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

AND

THE SETTLEMENT AGREEMENT WITH
MURRAY HOULT POLLITT AND POLLITT & CO. INC.

REASONS FOR THE DECISION OF THE
ONTARIO SECURITIES COMMISSION

Hearing:	**Wednesday, November 17, 2004**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Vice-Chair (Chair of the Panel)**
	Robert W. Davis	**-**	**Commissioner**
	David L. Knight	**-**	**Commissioner**
Counsel:	**Kate Wooton**	**-**	**For Staff of the Ontario Securities Commission**
	David Stevens	**-**	**For Murray Pollitt and Pollitt & Co. Inc.**

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the hearing, including oral reasons delivered at the hearing on the settlement agreement between staff of the Commission and Murray Hoult Pollitt and Pollitt & Co. Inc. in the matter of Robert Cassels, Murray Hoult Pollitt and Pollitt & Co. Inc. The transcript has been edited, supplemented and approved by the chair of the panel for the purpose of providing a public record of the decision. This extract should be read together with the settlement agreement and the order signed by the panel.

Vice-Chair Moore:

[1] We have decided that this agreement is in accordance with the public interest, and, therefore, we approve the settlement agreement.

The Facts

[2] The facts are fully set out in the settlement agreement dated November 11th, 2004.

[3] Mr. Pollitt is registered in Ontario under the Act as a trading officer, and is a director and the president of Pollitt & Co. of which he is a majority shareholder.

[4] Pollitt & Co. is registered in Ontario as a securities dealer in the category of broker.

[5] The facts that gave rise to this matter occurred in 2002. In October, Scotia Capital Inc. commenced discussions with a company called United Grain Growers Limited, also known as Agricore, in respect of a $100 million convertible debenture bought deal financing. These discussions led to the formation of an underwriting syndicate to be led by Scotia and co-led by National Bank Financial. Pollitt & Co. was invited to participate in the syndicate.

[6] The key facts occurred within an hour on November 11th, 2002.

[7] At approximately 2:45 p.m. a brief conference call was convened by the lead underwriters to formally invite certain other dealers, including Pollitt & Co., to participate in the syndicate. During this call the terms of the anticipated financing were discussed.

[8] In the 15 minutes following this brief call, each of the dealers that were invited to participate, including Pollitt & Co., confirmed to the lead underwriters their participation in the deal, and at approximately 3:15 p.m. the lead underwriters presented the company with a fully syndicated bought deal.

[9] At approximately 3:26 p.m., the deal was finalized.

[10] At approximately 3:38 p.m., at Agricore's request, trading in the shares of Agricore was halted by The Toronto Stock Exchange.

[11] The underwriters and Agricore had previously discussed the issuing of a press release after the close of business at 4:00 p.m.

[12] The coupon rate on the debentures was 9%, and the conversion price was $7.50 per share. The market price at the time was $6.

[13] Mr. Pollitt concluded that the interest rate and the conversion terms would make a convertible debenture highly attractive to potential purchasers. He also considered that the convertible debenture offering would be highly dilutive to the existing shareholders of Agricore, including clients of Pollitt & Co.

[14] Mr. Pollitt called a few of his institutional clients to give them a heads-up on the forthcoming transaction.

[15] In actual fact, when the shares of Agricore resumed trading on November 12, they opened at $5.90. They closed that day at $5.31. By the close of markets on the next day, they were trading at $5.14.

[16] Pollitt & Co.'s participation in the underwriting was to be only 3% of the offering. When the lead underwriters found out shortly after 3:00 p.m. that some institutions were making inquiries about the deal and realized that the secret was out, they immediately made inquiries to find out the source of the leak.

[17] Pollitt & Co. admitted that it had given a heads-up to some of its clients.

[18] As a result, Pollitt & Co. was excluded from the underwriting syndicate and forfeited approximately $100,000 of profits it would have otherwise made.

[19] Also as a result of this matter, Pollitt & Co. has been denied participation in other underwritings and has suffered loss of fees of approximately $200,000 in addition to the $100,000 referred to previously.

Action Contrary to the Public Interest

[20] The seriousness of the conduct is undisputed. Mr. Pollitt and Pollitt & Co. have acted contrary to the provision of the Act dealing with tipping, in particular section 76(1) of the Act.

[21] In addition, the conduct is contrary to the public interest with respect to the rules and regulations relating to pre-marketing activities in the context of a bought deal as set out in National Instrument 44-101 and also contrary to sections 53(1) and 76(2) of the Act.

Seriousness of Conduct

[22] Tipping is just as serious as illegal insider trading. It is conduct that undermines confidence in the marketplace. As a result, it is in the public interest to deal swiftly and firmly with violations that constitute tipping.

Sanctions

[23] Coming to the settlement agreement, we have to decide whether or not the proposed sanctions that have been agreed to by the parties are within the parameters of acceptability to achieve the public interest goal of deterrence and prevention.

[24] In *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, (2002), 199 D.L.R. (4th) 577, at 590 to 591, the Supreme Court of Canada set out clearly that the purpose of the Commission's public interest jurisdiction under section 127 is neither remedial nor punitive. Accordingly, we have to be careful not to treat precedents with the rigour a court might treat sentencing guidelines when exercising a punitive jurisdiction.

Sanctions are for Prospective Purposes

[25] The Supreme Court of Canada stated in *Asbestos* that our jurisdiction, in the public interest, is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets. Accordingly, we really need to look to the future and determine what sanctions are appropriate to prevent and protect against future conduct by the particular respondents and as a deterrent to other participants in the marketplace.

[26] *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7747 makes it clear that each case has to be decided on its particular facts. In my view this especially applies to the appropriateness of sanctions.

[27] *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600, at 1610-1611 makes it clear that in devising sanctions to restrain as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient, “we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be. We are not prescient after all.”

[28] In *Mithras*, the Commission went on to observe as to certain factors that were relevant in that particular case based on past conduct that would help the Commission to decide what was likely to happen in the future and what sanctions would be appropriate.

Seriousness of Tipping

[29] In *Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133, at 1134 this Commission stated:

> We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace where illegal insider trading has been admitted. In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that the proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents.

[30] As I said earlier, we regard tipping as seriously as we do illegal insider trading. The quote from *Cowpland* is equally applicable to the case before us today.

Appropriate Factors for Sanctioning

[31] In *Belteco* the Commission set out six factors that may be relevant in considering appropriate sanctions: 1) the seriousness of the allegations; 2) a respondent's experience in the marketplace; 3) the level of a respondent's activity in the marketplace; 4) whether or not there has been a recognition of the seriousness of the improprieties; 5) whether or not the sanctions imposed may serve to deter not only those involved in the case being contested but any like-minded persons from engaging in similar abuses in the capital markets; and, 6) any mitigating factors.

[32] *Cowpland* set out six additional factors that may also be relevant: 7) the size of any profit or loss avoided from the illegal conduct; 8) the size of any financial sanctions or voluntary payment when considering other factors; 9) the effect any sanction might have on the livelihood of a respondent; 10) the restraint any sanctions may have on the ability of a respondent to participate without check in the capital markets; 11) the reputation and prestige of the respondent; and, 12)the shame or financial pain that any sanction would reasonably cause to the respondent and the remorse of that respondent.

Acceptability of Agreed Sanctions

[33] The role of the Commission in reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters: *Re Sohan Singh Kooner et al*, (2002) 25 O.S.C.B. 2691 at 2692.

[34] We believe it is particularly important in this case to give great weight to staff's views of what might happen in the future with respect to these respondents. Staff has worked closely with the respondents over the last two or three months in coming to the settlement agreement. While this panel must form its own opinion and needs to look at all factors and the views of staff are only one of those factors – in this case we do give great weight to the views of staff.

[35] The agreed sanctions are at the lighter end in the panoply of severity that has been applied in past cases. We agree with staff and respondents' counsel that there are significant mitigating factors in this case.

[36] The conduct complained of was an isolated incident. It occurred over a very short period of time, and the respondents have been most cooperative right from the start.

[37] One of the objectives of law enforcement is speed and efficiency. We note that the statement of allegations in this matter was issued three months ago and this matter was ready to be brought on in short order. Therefore, the cooperation of the respondents has been significant in meeting the objective of a speedy resolution of this matter.

[38] We note that Pollitt & Co. is a relatively small dealer and has suffered substantial financial pain as a result of the conduct it has engaged in because of the adverse publicity and the immediate impact on its business.

[39] We note also that immediately upon the matter coming to light, Pollitt & Co. retained Cassels Brock Regulatory Consultation Inc. to review its practices and procedures and has agreed, as part of the sanctions, to have the recommendations made by the consulting firm reviewed to see that they have been properly implemented.

[40] We note that the conduct of the respondents was not directly for their own profit but was for the profit of their clients, and, in particular, they do not appear to have made any financial gains from their wrongdoing.

[41] The respondents have not been the subject of any proceedings before the Commission or, as far as we know, any other regulatory body. So, as I said before, this does appear to be an isolated incident.

[42] The respondents recognize the seriousness of what they have done.

[43] We believe that the sanctions proposed are appropriately proportionate with regard to these respondents.

[44] Accordingly, we will issue an order to the following effect as agreed to in the agreed statement of facts: 1) pursuant to clause 1 of subsection 127(1) of the Act, the registration of the respondent Murray Pollitt as a trading officer will be suspended effective the close of business today for a period of 30 days; 2) pursuant to subsection 127(2) and further to a review of its practices and procedures in 2002 and 2003, Pollitt & Co. will retain Cassels Brock Regulatory Consulting Inc., at its sole expense, to ensure that its revised practices and procedures have been properly implemented and to ensure that compliance staff and trading officers are properly trained in their obligations, roles, and responsibilities; 3) pursuant to clause 6 of subsection 127(1) of the Act, the respondents will be reprimanded by the Commission; and, 4) pursuant to section 127.1 of the Act the respondents or either of them will make payment by certified cheque to the Commission in the amount of $27,000 in respect of a portion of the costs of the investigation and proceeding in relation to this matter.

[45] Before I ask Mr. Pollitt to rise so I can admonish him and administer the reprimand, Commissioner Davis has a comment.

Commissioner Davis:

[46] Thank you, Mr. Chair. In considering the evidence before us, in particular that there is no direct benefit that has been derived - and in fact there have apparently been substantial costs to the respondents of $327,000 based on the evidence - I certainly agree that the proposed sanctions are appropriate.

[47] I'd like to observe, however, that there were obviously reputational costs. Those are difficult to measure. But motivation to do this might go beyond direct benefits and include indirect – and, again, probably immeasurable – benefits, the major one of which could be or would be maintaining or enhancing the goodwill of clients. So I'd just like that comment to be on the record.

Vice-Chair Moore:

[48] Mr. Pollitt, you and Pollitt & Co. are hereby reprimanded. I know that you understand the seriousness of what you have done and that you intend, henceforth, to keep your previously unblemished record free from blemish. Thank you. You may sit down.

Approved by the chair of the panel on November 17th, 2004.

“Paul M. Moore”

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Paul M. Moore, Vice-Chair