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 BROUGHT BY KWOK YUEN HO

Motion:	**October 19, 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**
	Jessica Kimmel	**- For ATI**
	Matthew Britton	**- For Staff of the Ontario Securities Commission**

A. Background

[1] In July 2004, Kwok Yuen Ho (K.Y. Ho) brought a motion to have certain words in the Statement of Allegations struck. That motion was dismissed by a differently constituted Panel (the Prior Panel).

[2] Following the dismissal, K.Y. Ho filed a Notice of Appeal pursuant to section 9(1) of the *Ontario Securities Act* (the Act) to the Divisional Court. That appeal, as of this date, has not been argued.

[3] In September 2004, the panel of Commissioners that will preside at the hearing of this matter (the Hearing Panel) was constituted. Shortly thereafter, K.Y. Ho requested that the Hearing Panel re-hear the motion that was dismissed in July by the Prior Panel. The Secretary of the Commission set a date for the hearing of the request and advised Mr. Ho that the Hearing

Panel would require submissions as to its jurisdiction to reconsider the dismissed motion. The motion was heard on October 19, 2004.

B. The Facts

[4] The Statement of Allegations in this matter, dated January 16, 2003, sets out certain allegations of fact concerning K.Y. Ho and others related to insider trading following which it is stated in paragraph 62:

> "Staff submit that: (c) K.Y. Ho, Betty Ho, Chang, Stone, De La Torre and Rae committed insider trading contrary to section 76(1) of the Act and contrary to the public interest."

[5] On February 19, 2004, Commission Staff (Staff) sent to counsel for the various respondents a letter which contained the following statements:

> I confirm that it's Staff's position that the Commission should make an order based on the allegations set out in the Statement of Allegations. Staff does not allege nor intend to make submissions on any other theory of liability than is alleged in the Statement of Allegations.
>
> At the same time, Staff takes the position that in the event the Panel heard evidence during the course of the proceedings that makes it form the opinion it is in the public interest to make an order, it is able to do so, even if it determines that Staff has failed to prove its specific allegations.

[6] This was followed by a Notice of Motion by K.Y. Ho, returnable July 15 for an order "striking the allegation of insider trading contrary to the public interest as set out in paragraph 62(c) of the Statement of Allegations, dated January 16, 2003".

[7] Numerous grounds were set forth in the Notice of Motion for the relief sought. In particular, it was stated that by the Statement of Allegations and by its letter of February 19, 2004, Staff is seeking the alternative finding that K.Y. Ho committed insider trading "contrary to the public interest" even if Staff fails to prove its allegation that K.Y. Ho's disposition of shares was in breach of 76(1) of the Act.

[8] The Notice of Motion stated that, as there were no facts set out in the Statement of Allegations to support this alternative relief, it would not only be contrary to the rules of natural justice and procedural fairness which require that K.Y. Ho know the case against him, it would also be contrary to section 8 of the *Statutory Powers Procedure Act* which requires that he be furnished prior to the hearing with reasonable information of any allegations against him. The motion was heard on July 15, 2004 and dismissed. (Reasons reported July 30, 2004 (2004) 27 OSCB 6859.)

[9] As noted in its Reasons, the Prior Panel did not think that it was appropriate that an order be made striking provisions in the Statement of Allegations. Rather, it was for Staff to satisfy itself that the case which it was going to present was sufficiently covered by the Statement of Allegations. In addition, the Prior Panel emphasized that the Hearing Panel would be obliged to

conduct the hearing in accordance with the rules of natural justice which entitle the Respondent to know in advance the case with which he may be faced at the hearing.

[10] As noted previously, K.Y. Ho subsequently appealed the decision of the Prior Panel to the Divisional Court and the appeal has yet to be argued.

[11] In September, following the constitution of the Hearing Panel which would preside at the hearing of this matter on the merits, K.Y. Ho requested that this Hearing Panel reconsider the July motion. K.Y. Ho was advised that he would have to address the question of whether or not the Hearing Panel had the jurisdiction to entertain the request for reconsideration. The motion was argued on October 19 and was supported by ATI. It was agreed at the outset, that the submissions by counsel on both the jurisdiction of the Hearing Panel to entertain the request for reconsideration and why it should be reconsidered, would be heard together.

[12] It should be noted that Mr. McDougall, Counsel for K.Y. Ho, advised that if the Hearing Panel determined it had jurisdiction to hear the request for reconsideration and did so, the pending appeal would be withdrawn.

C. Jurisdiction

[13] Staff at the outset registered what was, in effect, a preliminary objection to the re-hearing and stated there was simply no basis on which the Hearing Panel could or should entertain this motion for reconsideration. Staff also stated unequivocally that it would only be asking for an order under s. 127(1) of the Act if a finding was made that K.Y. Ho had breached section 76 of the Act.

[14] Mr. McDougall submitted that there were three grounds on which he would base his submission that the Hearing Panel had jurisdiction to reconsider the July 15 decision.

[15] The first ground was section 144(1) of the Act which reads as follows:

> The Commission may make an order revoking or varying a decision of the Commission, on the application of the Executive Director or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest.

[16] While no Notice of Motion under section 144 was served, Mr. McDougall stated that he was prepared, if necessary, to do so *nunc pro tunc*.

[17] The circumstances under which a section 144 order can be made were considered in the decisions of *Ultramar PLC* (1991) 14 OSCB 5221 and *Universal Settlements* (2003) 26 OSCB 2345.

[18] Both of these decisions make it clear that the making of an order under section 144 requires there be the appropriate facts or new circumstances to justify the making of an order.

[19] As noted previously, no affidavit was filed in support of this application. Accordingly, even if section 144 could be a jurisdictional basis for this application, it can only be so if

appropriate facts or circumstances exist and are placed before the Panel for consideration. That not having been done, no basis has been demonstrated for this Panel to make a section 144 order.

[20] The second ground submitted as a basis for review was Rule 9 of the Commission's Rules of Practice.

[21] Rule 9 is a rule made pursuant to section 25.1(1) of the *Statutory Powers Procedure Act* which provides "A Tribunal may make rules governing the practice and procedure before it". It should also be noted that section 21.2(1) of that *Act* states "A Tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order". Pursuant to that authority, the Commission enacted Rule 9.

[22] Rule 9 refers to the review of both final and interim decisions. The procedure for each is quite distinct and neither was followed in the motion that is before us.

[23] Mr. McDougall indicated that he was proceeding on the basis that the order of the Prior Panel was a final order. That position is consistent with Mr. Ho having appealed that order under section 9 of the *Act* which provides only for appeals from final orders.

[24] For the review of a final order under Rule 9, it must be commenced by a request for review which request is required by Rule 9.3 to be supported by a number of things including an affidavit from the requester setting out the facts relied on in support of the request. In that this requirement has not been complied with nor have certain of the other requirements which are to be included in a request for review under this provision, we are unable to consider this motion under Rule 9.

[25] The third ground relied on by Mr. McDougall was a statement made by Mr. Justice Sopinka in *Chandler v. Alberta Association of Architects* (1989), 62 DLR (4^{th}) 577 (*Chandler*).

[26] In *Chandler*, a Tribunal had commenced a hearing and concluded it by making a disposition which exceeded its jurisdiction. In order to remedy this, the Tribunal decided to reopen the hearing so that it could make a ruling within its jurisdiction. An objection was taken to the reopening based on a submission that the Tribunal had made a determination, albeit an improper one, but having done so, it was *functus officio* and could not reopen the hearing, a submission which was accepted in the dissenting judgment.

[27] In writing for the majority, Sopinka J. referred to the history of the *functus officio* doctrine and its application to administrative tribunals. He pointed out that the general rule that a final decision of a court cannot be reopened derives from a decision of the English Court of Appeal in *Re St. Nazaire Co.* (1879), 12 Ch.D. 88. That decision had been considered by the Supreme Court in *Grillas v. Minister of Manpower and Immigration* (1971), 23 D.L.R. (3^{rd}) 1. In the latter case, Martland J. stated:

> The basis of the English Rule, to which reference is made in this passage, is to be found in the case of in *Re St. Nazaire Co.*, in which the Court of Appeal held that, under the system of the procedure established by the Judicature Acts, a judge of the High Court had no jurisdiction to rehear

> an order, as the power to rehear was part of the appellate jurisdiction transferred by the Acts to the Court of Appeal.

[28] In referring to that principle, Sopinka J. in *Chandler (supra)* stated at page 595:

> In *Grillas v. Ministry of Manpower and Immigration* (1971), 23 D.L.R. (3rd) 1, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view.

[29] At page 596, Sopinka J. continued:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp., supra.*
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> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation *Grillas, supra.*

[30] It was these latter two paragraphs from the judgment of Sopinka J. that Mr. McDougall relied upon to submit that this Panel had jurisdiction to reconsider the July 15 decision.

[31] It should be noted that the concern expressed by Justice Sopinka is in regard to final decisions of administrative tribunals which are subject to an appeal only on a point of law. In such cases, he held "Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal".

[32] The concern expressed by Mr. Justice Sopinka in connection with the limitation on review of the decision of certain administrative tribunals has no application to this Commission. As noted above, this Commission's decisions are not only appealable on a point of law but there is a full right of appeal under section 9 to the Divisional Court. The *Act* also provides the authority in section 144 for decisions of the Commission to be revoked or varied. In addition, there is also the authority under Rule 9 of the *Rules of Practice* for the Commission to review not only final but also interim decisions.

[33] For the above reasons, we find that there is no basis for this Hearing Panel to review the July 15 decision and the application is dismissed.

* * *

[34] Even if we had found that there was a basis for reviewing the decision of the Prior Panel, we would not have come to a different conclusion than the Prior Panel.

[35] We were struck by the "Catch 22" aspect of Mr. Ho's submission. On the one hand, Mr. Ho states that the rules of natural justice require that he know the case he has to meet before any order can be made against him. At the same time, he finds it necessary to bring this application to prevent an order being made which he states cannot be made in any event as there are no facts to support such an order in the Statement of Allegations.

[36] In the course of oral submissions, Staff confirmed that it would not be alleging any conduct that is contrary to the public interest aside from the facts giving rise to the alleged breach of section 76 of the Act as set out in the Statement of Allegations. Staff confirmed, repeatedly, that it would be seeking to prove a breach of section 76 of the Act. Staff indicated that, if it were unsuccessful in doing so, it would not be asking the Commission to issue an order under Section 127 of the Act on the basis that the conduct in question, while falling short of an established breach under the Act, was contrary to the public interest.

[37] Staff, however, pointed out that the Hearing Panel has the discretion to make an order under section 127 of the Act if, at the conclusion of the hearing and based on all the evidence led, it forms the opinion that it would be in the public interest to do so, notwithstanding Staff's failure to prove its specific allegations.

[38] Counsel for Mr. Ho agreed that the Commission has a public interest jurisdiction and that an order could be made in the public interest without a corresponding breach of securities law. Indeed, the jurisprudence is unequivocal and well-established in this regard.

[39] However, we note that the Commission's public interest jurisdiction is not boundless and without limitations. Any order made on public interest grounds would, of necessity, have to be based on the facts alleged by Staff in the Statement of Allegations which, in turn, will form the basis of the evidence led at the hearing and will inform the manner in which K.Y. Ho and the other respondents in this proceeding prepare to defend themselves against the allegations.

[40] Notwithstanding these clarifications, counsel for Mr. Ho maintained that the Statement of Allegations must be amended to delete the words "and contrary to the public interest" at the end of section 62(c). Based on the analysis set out above, we do not consider that the existence of

these words will in any way affect Mr. Ho's ability to make full answer and defence. In particular, they will not affect his right to know the case he must meet in order that he may have a fair hearing.

[41] At this time, the Hearing Panel has not heard the evidence or the submissions of counsel on that evidence. Whatever the decision of this Panel will be, it must accord with the rules of natural justice. In our view, the words in issue in the Statement of Allegations do not affect that requirement.

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

_"Susan Wolburgh Jenah"____ _"M. Theresa McLeod"___

Susan Wolburgh Jenah **M. Theresa McLeod**
Chair

_____"H. Lorne Morphy"_____

H. Lorne Morphy, Q.C.