



**CITY OF MISSISSAUGA JUDICIAL INQUIRY**  
THE HONOURABLE MR. JUSTICE DOUGLAS CUNNINGHAM, COMMISSIONER

**SUMBISSIONS OF ENERSOURCE CORPORATION**

**Overview**

1. Enersource Corporation (“Enersource”) is grateful for the opportunity to participate in this Inquiry and for the opportunity to assist the Commissioner in the discharge of his mandate.
2. Enersource through its subsidiary, Enersource Hydro Mississauga, is one of Ontario’s largest municipal electric utilities. It serves 191,000 residential, business, government and institutional clients. It has an enviable, industry-leading record for reliability, customer service, cost efficiency and worker safety.
3. One of the sources of Enersource’s strengths is its shareholders. The City of Mississauga (sometimes also referred to as the “City” or “Mississauga”) and OMERS, through its subsidiary Borealis Energy Corporation, work together productively to make Enersource a valuable asset that the ratepayers of Mississauga can be proud of and from which they benefit enormously. The benefits of this partnership, which is unique in Ontario, are evident in the results Enersource achieves.

4. While Enersource's pecuniary interests are not directly in issue in this Inquiry, Enersource sought standing as there was potential for the evidence and the findings of the Commissioner to impact upon the relationship between Enersource's shareholders and on Enersource's governance structure. Given the importance of the relationship between the shareholders and the governance structure to the welfare of Enersource and, indirectly, Enersource's customers, Enersource has participated in this proceeding, in a manner and to an extent commensurate with this interest. Enersource's submissions will generally be limited to addressing the principal question of how the so-called veto came to be in the shareholders agreement that was entered into on December 6, 2000, and to questions which relate to the governance and operations of Enersource. Enersource will not make submissions on matters of governance and administration which pertain exclusively to the City of Mississauga.
5. The evidence clearly establishes, and, indeed, it is conceded by all parties, that the shareholders agreement that was executed on December 6, 2000 (the "Shareholders Agreement") has served Enersource, Enersource's customers and Enersource's shareholders well.<sup>1</sup> The evidence also clearly establishes that both the City and OMERS, and their respective representatives, acted with integrity, skill and professionalism throughout the negotiation of the Shareholders Agreement.
6. The evidence is clear that this agreement has provided extraordinary benefits to Mississauga. In addition to the operating successes Enersource has achieved as a result of this partnership, the City of Mississauga was able to monetize a portion of its equity investment in Enersource, to monetize the promissory note held by the City (approximately \$120,000,000) and to obtain a put which essentially transferred to OMERS the entire financial risk of ownership that was assumed by Mississauga when it decided not to sell its interest in the utility. There has been no evidence that this deal was anything other than remarkably beneficial to the City.

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<sup>1</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 478, line 23 to p. 480, line 22; Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 748, lines 11-14; Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 714, line 11 to p. 716, line 8; Cross-examination of Mayor McCallion by Mr. McDowell, June 2, 2010, p. 1068, lines 13-22

7. The requirement in Article 2.15 of the Shareholders Agreement that on OMERS-appointed board member concur in certain fundamental decisions made by the board, and which is at the heart of this Inquiry, was reasonable protection for OMERS in the circumstances. While only owning 10% of the equity, OMERS made a significantly larger financial investment and was at risk of becoming the owner of 100% of the equity at a fixed price. Therefore, OMERS reasonably requested a right of veto, through a unanimous consent provision in the Shareholders Agreement, with respect to a limited number of fundamental changes which could significantly affect the value of the corporation (the “Veto”).
8. The evidence confirms that the request for this Veto was appropriately raised by OMERS with the chief negotiator for the City of Mississauga, that the proposed change was appropriately identified in a revised draft prepared by OMERS’ solicitors and which was sent to the City’s solicitors, and that the City’s solicitors advised that the revision was appropriate in the circumstances. There can be no serious suggestion, and indeed no party appears to be suggesting, that OMERS, its negotiating representatives or its solicitors acted anything other than entirely appropriately and transparently in all their dealings with the City and the City’s staff and counsel. The Shareholders Agreement with the Veto was not put before Council for formal approval because counsel for the City was of the view that the existing approval was sufficient and that specific approval of the Veto was not required.
9. The only issue possibly left unresolved is whether there was appropriate communication and instruction as between the City Council on the one hand, and the City’s Staff and external counsel on the other hand, regarding the proposed Veto. However, whether or not the Mayor or councillors were apprised of the change on an informal basis is a question which it is unnecessary for the Commissioner to address in order to answer the question before this Inquiry.
10. Enersource asks the Commissioner to emphasize, in a preliminary report issued at the earliest possible moment, that there is no doubt that both of Enersource’s shareholders acted with integrity and that the evidence revealed no reason for the City or the residents of Mississauga to be concerned about the City’s partnership with OMERS or to have any

reservation about signing the revised Shareholders Agreement approved by OMERS and by the negotiating committee appointed by the City of Mississauga.

## Facts

11. In 1998, the Government of Ontario initiated a restructuring of the electricity industry. The primary impetus for restructuring was to introduce competition in the generation sector.<sup>2</sup> However, in anticipation of a competitive market, the Province also mandated the commercialization and corporatization of Ontario's approximately 300 municipal electric utilities ("MEU"). MEUs were the local distributors of electricity produced by Ontario Hydro.<sup>3</sup>
12. Until 1998, MEUs were commissions established pursuant to the *Public Utilities Act* and, in many cases, operated as *de facto* departments of local municipal governments. The *Energy Competition Act* required that the commissions be incorporated pursuant to the *Ontario Business Corporations Act* and that the assets owned by the municipalities associated with their business be transferred to the corporation.<sup>4</sup> The transferring municipality typically received a promissory note in payment for the assets transferred.
13. The shareholders of the newly incorporated distribution companies were the municipalities. The municipalities were permitted to sell their interest in their distribution utilities. Indeed, it was the hope of the Government that there would a consolidation of in the industry and resulting efficiencies and economies of scale.<sup>5</sup>
14. The City of Mississauga retained Toronto Dominion Securities Inc. ("TDSI") to assist it in identifying and evaluating its options. As part of that process, TDSI undertook an RFP with a view to identifying parties who were interested in purchasing, or acquiring an

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<sup>2</sup> Exhibit 5 ("A Framework for Competition - The report of the Advisory Committee on Competition in Ontario's Electricity system to the Ontario Minister of Environment and Energy (MacDonald Report)", May 1996, Chapter 8)

<sup>3</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 157, lines 15-18

<sup>4</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 157, lines 3-11; Examination-in-Chief of David Lever by Ms. Loewith, May 31, 2010, p. 534, lines 6-21

<sup>5</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 534, line 22 to p. 535, line 7

interest in, Enersource.<sup>6</sup> Proposals were received which ranged from the outright sale of the City's entire interest, to proposals which would see the City retain a substantial interest in the utility.<sup>7</sup>

15. A canvass of the views of the residents of Mississauga indicated a significant preference for retaining ownership of Enersource.<sup>8</sup>
16. TDSI recommended the proposal received from OMERS. OMERS' vision was for a merger of some or all of the "905" area code utilities into one large utility which would have significant purchasing power in the electricity market. OMERS proposed that the City of Mississauga and OMERS form a corporation (ultimately Enersource) which would serve as the platform for expanding the alliance to other area utilities. OMERS proposed that it would acquire a 10% interest in the new entity. The OMERS proposal also contemplated that OMERS would raise financing to monetize the Enersource debt held by the City of Mississauga (\$120,000,000) and would commit to providing financing for the contemplated subsequent acquisitions.<sup>9</sup>
17. While the OMERS proposal was attractive to the City of Mississauga, the City requested that OMERS improve its offer by agreeing to a "put", whereby the City of Mississauga would have the option, for a specified period of time, of being able to require OMERS to purchase the City's 90% interest at a fixed price. While OMERS initially rejected this proposal, it ultimately agreed.<sup>10</sup>

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<sup>6</sup> Examination-in-chief of Jonathan Toll by Mr. McDowell, May 25, 2010, p. 61, line 12 to p. 64, line 10

<sup>7</sup> Examination-in-chief of Jonathan Toll by Mr. McDowell, May 25, 2010, p. 68, line 3 to p. 69, line 23

<sup>8</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 419, line 18 to p. 420, line 3

<sup>9</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 560, line 9 to p. 562, line 6; Exhibit 49 (Strategic Alliance Agreement)

<sup>10</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 667, line 18 to p. 672, line 12; Exhibits 10 and 11

18. The put was a substantial benefit to Mississauga. If the venture turned out to be successful, Mississauga could allow the put to lapse and retain its interest. If it did not, it could force OMERS to acquire its 90% stake for the fixed price of \$360 million.<sup>11</sup>
19. At the time it agreed to the put, OMERS also indicated its views on certain corporate governance matters, including the composition and powers of the Board of Directors. OMERS contemplated an eight person board when there were just two shareholders, comprised of six nominees of the City and two nominees of Borealis. Importantly, certain fundamental decisions would require the approval of more than 75% of the directors, thus effectively giving OMERS a veto with respect to certain fundamental corporate changes. However, OMERS proposal also contemplated that when additional utilities joined the alliance, the number of directors would increase to twelve and OMERS would lose the Veto.<sup>12</sup>
20. Provisions requiring shareholders' unanimous or special majority approval of certain corporate acts are not uncommon, and in some cases required by corporate law.<sup>13</sup> The rationale for the Veto in this case was obvious, and appeared reasonable, to all. While OMERS was only acquiring a 10% interest in Enersource, its financial commitment to Enersource was considerably larger and, more importantly, it was at risk of being forced to become the owner of 100% of the equity of Enersource at a fixed price. Essentially, the put permitted the City of Mississauga to transfer the financial risks of ownership to OMERS. In those circumstances, it was entirely reasonable for OMERS to ask that fundamental changes to the corporation which could significantly affect its business and value be subject to OMERS' approval.<sup>14</sup>

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<sup>11</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 469, lines 18-24; p. 473, lines 3-8

<sup>12</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 673, line 24 to p. 680, line 12; Exhibit 12

<sup>13</sup> Cross-examination of William Houston by Mr. Barrack, May 26, 2010, p. 301, line 20 to p. 302, line 1

<sup>14</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 287, line 2 to p. 288, line 7; Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 469, line 11 to p. 470, line 10; Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 709, lines 1 to 17; Cross-examination of Hazel McCallion by Mr. McDowell, June 2, 2010, p. 1069, line 7 to p. 1070, line 5

21. Initially, both the City of Mississauga and OMERS were optimistic that other utilities would join the alliance.<sup>15</sup> The form of Shareholders Agreement which was tendered by OMERS did not contain the Veto but, rather, provided that fundamental changes need only be approved by 75% of the directors. Counsel for OMERS indicated that the absence of the Veto in the draft Shareholders Agreement was either an oversight or due to the fact that OMERS fully expected other utilities to join, in which case the Veto would disappear in any event.<sup>16</sup>
22. On April 12, 2000, City Council approved the entering into of the strategic alliance agreement (the “SAA”),<sup>17</sup> to which was appended a form of Shareholders Agreement which did not contain the Veto.
23. Shortly after the approval by the City of the SAA, the Government of Ontario introduced a significant change in policy with regard to MEUs. Initially in draft legislation, and subsequently in a Ministerial Directive to the Ontario Energy Board, the Government of Ontario significantly reduced and deferred the return on equity which distribution utilities would be permitted to recover through rates. This Directive had a significant impact on the value of a utility such as Enersource to investors and shareholders. Additionally, and perhaps partly as a result of this policy change, the City and OMERS were not able to interest any other GTA utilities in joining their alliance.<sup>18</sup>
24. Accordingly, as the closing of the SAA and related transactions approached (it was scheduled for December 6, 2000) the City of Mississauga became very concerned that OMERS would back out of the deal. The Mayor and City Council recognized that the

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<sup>15</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 675, line 21 to p. 676, line 12; Cross-examination of David O’Brien by Mr. Lax, May 27, 2010, p. 498, line 14 to p. 499, line 3

<sup>16</sup> Cross-examination of David Lever by Mr. Mark, May 31, 2010, p. 614, line 6 to p. 615, line 15

<sup>17</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 175, lines 4-10

<sup>18</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 564, line 6 to p. 569, line 22

transaction represented a valuable opportunity for the City of Mississauga, and they were anxious to complete it.<sup>19</sup>

25. The responsibility for negotiating the transaction was delegated to the City Manager, David O'Brien.<sup>20</sup> The City retained Mr. William Houston, of the Fraser Milner law firm, to provide legal advice.<sup>21</sup> The overriding instruction which City Council gave to Messrs. O'Brien and Houston was to get the transaction completed.<sup>22</sup>
26. On November 29, 2000, the then-existing form of the Shareholders Agreement was put before the City Council for approval. City Council authorized the Mayor to execute the Shareholders Agreement.<sup>23</sup>
27. OMERS desired to complete the transaction notwithstanding the changed environment and notwithstanding that it was apparent that no other utilities would join the alliance.<sup>24</sup> On December 3, 2000, OMERS' Chief Negotiator, Michael Nobrega, and OMERS' counsel, David Lever of McCarthy Tétrault, met for a final, detailed review of the draft Shareholders Agreement.<sup>25</sup> Amongst other things, Mr. Nobrega wanted the Veto reinserted in the agreement, as it appeared that no other utilities were going to join the alliance.<sup>26</sup> Mr. Nobrega contacted Mr. O'Brien and discussed this proposed change with him.<sup>27</sup> Mr. O'Brien understood the nature of the change being requested, and the reasons

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<sup>19</sup> Examination-in-chief of Hazel McCallion by Ms. Kristjanson, June 2, 2010, p. 1001, line 4 to p. 1003, line 7; Cross-examination of Hazel McCallion by Mr. Mark, June 2, 2010, p. 1026, lines 1-23

<sup>20</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 162, line 13 to p. 163, line 2; Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 440, lines 19-22

<sup>21</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 157, line 22 to p. 158, line 6

<sup>22</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 201, lines 11-15; Cross-examination of Hazel McCallion by Mr. Mark, June 2, 2010, p. 1026, lines 12-17

<sup>23</sup> Exhibit 25 (City By-Law#: 0171-2000)

<sup>24</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 700, line 10 to p. 702, line 15

<sup>25</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 577, lines 5-17; Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 707, lines 8-15

<sup>26</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 582, line 18 to p. 583, line 25

for it,<sup>28</sup> and asked Mr. Nobrega to have Mr. Lever draft the suggested revisions to the agreement and send the changes to Mr. Houston.<sup>29</sup>

28. A blacklined copy of the Shareholders Agreement highlighting the reinsertion of the Veto was received by Mr. Houston late in the day on December 4, 2000.<sup>30</sup> Mr. Houston was of the view that, in the circumstances, the requested change was commercially reasonable and he advised Mr. O'Brien that there was no legal impediment to incorporating the change in the Shareholders Agreement.<sup>31</sup>
29. Mr. Houston was of the view that it was not necessary to get any further formal approval of City Council to any of the changes contained in the December 4 revised draft.<sup>32</sup> The transaction closed on December 6, 2000. Mayor McCallion executed the Shareholders Agreement on behalf of the City of Mississauga, although she did not read it before signing.<sup>33</sup> Her Worship maintains she was unaware of the Veto.<sup>34</sup> Mr. O'Brien does not specifically recall discussing it with her, but believes it was "very probable" that he did.<sup>35</sup>
30. Mr. Houston recalled briefing Council<sup>36</sup>, at one Councillor recalls a briefing.<sup>37</sup>

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<sup>27</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p.457, line 25 to p. 460, line 12; Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 712, lines 4-23

<sup>28</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 472, lines 1-5; p. 489, line 3 to p. 492, line 15

<sup>29</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 585, line 10 to p. 586, line 6; p. 587, line 22 to p. 588, line 15

<sup>30</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 207, line 1 to p. 209, line 19; p. 234, lines 3-9

<sup>31</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 217, line 10 to p. 218, line 5; p. 226, line 17 to p. 228, line 1

<sup>32</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 201, line 23 to p. 202, line 6

<sup>33</sup> Cross-examination of Hazel McCallion by Mr. McDowell, June 2, 2010, p. 1061, lines 18-23

<sup>34</sup> Cross-examination of Mary Ellen Bench by Ms. Kristjanson, June 1, 2010, p. 902, lines 1-8; Examination-in-chief of Hazel McCallion by Ms. Kristjanson, June 2, 2010, p. 1003, line 13 to p. 1004, line 9

<sup>35</sup> Cross-examination of David O'Brien by Ms. Kristjanson, May 27, 2010, p. 514, lines 2-18

<sup>36</sup> Exhibit 18, p.3 (Email from William Houston to Mary Ellen Bench dated December 22, 2008)

31. Following December 6, Enersource thrived. Under the direction of its two shareholders, Enersource continued to be an industry leader.<sup>38</sup> Additionally, the City, with the assistance of OMERS, was able to monetize the promissory note it held from Enersource.<sup>39</sup> The put expired on December 31, 2008, without being exercised by the City.<sup>40</sup>
32. The relationship between the shareholders was harmonious, and from 2000 until 2007 it was not necessary to consult the Shareholder Agreement.<sup>41</sup> In 2007, a disagreement arose between the City and OMERS regarding directors' compensation.<sup>42</sup> When the Shareholders Agreement was consulted, the City realized that directors' compensation was a matter in respect of which OMERS held a Veto. The Mayor and some Councillors expressed surprise at the existence of the Veto and indicated that they did not believe it had been brought to them for approval prior to the execution of the Shareholders Agreement.<sup>43</sup>
33. The City was concerned that perhaps there had been some questionable conduct on the part of OMERS, and the City Solicitor was instructed to contact counsel who had been involved in the transaction to determine how the Veto came to be in the Shareholders Agreement.<sup>44</sup> With assistance of outside counsel, the City Solicitor determined that there had been no untoward conduct of any sort on the part of OMERS or OMERS' counsel.<sup>45</sup>

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<sup>37</sup> Examination-in-chief of Kathleen Mahoney by Ms. Loewith, June 15, 2010, p. 1095, line 8 to p. 1096, line 14

<sup>38</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p.432, line 20 to p. 433, line 4; Cross-examination of David O'Brien by Mr. Mark, May 27, 2010, p. 510, line 6 to p. 511, line 4

<sup>39</sup> Examination-in-chief of David O'Brien by Mr. McDowell, May 27, 2010, p. 431, lines 12-15

<sup>40</sup> Examination-in-chief of David Lever by Ms. Loewith, May 31, 2010, p. 600, lines 6-20

<sup>41</sup> Examination-in-chief of Jeffrey Singer by Ms. Loewith, June 1, 2010, p. 771, lines 2-6

<sup>42</sup> Examination-in-chief of Mary Ellen Bench by Mr. McDowell, June 1, 2010, p. 831, line 20 to p. 833, line 11

<sup>43</sup> Examination-in-chief of Hazel McCallion by Ms. Kristjanson, June 2, 2010, p. 1003, line 13 to p. 1004, line 11

<sup>44</sup> Cross-examination of Mary Ellen Bench by Mr. Mark, June 1, 2010, p. 875, line 17 to p. 876, line 2

<sup>45</sup> Examination-in-chief of Jeffrey Singer by Ms. Loewith, June 1, 2010, p. 777, line 23 to p. 781, line 21

The City Solicitor reported her findings to City Council, which accepted her conclusions.<sup>46</sup>

34. If City Councillors and the Mayor were not given the opportunity to consider and approve the OMERS Veto prior to the Shareholders Agreement being signed on December 6, 2000, it was because Mr. Houston believed that their approval was not necessary and that he expected Mr. O'Brien to communicate the change to Council, if such communication was necessary.<sup>47</sup> It is also apparent that City Council would have approved the Veto if they had been asked to do so.<sup>48</sup>
35. Notwithstanding that City Council had the results of the City Solicitor's investigation and accepted the conclusions thereof, in 2009 City Council nonetheless resolved that this Judicial Inquiry, initially contemplated to address an unrelated real estate transaction, include an inquiry into the question of how the Veto came to be into the Shareholders Agreement.<sup>49</sup> City Council did so notwithstanding that OMERS and a negotiating committee for the City had negotiated a revised Shareholders Agreement which, if approved by the City, would have, *inter alia*, eliminated the Veto.<sup>50</sup> City Council deferred consideration of the revised agreement until after the conclusion of this Inquiry.<sup>51</sup>

### **How Did the OMERS Veto Get Into The Shareholders Agreement?**

36. The evidence is clear that the negotiators and external counsel for both the City and OMERS acted with skill, integrity and professionalism throughout.<sup>52</sup> Mr. O'Brien, on

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<sup>46</sup> Examination-in-chief of Mary Ellen Bench by Mr. McDowell, June 1, 2010, p.856, line 10 to p. 857, line 2

<sup>47</sup> Cross-examination of William Houston by Mr. Lax, May 26, 2010, p. 374, line 23 to p. 376, line 3

<sup>48</sup> Cross-examination of Hazel McCallion by Mr. McDowell, June 2, 2010, p. 1069, lines 7-25

<sup>49</sup> Examination-in-chief of Mary Ellen Bench by Mr. Lax, June 2, 2010 (recalled), p. 933, line 19 to p. 934, line 13

<sup>50</sup> Cross-examination of Mary Ellen Bench by Mr. Barrack, June 2, 2010 (recalled), p. 943, line 7 to p. 949, line 5

<sup>51</sup> Examination-in-chief of Mary Ellen Bench by Mr. Lax, June 2, 2010 (recalled), p. 931, lines 9-24

<sup>52</sup> Mr. Houston described OMERS as having acted in "high good faith": Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 202, line 24; Cross-examination of Michael Nobrega by Mr. McDowell, May 31, 2010, p. 748, lines 5-14

behalf of the City, clearly negotiated a deal which was very advantageous for the City.<sup>53</sup> Indeed, Mr. Nobrega confirmed that the City was “formidable” as a counter-party.<sup>54</sup> All of the evidence indicates that Mr. O’Brien was not only capable, but professional in his dealings with all parties.<sup>55</sup> He was solicitous of City Council, briefed them in connection with all decisions and kept Councillors and the Mayor apprised of progress on a regular, informal basis.<sup>56</sup>

37. It is also clear that Mr. Nobrega and Mr. Lever acted entirely appropriately and transparently at all times. There can be no suggestion, on the evidence, that OMERS made any attempt to have the Veto inserted in the agreement without it being brought clearly to the attention of the City of Mississauga and its counsel.<sup>57</sup>
38. Both Mr. O’Brien and Mr. Houston were aware of the insertion of the Veto.<sup>58</sup> Mr. Houston was of the view that the insertion of the Veto, although it was a significant matter, did not require a further resolution of City counsel<sup>59</sup>. The Shareholders Agreement was executed on December 6 by Mayor McCallion. Mayor McCallion relied upon the implied assurances of Mr. O’Brien and Mr. Houston that the form of the agreement complied with the authorization she had to execute the agreement on behalf of the City as set out in the resolution of November 29, 2000.<sup>60</sup>

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<sup>53</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 692, lines 11-15; Examination-in-chief of Hazel McCallion by Ms. Kristjanson, June 2, 2010, p. 1020, line 14 to p. 1021, line 3

<sup>54</sup> Examination-in-chief of Michael Nobrega by Mr. Barrack, May 31, 2010, p. 672, line 21 to p. 673, line 20; Cross-examination of Michael Nobrega by Mr. McDowell, May 31, 2010, p. 748, lines 5-14

<sup>55</sup> Questioning of Michael Nobrega by Commissioner Cunningham, May 31, 2010, p. 751, lines 13-18; Re-examination of Hazel McCallion by Mr. McDowell, June 2, 2010, p. 1043, lines 5-24

<sup>56</sup> Cross-examination of Hazel McCallion by Mr. Mark, June 2, 2010, p. 1027, line 13 to p. 1029, line 10

<sup>57</sup> Re-cross-examination of Mary Ellen Bench by Mr. Mark, June 2, 2010 (recalled), p. 967, line 21 to p. 968, line 8

<sup>58</sup> Examination-in-chief of Mary Ellen Bench by Mr. McDowell, June 1, 2010, p.856, lines 22-23

<sup>59</sup> Examination-in-chief of William Houston by Mr. McDowell, May 26, 2010, p. 201, line 23 to p. 202, line 6; p. 234, lines 6-9

<sup>60</sup> Examination-in-chief of Hazel McCallion by Ms. Kristjanson, June 2, 2010, p. 1013, line 22 to p. 1015, line 16

39. Accordingly, it is clear that there was no misconduct by OMERS or OMERS' representatives or counsel in connection with the insertion of the Veto in the Shareholders Agreement. Nor was there any misconduct on the part of City Staff or its counsel.
40. It is submitted that these conclusions are sufficient for the Commissioner to discharge his mandate under the terms of reference.
41. The other question which might perhaps be asked is whether the Mayor and some Councillors were advised of the insertion of the Veto between December 4 and December 6, or whether they ought to have been informally advised.
42. It is submitted that it is not necessary for the Commissioner to answer this questions. The mandate of the Inquiry is to determine how the OMERS Veto came to be in the Shareholders Agreement. It is submitted that speculation into the additional question of whether Mr. O'Brien did or did not speak informally with the Mayor or some Councillors, or whether he ought to have if he didn't, would serve no purpose and is ultimately irrelevant to the primary question, which is to determine whether there was any misconduct involved.

### **Suggested Findings and Recommendations**

43. Enersource is concerned that the publicity surrounding the calling of this Inquiry, and the political overtones that continue to dominate its discussion in the media, may suggest to the public that there is some question as to the integrity or good faith of one or both of the shareholders. The evidence in this Inquiry, and the enviable record of performance by Enersource since 2000, demonstrate beyond any question that both shareholders of Enersource at all times acted with integrity and good faith, and have made enormous and valuable contributions to the interests of Enersource and the citizens of the City of Mississauga. Enersource asks the Commissioner to make such a finding in his report so that the public record can be clear, and the citizens of Mississauga may take comfort, that their electric distribution utility is indeed in good hands and is owned by shareholders in whom they can have the utmost confidence.

44. Enersource believes that there is no basis for the Commissioner to conclude that there was any misconduct by any party in connection with the insertion of the Veto in the Shareholders' Agreement. The Commissioner should find that OMERS and its representatives and counsel, and the City of Mississauga and its representatives and counsel, acted in accordance with accepted practices for the negotiation of contracts such as the Shareholders Agreement and that every party proceeded with integrity and transparency.
45. Similarly, Enersource is concerned that it has been suggested in some quarters that the Shareholders Agreement, in view of the Veto, was one-sided in favour of OMERS and unfair or disadvantageous to the City. The evidence is uncontradicted that the Veto was entirely appropriate in the commercial circumstances which prevailed at the time. Indeed, the transaction, when examined as a whole, was decidedly favourable to the City.<sup>61</sup> Moreover, OMERS did not attempt to use it in the seven years following closing. Enersource asks the Commissioner to reassure ratepayers that OMERS at no time sought to over-reach or take unfair advantage of the City of Mississauga.
46. It is submitted that the Commissioner should find that the Veto was not formally brought back to City Council prior to execution of the Shareholders' Agreement on December 6<sup>th</sup> because outside counsel for the City of Mississauga was of the opinion that such formal approval was not required.
47. It is submitted that the Commissioner need not, and should not, make any finding with respect to whether the Mayor or any City Councillors were informally advised by Mr. O'Brien of the addition of the Veto prior to the execution of the Shareholders' Agreement on December 6, 2000.
48. As it is manifestly in the interest of Enersource and residents of Mississauga that harmonious relations between the City of Mississauga and OMERS continue, and that there be no impediment to the continued good governance of Enersource, the Commissioner should conclude that there is no reason for the City to be concerned about

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<sup>61</sup> Cross-examination of David Lever by Mr. Barrack, May 31, 2010, p. 625, line 7 to p. 626, line 12

its partnership with OMERS or have any reservation about signing the revised Shareholders' Agreement approved by OMERS and the negotiating committee appointed by the City of Mississauga.

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