3.1.2 Bennett Environmental Inc. et al.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
BENNETT ENVIRONMENTAL INC., JOHN BENNETT, RICHARD STERN,
ROBERT GRIFFITHS, AND ALLAN BULCKAERT

SETTLEMENT AGREEMENT WITH BENNETT ENVIRONMENTAL INC.

Hearing:	June 20, 2006		
Panel:	Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
	David L. Knight	-	Commissioner
Counsel:	Judy Cotte	-	On behalf of Staff of the
	Pamela Foy	-	Ontario Securities Commission
	Scott Pilkey		
	Thomas F. O`Neil III	-	For Bennett Environmental
	Erica Salmon Byrne		
	Howard Rubinoff		
	Grant V. Sawiak		

ORAL DECISION AND REASONS

The following text has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the chair of the panel for the purpose of providing a public record of the decision.

[1] CHAIR: We have considered the settlement agreement between Commission staff and Bennett Environmental Inc. We have listened to submissions of counsel for staff and submissions of special counsel for Bennett Environmental Inc. We have decided to approve the settlement agreement as being in the public interest. The facts are set out in the settlement agreement and it will form part of the record. So, I do not propose to review the facts in any detail.

[2] Broadly speaking, this case concerned Bennett Environmental Inc. and an important contract that it entered into in the United States relating to the cleaning up of an industrial site and dealing with soil contamination.

[3] The original contract may have been ambiguous but it has been admitted that the press release describing the contract left something to be desired in the disclosure. Subsequently, contract negotiations ensued between the parties and it became clear that the contract was changed significantly or novated with a new contract. Material changes did occur and there was no disclosure of those material changes until much later when finally a press release was issued.

[4] When that press release was issued, within ten days, the price of the stock fell by at least 50 percent. It turns out that key officers sold shares of the company prior to the subsequent announcement and thereby avoided losses they would have incurred had they continued to own the shares that they sold.

[5] The board of directors appointed a special committee to investigate what happened, shortly after Mr. Bulckaert became the chief executive officer. The company in effect replaced its officers with a new slate. The company subsequently has turned itself around and was described to us as a new company. It has adopted new policies and procedures with respect to disclosure, governance matters, has segregated out the duties performed in key positions, and has been extremely co-operative with the Commission from the start of the investigation.

[6] The company has suffered monetary consequences because of its actions. There was a class action lawsuit in the United States. This has recently been settled with a payment of U.S. $9,750,000, some of which was paid by the company's insurers and some of which was contributed by the company itself. In addition, the company has incurred expenses and time resources and dollars in co-operating with the Commission and in cleaning up its own act. The company has taken advantage of the credit for cooperation policy that has been put out by the Commission. Based on the facts outlined in the settlement

agreement, credit for cooperation was not the sole motivating factor for the company. It also has a genuine desire to be properly governed and to be a good corporate citizen.

[7] The settlement agreement contemplates the following sanctions: Pursuant to clause 4 of section 127(1) of the Act, within 30 days from the date of this order that we will sign, the company shall initiate a review of its disclosure and reporting practices and procedures by an independent third party, acceptable to both the company and staff, at the expense of the company; and pursuant to clause 4 of 127(1) of the Act, the company will implement any recommendations made by the independent third party that are approved by staff, within a reasonable period of time, as approved by staff.

[8] There is no provision for a monetary penalty against the company. It is appropriate that there not be a monetary penalty. This case involved personal wrongdoing by officers of the company. Monetary penalties against a company indirectly come out of the pocket of the shareholders. Monetary penalties against a company in a case like this may be appropriate to serve as a deterrent factor. We have carefully considered whether this is one where a monetary penalty against the company should have been agreed to before we approved the settlement agreement.

[9] Our jurisdiction as a securities commission is not to punish but is to protect investors. We need to look at the likelihood of future problems based on past conduct. We need to take into account real changes that are made to deal with problems that have arisen, and we need to look at the economics involved. It is not enough just to look at the immediate details of this case. We should look at the economic consequences the company has incurred in determining whether or not a monetary penalty is necessary for deterrent purposes. We are mindful that there are ongoing proceedings against the persons who were officers at the time. In this case, we agree with staff and with the submissions of counsel for the company that this is not an appropriate case for a monetary fine.

[10] This case should serve as a beacon to illustrate that the Commission's policy of credit for cooperation is a real one. It should serve as an example that where a company takes its corporate governance seriously and implements meaningful change – meaningful procedures, adopts a code of business ethics, a code of business conduct, and takes steps to ensure that its disclosure practices will meet the best of the practices adopted in the corporate world – there are significant consequences. The sanctions that we are imposing in this case are appropriate taking into account everything that has transpired.

[11] This is particularly significant because the transgressions in this case were serious. The Commission regards failure to disclose material facts as an important failure. The Commission regards failure to make timely disclosure of material changes as important, and this Commission views insiders trading on inside information before disclosure of material changes as very serious.

[12] We have described in the past illegal insider trading as being a cancer on the market causing a loss of confidence by the public in the marketplace. Appropriate sanctions, therefore, are extremely important in order to maintain and restore the public confidence. But this can be accomplished by giving appropriate credit for cooperation and by acknowledging real changes that give us a basis for believing that improper conduct will not be permitted to re-occur in the future, and by measuring the economic and other consequences already incurred by the company as a result of the misconduct in question. Consequently, we believe that the sanctions in this case are appropriate and meet the test of the public interest.

Approved by the chair of the panel on June 30, 2006.

“Paul M. Moore”