RE: Indemnity letters

From: "Veinot, Cindy (TBS)" <"/o=govon/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=veinot, cindy (tbs)d57">
To: "Kaufman, Paul (TBS)" <paul.kaufman@ontario.ca>
Cc: "Hosick, Sarah (TBS)" <sarah.hosick@ontario.ca>
Date: Wed, 14 Feb 2018 12:00:28 -0500

Thanks – I have a call with KPMG now, so will see what I can do -- Cindy

From: Kaufman, Paul (TBS)
Sent: February 14, 2018 11:53 AM
To: Veinot, Cindy (TBS)
Cc: Hosick, Sarah (TBS)
Subject: RE: Indemnity letters

Cindy –

The majority of the letter clarifies that KPMG doesn't have any duties to us, that they aren't providing any assurances about the accuracy, completeness, etc. of the opinion to us, and that we don't have any rights as against them in connection with the opinion. In the circumstances, this seems reasonable since IESO likely agreed to give KPMG control over IESO's distribution of the opinion when they contracted KPMG originally and we're not KPMG's client, so KPMG isn't going to be interested in taking on any risk associated with our use of the opinion.

The third last paragraph relates to confidentiality – it requires us to keep the opinion confidential, and to provide KPMG with notice if we become legally obligated to disclose it. It would be good for clarity if the first sentence in this paragraph could be modified to make it clear that our obligation to maintain the opinion in confidence is "subject to applicable law" (meaning that if we get compelled to disclose the opinion to the OAG, under FOI, or through litigation, we'll notify KPMG and they can exercise any rights they have to intervene, but ultimately we will disclose the opinion if we have no other legal option)– this is likely implicit in the letter, but it is a best practice to say it expressly to avoid confusion in the future.

The fourth last paragraph contains an indemnity. This raises a couple of issues:

1. The indemnity would require approval under section 28 of the FAA before it could be agreed to. The DM and Karen Hughes have delegated authority to give approvals under section 28 (although I've never seen one get approved by Karen), and could provide their approval simply by signing the letter on behalf of TBS (i.e. legally we wouldn't need a separate memo that one of them signs approving the indemnity, as we do when other ministries ask for approvals under section 28).
2. The indemnity doesn't exclude liability attributable to KPMG's own negligence or wilful misconduct, and doesn't give the Crown the ability to take control of any litigation against KPMG that might trigger our obligations under the indemnity. We recommend including both of these features in indemnities that the Crown provides as a best practice, although in some cases indemnities that don't include these protections do get approved under section 28.

KPMG seems to be seeking a similar indemnity from IESO (which doesn't need a section 28 approval under the FAA), although the indemnity they are asking for from IESO is a bit narrower (it excludes coverage where KPMG acts fraudulently or engages in intentional and deliberate misconduct). You may want to see if KPMG is comfortable relying on the indemnity from IESO and not asking for an additional one from TBS – that would avoid the need for a section 28 approval.

If that's not possible, I'm happy to propose some specific edits if we can get an editable version of the letter, or to talk to KPMG's lawyers if they are willing to entertain edits and prefer to hold the pen. Regardless of whether KPMG is willing to negotiate the scope of the indemnity, if it stays in it will need approval from Karen or the DM.

Happy to discuss if you like.

Paul

Paul Kaufman
Counsel
Ministry of the Attorney General | Legal Services Branch | Treasury Board Secretariat
9th Floor, 77 Wellesley Street West, Ferguson Block, Toronto, ON M7A 1N3
Phone: 416-327-7012 Fax: 416-325-9404

From: Veinot, Cindy (TBS)
Sent: February-14-18 10:26 AM
To: Kaufman, Paul (TBS)
Cc: Hosick, Sarah (TBS)
Subject: FW: Indemnity letters

Paul – Can you take a look at the CPO letter – this is in connection with the final opinion from KPMG for IESO on the Fair Hydro Plan.

Thanks,

From: Kim Marshall [mailto:Kim.Marshall@ieso.ca]
Sent: February 14, 2018 10:01 AM
To: Veinot, Cindy (TBS)
Subject: FW: Indemnity letters

For discussion later today

Kimberly Marshall | VP, Corporate Services & CFO
Independent Electricity System Operator (IESO) | T: (416) 969-6232 | C: (416) 545-7202
120 Adelaide Street West, Suite 1600, Toronto, ON M5H 1T1
Web: www.ieso.ca | Twitter: IESO_Tweets | LinkedIn: IESO

Corporate Services collaborates with you to deliver solutions and expertise that enable the IESO to achieve its goals.

From: Picard, Michel [mailto:mpicard@kpmg.ca]
Sent: February 14, 2018 9:19 AM
To: Kim Marshall
Subject: Indemnity letters

Hi Kim,

We need to obtain an indemnity letter from both IESO and OPCD before our opinion can be provided to OPCD.

In that respect, I attached the required letters.

Regards,

Michel Picard, CPA, CA

Partner, Accounting Advisory Services

KPMG LLP
333 Bay Street, Suite 4600
Toronto, Ontario, M5H 2S5
T 416 777 8414
M 416 560 2569
mpicard@kpmg.ca
LinkedIn