

Message

From: Leo Longo [/O=AIRD & BERLIS/OU=ABDOMAIN/CN=RECIPIENTS/CN=LLONGO]
Sent: 4/7/2015 1:21:32 PM
To: 'jbrown@collingwood.ca' [jbrown@collingwood.ca]
Subject: SSA - July 31, 2012 PowerStream Letter PRIVILEGED & CONFIDENTIAL

John;

We have discussed the above-captioned letter and our firm's draft privileged and confidential memo dated March 26, 2015.

The memo reports on the legal status of the July 31, 2012 letter. While acknowledging that the Town is open to take the position that the letter is merely a non-enforceable "agreement to agree", it cautions against taking that position. Not apparently factored into that advice are some of the matters discussed below.

In our discussion last week with Sara, she advised that the import of signing the July 31, 2012 letter was never discussed with her. She believed that the Town, in signing the letter, simply waived compliance with 4.3(5) of the Purchase Agreement...but was not amending the SSA.

As was noted by Ron in the memo, the July 31, 2012 letter spoke to:

i) the parties undertaking a review and amendment of 5 agreements, including the SSA, within a 12 month period. No such review occurred;

ii) the fact that "there is considerable work involved in assessing the appropriate costs and conditions for the provision of services as set out in the Services Agreements". No such work or assessment has been undertaken; and

iii) that each of the 5 agreements was to be reviewed annually by the parties "to agree upon the revised cost of services to be provided pursuant to such agreement". No such annual reviews have been undertaken.

All of this will no doubt be taken into consideration when determining whether that letter constitutes a binding contract.

In determining what course of action to recommend to the Town respecting the SSA, you have advised that:

i) you have commissioned a Phase 2 consultant's report respecting the cost savings that might be realized by the Town assuming direct control over the provision of services currently supplied by Solutions to the Town pursuant to the SSA. You believe that substantial annual cost savings (\$500,000) and other public benefits would accrue to the Town in so doing;

ii) you have also requested that the Town's labour lawyers provide an opinion on the financial ramifications and liability exposure of the Town terminating the SSA from an employment law perspective. That opinion has yet to be received; and

iii) Ron Clark has advised that if the Town were to attempt to terminate the SSA and PowerStream was successful in persuading a court or arbitrator that the July 31, 2012 letter constituted a binding and enforceable legal agreement extending the SSA's term to December 31, 2017, the Town financial exposure might be in the range of \$1,700,000 [or otherwise calculated based upon a cost-based approach plus a "return on equity"].

At this juncture and up to July 1, 2015, the Town will be considering whether it will serve a notice on Solutions respecting the termination of the SSA on December 31, 2015. During this period you will be meeting with Town staff and with reps from PowerStream and Solutions...and an opportunity exists to negotiate an exit strategy from the SSA that might be agreeable to all parties concerned. As these discussions occur it would be prudent for the Town not to be seen as having a final position as to whether the July 31, 2012 letter constitutes a

binding agreement. Rather, at most that issue should be said to be under active review and consideration by the Town's lawyers.

Possible outcomes to be explored during those discussions include:

- i) terminating the SSA as of December 1, 2015;
- ii) renegotiating the actual services to be provided by Solutions under the SSA [and related Town costs for same] for any agreed-upon period of time between now and December 31, 2017;
- iii) maintaining the status quo.

Which outcome to be pursued will be based upon those discussions and weighing all of the advice the Town has or will be receiving in the coming days from its consultants and legal counsel.

Recognize that there are discrete buy-sell provisions in the shareholders' agreement between the parties that would allow either PowerStream or the Town to put the other party to their election to either buy or sell their shares to the other at a fixed price. These provisions are now in effect to my knowledge [as the contractual "standstill" period has expired]. It is speculative as to whether the Town's final position on whether to terminate the SSA might prompt PowerStream to initiate the buy-sell process. The "threat" of such provisions being invoked is now a constant concern going forward and will loom over any future discussions the Town and PowerStream may have on any matter.

A matter that I find troubling is that the Town has had a Purchasing By-law No. 2006-42 throughout this period and that:

- i) between the adoption of this by-law in 2006 and the PowerStream deal in 2012, the Town has been annually paying Solutions for services without adhering to the tender and procurement provisions of said By-law;
- ii) it appears that no consideration was given to Purchasing By-law No. 2006-42 and its requirements when the various PowerStream agreements were entered into; and
- iii) it appears that no consideration was given to Purchasing By-law No. 2006-42 and its requirements when the Mayor and Clerk signed the Town's acceptance and agreement to the July 31, 2012 PowerStream letter.

Any consideration of what course of action the Town will now pursue respecting the SSA should be taken, in part, in full consideration of and compliance with Purchasing By-law No. 2006-42.

I hope this assists.

Regards,
LFL

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