PHASE I

The Enersource Transaction

1 Change to Energy Structure in Mississauga

Energy Structure in Ontario

In 1906 the Ontario government created Ontario Hydro as a provincial institution to deliver power at cost. After almost a century of doing so, in late 1995 the Ontario government authorized the appointment of an advisory committee to study the province's energy structure and to assess options for phasing competition into Ontario's electricity system.

At the time the committee was struck, municipal utilities were publicly owned, not-for-profit organizations established by the local governments. There were 307 municipal electric utilities (MEUs) in 1995, differing in composition, size, customer mix, geographic profile, and commercial sophistication.[1]

The committee, chaired by the Honourable Donald S. Macdonald, released its conclusions in May 1996 in a report entitled *A Framework for Competition: The Report of the Advisory Committee on Competition in Ontario's Electricity System* (Macdonald Report).[2] The committee noted that, although electricity transmission is a natural monopoly, electricity generation is not. In the committee's view, economic and technological changes since 1906 meant it was possible to have competition among electrical suppliers. The committee further advised that most customers supported increased choice and flexibility in products and services. The right to choose the company or supplier with

whom to do business was becoming a more frequent demand.

As a result, the committee contemplated a system in which transmission of electricity would remain a monopoly, but its generation would become competitive. This concept was particularly timely, since Ontario's rates seemed out of step. Lower-cost electricity was available in the United States and also, under certain circumstances, from Quebec.[3]

The Macdonald Committee therefore concluded that a new approach, one that adopted new institutions, regulations, and behaviours, was required. In particular, a more competitive electricity-generating sector would allow electricity suppliers in Ontario to compete in an open, integrated power market.

To accomplish the goals set out in the Macdonald Report, the committee recommended that the generating assets be separated and established as distinct, competing, operating entities under the Ontario *Business Corporations Act* (OBCA).[4] Each municipality would decide if it wished to keep its assets or sell shares to investors. Municipalities could also seek out partners in the private sector.

As Ontario Hydro was dismantled, there would be a complementary restructuring of the distribution system, and MEUs would be given all the powers of corporate bodies under the OBCA. The Ontario Energy Board (OEB) would be responsible for regulating the electrical industry.

In the committee's view, these changes would generate commercial pressure, which would in turn reduce the rates paid to electricity generators and, ultimately, the rates paid by consumers. As well, private ownership would prevent political factors from determining prices and investment decisions, since managers would make better decisions when accountable to shareholders.[5]

The committee hoped the 307 MEUs would consolidate to allow for the benefits of economies of scale and scope, as well as related operational efficiencies and cost savings.[6] The committee recognized that some MEUs would do well, while others would fail, but it felt this consolidation would yield benefits for the Ontario public. The correct number of utilities was estimated to be between seven and ten.[7]

The Macdonald Report ultimately recommended restructuring the energy distribution sector along the following three principles:

1 Ontario Hydro retail should be absorbed into the local distribution system.
2 There should be fewer distribution utilities.

3 Each distribution utility was to keep separate its monopolistic wire business from its competitive electricity sale and service business.[8]

The Macdonald Report was widely reviewed and accepted, and it set out the road map for the restructuring of Ontario's energy sector.

Electricity Act, 1998

In light of the changing energy structure and the Macdonald Report's recommendations, Ontario passed the *Electricity Act, 1998*. This legislation required municipalities to transfer their municipal electrical utilities to OBCA corporations.

At the time, the City of Mississauga operated a model utility. Although it was not the largest in Ontario, it "was considered probably the most efficiently run and preeminent utility in all of Ontario."[9] Mississauga, as with all other Ontario municipalities, began considering its options in accordance with the mandate to restructure. To do so, it undertook a public request for proposals (RFP) process to solicit bids from those interested in acquiring, leasing, or partnering with Hydro Mississauga.

Ultimately, Mississauga decided to enter into a sophisticated partnership transaction with Borealis Energy Corporation (Borealis), a subsidiary of the Ontario Municipal Employees Retirement System (OMERS). Mississauga and OMERS / Borealis would together form a merged company (ultimately named Enersource), with Mississauga holding the majority of shares. This portion of the Report examines the means by which the OMERS / Borealis veto emerged late in the process of negotiations of the shareholder approval provisions in the agreement negotiated between solicitors acting on behalf of OMERS / Borealis and the City of Mississauga, respectively. As I will review, the precise terms of the shareholder approval provisions, and the veto itself, evolved over time. Unfortunately, the city was unaware that the veto existed until many years after the Enersource transaction had been concluded.

Request for Proposals

Key Participants for the City

The RFP process was a significant endeavour requiring the efforts of a wide range of principals and experts. David O'Brien was the city manager for Mississauga at the time. The city manager is essentially the chief administrator for the municipality. Mr. O'Brien had occupied the position since 1995, having previously served as city manager for Sudbury, Gloucester, and Ottawa.[10]

TD Securities was retained, through a competitive process, to bring the financial sophistication to the RFP process that the city would not otherwise have had. Jonathan Toll, managing director of mergers and acquisitions for TD Securities, was responsible for managing the RFP procedure. In conducting this process, TD recommended that Hydro Mississauga be recapitalized and corporatized. Recapitalizing would change the way the city invested in Hydro Mississauga, since the city could then be permitted to convert to 60 per cent debt and 40 per cent equity. Corporatizing Hydro Mississauga would make it (or its new entity) an Ontario business corporation.

Also through a competitive process, the city retained the law firm of Fraser Milner LLP (Fraser Milner).* Completing the transaction required numerous ancillary agreements. William Houston of Fraser Milner oversaw this legal work, and other Fraser Milner lawyers were involved.

Procedure

The RFP procedure followed two steps. The first was to reach out to a world-wide group of approximately 50 companies with information about Hydro Mississauga, and invite those companies to review specific information and submit a proposal. The second step was to take some of the preliminary bids to a further round, where the submitting companies would be given additional confidential information and asked to make a binding proposal. TD Securities was responsible for reviewing each proposal in detail, liaising with each proponent to obtain clarifications and answers, and reporting to city council.

Proposals Received and Considered

As part of step one, confidentiality agreements and "teaser" letters were sent to fifteen potential Canadian bidders, twenty-five in the US, and nine potential

* The name was later changed to Fraser Milner Casgrain LLP.

international bidders. Of these, nine Canadian bidders, twelve US bidders, and four international bidders requested detailed information to enable them to submit bids.[11] Ultimately, TD narrowed the proposals received down to four which, in its view, required detailed consideration by city council.

Bidder 1 proposed purchasing Hydro Mississauga outright, such that the city would leave the electricity business and could invest in other opportunities.* Bidder 1 proposed two options: (1) a straight sale of the business for $560 million; or (2) a 22-year lease, with an estimated value of $560 million.[12]

Bidder 2, as well, offered to purchase Hydro Mississauga outright, although it was also willing to consider a lease, a minority purchase with a put (the option to purchase the balance of shares), and the sale of a share interest in Bidder 2 equal to the cash proceeds of the sale. The total value of Bidder 2's proposal was $475 million.[13] Bidder 2's proposal also included a guaranteed price freeze on electricity rates for three years, which Bidder 2 valued at $110 million.

Bidder 3 suggested merging with Hydro Mississauga. The city would receive a 23 per cent share of the new company and a proportionate share on the new board of directors.

OMERS / Borealis† submitted the fourth bid.[14] At the time bids were sought, OMERS was looking for opportunities to become more involved in private equity, real estate, and infrastructure investments. Borealis was created for the purpose of infrastructure investments in particular, and at the time it submitted its proposal to the City of Mississauga it had made three previous attempts to become involved in this field. Borealis wanted to invest in large, regulated businesses that were able to generate stable long-term cash flows to fund the ongoing obligations of the funds.[15] A team from the legal firm McCarthy Tétrault LLP (McCarthy Tétrault), led by David Lever, provided Borealis with legal advice regarding the preparation of this bid.[16]

Borealis's proposal was to create a strategic alliance with the City of Mississauga which would bring together other municipal electric utilities in the 905 region‡ and ultimately create a large utility owned by a number of municipalities.[17] Michael Nobrega, the CEO of Borealis at the time, testified that, on its own, Hydro Mississauga was not large enough to be seen as

* For confidentiality purposes, the identities of the three unsuccessful bidders have been redacted in the relevant exhibits, and they will be referred to in this Report as Bidder 1, Bidder 2, and Bidder 3.

† The terms OMERS and Borealis have been used interchangeably in relation to the transaction.

‡ For the purposes of this Report, the "905 region" refers to a municipality within the 905 telephone area code in southern Ontario.

a viable investment for Borealis. However, when combined with other 905 utilities from Burlington to Clarington, a merged utility would have between 600,000 and 700,000 customers, which was an appropriate scale for a Borealis investment.[18]

Borealis proposed to purchase a 10 per cent interest in Hydro Mississauga and to refinance Hydro Mississauga's debt.[19] As consideration for the 10 per cent stake in Hydro Mississauga Borealis would receive, it would provide the city with $18 million. Mr. Nobrega explained that Borealis did not intend to own more than 10 per cent of Hydro Mississauga, because municipalities are exempt under the *Income Tax Act* as long as they retain at least 90 per cent ownership of the entity.[20]

The Borealis bid further contemplated merging Hydro Mississauga with other 905 MEUs. Each utility merged would receive its proportionate share in the new company based on the OEB-calculated book value. As new municipalities joined, Borealis would continue to make equity contributions such that it would always maintain a 10 per cent stake. The total value of this bid, including the put (or sell) option described in detail below, was $545 million.[21]

At the time it submitted its proposal, Borealis delivered a cheque to the city in the amount of $430 million. Jonathan Toll of TD Securities had never seen a proponent make this gesture before, but believed it was done to show the proposal was being made in good faith.[22] Mr. Lever described the cheque as an attempt by Borealis to show its *bona fides* and to demonstrate that it had the wherewithal and strength to take on such a transaction. Since Borealis was a relatively new entity and OMERS had not previously been active in the infrastructure area, the cheque was intended to present Borealis as a serious proponent.[23]

Recommendation to Accept the Borealis Proposal

David O'Brien prepared a report for city council setting out the details of each proposal and the analysis of TD Securities and city staff with respect to the bids received.[24] In addition, TD Securities made a presentation to council about the four principal bids.[25] Mr. O'Brien and Mr. Toll then presented their views at an in camera session of council on March 29, 2000.

After analyzing each bid, Mr. O'Brien and Mr. Toll recommended the acceptance of Borealis's proposal.[26] This opinion reflected the views of all staff members who had participated in the process, and it was presented by Mr. O'Brien as the senior public servant of Mississauga.[27] In their view, Borealis provided

a strategic partner with financial strength and offered significant potential to both the city and the entire 905 region. It opened the door for 905 utilities to work together and grow as a business while retaining public accountability for energy. In addition, they believed the new entity would have the size, stability, name recognition, and public support to compete effectively in the retail market. Mr. O'Brien and Mr. Toll therefore concluded that the Borealis proposal provided the highest ongoing value to the city.[28]

One of the attractions of this proposal was that the City of Mississauga would retain ownership of the utility. During the bidding process, the city held a public meeting regarding the future of Hydro Mississauga, at which residents expressed an overwhelming public preference in favour of Mississauga's retaining ownership.[29]

Mr. O'Brien told the Inquiry that he believed the public favoured retaining ownership for two reasons.[30] First, electricity is considered a "sacred service," and thus the public is reluctant to have a private ownership. Second, the public preferred to keep the utility as a long-term source of income, rather than receive a one-time cash payment.

The Borealis proposal, according to the mayor, was also attractive from a practical perspective because it would help reduce the number of utilities in Ontario and thus reduce costs through saved administrative fees and other expenses. She was glad to have the backing of one of the largest pension plans in Canada when going to the bond market.[31]

At the March 29, 2000, meeting, Mr. O'Brien recommended that the mayor and clerk be authorized to enter into a strategic alliance with Borealis and that staff be authorized to work with Borealis to achieve a merger. Staff would negotiate the form of the city's equity participation in the new company and report back to council.[32]

City council passed Resolution 0091-2000, which authorized staff to proceed as recommended. The city moved forward with a deal with Borealis.

2 Negotiation with Borealis

The city entered into comprehensive negotiations with Borealis, the salient elements of which are addressed below. To appreciate the significance of some of the highlighted negotiations, however, it is important to understand the

steps leading to the form of the proposal reviewed and accepted by city council on March 29, 2000.

Pre–March 29, 2000, Negotiations

The "Put"

When Borealis submitted its proposal on February 25, 2000, to create a strategic partnership with the City of Mississauga, it expected the proposal would form a starting point for further discussions with the city.[33] The company's intention was to acquire up to a 10 per cent equity interest in Hydro Mississauga.

As noted above, the Borealis proposal offered a structured refinancing plan for Hydro Mississauga that brought with it a number of attractive benefits to the city, including the maintenance of public ownership, the continued monitoring of the quality of services by the city, and the reduction of the financial exposure of the city to the business risks of energy deregulation.[34]

The proposed capital restructuring would be effected by Hydro Mississauga repurchasing some of the shares in the capital of Hydro Mississauga held by the city.[35] Hydro Mississauga in turn was to pay for these shares by issuing to the city $257,499,000 in senior debt and $85,833,000 in subordinated debt.[36]

On recapitalization, the following transactions were to occur:

- OMERS would purchase from the city the Subordinated Debt issued by Hydro Mississauga, and OMERS would pay one dollar for each dollar of indebtedness it purchased.
- Within 30 business days after completion of recapitalization, Hydro Mississauga would sell long-term debt in the public long-term debt markets.
- OMERS would subscribe (by December 31, 2000) for such number of common shares of Hydro Mississauga as would result in OMERS having up to 10 per cent interest in Hydro Mississauga. The subscription price was to be based on a multiple of the deemed book equity to be negotiated and determined on the subscription date.

As noted, OMERS / Borealis submitted its cheque in the sum of $430 million together with this proposal.

As one might expect, before the submission of Borealis's proposal to city council on March 29, 2000, TD and Borealis exchanged correspondence regarding certain details in the proposal.

One of these issues was the possibility of a "put." A put is a right to sell an asset at a fixed price for a fixed period. Although Borealis proposed purchasing only 10 per cent of Hydro Mississauga, a put would have entitled the city to require Borealis to purchase the remaining 90 per cent of shares before a set deadline, if the city so desired. This arrangement would protect the city against a declining market for municipal utilities, without raising any immediate political issues by selling.[37]

Borealis's February 25, 2000, proposal had not included a put.[38] Mr. Lever testified that, at some point shortly thereafter, TD indicated it would like Borealis to provide the city with a put. Mr. Lever understood other proponents had offered to purchase all of Hydro Mississauga from the city, and the city wanted to keep that door open. Mr. Lever also believed the city was looking for a potential way out of the strategic alliance if it did not work out.[39]

On February 29, 2000, Michael Nobrega wrote to Mr. Toll with respect to the idea of a put.[40] Mr. Nobrega informed him that the senior officers at OMERS believed a put would be contrary to what Borealis was trying to achieve by way of consolidation with Hydro Mississauga. As Mr. Lever explained, the strategy was to work with other municipalities to create a large amalgamation of their utilities, and, if one municipality had a put, it would change the dynamic of the group.[41] Accordingly, if Mississauga were granted a put, Mr. Nobrega believed OMERS / Borealis would have to treat the owners of other MEUs equally and provide a similar option to them. In Mr. Nobrega's estimation, OMERS / Borealis would be required to set aside more than $1.2 billion for this contingency.

On March 3, 2000, Mr. Nobrega wrote again to Mr. Toll, telling him that OMERS / Borealis had carefully considered the idea of granting the City of Mississauga a put.[42] He said that OMERS / Borealis was now willing to provide the city with a put option whereby the city could put all (or a portion) of its shares in the new corporation to OMERS during a six-month period beginning July 1, 2004. If the city exercised this option, OMERS would pay a price equal to two times Hydro Mississauga's deemed book equity as at December 31, 1999.

Mr. Nobrega noted that he expected other 905 MEUs joining the new corporation to request similar rights.[43] To keep a level playing field, OMERS / Borealis adjusted the recapitalization structure it had originally proposed so that it would be able to finance the exit strategies for other 905 MEUs wishing to pursue that option. Apparently, $750 million was taken out of the

recapitalization money and dedicated to the puts.

Under this proposal, the city, Hydro Mississauga, and OMERS / Borealis would form an "alliance" that would act as the catalyst for the consolidation of the 905 MEUs. The city and OMERS / Borealis would together incorporate a new corporation (known as "Mergeco") to effect the consolidation. On March 27, 2000, OMERS / Borealis provided the city with its final proposal to create a strategic alliance with the City of Mississauga.[44] The proposed arrangements were quite complex. It will suffice for these purposes to observe the following:

1 Hydro Mississauga would reorganize and recapitalize its shares to Mergeco by means of the city incorporating a new wholly owned subsidiary (Mississauga Holdco).
2 Mississauga Holdco would acquire all the Hydro Mississauga shares held by the city for consideration of 40 common shares in Mississauga Holdco.
3 Mississauga Holdco and Hydro Mississauga Corporation (HMC) were to amalgamate into Mississauga Wiresco, at which time shares in Hydro Mississauga were to be cancelled.
4 Once Mississauga Wiresco became a subsidiary of Mergeco, OMERS / Borealis would contribute to Mergeco a contribution to capital equal to 10 per cent of the sum of the regulated base equity in Hydro Mississauga.
5 Within 30 business days of closing, Mergeco was to repay the promissory note referred to above out of funds raised in the long-term public debt markets, or by drawing on the senior secured bridge debt facility OMERS / Borealis agreed to provide.
6 OMERS / Borealis was to enter into a put agreement with the city where the city might put its shares in Mergeco to OMERS / Borealis at any time from July 1, 2004, to December 31, 2004, at a price of two dollars per Class A share and one dollar per Class B share (in the aggregate, the value of the put option was $360 million).
7 The city, OMERS / Borealis, and Mergeco were to enter into a shareholders' agreement.

This offer was to provide the city with approximately $725 million in financial benefits.

Mr. Lever told the Inquiry he believed Mr. Toll was very convincing in his

discussions with Mr. Nobrega regarding the put.[45] Mr. Nobrega testified that Borealis changed its mind and agreed to offer a put as part of the "poker game" of the negotiations with the city. He regarded the city as "sophisticated" and a "formidable foe" during the negotiations. He also speculated that, by virtue of having presented the cheque for $430 million, OMERS / Borealis sent the message that it had the wherewithal and could therefore offer a put. In addition, Mississauga was playing the different bids against each other, and OMERS / Borealis wanted to remain in the running.[46]

The proposal considered by council on March 29, 2000, therefore included the option to enter into a put agreement.[47]

Corporate Governance

Mr. Toll also requested further information from Borealis about certain governance issues for the new corporation, even though the decision of whether to accept governance suggestions was up to the city, and not TD Securities. Mr. Toll noted that he does not usually get involved in governance questions, since most of the transactions he handles involve a complete change of ownership.[48]

On March 7, 2000, Gerard McGrath, the chief financial officer and secretary of Borealis, responded to Mr. Toll's request for additional information about some of the governance issues.[49] Mr. McGrath explained that the board of directors would initially consist of six representatives from the City of Mississauga and two representatives from OMERS / Borealis. A quorum of the board would consist of seven members, two of whom were required to be OMERS / Borealis representatives. All major operating decisions would require the approval of more than 75 per cent of the board members present at a duly constituted meeting. These included, among other things, major capital investments, dividend payments, and debt issuances.[50]

By requiring five city representatives and two OMERS / Borealis representatives to satisfy quorum, neither the City of Mississauga nor OMERS / Borealis could make a major decision on its own without the consent of the other.* Both the city and OMERS / Borealis would have a veto.[51]

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* If all eight directors attended a meeting, "more than 75 per cent" would require the vote of at least seven members. If only seven directors were in attendance, the "more than 75 per cent" rule would require the vote of at least six directors – and because a quorum required both OMERS representatives to be present, at least one OMERS representative would be voting in favour of the decision. If, however, the board were expanded to its maximum of twelve directors, OMERS' power would depend on how many directors attended each meeting. Under all configurations, the city would have had a veto over all major operating decisions.

Going forward, if and when other 905 MEUs joined the corporation, any other 905 municipality holding at least 10 per cent of the Class A shares would be entitled to appoint one representative to the board for each 10 per cent interest it held. The number of directors would be increased to accommodate those representatives, but in no event could the total number of directors exceed twelve. Mr. McGrath explained that all major operating decisions would continue to require the approval of more than 75 per cent of the board and a quorum would remain at seven members, two of whom had to be OMERS / Borealis representatives.[52]

Once other 905 utilities joined the strategic alliance (by contributing at least 10 per cent to the value of the company, giving them seats on the board), the city would have a veto, but OMERS / Borealis would not. Mr. Lever explained that, by then, the deal would no longer be a bilateral arrangement, and the existence of a third party at the table would help ensure that only appropriate risks were being taken.[53]

Mr. Nobrega told the Inquiry that, at the time of the March 7 letter from Mr. McGrath, Borealis still envisaged the deal as multilateral.[54] He expected there would be no more than one day before the initial bilateral board became multilateral. At the time, Borealis did not consider even the possibility that no other MEU would join the strategic alliance.[55]

Thus, in its formal proposal considered by city council on March 29, OMERS / Borealis confirmed that the board would initially consist of eight directors, six of whom would be nominated by the city and two by OMERS / Borealis. As other 905 MEUs joined the corporation, the board would be expanded to a maximum of twelve directors.[56] That number was consistent with the correspondence previously noted.[57]

However, the OMERS / Borealis proposal also stated that "all material decisions of Mergeco will require the approval of 75 per cent of the board which will effectively provide the city with a veto over Mergeco's major decisions."[58] In other words, the requirement that there be two OMERS / Borealis members in a quorum was dropped. Accordingly, the city would have a veto, but OMERS / Borealis would not. Mr. Toll did not have an explanation as to why this term was changed from the letter of March 7, 2000.[59] Mr. Nobrega testified the change did not worry him, since he did not expect the board to have eight people for long, as it was always intended to be a multilateral deal with twelve

directors.[60] As a multilateral deal, Mississauga councillors could not force a change on their own.

Post–March 29, 2000, Negotiations and Authority to Instruct Solicitors

On March 29, 2000, city council instructed negotiations to proceed to finalize a strategic alliance agreement with Borealis in accordance with its proposal.[61]

I find the chain of command in the negotiations that followed, and in the process of closing the deal, to be somewhat unclear. Once the city decided to enter into an agreement with Borealis, City Manager David O'Brien was to be the "point person" who would provide instructions to develop the strategic alliance agreement that would be the foundation for the new corporation.[62] Mr. O'Brien testified that the discussions to bring the deal to fruition were basically between him and Mr. Nobrega.[63] In effect, Mr. O'Brien was both the city manager and the project manager for the development of the strategic alliance agreement.

Mr. Toll explained that, once the financial terms of an agreement have been structured, the lawyers then deal with "papering" the transaction. Mr. Toll would become involved only if a financial matter arose requiring his guidance.[64] Mr. Houston acted for the city in the negotiation of the strategic alliance agreement. He negotiated principally with Borealis's solicitors, McCarthy Tétrault, as to the form of agreements. Neither he nor anyone else from his firm ever attended a meeting with Borealis's CEO, Mr. Nobrega, to directly negotiate the terms of the agreement.*

Mr. Houston testified that for high-level matters he received instructions from Mr. O'Brien. Instructions on other matters would come from other individuals within the city. Mr. Houston did not report directly to the mayor, but met with her and Mr. O'Brien on some occasions regarding "big picture" issues.[65]

Throughout the process, Mr. O'Brien explained, he kept the mayor and council apprised of developments in two ways. First, there would be formal in camera meetings. Second, there would be "briefing sessions," which Mr. O'Brien described as "gatherings of Council to just talk about issues as they move[d] forward." Mr. O'Brien stated that these briefing sessions were very common in the municipal world at the time, although they are less common now. Often these meetings would take place "at the edges of a council meeting";

* It was McCarthy Tétrault that was drafting the various versions of the agreement between OMERS / Borealis and the city, based on the negotiations. Testimony of W. Houston, Transcript, May 26, 2010, pp. 228–29.

that is, Mr. O'Brien would brief the councillors before or after a formal council meeting. If and when it was necessary to advise council on an urgent matter, Mr. O'Brien would ask his assistant or the city clerk to arrange for the councillors to attend at a convenient time, often 9:00 a.m. or 4:00 p.m.[66]

Strategic Alliance Agreement

On April 12, 2000, city council instructed the mayor and clerk to execute the strategic alliance agreement on behalf of the city and to execute a shareholder resolution directing Hydro Mississauga to sign the strategic alliance agreement.[67] The strategic alliance agreement set out the parameters of the new corporation and the principal agreement. Further details were still to be negotiated. McCarthy Tétrault had prepared the agreement on behalf of OMERS / Borealis.

Mr. Lever explained that the strategic alliance agreement was made up of three principal elements. First, the City of Mississauga and Borealis would work together to facilitate the consolidation of municipal electric utilities. Second, they would recapitalize and reorganize Hydro Mississauga to create indebtedness between Hydro Mississauga and the city so that the city could take some of its equity out of the company. Third, Borealis would make a number of financial commitments: (1) a $1.25 billion senior loan facility so that, as municipalities joined the alliance, they would have their utilities refinanced and OMERS would stand behind that financing; (2) a $750 million equity acquisition facility, with respect to the put; and (3) a $200 million equity contribution facility directed to the consolidated municipal electric utility.[68]

With respect to the governance of the new corporation, the shareholders' agreement attached to the strategic alliance agreement provided that a quorum required 75 per cent of the total directors, provided at least two of those present were appointees of Borealis. Major decisions required the approval of at least 75 per cent of the directors at a properly constituted meeting.[69]

April Press Release

At some point in the month of April 2000, the city issued a press release setting out the key features of the deal. With respect to control, the press release stated: "Major corporate decisions will require a vote by at least 75 per cent of the members, providing Mississauga with a veto and control over the company's decisionmaking."[70] This press release was sent to Mississauga residents to keep them updated about Hydro Mississauga developments.

Strategic Alliance Amending Agreement

After the execution of the strategic alliance agreement, negotiations continued in an effort to finalize the details of the agreement. In addition, Borealis held meetings with other 905 utilities to discuss a merged 905 utility. Mr. O'Brien had sole authority from the city to negotiate the deal with OMERS / Borealis, and he continued to be assisted by Fraser Milner. Fraser Milner provided legal and structural advice, but not business advice.[71]

On October 31, 2000, the city and OMERS / Borealis entered into a strategic alliance amending agreement, which set out the parties' agreement about a number of issues negotiated over the preceding months. The closing date was extended to December 6, 2000, "or such earlier or later date as may be agreed upon by the parties."[72] The strategic alliance agreement had to be closed, however, by December 31, 2000. This date was set both because the relevant parties operated on a December 31 year end, and because the deal had to be completed by that date to avoid transfer tax.[73]

In light of the anticipated difficulty of obtaining signatures from eight directors at closing,[74] the following amendment was made with respect to the structure of the board:

> The Articles of the Corporation shall provide for the Board to have a minimum of three (3) directors and a maximum of twelve (12) directors. Initially the Board shall consist of three (3) directors. The City of Mississauga shall be entitled to nominate two (2) persons and Borealis shall be entitled to nominate one (1) person. The first Board shall be as follows: (i) Hazel McCallion and David O'Brien as nominees of the City of Mississauga; and (ii) Michael Nobrega, as nominee of Borealis.[75]

Under the amending agreement, at a time to be determined by the city, the board of directors, while initially consisting of three directors, would be increased to eight people, six of whom would be nominated by the city and two by OMERS / Borealis. As noted, the board would be *further* increased when another 905 municipality joined to become a wholly owned subsidiary of the corporation. That 905 municipality would then be entitled to nominate one person for each $125 million of regulated rate base, and the number of such nominees would be limited to four directors from all such 905 MEUs.[76]

A further amendment to the agreement modified the definition of quorum and, in doing so, gave more control to OMERS / Borealis. Article 2.13(iv) of the amending agreement stipulated:

> Prior to such time as the City of Mississauga has determined … that the Board of Directors be increased to (8) persons, a quorum for a meeting of the Board shall consist of two directors, provided at least one director must be a nominee of the City of Mississauga and the other a nominee of Borealis. Thereafter, a quorum for a meeting of the Board shall consist of such number of directors as is 75% of the total number of directors … provided at least two (2) of which must be appointees of Borealis.[77]

Consequently, although the amendment modified the definition of quorum, the requirement that at least 75 per cent of those present approve a major decision did not change. The result was when the board consisted of three directors, Borealis held a veto over all major decisions.[78] When the board expanded to eight directors or more, the city retained a veto, but Borealis did not.

In his evidence, Mr. Houston testified that the overriding strategic objective – in reviewing the drafts and the standing instruction given to Fraser Milner – was to ensure the city had a veto over all major decisions. However, Mr. Houston did not think city councillors ever turned their minds to the question of whether Borealis would have a veto as well.[79]

Further Change to Energy Structure

During the course of the negotiations, significant developments took place in the energy sector in Ontario. On June 7, 2000, the minister of energy, science and technology issued a directive to the Ontario Energy Board, which was responsible for setting rates. Under the *Ontario Energy Board Act* the Energy Board is to set "just and reasonable rates," and the minister's directive advised that the first thing to be considered in determining just and reasonable rates was the *price* effect on the consumer. Mr. Lever explained that this directive was in response to rate applications submitted by municipalities in the spring of 2000, all requesting increases. This development was clearly of concern to the government.[80]

A subsequent and important development occurred on June 20, 2000, when the government introduced Bill 100 in the legislature. Bill 100 had two

principal features: first, if a municipality withheld some assets rather than transferring them all into the OBCA corporation, the municipality could not apply for the rate increase that might otherwise have been available.[81]

Second, and most importantly, Bill 100 stated that, in setting distribution rates, the municipality could not pass on costs arising out of interest payments or dividend payments on the capital structure, through to the ratepayer. Because a fundamental aspect of the strategic alliance agreement had been a recapitalization of Hydro Mississauga, this restriction significantly undermined the vision of the strategic alliance between Borealis and the city.[82] Mississauga would not be able to pass any transitional costs on to consumers.

The introduction of Bill 100 had a chilling effect throughout the industry. No longer was it attractive for the other 905 municipalities to join the strategic alliance. Mayor McCallion told the Inquiry that, as a result of Bill 100, the city was also worried the strategic alliance with Borealis would not close.[83]

Ultimately, Bill 100 languished in the legislature and eventually disappeared, but the changes introduced through the minister's directive were sufficient to have the impact the government sought. In particular, the OEB had to put primacy on consumers' costs, and the restrictions on rate increases over time significantly reduced the earning potential under the strategic alliance.

Final Negotiations

The transaction was scheduled to close on December 6, 2000. As is common before a large transaction closes, significant activity took place in the final days. Unfortunately, during these final stages, there was no city solicitor in Mississauga to provide direction. The city solicitor had left her position in November 2000, and a replacement had not yet been appointed. As a result, no lawyer at the city had overall responsibility for this matter.[84]

David O'Brien Appointed President of Enersource

On November 27, 2000, Mr. O'Brien was appointed president of Enersource. Angus MacDonald took over as acting city manager, but Mr. O'Brien continued to provide instructions to Mr. Houston with respect to the closing of the transaction. Mr. O'Brien also continued to be involved with other issues, among them the 905 amalgamation and the creation of the Greater Toronto Services Board.[85]

Neither Mr. O'Brien nor Mr. Houston believed Mr. O'Brien's new role should preclude him from giving instructions about the closing of the strategic alliance. In this regard, Mr. Houston testified that "it would have been very, very difficult to get anybody else up to speed in the last week before closing" and "it would have been unfair to such a person to impose an obligation to give instructions with respect to closing of this transaction without them having lived the transaction for the previous year." Mr. Houston also believed there was no legal impediment to receiving instructions from Mr. O'Brien because, at the time Mr. O'Brien was providing instructions, Enersource was still a 100 per cent–owned subsidiary of the city.[86]

Council Approval, November 29, 2000

The last city council meeting before the Enersource transaction closed was held on November 29, 2000. At this meeting, Mr. Houston reviewed drafts of the agreements with city council. He told the Inquiry that his review was fairly substantial, and he recalled having "a huge pile of documents in front of me." Mr. Houston did not, however, recall any discussion about the shareholder approval provision at this meeting. He did not think there would have been any reason for such a discussion because, at that point, there had not been any change made to the provision.[87]

Mr. Houston also testified that members of council should have been aware that further changes were to be made to the agreements since, as he stated, "they had no basis to assume that the documents were all execution-ready."[88] In particular, there were a number of unsatisfied conditions precedent as of November 29, 2000.[89] The mayor, however, testified that she understood the agreements before council on November 29 were the final versions, and if there were to be changes they would come back to council.[90]

At the November 29, 2000, meeting, city council passed By-law 0600-2000, which authorized the mayor and clerk to execute all documents necessary to effect the closing of the strategic alliance agreement. This by-law did not give the mayor any specific authority or management responsibility to negotiate the transaction, but simply authorized her to affix the city's seal to close the transaction.[91]

Mr. Houston told the Inquiry the wording of the November 29 closing by-law was broad enough to include non-fundamental changes that might be made after November 29 and that might be necessary to close the transaction

in accordance with the overriding direction from city council.[92] It would have been fully apparent to city council that the closing documents had not been finalized and that additional changes might be made before closing. In his view, it would have been absurd to give the closing by-law a narrow interpretation such that the mayor could only sign the documents if they remained identical to those presented to council on November 29.[93]

Mr. Houston agreed, during cross-examination, that it is usual for boards of directors to approve a transaction in principle and then delegate the details of changes to management to settle in the final days of a transaction.[94]

Instructions from OMERS, December 3, 2000

David Lever testified that, on December 2, 2000, he and Mr. Nobrega agreed they would take some time to review carefully each draft agreement, and they set aside time on December 3 to share their thoughts. Mr. Lever made handwritten notes on the shareholders' agreement which reflected his thoughts, and he added to those notes when he and Mr. Nobrega spoke on December 3. As a result of their review, Mr. Lever recorded three changes to the shareholders' agreement.[95]

First, to achieve a quorum, rather than both Borealis nominees being present, only one Borealis nominee would be required.[96] His notes in the margin suggest he and Mr. Nobrega agreed in this.[97]

The second change involved article 2.12, which was changed to reduce the chair's annual remuneration from $50,000 to $20,000.[98] Mr. Lever's note suggests that Mr. Nobrega believed $50,000 was too high, since the chair would no longer have to manage the integration of different municipalities.[99] Mr. Lever's note also confirms that Mr. Nobrega said he would speak to Mr. O'Brien about this point. Mr. O'Brien had no recollection of speaking with Mr. Nobrega about this issue.[100]

The third and most important change related to the approval for major changes – that is, the veto. Mr. Lever's notes state that the 75 per cent approval must include one of the Borealis directors.[101] Mr. Lever explained that the less onerous requirement of "at least 75 per cent" approval allowed the city to make major decisions on its own without Borealis's approval. As no other municipalities would be joining the corporation, and since OMERS had significant exposure pursuant to the put agreement, both Mr. Lever and Mr. Nobrega felt OMERS bore all the risk of owning Hydro Mississauga. The amount OMERS would be

required to pay if the put were exercised would far exceed the value of the business at the time in light of the minister's directive.[102] As a result, OMERS wanted the protection of the veto to prevent harmful decisions from being made.

According to Michael Nobrega, the requirement for the approval of at least one Borealis director resulted from what he had learned about municipal politics over the course of the negotiations. Since it was not clear where the transaction might go, and whether the deal would ever become multilateral, Mr. Nobrega felt Borealis needed some say in the major decisions of the merged corporation. Under the circumstances, he did not think it was "a big ask." Mr. Nobrega told the Inquiry that, although the idea of a Borealis veto over major changes had existed as of March 7, 2000, and had subsequently been removed, there was no tactical plan to bring the requirement back a few days before the closing. Instead, he said it was "a genuine attempt by OMERS" to protect its members.[103]

Mr. Nobrega had a specific recollection of his December 3 conversation with Mr. O'Brien. Mr. Nobrega said he told Mr. O'Brien he had discussed the changes with his superiors and that they were important changes. This conversation lasted about half an hour. Mr. Nobrega explained the changes to Mr. O'Brien very carefully. Mr. Nobrega had no opinion about whether city council was involved. In his view, it was up to Mr. O'Brien to "manage his stakeholders."[104]

Mr. Nobrega said Mr. O'Brien told him to have Mr. Lever put the changes into the agreement and have it sent over to Fraser Milner. Mr. O'Brien said he would handle it from there.[105] A copy of the shareholders' agreement that reflects these changes is attached to this Report as Appendix G. Mr. O'Brien, in his evidence, recalled that Mr. Nobrega discussed this change with him, although he could not recall if the discussion was in person or over the phone. Mr. O'Brien did not recall the precise sequence of events, but he believed he would have discussed the changes with Mr. Nobrega and then have told Mr. Houston the proposal had been received from OMERS and asked if Mr. Houston saw anything wrong from a legal perspective.[106]

Mr. Lever told the Inquiry that he believes Mr. Nobrega and Mr. O'Brien spoke about these changes on the evening of December 3. He said Mr. Nobrega called him back later in the evening of December 3 and instructed him to make the three changes set out in the agreement and to provide a blacklined copy of the agreement to Fraser Milner.[107] Mr. Nobrega had the same recollection of this phone call.[108]

Mr. Lever said that, after speaking with Mr. Nobrega that evening, he brought the marked-up version of the agreement to Iain Morton of McCarthy Tétrault, walked through the changes with him, and asked him to circulate a revised and blacklined draft to the other lawyers at McCarthy Tétrault involved and to Borealis and Fraser Milner.[109]

Mr. Lever did not recall thinking about the Borealis veto as a "deal breaker," although he conceded it was an important change OMERS required to protect its interests. Mr. Lever testified that, because Mr. Nobrega and Mr. O'Brien were able to reach agreement on these points, no one had to use the term "deal breaker."[110]

Communication Changes, December 4, 2000

On the morning of December 4, 2000, Iain Morton of McCarthy Tétrault sent an email to John Rhude at Fraser Milner which noted the changed composition of the board to three members and the reduced annual remuneration for the chair to $20,000.[111]

Later that day, Mr. Morton sent a letter to Mr. Houston, Jill Leonard, and John Rhude at Fraser Milner.[112] The letter attached blacklined copies of the put agreement, the financing agreement, and the shareholders' agreement, all of which were schedules to the strategic alliance agreement. The changes reflected in the blacklining to the shareholders' agreement were those made by Mr. Lever on December 3.*

Mr. Houston also recalled discussing the changes with Mr. Lever before he received the letter. He said Mr. Lever told him Mr. Nobrega and Mr. O'Brien had negotiated some changes, which were reflected in the blacklining. Although Mr. Houston did not recall the exact words of his discussion with Mr. Lever, he said he believed Mr. Lever had told him about the substantive changes he could expect to find in the blacklined agreement.[113] Mr. Lever recalled substantially the same conversation.[114]

On receiving the blacklined copies, Mr. Houston said he spoke with Mr. O'Brien, who confirmed he had reached an agreement with Mr. Nobrega about the changes contained in the shareholders' agreement. Mr. Houston told

* Blacklining is a common commercial practice whereby lawyers highlight proposed changes to an agreement. Mr. Houston candidly confirmed that he would not have expected the cover letter to detail the changes because he would be expected to review the documents and highlighted changes. Testimony of W. Houston, Transcript, May 26, 2010, pp. 212–13.

the Inquiry he did not believe there was any bad faith on the part of Borealis in raising this point (the requirement of the approval of at least one Borealis director for major changes) at such a late stage.[115]

Also on December 4, 2000, city council held its inaugural meeting for the new council. The new councillors were sworn in, but no business was conducted. This was principally a ceremonial, formal evening for the family and friends of the new council members.[116]

Reasons for the Borealis Veto and Its Importance to OMERS

Both Mr. Houston and Mr. O'Brien told the Inquiry there were sound business reasons for the Borealis veto. First, given the value of the put and the ease with which the city could have required Borealis to purchase the remaining shares for $360 million, it was reasonable to ensure that the city could not make decisions without the approval of at least one Borealis director. For example, without the veto the city could sell off Enersource's assets or property before triggering Borealis's put commitment – and Borealis would not be able to prevent the sale. In addition, Borealis was committing to purchase all of Hydro Mississauga's debt, while the city was benefiting substantially from the money Borealis was investing.[117]

Mr. Toll testified that it was unusual for a 10 per cent owner to have effective control over major decisions, but "everything is specific to the circumstances surrounding the particular deal." OMERS was making a significant financial contribution to the new company, and the put constituted a significant economic risk. Mr. Toll testified that, in his professional opinion, when a company takes on the type of risk that OMERS did, it is not unreasonable to want a fair degree of control.[118]

I accept that the inclusion of the Borealis veto made good sense once it became clear the deal would only involve two parties. All the lawyers who testified, and in particular Mr. Houston and Mr. Lever, provided great assistance to the Inquiry in relation to these complex commercial matters. But even if the veto made commercial sense, I am required to reach a conclusion as to how such a fundamental change came to form part of the deal without being drawn to the attention of council, as it should have been. As I will elaborate, these were hard-nosed and complex commercial negotiations. I find, however, that Mr. O'Brien failed in his obligation to draw the veto to the attention of the mayor and council.

Mr. O'Brien testified that the Borealis veto should have expired when the put expired. In his view, the failure of the veto and the put to expire at the same time was an oversight and indeed, as he was city manager, it was his oversight.[119] According to Mr. Houston, although the put was part of the justification for the veto, OMERS also had liability with respect to the financing agreement and its obligation to arrange for the placement of the bonds.[120]

With respect to the expiry of the veto, Mr. Nobrega told the Inquiry that OMERS fully expected the put to be exercised, and thus he did not think about limiting the veto to the timing of the put.[121] Because he fully expected the city to act on the put, there would have been no post-put time during which corporate governance would be relevant.

Mr. Houston understood the Borealis veto to be "a dealbreaking matter from the Borealis side." He also thought Mr. O'Brien believed the veto was a deal breaker, although he did not think the term was used when they spoke on December 4.[122]

Mr. O'Brien testified that he did not recall Mr. Nobrega ever using the term "deal breaker," although he had the impression from Mr. Nobrega that this matter was urgent and that he was under some pressure from his board to make the change. Regardless of what term was used, Mr. O'Brien was left with the impression that the veto was indeed a deal breaker for Mr. Nobrega and OMERS.[123] Mr. Nobrega confirmed to the Inquiry that, although he would not have used the words "deal breaker," he would not have closed the transaction without the protection of the Borealis veto.[124]

Although Mr. Nobrega believed the veto was essential to the deal, my impression is that he very much wanted to close the transaction. It was a good deal from the OMERS / Borealis perspective. Mr. Nobrega impressed me as a sophisticated businessman who was, and is, assiduous in protecting the interests of his pension plan members. I have no doubt about his skills as a negotiator.

I find that Mr. Nobrega raised the veto late in the negotiations because strategically it was more likely to be accepted by Mississauga at that time, when agreement had been reached on virtually all other points. So that I am not misunderstood, let me emphasize this – I do not believe that proceeding in this way was an unfair move in commercial negotiations between sophisticated parties. As Mr. Nobrega said, both he and Mr. O'Brien were "big boys."[125] Even Mr. Houston said it was not unusual to have important matters raised late in

negotiations. As he said, in an ideal world all changes to an agreement would be debated by a panel of lawyers on each side, "but in the real world that is not how transactions close. The expression 'if it weren't for the last minute a lot of things would never be done,' is [as] true in commercial law as [it is] in life."[126]

Should Council Have Been Advised of the Change?

I find city council should have been advised of the Borealis veto and I accept Mayor McCallion's characterization of the veto as a major change that should have been discussed with the assistance of the solicitors acting for Mississauga at a special meeting called for that purpose.

Mr. Houston and Mr. O'Brien both recognized the Borealis veto as being important to OMERS. At the same time, Mr. Houston testified, Mr. O'Brien felt it was important to get the deal done and did not ask for his advice on the business terms affected by the blacklining. Instead, he asked Mr. Houston to do a normal legal review. Mr. Houston explained that the message he received from Mr. O'Brien was that unless his legal review found something objectionable, the blacklining reflected the deal he had negotiated in order to get the transaction done.[127]

Mr. Houston told the Inquiry there were no discussions with Mr. O'Brien about going back to council to address these changes. Moreover, Mr. Houston had never advised Mr. O'Brien about when to communicate with city council and had no reason to believe Mr. O'Brien was not communicating with the mayor and council. In his view, Mr. O'Brien had always kept council and the mayor well informed.[128]

Mr. Houston further explained that he had never gone directly to city councillors, and to do so without Mr. O'Brien's instructions would have been "a breach of the chain of command." The only time he attended city council meetings was when Mr. O'Brien invited him to answer specific questions. Moreover, and perhaps more importantly, Mr. Houston did not believe a further council meeting was legally necessary to close the transaction. In Mr. Houston's view, the necessary municipal corporate authority was contained within the closing by-law. He told the Inquiry the November 29, 2000, by-law was broadly drafted and the change effected by the Borealis veto did not displace that authority.[129]

As Mr. Houston explained:

> I made the decision to accept Mr. O'Brien's instructions. To have rejected them would have risked disaster and huge economic loss for the City, and perhaps serious legal trouble for myself and the firm as a result of having given advice not to accept what is – what I viewed as the normal give and take in the circumstances of this matter of negotiations just prior to closing.[130]

Although there would not have been sufficient time for city council to pass a resolution regarding the veto, this did not mean city council could not have been informed, Mr. Houston testified. Subject to the exigencies of the situation, the mayor and any councillors who could have been reached easily should have been made aware of the changes.[131]

Mr. O'Brien also testified that the mayor and council should have been made aware of these changes. He was not, however, able to say it was "more likely than not" that he advised any councillors of the change. His practice was to speak with the mayor much more frequently than with the other councillors.[132]

In her evidence, the mayor said she would have trusted Mr. O'Brien to recognize the importance of the Borealis veto and to bring it to council's attention.[133] Similarly, Mary Ellen Bench, the city solicitor, told the Inquiry the changes reflected in the December 4, 2000, blacklined agreement should have come back to council for approval.[134] In her view, these were substantive changes that only council could authorize.

Could Council Have Been Advised of the Change?

Council could have been advised of the change, but it seems that the negotiations had reached a certain momentum. Some thought the December 6 deadline could not be extended.

Although the change giving Borealis a veto was "important," Mr. Houston testified his overriding instructions were to get the deal done. This change was received with one business day left before closing. In his view, there wasn't time for council to consider the new veto provision in a meeting and approve it by resolution. As a result, if he had insisted that a special council meeting be called to discuss the change, it would have jeopardized the closing since there was no possibility of convening a council meeting before the December 6 deadline. The city did not have the right to extend the closing, he said. In addition, the city did not have the ability to compel closing since there were still several

closing conditions and city covenants outstanding. To conclude the transaction, it needed a willing buyer.[135]

I accept that Mr. Houston felt a sense of urgency acting for the city at the time, which was reinforced by the instructions he had received from Mr. O'Brien. At the same time, a number of witnesses cast doubt on this evidence, no doubt with the benefit of hindsight. Ms. Bench told the Inquiry it would have been possible to add the changes to the agenda of the December 6 meeting, the sole purpose of which was to pass the city's interim tax levy by-law. A special meeting of council could also have been scheduled on 48 hours' notice.[136]

In addition, Mr. Lever testified that if, on reading the changes set out in the blacklined agreement sent over on December 4, Mr. Houston had called back and said he needed more time to consult with city council, there would have been no reason why the December 6 deadline could not have been extended.[137] Mr. Lever would have had to discuss that request with Borealis, but he told the Inquiry he did not see why that request would not have been granted.

Similarly, Mr. Nobrega testified that it is common for closing dates to be extended as new matters arose. When he is completing a transaction which "looks out" over 50 or 60 years, Mr. Nobrega said, an extension of a few days or a week would not matter. The goal is to provide flexibility to allow the transaction to be properly structured and completed. From OMERS' perspective, there was no particular reason why the deal had to be closed by December 6.[138] It seems to me that this might be easy for Mr. Nobrega to say at the time of the Inquiry, but I am not convinced he felt the same way leading up to the December 6 closing date.

Was Council Advised of the Borealis Veto?

I find that no member of council, including the mayor, was advised of the Borealis veto. The weight of the evidence precludes any other finding. The mayor testified she was never advised of the veto, and that she was not at any meeting where council was told of this change.[139] Although she may have spoken with Mr. O'Brien about the closing of the deal in general terms during those final days, the mayor said Mr. O'Brien did not advise her of the Borealis veto. Ms. Bench told the Inquiry that the mayor has consistently said she had no knowledge of the veto.[140]

The mayor further testified that, had she been told about the veto, she

would have insisted council be informed of it, since it was a major change. She said she would have asked Mr. Houston to take council through the pros and cons of the amendment. Had the reasons for the veto been explained to council, she said, "I really believe council would have gone for it."[141] I accept from this evidence that the mayor was not advised of the veto insertion. She gave her evidence about what she *would* have done had she been advised with the assurance of many years' experience.

As to Mr. O'Brien, he had no specific recollection of when he spoke with council, although he told the Inquiry it was "very probable" he spoke with the mayor about the changes. He also believed he made council aware of them at some point on December 6.[142]

Mr. Houston provided no evidence to the Inquiry as to whether council was or was not advised of the December 4, 2000, change. Although he had a vague recollection of an in camera meeting just before the December 6, 2000, meeting, Ms. Bench told him that such a meeting did not take place, and Mr. Houston accepted that.[143] Ms. Bench also explained to the Inquiry that a city by-law prohibits council from meeting to transact business or make decisions without following the appropriate procedures for calling meetings.[144]

Councillors George Carlson, Carmen Corbasson, Nando Iannicca, Patricia Mullin, and Maya Prentice swore affidavits in which they stated they did not recall any meeting or briefing on or around December 6, 2000, at which the shareholders' agreement was discussed.[145] Councillor Iannicca, however, stated in his affidavit that he did recall a meeting with Mr. O'Brien and council members, in the caucus room, where the put option and veto clause were discussed. Councillor Iannicca said he was certain this meeting did not occur *before* the shareholders' agreement was signed on December 6, 2000.[146]

Councillor Katie Mahoney recalled a meeting in the caucus room where Mr. O'Brien outlined the veto and explained to the councillors that there was "one addition to the agreement we've agreed to." A short discussion followed Mr. O'Brien's statement. Mr. O'Brien did not refer to any documents and did not give a formal presentation. Councillors asked a few clarification questions, but there were no objections. Councillor Mahoney told the Inquiry that Mr. O'Brien sat in the chair traditionally used by the mayor, which suggests the mayor was not in attendance. Although she believes this meeting was held before the December 6 closing of the deal, Councillor Mahoney could not assist the Inquiry in determining exactly when the meeting was held.[147]

The evidence before me is overwhelming that council was not advised of the Borealis veto before the execution of the agreement. The mayor and Councillors Carlson, Corbasson, Iannicca, Mullin, and Prentice were certain they were never advised. Mr. O'Brien said he believed he informed council, but in answer to my question, could not say that it was "more likely than not" he did so. Councillor Mahoney was alone in her recollection that council was told of the veto in advance of the deal closing. I am grateful to her for her genuine efforts to assist the Inquiry in reconstructing events from nearly 10 years in the past.

Ultimately, Mr. O'Brien and the mayor both recognize that the Borealis veto was an important change which should have been brought to council for approval. Mr. Houston, however, believed he was not obliged to draw the changes to council's attention, and that there was not enough time to do so. Ms. Bench told the Inquiry that an emergency meeting could have been scheduled. Mr. Lever and Mr. Nobrega both testified that they would have allowed an extension of the December 6 closing, if requested.

Execution of Deal, December 6, 2000

Early on December 6, a very short city council meeting was held.[148] The meeting began at 9:08 a.m. and was adjourned at 9:11 a.m. The sole issue discussed, as already noted, was the interim tax levy for 2001. There was no record of any meeting of councillors before or after the tax levy meeting. Neither Mr. O'Brien nor Mr. Houston is listed as being present at the December 6, 2000, meeting. Mr. O'Brien confirmed that, after he was seconded to Enersource, he would not have attended meetings. The closing documents were executed later on December 6, 2000. Mr. Lever believed the closing was scheduled for later in the day in order to give Mr. Houston time to meet with his clients.[149]

The mayor and city clerk signed the agreements closing the Enersource transaction. Under the *Municipal Act*, the mayor has the same authority as other members of council. She cannot bind the city without a proper by-law or resolution of council.[150]

As the mayor explained to the Inquiry, she does not read every clause of every agreement she signs. Given the significant number of complex agreements she is tasked with signing, she relies on qualified staff, including the city manager, outside consultants, the legal department, and outside legal counsel to vet agreements to ensure they accord with council's direction.[151] The mayor

also executed a certificate wherein she stated she was familiar with the provisions of the strategic alliance agreement of April 12, 2000, and the amending agreement of October 31, 2000.[152] This was the only time she could recall having signed such a document.

According to Mr. Houston, in executing the documents on December 6, Mayor McCallion was exercising her authority to sign the documents and was entitled to assume they were in order.[153] He assumed that "whatever communication with the mayor and council was necessary had been done … consistent with all prior experience."[154]

Post–December 6, 2000

A number of agreements were not settled by December 6, and were concluded in the weeks following the closing. Although they were technically preconditions to the closing, the parties agreed to waive those conditions and give extra time to resolve them.[155] These agreements included the pole attachment agreement and the street-lighting agreement.

On December 19, 2000, approximately two weeks after the Enersource deal closed, Mr. Houston briefed the directors of the new corporation, distributing a document entitled "Brief for Directors."[156] In this document, the overview of the shareholders' agreement noted that fundamental changes would require the approval of 75 per cent of the directors at a properly constituted meeting (or the consent in writing of all directors).[157] The document did not mention that the 75 per cent had to include at least one Borealis nominee (the Borealis veto).

The purpose of this document, Mr. Houston stated, was to provide an overview of the details of the various agreements. It was not intended to explain every provision. Mr. Houston acknowledged his summary of the governance structure was incomplete. However, he said the full texts of the agreements were attached, and that the directors included Mr. O'Brien and Mr. Nobrega, both of whom had detailed knowledge of the agreements. There are no notes or records from the December 19, 2000, meeting, and Mr. Houston could not recall if anyone raised an issue about the Borealis veto at that meeting.[158]

I am left with some lingering concerns about the briefing and materials provided to new directors. Both Mr. O'Brien and Mr. Houston were well aware by December 19, 2000, that Borealis enjoyed a veto. One or both of them should have drawn this change to the attention of the board members. Whether Mr.

O'Brien or Mr. Houston intended to keep council or the Enersource board in the dark about the changed provision, I cannot say. It certainly is suspicious.

Mr. Houston believed he would have followed his usual practice of going through the terms of the agreement and the material provisions during his briefing for the directors.[159]

The Enersource deal progressed well in the following months and years. Enersource has developed into a very efficient and productive utility, and the board has operated smoothly.

3 Problem, Investigation, and Proposed Changes

The Penny Drops: Borealis's Veto Discovered by Council

In the spring of 2007, an issue arose with respect to the remuneration of the directors of Enersource. City council did some research into remuneration for boards in other municipalities and raised concerns that the payments for Enersource were too high.[160] At the time, it was the practice of OMERS' representatives to remit their compensation to OMERS.[161] For their part, city councillors kept their payments.[162]

Before the spring of 2007, the Enersource board itself had engaged an outside expert consultant to give an opinion about appropriate and competitive compensation. The board would then have to decide whether to amend or accept the recommendation. If the recommendation was approved by the board, it would then go to the shareholders (the City of Mississauga and OMERS) for approval.[163]

On the basis of the information it obtained through its research, city council passed a resolution to cut the remuneration paid to Enersource directors. Borealis was not consulted before the passage of this resolution.[164] Borealis subsequently advised the city it could not take this step unilaterally, since it required the approval of at least one Borealis board appointee.[165] This, according to the mayor, was the first time that the city learned Borealis's approval was required for major decisions.[166]

In the summer of 2007, City Solicitor Mary Ellen Bench contacted Jeffrey Singer, a lawyer at Stikeman Elliott LLP, who was acting as outside counsel to the City of Mississauga. Ms. Bench advised Mr. Singer that the city and Borealis were unable to reach an agreement on director remuneration, and

asked what the shareholders' agreement provided as a process to resolve this sort of dispute.[167] By then, Ms. Bench believed OMERS and the city had reached an impasse.[168]

Mr. Singer and his team reviewed the shareholders' agreement and advised Ms. Bench that, pursuant to the agreement, compensation must be approved by the board, either unanimously in writing or at a properly constituted meeting where at least 75 per cent of the board, including at least one of the Borealis nominees, voted in favour of the proposition. In addition, at least 50.1 per cent of the shareholders would have to approve the compensation. Mr. Singer also explained there was no protocol for dealing with a stalemate – for example, an arbitration clause or other dispute resolution mechanism.[169]

Janice Baker, the city manager, told Mr. Singer she had always believed, and advised council, that the members of council had the final say in board compensation.[170] Mr. Singer's information alerted the city that this was not the case. As a result, Ms. Bench contacted Mr. Houston to ask for assistance in understanding how the provision, which gave Borealis a veto over major issues including board compensation, came to be. In particular, she wanted to know how the shareholders' agreement had been changed between the one presented to council in April 2000 and the one ultimately signed on December 6, 2000.[171]

City Council's Investigation

Contact with Mr. Houston

On October 3, 2007, Ms. Bench sent an email to Mr. Houston outlining the question that had arisen. She left him a voicemail message as well.[172] Mr. Houston received Ms. Bench's phone message on October 4 and returned the call immediately, before reading her October 3, 2007, email.[173]

Close to seven years had passed between the conclusion of the Enersource transaction and Ms. Bench's telephone conversation with Mr. Houston. By that time, Mr. Houston was no longer practising at Fraser Milner. Perhaps unwisely, he attempted to answer Ms. Bench's questions about the origins of the Borealis veto as soon as they spoke and without the benefit of his files from Fraser Milner. I have no doubt he was eager to assist Ms. Bench, just as his candid and expert testimony has been of great assistance to the Inquiry. Regrettably, Mr. Houston's haste in his dealings with Ms. Bench led the city solicitor down something of a rabbit hole.

At the time of their October 4, 2007, conversation, Mr. Houston believed

Ms. Bench was talking about an amendment made to the shareholders' agreement *after* it was executed. Such a change would indeed have been extraordinary. Mr. Houston did not appreciate that Ms. Bench was talking about a drafting change contained in the final agreement as executed on December 6, 2000. Accordingly, Mr. Houston advised Ms. Bench it would be a question of law as to whether the subsequent amendment would be effective.[174]

Similarly, believing that Ms. Bench was talking about a subsequent agreement, Mr. Houston told Ms. Bench he did not "even know if he saw" the Borealis veto clause as it could have "possibly [been] a last minute deal between David [O'Brien] and Michael [Nobrega]."[175] Mr. Houston told Ms. Bench that "if he had seen this he would have objected" because this "minor amendment tends to savage the entire agreement."[176]

Mr. Houston told the Inquiry that, in retrospect, it would have been better to ask for time to collect his files from Fraser Milner and to review the documents before responding so quickly to Ms. Bench's questions. However, he understood from Ms. Bench that she had reviewed her own files and needed a response on an urgent basis.[177]

On October 12, 2007, Mr. Houston sent Ms. Bench a follow-up email.[178] He advised her he had looked in Fraser Milner's record book and could not find a shareholders' agreement amendment. Mr. Houston asked Ms. Bench to provide him with a copy of the amendment so he could respond more fully to her questions. At this time, Mr. Houston was still under the impression that Ms. Bench was asking about a separate agreement, executed after December 6, 2000.

Ms. Bench asked Mr. Houston to attend the next city council meeting in order to provide background information and answer questions regarding the veto.[179] Mr. Houston agreed to do so. Before the meeting, Mr. Houston obtained a copy of the shareholders' agreement from Ms. Bench and sent clarification with respect to his earlier misunderstanding. In an email to Ms. Bench dated October 17, 2007, Mr. Houston explained that he *now* understood council was concerned about the content of section 2.15 (the provision which added the Borealis veto) as it was included in the signed shareholders' agreement, and not any subsequent agreement.[180] Mr. Houston acknowledged that he still did not have access to all the relevant files, but suggested where further information could be obtained.

Mr. Houston also provided Ms. Bench with context for the Borealis veto.

He emphasized that, because OMERS had given the city a put, it was important that the assets it was committing to buy did not deteriorate in value before the put expired. Thus, although a veto in favour of a 10 per cent minority shareholder might have been unusual at first impression, Borealis had exposure well beyond that of a typical minority shareholder. In other words, Mr. Houston agreed OMERS' risk was higher than that of a regular 10 per cent owner because there was a contingent risk of owning the entire business if the city chose to exercise the put, as well as actual risk as a lender and financier of the business.[181] For that reason, Mr. Houston regarded the veto provision as reasonable.

Mr. Houston also noted that the OEB's directive had significantly reduced the potential rate of return available to Enersource, thereby devaluing Enersource's main asset. Mr. Houston pointed out that Borealis did not attempt to use this development against the city or to renegotiate the terms of the put, or indeed to withdraw from the transaction.

Ms. Bench responded to Mr. Houston's email of October 17, 2007, and expressed gratitude for his assistance. She confirmed that Mr. Houston could contact anyone involved in the matter to reacquaint himself with the issues, and also invited him to review the city files before attending the October 24, 2007, meeting.[182]

Contact with Mr. Lever

At approximately the same time as she initially contacted Mr. Houston, Ms. Bench also sent an email to David Lever requesting information. Unfortunately, the email was addressed to dlever@mccarthy.com and should have been sent to dlever@mccarthy.ca.[183] In any event, Mr. Lever did not receive it. On October 22, 2007, Mr. Nobrega advised Mr. Lever that Ms. Bench had been trying to get in touch with him and they spoke soon thereafter.[184]

On the basis of their conversation, Mr. Lever understood an issue had arisen regarding section 2.15 and that Ms. Bench was interested in knowing how the Borealis veto had been inserted. Mr. Lever reviewed the McCarthy Tétrault files in relation to this matter, and in doing so found a copy of the December 4, 2000, cover letter enclosing a blacklined copy of the shareholders' agreement.[185] It was included in a number of separate McCarthy Tétrault files because various lawyers had received copies of the blacklined agreement.[186]

Council Meeting, October 24, 2007

On October 24, 2007, before Mr. Lever found the December 4, 2000, letter, Mr. Houston attended an in camera session of Mississauga City Council regarding the Enersource shareholders' agreement. Mr. Houston attended on his own behalf, and not on behalf of Fraser Milner.[187] Minutes of that meeting were not kept, but Ms. Bench took detailed notes,[188] as did Aaron Platt, who was assisting outside counsel, Jeffrey Singer.[189] At this meeting, Mr. Houston clarified his earlier misunderstanding; the Borealis veto was not an amendment to the shareholders' agreement but rather had been included in the agreement before closing.

Mr. Houston hypothesized that the change arose in the last two weeks before the closing, at a time when hundreds of changes were being made to the seven or eight agreements under active negotiation. Mr. Houston told council he believed the change would have been reflected in one of the documents presented to council on November 29, 2000. Mr. Houston also pointed out that the April 17, 2001, prospectus listed the Borealis veto in the shareholders' agreement "as an important part of protection to bond buyers."[190] Mr. Houston explained to city council his understanding that without the Borealis veto, bonds would have been harder to sell or would have demanded a higher rate owing to the risk of political interference.

At this meeting, Mr. Houston told city council the change was not significant since the city still benefited as the 90 per cent owner and had received the money as part of this transaction. Accordingly, the city and Enersource were not adverse parties.[191] Finally, Mr. Houston explained that it was important to close the transaction by the end of December 2000, since the exemption for transfer taxes for municipal electric utilities expired on December 31.[192]

During this council meeting, the mayor expressed concern that, although Mr. Houston outlined why the Borealis veto was justified, he was not able to explain how it came to be inserted into the shareholders' agreement. Thus, although there was consensus that there had been a valid reason for including it, council was not satisfied it had received an answer as to how it became part of the agreement.[193]

At the conclusion of the meeting, council asked its outside lawyer, Jeffrey Singer, to conduct a further investigation into how the veto became part of the shareholders' agreement.[194] This made sense, since by then Mr. Singer was dealing with a number of Enersource issues for Mississauga.

The Jeffrey Singer Investigation

Later on October 24, 2007, Mr. Singer contacted Mr. Lever and explained that the city had retained him to investigate the Borealis veto.[195] That evening, Mr. Lever found the December 4, 2000, letter enclosing the blacklined shareholders' agreement, and confirmed with Mr. Nobrega that he could send the letter to Mr. Singer.[196] On October 25, 2007, Mr. Lever called Mr. Singer and told him about the December 4 letter and sent him a copy. Mr. Lever also sent an email to Ms. Bench, letting her know he had found the documents and that he had provided them to Mr. Singer. Mr. Singer then forwarded the December 4 letter to Ms. Bench and summarized the information he had learned from Mr. Lever.[197]

Mr. Singer reported his findings to Ms. Bench in a November 13, 2007, memorandum. The veto, he explained, had been proposed during the course of negotiations, and Mr. Lever was instructed to add the changes by Mr. Nobrega, who advised that the addition had been "cleared" with Mr. O'Brien. The letter had then been sent with the blacklined agreement by McCarthy Tétrault, counsel to Borealis, to Fraser Milner, counsel to the city.[198] Mr. Singer confirmed with Chris Pennington of Fraser Milner that Fraser Milner had indeed received the December 4 letter attaching the agreement.[199]

Mr. Singer concluded and so advised Ms. Bench that "it would appear that there was no impropriety as to process in connection with the matter."[200] Mr. Singer did not express any opinion about what steps should then have been taken to advise council of the changes to the shareholders' agreement. During his testimony before the Inquiry, however, Mr. Singer said the changes reflected in the blacklined agreement were the type counsel should have discussed with the client.[201]

I agree with Mr. Singer's conclusion.

Correspondence in December 2008

There was little further discussion about the veto after Mr. Singer submitted his findings. However, Ms. Bench and Mr. Houston exchanged correspondence about this subject again in December 2008. By email dated December 22, 2008, Mr. Houston told Ms. Bench he believed he had attended an in camera meeting of council with Mr. O'Brien on December 5, 2000, and that he had all draft closing documents with him at the time. These documents would have included

the final version of the shareholders' agreement with the Borealis veto. He did not recollect that provision being controversial.[202]

In response to Mr. Houston, Ms. Bench clarified that there was no council meeting on December 5, 2000.[203] Although his memory about the date was not precise, Mr. Houston said he "definitely remember[ed] attending an in camera meeting, not in the main council chambers."[204] I believe that Mr. Houston, like other witnesses, was doing his best to recall past events. However, in spite of the seriously conflicting evidence, I reiterate my earlier finding. The evidence before me is not persuasive that such a meeting occurred.

Proposed Changes to the Shareholders' Agreement

On December 10, 2008, city council resolved to purchase OMERS' interest in Enersource.[205] In fact, the city did not have any right to purchase OMERS' shares at its demand.

At the time the resolution was passed, the put was still operative, since it had been extended from December 31, 2004, to December 31, 2005, and subsequently to December 31, 2008.[206] After the put expired at the end of 2008, Mr. Nobrega wrote to the city outlining Borealis's position with respect to the city's desire to purchase its share in Enersource.[207] Mr. Nobrega confirmed that OMERS was under no contractual obligation to sell its equity interest. He did state, however, that, since OMERS' obligations under the financing agreement – including the put – had now expired, OMERS was open to discussing revisions to the shareholders' agreement with the city.[208] In particular, OMERS was willing to drop the Borealis veto.

City council organized a public meeting to discuss Enersource. At that meeting, there was a strong public preference for keeping Borealis as a 10 per cent shareholder of Enersource.[209] On learning this information, on January 28, 2009, the city created a committee to negotiate amendments to the shareholders' agreement.[210] The committee retained Mr. Singer to negotiate changes on behalf of the city with Mr. Lever.

At the same time, Mr. O'Brien was asked to reconstruct from memory the sequence of events regarding the origin of the Borealis veto. In a January 2009 email, Mr. O'Brien advised Carol Horvat, executive assistant to Mayor McCallion, that he was "certain that there would have been an 'in camera' meeting on [November 29, 2000] where the final details of all agreements would have been discussed, including the changes to the original draft agreements."[211]

Mr. O'Brien recognized that the actual changes to the shareholders' agreement were made after November 29, but he believed that council was briefed on those changes at the November 29 meeting.

During his testimony at the Inquiry, however, Mr. O'Brien clarified that the changes to the shareholders' agreement were raised only in *December*; thus, they could not have been discussed at the November 29 meeting. Mr. O'Brien also told the Inquiry there was likely an in camera informal meeting of council on December 6, when council was meeting to pass the tax levy by-law. Mr. O'Brien could not recall the meeting, but stated "my standard practice, my normal way of doing business with city council was to keep them fully apprised. And I have every confidence I would have briefed them on this."[212]

In his January 2009 email, Mr. O'Brien also stated it was the job of the legal department and outside counsel to ensure that what was being signed was consistent with what council had approved.[213] In his testimony, however, Mr. O'Brien stated he had drafted the email in haste. He testified that it was his responsibility as "the person in charge on behalf of the city" to ensure that the agreements were consistent with what council had approved. As the senior public servant for the city, he was the one in charge and it was his responsibility.[214] I am grateful to Mr. O'Brien for his candour.

On April 15, 2009, Mr. Nobrega attended an in camera city council meeting with Mr. Lever. Because the put had expired and OMERS no longer had a $360 million exposure, he told council it was prepared to change the governance structure of Enersource to eliminate the veto.[215] Mr. Nobrega's presentation stated:

> Borealis will have no veto rights. This change is appropriate, given that OMERS has reduced its exposure to Enersource from $2.2 billion to its 10% equity investment in Enersource.[216]

Mr. Nobrega gave a detailed presentation to city council, including a proposal about a new way of appointing directors to the Enersource board.[217]

By early October 2009, OMERS and the negotiating committee were close to agreement about a document they were prepared to recommend.[218] The new agreement would have eliminated the Borealis veto, changed the procedure for appointing directors, and established a formula for setting director compensation. However, in its wisdom, city council passed a resolution calling

for a judicial inquiry before any approval of the newly negotiated agreement. Mr. Nobrega explained he did not think it would be appropriate to sign the new agreement until the Inquiry was completed.[219] Accordingly, no new deal has been reached.

At least this portion of the Inquiry could have been avoided, had council chosen to agree with the negotiating committee's recommendation.

4 Governance Issues Raised by the Enersource Transaction

Analysis

The Terms of Reference require me to inquire into the issue of the Borealis veto becoming part of the shareholders' agreement as it relates to the good government of the City of Mississauga and to make any recommendations I deem appropriate and in the public interest as a result of that investigation. Having found that council was not advised of the change to the shareholders' agreement before the strategic alliance agreement was executed, I interpret the Terms of Reference as requiring me to make findings on the following issues in relation to Phase I:

1 Should council have been advised of changes to the shareholders' agreement between November 29 and December 6, 2009? If so, whose responsibility was it to inform council?
2 Should Mr. O'Brien have continued to instruct Mr. Houston and to make decisions for the city after being seconded to Enersource?

Duty to Advise Council

Should council have been advised of changes to the shareholders' agreement between November 29 and December 6, 2009? If so, whose responsibility was it to inform council? I concur with Mr. O'Brien's concession that it was his duty as city manager with carriage of the negotiations to ensure that he understood the full import of major changes to the deal. He made this admission in his evidence during a discussion about the duration of the put. Given the fact that Mr. O'Brien had carriage of the negotiations on behalf of the city, I conclude it was his duty to ensure that council and the mayor were fully

briefed about the major change after November 29. I find this duty existed even though Mr. O'Brien was by then acting as the CEO of Enersource. It is clear to me that the difficulties associated with communications and approvals were exacerbated both by Mr. O'Brien's dual responsibilities while Enersource started operations, and by the failure of the city to appoint a city solicitor to oversee the legal work in relation to what was the largest transaction ever entered into by the city.

Mr. Houston agreed that the change from a provision requiring 75 per cent approval to a change requiring 75 per cent approval including the approval of a Borealis director was an important change. However, Mr. Houston stated that, if he had been dealing with a corporation and this type of change came about, he would not have brought the change back to the directors of the corporation. Mr. O'Brien was managing this project on behalf of the city, and he had advised Mr. Houston he had reached an agreement on this term with Mr. Nobrega.[220]

Mr. Houston believed Mr. O'Brien had authority to comply with the overriding directions from council, which were "to get this deal done and bring in a huge amount of money to the City coffers." Accordingly, Mr. Houston believed Mr. O'Brien's authority included the governance provision. Mr. Houston testified that Mr. O'Brien must also have believed he had this authority; otherwise, he would not have negotiated the change without returning to city council.[221]

Mr. Houston agreed that the change was negotiated to get the deal done, and his understanding at the time was that, if the change had not been negotiated, "there was a substantial risk that the deal would not close and the city would be out a very, very large amount of money." Mr. Houston also testified that, once Bill 100 died, the province found a different way to achieve the same result. The province issued a directive to the Ontario Energy Board limiting the return on equity of municipally owned electric utilities. This change made the deal with Mississauga far less attractive to Borealis. From the city's perspective at that point, he said, Mississauga was lucky to "get this deal done."[222]

Ms. Bench testified that city council now has a procedure in place whereby the legal department stamps agreements "approved as to form" before the mayor and clerk sign them, so that the mayor and clerk know the documents have been vetted through the appropriate channels. Ms. Bench told the Inquiry that the current procedure would have ensured that the version of the agreement with the blacklined changes would not have been signed without council's approval.[223]

Mr. Houston also pointed out that it would have been easier to assist city council when Ms. Bench contacted him with questions, and to respond, if minutes had been kept of in camera sessions of council. I note that the mayor also agreed that it would "solve a lot of problems" if minutes were kept of in camera meetings.[224]

Mr. O'Brien's Two Roles

Should Mr. O'Brien have continued to instruct Mr. Houston and to make decisions after being seconded to Enersource? Mr. O'Brien ought not to have occupied the Enersource CEO position by secondment until he had completed the Borealis transaction. Occupying these two roles caused no impropriety; however, it placed significant strain on Mr. O'Brien and can only have made it more difficult for him to focus on his duties in relation to the closing. It also placed Mr. O'Brien in a position where he was instructing lawyers on behalf of the city when in his new role he had to be mindful of the interests of Borealis.

Summary of Key Findings

The evidence throughout the Inquiry was consistent that the alliance between the City of Mississauga and Borealis was helpful to both and has been productive for the city. Indeed, as Mr. O'Brien pointed out, the city got a bond issue at good rates, was able to take some cash and property out of the company, and has received healthy dividends. The utility is regarded as a model of efficiency according to Mr. O'Brien, who offered the view that Enersource continues to be "spotlighted as an extraordinarily well run utility, an extraordinarily successful utility." In his view, Enersource has benefited from the relationship with Borealis and OMERS, particularly because it exposed Enersource to business opportunities, consulting work, and advice, making it a top-notch leader in the field.[225]

I find that council should have been advised that the Borealis veto had been inserted into the agreement before it was signed by the mayor. I find that no member of council, including the mayor, was so advised. The veto was a major change that should have been explained to council by the solicitors acting for the city, at a special meeting called for that purpose.

I find that Mr. Nobrega raised the veto late in the negotiations because strategically it was by then more likely to be accepted by the city. However, this tactic was not unusual or in any way untoward in a transaction involving

commercially sophisticated parties, as was the case here. I accept that Mr. Houston felt there was urgency in getting the deal done and this urgency was driven by Mr. O'Brien's instructions. However, I find that informing council was sufficiently important and that some step should have been taken to do so, even if that meant negotiating an extension of the closing date or calling an emergency meeting of council.

Recommendations for Phase I

Informal Meetings of Council

I recognize that in any legislative body there will always be informal meetings among smaller groups of legislators. In his evidence, Mr. O'Brien described scenarios in which councillors might receive briefings on substantial and confidential matters outside the council chamber and its protections. This practice should be discouraged. This kind of informality can only lead to difficulty, and it is evident that in this instance it led to confusion surrounding who (if anyone) was advised of the Borealis veto, and in what setting. I note that informal meetings are not permitted under the *Municipal Act, 2001*.

RECOMMENDATION 1

I recommend that no informal meetings of city council be allowed. For clarity, I do not think it appropriate for city business, including briefings from officials that would otherwise be discussed at a council meeting, to be discussed in an informal setting.

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Minutes of In Camera Meetings

I recognize there are practical issues with the keeping of in camera minutes, and that from the standpoint of confidentiality it may be preferable that no minutes survive. Federal cabinet departments keep detailed minutes and memoranda of their confidential discussions. The reason for such documentation, of course, is not just to permit historical examination many years later, but to ensure that positions taken by various participants are clearly recorded, and that the substance and rationale for decisions are understood.

In the evidence before me, intelligent and well-meaning witnesses could not agree as to what had been discussed at in camera meetings. I cannot help but feel that much of the cost of this part of the Inquiry could have been saved, had minutes been kept. Although minutes should be kept, distribution of the minutes should be controlled to protect confidentiality.

RECOMMENDATION 2

I recommend that minutes be kept of any in camera meetings. Distribution of those minutes should be controlled to protect confidentiality. The minutes should be kept in paper form only. Distribution of in camera minutes should be controlled through bar coding or numbered copies to protect confidentiality.

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Importance of Involvement of City Solicitor

In my view, it is imperative for a large municipality to have a city solicitor involved in major transactions on an ongoing basis. The city solicitor should have sufficient information to brief the mayor and city manager at regular intervals and when there are major developments in a transaction. Although the city manager may well be the point of contact with outside counsel in such transactions, it is important that the city solicitor be kept informed of these discussions to ensure that members of council, including the mayor, are able to receive timely internal legal advice about the transaction.

I have considerable sympathy for William Houston's predicament in this instance. As he testified, he was uncomfortable with the notion that he might somehow have been expected to have alerted council to the change in the agreement. I agree with him. This was not his job as the city's outside counsel, and a proper chain of command would likely have ensured that the information was properly shared with city council.

In executing the documents on December 6, 2000, the mayor was required to certify she was familiar with all its terms.[226] The mayor advised the Inquiry that this was the only time in her tenure as mayor she was asked to sign such a document.[227] Requiring the mayor to certify personal familiarity when she, quite understandably, relied on her staff to review the provisions of the agreement in detail, was not reasonable.

Quite simply, the mayor's certification must be taken to mean something. I would not expect her to review the shareholders' agreement dealing with the shareholdings, governance, and all their complexities. At the same time, I would expect her to decline to certify her familiarity unless she had taken the time to conduct such a review.

RECOMMENDATION 3

I recommend that the city solicitor be involved in negotiations between the city and third parties from the outset, and that he or she be kept informed at all stages.

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Certification of Personal Familiarity

RECOMMENDATION 4

I recommend that public officials not certify personal familiarity with any document unless that statement is true in all respects.

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