Minute No. 329
Report - Executive Policy Committee - April 14, 2004

Item No. 10 Indemnification of the Winnipeg Symphony Orchestra Board
File FG-1.1(W)

COUNCIL DECISION:

Council concurred in the recommendation of the Executive Policy Committee and adopted the following:

1. That the Indemnification Agreement, attached to Report 16, drafted in partnership with the Province of Manitoba, be approved which Agreement provides liability protection to the members similar to the protection provided, pursuant to Section 497 of The City Charter, to all City employees and appointees of the City from actions taken in good faith.

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

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DECISION MAKING HISTORY:

Moved by His Worship Mayor Murray,

That the recommendation of the Executive Policy Committee be adopted by consent.

Carried

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On April 14, 2004, the Executive Policy Committee passed the following motion, namely:

WHEREAS in January 2003, Council, in response to the financial instability of the Winnipeg Symphony Orchestra (WSO), authorized the City's participation in an Agreement with Canada, Manitoba and the WSO to provide for the appointment of an Interim Management Committee for the WSO with representation from each party;

AND WHEREAS the Winnipeg Symphony Orchestra provides a unique and pivotal foundation for other artistic organizations and events in the city;

AND WHEREAS in March, 2003, Council approved city appointments to the Interim Management Committee and the indemnification of the City and musician members;

AND WHEREAS in September 2003, the Interim Management Committee of the Winnipeg Symphony Orchestra provided their recommendations and a five-year business plan to the City of Winnipeg and the Province of Manitoba;

AND WHEREAS at the Annual General Meeting of the Winnipeg Symphony Orchestra held on December 5, 2003, a new Board of Directors was appointed, and the City has been asked by the Board Chair and the Province of Manitoba to join the Province in indemnifying the WSO Board of Directors;

THEREFORE BE IT RESOLVED THAT the Indemnification Agreement, attached to Report 16, drafted in partnership with the Province of Manitoba, be approved which Agreement provides liability protection to the members similar to the protection provided, pursuant to Section 497 of The City Charter, to all City employees and appointees of the City from actions taken in good faith.

RE: Indemnification of the Winnipeg Symphony Orchestra Board

FOR SUBMISSION TO: Executive Policy Committee

ORIGINAL REPORT SIGNED BY: Chief Administrative Officer

REPORT DATE: April 8, 2004

RECOMMENDATION:

1. That this report be received as information.

2. That the attached agreement be used if Council wishes to indemnify, in partnership with the Province of Manitoba, the Directors of the Winnipeg Symphony Orchestra (WSO).

REPORT SUMMARY

KEY ISSUES:

IMPLICATIONS OF THE RECOMMENDATION(S):

General Implications
? None
? For the organization overall and/or for other departments
X For the community and/or organizations external to the City of Winnipeg
X Involves a multi-year contract
Comment(s):

The Indemnification Agreement will be terminated after 2 years unless the WSO is able to purchase directors' and officers' liability insurance earlier or unless either the City or Province withdraws earlier and upon 10 days notice.

There is risk the Directors will step down from the Board if indemnification is not provided. This will have implications in the community.

Policy Implications
? No
X Yes
Comment(s):

The City Charter provides legal protection for members of boards who are appointed by the City. However, with the exception of community center boards, the City has typically not indemnified board members who are not City appointees. In this particular situation, the board members were approved by the Mayor and Premier and were then appointed by the WSO's

membership at their Annual General meeting. This situation is unique in that the City has not formally appointed the board members.

Environmental Implications

X None
? Yes
Comment(s):

Human Resources Implications

X No
? Yes
Comment(s):

Financial Implications

? Within approved current and/or capital budget
? Current and/or capital budget adjustment required
Comment(s): There are no direct financial implications. However, the provision of liability protection does expose the City to financial risk.

REPORT

REASON FOR THE REPORT:

The Board of Directors of the Winnipeg Symphony Orchestra (WSO) has requested indemnification by the City of Winnipeg and the Province of Manitoba.

Council must approve an indemnification agreement of this nature.

HISTORY:

In January 2003, Council, in response to the financial instability of the WSO, authorized the City's participation in an Agreement with Canada, Manitoba and WSO to provide for the appointment of an Interim Management Committee for the WSO with representation from the each party and further, that bridge financial assistance (up to $200,000) be provided.

In March, 2003 Council approved City appointments to the Interim Management Committee and the indemnification of (2) City and (1) musician member(s) to this Committee.

The Interim Management Committee provided their recommendations and a 5 year business plan in September 2003 to the City and the Province.

At the Annual General Meeting of the WSO on December 5, 2003, a new Board of Directors was appointed.

DISCUSSION:

Given the currently unstable financial position of the WSO, the new WSO Board members cannot purchase directors and officers liability insurance and will likely step down from their positions. The City has been asked by the Board Chair and by the Province to join the Province in indemnifying the Board.

The City Charter provides legal protection for members of boards who are appointed by the City. However, with the exception of community center boards, the City has typically not indemnified board members who are not City appointees. In this particular situation, the Board members were approved by the Mayor and Premier and were then appointed by the WSO's membership at their Annual General meeting. This situation is unique in that the City has not formally appointed the Board members.

A number of options to provide such indemnification were explored by city administrators. An indemnification agreement was determined to be the most appropriate option given the nature of the WSO's situation.

An Indemnification Agreement that has been drafted by the Province with input from the City. The Agreement has been approved by the Province and attached in Appendix A. The Agreement includes the following key parameters:

- The agreement provides liability protection similar to the protection provided to all City employees and appointees of the City from actions taken in good faith (pursuant to s. 497 of the City Charter).
- There is no limit on the liability protection being offered to directors
- The Province and City will share equally the cost of the indemnification; on matters that might arise out of the enforcement or administration of the Criminal Code, provincial statues or regulations, the City alone will provide indemnification; the Province alone will provide indemnification if matters arise out of the enforcement or administration of any City By-law or regulation
- The Agreement will be terminated after 2 years unless the WSO is able to purchase directors' and officers' liability insurance earlier or unless either the City or Province withdraws earlier upon 10 days notice.
- The Agreement is contingent upon the WSO having and maintaining Commercial General Liability (CGL) insurance policy; such insurance reduces the exposure of the City and the Province through this Agreement. It has been confirmed that the WSO currently has CGL insurance.
- In the event that there is a disagreement about whether a WSO insurance policy covers a particular liability, the City and the Province will provide payment to the director with respect to the recoverable sums and then, will themselves, seek payment from the insurer.

FINANCIAL IMPACT:

If Council chooses to indemnify the Board of the WSO, there is no direct financial impact however there is financial risk. Given the fact that that the City solely indemnifies for matters arising out of the enforcement or administration of the Criminal Code, provincial statutes or regulations and that the Province alone will provide indemnification if matters arise out of the enforcement or administration of any City By-law or regulation, the City is exposed to somewhat greater financial risk than the Province.

original signed by Pat Bodnar
Senior Financial Accountant

IN PREPARING THIS REPORT THERE WAS CONSULTATION WITH AND CONCURRENCE BY:

The Legal Services, Corporate Services Department and the Risk Management Division, Corporate Finance Department.

THIS REPORT SUBMITTED BY:

Connie Walker
Manager, Strategic Management Division
CAO Secretariat

Appendix A

THIS INDEMNITY AGREEMENT made on the day of , 2004.

BETWEEN:

THE GOVERNMENT OF MANITOBA
as represented by the
Minister of Culture, Heritage & Tourism

("**Manitoba**")

- and -

THE CITY OF WINNIPEG

("**Winnipeg**")

- and -

WALLY FOX-DECENT, CAROL BELLRINGER,
GRAHAM DIXON,
SAM KATZ, BOYD MacKENZIE, HARVEY POLLOCK,
BARRY REMPEL, SUSAN RILEY, CHRISTIAN SINCLAIR,
and RICHARD TURNER

(collectively, the "**Directors**")

WHEREAS

A. It is in the interests of the long-term viability of The Winnipeg Symphony Orchestra Inc. ("WSO") that individuals be willing to serve as directors of the WSO.

B. Individuals who hold the position of "director" are exposed to certain liabilities by operation of law.

C. In order to encourage individuals to serve as directors of the WSO, Manitoba and Winnipeg are prepared to offer an indemnification against liabilities arising as a result of the individuals holding the position of director of the WSO.

D. The Directors have accepted positions as directors of the WSO subject to being provided with an indemnification against liabilities arising as a result of holding the position of director of the WSO.

NOW THEREFORE THIS INDEMNIFICATION AGREEMENT WITNESSETH THAT:

1. (a) Subject to subsections 1(b), 1(c) and 1(d), Winnipeg and Manitoba hereby covenant and agree to indemnify and save harmless all of the Directors against all costs, charges, expenses, suits, claims and damages (including any legal costs on a solicitor and client basis and any amount paid to settle an action or satisfy a judgment) reasonably incurred by a Director in respect of any civil, criminal or administrative action or proceeding to which a Director is made a party by reason of being or having been a director of the WSO, save and except:

(i) In the case of Winnipeg, for any such action or proceeding arising out of the enforcement or administration of any City By-law or regulation to

which he or she is made a party by reason of being or having been acting in the capacity as a director of the WSO.

(ii) In the case of Manitoba, any such action or proceeding arising out the enforcement or administration by Manitoba of the *Criminal Code*, provincial statutes or regulations to which he or she is made a party by reason of being or having been acting in the capacity as a director of the WSO .

(b) Winnipeg and Manitoba shall provide the indemnification under subsection 1(a) only if:

(i) the Director acted honestly and in good faith with a view to the best interests of the WSO ; and

(ii) in the case of a criminal or administrative action or proceeding the Director had reasonable grounds for believing that their conduct was lawful.

(c) This indemnification is contingent upon the WSO maintaining a general liability policy of insurance and shall not extend to any costs, charges, expenses, suits, claims or damages which are paid by any policy of insurance maintained by the WSO.

(d) This indemnification shall not extend to any amount paid to satisfy a judgment for exemplary or punitive damages.

2. Manitoba and Winnipeg agree that they shall share equally the cost of the indemnification of the Directors except that:

(a) Manitoba shall be solely responsible for all costs of indemnification with respect to actions or proceedings arising out of the enforcement or administration of any City of Winnipeg By-law or regulation.

(b) Winnipeg shall be solely responsible for all costs of indemnification with respect to actions or proceedings arising out of the enforcement or administration by Manitoba of the *Criminal Code,* provincial statutes or regulations.

"Costs" for the purpose of this paragraph shall mean all costs related to the indemnification, including without limitation legal costs on a solicitor and client basis.

3. In the event and each time that an action or proceeding, to which the indemnity provided for in section 1 applies, is threatened or brought against a Director, the following shall apply:

(a) The Director shall notify Winnipeg and Manitoba upon receiving notice of any threatened action or proceeding and upon being served with notice of any action or proceeding;

(b) The Director shall continue to provide particulars of any threatened or actual claim or proceeding on an ongoing basis to keep Manitoba and Winnipeg fully informed as to the status of the threatened or actual claim or proceeding the Director shall notify Winnipeg and Manitoba;

(c) upon receiving notice pursuant to clause (a), the Director and a representative of Winnipeg and a representative of Manitoba shall meet and appoint counsel acceptable to all parties. Should the parties be unable to agree on counsel, Winnipeg and Manitoba shall appoint counsel agreeable to them. If Winnipeg and Manitoba acting reasonably cannot agree on counsel then the parties shall request that the Chief Executive Officer of The Law Society of Manitoba select counsel. Winnipeg and Manitoba shall accept responsibility for the conduct of the action or proceeding and the Director shall cooperate fully with counsel;

(d) The Directors agree that they shall not enter into any binding settlement agreement with respect to any action or proceeding arising as a result being or having been a director of the WSO, without the prior written approval of Manitoba and of Winnipeg, which may be withheld for any reason;

(e) where notice pursuant to clause (a) is with respect to an action or proceeding to which subsection 2(a) applies, the process set out in clause (b), ,(c) and (d) shall be followed but Winnipeg shall not participate;

(f) where the notice pursuant to clause (a) is with respect to an action or proceeding to which subsection 2(b) applies, the process set out in clause (b), (c)and (d) shall be followed but Manitoba shall not participate.

5. To the extent that they make any payment pursuant to this Indemnification Agreement, Manitoba and Winnipeg are subrogated to and shall be deemed to be an assignee of all rights of recovery against any other person liable in respect of the action or proceeding which lead to the payment hereunder.

6. This Indemnification Agreement shall be terminated:

(a) with respect to an individual Director, upon the Director ceasing to hold the position of director of the WSO;

(b) upon the WSO achieving sufficient fiscal viability so as to allow it to obtain directors' and officers' liability insurance at commercially reasonable rates;

(c) on the ____ day of ___, 2006; or [insert date two (2) years after execution]

(d) at any time upon 10 days notice by Manitoba or by Winnipeg;

whichever event should first occur.

7. Neither Manitoba nor Winnipeg shall incur any obligation to indemnify or save harmless the Directors in respect of any action or proceeding arising after the termination of this Indemnification Agreement as a result of any of the Directors being or having been a director of the WSO. However, the termination of this Indemnification Agreement shall not affect the obligations of Manitoba and of Winnipeg to indemnify and save harmless any of the Directors in respect of any action or proceeding arising while this Indemnification Agreement is in effect as a result of the Directors being or having been a director of the WSO.

8. The indemnity granted herein shall enure to the benefit of and shall be binding upon the Directors and their heirs and legal representatives and shall be binding upon Manitoba and Winnipeg and their respective successors and assigns.

DATED at the City of Winnipeg, in the Province of Manitoba this day of , 2004.

THE GOVERNMENT OF MANITOBA as Represented by the Minister of Culture, Heritage and Tourism

Witness

THE CITY OF WINNIPEG

Witness **Mayor**

Witness **City Clerk**

Witness **WALLY FOX-DECENT**

Witness **CAROL BELLRINGER**

Witness **GRAHAM DIXON**

Witness **SAM KATZ**

Witness **BOYD MacKENZIE**

Witness **HARVEY POLLOCK**

Witness **BARRY REMPEL**

Witness **SUSAN RILEY**

Witness **CHRISTIAN SINCLAIR**

Witness **RICHARD TURNER**