

MAYOR'S SUBMISSIONS
TO
MISSISSAUGA JUDICIAL INQUIRY:
ENERSOURCE ISSUES

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A. Overview

1. The first phase of this judicial inquiry involves events leading up to the sale of 10% of Enersource to Borealis. The focus is how section 2.15(t)(i) of the Shareholders' Agreement was amended, between November 29, 2000 and December 6, 2000, to provide that a nominee of Borealis must be among the directors approving certain major corporate changes to Enersource.
2. Council first approved the Strategic Alliance Agreement between the City and Borealis on April 12, 2000. From April, 2000 through to December, 2000, the City and Borealis attempted to interest other municipalities in participating in the strategic alliance, but no other municipalities opted to join. There were also significant changes in the regulated electricity distribution market in this period. The Agreement was amended on October 31, 2000, to allow for an extension of time for the closing, and make certain attendant changes.
3. The Agreement came back to Council for approval at its meeting on November 29, 2000. Council approved a by-law referring to the Strategic Alliance Agreement dated April 12, 2000, and the Amending Agreement of October 31, 2000. The Mayor and the Clerk were authorized to execute all documents required to effect the closing of the Strategic Alliance Agreement.
4. Subsequent to Council's November 29th meeting, Mr. Nobrega of Borealis raised the issue of the veto in a telephone conversation with Mr. O'Brien, the City Manager, on December 3, 2000. On December 4th Borealis' counsel provided a black-lined draft of the Shareholders' Agreement reflecting the veto and two other changes to the City's outside counsel, Mr. Houston. Mr. Houston discussed the change with Mr. O'Brien. Mr. O'Brien instructed Mr. Houston to implement the three changes to the Shareholders' Agreement.

5. The amended Shareholders' Agreement did not come back to Council for formal approval after November 29th. The Mayor submits that the amended Agreement should have been taken back to Council, since the veto represented a major change to the Agreement. Council was the only body with the authority to change the agreement. In a weak Mayor/strong Council system such as that in place in Ontario, Council exercises all authority unless delegated appropriately. Council did not delegate the authority to amend the agreement. As City Manager, Mr. O'Brien would have been aware that only Council had the authority to amend the Agreement once the by-law had been passed.

6. There is no formal record of Council approving the change. Five Councillors and the Mayor do not recall being informed of the change prior to the execution of the Agreement. One Councillor recalls an informal briefing by Mr. O'Brien, when the Mayor was absent. No other Councillors share this recollection. Mr. O'Brien seems to recall an informal briefing as well, given that there was no *in camera* meeting of Council between December 3 and December 6th. This evidence is based on his normal practice and should be discounted.

7. In any event, the Mayor submits that an informal briefing would not have been sufficient, given Council's by-law approval of November 29, 2000. The municipal governance model in effect at all times made it clear that Council decides and the administration implements. The decision-making role is for "council" rather than for staff or the head of council. Council performs its role through by-law or resolution, in a duly constituted meeting.

8. The Mayor does not recall being told in any manner of the change to the Agreement before she executed the documents on December 6th. She testified that if she had been told, she would have required a meeting of Council to approve the change. Since the issue of the veto first arose in 2007, the Mayor has been consistent that she and Council were not informed, prior to the execution of the Agreement, about the insertion of the negative veto.

9. The Mayor submits that it was the responsibility of the City Manager, and the outside consultants, to inform Council of the change, and to ensure that the documents signed were consistent with the documents approved by Council. This would be consistent with the *Municipal Act* provisions then in force, which provided that “the powers of a municipal corporation shall be exercised by its council,”¹ and the powers of a municipality were to be exercised by by-law.² It would also be consistent with the City Manager’s duties as Chief Administrative Officer under By-Law 396-95, sections 3.3 and 3.10.

10. At the end of the day, however, the Enersource deal has been very beneficial for the City. The veto has never been exercised by Borealis.

11. The issue of the veto arose in the context of a difference of opinion over director compensation in 2007. Once the issue arose, Borealis and a City Negotiating Committee agreed to amend the Shareholders’ Agreement to remove the veto, together with a process for nominating and appointing independent directors. However, Council did not approve the agreement for a variety of reasons, one of which was the commencement of this Inquiry. The Mayor would welcome a direction from the Commissioner indicating that none of the issues the Inquiry is dealing with should restrain Council or Borealis from pursuing the amendments to the Shareholders’ Agreement.

12. The Mayor also notes that the City has subsequently implemented a process whereby documents are stamped “approved as to form”, so that the Mayor and the Clerk know that the documents have been properly vetted. This should ensure that a similar change will not happen in the future.

¹ *Municipal Act*, R.S.O. 1990, c. M.45, s. 9, Mayor’s Authorities, Tab 1

² *Municipal Act*, s. 101 (1), Mayor’s Authorities, Tab 1

B. The Municipal Act: The Statutory Scheme

13. In considering the issues which arise in the Enersource portion of the Inquiry, it is important to understand the statutory scheme under the *Municipal Act*³ with respect to the roles of Council, the Mayor, and staff. Significant changes were made to the *Municipal Act* in 2001 and 2006, although the roles of council, the Mayor as head of council and staff are similar. Since any recommendations should be situated within the context of the existing statutory framework, both the prior and present statutory provisions are set out below. References to the “*Municipal Act*” refer to the provisions as they were in force in December, 2000. References to the “*Municipal Act, 2001*”⁴ refer to provisions which exist today.

1. Background: Municipal Governance

14. Ontario has a “weak Mayor/strong Council” system of municipal governance, as described by Commissioner Bellamy in the Toronto Computer Leasing Inquiry Research Paper on Municipal Governance.⁵ Generally, executive and legislative powers rest with full Council. The only additional independent duties given to the Mayor, as compared with any other councillor, arise from her role as head of Council. Other less tangible expectations may include providing leadership to the Council, representing the municipality at official functions, and carrying out various procedural duties as head of Council.⁶ This is the form of governance in existence in Mississauga at all relevant times.

15. As Commissioner Bellamy states, “[c]onsistent with the history and culture of municipal affairs in Ontario, the province’s *Municipal Act, 2001* enshrines a “weak

³ *Municipal Act*, R.S.O. 1990, c. M.45, Mayor’s Authorities, Tab 1

⁴ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor’s Authorities, Tab 2

⁵ Toronto Computer Leasing Inquiry Research Paper, Municipal Governance, Volume 1: Overview of Approaches, November, 2003, Mayor’s Authorities, Tab 3

⁶ *Ibid*, see discussion at p. 16

Mayor/strong Council” model of municipal governance.”⁷ The Enersource matter must be analysed within the statutory framework of the weak Mayor/strong Council model.

2. The Role of Council

16. The key defining feature of municipal governance in Ontario, under both the *Municipal Act* and the *Municipal Act, 2001*, is that municipal power and authority is generally exercised by Council, and the Mayor has very little formal authority outside chairing Council meetings. As Commissioner Bellamy states:⁸

The most important ground rule is that Council is the source/primary locus of almost all authority with relatively few exceptions, including all legislative authority. Council makes the decisions with respect to whether and to what extent to delegate this authority to others, including the Mayor, various standing or other committees, and the administrative staff. The statutory authority of the Mayor/head of Council is actually quite limited, with a strong emphasis on the responsibility to chair Council meetings.

17. In December, 2000, section 9 of the *Municipal Act* provided that: “**The powers of a municipal corporation shall be exercised by its council.**”⁹

18. Section 101(1) of the *Municipal Act* provided that:¹⁰

101.(1) Except where otherwise provided, the jurisdiction of every council is confined to the municipality that it represents **and its powers shall be exercised by by-law.**

⁷ Ibid, p. 44

⁸ Ibid, p. 44

⁹ *Municipal Act*, R.S.O. 1990, c. M.45, Mayor’s Authorities, Tab 1, s. 9

¹⁰ *Municipal Act*, R.S.O. 1990, c. M.45, Mayor’s Authorities, Tab 1, s. 101(1)

19. Similar provisions apply today. Section 5(1) of the *Municipal Act, 2001* provides: “**The powers of a municipality shall be exercised by its council.**”¹¹ Section 5(3) provides that “**A municipal power, including a municipality’s capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise.**”¹² Council decisions may be recorded in the form of a resolution, which is “simply an expression of a decision or wish of council.”¹³

20. Section 224 of the *Municipal Act, 2001* provides that the role of Council is as follows:¹⁴

- 224.** It is the role of council,
- (a) to represent the public and to consider the well-being and interests of the municipality;
 - (b) to develop and evaluate the policies and programs of the municipality;
 - (c) to determine which services the municipality provides;
 - (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
 - (d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;
 - (e) to maintain the financial integrity of the municipality; and
 - (f) to carry out the duties of council under this or any other Act.

3. The Role of the Mayor as Head of Council

21. The Ministry of Municipal Affairs and Housing describes the role of the Mayor as follows: “[D]ecisions of the municipality are made by council as a whole. The head of council does not have any more power than any other member of council to make

¹¹ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor’s Authorities, Tab 2, s. 5(1)

¹² *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor’s Authorities, Tab 2, s. 5(3);

By-laws must be signed by both the head of council or presiding officer at the meeting where the by-law was passed and the clerk, and under the seal of the corporation.

¹³ The Municipal Councillor’s Guide, Ministry of Municipal Affairs and Housing, Queen’s Printer for Ontario, 2007, also available on the internet at www.mah.gov.on.ca, Mayor’s Authorities, Tab 4

¹⁴ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor’s Authorities, Tab 2, s. 224

decisions on behalf of the municipality.”¹⁵ The Mayor does have certain very limited responsibilities as head of Council, under both the *Municipal Act* and 2001 Act and the City’s procedural by-law.

22. The Mayor is the head of Council. In 2000, the *Municipal Act* provided that the duties of the head of council were as follows:

70. It is the duty of the head of the council,

(a) to be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed;

(b) to oversee the conduct of all subordinate officers in the government of it and, as far as practicable, cause all negligence, carelessness and violation of duty to be prosecuted and punished; and

(c) to communicate to the council from time to time such information and recommend to it such measures as may tend to the improvement of the finances, health, security, cleanliness, comfort and ornament of the municipality.

23. In 2000, the City’s Procedure By-Law under the *Municipal Act* set out specific roles for the Mayor as head of Council.¹⁶ Under the Procedure By-law, as at December, 2000 the Mayor’s powers and duties included:

-to summon a special meeting (s. 6)

-to preserve order and decorum (s. 10)

-to Chair and call meetings to order (s. 45)

-to sign the minutes (s. 49), and

-to sit on General Council (s. 59(1))

¹⁵ The Municipal Councillor’s Guide, Ministry of Municipal Affairs and Housing, Queen’s Printer for Ontario, 2007, also available on the internet at www.mah.gov.on.ca, at p. 2, Mayor’s Authorities, Tab 4

¹⁶ Exhibit 68

24. Section 225 of the *Municipal Act, 2001* describes the role of the head of council.¹⁷

225. It is the role of the head of council,

- (a) to act as chief executive officer of the municipality;
- (b) to preside over council meetings so that its business can be carried out efficiently and effectively;
- (c) to provide leadership to the council;
- (c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);
- (d) to represent the municipality at official functions; and
- (e) to carry out the duties of the head of council under this or any other Act.

25. The head of council is also the chief executive officer of a municipality, with duties under section 226.1 of the *Municipal Act, 2001* as follows:¹⁸

226.1 As chief executive officer of a municipality, the head of council shall,

- (a) uphold and promote the purposes of the municipality;
- (b) promote public involvement in the municipality's activities;
- (c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and

¹⁷ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor's Authorities, Tab 2, s. 225

¹⁸ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor's Authorities, Tab 2, s. 226.1

(d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

26. There are a number of other provisions that require the head of council to execute certain acts in order to comply with the *Municipal Act, 2001* including signing all by-laws (s. 249(1)(b)). The head of council presides over council meetings unless absent or excused from doing so by circumstances provided in the Act or other legislation. Other statutes may also assign responsibility or authority, including the *Emergency Management and Civil Protection Act* which allows the head to “declare that an emergency exists” and to “...implement the emergency plan of the municipality...”¹⁹

27. In fact, Mayor McCallion does not even have the ability to appoint or decide the membership of committees of council. While some mayors do have that delegated power, the Council makes all of these appointments in Mississauga.²⁰

28. Mr. Houston, Mr. O’Brien, Ms. Bench and the Mayor²¹ all testified that the Mayor has no independent authority to bind the City. She only exercises such powers when the authority is delegated to her by Council. The parties in 2000 understood the limits on the Mayor’s authority. Thus, Mr. Houston testified that he didn’t deal with the Mayor on the SAA/Shareholders’ Agreement, since council had not appointed the Mayor or given her any special authority, and he understood that she did not have authority to bind the City without being delegated that power by Council.²²

29. Mr. O’Brien testified that the Mayor has no independent authority to act and bind council unless she is delegated that authority by Council.²³ He agreed that the Mayor was not given any specific legislative or management responsibility with respect to the terms

¹⁹ *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, section 4

²⁰ Mayor McCallion, p. 1034, l. 25 – p. 1035, l. 9

²¹ Mayor McCallion, p. 979, l. 24 – p. 980, l. 4

²² Mr. Houston, p. 167, l. 16 – p. 168, l. 2, and pp. 332-333

²³ Mr. O’Brien, p. 511

of the Enersource transaction other than signing the documents once they were finalized.²⁴

30. Commissioner Bellamy noted that while the governance model is “weak Mayor/strong Council”, it is possible to have a “strong” Mayor in practice, although without the statutory chief executive powers provided under the U.S. strong Mayor model. She noted that a more powerful Mayor in the Ontario model can be achieved through the individual characteristics/capabilities of the Mayor him or herself, such as:²⁵

- Leadership abilities and force of personality.
- Political will and ability to negotiate/build consensus and capacity to create coalitions within Council.
- The ability to communicate with the public.
- Political/public popularity.
- Understanding of the role of Mayor, Council, and the administrative staff, including their respect for the latter’s professional role.
- Capacity to create a compelling vision for the City and to market that vision to the public and Council.
- Personal approach to building a positive Council culture, establishing and maintaining decorum and professional conduct, etc.

31. Commissioner Bellamy noted that the “most commonly referred to example in our interviews of a strong Mayor along these lines was Hazel McCallion of the City of

²⁴ Mr. O’Brien, p. 511, l. 22 – p. 512, l. 2

²⁵ Toronto Computer Leasing Inquiry Research Paper, Municipal Governance, Volume 1: Overview of Approaches, November, 2003, at p. 57, Mayor’s Authorities, Tab 3

Mississauga. Mayor McCallion is perceived to be very effective in all of the categories identified above and as a result is seen as being a very powerful Mayor, notwithstanding the relatively weak powers conferred upon her by the *Municipal Act, 2001*.²⁶

32. What is important to note is that while a Mayor such as Mayor McCallion may be perceived as strong, and may provide leadership and vision, she does not have independent executive powers or legislative powers as those are assigned to Council.

4. The Role of Officers and Employees of a Municipality

33. In 2000, the roles of officers and employees were generally not set out in the *Municipal Act* save for the Chief Administrative Officer, Treasurer, Clerk, Collectors and Auditor.

34. Dave O'Brien served as Chief Administrative Officer in 2000 as that position was described in the *Municipal Act*. Section 72 of the *Municipal Act* provided as follows:

72. The council may by by-law appoint a chief administrative officer, who,

(a) shall have such general control and management of the administration of the government and affairs of the municipal corporation and perform such duties as the council by by-law prescribes; and

(b) shall be responsible for the efficient administration of all its departments to the extent that he or she is given authority and control over them by by-law. R.S.O. 1990, c. M.45, s. 72.

35. Council appointed Mr. O'Brien as Chief Administrative Officer pursuant to By-Law 396-95, effective October, 1995. His delegated authority to perform the general

²⁶ Toronto Computer Leasing Inquiry Research Paper, Municipal Governance, Volume 1: Overview of Approaches, November, 2003, at p. 57, Mayor's Authorities, Tab 3

duties of a City Manager was set out in the by-law and Schedule “A” to the by-law. Section 2.4 provided:²⁷

The duties and responsibilities of the City Manager as set forth in this by-law shall not empower the City Manager to have, perform, do or direct any act or matter that would to any extent whatsoever encroach upon the legislative powers of the Council.

36. Section 2.5 provided that the City Manager shall carry out his duties and responsibilities “in accordance with any and all relevant and applicable by-laws and resolutions of Council.”

37. The general duties and responsibilities of the City Manager set out in Schedule “A” to the by-law included keeping Council advised of matters as follows:

3.3 To coordinate and facilitate the flow of information between the Administration and Council and Committees of Council.

3.10 To provide all necessary information to Council for purposes of decision making and approving by-laws.

38. Mr. O’Brien’s appointment was repealed in 2005, when Council appointed Janice Baker Chief Administrative Officer and City Manager pursuant to By-Law 0078-2005.²⁸

39. Section 227 of the *Municipal Act, 2001* now defines the role of “officers and employees of the municipality” as follows:²⁹

Municipal administration

227. It is the role of the officers and employees of the municipality,

²⁷ City of Mississauga By-law 396-95, Mayor’s Authorities, Tab 5

²⁸ City of Mississauga By-Law 0078-2005, Mayor’s Authorities, Tab 6

²⁹ *Municipal Act, 2001*, S.O. 2001, c. 25, as am, Mayor’s Authorities, Tab 2, s. 227

(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any Act and other duties assigned by the municipality.

40. The municipal governance model in effect at all times made it clear that Council decides and the administration implements. The decision-making role is for "council" rather than for "councillors" or the head of council. Council performs its role through by-law or resolution, in a duly constituted meeting. There are no roles or responsibilities for individual councillors outside council meetings.

5. Council Meetings

41. Council meetings are regulated by both statute and procedural by-laws.

42. In 2000, Council meetings were regulated under Part IV of the *Municipal Act*. A "meeting" was defined in section 55 to mean "any regular, special, committee or other meeting of a council or local board." Section 55(2) required every council to adopt a procedure by-law, and section 55(3) required all meetings to be open to the public, subject to exceptions set out in section 55. However, before holding an *in camera* meeting Council was required to state by resolution the fact of the holding of a closed meeting, and the general nature of the matter to be considered at the closed meeting.³⁰

43. The *Municipal Act, 2001* provisions with respect to Council meetings and closed meetings are similar to those in effect in December, 2000.³¹ The most significant difference is that in December, 2000, there was no requirement to keep a record of *in camera* meetings. This has changed. The *Municipal Act, 2001* now requires that a record be kept of *in camera* meetings. Section 239 (7) and (8) of the 2001 Act provide:

³⁰ *Municipal Act*, R.S.O. 1990, c. M.45, as am, Mayor's Authorities Tab 1 s. 55

³¹ See sections 237-239 of *Municipal Act, 2001*, Mayor's Authorities, Tab 2

Record of meeting

239(7) A municipality or local board or a committee of either of them shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.

Same

239(8) The record required by subsection (7) shall be made by,

- (a) the clerk, in the case of a meeting of council; or
- (b) the appropriate officer, in the case of a meeting of a local board or committee.

44. Mayor McCallion testified that it would be of assistance if minutes were kept of *in camera* meetings and submitted to council for approval.³²

45. There is no provision in either the *Municipal Act* or the *Municipal Act, 2001* for “informal” meetings or briefings. Similarly, there is no provision for Council to make decisions other than by by-law or resolution.

C. Municipal Electricity Deregulation

46. Following the Macdonald Report, in 1998 the provincial government introduced both the *Energy Competition Act, 1998* and the *Ontario Energy Board Act*, to create competition in the supply of electricity. Mayor McCallion represented the Association of Municipalities of Ontario on a transitional committee established by the government to fulfill the direction of the government in privatizing the electricity distribution market.³³

³² Mayor McCallion, p. 1072, l. 3 – p. 1074, l. 4

³³ Mayor McCallion, p. 980 - 981

47. The new regulatory framework was important to Mississauga, since it required that municipal electricity distribution assets held by Mississauga Hydro be transferred to an OBCA corporation.³⁴

48. The City retained TD Securities as financial advisors and Fraser Milner as outside legal counsel to assist with the corporatization and subsequent restructuring of Mississauga Hydro. Mayor McCallion testified that the City felt it was “absolutely essential that we have outside expertise to guide us through this very complex agreement....”³⁵

49. On June 9, 1999 the City passed a resolution regarding Hydro restructuring.³⁶ The resolution authorized City Staff to issue a request for information document, and report back to Council for review of the fact finding process.³⁷ The City Manager, Dave O’Brien, was authorized to take charge and usher through the privatization process.³⁸

50. The June 9, 1999 resolution also authorized the City Manager to pay the fees of TD Securities and Fraser Milner, outside consultants retained by the City to assist in the privatization process.³⁹ Mayor McCallion testified that when Council delegated authority to a member of staff such as Mr. O’Brien, the expectation would be that the City manager and the consultants would report back on a regular basis to Council, either with a written report or verbal information.⁴⁰

51. TD Securities conducted an auction process. In a report to Council dated March 27, 2000, the City Manager provided the recommendation of staff that Council accept the Borealis bid.⁴¹ Mr. O’Brien identified a number of reasons supporting staff’s

³⁴ Mr. Lever, p. 534 Mayor McCallion, p. 981, ll. 12-17; Mr. Houston, p. 157

³⁵ Mayor McCallion, p. 989, ll. 21-25

³⁶ Exhibit 14, City Resolution dated June 9, 1999

³⁷ Ibid

³⁸ Mayor McCallion, p. 981, l. 23 – p. 982, l. 7; Mr. O’Brien, p. 440

³⁹ Exhibit 14

⁴⁰ Mayor McCallion, p. 984, ll. 8-17

⁴¹ Exhibit 6, March 27, 2000 Report by Dave O’Brien to Council

recommendation, including significant potential for the 905 GTA, the financial strength of OMERS and a good chance of retaining a sizable customer base.⁴²

52. On March 29, 2000 Council approved entering a strategic alliance agreement with Borealis. By resolution, Council directed:⁴³

That staff and consultants be directed to negotiate, for ratification by Council, a final agreement on behalf of the City of Mississauga, in a form satisfactory to the City Solicitor, Fraser Milner and TD Securities Inc., based upon the bid dated March 28, 2000, from Borealis Energy Corporation.

53. The Mayor was not personally involved in negotiating the agreement with Borealis.⁴⁴ That was done by Dave O'Brien and the consultants, who were expected to report to Council.⁴⁵

54. Negotiations proceeded pursuant to Council's authorization. On April 12, 2000, Council passed By-law 0171-2000, directing that the Mayor and Clerk be authorized to execute and affix the corporate seal to the Strategic Alliance Agreement (or "SAA") on behalf of the City.⁴⁶ The original deadline for closing the SAA was October 31, 2000.

55. Between April 12, 2000 and December 6, 2000, there were substantial changes both to the regulated market and the strategic alliance that made the deal with Borealis even more valuable to the City and less attractive to Borealis. Significant evidence on this point was given by Mr. Houston, Mr. Toll, Mr. O'Brien, Mr. Nobrega, Mr. Lever and the Mayor.

56. The primary changes in the regulated market and the strategic alliance included:⁴⁷

(i) the reduced rate of return in the regulated market,

⁴² Exhibit 6, page 9

⁴³ Exhibit 69

⁴⁴ Mayor McCallion, p. 990, l. 8-11

⁴⁵ Mayor McCallion, pl 989 l. 12 – p. 990, l. 7; see also Mr. O'Brien, p. 440

⁴⁶ Exhibit 25

⁴⁷ Mr. Lever, pp. 564-567; Mr. Nobrega, pp. 696-700

- (ii) the June 7, 2000 Minister's Directive to the OEB, which directed that the OEB was to give primacy to the interests of consumers in setting "just and reasonable rates",
- (iii) Bill 100, which was a live issue until November 17, 2000. Mr. Lever testified that it would have been virtually impossible for OMERS to proceed with the deal if Bill 100 had been implemented.
- (iv) The failure of any 905 GTA utilities to join the strategic alliance with the City and Borealis.

57. On October 31, the original deadline for closing the SAA was extended until December 6, 2000 by way of an amending agreement.⁴⁸ The October 31 SAA extended the closing date from October 31, 2000 to December 6, 2000, or such earlier or later date as the parties may agree.⁴⁹

D. Dave O'Brien Seconded to Enersource

58. On November 27, 2000 Dave O'Brien was seconded to serve as President and CEO of Enersource – Hydro Mississauga. He continued to be involved in discussions on behalf of the City in several critical areas. Given that Mr. O'Brien was the key City negotiator in the process, and had "lived the transaction for the previous year," as a practical matter his knowledge was required as the deal came to a close.⁵⁰

59. Mr. Houston testified that Mr. O'Brien continued to instruct him on the deal, noting that: "[t]he decision making with respect to Enersource was completely

⁴⁸ Mr. Lever, page 570

⁴⁹ Exhibit 15

⁵⁰ Mr. Houston, p. 338

consolidated, it was with the City, it was a hundred percent subsidiary”, and “it didn’t have a separate corporate mind at the time.”⁵¹

E. The Period November 29 to December 6th

60. Commission Questions 6 through 9 relate to the period November 29th through December 6th:

Question 6: Did the Mayor know that s. 2.15(t)(i) of the Shareholders Agreement had been amended to include the phrase "and a nominee of Borealis is among those directors approving" prior to its execution on December 6, 2000?

Question 7: Did City Council know that s. 2.15(t)(i) of the Shareholders Agreement had been amended to include the phrase "and a nominee of Borealis is among those directors approving" prior to its execution on December 6, 2000?

Question 8: Should the Mayor and/or Council have been advised that s. 2.15(t)(i) of the Shareholders Agreement had been amended to include the phrase "and a nominee of Borealis is among those directors approving"?

Question 9: Whose responsibility was it to ensure that the Mayor and/or Council knew that s. 2.15(t)(i) of the Shareholders Agreement had been amended to include the phrase "and a nominee of Borealis is among those directors approving

⁵¹ Mr. Houston, p. 198, ll. 7-20

61. The Mayor submits that the follow findings should be made on these issues:
- (a) Neither the Mayor nor Council were informed that s. 2.15(t)(i) of the Shareholders Agreement had been amended to include the phrase “and a nominee of Borealis is among those directors approving” prior to its execution on December 6, 2000.
 - (b) Further, the change was significant enough that Council should have ratified the change. Only Council would have the authority, by by-law, to ratify such a change, given that the approval given on November 29th was made by by-law.
 - (c) Council did not ratify the change prior to December 6th; and
 - (d) It was the responsibility of City Staff and outside consultants to bring such a substantive matter back for ratification to Council.

62. The City Manager suggested it was “very probable” that he informed the Mayor of the veto prior to December 6th. The Mayor submits that this did not happen, as discussed below. Further, this is irrelevant to the central issue. Only Council has the authority to make and amend a by-law, and to approve the change to a by-law approving a contract. Even if the City Manager had informed the Mayor, this would not have met the duties of the City Manager, and would not have resulted in proper authority for the veto.

1. November 29th Council Meeting and By-Law

63. On November 29, 2000, Council passed a by-law “to instruct closing of the Strategic Alliance Agreement with respect to the future operations of Hydro Mississauga Corporation.”⁵² The preamble to the By-law states that “WHEREAS Council by By-law 0171-2000 instructed that the City and Hydro Mississauga Corporation enter into the

⁵² Exhibit 23

Strategic Alliance Agreement dated April 12, 2000”, and “WHEREAS by Amending Agreement dated as of October 31, 2000, the parties have agreed to close the SAA on December 6, 2000”; and goes on to enact as follows in paragraph 1:

That the Mayor and Clerk be authorized to execute and affix the corporate seal of the City to all documents required to effect the Closing of the Strategic Alliance Agreement between The Corporation of the City of Mississauga, Hydro Mississauga Corporation, Ontario Municipal Employees Retirement Board and Borealis Energy Corporation.

64. The Mayor testified that it was her understanding that the version of the agreement presented to Council on November 29, 2000 would be the final version of the agreement to be executed on December 6, 2000. She testified that if there were to be changes to the contents of the agreement approved on November 29, 2000, those should have been taken to a formal meeting of council to either endorse or reject. She was not aware that changes were likely to come to the agreement following November 29, 2000.⁵³

65. The Mayor testified that she was not told by anyone, before she signed the agreement on December 6, that the contract which Council had reviewed on November 29, 2000 had been revised to add a negative veto in favour of Borealis.⁵⁴ The Mayor also testified that she was not at any meeting of Council where Council was informed that the agreement approved November 29, 2000 was amended prior to execution by adding the negative veto in favour of Borealis.⁵⁵ She testified that Mr. Houston, Mr. Nobrega, Mr. Lever and Mr. Obrien did not inform her of the insertion of the negative veto before she signed the agreement on December 6th.⁵⁶ We submit that this evidence should be accepted, for the reasons discussed below.

⁵³ Mayor McCallion, p. 996, l. 10 – p. 997, l. 11

⁵⁴ Mayor McCallion, p. 997, l. 22- p. 998, l. 2

⁵⁵ Mayor McCallion, p. 997, l. 22 – p. 998, l. 12

⁵⁶ Mayor McCallion, p. 998, l. 13 – p. 999, l. 25

2. Issue First Raised With City Manager December 3, 2000

66. The uncontradicted evidence is that the negative veto was first discussed with the City on the evening of Sunday, December 3, in a telephone conversation between Mr. Nobrega and Mr. O'Brien.

67. The City's outside counsel, Mr. Houston, was first informed of the change by Mr. Lever, Borealis' outside counsel, the afternoon of December 4th.⁵⁷ He spoke with Mr. O'Brien the evening of December 4th.

3. Council Did Not Approve the Change and Was Not Briefed

68. There is no formal Council resolution or by-law approving the changes to the November 29th draft. The weight of the evidence is that no *in camera* meeting was held at any time between December 3 and the signing at December 6th. At the time, section 55 of the *Municipal Act* required that before holding an *in camera* meeting Council was required to state by resolution the fact of the holding of a closed meeting, and the general nature of the matter to be considered at the closed meeting.⁵⁸ There is no evidence of any such resolution. Further, the weight of the evidence, as discussed below, is that Council did not approve the change, and was not briefed on the change, before the agreement was signed.

69. The inaugural meeting of Council was held on December 4th. The uncontradicted evidence is that no business was transacted at the December 4th inaugural meeting.

70. There was a Special meeting of Council held on December 6th. The minutes of that meeting show that the only item on the agenda was the interim tax levy. The meeting last 3 minutes, from 9:08 to 9:11 a.m.⁵⁹ There is no resolution on December 6 approving going *in camera* as then required by the *Municipal Act*. There is no evidence of a vote by Council approving the negative veto, either by way of resolution or by-law.

⁵⁷ Mr. Houston,

⁵⁸ *Municipal Act*, R.S.O. 1990, c. M.45, s. 55, as am

⁵⁹ Exhibit 36

The weight of the evidence is that the Councillors were not briefed on this day, and there was no other day between December 3 and the signing on which they could have been briefed.

(a) Mr. O'Brien's Evidence

71. Mr. O'Brien first responded to the issue January 22, 2009, in an e-mail to Ms. Horvat in which he stated that although he did not remember the details of the November 29 meeting, "I am certain that there would have been an "in-camera" meeting on that date where the final details of all the agreements would have been discussed, including the changes to the original draft agreements."⁶⁰ He stated in his e-mail that while the actual changes to the shareholders' agreement were made after the meeting, "I have every confidence that Council was briefed on these changes at the November 29th meeting." He also stated in the e-mail that if the changes had not been discussed on November 29th, outside counsel should not have included them in the final Shareholder Agreement.

72. At the Inquiry Mr. O'Brien accepted that the briefing of Council couldn't have happened on November 29. He testified that he didn't do it at the inaugural meeting of Council, so that he "probably" would have done it at the tax levy by-law meeting held on December 6th.⁶¹

73. Moving from the initial certainty in his e-mail that Council would have been briefed at an *in camera* meeting, Mr. O'Brien testified that he "believed" that was done by way of an "informal briefing". He did not have a clear recollection, but relied on his standard practice, stating:⁶²

21 Q: All right. And you have every
22 confidence that this would have happened on the 6th of
23 December?
24 A: I believe I would have briefed
25 council on this on the 6th of December. I can't recall .. (467)
1 the meeting itself, I apologize for that, but my standard

⁶⁰ Exhibit 17, E-mail from D. O'Brien to C. Horvat January 22, 2009.

⁶¹ Mr. O'Brien, p. 465, l. 1 - . 23

⁶² Mr. O'Brien, p. 466, l. 21- p. 467, l. 4

2 practice, my normal way of doing business with City
3 Council was to keep them fully appraised. And I have
4 every confidence I would have briefed them on this.

74. He testified that he “believed” he briefed Council, because he would have wanted to get approval. He testified that he could not recall doing it specifically, but the way he dealt with Council was to brief them, it was normal to do so, but he couldn’t recall if he did.⁶³

75. Mr. O’Brien’s recollection of matters from ten years ago was, understandably, hazy, and he quite candidly acknowledged at the outset that he hadn’t been involved in the process for ten years, and his memory would not be as good as it would on something done last week.⁶⁴

76. The haziness of his recollection was evident throughout his testimony. He has no recollection of the November 29th Council meeting.⁶⁵ He recalled discussing the veto issue with Mr. Nobrega, but did not recall whether in person or by phone, whether he had something in front of him, nor the order of the conversations with Mr. Nobrega and Mr. Houston.⁶⁶ He couldn’t recall the veto discussion with Mr. Nobrega, although he did recall the remuneration discussion.⁶⁷

77. He did not recall the discussion with Mr. Houston as to whether there was a legal impediment, but based his testimony on “something I would have done”, “I assume that I would have done”, because “that’s what I normally would have done.”⁶⁸ He couldn’t recall if Mr. Houston was with him on December 6th when he might have briefed Council.⁶⁹

⁶³ Mr. O’Brien, p. 502-503

⁶⁴ Mr. O’Brien, p. 515, ll. 16-25

⁶⁵ Mr. O’Brien, p. 455

⁶⁶ Mr. O’Brien, p. 457, l. 25 – p. 460, l. 12

⁶⁷ Mr. O’Brien, p. 500, l. 1 – p. 501, l. 10

⁶⁸ Mr. O’Brien, p. 460, l. 13 – p. 461, l. 6

⁶⁹ Mr. O’Brien, p. 503-504

78. While it appears that Mr. O'Brien's normal practice was to keep Council informed, the Mayor submits that on this occasion he failed to do so, given the weight of the evidence from the five councillors and the Mayor.

(b) Evidence of Councillors re December 6

79. Five Councillors have provided affidavit evidence stating that they do not recall being in attendance at any meeting/briefing on December 6, 2000 where the Shareholders' Agreement was discussed, either before or after the Council meeting. They also have no recollection of any meeting or briefing on that date, inclusive of any briefing provided by Mr. O'Brien.⁷⁰

80. Councillor Corbasson swore that she "would have recollected if Mr. O'Brien or anyone else had briefed me regarding the veto, as I would have spoken vehemently against it."⁷¹ Councillor Iannicca recalls a meeting where the put option and veto clause were discussed, but states: "I am certain that this meeting was not before the Shareholders Agreement was signed on December 6, 2000. This is the only Council discussion of the veto clause that I remember."⁷²

81. The Mayor similarly testified that she has no recollection of being briefed at Council on December 6th, either in a meeting or an "informal briefing," as discussed in the next section.⁷³

82. Only Councillor Mahoney testified that she recalls an informal briefing in which Mr. O'Brien provided a briefing on the veto, although she recalls the Mayor was not in attendance.⁷⁴ She testified that the briefing took place in the caucus room after a council meeting or a general committee meeting, as the Councillors "had been gathered in the

⁷⁰ Exhibits 75 - 79

⁷¹ Exhibit 76

⁷² Exhibit 77

⁷³ Mayor McCallion, p. 997, l. 22 – p. 1000, l. 3; p. 1054, l. 16 – 23; p. 1075, l. 16 – p. 1076, l. 20

⁷⁴ Councillor Mahoney, p. 1099, ll. 15-18

council chamber for a constituted meeting.”⁷⁵ Given the timing, the only possible Council meeting could have been December 6, and the weight of the evidence is that Council was not briefed on December 6th.

83. Councillor Mahoney could not recall what the council meeting, was about, nor how long it lasted.⁷⁶ She can’t remember specifically which Councillors were in attendance.⁷⁷ She doesn’t remember specific questions. She testified that there were questions of clarification, but there was no objection.⁷⁸ However, she was unable to recall the date of the meeting, except that it was “close to Christmas.”⁷⁹ Further, she does not take the position that Council voted to amend the November 29 by-law. She agreed that no formal decision making could take place in an informal briefing.⁸⁰

4. The Mayor Was Not Told

84. Mr. Houston, Mr. Nobrega, and Mr. Lever all testified that they did not tell the Mayor personally of the addition of the negative veto.

85. Bill Houston testified that he didn’t brief the Mayor or the Councillors in the period November 29 to December 6 on this issue.⁸¹ He testified that he did not report to the Mayor, the Mayor did not give any instructions on issues relating to the Strategic Alliance Agreement, and that Council had not appointed the Mayor or given her any special authority, other than as the Chair of Council.⁸² Mr. Houston testified as follows:⁸³

16 Q: And between the time you received the
17 blacklined agreement on December 4th and the Mayor's
18 execution on December 6th, I want to be clear, you never
19 called the Mayor to discuss the changes with her?
20 A: No.
21 Q: You never sought instructions from

⁷⁵ Councillor Mahoney, p. 1105, ll. 11-18

⁷⁶ Councillor Manoney, p. 1106, ll. 15-18

⁷⁷ Councillor Mahoney, p. 1108-1109

⁷⁸ Councillor Mahoney, p. 1132, ll. 5-6

⁷⁹ Councillor Mahoney, p. 1101, ll. 5-7

⁸⁰ Councillor Mahoney, p.1 1123

⁸¹ Houston, pp. 196-197

⁸² Houston, p. 166, l. 24 -p. 168, l. 2

⁸³ Houston, p. 337 l. 16 – l. 24

22 the Mayor with respect to the reasonableness of those
23 changes?

24 A: I did not personally no.

86. On December 6th, at the closing, Mr. Houston testified that he could not remember whether he did advise the Mayor. He stated that his practice would be to point out the effects of documents as they're being signed, but that at this time "this was being done in a – in a great rush. The Mayor and I are not sitting down and having a long discussion going re – going through all of the documents clause by clause....She was exercising her authority to sign the documents. And she was entitled to assume the documents were in order."⁸⁴

87. It appears that there was very little time between the time the Mayor attended at the closing meeting and the actual meeting. The Mayor's schedule listed the closing meeting at 4 p.m. that day.⁸⁵ Mr. Lever testified that "We were asked to show up at 4:00 p.m. and we sat around for a few minutes. My understanding was that Mr. Houston was meeting with his clients to review the documents".⁸⁶

88. Mr. Nobrega testified that he did not speak with the Mayor about the change to section 2.15 of the Shareholder's Agreement, and he did not observe anyone speaking directly to the Mayor about section 2.15 of the Agreement.

89. Mr. O'Brien's evidence was that he had "no specific recollection of raising the veto with the Mayor" in the period December 3 to December 6.⁸⁷ He went on to testify that it was "very probable" that he did raise the issue with the Mayor. The reasons he gave were based on his normal practice; he and the Mayor were often in the office early, and they often chatted 4 or 5 times per day.⁸⁸ The Mayor asks this Commission to find that Mr. O'Brien did not inform her of the addition of the veto, for the reasons set out below.

⁸⁴ Mr. Houston, p. 375, ll. 3 - 14

⁸⁵ Exhibit 73

⁸⁶ Mr. Lever, p. 591

⁸⁷ Mr. O'Brien, p. 513, ll. 19-22

⁸⁸ Mr. O'Brien, p. 513, l. 23 – p. 514, l. 18

90. First, the Mayor has testified that she has no recollection of Mr. O'Brien informing her of the veto. More importantly, she has testified in a strong, consistent and direct manner that if Mr. O'Brien had informed her of the veto, "I would have said that must go to council,"⁸⁹ Mr. O'Brien would know it had to go to council for approval, "because it was a major change". The Mayor also would have said that the outside lawyer, Mr. Houston, should be there to present to council the pros and cons of the addition, because "council hired the legal firm to guide us down the road of this very complicated agreement. That did not happen."⁹⁰ She also testified that she would have called a special meeting of Council if Mr. O'Brien had so requested.⁹¹ She repeated in questioning by Mr. McDowell that if Mr. O'Brien had brought the veto to her attention, such a "major, significant change to an agreement must go to council for change, for approval."⁹²

91. In response to questions from the Commissioner, the Mayor testified that if Mr. O'Brien had told her about the change, she would have recognized this was a major change to a contract that would require Council approval, and: "I have no authority to approve that change, to consent with it in any way."⁹³ As she noted: "...a City Manager knows full well that the Mayor has no authority to approve anything, so it must be approved by Council."⁹⁴ This is consistent with the municipal governance framework.

92. Mr. O'Brien's statement that it was "very probable" that he informed the Mayor is based on his normal practice. He also relied on his normal practice for his statement that he "believed" or had every confidence, that he briefed Council. Mr. O'Brien's statements with respect to normal practice on both the briefing of Councillors and the probability that he spoke to the Mayor should not be accepted, given the sworn evidence of both the Mayor and the Five Councillors.

⁸⁹ Mayor McCallion, p. 999, l. 18-21

⁹⁰ Mayor McCallion, p. 999, l. 22 – p. 1000, l. 3

⁹¹ Mayor McCallion, p. 1000, l. 22 – p. 1001, l. 3

⁹² Mayor McCallion, p. 1054, ll. 16-23

⁹³ Mayor McCallion, p. 1076, ll. 5-20

⁹⁴ Mayor McCallion, p. 1078, ll. 3-15

93. Mr. O'Brien relied on the fact that he and the Mayor had offices near each other, and often talked a number of times a day. However, the Mayor's schedule for the period December 3 to December 6 indicate that she was out of the office for significant periods of time.⁹⁵ Further, she did not have a cell phone at that time.⁹⁶ The Mayor did not agree that she and Mr. O'Brien spoke 4-5 times a day every day, since "some days I wouldn't speak to the City manager at all."⁹⁷

94. A finding that Mr. O'Brien did not inform the Mayor of the veto is also consistent with the evidence of Mary-Ellen Bench. She testified that the Mayor's position in all of the meetings she had been at from 2007 forward was that the Mayor was not aware of the clause going into the Agreement, and it had not been brought to the Mayor's attention.⁹⁸

95. The first written record of the Mayor's reaction to the veto is Mary Ellen Bench's e-mail to Janice Baker of October 4, 2007, Exhibit 22, which records that Ms. Bench gave the Mayor copies of the April and December wording, and that the Mayor "has no recollection of council ever being told about this or of the matter ever being discussed with her." This is consistent with the Mayor's testimony throughout the period from 2007 to today.

96. A finding that Mr. O'Brien did not inform the Mayor of the veto is also consistent with the Mayor's subsequent actions, including requesting written statements from both Mr. Houston and Mr. O'Brien as to why the December 6 shareholders' agreement was different than the version approved by Council on November 29, 2000.⁹⁹

97. A finding that neither the Mayor nor Council were told of the addition of the veto is also consistent with Council's actions in 2007, in which they took steps to investigate

⁹⁵ Exhibit 73, Mayor's Journal Summary, and evidence of Mayor McCallion, p. 1008 to p. 1013

⁹⁶ Mayor McCallion, p. 1048, l. 3 – p. 1049, l. 8

⁹⁷ Mayor McCallion, p. 1048, l. 9 – p. 1049, l. 9

⁹⁸ Ms. Bench, p. 854, ll. 20-23

⁹⁹ See Exhibit 65 (Ms. Horvat e-mail re written statement from Houston); Exhibit 17, O'Brien e-mail to Ms. Horvat

the insertion of the veto, and hired the outside lawyer, Mr. Singer, to look at the process.¹⁰⁰

F. Agreement Should Have Come Back for Council's Approval

98. The Mayor submits that only Council would have the authority, by by-law, to ratify such a change, given that the approval given on November 29th was made by by-law. This is consistent with the *Municipal Act* at the time.

99. Mary-Ellen Bench testified that the change to section 2.15 should have come back to Council for ratification or approval, since it dealt with a substantive matter and there was no delegated authority to make this change at this time, after Council had approved the November 29 version.¹⁰¹

18 Q: Should this change have come back to
19 council, in your view?

20 A: Absolutely. It was a substantive
21 change and there was no delegated authority to negotiate
22 those matters, so only council has the authority to make
23 those decisions.

100. Ms. Bench further testified:¹⁰²

20 Q: If the agreement were to be changed
21 in a substantive respect between the date of this
22 approval and the date of the signature of the clerk and
23 the Mayor, you would expect the staff member responsible
24 to come back to council, correct?

25 A: Absolutely. (901)

1 Q: And it's -- I think you've already
2 told us that the insertion of the veto between November
3 29th and the final approval -- or the final signing of
4 the agreement -- Shareholders' Agreement and the
5 Strategic Alliance Agreement on December 6th.

6 The addition of the veto was a substantive
7 matter?

8 A: Yes.

9 Q: And that you would have expected the
10 staff member responsible to come back to council because

¹⁰⁰ Mayor McCallion, p. 1004, l. 5 – p. 1005, l. 6

¹⁰¹ Ms. Bench, p. 871, ll. 18-23

¹⁰² Ms. Bench, p. 900, l. – p. 901, l. 12

11 a bylaw had already been signed?

12 A: Yes. You'd need authority.

101. Mary-Ellen Bench testified that the *Municipal Act* did not authorize an informal briefing in these circumstances: proper procedure is required in order to ask Council to give authority to make a decision, or ratify a decision.¹⁰³

102. Mr. O'Brien testified that it was "absolutely" his responsibility to brief Council, as the senior public servant and the person in charge on behalf of the City.¹⁰⁴

1. Mayor Entitled to Rely on Staff

103. The Mayor was entitled to rely on staff to ensure that the documents were in order.¹⁰⁵ Under City Solicitor Mary-Ellen Bench, the City has now introduced a system whereby documents are stamped approved as to form, so the Mayor and the Clerk know that the documents have been properly vetted.¹⁰⁶ That is a positive measure.

104. However, even in the year 2000, the Mayor should have been able to rely on staff to ensure that documents presented for signature were the documents approved by Council. As Ms. Bench testified, if an agreement were to be changed in a substantive respect between the date of approval and the date of signature, Ms. Bench would expect the staff member to come back to Council.¹⁰⁷

105. It would be unreasonable to assume or recommend that the Mayor, the Clerk, or Councillors should proofread complex commercial contracts brought to them for approval or signature. For example, Mayor McCallion testified that at the last Council meeting, there were 35 by-laws incorporating different agreements.¹⁰⁸ If she had to

¹⁰³ Ms. Bench, p. 867

¹⁰⁴ Mr. O'Brien, p. 477, l. 8- p. 478, l. 20

¹⁰⁵ Ms. Bench, p. 899-900

¹⁰⁶ Ms. Bench, p. 870

¹⁰⁷ Ms. Bench, p. 900

¹⁰⁸ Mayor McCallion, p. 984, l. 18 – p. 985, l. 3

proofread all the contracts before signing them, then agreements could not be processed in a timely manner. As Mayor McCallion testified:¹⁰⁹

4 We depend on staff. That's why we hire
5 qualified staff to vet the agreements very carefully and
6 make sure that the direction given by council at
7 different meetings is followed, and that when the
8 document comes forward, it is approved by either the
9 Commissioner of the department responsible, by the Legal
10 Department and -- and by the Clerk's Department, to make
11 sure that all documents are in order according to
12 council's direction.

106. Mayor McCallion was asked whether she compared each clause of the April 12th Agreement with the version presented to her for signature on December 6th. She did not do so, she testified, because “council depends on the staff and the consultants that were hired to guide us through this entire thing and to implement the direction of council” to ensure consistency in the agreements that are presented to council for signature.¹¹⁰ Ensuring that agreements reflect what Council approved is not part of the Mayor’s responsibility. She testified as follows:¹¹¹

2 Q: And whose responsibility was that to
3 present the proper documents for signing?
4 A: The -- the legal department in the
5 City, the City Manager, the outside consultants, the
6 outside legal -- to make sure that the contract was in
7 line with the direction of the council.

2. The Mayor’s Closing Certificate

107. At the closing, the Mayor signed a certificate in her capacity as Mayor, based on her knowledge, information and belief as an officer of the City.¹¹² In the certificate, she stated that she was familiar with “the provisions of the strategic alliance agreement made the 12th day of April, 2000, and the strategic alliance amending agreement made as of the

¹⁰⁹ Mayor McCallion, p. 985, ll. 4-12

¹¹⁰ Mayor McCallion, -. 1010 – p. 1015

¹¹¹ Mayor McCallion, p. 1015, ll. 2- 7

¹¹² Exhibit 24

31st day of October, 2000.” The Mayor was clearly familiar with the provisions of these agreements, and there is no reference to the strategic alliance agreement made as of December 6, 2000.

108. There is also a provision that the representations and warranties of the City are true and correct, and the City has performed its obligations, covenants and agreements. The Mayor was entitled to rely on the City’s professional advisors in order to sign this certificate.

109. This is not the traditional form of certificate signed by the Mayor with respect to an agreement. It was drafted by Fraser Milner, the City’s outside counsel.¹¹³ Given that this was a one-off certificate, it is unlikely that any recommendation in relation to the certificate would be useful.

G. City Staff and Consultants Believed Veto was Reasonable

110. The City’s staff and consultants have testified at this Inquiry that the Borealis veto was reasonable from both a legal and business perspective in the circumstances, with the caveat that the veto should have expired when the put expired.

111. Mr. Toll, of TD Securities, testified that it was his professional opinion that it was reasonable for OMERS to suggest that there would be no fundamental or major changes to the business without its approval in the circumstances.¹¹⁴ The circumstances were the significant potential OMERS commitments under the SAA, which included:¹¹⁵

- (1) \$200 million equity commitment for the recapitalization;
- (2) \$750 million acquisition commitment;
- (3) \$1.25 billion senior debt commitment; and,

¹¹³ Mr. Houston, p. 337

¹¹⁴ Mr. Toll, p. 140, l. 19 – p. 141, l. 2

¹¹⁵ Mr. Toll, p. 138, l. 14 – p. 141, l. 2

(4) \$360 million Put commitment.

112. Mr. O'Brien testified that the request to add the veto was "quite reasonable", given the value of the Put and the ease with which the City could exercise the Put to Borealis, as well as the other financial commitments by Borealis and the value taken by the City.¹¹⁶ He testified that the language should not have stayed after the Put expired, and that this was an oversight.¹¹⁷

113. Mr. Houston testified that the veto was reasonable and there was business justification for the veto, given that OMERS was a 10% owner with a contingent risk of the entire business, plus the actual risk as a lender and financier of the business.¹¹⁸ Another important element is that the transfer tax exemption for municipal electrical utilities was going to expire on December 31, 2010.¹¹⁹

H. Council Would Likely Have Approved the Borealis Veto

114. The Mayor testified that if the consultants had advised Council of the pros and cons of the veto, in light of Borealis' exposure, that she would have accepted this advice. If Mr. Houston and Mr. O'Brien had testified to the business necessity of the veto and the legality and reasonableness of the veto, she would have approved it, and she believes Council would have supported it.¹²⁰

115. In fact, once Council was apprised of the veto in 2007, Ms. Bench's notes of the October 10, 2007 *in camera* Council meeting indicate Councillor Saito after debate withdrew a motion to re-open the shareholders' agreement.¹²¹ Upon being advised of the veto, Council did not vote to exercise the Put or otherwise terminate the agreement.¹²²

¹¹⁶ Mr. O'Brien, p. 472, l. 1-p. 473, l. 2

¹¹⁷ Mr. O'Brien, p. 473, ll. 16-23

¹¹⁸ Mr. Houston, p. 312, l. 4 – p. 313, l. 14

¹¹⁹ Mr. Houston, p. 291, l. 10

¹²⁰ Mayor McCallion, p. 1001, l. 4 – p. 1002, l. 24

¹²¹ Exhibit 20, Ms. Bench Notes of October 10, 2007 *in camera* meeting, pp. 77-78

¹²² Mayor McCallion, p. 1069 l. 6 – p. 1070, l. 5

I. The Veto Has Never Been Used

116. OMERS has never exercised its veto right over a proposed special change. This is supported by the evidence of Mayor McCallion,¹²³ Michael Nobrega,¹²⁴ Dave O'Brien and Mary-Ellen Bench.

117. The issue first arose in the context of a disagreement over director compensation for members of the Enersource board in the spring of 2007. Until that time, no one at the City took out the Shareholder's Agreement and read it comprehensively.¹²⁵

118. OMERS and the City did agree to renegotiate the Shareholders' Agreement to eliminate the veto. On January 22, 2009, Mr. Nobrega wrote a letter to the Mayor which stated that due to the expiry of the Put, OMERS is willing to discuss revising the Shareholders' Agreement, and to consider "amending or deleting the unanimous consent rights."¹²⁶ Mr. Nobrega affirmed that at a public meeting on January 22, 2009,¹²⁷ and the Committee subsequently met frequently to discuss matters. In the Mayor's view, and the evidence of Ms. Bench, the revised Agreement presented to Council was an acceptable compromise that eliminated the veto, and the City retained control over appointments to the Board.¹²⁸

119. However, the Agreement has not been approved by Council.

J. Enersource Strategic Alliance Has Worked Well for the City

120. The City/Borealis Strategic Alliance has been an excellent deal for the City, as many of the witnesses testified.

¹²³ Mayor McCallion, p. 1005, l. 7 – p. 1006, l. 3

¹²⁴ Mr. Nobrega, p. 718

¹²⁵ Ms. Bench, pp. 832-833

¹²⁶ Exhibit 57, Letter from Mr. Nobrega to Mayor McCallion

¹²⁷ Mayor McCallion, p. 1032- 1033

¹²⁸ Mayor McCallion, p. 1078, l. 16 – p. 1081, l. 20; Ms. Bench, p. 947 l. 25- p. 949, l. 5

121. Dave O'Brien called it a "wonderful" deal for the City, which resulted in a good bond issue, the City taking out cash and property, and healthy dividends.¹²⁹ He testified as follows:¹³⁰

6 Q: So given your continued involvement
7 in the industry, Mr. O'Brien, tell us how, in your view,
8 Enersource has faired since it closed this deal with
9 Borealis in 2000, as a utility and as a business
10 corporation?

11 A: Well, I can tell you that Enersource
12 continues to be spotlighted as an extraordinarily well
13 run utility, an extraordinarily successful utility. It
14 has -- I think En -- I think Enersource has benefited
15 from the relationship with Borealis and OMERS in a number
16 of ways, certainly exposing them to business
17 opportunities, particularly with respect to some
18 consulting work they may have done, or some advice they
19 may have -- they have -- may have provided.

20 It certainly has given -- I can tell you
21 that, to this day, people still talk about that deal with
22 -- with Borealis as being one (1) of the great coups of
23 this whole process, that a utility and the pension plan
24 were able to get together like this and -- and continue
25 the success. (P. 511)

1 So I would say that there's no question in
2 my mind, and -- and I would say in -- in the mind of the
3 industry today, that Enersource is still considered to be
4 a topnotch leader in the field.

122. Mr. Nobrega testified that the Enersource Strategic Alliance was an "absolutely brilliant" deal by the City of Mississauga, in which the City has received approximately \$770 million.¹³¹

123. The Mayor testified that the Enersource deal has been very successful and a great asset to the City, combining both the investment and energy expertise of OMERS with the City.¹³²

¹²⁹ Mr. O'Brien, p. 479 - 480

¹³⁰ Mr. O'Brien, p. 510, l. 6 - p. 511, l. 4

¹³¹ Mr. Nobrega, p. 714, l. 11 - p. 715, l. 21

¹³² Mayor McCallion, p. 1020, l. 14 - p. 1021, l. 3

K. Conclusion

124. The Mayor submits that the issue of the Borealis veto should have been presented to Council for approval. It was the responsibility of the City Manager and outside consultants to ensure that any major changes after November 29, 2000 were ratified by Council. The weight of the evidence is that neither the Mayor nor Council were briefed on the veto after it was first raised with Mr. O'Brien on December 3, 2000, and before the SAA was executed.

125. It is clear that Council did not approve the changes by by-law before December 6th.

126. The only evidence that Council was informally briefed on the changes is (a) Councillor Mahoney's recollection of an informal briefing where the Mayor was not present, and (b) Mr. O'Brien's statement based on his normal practice of keeping Council informed. However, the weight of the evidence of the five Councillors and the Mayor is Mr. O'Brien did not brief Council on the changes. Mr. O'Brien failed to follow his normal practice.

127. The only evidence that the Mayor might have been briefed is Mr. O'Brien's statement that it was "very probable" he told the Mayor, based on his normal practice. However, given the Mayor's evidence, and her strong reaction that a change of this nature would have required the approval of Council, the weight of the evidence is that Mr. O'Brien did not inform the Mayor. Again, Mr. O'Brien failed to follow his normal practice.

128. The detailed submissions on the evidence have been set out above. The Mayor submits that she acted properly at all times.

129. The Mayor submits that she, the Clerk and Council were entitled to rely on staff and outside legal consultants to ensure that any agreement presented for signature was the agreement that Council had approved. Council is the decision-making body of the City.

130. There was no *in camera* briefing of Council on December 6th. However, the Mayor does support a recommendation that minutes be kept of *in camera* meetings, so long as this is consistent with the *Municipal Act, 2001*. If such minutes are kept, they should be approved by Council.

June 21, 2010

ALL OF WHICH IS RESPECTFULLY SUBMITTED,


ELIZABETH McINTYRE


FREYA KRISTJANSON

AUTHORITIES

Municipal Act, R.S.O. 1990, c. M.45, as am to December, 2000

Municipal Act, 2001, S.O. 2001, c. 25, as am

Toronto Computer Leasing Inquiry Research Paper, Municipal Governance, Volume 1:
Overview of Approaches, November, 2003

The Municipal Councillor's Guide, Ministry of Municipal Affairs and Housing, Queen's
Printer for Ontario, 2007

City of Mississauga By-law 396-95

City of Mississauga By-Law 0078-2005