

MISSISSAUGA JUDICIAL INQUIRY

PURSUANT TO SECTION 274 OF THE MUNICIPAL ACT AND A RESOLUTION OF COUNCIL OF THE CITY OF MISSISSAUGA 0271-2009 DATED NOVEMBER 11, 2009

BEFORE: ASSOCIATE CHIEF JUSTICE J. DOUGLAS CUNNINGHAM

SUBMISSIONS ON BEHALF OF WILLIAM T. HOUSTON

PART I TERMS OF REFERENCE OF INQUIRY

1. William Houston is a barrister and solicitor and was formerly a partner in the law firm Fraser Milner Casgrain LLP (“FMC”). In this capacity, Mr. Houston acted as legal counsel for the City of Mississauga (the “City”) in connection with a transaction that was completed on December 6, 2000 (the “Strategic Alliance Agreement”) by which Hydro Mississauga Corporation (“HMC”), the hydro-electrical utility owned and operated by the City, became a subsidiary of Enersource Corporation (“Enersource”), and Borealis Energy Corporation (“Borealis”), a subsidiary of the Ontario Municipal Employees Retirement Board (“OMERS”), acquired a 10% equity interest in Enersource.

2. Resolution 0271-2009 adopted by the Council of the Corporation of the City of Mississauga at its meeting on November 11, 2009 (the “Authorizing Resolution”) authorized the within Judicial Inquiry (the “Inquiry”). The Authorizing Resolution specified the terms of reference of the Inquiry as follows:

AND IT IS FURTHER RESOLVED THAT the terms of reference of the inquiry shall be:

To inquire into all aspects of the transactions and matters described in the aforesaid recitals, their history and their impact on the Corporation of the City of Mississauga as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations that the Commissioner may deem appropriate and in the public interest as a result of the inquiry.

And it is further resolved that the Commissioner, in conducting the inquiry into the transactions and matters in question to which the Corporation of the City of Mississauga is a party, is empowered to ask any questions which he or she may consider as necessarily incidental or ancillary to a complete understanding of these transactions and matters.

3. Among the recitals to the Authorizing Resolution is the following:

AND WHEREAS the individual referenced is actually the current President and CEO of OMERS, and was also integral to the process by which a negative veto was added to the December 2000 Enersource Shareholders Agreement, to which the City was a party and which was executed by the Mayor, after it was approved by Council and without Council's knowledge of the insertion of the negative veto, which event has never been satisfactorily explained despite several attempts by Council to obtain this information;

The submissions on behalf of Mr. Houston relate only to the portion of the Inquiry referenced in this recital. The referenced recital concerns a provision (now known as the "Borealis veto") included in the Shareholders Agreement that was entered into as part of closing of the Strategic Alliance Agreement that provided that major decisions required approval of one of the nominees of Borealis to the board of directors of Enersource.

4. In his opening submissions, Commission counsel submitted that this phase of the Inquiry seeks to investigate the process by which the veto provision was inserted in the agreement. According to Commission counsel, the narrow question for review by the

Commissioner is to determine “by what means” clause 2.15 of the Enersource Shareholders' Agreement “found its way” into the agreement.

Opening Submissions of Commission Counsel, pp.8-9

5. It is respectfully submitted that this narrow question has been conclusively answered, and that this answer was known to the City no later than October 25, 2007. The provision was included as a result of a negotiation between the authorized lead representatives of the City and Borealis, Mr. O'Brien and Mr. Nobrega, respectively, who considered the provision to be fair and reasonable, and necessary to complete the transaction. The proposed provision was effective from a legal perspective and, following this negotiation, the transaction was completed, and the City realized very substantial benefits that continue to this day.

PART II FACTS

Mr. Houston's Retainer

6. At the time of the Enersource transaction, Mr. Houston was an experienced regulatory and commercial lawyer. Mr. Houston was interviewed for the position of outside counsel to the City in connection with transforming the municipally owned electric utility into a private business corporation and was selected for this role. His initial retainer, completed in January, 2000, was, in effect, to transform the Mississauga Hydro Electric Commission into a business corporation that became HMC and then Enersource Hydro Mississauga Corporation. Subsequently, the City selected OMERS and its subsidiary, Borealis, to be its strategic alliance partner that would become an equity owner of Enersource.

Transcript of Evidence of William Houston, pages 159-161

7. The City Manager, David O'Brien, was the project manager for the project and provided all high-level instructions to Mr. Houston. Specifically, with respect to what became the Strategic Alliance Agreement ("SAA"), Mr. Houston took instructions from Mr. O'Brien. Mr. Houston had no prior working relationship with Mr. O'Brien and had never previously been retained by him in any capacity. Mr. Houston became involved in dealing with counsel for Borealis concerning the form of the commercial agreements, but he was not involved in face-to-face negotiations concerning the business terms. Mr. Houston did not report directly to the Mayor or City Council in relation to the Strategic Alliance Agreement.

Transcript of Evidence of William Houston, pages 162-168; 228-230

Proposal for Strategic Alliance Agreement

8. A proposal to create a strategic partnership with the City was presented by Borealis on February 25, 2000. This followed a competitive RFP process. This proposal was for the formation of a strategic financial partnership with the City in order to empower the cities within the 905 Area Code (the "905 Cities") and their respective municipal electric utilities (the "905 MEUs") to meet the challenges and opportunities created by the restructuring of the electricity industry in Ontario. By letter dated March 3, 2000, OMERS confirmed its agreement to a put in favour of the City that would give the City the option of putting all or any portion of its equity in HMC to OMERS at a price equal to two times HMC's deemed book equity as at December 31, 1999.

Letter from Borealis dated March 3, 2000, Exhibit 11

The Borealis Veto is Introduced

9. On March 7, 2000 a letter was sent by Borealis to Jonathan Toll of TD Securities Inc., who was representing the City as its investment advisor, responding to a request for

information concerning governance issues for the company that would become Enersource including, in particular, the composition of the board of directors. In this letter, Borealis specifically wrote as follows:

All major operating decisions of Mergeco will require the approval of *more than 75%* of Board members present at a duly constituted meeting of the Board. A quorum of the Board will consist of seven (7) members, two (2) of whom must be the OMERS' representatives. (emphasis added)

This requirement would mean that at least one of the OMERS' representatives would be required to approve a major operating decision of the company that would become Enersource. In other words, OMERS would have a veto. No evidence has been presented that the City objected to this requirement, or that maintaining “absolute control”, as opposed to simply always having an effective “City veto”, was a negotiating objective.

Letter from Borealis Energy Corporation to Mr. Jonathan Toll dated March 7, 2000; Exhibit 12

Preparation of Draft Shareholders Agreement That Omitted Veto

10. Between March 9 and March 26, 2000 the lawyers for Borealis prepared a draft offer including a draft Shareholders' Agreement to be presented to the City. The first draft of the Shareholders' Agreement (apparently based upon a precedent maintained by the solicitors for Borealis) contained a provision (s. 2.16) for special approval of actions that required the approval of "at least" (as opposed to “more than”) seventy-five percent of directors at a properly constituted meeting. Mr. Nobrega, the OMERS representative, does not recall whether this change was brought to his attention. Mr. Nobrega testified that, in the face of the Put, he would never have countenanced a structure where the City had both a veto and control over the decision making of Enersource. He testified that had he seen the April, 2000 press release from the City

announcing a board structure that did not give Borealis a veto, he would have been concerned. Nevertheless, the change to omit the veto became incorporated into the March 27, 2000 proposal presented by Borealis to the City.

Transcript of Evidence of Michael Nobrega, pp. 681-686; 743-745

Transcript of Evidence of David Lever, pp. 548-550

By-Law Authorizing Execution of Strategic Alliance Agreement

11. On April 12, 2000, the City passed by-law number 0171-2000 by which the Mayor and the Clerk were authorized to execute and to affix the corporate seal to the Strategic Alliance Agreement on behalf of the City, and to a Shareholder Resolution directing Hydro Mississauga Corporation to sign the Strategic Alliance Agreement. A recital to the by-law stated that negotiations to effect the strategic alliance had been completed, and that Borealis and OMERS have now submitted a signed Strategic Alliance Agreement dated April 12, 2000.

City of Mississauga By law Number 0171-2000; Exhibit 25

12. A letter dated October 20, 2000 was sent by Mr. Houston to Mr. O'Brien with respect to by-law 171-2000 in which Mr. Houston noted that the by-law does not contain any broad language with respect to the Mayor or Clerk signing additional documents. Given that negotiations were completed and a final document had been signed by Borealis and OMERS, this statement was correct with respect to that By-law.

Letter dated October 20, 2000 from William Houston to David O'Brien; Exhibit
26

Amending Agreement Dated October 31, 2000

13. By Amending Agreement dated as of October 31, 2000 the SAA was amended with the approval of Council. This agreement provided that the initial board of Enersource

(intended to be during a short transitional period until the board was increased to 8 persons, and ultimately to 12) would be only 3 members, including a nominee of Borealis, such that the City could not reach the 75% threshold, and would not have absolute control, either for the short anticipated transitional period, or commencing when one additional MEU joined the alliance.

Strategic Alliance Amending Agreement dated as of October 31, 2000; Exhibit 15

By-Law Authorizing Execution of Documents Required to Close Transaction

14. The steps required to be taken to complete the Strategic Alliance Agreement progressed and on November 29, 2000, a week before the December 6 closing date, by-law 0600-2000 was passed that broadly authorized the Mayor and the Clerk to execute all documents required to effect the Closing of the Strategic Alliance Agreement. In contrast to by-law 0171-2000, by-law 0600-2000 (i) does not recite that negotiations are completed; and (ii) does not recite that a signed agreement has been submitted by Borealis, because these events had not yet occurred. According to Mr. Houston, Council were not told that the documents were ready to be executed, and should have known that the final forms of several of the documents were under active negotiation, and that there were more changes to come, in order to effect the closing as directed in the by-law.

City of Mississauga By-Law 0600-2000; Exhibit 23;

Transcript of Evidence of William Houston, pp. 197-200

15. Mr. Lever, who represented Borealis, testified that "no one believed on November 29 that there was a final version of the agreements that were being laid before the City". He confirmed that drafts were still being exchanged and that, from his perspective, the parties were still working towards closing and still working on the drafts.

Transcript of evidence of David Lever, pages 574-575

Negotiation for Inclusion of Borealis Veto

16. On December 4, 2000 Mr. Houston had a telephone discussion with Mr. O'Brien who informed him that he had discussed changes to the draft Shareholders Agreement with Mr. Nobrega, including the introduction of the Borealis veto, and that there would be blacklined changes to the Shareholders Agreement coming from the lawyers for Borealis. Mr. Houston was not asked for advice on the business terms, and Mr. O'Brien indicated to him that it was important to agree to these changes in order to get the deal done. Mr. Houston was asked to review the blacklined changes from a legal perspective. Mr. Houston also had a telephone conversation with Mr. Lever representing Borealis who reported that changes had been negotiated between Mr. O'Brien and Mr. Nobrega, and that blacklined revisions would be coming over.

Transcript of Evidence of William Houston, pages 206-215

17. Mr. Houston reviewed the changes that accompanied the letter dated December 4, 2000 from McCarthy Tetrault with his colleague, John Rhude, and saw no problems with what had been agreed to from a legal perspective. All proposed changes were evident from blacklining. The drafting was one hundred percent clear and in accordance with what he understood from Mr. O'Brien had been discussed. Mr. Houston considered the veto to be an important change and he immediately saw the business rationale for it and the advantages from the City's perspective in agreeing to this request.

Transcript of Evidence of William Houston, pages 227-228

18. Mr. Houston's understanding of the business rationale included a recognition of the exposure of Borealis under the Put Agreement and also the Enersource bond offering and the

Financing Agreement, including the harm that might ensue from Enersource being influenced by political decision-making by a future City Council that might take a less businesslike approach than the 2000 Council. Mr. Houston recognized that, from the City's perspective, the obtaining of the Put and the proceeds of the bond offering to pay out the Note to be received on closing, would be specifically at risk without the City's agreement to the requested change to the Shareholders Agreement. Mr. Houston believed that Mr. O'Brien had authority to conduct further negotiations to comply with the overriding direction or instruction from Council, which was to complete the transaction with OMERS, and that his authority included agreement to the Borealis veto. The SAA transaction was a very beneficial one for the City in several respects, and had become far less attractive to Borealis because of the reduction on return on equity from what was expected when the SAA was executed in April.

Transcript of Evidence of William Houston, pages 226-227

19. Mr. Houston considered that, without agreement to the veto, there was a substantial risk that the transaction would not close. His concern was well founded, because Mr. Nobrega has since acknowledged his concern about the political risk in closing without the veto and he confirmed that, without it, the deal would not have closed. In addition, Mr. Nobrega identified what he described as a "real risk" if closing of the transaction drifted beyond December 6: that the new Minister of Science and Technology might have introduced a new regulation to replace Bill 100, risking a further "eruption" in the sector. He thought that the City had decided to close down this risk.

Transcript of Evidence of Michael Nobrega, pages 709; 713, 740-741

20. Mr. Houston regarded the instructions that he was given by Mr. O'Brien as proper, having regard to (i) the overriding direction from Council to complete the transaction;

and (ii) the risk of economic hardship to the City if the instructions were not followed. He was well aware at the time that Borealis could not be compelled to close the transaction, or to make any other change in the SAA or the terms of closing, because conditions precedent and City covenants had not been fulfilled. In accepting Mr. O'Brien's instructions, Mr. Houston recognized the risks of the City refusing the requested changes as immense, and the rewards as immediate and substantial. Mr. Houston accepted and followed the instructions that he was given, and the changes were incorporated into the final form of Shareholders Agreement that was executed on closing.

Transcript of Evidence of William Houston, pages 224-231

21. Mr. Houston was not responsible for communicating directly to City Council or the Mayor concerning the transaction, and he would have viewed doing so on this occasion as a breach of the chain of command. Any time that he attended at City Council, in formal sessions or informally, or at the Mayor's office, was at Mr. O'Brien's invitation. At the time that he received instructions from Mr. O'Brien that the Borealis veto should be included in the Shareholders Agreement, Mr. Houston had no reason to think that Mr. O'Brien would not communicate with the Mayor and Council concerning the changes, just as he had been doing very effectively over the previous year. He agreed that it would have been proper for Mr. O'Brien to discuss the changes with the Mayor and as many other Councillors as could be conveniently contacted without jeopardizing the transaction. Mr. O'Brien believes that he did consult with members of Council concerning the veto at a briefing session, and Councillor Mahoney recalls that such a briefing was done.

Transcript of Evidence of William Houston, pages Transcript of Evidence of
David O'Brien, pp. 444-445; 447-448; 464-467; 469; 483-484; 485-486; 488-489;
520-521

Transcript of Evidence of Kathleen Mahoney, pp. 1095-1103; 1122-1123; 1131-1133

The Enersource Bond Prospectus

22. The transaction also contemplated that there would be a bond issue by Enersource following closing, a substantial part of the proceeds of which were to be used to pay out the Note to be received by the City on closing. The prospectus dated April 25, 2001 that was prepared in connection with the bond offering expressly disclosed, on page 17, under the Heading "Enersource Shareholders' Agreement", the following:

At the present time, the Enersource Shareholders' Agreement stipulates that the size of the Enersource board of directors is to be set at eight with six directors appointed by Mississauga and two by Borealis Energy. Fundamental actions require the consent of either at least 75% of the directors voting at a meeting with one such director being a Borealis appointee, or all of the directors in writing.

This prospectus was considered at a meeting of the Enersource Board of Directors held on April 24, 2001. Those present included Mr. Nobrega, Mr. O'Brien and the Mayor. At the meeting, it was resolved that a prospectus substantially in the form of the draft prospectus presented to the directors be approved. The Enersource Shareholders Agreement, with the Borealis veto, had previously been delivered to the City and been the subject of a presentation to the Enersource Board, although the written materials accompanying did not highlight the veto.

Enersource Prospectus, [ENS-007-114-001]

Minutes of Meeting of Board of Directors of Enersource on April 24, 2001,
[MIS.014.001.168]

City Investigation in 2007

23. Almost seven years after closing of the Enersource transaction, years into having enjoyed the downside protection the Put, receipt of the Enersource bond proceeds to pay out the

Note, and expiry of the Financing Agreement, the City began to look into the circumstances that led to the inclusion of the veto.

24. Mr. Houston was contacted by Mary Ellen Bench, the City Solicitor on October 4, 2007 concerning the Borealis transaction. Although an email was sent by Ms. Bench in the late afternoon on October 3, Mr. Houston does not believe that he saw this e-mail before his first telephone discussion with Ms. Bench. During their discussion, Mr. Houston understood that Ms. Bench was asking about a stand alone document, an amendment made post-closing to the Shareholders Agreement that was signed on closing, that had the effect of removing control of Enersource from the City. He did not appreciate that she was asking him about the drafting change that resulted in the Borealis veto. He had not reviewed any documents, and had not considered the circumstances leading to closing of the transaction for many years since December 2000. Ms. Bench's notes show that her discussion concerned "the amendment".

25. Mr. Houston's understanding concerning his discussion with Ms. Bench was confirmed in his e-mail of October 12. He wrote that he had confirmed his initial recollection that the "Shareholders Agreement Amendment" is not in the record book, and would not have been intentionally left out. He wrote that he did not recall being asked to advise on the "Amendment" and that he did not recall that his colleague, Mr. Rhude, had been requested to so advise. Mr. Houston requested that he be provided with a copy of the "Amendment" and any correspondence or memoranda that references it.

E-mail from William Houston to Mary Ellen Bench dated October 12, 2007,
Exhibit 22

26. Mr. Houston received a package of documents from Ms. Bench on October 12. After reviewing them, he wrote on October 17 to advise that he now understood that the issue

was with respect to the fact that Article 2.15 was included in the Shareholders Agreement as originally signed, and not a provision that was added afterwards. He asked to review the relevant correspondence files for the pre-closing period, and had still not been provided with a copy of the December 4, 2000 letter from McCarthy Tetrault that enclosed the black lined negotiated changes. He explained his recollections of the business rationale for the Borealis veto in this e-mail and advised that this change was one of several provisions that were negotiated in this business context.

E-mail from Mr. Houston to Ms. Bench dated October 17, 2007; Exhibit 34

Mr. Houston's Appearance at City Council

27. At the invitation of Ms. Bench, Mr. Houston appeared before an *in camera* session of Council on October 24. He again explained that the Borealis veto was negotiated prior to closing and took Council through the rationale for its inclusion. At this time Mr Houston had still not come across the Dec 4, 2000 letter from McCarthy Tetrault that attached the blacklined revisions to the draft Shareholders Agreement and the City had not received it from Mr Lever because of the misdirected e-mail from Ms Bench to Mr. Lever. This document was received by the City on October 25, 2007, and showed the time of the introduction of the veto into the draft Shareholders Agreement. At the conclusion of the October 24 meeting, Council passed a Resolution on that date indicating that the matter was closed.

Report of Mr. Singer's Investigation

28. As a result of its investigation into the circumstances that resulted in inclusion of the Borealis veto, the City also obtained information from Mr. Lever, Mr. Nobrega and Mr. O'Brien, and all agreed that the Borealis veto was negotiated and agreed upon prior to closing, and that a black lined a version of the Shareholders Agreement was prepared and delivered by

the lawyers for Borealis to the lawyers for the City prior to closing, as had been discussed by Mr. O'Brien and Mr. Nobrega. No one was asserting, or has since asserted, that inclusion of the Borealis veto was unreasonable, and it was accepted that the transaction was extremely beneficial to the City. Outside counsel retained by the City to investigate this matter, Mr. Singer, concluded in his November 13, 2007 report that "there was no impropriety as to process in connection with the matter herein investigated."

Memorandum from Mr. Singer dated November 13, 2007, Exhibit 64

PART III SUBMISSIONS

29. It appears from the Authorizing Resolution that this part of the Inquiry was called because of unproven assertions that (i) a person described by Mr. Peter McCallion as the "Chair of OMERS" is the President and CEO of OMERS and was integral to the process by which the veto was included in the Shareholders Agreement, and also had involvement in respect of the land development events that are the subject of the other part of the inquiry; and (ii) the veto was added without the knowledge of Council, and its inclusion had not been "satisfactorily explained".

30. With respect to the first assertion, it is submitted that there is no evidence that the events concerning the Enersource Transaction are related in any way to the transactions that are the subject of the other part of this Inquiry.

31. With respect to the second assertion, it is respectfully submitted that the circumstances leading to inclusion of the veto were fully explained in the fall of 2007, and again through the evidence at this part of the Inquiry, and include proof of the following:

- (a) The veto was a reasonable business provision (that had been on the table early in the process, had never been negotiated out, but was omitted later for unexplained reasons), that was agreed upon as part of normal course commercial negotiations, and was considered to be necessary to complete this large transaction that was very beneficial to the City. Without agreement to the veto, the transaction would not have been completed, and the City would not have realized the substantial benefits from it.
- (b) The provision was an important one, and was one of many revisions to draft agreements that were under active negotiation during the days leading to the closing date (many of which were to the City's benefit).
- (c) Inclusion of the veto was discussed and agreed upon by the representatives charged with responsibility for negotiating the business aspects of the transaction, namely, Mr. O'Brien for the City, and Mr. Nobrega for Borealis. The timing of this negotiation was not unusual for this kind of transaction.
- (d) Instructions were given to legal counsel for the parties that this provision was to be added. Mr. Houston was not asked to advise concerning the business rationale for its inclusion, but only whether the language providing for its inclusion presented any legal problems. He considered the provision to be reasonable and beneficial to the City, based upon any fully informed risk/reward analysis, and concluded that the proposed language to give effect to the veto presented no legal problems. Based upon his discussions with Mr. Lever and Mr. O'Brien, Mr.

Houston regarded the request for inclusion of the veto by Borealis as one that, if rejected, would put completion of the transaction at substantial risk, a risk he understood the City did not want to assume.

- (e) Mr. Houston expected that Mr. O'Brien would communicate to representatives of Council and the Mayor the inclusion of the veto, and had no reason to think that he would not do so. Mr. O'Brien testified that he has every confidence that he discussed the veto with members of Council at a briefing session on the day of closing, December 6, 2000, and Councillor Mahoney has testified that she specifically recalls such a briefing before closing. Although the minutes of the formal December 6, 2000 meeting have been identified and placed into evidence (Exhibit 36), minutes of *in camera* meetings were not kept at the time.
- (f) The veto was prominently disclosed in the prospectus for the bond offering that was reviewed and formally approved by the Board of Directors of Borealis in accordance with Ontario *Securities Act* requirements on April 24, 2001 at a meeting attended by Mr. Nobrega, Mr. O'Brien and the Mayor.
- (g) The veto has not caused any problem with the business of Enersource and, when an issue was raised about its continuing need subsequent to the expiry of the Put, the completion of the Bond offering, and the expiry of the Financing Agreement, Borealis agreed to have it removed.

Mr. Houston Properly Took Instructions From the City Manager

32. As legal counsel for the City in connection with the Enersource transaction, Mr. Houston took instructions from the City Manager, Mr. O'Brien, with respect to all high-level matters, including the Shareholders Agreement. Mr. O'Brien's evidence was clear that he was responsible for the business level negotiations concerning the transaction and that Mr. Houston was only responsible for providing advice concerning whether there was any "legal impediment" to the proposed arrangement. Mr. O'Brien confirmed that Mr. Houston was well aware that Mr. O'Brien had full authority to negotiate on behalf of the City. Ms. Bench's evidence was that the normal relationship is that outside legal counsel reports to staff, and staff are the persons who report to council. Mr. Houston was entitled to accept instructions from Mr. O'Brien that he regarded as reasonable and within Mr. O'Brien's authority to negotiate. Mr. Houston properly discharged his obligations to provide legal advice concerning the transaction.

Transcript of Evidence of Mary Ellen Bench, pp. 869-870

Transcript of Evidence of David O'Brien, p. 460; 518-519

Inclusion of the "Veto", and its Duration, Were Business Issues, Not a Legal Ones

33. The topic of the Borealis veto had been introduced in the March 7, 2000 letter from Borealis to Mr. Toll. Mr. Houston was not consulted about this business issue at that time, and he received no specific communication about it until his discussions with Mr. O'Brien and Mr. Lever on December 4. The rationale for inclusion of a requirement that major changes be approved by one of the Borealis representative on the board concerned commercial and political considerations of which Mr. O'Brien was fully aware, and also involved the business relationships among Borealis, the City and Enersource. Mr. O'Brien did not brief Mr. Houston on the business reasons for his agreement to the veto, nor did he ask Mr. Houston to provide

business advice with respect to this provision. Mr. O'Brien testified that the justification for inclusion of the veto was the existence of the Put, and a number of other things, including the purchase of debt by OMERS.

Transcript of Evidence of David O'Brien, pp. 472- 473

34. While Mr. O'Brien now considers his own failure to attempt to limit the veto to the period of time when the Put was in effect to be an oversight on his part, there is no evidence that Borealis would have agreed to such a limitation at the time, given its obligations and major exposures as of closing with respect to the upcoming the Bond issue (where possible political interference in running Enersource was agreed to be a negative with respect to the bonds), and the less likely, but still on the table, 905MEU mergers (see Prospectus, p. 17). Even Mr. Nobrega, when asked whether he agreed that the veto should have expired when the Put expired, was unable to say, other than speculating that "in retrospect, ten (10) years later, maybe it's so". He testified that he had expected that both parties would act in good faith and do what was best for the business. When the City ultimately chose to let the Put expire, it did not attempt to negotiate removal or amendment of the veto, although the existence of the veto was well known at the time, even if it had previously been forgotten.

Transcript of Evidence of Michael Nobrega, pp. 676; 747-748

35. This issue has no bearing on whether Mr. Houston discharged his obligations properly.

Mr. Houston Not Responsible for Communications with Council

36. The evidence was clear that Mr. Houston was not responsible for ensuring that Mr. O'Brien communicated effectively with members of Council or the Mayor. In fact, the

Mayor had written to Mr. O'Brien on August 22, 2000 requesting that he prepare material for Council concerning the procedures to be followed to approve certain contracts. The Mayor had specifically noted that Council meetings are held every two weeks that there may be problems created because of the timing of the request and the urgency. Mr. Houston was not asked to provide any input into these procedures.

E-mail dated August 22, 2000 from Mayor McCallion to David O'Brien; Exhibit
38

37. When he was questioned about the obligations of outside counsel in connection with communications with Council, Mr. O'Brien fairly conceded that it was not Mr. Houston's responsibility to brief Council, but his own. He confirmed that Mr. Houston would have understood that Mr. O'Brien had authority to conduct negotiate on behalf of the City. He noted that if there were any *in camera* meetings to provide a briefing, Mr. Houston might be there, but Mr. O'Brien would do the briefing.

Transcript of Evidence of David O'Brien, pp. 477-478; 518-519

The November 29, 2000 By-Law Authorized Closing

38. By-law 0600-2000 was a broadly worded by-law that authorized the Mayor and Clerk to execute and to affix the corporate seal of the City to all documents required to effect the Closing the Strategic Alliance Agreement. In contrast to the earlier by law that authorized execution of the Strategic Alliance Agreement, there was no recital indicating that negotiations had been completed. At the time of approval of this by-law, no closing documents were stamped as being approved for execution because such documents were not yet final. According to Mr. Houston, it should have been clear to Council that the documents needed to close the transaction

were not completed and were still under negotiation. This was supported by the evidence of Mr. Lever.

39. It was clear to Mr. Houston that the overriding direction from Council was that steps should be taken to ensure that the Enersource transaction was completed. Mr. Houston was not, at any time, responsible for advising the City concerning municipal procedural matters and was entitled to rely upon the office of the City Solicitor on such matters. The by-law authorizing future execution of documents required to close the SAA, without listing or stamping of such documents, was certified by the City Solicitor's office as to its form, consistent with its prior practice. The form of this by-law should be contrasted with by-law 0171-2000 that authorized execution of the SAA..

Transcript of Evidence of David O'Brien, p. 477

By-Law 0600-2000 dated November 29, 2000; Exhibit 23

By-Law 0171-2000 dated April 12, 2000, Exhibit 25

40. Ms. Bench was asked about the legal authority conferred by the November 29, 2000 by-law, and she agreed that the Mayor and the Clerk had specific authority to execute the closing documents based upon this by-law. There is, therefore, no doubt that the closing documents were duly executed pursuant to the authority of By-Law 0600-2000.

Transcript of Evidence of Mary Ellen Bench, p. 867

By-Law Number 0600-2000, Exhibit 23

41. Mr. O'Brien testified on several occasions that he has every confidence that he briefed Council either before or after the December 6 Council meeting. When he was asked whether he was "morally certain" that the briefing was given to Council on December 6, he repeated his belief that he would have briefed Council that day. When he was asked about

briefing Council again by the Commissioner, Mr. O'Brien agreed that the changes that had come up through negotiations with Mr. Nobrega were important, and he repeated that he believed that he briefed Council on December 6.

Transcript of Evidence of David O'Brien, pp. 444-445; 447-448; 464-467; 469; 483-484; 485-486; 488-489; 520-521

42. Councillor Mahoney confirmed the belief of Mr. O'Brien and testified that, before closing, she and other members of Council were briefed concerning the veto by Mr. O'Brien. She described her specific recollection of this briefing, including where Mr. O'Brien was sitting and that Mr. Angus MacDonald, the acting City Manager, was present (and sat at the end of the table). Councillor Mahoney recalled that Mr. O'Brien outlined the veto, there was a short discussion and some questions and answers and there were no objections to inclusion of the veto provision. According to Councillor Mahoney, none of the councillors present indicated that this was something that should go before the full Council.

Transcript of Evidence of Kathleen Mahoney, pp. 1095-1103; 1122-1123; 1131-1133

43. Councillor Mahoney testified that these kinds of briefings occurred from time to time both when Mr. O'Brien was the City Manager, and prior to this time. She explained that such informal briefings, or "education sessions" are no longer held since changes were made to the *Municipal Act* following 2000. Several other councillors did not recall that such a briefing was held, although Councillor Iannicca remembered a briefing of members of Council concerning the veto in the Caucus Room by Mr. O'Brien, but recalled that this occurred on an occasion after closing of the Enersource transaction.

Affidavit of Councillor Iannicca, Exhibit 77

44. The transaction was completed on December 6, the scheduled closing date, and the documents necessary to do so were properly executed that day, under the authority of by-law 0600-2000.

No Failure to Disclose Veto at December 19, 2000 Meeting of Enersource Directors

45. Mr. Houston was questioned about a memorandum dated December 19, 2000 that was prepared for the directors of Enersource. The memorandum contains a number of bulleted points referencing the Shareholders Agreement, but does not refer to the Borealis veto. Mr. Houston acknowledged that, in hindsight, the memorandum should have referenced the veto. However, the briefing book itself contained the Shareholders Agreement, as executed with the veto, and the board of directors of Enersource included both Mr. Nobrega and Mr. O'Brien who had personally negotiated inclusion of the veto. Mr. Houston gave a presentation to board members with respect to each of the documents described in the memorandum and, although he does not have a specific recollection of this presentation given ten years before he testified, he considers it most unlikely that the veto was not discussed. No evidence was given by any director present that the veto was not discussed at the presentation.

Transcript of Evidence of William Houston, p. 195

46. Further, the existence of the veto was prominently and specifically referenced in the prospectus prepared in connection with the bond issue which was approved by the Board of Directors of Enersource in April, 2001, and the individual Board members should certainly have become aware of the veto then through their review of the prospectus before voting to authorize its filing with the OSC and authorizing their colleagues to sign the required Certificate.

47. It is unclear what position is sought to be advanced by those pointing to the failure of this memorandum to refer to the veto. It could not be in support of a suggestion that Mr. Houston was not instructed to accept inclusion of the veto prior to closing, since this fact has been established beyond controversy. It could not be in support of an assertion that Mr. Houston intended to conceal the veto from the Board at the briefing session, since he had no reason to do so, given that persons with knowledge of the veto sat on the Board, the veto was itself set out a few pages later in the same briefing book and, as noted, the prospectus, on which Mr. Houston was also working, referenced the veto.

48. It is respectfully submitted that nothing turns on this memorandum and that it is not relevant to any issue that falls within the scope of the Inquiry.

Mr. Houston's Responses to Questions in 2007

49. Finally, there were suggestions during Mr. Houston's evidence and, in particular, during his cross-examination by Commission Counsel, that his answers to questions first raised by Ms. Bench could not be reconciled with the information that he subsequently provided, after receiving a more complete explanation of the issue, including provision of some relevant documents. Mr. Houston repeatedly explained the misapprehension under which he was, at first, operating (that Ms. Bench was referring to a separate, stand alone Amendment that had the effect of taking control of Enersource from the City). The fact that Mr. Houston was under a misapprehension was completely corroborated by Mr. Houston's email sent a few days later, on October 12, which clearly disclosed the thinking underlying his mistaken understanding of the facts as reported to him by Ms. Bench.

50. Mr. Houston's answers beginning with his email of October 17 and continuing through his appearance before Council on October 24 are consistent with the evidence of all other witnesses with relevant knowledge, that is, that the veto was a reasonable request that was negotiated and agreed upon by representatives of the City and of Borealis before closing. By October 25, the City had Mr. Lever's report explaining how the veto came about. This conclusion was reported by Mr. Singer in his November 13, 2007 memorandum in which he expressed that there was "no impropriety as to process".

Memorandum from Mr. Singer dated November 13, 2007, Exhibit 64

PART IV SUMMARY AND CONCLUSION

51. The evidence at this part of the Inquiry has clearly shown how the Borealis veto came to be included in the Shareholders Agreement that was executed on closing. The veto was one of a number of changes to draft documents that were under active negotiation before closing, and was agreed to by the lead negotiators for Borealis and the City, Mr. Nobrega and Mr. O'Brien, respectively. Mr. Houston was instructed to include the veto by Mr. O'Brien, the person at the City to whom he was reporting, subject only to his review of the proposed language from a legal perspective. Mr. Houston properly concluded that the proposed language gave effect to the change that had been negotiated. He also regarded the provision as reasonable based upon the circumstances at the time, including the Put Agreement, the forthcoming bond issue, and the Financing Agreement.

52. The introduction of the veto was an important change to the draft Shareholders Agreement, and Mr. Houston had no reason to think that it would not be communicated to members of Council by Mr. O'Brien, just as he had effectively communicated with Council throughout the process over the previous year. Mr. O'Brien testified that he believes that he

briefed members of Council concerning the veto and Councillor Mahoney has confirmed her specific recollection that such a briefing of council members was held.

53. Mr. O'Brien has acknowledged that Mr. Houston was entitled to accept instructions from him, and Ms. Bench has confirmed that outside counsel normally reports to staff, not to the Mayor or Council. Mr. Houston was not retained to advise the City concerning municipal procedural issues, and was not responsible for communicating the inclusion of the veto to Council.

54. Mr. Houston's overriding instructions were to close the transaction, one that was expected to provide, and has provided, substantial benefits to the City. By the time of closing, the transaction had become much less beneficial to OMERS, because of limitations on the return on equity for electric utilities and, as Mr. Nobrega pointed out, there was a "real risk" at the time that new changes could be introduced by the Ministry of Science and Technology that could cause a further "eruption" in the sector. No one could have known at the time what would have happened had closing of the transaction been delayed and, for this reason, the course of prudence was to ensure that the transaction was completed on the scheduled closing date, and not to risk the unknown consequences of delay. The closing documents were duly and properly executed on December 6, 2000 under the authority of by-law 0600-2000.

55. It is respectfully submitted that the conclusion reached by Mr. Singer in November 2007, following his investigation into the process that led to inclusion of the veto, is still correct. There was no impropriety as to process in connection with the matters that are the subject of this part of the Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF JUNE, 2010.

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Per:

A handwritten signature in black ink, appearing to read "Peter Cavanagh". The signature is written in a cursive, flowing style.

Counsel for William T. Houston