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

- and –

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

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SETTLEMENT HEARING RE: ROBERT GRIFFITHS

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Hearing:	November 30, 2006	
Panel:	Paul M. Moore, Q.C., Chair Robert L. Shirriff, Q.C., Commissioner David L. Knight, Commissioner	
Appearances:	Pamela Foy Scott Pilkey	On behalf of Staff of the Commission
	John Contini Nairn Waterman	On behalf of Robert Griffiths

ORAL RULING 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.

Chair:

[1] We approve the settlement agreement as being in the public interest.

[2] We order that the transcript of this hearing be kept confidential except to the extent excerpts are published in the Bulletin to reflect our decision and reasons.

[3] This settlement agreement is one of four settlement agreements in this matter. Two settlement agreements were reached last June with Bennett Environmental Inc. and with Allan

Bulckaert. Yesterday we approved a settlement agreement with John Bennett. In approving the three settlements we gave reasons, and those reasons are relevant to our reasons today.

[4] The settlement agreement with Mr. Griffiths will be on the web site and will be published in the Bulletin. Therefore, I'm not going to outline all the facts surrounding this matter. I will highlight them briefly.

[5] The case involves late disclosure by Bennett Environmental and its officers and directors of problems in respect of a contract that was quite important to the company. Prior to the company making disclosure of the issues surrounding the contract and the dispute, certain activities took place. Once the contract dispute was disclosed publicly the price of the company's shares fell almost 50 percent within the next ten days.

[6] Mr. Griffiths, as vice president US sales of the company, had primary responsibility for the contract. He was originally hired by the company as an intern in March 1999, following completion of his university studies in environmental science. This was his first job and he had never been employed as an employee, officer or director of a public company.

[7] Mr. Griffiths admits that he was aware of the existence and nature of the dispute surrounding the contract during the material time.

[8] He admits that the existence of the dispute over the contract constituted a material change within the meaning of the Securities Act, which the company failed to disclose contrary to section 75 of the Act and contrary to the public interest.

[9] Mr. Griffiths acknowledges that he authorized, permitted or acquiesced in the company's failure to disclose the material change forthwith, and thereby committed an offence under section 122(3) of the Act, and acted contrary to the public interest.

[10] Mr. Griffiths also admits that the company's continued reporting of certain matters relating to the contract was misleading or untrue, contrary to section 122(1B) of the Act and contrary to the public interest.

[11] Mr. Griffiths acknowledges that he authorized, permitted or acquiesced in the misleading or untrue disclosure regarding the contract, and thereby committed an offense pursuant to section 122(3) of the Act, and acted contrary to the public interest. He admits that the existence of the dispute also constituted the material fact within the meaning of the Act that had not generally been disclosed.

[12] During the material time, Mr. Griffiths exercised options to acquire and then sold a total of 45,600 shares of the company while in possession of knowledge of some or all of the aforementioned material facts and material change, contrary to section 76 of the Act.

[13] In the settlement agreement, Mr. Griffiths has agreed to a 15-year trading ban and a 15-year ban on acting as a director or officer of a company. He has also agreed to pay to the Commission the sum of $150,000 as an administrative penalty.

[14] In addition, Mr. Griffiths has agreed to pay to the Securities and Exchange Commission of the United States $50,000 in settlement of the SEC's allegations against him.

[15] Mr. Griffiths' loss avoided on the sale of his shares of the company was approximately $729,000. His actual after-tax profit on the sale of those shares was approximately $378,000.

[16] Staff has submitted that although the quantum of the agreed-upon settlement payment diverges from the practice of a payment equal to one and a half times the profit made or loss avoided, it is appropriate when viewed as part of the overall settlement achieved in the circumstances, and is in the public interest. We agree with staff.

[17] While ignorance of the law is no excuse, and illegal insider trading is not something that we should tolerate, we must take into account all facts and circumstances in determining whether sanctions in any case are appropriate.

[18] In *Re: M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 at paras. 9-10 (O.S.C.), we 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. … In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionally appropriate with respect to the circumstances facing the particular respondents."

[19] The Commission, in that case, set out six factors that might be relevant in setting sanctions. In *Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at paras. 23, 25 (O.S.C.) the Commission set out six other factors that may be relevant.

[20] Some of those factors referred to in the two cases are: the seriousness of the allegations, the respondent's experience in the marketplace, the level of the respondent's activity in the marketplace, whether or not there has been a recognition of the seriousness of the improprieties, whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets, and any mitigating factors.

[21] Another matter to be considered is the affect any sanction might have on the livelihood of a respondent.

[22] Mr. Griffiths received the options as part of his remuneration package. He sold them and traded the shares immediately to pay for the shares issued under the options. He was not a frequent player in the marketplace. Indeed, he was inexperienced in the marketplace, and inexperienced with securities laws.

[23] He was an intern at one time and this was his first job. He was fresh out of university.

[24] We do not see his conduct as malicious or devious. Indeed, he reported what he was doing to the company's chief financial officer, Mr. Stern, and received permission to go ahead and do what he did.

[25] We have heard from Mr. Griffiths and we believe that there is a recognition now of the seriousness of the impropriety that he was involved in.

[26] I'm going to also deal with some other mitigating factors that we believe are relevant.

[27] Mr. Griffiths had primary responsibility for the contract in question, but he was not responsible for drafting the company's press release that gave the disclosure that is questionable. He was only occasionally consulted by the company's disclosure committee regarding press releases in connection with the contract.

[28] As I previously mentioned, he had no background or training in securities laws. He was hired as an intern fresh out of university and had never been an employee, officer, or a director of a public company. He held an honest but mistaken belief that the contract issues were not serious because they would be resolved in favour of the company.

[29] As I previously mentioned, he was required to seek the approval of the company's chief financial officer, Mr. Stern, prior to the exercise of the options, and he did this.

[30] We heard today that Mr. Stern was aware that these options would be exercised and the shares sold immediately to pay the exercise price, and that Mr. Stern raised no issue with respect to Mr. Griffiths' proposed sale of the shares.

[31] As I previously mentioned, the options were provided to him as part of his remuneration package, and were not market options that he purchased in the market.

[32] It was Mr. Griffiths' practice to exercise employee options and sell the shares at the earliest available opportunity in part in order to have funds available to pay the applicable income taxes.

[33] Upon being advised of staff's investigation, Mr. Griffiths immediately indicated his willingness to cooperate and to settle the issues raised by staff. He has performed or acted in accordance with the Commission's policy of credit for cooperation.

[34] Our jurisdiction is not punitive, it is preventive and protective. As stated in *Belteco*, the Commission is not prescient. We're not in a position to know for certain what may happen in the future with respect to Mr. Griffiths' conduct. But we can look to past conduct as an indication of what might happen in the future. In this case, we believe that it is unlikely that Mr. Griffiths will not have learned from his mistakes, and unlikely that he will cause the market problems in the future.

[35] However, we also are mindful of the fact that we don't know for sure, that illegal insider trading is serious, and that an appropriate message has to be given to like-minded persons who may consider the risks involved in violating the Securities Act. The message must be out there

that there are consequences to breaches of the Securities Act and that the wager is not that you get to keep what you make illegally unless you're caught, and then you only have to give back the profit you make.

[36] So the normal rule of thumb – of a multiple on the profit made or the loss avoided that we generally like to see applied in insider trading cases – is a good one, but it's not sacrosanct.

[37] We have to go back to the appropriate factors and the purpose of our jurisdiction. Taking into account Mr. Griffiths' personal financial circumstances and the evidence that was provided to us on that, we are satisfied that he cannot reasonably afford to pay more than the $150,000 he's agreed to pay to the Commission and the $50,000 he's agreed to pay to the SEC.

[38] We are satisfied that the deviation from the norm of one and a half times loss avoided or profit made is an appropriate deviation in this case.

[39] With respect to the ban on acting as an officer or director for 15 years, and the ban on trading in securities for 15 years with a minimal carve out, again, we are satisfied that taking everything into account, this is appropriate.

[40] But we do believe that the time might arise, in perhaps five years, when it would be appropriate, if requested, for the Commission to consider varying the order that we will be issuing today, varying the order pursuant to section 144 of the Act to allow Mr. Griffiths to act as an officer or director of a company or to trade without restriction.

[41] We are not predicting that this would be granted by any panel in the future, but after five years, depending on the circumstances presented to the Commission, we would anticipate that a good set of facts may well see the relief granted. One may look upon these five years as a probationary period.

[42] We are prepared to approve the settlement without changing the 15 years of the two bans because the role of a Commission panel in reviewing a settlement 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. That is why we are approving the settlement agreement that has been agreed to by staff and by Mr. Griffiths, represented by eminent and competent counsel.

[43] We also note that in *Re: Pollitt et al* (2004), 27 O.S.C.B. 9643 at para. 25 (O.S.C.), the Commission stated that the potential likelihood of future violation by a respondent should be given considerable weight. And this we have done and this we believe staff has done in coming to the settlement agreement.

[44] Finally, Mr. Griffiths is at the beginning of his career. This has been an unfortunate episode in his business life. The consequences to him have been quite severe, but we believe that it is in the public interest to allow him to get on with his life, subject to the terms of our order, and our statements on the possibility of variation of the order under section 144.

[45] Mr. Shirriff, would like to add some additional reasons?

Mr. Shirriff:

[46] Thank you. I concur with the reasons delivered by the Chair of the panel, and I do agree that we should approve this settlement as being in the public interest.

[47] I was concerned at one point during the hearing that perhaps the proposed sanctions were inappropriate in that they were too severe, but having listened to the submissions of counsel, I'm prepared to approve the settlement.

[48] However, when I consider the mitigating circumstances that have been outlined and addressed by the Chair of the panel, and also the testimony of Mr. Griffiths himself, I am convinced that he has made a mistake. I believe he understands the nature of that mistake. As the Chair has said, I believe he deserves a new start in life. He has set about doing that. He has some very serious financial commitments in respect of his family and he's going to need help with all of this.

[49] And so, speaking for myself, I would encourage him, at the appropriate time, to seek counsel's advice to make a section 144 application to vary this decision, so as to – if not remove, certainly cut down – these two bans imposed upon him.

[50] Also, when he is allowed to begin trading in his RRSP, I would again encourage him to come forward and ask that the strictures on the trading be loosened so that there are more carve outs, giving him a little more freedom to trade in his own account for the benefit of himself and his family.

Chair:

[51] Commissioner Knight?

Mr. Knight:

[52] I, too, support the reasons as given by Vice Chair Moore. I see little point in echoing what Commissioner Shirriff said because I share his views. I will content myself in saying that I support the views and additional reasons expressed by the Vice-Chair and Commissioner Shirriff.

Chair:

[53] I also agree with the additional reasons stated by Commissioner Shirriff.

[54] I would encourage an early expanding of the carve outs for trading in Mr. Griffiths' RRSP to at least accord with some of the carve outs that were granted in *Valentine*, 28 O.S.C.B. 59 (O.S.C.) and in *Joseph Allen*, (2006), 29 O.S.C.B. 3944 (O.S.C.), even before the two years referred to in the order.

[55] Finally, with respect to the five years probationary period I previously mentioned, it may be appropriate to abridge it in special circumstances. For example, because of an employment situation, it might make sense for a small non-public company to somehow involve Mr. Griffiths as an officer or director. Then, a variation of the order may be appropriate.

[56] These bans of 15 years, and the five years probationary period, should not be taken with the same degree of absoluteness that we would expect them to have in some of the other cases that come before us.

Approved by the chair of the panel on December 12, 2006.

PAUL M. MOORE