

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

WYMAN MACKINNON

Plaintiff

- and -

**ONTARIO MUNICIPAL EMPLOYEES RETIREMENT BOARD,
BOREALIS CAPITAL CORPORATION, BOREALIS REAL
ESTATE MANAGEMENT INC., IAN COLLIER,
R. MICHAEL LATIMER and MICHAEL NOBREGA**

Defendants

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

WHEREAS:

a) The Parties to this Action (the "Action"), Wyman MacKinnon ("MacKinnon"), Ontario Municipal Employees Retirement Board (continued as OMERS Administration Corporation pursuant to the OMERS Act, 2006) ("OMERS"), Borealis Capital Corporation and Borealis Real Estate Management Inc. ("BCC" and "BREMI" respectively) and Ian Collier, R. Michael Latimer and Michael Nobrega (the "Individuals") ("OMERS, BCC, BREMI and the Individuals being the "Defendants") and CUPE (Ontario) ("CUPE") have appointed Stanley Beck, Q.C., as mediator (the "Mediator") to facilitate settlement negotiations for an overall resolution of all matters in dispute in this Action and issues surrounding it;

b) In this Action, MacKinnon raises transactions involving the Defendants which he and CUPE question. The Action includes allegations of wrongdoing against the Defendants, which they vigorously deny;

c) The settlement process before the Mediator has been governed by the terms of the following agreements made between the parties to this action, being the Settlement Process Agreement dated April 26, 2008 (the "SPA"), the Parameters for Settlement dated November 27, 2009 (the "Parameters"), and the Agreed Approach dated May 5, 2010 (the "Agreed Approach");

d) As part of that settlement process, the Mediator has, in conjunction with the parties to this action, finalized a written report provided with his letter of recommendation to the Court dated April 5, 2012, which together set out his findings, conclusions and recommendations on the various issues that were referred to him by the Parties (and together shall be referred to as the "Mediator's Report");

e) With the Mediator's assistance, the parties to this action (collectively the "Parties") have reached an overall Settlement Agreement on the terms set out below (this "Settlement Agreement"), which resolves all issues in this Action (and issues surrounding it), subject to leave of the Court to dismiss the action on consent.

THE PARTIES HAVE THEREFORE AGREED as follows, in consideration of the mutual covenants contained herein and other valuable considerations (the receipt and sufficiency of which are hereby acknowledged):

1. RECITALS - The recitals to this Settlement Agreement are true.
2. MEDIATOR'S REPORT - In the course of the mediation and settlement process, the Defendants made sufficient disclosure of documents and information to support the findings, conclusions and recommendations expressed in the Mediator's Report. The Parties do not contest the contents of that Report.
3. DISMISSAL AND RELEASE OF ALL CLAIMS - Based upon the Mediator's Report, the Parties agree that (subject to approval of the Court), all claims made in this Action shall be dismissed on consent and that OMERS shall pay to CUPE (in addition to any amounts already paid on account of costs ordered by the Court of Appeal) \$1,115,534.69 for the costs and disbursement of the action through and to

completion, in full satisfaction of all claims by the Plaintiff and CUPE for legal fees, disbursements and taxes ("Costs") with the exception of the following:

- (a) OMERS shall pay the full costs of the Mediator, including reimbursement of CUPE for any amounts already paid by it to the Mediator; and
- (b) OMERS shall bear the costs of any notice requirements ordered by the Superior Court of Justice as part of the settlement approval motion.

MacKinnon hereby directs OMERS to pay the costs to Koskie Minsky LLP, in trust.

- 4. SOLE OTHER PAYMENT FOR LEGAL COSTS AND MEDIATOR'S FEES - The Costs are the sole monetary payment under this Settlement Agreement by any defendant apart from the Mediator's fees and disbursements.
- 5. RELEASES – Subject to paragraph 15 hereof, the Parties to this Settlement Agreement hereby remise, release, and forever discharge each other (together with their predecessors, parent companies, subsidiaries, affiliates and their respective officers, directors, employees, agents, solicitors, heirs, executors, successors, assigns, advisors and insurers) of, and from, all past, present or future claims, demands, counterclaims, liabilities, damages or other rights whatsoever that may exist, or that could arise, between them in relation to the facts and allegations pleaded, or which could have been pleaded, in the Action. No party shall bring a proceeding against any person not a party to this Settlement Agreement who might claim contribution and indemnity against a party to this Settlement Agreement in respect to the matters released herein.
- 6. REPUTATIONAL ISSUES AND JOINT STATEMENT - The Parties acknowledge and agree that, to address the Defendants' concerns that harm has been caused to the reputations of the Individuals related to allegations made in the pleadings and in media reports, the Mediator's Report (and all exhibits) and the terms of this Settlement Agreement shall become matters of public record once they have been filed with the Court. Each of the Parties further agree that any public statement

made in the future by or on their behalf regarding the terms of this settlement, the Mediator's Report, or the transactions, events, occurrences, omissions, policies, procedures or practices questioned by MacKinnon and CUPE Ontario in this action or in these mediation proceedings shall (i) not state anything inconsistent with the findings and conclusions reached in the Mediator's Report; and shall (ii) include specific language stating that such person or Party accepts the findings and conclusions expressed in the Mediator's Report and has confidence in and fully supports, the current leadership team at OMERS. Nothing in this Settlement Agreement will restrict any of the Parties from commenting on the policies or practises of OMERS regarding matters that are not raised in the pleadings, information, documents or discussions exchanged between the parties in this action and in these mediation proceedings.

7. PUBLIC STATEMENTS OF PARTIES – When the Mediator's report and this Settlement Agreement are filed with the Court, the parties shall make a joint press statement to be issued in the form attached as Schedule “A”. Each party shall also be entitled to make their own public statement or statements through the internet, press or media (“a Public Statement”) in respect of the resolution of the Action and addressing the transactions questioned in the pleadings and their impact on the Defendants' reputations, provided that, until a date (“the Date”) occurs that is 15 days after Court approval of this Settlement Agreement, the content of each such statement (and its timing for public release) shall be approved in writing by the Mediator before it is made public on notice to the opposite parties.
8. IMPROVED WORKING RELATIONSHIPS - The Parties acknowledge and agree that OMERS and CUPE have established improved working relationships with each other (in part, due to OMERS latest practices and controls on stakeholder relations, on communications with the public media, and on executive hiring). OMERS and CUPE will continue to pursue and develop better communications and working relationships between them. OMERS acknowledges that disclosure is important to stakeholders, including CUPE, in relation to, for example, transactions out of the ordinary course of business. OMERS now functions with a

Disclosure Committee which includes a number of senior executives with both financial and non-financial backgrounds who bring their knowledge and sensitivity around transparency to OMERS. Following autonomy in 2006, OMERS went through a thorough governance review which, among other things, led to a new Communications and Information Policy in 2008. Consistent with OMERS approach today, policies like this, that are a Board responsibility, are reviewed and updated regularly by the Board. Autonomy in 2006 has now also given sponsors a direct path to Board appointees which will facilitate sponsor priorities, such as disclosure, being dealt with at OMERS. As an important and valued sponsor, CUPE is encouraged to meet with Board members and management regularly, as contemplated by the Communication and Information Policy, to further the relationship, and will avail itself of OMERS expertise and information at its member or annual general meetings from time to time to discuss OMERS strategies, activities and pension administration issues.

9. COURT APPROVED SETTLEMENT - Based upon the Mediator's Report, the Plaintiff shall promptly bring a motion in this Action on consent of all parties (on a date acceptable to all counsel) for court approval of all terms of this Settlement Agreement, for the dismissal of all claims in this Action, and for approval of costs payable by OMERS to the Plaintiff pursuant to the terms set out above.
10. COURT FILINGS - Copies of the final signed version of the Mediator's Report (and all exhibits) and of this Settlement Agreement shall be filed in court as part of the Plaintiff's materials in support of that motion.
11. CO-OPERATION AND SUPPORT - The Parties agree to co-operate in support and adoption of the Mediator's Report and the Consent Order sought from the Court when the Plaintiff brings forward that motion to be heard.
12. DRAFT MATERIALS - Before the Plaintiff's motion material is filed in court, that material shall be circulated in draft to the Defendants' legal counsel to determine if it is in a form acceptable to the Defendants for the purposes of providing their consent to the Plaintiff's motion. If any differences arise on the contents of the

drafts that can not be resolved between the Parties, then the Mediator shall help them resolve their differences before the draft materials are filed in court or otherwise made public.

13. FURTHER RESOLUTION IF REQUIRED - If the Court declines to approve one or more terms of this Settlement Agreement, then the Parties will resume their settlement discussions with each other, with the Mediator's assistance if required by any party, for the purpose of entering a signed amendment to this Agreement, which shall be re-submitted to the Court for approval in accordance with the procedures for seeking court approval set out above.
14. PUBLIC COURT FILINGS - The Parties agree that, once the final signed version of the Mediator's Report (and all exhibits) and of this Settlement Agreement have been duly filed in Court pursuant to the terms of this Settlement Agreement, the written content of those documents will become a matter of public record and will no longer be subject to any confidentiality agreement or settlement privilege as between the Parties.
15. CONFIDENTIALITY AND SETTLEMENT PRIVILEGE - Subject to the preceding paragraph, the Parties acknowledge and agree that all information, documents and discussions exchanged between them through the mediation process shall remain confidential and privileged, and that the provisions set out in paragraph 2 of the SPA shall survive and continue, beyond the closing date for completing all terms of this Settlement Agreement. Prior to that closing date, each of the Parties to this Agreement shall exchange with all others a list of persons (with their current business contact information) who have had access to information, documents or discussions exchanged between the Parties in the course of this mediation process. It is understood and agreed that if any listed person (or others that may be subject to these confidentiality and privilege provisions) should disclose at any time any information or documents in breach of confidence or settlement privilege (except as may be required by law or permitted under court order), then any of the Parties harmed by such actions shall be entitled to pursue all rights, remedies, court

actions or proceedings against such persons, notwithstanding any other provisions of this Settlement Agreement or of any other agreements between the parties.

16. ENTIRE AGREEMENT – The express terms of this Settlement Agreement constitute the entire agreement between the Parties hereto. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express or implied, between the Parties other than as expressly set forth herein. The terms of this Settlement Agreement cannot be varied, amended or waived except in writing duly executed by the Parties or their counsel.
17. FURTHER ASSURANCES – The Parties shall from time to time execute and deliver all such further documents and instruments and do all acts and things as another party may reasonably require to effectively carry out or to better evidence or perfect the full intent and meaning of this Settlement Agreement.
18. GOVERNING LAW – The interpretation and enforceability of this Agreement and its terms shall be governed by, and construed in accordance with, the laws of the Province of Ontario.
19. SUCCESSORS AND ASSIGNS – This Settlement Agreement and Release shall be binding upon and shall enure to the benefit of each party, and each of their heirs or executors, or their predecessors, successor and assigns.
20. COUNTERPARTS – For the convenience of the Parties hereto, this Settlement Agreement may be executed in any number of counterparts and all of these counterparts shall for all purposes constitute one agreement, binding on the Parties, notwithstanding that all Parties are not signatory to the same counterpart.

DATED this 26th day of April, 2012.

Witness

▶ WYMAN MACKINNON

▶ **CUPE ONTARIO**



Per: Fred Hahn, President

- ▶ and by counsel to the Plaintiff and CUPE Ontario:
Koskie Minsky LLP:

Per: Mark Zigler, Partner

▶ **OMERS ADMINISTRATION
CORPORATION, a continuation of ONTARIO
MUNICIPAL EMPLOYEES RETIREMENT
BOARD**


Per:

Per: Blair Cowper-Smith, Executive Vice
President and Chief Legal Officer

▶ **CUPE ONTARIO**

Per: Fred Hahn, President

- ▶ and by counsel to the Plaintiff and CUPE Ontario:
Koskie Minsky LLP:



Per: Mark Zigler, Partner

▶ **OMERS ADMINISTRATION
CORPORATION, a continuation of ONTARIO
MUNICIPAL EMPLOYEES RETIREMENT
BOARD**



Per:


James A. Roks
Vice President, Legal
& Corporate Secretary



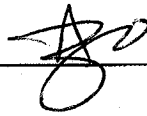
Per: Blair Cowper-Smith, Executive Vice
President and Chief Legal Officer

▶ **BOREALIS CAPITAL CORPORATION**

Per: 
Michael Rolland
Director

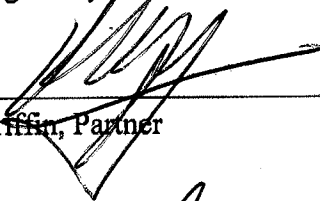
Per: 
Michael Kelly
Secretary


▶ **BOREALIS REAL ESTATE MANAGEMENT INC.**

Per: 
Bob Aziz
Executive Vice President
& Chief Legal Counsel

Per: Colin H. Loudon
Executive Vice President
& Chief Financial Officer

▶ and by counsel for the Corporate Defendants:
Lenczner Slaght Royce Smith Griffin LLP

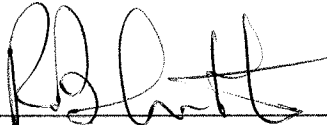
Per: 
Peter Griffin, Partner


Witness

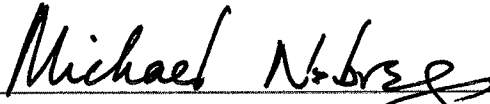
▶ **IAN COLLIER**


Witness

▶ **R. MICHAEL LATIMER**



Witness



▶ MICHAEL NOBREGA

▶ and by counsel for the Individual Defendants:
Gowling Lafleur Henderson LLP



Per: R. Bruce Smith, Partner

SCHEDULE "A" TO THE SETTLEMENT AGREEMENT

Joint Press Statement

On Filing Motion for Settlement Approval in the OMERS/Borealis litigation

A Settlement Agreement has been signed resolving litigation surrounding asset management contracts for real estate investments of the OMERS pension plan for the years 2002-2004, subject to court approval. The action was brought on behalf of the Plan's members and stakeholders and involved CUPE Ontario, OMERS, two affiliated companies (Borealis Capital Corporation and Borealis Real Estate Management Inc.), and three investment executives, Michael Nobrega, Michael Latimer and Ian Collier. The settlement was reached through a mediation process chaired by Stanley Beck, Q.C., a former Chair of the Ontario Securities Commission and former Dean of the Osgoode Law School. Today, the parties have jointly filed the Settlement Agreement for review and approval by a judge of the Ontario Superior Court of Justice.

Mr. Beck recommends the overall terms of settlement as being fair and in the best interests of all members and stakeholders of the OMERS pension plan. In his Report and letter of recommendations to the Court (his "Report and Recommendations"), Mr. Beck found no wrongdoing by any defendant. He further concluded that more detailed disclosure by OMERS fully explaining transactions and events at the time, which had not been previously supplied, may have avoided this litigation. Finally he observed that the processes in place today will help to ensure better communication and new strong governance practices will avoid these types of issues in the future.

The parties accept the findings and conclusions expressed in the Report and Recommendations.

The hearing to approve the settlement will occur on June 28, 2012.

If it is approved by the court, the settlement requires that the court action shall be dismissed and OMERS shall pay the plaintiff's costs of the litigation as the sole monetary payment made by any defendant.

OMERS and CUPE Ontario acknowledge that since the events giving rise to the litigation they have established improved working relationships and, further, the plaintiff and CUPE Ontario have confidence in, and fully support, the current leadership team at OMERS.

A copy of the Mediator's Report and Recommendations, the Settlement Agreement and other information about this representative action is available on the website of plaintiff's counsel, Koskie Minsky LLP at <http://www.kmlaw.ca/Case-Central/Overview/?rid=41>