

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

- AND -

**IN THE MATTER OF ROBERT CASSELS, MURRAY HOULT POLLITT
AND POLLITT & CO. INC.**

**SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE COMMISSION AND MURRAY HOULT POLLITT
AND POLLITT & CO. INC.**

I. INTRODUCTION

1. By Notice of Hearing dated August 30, 2004, the Ontario Securities Commission announced that it proposed to hold a hearing to consider whether, pursuant to sections 127 and 127.1 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 orders as specified therein.

II. JOINT SETTLEMENT RECOMMENDATION

2. Staff recommend settlement of the allegations against the Respondents Murray Pollitt and Pollitt & Co. Inc. (the "Respondents"), in accordance with the terms and conditions set out below. The Respondents agree to the settlement on the basis of the facts and conclusions agreed to as provided in Part IV and consent to the making of an order against them in the form attached as Schedule "A" on the basis of the facts set out in Part IV.

2.

3. This settlement agreement, including the attached Schedule "A" (collectively, the "Settlement Agreement") will be released to the public only if and when the Settlement Agreement is approved by the Commission.

III. ACKNOWLEDGEMENT

4. Staff and the Respondents agree with the facts and conclusions set out in Part IV of this Settlement Agreement.

IV. AGREED FACTS

Background

5. Murray Houlton Pollitt ("Pollitt") is registered in Ontario under the Act as a trading officer and director and President of Pollitt & Co. Inc. ("Pollitt & Co."). Pollitt holds an approximate 75% ownership interest in Pollitt & Co.
6. Pollitt & Co. Inc is registered in Ontario as a securities dealer in the category of broker.
7. Robert Cassels ("Cassels") is registered in Ontario as an investment counsel and portfolio manager with the firm Cassels Investment Management Inc. ("CIM"). CIM was a client of Pollitt and Co. at the material time.

Pollitt & Co. is Invited to Participate in a "Bought Deal" Syndicate

8. In October, 2002, officials at Scotia Capital Inc. ("Scotia") commenced discussions with the CEO of United Grain Growers Limited (doing business as Agricore United ("Agricore")), respecting a potential \$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 Inc. ("NBF"). At the request of the

Agricore CEO, Scotia invited Pollitt & Co. to participate as a junior member of the syndicate.

9. On November 11, 2002, at approximately 2:45 p.m. (all subsequent times referred to herein occurred on November 11, 2002), a brief conference call was convened by Scotia and NBF in order to formally invite certain other securities dealers, including Pollitt & Co., to participate in the syndicate. During this call, the terms of the anticipated financing were discussed. In the 15 minutes following this brief call, each of the dealers that were invited to participate, including Pollitt & Co., confirmed to Scotia their participation in the deal. At approximately 3:15 p.m., Scotia presented Agricore with a fully syndicated bought deal.
10. The principal shareholder had already agreed to purchase \$45 million of the offering on November 8, 2002. The remaining \$55 million of convertible debentures being offered for sale to the public (not including the dealers' option to acquire an additional \$5 million) was allocated among the members of the syndicate. As a junior member of the syndicate, Pollitt & Co. was allocated 3% of the offering.
11. At approximately 3:26 p.m., Agricore notified Scotia that it was accepting the terms of the bought deal. It was intended that a press release, announcing the agreement in respect of the bought deal, would be issued at the close of the markets (4:00 p.m.) that day.
12. At approximately 3:38 p.m., at the issuer's request, trading in shares of Agricore was halted by the TSX. At approximately 3:40 p.m., Agricore issued a press release announcing that it had entered into a bought deal agreement to issue and sell to a syndicate of underwriters co-led by Scotia and NBF \$100 million aggregate principal amount of 9.0% convertible unsecured subordinated debentures due November 30, 2007. The debentures were convertible at any time prior to maturity into the common stock of Agricore at \$7.50 per share.

4.

13. The market price of Agricore at the time trading was halted on November 11, 2002 was \$6.00. When Agricore resumed trading on November 12, 2002 it opened at \$5.90 and closed at \$5.31. By the close of markets on Friday, November 15, 2002, Agricore was trading at \$5.14.

Pollitt & Co. Market the Offering in Advance of the Press Release

14. Upon learning of the terms of the proposed bought deal, Pollitt concluded that the interest rate offered and the conversion terms would make the convertible debenture offering highly attractive to potential purchasers. He also considered that the convertible debenture offering would be highly dilutive to existing shareholders of Agricore, including clients of Pollitt & Co. As a result, Pollitt decided to provide certain clients, including CIM with a "heads up" about the bought deal prior to the transaction being generally disclosed by means of a press release and to advise that they should contact Scotia in the event that they wished to purchase any of the offering as Pollitt and Co. had only 3% of the offering. These communications were made subsequent to Pollitt & Co. being invited to participate in the bought deal syndicate at approximately 2:45 p.m. and prior to the issuance of any press release announcing the bought deal at approximately 3:38 p.m.
15. At approximately 3:03 p.m., Scotia received a call from one of the Pollitt & Co. institutional clients who had just been advised by Pollitt & Co. of the anticipated bought deal. The institutional client expressed an interest in purchasing securities pursuant to the bought deal. Concerned that a would-be investor had knowledge of the bought deal prior to the deal being announced in a press release, Scotia contacted the members of the syndicate to determine whether they had been marketing the bought deal in advance of the press release. At approximately 3:16 p.m., Scotia spoke with Pollitt who confirmed that Pollitt & Co. had been the source of the information provided to the institutional client in advance of the press release. Scotia immediately instructed Pollitt to stop all

such communications.

16. At approximately 3:36 p.m., Scotia advised Pollitt & Co. that it was being excluded from the syndicate as a result of engaging in pre-marketing communications in respect of the bought deal prior to the issuance of a press release. In addition to Pollitt & Co.'s pre-marketing communications giving rise to potential violations of securities law, Pollitt & Co. could not sign the certificate required of all IDA members that participate in a bought deal syndicate certifying that the member has complied with IDA By-law 29.13 (which prohibits pre-marketing communications prior to the issuance of a press-release).
17. One of the clients of Pollitt & Co. advised by Pollitt of the bought deal in advance of a press release was CIM. At approximately 3:08 p.m. Cassels at CIM received a voice mail message from Pollitt advising of the bought deal and indicating that if Cassels was interested in participating in the deal he should contact Pollitt. At approximately 3:14 p.m. Cassels spoke to Pollitt and was advised of the terms of the bought deal.
18. Pollitt acknowledges and admits that (i) he was in a special relationship with Agricore at the material time; (ii) the bought deal was a material fact; (iii) he had knowledge of that material fact; and (iv) he informed institutional clients of the bought deal prior to it being generally disclosed to the public.

Conduct Contrary to the Public Interest

19. The conduct of the Respondent Pollitt as described above, constituted a contravention of s.76(2) of the Act, clause 14.1 of National Instrument 44-101, and the Canadian Securities Administrators' Notice "Pre-Marketing Activities in the Context of Bought Deals" and was conduct contrary to the public interest.

20. The conduct of the Respondent, Pollitt & Co., as described above, was contrary to the public interest in that it failed to properly implement and enforce procedures to ensure that when participating as a member of a bought deal syndicate, no inappropriate pre-marketing activities were engaged in by directors, officers, employees or agents of the dealer, including communications which were contrary to s.76(2) of the Act, IDA By-Law 29.13, and inconsistent with the Canadian Securities Administrations Notice "Pre-Marketing Activities in the Context of Bought Deals".

Position of the Respondents and Mitigating Factors

21. Pollitt recognizes and admits the seriousness of his violation and takes full responsibility for it personally and on behalf of his company, Pollitt & Co. He is remorseful for his conduct and acknowledges that it was unbecoming of a registrant.
22. Pollitt acknowledges that the communications made by him on November 11, 2002, as described in paragraphs 14 and 17 were inappropriate and constituted a violation of the pre-marketing rules. He also acknowledges that his communications constituted "in effect" tipping and that such conduct is in violation of the Act.
23. Pollitt represents that it was not his intention or expectation that the clients he contacted, registrants themselves, would act upon the material information concerning the offering prior to any public announcement in a manner that contravened the Act. Rather, Pollitt represents that the purpose of his communications was to advise that the debenture offering would likely be highly sought after, given its very favourable terms opposite the common shares, and that Pollitt & Co. with only 3% of the offering would unlikely be able to satisfy any large demands of his clients.
24. Pollitt & Co. represents that it lost fees of approximately \$200,000 by virtue of its expulsion from the underwriting syndicate. The Respondents accept that this loss was the

necessary consequence of their improper conduct. The Respondents submit however, that, as a small brokerage, Pollitt & Co. has suffered disproportionate damage as a result of the publicity arising from the charges in this matter. Those damages include the loss or reduction of business from large institutional clients with a resultant reduction in revenues, difficulty in recruitment of senior staff and a reduction in incentive income for its employees. An example of the harm suffered by Pollitt & Co. is seen by the fact that, within the past few weeks, Pollitt & Co. has been excluded by the lead bank from an underwriting syndicate for a company Pollitt & Co. had previously dealt with, notwithstanding the fact that the company's management wanted Pollitt & Co. to be part of the underwriting group. This alone cost Pollitt & Co. approximately \$100,000.

25. Pollitt represents that it was not his intention to derive any direct benefit from his conduct, and in fact, neither Pollitt nor Pollitt & Co. did so benefit.
26. Pollitt represents that he has been a public advocate of shareholder rights, most recently with respect to transactions or proposed transactions involving Iamgold and Stelco.
27. Pollitt is 63 years of age. He has participated in the Ontario capital markets for approximately 40 years. His conduct has not previously been a concern for Staff. Pollitt & Co. has participated in the Ontario capital markets for approximately 20 years. The conduct of Pollitt & Co. has not previously been a concern for Staff.
28. Pollitt has been candid and fully co-operative with Staff from the very onset of its investigation and in connection with this settlement proceeding.

V. TERMS OF SETTLEMENT

29. The Respondents agree to the following terms of settlement:

- (a) pursuant to clause 1 of subsection 127(1) of the Act, the registration of the Respondent Murray Pollitt as a trading officer is suspended for a period of 30 days effective from the date of the order of the Commission approving the Settlement Agreement;
- (b) pursuant to subsection 127(2) and further to a review of its practices and procedures in 2002 and 2003, Pollitt & Co. will forthwith 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;
- (c) pursuant to clause 6 of subsection 127(1) of the Act, the Respondents will be reprimanded by the Commission;
- (d) pursuant to section 127.1 of the Act, the Respondents, or either of them, agree to 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; and
- (e) the Respondent, Murray Pollitt, agrees to attend, in person, the hearing before the Commission on November 17, 2004.

VI. STAFF COMMITMENT

30. If this Settlement Agreement is approved by the Commission, Staff will not initiate any other proceeding under the Act against the Respondents in relation to the facts set out in Part IV of this Settlement Agreement, subject to the provisions of paragraphs 35 and 36

below.

VII. PROCEDURE FOR APPROVAL OF SETTLEMENT

31. Approval of this Settlement Agreement shall be sought at a hearing of the Commission scheduled for November 17, 2004 (the "Settlement Hearing") or such date as may be agreed to by Staff and the Respondents.
32. Staff or the Respondents may refer to any part, or all, of the Settlement Agreement at the Settlement Hearing. Staff and the Respondents agree that the Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing, unless the parties agree that further evidence should be submitted at the Settlement Hearing.
33. If the Settlement Agreement is approved by the Commission, the Respondents agree to waive their right to a full hearing, judicial review or appeal of the matter under the Act.
34. Staff and the Respondents agree and undertake that if the Settlement Agreement is approved by the Commission, they will not make any statement inconsistent with this Settlement Agreement.
35. If the Respondents fail to honour the agreement contained in paragraph 34 of this Settlement Agreement, Staff reserve the right to bring proceedings under Ontario securities law against the Respondents based on the facts set out in Part IV of this Settlement Agreement, as well as the breach of the Settlement Agreement.
36. If the Settlement Agreement is approved by the Commission, and at any subsequent time the Respondents fail to honour any of the Terms of Settlement set out in Part V herein, Staff reserve the right to bring proceedings under Ontario securities law against the Respondents based on the facts set out in Part IV of the Settlement Agreement, as well as

the breach of the Settlement Agreement.

37. Whether or not the Settlement Agreement is approved by the Commission, the Respondents agree that they will not, in any proceeding, refer to or rely upon the Settlement Agreement or the settlement negotiations as the basis of any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.
38. If, for any reason whatsoever, the Settlement Agreement is not approved by the Commission, or an order in the form attached as Schedule "A" is not made by the Commission;
- (a) the Settlement Agreement and its terms, including all settlement negotiations between Staff and the Respondents leading up to its presentation at the Settlement Hearing, shall be without prejudice to Staff and the Respondents;
 - (b) Staff and the Respondents shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations in the Notice of Hearing and Statement of Allegations of Staff, unaffected by the Settlement Agreement or the settlement negotiations; and
 - (c) the terms of the Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person except with the written consent of Staff and the Respondents, or as may be required by law.

VIII. DISCLOSURE OF SETTLEMENT AGREEMENT

39. The Settlement Agreement and its terms will be treated as confidential by Staff and the

11.

Respondents until approved by the Commission, and forever if, for any reason whatsoever, the Settlement Agreement is not approved by the Commission, except with the written consent of Staff and the Respondents, or as may be required by law.

40. Any obligations of confidentiality shall terminate upon approval of the Settlement Agreement by the Commission.

IX. EXECUTION OF SETTLEMENT AGREEMENT

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

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

Signed in the presence of:

"David Stevens"

"Murray Houlton Pollitt"

Murray Houlton Pollitt

DATED this "12th day of November , 2004"

"David Stevens"

per "Murray Houlton Pollitt"

Pollitt & Co. Ltd.

DATED this "12th day of November, 2004"

12.

Signed in the presence of:

**Staff of the Ontario Securities Commission
Per:**

"Michael Watson"

**Michael Watson
Director, Enforcement Branch**

DATED this "11th day of November, 2004"