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

– and –

IN THE MATTER OF
ATI TECHNOLOGIES INC., KWOK YUEN HO, BETTY HO, JO-ANNE CHANG, DAVID STONE, MARY DE LA TORRE, ALAN RAE and SALLY DAUB

MOTION FOR PRODUCTION

BROUGHT BY KWOK YUEN HO

Motion:	**October 18, 2004**	
Panel:	**Susan Wolburgh Jenah**	**-Vice Chair of the Commission (Chair of Panel)**
	M. Theresa McLeod	**-Commissioner**
	H. Lorne Morphy, Q.C.	**-Commissioner**
Counsel:	**J. L. McDougall, Randy Bennett**	**-For the Applicant, Kwok Yuen Ho**
	Matthew Britton	**-For Staff of the Ontario Securities Commission**

I. The Proceedings

[1] This was a motion brought by Kwok Yuen. Ho (K.Y. Ho or the Applicant) for an order requiring Staff to produce all written or otherwise recorded notes, reports and analyses of staff

investigators, including, but not limited to, those prepared by Jody Sikora (Sikora) and Belinda Taneski, the investigators who participated in the investigation that led to the issuance of a Notice of Hearing and Statement of Allegations by Staff of the Ontario Securities Commission (Staff).

[2] On January 16, 2003, a Notice of Hearing and Statement of Allegations were issued against the Respondents including the Applicant K.Y. Ho.

[3] In paragraph 9 of the Statement of Allegations, the following allegations are set out against K. Y. Ho, his wife Betty Ho and ATI:

> 9. The specific allegations advanced by Staff are:
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> (a) That ATI failed to disclose material information forthwith contrary to s.408 of the TSX Company Manual and thereby acted contrary to the public interest. The material information was that ATI would report lower than expected revenue and earnings for Q3-2000.
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> (b) That ATI made a statement to Staff of the Commission during the course of its investigation of ATI that, in a material respect and at the time and in light of the circumstances in which the statement was made, was misleading or untrue or did not state a fact that was required to be stated or that was necessary to make the statement not misleading. In particular, ATI made the statement that the earliest material meetings, communications, events and developments leading up to the disclosure on May 24, 2000 occurred on May 16, 2000.
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> (c) That between April 24, 2000 and May 2, 2000, K.Y. Ho and Betty Ho traded 494,900 ATI shares. At the time these shares were traded, they were in a special relationship with ATI and had knowledge of a material fact with respect to ATI that had not been generally disclosed. The material fact was that ATI would fall short of its forecasted revenue and earnings for Q3-2000. Of these shares, 240,900 ATI shares were sold from an account in the name of Betty Ho for total proceeds of approximately $6,954,279. By selling the shares prior to the issuance of the news release on May 24, 2000, K.Y. Ho and Betty Ho avoided a loss of $3,352,824. The remaining 254,000 shares were donated to charities from an account in the name of K.Y. Ho. By donating the shares prior to the issuance of the news release, K.Y. Ho was able to maximize his tax benefit and avoid a loss in the value of the shares of $3,585,100.

[4] Staff alleges in paragraph 62(c) of the Statement of Allegations that K.Y. Ho, along with other named Respondents, committed insider trading contrary to section 76(1) of the Act and contrary to the public interest.

[5] Staff advised the Respondents that it is the intent of Staff to call Sikora as a witness at the hearing. Sikora is the Staff investigator responsible for the investigation of this matter. Sikora is to be called to give only factual and not expert opinion evidence. It was following receipt of that advice that this motion was brought by K.Y. Ho.

[6] At the outset of the hearing of this motion, counsel for K.Y. Ho, Mr. McDougall, narrowed the order he was seeking to request only the production of the working file of Sikora on the basis that he would be the only investigator called to give evidence at the hearing.

[7] In requesting Sikora's working file, Mr. McDougall stated that he was not asking for the factual information obtained by Sikora during the investigation which had already been disclosed, but rather he was asking for the file created by Sikora as an investigator during the course of the investigation that led to the statement of allegations being issued.

[8] Mr. McDougall indicated in the course of his submissions that he contemplated the working file would include:

- How Sikora formed the opinion that there were grounds to proceed against the Respondent, K.Y. Ho.
- What facts formed the basis of that opinion.
- How he assembled, analysed and selected the facts which will be put before the Commission during the hearing.
- Everything he reported on about the facts he collected.
- What he was told by others to do during the investigation.
- What facts were dispositive to him and why he ignored other facts.
- On what basis he selected the evidence to use in support of Staff's case and why he decided not to use certain other evidence.
- How he reduced approximately 13,000 documents to a core of the 500 documents which will form the basis of Staff's case.
- What analysis, tests and criteria were used in this process.

II. The Issue

[9] The sole issue before us is whether an order should be issued requiring production to K.Y. Ho of what Mr. McDougall describes as the working file of the investigator Sikora.

III. The Position of the Parties

1. The Applicant's Position:

[10] The Applicant cites *Howe v. Institute of Chartered Accountants (Ontario)* (1994), 118 D.L.R. (4th) 129 (Ont. C.A.), (*Howe*) as authority for the proposition that it is a requirement of natural

justice and an essential element of a fair hearing that adequate disclosure be made in order to enable a party to know the case it has to meet and to mount a defence.

[11] The Applicant also notes that Staff is obligated to make full disclosure of all information relevant to K.Y. Ho's defence as established in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.), (*Stinchcombe*) and as adopted in *Deloitte & Touche LLP v. Ontario Securities Commission* (2003), 232 D.L.R. (4th) 1 (S.C.C.), (*Deloitte (SCC)*).

[12] The Applicant argues that the investigative notes, reports and analyses of Sikora are clearly relevant, particularly as he will be the key witness at the hearing. He notes that the test for disclosure is relevance and he cites the following paragraphs from Doherty J. A.'s decision in the Court of Appeal, *Deloitte & Touche LLP v. Ontario (Securities Commission)* (2002), 26 B.L.R. (3d) 161 (Ont. C.A.), (*Deloitte (OCA)*):

> [40] Relevant material in the *Stinchcombe, supra,* sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the Philip respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the Philip respondents to make full answer and defence to the Staff allegations. This latter category includes material that the Philip respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions: *Stinchcombe, supra,* at p. 12; *R. v. Egger*, [1993] 2 S.C.R. 451 (S.C.C.) at 467; *R. v. Chaplin* (1994), [1995] 1 S.C.R. 727 (S.C.C.) at 742; *R. v. McQuaid*, [1998] 1 S.C.R. 244 (S.C.C.) at 257-58.
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> [41] In deciding whether material in its possession could reasonably be relevant to the Philip respondents, Staff was obliged to take a generous view of relevance. Staff was not privy to defence strategies or tactics, or to material in the possession of the Philip respondents, which could alter the significance of documents in Staff's possession. As Cory J. said in *McQuaid, supra,* at p. 258:
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>> The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial.

[13] The Applicant adds that as a witness at the hearing, the credibility of Sikora will be in issue. The Applicant submits that he is entitled to all relevant material which could aid in the preparation of that cross-examination. The Applicant maintains that the work file of the investigator may be useful for the purposes of impeachment of the credibility of the investigator.

[14] The Applicant argues that Staff intends to advance its case against him through one principal witness: Sikora. In these circumstances, mere disclosure of the "fruits of the investigation" is inadequate to allow K.Y. Ho to make full answer and defence. It is crucial to K.Y. Ho's defence that he be given full disclosure, which includes the investigative notes, reports and analyses of Sikora so

that he has an opportunity to have a fair hearing in accordance with the requirements of natural justice.

2. Staff's Position

[15] Staff submits that it has already disclosed all relevant and potentially relevant material to the Respondents in keeping with Staff's disclosure obligations as set out in *Stinchcombe* and *Deloitte (SCC).* Staff, specifically says it has produced the following material:

- a 56 page "will say" statement of the investigator Sikora;
- documentary evidence it intends to rely upon in support of the allegations;
- a list of witnesses and either a will-say of their evidence or a copy of their transcribed interviews;
- some notes taken by the investigator of witness interviews; and
- approximately 13,000 documents.

[16] Staff maintains that while it has taken a very generous view of its disclosure obligations in this case, the investigator's work file is not relevant and hence not disclosable.

[17] Staff further submits that Sikora is being called as a fact witness through which certain documentary evidence will be submitted at the hearing. As Sikora is not being called as an expert, his work file is not relevant as he will not be giving any opinion evidence.

IV. Analysis

[18] The present motion is a request for the disclosure of the investigator's work file as described above. The case law relating to disclosure clearly distinguishes between evidence obtained in the course of an investigation and materials created by an investigator. The Commission reinforced this distinction in *Re Shambleau* (2002), 25 O.S.C.B. 1850 (April 5, 2000), (*Shambleau*), where reference was made at page 1852 to the position of the British Columbia Securities Commission (B.C.S.C.) on this issue:

> In *Re Vancouver Street Exchange, (O'Neill)* (1999), BCSC Weekly Summary [Edition 99:22], the BCSC used the *Cartaway* disclosure standard in the context of proceedings before the Canadian Venture Exchange. The BCSC found:
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> > [i]t is the responsibility of the hearing panel to determine whether the allegations in the Citation have been met. The views of the Exchange staff, as expressed in internally generated documents, such as investigation reports, are of no relevance in this regard.

> The BCSC refused to order production of investigation reports and similar internal staff documents, drawing a distinction between evidence obtained in the course of an investigation and materials created by investigation staff.

[19] The distinction between evidence obtained in the course of an investigation and materials created by investigation Staff is key to reconciling the cases to which we were referred. Information and evidence which is "obtained in the course of an investigation" and is relevant to the Statement of Allegations must be disclosed. As the Commission said in *Shambleau*:

> The law of disclosure is based upon the fundamental right to make full answer and defence. All relevant information must be disclosed whether the TSE Staff intends to introduce it or not or whether it is inculpatory or exculpatory. If the information is of some use it should be disclosed. Stated somewhat differently the "fruits of the investigation" are not the property of the Staff; *Howe v. Institute of Chartered Accountants, supra, Re Glendale Securities Inc. (1995), 18 O.S.C.B. 5975..*

[20] In *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629 (Ont. Div. Ct.), (*Shambleau (Div. Crt.))*, the Ontario Divisional Court upheld the Commission's decision that the report of an investigator was not to be disclosed even though the investigator was a witness in the hearing. This was because the investigator's report in *Shambleau* contained opinion evidence and was *prima facie* irrelevant in light of the fact that the investigator was not being offered to give opinion evidence.

[21] In both *Re Mills* [1999] I.D.A.D. No. 41 (December 16, 1999), (*Mills*), and in *Re Cox,* 2001 B.C.Sec.Com. 204 (February 16, 2001), (*Cox*), disclosure of investigative reports was sought but denied.

[22] In concluding that it was not necessary for the Applicant to have access to the investigator's report, the District Council in *Mills* stated:

> An investigator's report is usually prepared for purposes of determining whether to initiate proceedings. [See Note 3 below] An obligation to disclose pre-charge reports would inevitably require disclosure of documents relating to internal deliberations related to this determination. Neither Stinchcombe nor the cases applying its principles in the regulatory context go this far. Nor, in the review of the District Council, should they except in exceptional circumstances...
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> In principle the District Council is unable to distinguish the recommendations contained in an investigator's report of his investigation from any other internal staff opinion concerning a decision to initiate proceedings against an individual or a member firm. If Mr. Lane's recommendation is relevant, it would be difficult to exclude an internal memorandum accompanying his formal report and containing only his recommendation. It would also be difficult to exclude notes of discussions within the Association's Enforcement Division in which staff members may express differing views with respect to initiating proceedings. None of these is relevant evidence. To require disclosure of any one may in principle necessitate disclosure of all such deliberations. This is not the type of information addressed

> in Stinchcombe or in Howe. Nor is disclosure of such documents necessary to enable a respondent to address the allegations against him, except possibly in exceptional circumstances where their evidentiary relevance to a material issue is clear.

[23] The B.C.S.C. came to a similar conclusion in *Re Cartaway Resources Corp.* (June 4, 1999), 22 B.C.S.C.W.S. 27:

> In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 16(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as "potentially relevant to the respondents" the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not "fruits of the investigation" as suggested by Johnson and need not be disclosed.

[24] The dissent of Laskin J.A. in *Howe* favoured disclosure of the investigator's report. That, however, was a situation where the investigator was asked to form an opinion as to the propriety of the accused's conduct and was to be called as an expert witness at the hearing in which he would testify as to that opinion. In commenting on Mr. Justice Laskin's dissent in *Howe*, the Divisional Court in *Shambleau* noted the following:

> ...Clearly, in those circumstances, the entire report was required to be disclosed. Mr. Justice Laskin noted that the issue was so clear that there was no need to even examine the report itself...The reasons of Justice Laskin were given in the context of the case before him and did not purport to establish nor does it establish any rule that in all cases all investigative reports must be released. [emphasis added]

VI. The Decision

[25] We do not find the statement by Doherty J.A.in *Deloitte (OCA), supra,* concerning the obligation of disclosure inconsistent with what has been previously stated in *Re Cartaway Resources, Mills* and *Shambleau* as to the disclosure obligations in regard to an investigator's work file when the investigator is not being called as an expert to give opinion evidence.

[26] In our view, what is being sought here by the Applicant clearly falls within the latter category and need not be disclosed.

[27] There has been no suggestion by Mr. McDougall that Staff has in any way failed to comply with its obligation to disclose all relevant information it has obtained during the investigation. As noted by Doherty J.A. in *Deloitte (OCA)*, the *Stinchcombe* case requires disclosure of all relevant

material in the possession or control of Staff. This includes disclosure of relevant material “intended for use by Staff in making its case” against the Respondent. It does not go so far, however, as to require disclosure of how or why Staff has determined what material it will rely on in making its case against the Respondents. Such is the nature of the disclosure the Applicant seeks to access to in this case.

[28] Accordingly, the Applicant’s motion for production is denied.

DATED at Toronto this 26th day of November, 2004.

_”Susan Wolburgh Jenah”____

Susan Wolburgh Jenah
Chair

_”M. Theresa McLeod”_____

M. Theresa McLeod

_____”H. Lorne Morphy”______

H. Lorne Morphy, Q.C.