

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

EP SECURITIES CONSULTING INC.

- and -

BOREALIS INFRASTRUCTURE MANAGEMENT INC.

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED STATEMENT OF CLAIM  
Notice of Action issued on October 27, 2010**

AMENDED THIS Jan 13, 2011 PURSUANT TO CONFORMEMENT A

MODIFIÉ CE A

RULE/LA RÈGLE 26.02

THE ORDER OF L'ORDONNANCE DU

DATED / FAIT LE Jan 13, 2011

Plaintiff

Defendant

REGISTRAR GREFFIER

SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

1. The plaintiff claims on behalf of itself and the Class (defined below):
  - (a) an order certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff of the Class;
  - (b) a declaration that the defendant Borealis Infrastructure Management Inc. ("Borealis Infrastructure") breached securities legislation and breached the Canadian Take-Over Bid Regime (defined below);
  - (c) a declaration that Borealis Infrastructure breached its contractual obligation to the Plaintiff and the Subclass Members (defined below);
  - (d) general and specific damages in the sum of \$120,000,000 or such other sum as this Honourable Court finds appropriate and an order for specific performance of the contracts described herein;
  - (e) punitive damages in the amount of \$50,000,000 or such other sum as this Honourable Court finds appropriate;
  - (f) prejudgement and postjudgement interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

- (g) costs of the action on a substantial indemnity basis or in amount that provides full indemnity;
- (h) pursuant to section 26 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (i) such further and other relief as to this Honourable Court may seem just and appropriate in all the circumstances.

### **The Parties**

2. The plaintiff EP Securities Consulting Inc. (“EP Securities”) held trust units of Teranet Income Fund (“Teranet Income”) at all material times. Borealis Infrastructure and Borealis Acquisition Corporation acquired its units pursuant to the Borealis take-over bid described below. In total, EP Securities tendered 27,000 trust units of Teranet Income to the Borealis take-over bid at a time when the bid offer price was \$11.00 per unit. The offer price was later reduced to \$10.25 and EP Securities only received \$10.25 for each of its units.

3. The defendant Borealis Infrastructure is a federally incorporated company with its head and registered offices in Toronto, Ontario. Borealis Infrastructure identifies, invests in and manages infrastructure assets on behalf of OMERS Administration Corporation (“OMERS”) which acts as the administrator for the pension plans which comprise the Ontario Municipal Employees Retirement System.

4. Borealis Acquisition Corporation was a special purpose investment entity managed by Borealis Infrastructure. Its head office and registered offices were located at Borealis Infrastructure’s office in Toronto, Ontario. They were affiliates. Borealis Acquisition Corporation was incorporated on September 4, 2008 for the sole purpose of jointly conducting the Borealis take-over bid with Borealis Infrastructure, or alternatively to permit Borealis Infrastructure to indirectly conduct the take-over bid through Borealis Acquisition Corporation.

5. Borealis Acquisition Corporation carried on no business other than that incidental to the Borealis take-over bid and it was amalgamated into Teranet Inc. on March 1, 2009. (hereinafter referred to as “Borealis Acquisition”). Borealis Acquisition (and subsequently Teranet Inc.) was at all material times completely controlled by Borealis Infrastructure and

acted as its agent. Borealis Infrastructure and Borealis Acquisition are hereafter collectively referred to as "Borealis".

6. EP Securities brings this action pursuant to the *Class Proceedings Act, 1992* on its own behalf and on behalf of all other persons and entities, wherever they may reside or be domiciled, who held trust units of Teranet Income Fund or Teranet Holdings Limited Partnership and which were taken up pursuant to the Borealis take-over bid (the "Class Members").

7. EP Securities also seek to represent a subclass of the Class Members, being those Class Members that tendered their units to the Borealis take-over bid before the announcement of a variation to the take-over bid to reduce the offer price to \$10.25 on October 28, 2010 (the "Subclass Members").

#### **Borealis' Take-over of Teranet**

8. On September 12, 2008, Borealis commenced a take-over bid for all of the outstanding trust units of Teranet Income and all of the outstanding Class B limited partnership units of Teranet Holdings Limited Partnership ("Teranet Holdings"). The take-over bid offer price was \$11 per unit for both Teranet Income and Teranet Holdings and was set to expire on October 17, 2008. The take-over bid circular boasted that the offer of \$11 per unit represented the value Borealis saw in Teranet.

9. The take-over bid also promised unitholders that they would receive \$11.00 for every unit and the offer provided certainty:

*The Offer represents an opportunity for Unitholders to receive \$11.00 in cash per Unit for 100% of their Units.*

#### ***Opportunity for Certainty of Value and Liquidity***

*Under the Offer, Unitholders are offered 100% cash consideration for all of their Units, providing Unitholders with certainty of value and liquidity at a premium to trading prices of the Trust Units prior to August 27, 2008.*

10. The take-over bid circular sent to the unitholders of Teranet Income and Teranet Holdings was attached to a cover letter on Borealis Infrastructure's letterhead and which was

signed by its chief executive officer, Michael Rolland. Mr. Rolland stated in the cover letter that Borealis Infrastructure was “presenting” the offer. In addition all of the press releases released by Borealis Acquisition in regards to the Borealis take-over bid were issued on Borealis Infrastructure’s letterhead.

11. The Borealis take-over bid was subject to certain conditions and the take-over bid circular provided that “[i]f such conditions are met, the Offeror will (unless it shall have withdrawn or terminated the Offer) become *obligated* to take up and pay for the Units validly deposited under the Offer and not withdrawn in accordance with the terms hereof.”

12. Section 4 of the circular, entitled “Conditions of the Offer”, detailed 18 conditions for the offer, which included the following:

- (a) at least 66⅔ of the units of each Teranet Income and Teranet Holdings are deposited at the time of take-up;
- (c) that the bid receive any necessary regulatory approval; and
- (o) that there should not have occurred a “financial occurrence of national or international consequence ... [that] could reasonably be expected to adversely affect, the financial or banking markets in Canada, the United States or internationally generally, or the financial condition, business, operations, assets, affairs or prospects of [Borealis Acquisition Corporation] or Borealis Infrastructure or [Teranet Income] ...” (the “Financial Occurrence Condition”).

13. All of the conditions listed under section 4 of the take-over bid circular were fulfilled, and at no point during the course of the Borealis take-over bid was it reasonable to conclude that any of the conditions had not been fulfilled.

14. A key component of the Borealis take-over bid was Borealis’ assurance that the offer was not subject to any financing condition, that the financing for the bid had already been secured, and that OMERS had given an unconditional commitment to provide the funding if necessary. Part 8 of the take-over bid circular is as follows:

#### ***8. Source of Funds***

*If the Offeror acquires all of the Units, the total amount of cash required for the purchase of the Units will be approximately \$1.7 billion.*

*A significant portion of such amount will be funded by the Offeror's (or an affiliate of the Offeror's) issuance of third party debt with the balance being paid from the Offeror's available cash resources which will be funded by OMERS. If all or a portion of such debt is not available on terms acceptable to the Offeror, OMERS has unconditionally agreed to fund such amount to the Offeror and has sufficient liquidity to do so. The Offeror's obligation to purchase the Units tendered in the Offer is not subject to any financing condition.*

*The Offeror believes that the financial condition of the Offeror and Borealis Infrastructure is not material to a decision by a holder of Units of whether to tender such Units in the Offer because: (i) cash is the only consideration that will be paid to the holders of Units in connection with the Offer; (ii) the Offeror is offering to purchase all of the outstanding Units in the Offer; (iii) the Offer is not subject to any financing condition; (iv) OMERS has agreed to provide the Offeror with the amount of cash consideration required to pay the holders of the Units in accordance with the Offer and OMERS' commitment to fund is not subject to any conditions; and (v) OMERS is rated AAA by Standard & Poor's and AAA by DBRS. [Emphasis added]*

15. On October 15, 2008, Borealis extended the expiry date for the offer to October 31, 2008. The notice of extension was made primarily to provide Borealis with further time in which to secure approval of the take-over from the Ontario government.

16. On October 28, 2008, three days before the bid's new expiry date, Borealis improperly varied the offer. It reduced the bid offer price to \$10.25 and extended the bid to November 10, 2008. In reducing the bid offer price, Borealis did not rely on any of the conditions in its original take-over bid, nor were any such conditions met. The notice of extension and variation stated the following:

*On October 28, 2008, the Offeror announced that, as a result of deterioration in economic and financial market conditions and increases in the cost of capital, it was reducing the Offer Price and extending the Expiry Date as provided for in this Notice.*

17. Borealis' October 28, 2008 press release which accompanied its notice of extension and variation was similarly worded.

18. Borealis did not explain why “increases in the cost of capital” had any effect on its take-over bid given the statements made in its bid offer that the bid was “not subject to any financing condition” and that OMERS had “unconditionally agreed to fund” the bid if Borealis was not able to secure financing on acceptable terms.

19. Further, Borealis could not rely on the Financial Occurrence Condition to justify its reduction in the offer price as the “deterioration in economic and financial market conditions and increases in the cost of capital” had begun well in advance of September 12, 2008, the date on which the Borealis take-over bid commenced.

20. On November 3, 2008, Borealis issued another press release to “remind” unitholders that its bid was to expire on November 10, 2008. In that press release, Borealis attempted to justify the reduction in the offer price by making reference for the first time to the conditions listed in section 4 of the take-over bid circular and in particular to the Financial Occurrences Condition. Borealis stated that the “material deterioration of economic conditions and financial markets and the changing forecast [had], among other things, increased the long-term cost of capital and prevented” the Financial Occurrences Condition from being fulfilled.

21. On November 11, 2008, Borealis announced that it had taken up all of the tendered units of Teranet Income and Teranet Holdings at the price of \$10.25. It advised that it would purchase the remaining units on a compulsory basis pursuant to Teranet Income’s Declaration of Trust and Teranet Holdings’s partnership agreement.

#### **Borealis’ Acquisition of Units Outside of the Bid**

22. The take-over circular provided that neither Borealis nor Borealis Acquisition had any intention of acquiring units other than by means of the take-over bid offer.

23. Despite this representation, between September 23, 2008 and October 8, 2008, Borealis purchased 2,610,200 units of Teranet Income by way of OMERS through the facilities of the Toronto Stock Exchange. Borealis purchased Teranet Income units at the following different prices:

- (a) On September 23, 2008, Borealis purchased 123,900 units of Teranet Income at an weighted average price of \$10.99, and the highest price paid for such units was also \$10.99;
- (b) On September 26, 2008, Borealis purchased 34,700 units of Teranet Income, and the highest price paid for such units was \$11.00;
- (c) On September 28, 2008, Borealis purchased 841,400 units of Teranet Income, and the highest price paid for such units was \$11.00;
- (d) On October 6, 2008, Borealis purchased 690,200 units of Teranet Income, and the highest price paid for such units was \$10.75;
- (e) On October 7, 2008, Borealis purchased 517,000 units of Teranet Income, and the highest price paid for such units was \$10.60; and
- (f) On October 8, 2008, Borealis purchased 402,900 units of Teranet Income, and the highest price paid for such units was \$10.60.

### **Breach of Contract**

24. Borealis' take-over bid offer on September 12, 2008 constituted a contractual offer to purchase the Teranet Income and Teranet Holdings units at \$11 per unit. EP Securities and the Sub-Class Members deposited their units before any reduction in the offer price. The take-over bid circular provided that the deposit of units by unit holders created a "binding agreement", and that acceptance of the Borealis take-over bid offer would result in the formation of a contract to be construed in accordance with the laws of Ontario and Canada and governed by the courts of Ontario.

25. The deposit of units thus constituted a formal acceptance of the terms of Borealis' offer at a price of \$11.00.

26. Borealis breached the terms of this contract by paying EP Securities and the Sub-Class Members a price of only \$10.25 per unit. EP Securities and the Sub-Class Members are

entitled to an order for specific performance and damages in an amount equal to \$0.75 for each unit held.

27. Borealis' breach of the contract, as well as the high-handed manner in which it did so, constitutes a breach of its contractual and common law duty of good faith to EP Securities and the Sub-Class Members.

#### **Borealis' Breach of Securities Legislation and the Canadian Take-Over Bid Regime**

28. Borealis improperly reduced the take-over bid offer price from \$11.00 to \$10.25. It breached the securities legislation and take-over bid regimes across Canada, including the following statutory and regulatory provisions:

Part XX of *Securities Act*, R.S.O. 1990, c. S. 5 ("*OSA*"); OSC Rule 62-504; CSA Staff Notice 62-305; National Policy 62-203; Multilateral Instrument 62-104; Part 13 of *Securities Act*, R.S.B.C. 1996, c.418; Part 14 of *Securities Act*, R.S.A. 2000, c. S-4; Part XVI of *Securities Act*, 1988, S.S. 1988-89, c. S-42-2; Part IX of *Securities Act*, C.C.S.M. c.S50; Title IV and Chapter III.1 of Title VIII of *Securities Act*, R.S.Q., c. V-1.1 and Regulation 62-104 respecting takeover bids and issuer bids, 2008 G.O.Q. 2, 565; Part 9 of *Securities Act*, S.N.B. 2004, c. S-5.5; Sections 95 to 99 of *Securities Act*, R.S.N.S. 1989, c. 418; Part XIX of *Securities Act*, R.S.N.L. 1990, c. S-13 and Part IX of *Securities Regulation*, C.N.L.R. 805/96; Part 12 of *Securities Act*, R.S.P.E.I. 1988, c. S-3.1 (collectively the "Canadian Take-Over Bid Regime").

29. In particular, without limitation, Borealis breached the Canadian Take-Over Bid Regime as follows:

- (a) Borealis failed to offer identical consideration to all unitholders in the context of a formal take-over bid, contrary to subsection 97(1) of the *OSA* (and the equivalent in other provinces<sup>1</sup>). Borealis purchased 2,610,200 units of Teranet Income for a price as high as \$11.00 per unit and at a weighted average price of \$10.78 per unit during the course of its take-over bid (through the facilities of the Toronto Stock Exchange). It made these purchases at a time when the offer price was \$11.00 per unit. However, the price was later reduced and those that deposited their units pursuant to the take-over bid only received \$10.25;

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<sup>1</sup> section 2.23 of Multilateral Instrument 62-104



- (b) it provided the unitholders of Teranet Income and Teranet Holdings and the market with less than two weeks to consider its offer, even though the reduction in price fundamentally altered Borealis's take-over bid. This prevented an open and even-handed bid process from taking place, contrary to the objectives behind the Canadian Take-Over Bid Regime (including those objectives set out in National Policy 62-203);
- (c) Borealis acted contrary to subsection 98.3(1) of the *OSA* (and the equivalent in other provinces<sup>2</sup>) by failing to take up and pay for units deposited at the \$11.00 offer price even though all of the conditions of the Borealis take-over bid were satisfied before or at the time of the reduction of price;
- (d) Borealis failed to take up and pay for all of the units that had been deposited before its extensions of the bid even though all of the conditions of the take-over bid had been complied with, contrary to subsection 98.3(4) of the *OSA* (and the equivalent in other provinces<sup>3</sup>);
- (e) in order to prevent other potential bidders from competing with the Borealis take-over bid, Borealis initially offered \$11.00 per unit with the intent of later reducing the take-over bid price to allow for only a short time period at the reduced price. This had the effect of preventing other potential bidders who might have been willing to make an offer price equal to or less than \$11.00 but more than \$10.25 from competing with the Borealis take-over bid. This undermined an open and even-handed bid process;
- (f) Borealis made materially misleading, inaccurate and/or untrue statements in the take-over bid circular and the notice of extension and variation, contrary to

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<sup>2</sup> section 2.32(1) of Multilateral Instrument 62-104

<sup>3</sup> section 2.32(4) of Multilateral Instrument 62-104

sections 94.2, 99(1), 122(1) and 126.2(1) of the *OSA* (and the equivalent in other provinces<sup>4</sup>). In particular and without limitation, Borealis:

- (i) stated that it did not intend to acquire any units of Teranet Income or Teranet Holdings other than by means of the take-over bid offer;
  - (ii) stated that the take-over bid represented an opportunity for unitholders of Teranet Income and Teranet Holdings to receive \$11.00 in cash per unit for 100% of their units;
  - (iii) it stated that the take-over bid provided unitholders of Teranet Income and Teranet Holdings with “certainty of value and liquidity” at a premium to trading prices of the units; and
  - (iv) it stated that it would not extend the expiry of the Borealis take-over bid if all of the terms and conditions of the offer had been fulfilled or complied with, unless it first took up all of the units then deposited under the offer and not withdrawn.
- (g) Borealis failed to send a notice of change relating to its intention to begin purchasing units of Teranet Income, contrary to section 94.3 of the *OSA* (and the equivalent in other provinces<sup>5</sup>). Borealis made purchases totalling approximately 1.8% of outstanding units despite its representation in the take-over bid circular that it had no intention of making any purchases.

30. For these breaches and others, Borealis is liable to pay compensation and/or restitution to EP Securities and the Class Members (who are “interested persons”) in an amount equal to \$0.75 for each unit held, being approximately \$120,000,000, pursuant to section 105 of *OSA* or alternatively for non-residents of Ontario, the following statutory provisions:

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<sup>4</sup> section 2.1 of Multilateral Instrument 62-104; section 3.3 of Multilateral Instrument 62-104; section 168.1 of *Securities Act*, R.S.B.C. 1996, c.418; section 221.1 of *Securities Act*, R.S.A. 2000, c. S-4; sections 55.11 and 55.13 of *Securities Act*, 1988, S.S. 1988-89, c. S-42-2; section 136(1) of *Securities Act*, C.C.S.M. c.S50; sections 196 and 197 of *Securities Act*, R.S.Q., c. V-1.1; sections 179(2) and 181 of *Securities Act*, S.N.B. 2004, c. S-5.5; section 132B(1) of *Securities Act*, R.S.N.S. 1989, c. 418; section 122(1) of *Securities Act*, R.S.N.L. 1990, c. S-13; and sections 146(1) and 151(1) of *Securities Act*, R.S.P.E.I. 1988, c. S-3.1.

<sup>5</sup> section 2.11 of Multilateral Instrument 62-104

section 115 of *Securities Act*, R.S.B.C. 1996, c.418; section 180 of *Securities Act*, R.S.A. 2000, c. S-4; section 102 of *Securities Act, 1988*, S.S. 1988-89, c. S-42-2; section 96 of *Securities Act*, C.C.S.M. c.S50; Chapter III.1 of Title VIII of *Securities Act*, R.S.Q., c. V-1.1; section 130 of *Securities Act*, S.N.B. 2004, c. S-5.5; section 99 of *Securities Act*, R.S.N.S. 1989, c. 418; section 94 of *Securities Act*, R.S.N.L. 1990, c. S-13; section 110 of *Securities Act*, R.S.P.E.I. 1988, c. S-3.1.

### **Punitive Damages**

31. Borealis engaged in deliberate, high-handed, oppressive and bad faith conduct and EP Securities and the Class Members are entitled to punitive damages. In particular and without limitation, Borealis made an initial offer of \$11.00 per unit but reduced the price on the eve of the bid's expiry and left a short period of time for investors and other potential bidders to adjust. It sought to undermine any possibility of a fair bidding process, it acted in order to prevent competing bids and to force unitholders into a situation where they would accept a lower amount than they had contemplated, and breached its contractual and common law duty of good faith to the Plaintiff and the Sub-Class Members.

32. This action is commenced pursuant to the *Class Proceedings Act, 1992*.

33. The trial of the action should take place in Toronto.

November 25, 2010

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Court File No. CV-10-413077-CP00

**EP SECURITIES CONSULTING INC.**

Plaintiff

and

**BOREALIS INFRASTRUCTURE  
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Defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

(Proceeding commenced at Toronto)

**AMENDED STATEMENT OF CLAIM**  
**Notice of Action issued on October 27, 2010**

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