



Ontario  
Securities  
Commission

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**IN THE MATTER OF THE *SECURITIES ACT*,  
R.S.O. 1990, c.S.5, as amended**

**AND**

**IN THE MATTER OF  
ROBERT WAXMAN**

**SETTLEMENT AGREEMENT**

**I. INTRODUCTION**

1. By Notice of Hearing dated August 30, 2000, Amended Notice of Hearing dated December 9, 2005 and Amended Notice of Hearing dated August 9, 2007 (the "Amended Notice of Hearing"), the Ontario Securities Commission (the "Commission") announced that it proposed to hold a hearing in the matter of Philip Services Corp, Allen Fracassi, Philip Fracassi, Marvin Boughton, Graham Hoey, Colin Soule, Robert Waxman and John Woodcroft (the "Respondents") to consider whether, pursuant to subsections 127(1) and 127.1(1) of the *Securities Act*, R.S.O. 1990, c.S.5, as amended (the "Act"), it is in the public interest for the Commission to make an order that:
  - (a) the Respondents cease trading in securities, permanently or for such time as the Commission may direct;
  - (b) the individual Respondents are prohibited from becoming or acting as a director or officer of any issuer;
  - (c) the individual Respondents resign any positions they may have as a director and/or officer of any issuer;

- (d) the Respondents be reprimanded;
  - (e) the Respondents, or any of them, pay the costs of Staff's investigation and this proceeding; and/or
  - (f) such further orders as the Commission may deem appropriate.
2. On November 25, 2005, the OSC approved a Settlement Agreement with Colin Soule.
  3. On March 3, 2006, the OSC approved a Settlement Agreement with Allen Fracassi, Philip Fracassi, John Woodcroft, Graham Hoey and Marvin Boughton.
  4. On April 25, 2007, the OSC withdrew its allegations against Philip Services Corp.

## **II. JOINT SETTLEMENT RECOMMENDATION**

5. Staff of the Commission ("Staff") agree to recommend settlement of the proceedings initiated against Robert Waxman ("Waxman") by the Amended Notice of Hearing in accordance with the terms and conditions set out below. Waxman consents to the making of an order against him in the form attached as Schedule "A" on the basis of the facts set out in Part III below.

## **III. STATEMENT OF FACTS**

6. For the purposes of this Settlement Agreement only and any order of the Commission contemplated hereby, Waxman agrees with the facts and conclusions set out in Part III of this Settlement Agreement.

### **Background**

7. Philip Services Corp. ("Philip" or the "Company"), was, at all material times, a reporting issuer in Ontario, Alberta, British Columbia, Quebec, Saskatchewan, Nova Scotia and Newfoundland. Philip's common shares were listed for trading on the Toronto Stock Exchange, the Montreal Exchange and the New York Stock Exchange under the symbol

PHV. At all material times, Philip was a corporation amalgamated under the laws of the Province of Ontario, with its head office in the City of Hamilton, in the Province of Ontario. Prior to May, 1997, Philip operated its business under the name of Philip Environmental Inc.

8. Philip was an integrated resource recovery and industrial services company providing, amongst other things, metal recovery and processing services to major industry sectors throughout North America. It was portrayed as one of North America's leading suppliers of metals recovery and industrial services. For the year ended December 31, 1997, Philip reported revenues of U.S. \$1.75 billion, of which U.S. \$1.1 billion was attributed to the Company's Metals and Recovery Group (the "Metals Group"). All currency is in USD unless otherwise indicated.
9. In 1997, Philip's business was organized into two operating divisions – the Metals Group and the Industrial Services Group ("ISG"). The Metals Group was Philip's largest operating division, accounting for more than 60% of the Company's revenue in 1996 and 1997.
10. Waxman was a Director of Philip and was the President of the Metals Group. In late September 1997, he was asked to relinquish his day-to-day duties and signing authority, and voluntarily agreed to do so, although this fact was not publicly disclosed.
11. Philip announced that Waxman had resigned as a Director of Philip and as President of the Metals Group in a press release dated January 5, 1998.
12. Allen Fracassi ("A. Fracassi") and Philip Fracassi ("P. Fracassi") are brothers and were the founders of a company purchased by Philip. A. Fracassi was the President, CEO and a Director of Philip. P. Fracassi was the Executive Vice-President, Chief Operating Officer and a Director of Philip.
13. Howard Beck ("Beck") was the Chairman of Philip's Board of Directors and a member of Philip's Audit Committee.

14. Marvin Boughton ("Boughton") was the Executive Vice-President and Chief Financial Officer ("CFO") of Philip. Boughton was a chartered accountant.
15. Peter Chodos ("Chodos") was the Executive Vice-President, Corporate development of Philip.
16. Felix Pardo ("Pardo") was a Director of Philip.
17. Colin Soule ("Soule") was the General Counsel, Executive Vice-President and Corporate Secretary of Philip.
18. Herman Turkstra ("Turkstra") was a Director of Philip and one of Philip's outside legal counsel.
19. John Woodcroft ("Woodcroft") was the Executive Vice-President, Operations of Philip.

#### **The November 1997 Offering**

20. On November 6, 1997, Philip made a public offering of 20 million common shares (the "November Offering"), 15 million of which were sold in the United States and 5 million of which were sold in Canada and internationally. The November Offering raised approximately \$364 million and closed on or about November 12, 1997. The price per each offered common share was \$16.50.
21. In connection with the November Offering, on October 24, 1997, Philip filed an amended preliminary prospectus with the Commission. Philip subsequently filed a final Prospectus (the "Prospectus") with the Commission and obtained a final receipt on November 6, 1997. As required pursuant to section 58 of the Act, the Prospectus contained an Issuer's Certificate signed by A. Fracassi, the CEO, Boughton, the CFO, and two directors, Waxman and Herman Turkstra, on behalf of Philip's Board of Directors. A registration statement (the "Registration Statement") was filed with the United States Securities and Exchange Commission (the "SEC") on or about November 6, 1997.

## **The Restructuring and Special Charges**

### **A. Overview**

22. On January 26 and 27, 1998, 11 weeks after the Prospectus was filed with the Commission, Philip issued two press releases announcing that the Company would be taking a restructuring charge. In the January 26, 1998 press release, Philip disclosed that it would be taking a restructuring charge and a charge relating to material financial transactions (the "Special Charges"). On January 27, 1998, Philip issued another news release further explaining these charges.
23. The failure to disclose the restructuring charge and the inappropriate accounting treatment of the many material financial transactions, as subsequently corrected in 1998 as part of the Special Charges, caused the financial statements contained in the Prospectus to be incorrect.
24. On Friday, January 23, 1998, the closing price for Philip's shares on the TSE was \$18.90. On January 27, 1998, following the announcements of January 26 and 27, Philip's common shares on the TSE closed at \$12.00.

### **B. The Restructuring Charge**

25. In the 10-K filed with the SEC on April 1, 1998, Philip explained the restructuring charge.

As at December 31, 1997, the Company recorded a pre-tax charge of \$155.7 million (\$117.1 million after tax) reflecting the effects of (i) restructuring decision made in its Industrial Services Group following the mergers of All Waste and Serv-Tech, (ii) integration decisions in various of its acquired Metals Services Group businesses, the most significant of which were acquired in late October 1997 and (iii) impairments of fixed assets and related goodwill resulting both from decisions to exit various business locations and dispose of the related assets, as well as assessments of the recoverability of fixed assets and related goodwill of business units in continuing use.

All businesses assessed for asset impairment were acquired in purchase business combinations and, accordingly, the goodwill that arose in those transactions was included in the tests for recoverability. Assets to be disposed of were valued at the estimated net realizable value while the value of the assets of the business units to be continued were assessed at fair value principally using discounted cash flow methods.

26. In the late summer of 1997, Philip commenced a process to identify and calculate potential items to be included in a restructuring charge. This process involved Philip finance employees, in consultation with the various divisions, including the Metals Group of which Waxman was the President, creating spreadsheets that identified items, including dollar amounts, that should form part of the restructuring charge. The restructuring charge calculated during the course of this process was similar to the amounts ultimately announced on January 26 and 27, 1998.
27. The final restructuring charge announced by Philip with respect to the two operating divisions, ISG and the Metals Group (of which Waxman was the President), amounted to \$101.298 million and \$54.422 million respectively for a total of \$155.720 million.
28. Waxman, as Director of Philip and President of the Metals Group, acted contrary to the public interest by failing to ensure that Philip filed financial statements in the Prospectus that contained full, true and plain disclosure of a restructuring charge in the amount of \$155.720 million.

**C. The Special Charges in Respect of Material Financial Transactions**

29. In the financial statements for the year ended December 31, 1997, as audited by Deloitte, Philip explained the Special Charges in respect of certain material financial transactions, which related primarily to its copper business. In addition to the restructuring charge, the major components of the Special Charges regarding the Inventory and Related Accounts (the "material financial transactions"), as disclosed by Philip in the Form 10-K and the Form 10-K/A, are as follows:

	(\$US'000)
Non-recurring charges recorded as operating expenses (including CIBC \$10 million and CCG \$30 million)	\$ 78,260
Costing errors recorded as operating expenses	32,875
Previously incurred but unrecorded trading losses resulting from speculative trading of copper cathode, recorded as special charges (including Holding Certificates \$31 million, Pechiney \$29 million and other "Cathode Trading Losses")	92,235
Overstatement of revenue and accounts receivable, recorded as adjustments to revenue, of which \$22.114 million is separately identified.	<u>31,622</u>
TOTAL	<u>\$ 234,992</u>

30. The Special Charges caused Philip to restate its comparative financials for the fiscal years ending December 31, 1996 and December 31, 1995, as they were inaccurate. The inaccurate financial statements for the fiscal years ending December 31, 1996 and December 31, 1995 were contained in the Prospectus.
31. The accounting irregularities amounted to approximately \$110 million of the total \$234.992 million of Special Charges relating to material financial transactions. None of the items identified below were properly disclosed in the financial statements that were contained in the Prospectus. The items relating to the Waxman and the Metals Group are as follows:
- a) Holding Certificates
  - b) Reversal of Invoices from Pechiney World Trade (USA), Inc. ("Pechiney")
  - c) Commodity Capital Group Metals Inc. ("CCG")
- a) Holding Certificates
32. At various times, Philip financed its operations with the use of holding certificates signifying that the inventory being held by Philip was the property of the customer. The Special Charges included an amount in respect of certain holding certificates issued in 1996 representing a total invoice value of approximately \$31 million which were issued to the following customers: \$8.8 million to Conversion Resources Inc. ("Conversion"); \$7.2 million to Pechiney; \$3.5 million to Pechiney; \$1.2 million to MIT; \$3.4 million to

Parametal; \$1.9 million to Kataman Metals Inc. ("Kataman") and \$4.7 million to Southwire.

33. The use of holding certificates involved the "sale and purchase" of metal inventory without a corresponding physical movement of the inventory and would immediately generate cash for Philip. These transactions were recorded by Philip as sales and the liability to repurchase the inventory was never recorded. However, given the liability to repurchase the inventory, these transactions should have been recorded as financing arrangements.
  34. The majority of the holding certificates were signed by Waxman and Rik Barrese, Metals Manager, who reported to Waxman. Other documents were signed by employees who reported to Waxman, Boughton and A. Fracassi.
  35. Waxman, as Director of Philip and President of the Metals Group, acted contrary to the public interest by failing to ensure that Philip filed financial statements in the Prospectus that contained full, true and plain disclosure of approximately \$31 million for holding certificates.
- b) Reversal of Invoices – Pechiney
36. In early 1997, McQuillan made an adjustment to the 1996 results in the amount of approximately \$29 million in order to increase profits. McQuillan achieved this by reversing seven invoices for the purchase of copper cathode from Pechiney. Consequently, the cost of sales and liabilities for 1996 were both understated in the amount of approximately \$29 million. The Pechiney transactions, as purchases of copper cathode, were transactions of the Metals group and fell under the control and supervision of Waxman.
  37. Ultimately, in or around April of 1997, Philip re-recorded the previous reversal of the Pechiney invoices and paid the \$29 million due to Pechiney. Consequently, the cost of sales for 1997 were overstated in the amount of approximately \$29 million, which offset



the 1996 understatement of the same amount. This also was to correct the 1996 understatement of liabilities.

38. Although the under and overstatements of cost of sales for 1996 and 1997 were offsetting, the purchases and repayments involving Pechiney were not properly recorded in the Company's financial statements for the year ended December 31, 1996 and for the quarters ended March 31, 1997, June 30, 1997 and September 30, 1997, and therefore these financial statements were misleading and not accurate.
  39. Waxman, as Director of Philip and President of the Metals Group, acted contrary to the public interest by failing to ensure that Philip filed financial statements in the Prospectus that contained full, true and plain disclosure of approximately \$29 million of unrecorded liabilities for invoices issued by its supplier, Pechiney, in 1996.
- c) Commodity Capital Group Metals Inc. ("CCG")
40. Due to its continuing cash flow shortages, Philip began negotiating a financing transaction with CCG, a corporation based in New York. In August and September of 1997, CCG provided approximately \$31 million in financing to Philip. In addition to the amount advanced from CCG, Philip also paid to CCG interest payments totalling approximately \$1.6 million. These transactions were negotiated by Waxman.
  41. Pursuant to these agreements, Philip agree to sell "commodity lots" (scrap metal) to CCG at the market value of the commodity. At a later date, Philip was obliged to repurchase the commodity lots at the same price at which Philip sold them, plus interest. Philip negotiated two such transactions, one commencing in August 1997 and one in September 1997.
  42. For both transactions, Philip's underlying liability to repurchase the inventory was not recorded. For the year ended December 31, 1997, the failure to record the underlying liability for the first transaction caused an overstatement of revenue of \$25.225 million

and a corresponding understatement of liabilities, and for the second transaction resulted in the inappropriate capitalization of Philip's payment for the inventory.

43. The financial statements that were contained in the Prospectus were misleading and not accurate due to the inappropriate accounting treatment of the CCG transaction.
44. After Philip filed its Form 10-K in March of 1998, an adjustment of approximately \$30 million was taken by Philip regarding the CCG transaction which was described as an unrecorded liability. The adjustment triggered the recall of Philip's Form 10-K and Deloitte's opinion on the financial statements contained in the Form 10-K.
45. Waxman, as Director of Philip and President of the Metals Group, acted contrary to the public interest by failing to ensure that Philip filed financial statements in the Prospectus that contained full, true and plain disclosure of a financing arrangement between Philip and CCG in the approximate amount of \$30.222 million.

#### **IV. TERMS OF SETTLEMENT**

46. Waxman agrees to the following terms of settlement:
  1. The Commission will make an Order:
    - a) approving the Settlement Agreement;
    - b) pursuant to clause 8 of subsection 127(1) of the Act, Waxman will be prohibited from becoming or acting as a director or officer of any reporting issuer for a period of twenty years commencing on the date that this Settlement Agreement is approved;
    - c) pursuant to clause 2 of subsection 127(1) of the Act, Waxman will be prohibited from trading in securities for a period of ten years, commencing on the date that this Settlement Agreement is approved;

- d) pursuant to clause 6 of subsection 127(1) of the Act, Waxman will be reprimanded; and
- e) pursuant to section 127.1 of the Act, Waxman will pay costs to the Commission in the amount of \$125,000.

**V. STAFF COMMITMENT**

- 47. If this settlement is approved by the Commission, Staff will not initiate any proceeding under Ontario securities law in respect of any conduct or alleged conduct of Waxman in relation to the facts set out in Part III of this Settlement Agreement, subject to the provisions of paragraph 51 below.

**VI. PROCEDURE FOR APPROVAL OF SETTLEMENT**

- 48. Approval of this Settlement Agreement shall be sought at the public hearing of the Commission in accordance with the procedures described in this Settlement Agreement.
- 49. Staff and Waxman agree that this Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing.
- 50. If this Settlement Agreement is approved by the Commission, Waxman agrees to waive his rights to a full hearing, judicial review, or appeal of the matter under the Act.
- 51. Staff and Waxman agree that if this Settlement Agreement is approved by the Commission, neither Staff nor Waxman will make any public statement inconsistent with this Settlement Agreement.
- 52. If this Settlement Agreement is approved by the Commission, and at any subsequent time Waxman fails to honour the terms of the settlement set out in Part V herein, Staff reserve the right to bring proceedings under Ontario securities law against Waxman based on, but not limited to, the facts set out in Part III of the Settlement Agreement, as well as the breach of the Settlement Agreement.

53. Whether or not this Settlement Agreement is approved by the Commission, Waxman agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

## **VII. DISCLOSURE OF AGREEMENT**

54. If, for any reason whatsoever, this Settlement Agreement is not approved by the Commission or an order in the form attached as Schedule "A" is not made by the Commission, each of Staff and Waxman will be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Notice of Hearing and Statement of Allegations, unaffected by this Settlement Agreement or the settlement negotiations.
55. The terms of this Settlement Agreement will be treated as confidential by all parties hereto until approved by the Commission, and forever if, for any reason whatsoever, this Settlement Agreement is not approved by the Commission, except with the written consent of both Waxman and Staff or as may be required by law.
56. Any obligations of confidentiality shall terminate upon approval of this Settlement Agreement by the Commission.

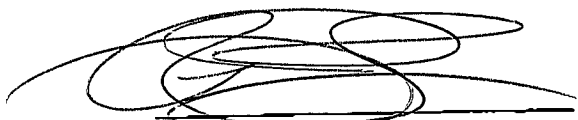
**VIII. EXECUTION OF SETTLEMENT AGREEMENT**

57. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

58. A facsimile copy of any signature shall be as effective as an original signature.

Dated this 11<sup>th</sup> day of December, 2007.

Brenda Genom  
Witness

  
Robert Waxman

**STAFF OF THE ONTARIO  
SECURITIES COMMISSION**

Per:

\_\_\_\_\_  
Michael Watson  
Director of Enforcement

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\_\_\_\_\_  
Witness

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Robert Waxman

**STAFF OF THE ONTARIO  
SECURITIES COMMISSION**

Per: .



\_\_\_\_\_  
Michael Watson  
Director of Enforcement