlement taking into account all the circumstances and comparing this to other payments to persons who were wrongfully convicted. The apportionment of liability of 60% to the Province and 40% to the City is within the range which counsel for the City and its insurers thought was appropriate for settlement purposes.

Aviva Canada is prepared to make a proportionate contribution to the settlement. The City is working with its insurance broker to obtain contributions from the other insurance companies who provided occurrence insurance during the other years of Mr. Driskell's incarceration when Aviva was not insuring the City. The total payment of $1.61M will have to be paid by October 1, 2008 if the settlement is approved, failing which interest will be applied to the payment. The insurance reserve fund has the funds required by the City above and beyond the Aviva payment in order to settle this matter.

Approval of the settlement will allow the City to control the financial risk associated with this litigation and allow the City and the Winnipeg Police Service to put this matter behind them.

Financial Impact Statement — Date: September 10, 2008

Project Name: Driskell JADR Settlement — **First Year of Program** 2008

	2008	2009	2010	2011	2012
Capital					
Capital Expenditures Required	$ -	$ -	$ -	$ -	$ -
Less: Existing Budgeted Costs	-	-	-	-	-
Additional Capital Budget Required	$ -	$ -	$ -	$ -	$ -
Funding Sources:					
Debt - Internal	$ -	$ -	$ -	$ -	$ -
Debt - External	-	-	-	-	-
Grants (Enter Description Here)	-	-	-	-	-
Reserves, Equity, Surplus	-	-	-	-	-
Other - Enter Description Here	-	-	-	-	-
Total Funding	$ -	$ -	$ -	$ -	$ -
Total Additional Capital Budget Required	$ -				
Total Additional Debt Required	$ -				
Current Expenditures/Revenues					
Direct Costs	$ 1,610,000	$ -	$ -	$ -	$ -
Less: Incremental Revenue/Recovery	-	-	-	-	-
Net Cost/(Benefit)	$ 1,610,000	$ -	$ -	$ -	$ -
Less: Existing Budget Amounts	1,610,000	-	-	-	-
Net Budget Adjustment Required	$ -	$ -	$ -	$ -	$ -

Additional Comments: Maximum claim payment of $1,610,000.00 from Police Services account 001-582011-220008-105-12308.

original signed by Ron Smolik Sept 10/08
Controller/Manager of Finance

IN PREPARING THIS REPORT THERE WAS:

Internal Consultation With and Concurrence By:

Risk Management
Legal Services

External Consultation With:

Charles Sherbo, legal counsel for Aviva Canada

THIS REPORT SUBMITTED BY:

Department: Internal Services
Division: Legal
Prepared by: Mark O'Neill
File No.: CL.5/2006(11)