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

AND

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

Motion Hearing: April 29, 2005

Panel:	Susan Wolburgh Jenah	-	Vice-Chair (Chair of the Panel)
	M. Theresa McLeod	-	Commissioner
	H. Lorne Morphy, Q.C.	-	Commissioner
Counsel:	Matthew Britton Tyler Hodgson	-	For Staff of the Ontario Securities Commission
	Joel Wiesenfeld Andrew Gray	-	For the Respondent, Betty Ho

REASONS AND ORDER

The Motion

[1] On April 29, 2005, at the close of the evidence introduced by Staff of the Commission ("Staff"), counsel for the respondent Betty Ho (the "Respondent") brought a motion for a nonsuit before the panel (the "Panel") seeking an order dismissing the allegations against her.

[2] Counsel for Mrs. Ho brought this motion on the basis that Staff has not led sufficient evidence to establish a *prima facie* case that the Respondent committed insider trading contrary to section 76 of the *Securities Act* (the "Act").

The Issues

[3] The issues raised by the Respondent's motion are as follows:

(1) Is a motion for a nonsuit available in proceedings before the Commission?

(2) If such a remedy is available, does the Commission have discretion to decide whether or not to put the moving party to its election?

(3) What is the test for granting a nonsuit motion?

(4) Application of the test to the circumstances of this case.

1. Is a motion for a nonsuit available in proceedings before the Commission?

[4] As a preliminary matter to this nonsuit motion, Staff raised the issue as to whether, having regard to the Commission's public interest jurisdiction, such a motion could be brought before the Commission. In so doing, Staff relies on a recent decision of the Alberta Securities Commission, *Re Ironside*, [2003] A.S.C.D. No. 1514 at 2, para. 4, in which a panel decided that entertaining a nonsuit motion would be inconsistent with its public interest jurisdiction. The Alberta Securities Commission stated:

> A section 198 and 199 hearing is an administrative proceeding, not a civil or criminal action. The paramount question that the Commission must decide is whether it is in the public interest for the Commission to make one or more of the orders permitted by sections 198 and 199. That question governs this Panel's ultimate decision on all issues raised in the hearing. *To answer that question, and given the Commission's statutory mandate to act in the public interest, we must hear all relevant evidence prior to determining whether to exercise our public interest jurisdiction.* [Emphasis added]

[5] Counsel for the Respondent submits that a nonsuit motion is generally available in administrative proceedings, and asserts that such a motion is appropriate where a respondent in an

administrative proceeding before the Commission has no case to meet at the conclusion of Staff's case. He submits that such is the case in this proceeding. Counsel relies on several decisions supporting the availability of nonsuit motions before administrative tribunals: *Re City of Toronto and Toronto Civic Employees' Union, Local 416* (2000), 93 L.A.C. (4th) 372, *White v. Canadian Union of Shinglers & Allied Workers*, [1996] O.L.R.B. Rep. 215; *Labourers' International Union of North America v. Hurley Corporation*, [1992] O.L.R.B. Rep. 940; *LSUC v. Pinckard*, [2000] LSDD No. 59.

[6] Paragraph 25.0.1(a) of the *Statutory Powers Procedure Act*, R.S.O. 1990 (the "SPPA") provides:

> A tribunal has the power to determine its own procedures and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding;

[7] The Commission's Rules of Practice further provide as follows:

> **1.2 General (1) General Powers of the Commission under these Rules –**
> The Commission may exercise any of its powers under these Rules on its own initiative or at the request of a party.
>
> (…)
>
> **(4) General Principle –** These Rules shall be construed to secure the most expeditious and least expensive determination of every proceeding before the Commission on its merits, consistent, however, with the requirements of justice.

[8] Having reviewed the *Re Ironside* decision to which we were referred by Staff, we do not find it to be determinative. Numerous decisions were referred to us by the Respondent as noted above in which nonsuit motions were entertained by administrative tribunals.

[9] We have considered the submissions of the parties, the relevant authorities and our ability to determine our own procedure and practices in proceedings before us. While we are not aware of such a motion having been brought previously before the Commission, we are of the view that such a motion can be brought.

2. Does the Commission have discretion to decide whether or not to put the moving party to its election?

[10] Counsel for the Respondent submits that in an administrative context, there is no requirement to put the moving party to an election with respect to whether he or she intends to call evidence. Counsel argues that the Commission has the discretion to forego such a requirement pursuant to its ability to control its own procedure. Further, counsel submits that where the propriety of an individual's conduct is at issue, it is appropriate to do so. He refers to *Abary v. North York Branson Hospital* (1988), 9 C.H.R.R. D/4975 where a board of inquiry stated that:

> (…) Similarly, in administrative hearings, particularly where the propriety of conduct is involved, a respondent should not be required to present evidence unless the proponent has first presented evidence upon which an adverse finding *could* be based. In other words, the principle of fairness should not require an evidentiary response in the absence of a "case to meet."

[11] Staff submits that in the *Abary* case, the Commissioner of the Ontario Human Rights Commission relied on the decision of Mr. Justice Lamer in *R. v. Dubois* [1985], 2 S.C.R. 350 ("*Dubois*"), in support of the proposition that an accused should not be required to present evidence unless the Crown has first presented evidence upon which a conviction could be based. Staff submits that the *Dubois* case is distinguishable in that it dealt with section 13 of the *Canadian Charter of Rights and Freedoms* and the protection against self-incrimination in the context of a criminal proceeding.

[12] Staff submits that the Respondent must be put to her election concerning intention to call evidence prior to the Panel entertaining this nonsuit motion. This, according to Staff, is the rule applicable in civil proceedings in Ontario.

[13] Staff submits that, although the decisions of various administrative tribunals are in conflict on this point, the seminal court case which squarely addressed this issue decided the matter conclusively against the Respondent. In *Ontario v. Ontario Public Service Employees Union*, [1990] O.J. No. 635 (Ont. Div. Ct.) at 9 (QL) ("*OPSEU*"), Mr. Justice Reid concluded:

> Over the years there has been some variation in the practice on non-suits turning on the question whether the mover must concurrently elect to call no evidence. That has now been resolved. A motion will not be entertained without an election to call no evidence [citation omitted].
>
> There is no reason to think that a motion for a non-suit before an administrative tribunal should not conform with the law that governs the courts.

[14] In Sopinka and Lederman, *The Law of Evidence in Canada* (2nd ed), pp. 139-42, the consequences of an election in civil proceedings are described in detail and were summarized by Staff as follows: (1) if the defendant elects to call no evidence and the motion is dismissed the defendant is precluded from leading further evidence and the case is immediately submitted to the trier-of-fact to arrive at a verdict; (2) if the defendant elects to call evidence, a decision on the motion is reserved until all the evidence in the case has been adduced. Similarly, if only one of the two defendants to an action brings a nonsuit motion, and that defendant elects to call no evidence, the motion is reserved and the evidence adduced by the remaining defendant may be used by the plaintiff in rebutting the outstanding nonsuit application.

[15] We accept that there is a well recognized general practice in Ontario that when a party brings a nonsuit motion in civil proceedings, the party is put to its election prior to the court entertaining the motion. Staff argued that such an election should be required in proceedings before the Commission, relying on the practice of civil courts in Ontario.

[16] The Respondent maintains that an election should not be required and relies on decisions of

the Ontario Labour Relations Board, labour arbitrators and the Human Rights Commission. For example, counsel for the Respondent referred us to the following cases. In *White v. Canadian Union of Shinglers & Allied Workers*, cited above, the Ontario Labour Relations Board said as follows at paragraphs 20 and 30:

> 20. … Similarly, the courts have come to recognize that the differences between them and administrative tribunals may justify a different approach to such motions by the latter (*Metropolitan Toronto vs. The Joint Board et al*., [1991] 6 O.R. (3d) 88 (Divisional Court)). The Board has taken a second look at how a nonsuit motion should be dealt with in its proceedings. In the result, and recognizing the discretion it clearly has in that respect, *the Board has become more receptive to the notion of a nonsuit motion without an election*.(…)
>
> 30. In short, whether the Board will exercise its discretion to invite or allow a nonsuit motion to proceed without putting the moving party to its election will depend on the circumstances and the Board's assessment of the situation in the case in which the issue arises. [Emphasis added]

[17] In *Labourers' International Union of North America v. Hurley Corporation*, cited above, the Ontario Labour Relations Board stated at para. 6:

> The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put a party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient, and expeditious proceedings before the Board.

[18] Staff submits that the decision of Mr. Justice Reid in the *OPSEU* case has not been overturned and therefore continues to reflect prevailing law in Ontario. On the other hand, counsel for the Respondent referred us to numerous decisions in which administrative tribunals declined to put the moving party to his or her election prior to considering a nonsuit motion. It is unnecessary for us to attempt to reconcile these various decisions.

[19] We accept that Mr. Justice Reid's comments in the *OPSEU* case continue to be applicable and should be carefully considered by administrative tribunals when nonsuit motions are brought. However, as an administrative tribunal, we have the ability to control our own procedure. We must balance considerations of efficiency and expediency against the need for fairness and natural justice in proceedings before us. In this case, we are satisfied that the Respondent's motion was not frivolous or vexatious. Nor was it brought to cause delay in these proceedings. In the particular circumstances of this case, and given that the Panel invited and heard submissions of both counsel on all the issues enumerated above, we exercise our discretion not to require the Respondent to be put to an election as to whether she will call evidence prior to considering the nonsuit motion.

3. What is the test for granting a nonsuit motion?

[20] Counsel for the Respondent submits that a nonsuit motion should be granted in an administrative proceeding where a party has failed to make out a *prima facie* case. He further submits that in an insider trading case, if Staff failed to make out a *prima facie* case with respect to any one of the elements of the offence, it would be appropriate for the Panel to grant the nonsuit motion as this failure to establish any of the elements would be fatal to the case against the Respondent.

[21] Staff submits that the test governing a nonsuit motion is the same for criminal or civil proceedings. In assessing circumstantial evidence, the adjudicator must assign "the most favourable meaning which can reasonably be attributed to any ambiguous" evidence. Staff argues that in determining the reasonableness of proposed inferences, the adjudicator is not to be influenced by the existence of alternative or more appealing inferences.

[22] With respect to inferences to be drawn from the evidence adduced, Staff submits that even if inferences could only be drawn with difficulty, a nonsuit motion must fail. They say that considerations of which inferences the trier of fact is more or most likely to draw fall outside the jurisdictional scope of the task assigned to the Panel when considering a nonsuit motion. In support of these submissions, Staff cites the case *R. v. Katwaru,* [2001] O.J. No. 209 (Ont. C.A.) at 8, paras 39-40 in which Mr. Justice Moldaver says as follows:

> Without reproducing the specific passages from the charge, suffice it to say that in the course of his instructions on the law relating to circumstantial evidence, the trial judge told the jury on numerous occasions that they could infer a fact from established facts but only if the inference flowed "easily and logically from [the] other established facts".
>
> The appellant submits, correctly in my view, that the trial judge erred by inserting the word "easily" into the equation. *In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical. The fact that an inference may flow less than easily does not mean that it cannot be drawn. To hold otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical*. [Emphasis added]

[23] We refer to the decision in *Re City of Toronto and Toronto Civic Employees' Union, Local 416,* in which the test is stated as follows:

> In determining a non-suit motion, the standard of proof applied in the courts is that of a prima facie case, and not the higher standard of the balance of probabilities. That is, the question on a non-suit motion is whether there is any evidence which, taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. *Any doubts in that respect are to be resolved in favour of the responding party*. [Emphasis added]

[24] In applying that test here, we are satisfied that, if one could hypothetically infer from the evidence adduced the existence of the elements of a section 76 offence, there is a basis for concluding that a *prima facie* case has been established for the purposes of the nonsuit motion.

4. Application of the test to the facts of this case

[25] Counsel for the Respondent submits that the necessary elements of the allegation of insider trading against Mrs. Ho are that: (i) she was a person in a special relationship within the meaning of section 76(5) of the Act; (ii) there was a material undisclosed fact about ATI Technologies Inc. ("ATI"), namely that "ATI would fall short of its forecasted revenue and earnings for Q3-2000"; (iii) Mrs. Ho had actual knowledge of the alleged material undisclosed fact about ATI; and (iv) Mrs. Ho traded ATI shares while she was in possession of the alleged material undisclosed fact about ATI. He maintains that Staff has not made out a *prima facie* case against Mrs. Ho with respect to these elements of insider trading and the Panel ought, therefore, to grant the nonsuit motion and dismiss the allegations against the Respondent at this stage of the proceeding.

[26] Further, counsel for the Respondent submits that the insider trading case against Mrs. Ho relies entirely on the hearsay evidence introduced through Mr. Sikora, the Staff investigator, which consists of a review of portions of documents selected by him. Counsel submits that given Staff's statutory power to collect evidence, including interviews under oath and pursuant to an investigation order, failure to call any direct evidence is conspicuous. Hence, counsel for the Respondent argues that an adverse inference should be drawn from the fact that the evidence of witnesses expected to be called by Staff to testify would have been unfavourable to Staff's case. For example, counsel asks the Panel to draw an adverse inference from Staff's failure to call Mr. Andrew Le Feuvre or anyone else at TD Evergreen with direct knowledge of the trades in question.

[27] In Staff's submission, the Respondent's argument is essentially that there is no evidence that Betty Ho traded on material, undisclosed information while in a special relationship with ATI because of (1) lack of direct evidence concerning marital communications of confidential material information and (2) Betty Ho was neither an officer, director or employee of ATI and was not a recipient of any documentary evidence.

[28] Staff submits that there is ample evidence from which the Panel could reasonably infer that the Respondent engaged in insider trading contrary to section 76 of the Act including:

(a) the interchangeability of funds and securities between KY Ho and Betty Ho's account, including the transfer of the 150,000 ATI shares from Betty Ho's account to KY Ho's account on April 26, 2000 that were ultimately donated by KY Ho to charity;

Exhibits 251 to 258

(b) Betty Ho was able to sign for and authorize the transfer of funds from KY Ho's account into her own account on her own authority;

Exhibit 261

(c) Despite owning in excess of 4,000,000 ATI shares, Betty Ho had never disposed of ATI shares prior to April, 2000, and first sold stock in the company contemporaneous to KY Ho's charitable donation;

Exhibits 252, 256

(d) Between the period of April 24 – May 2, 2000, Betty Ho sold 240,900 shares in ATI for

total proceeds $6,954,279;

(e) Betty Ho avoided a loss of $3,352,824 by selling her shares in advance of the May 24, 2000 early warning press release issued by ATI.

[29] Staff submits that, in these circumstances, the Panel can infer that the Respondent traded on material, undisclosed information while in a special relationship with ATI and cites the decision of *SEC v. Ginsburg* (2004), 362 F. 3d 1292 (11th Cir.) at p. 10 (QL) in which the court said as follows:

> By contrast, people do not make large stock trades for as many reasons as businesses take job actions. Although there are exceptions, people generally buy when they believe the price of a stock is going up and sell when they believe it is going down (either absolutely or relative to the expected performance of other stock). The factfinder in an insider trading case need only infer the most likely source of that belief. The temporal proximity of a phone conversation between the trader and one with insider knowledge provides a reasonable basis for inferring that the basis of the trader's belief was the inside information. The larger and more profitable the trades, and the closer in time the trader's exposure to the insider, the stronger the inference that the trader was acting on the basis of inside information.

[30] The Respondent's counsel conceded in oral argument before us that the burden on Staff to defeat a nonsuit motion is "lower" than the burden of proving the allegations made. As was established in the *OPSEU* case referred to above, the question on a nonsuit motion is whether there is any evidence which, taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. Any doubts in this regard are to be resolved in favour of the responding party to the nonsuit motion. In deciding to dismiss the nonsuit motion, we are not deciding that the inferences Staff would ask the Panel to draw at the conclusion of the case are inferences we would draw. Based on the evidence led by Staff, we need only decide that they are inferences that could reasonably be drawn. Accordingly, we conclude that the Respondent has failed to discharge the onus upon it to succeed on this nonsuit motion.

Conclusion

[31] In summary, we conclude that:

(1) a nonsuit motion is available in proceedings before the Commission;

(2) the Commission has discretion to put a party making a nonsuit motion to its election. In the circumstances of this case, we exercise our discretion not to require the Respondent to make such an election prior to considering the nonsuit motion;

(3) the test for granting a nonsuit motion is whether Staff failed to make out a *prima facie* case that Mrs. Ho committed insider trading contrary to section 76 of the Act; and

(4) the Respondent's motion for a nonsuit is dismissed.

Dated at Toronto this 11th day of May, 2005

"Susan Wolburgh Jenah"
Susan Wolburgh Jenah

"M. Theresa McLeod"
M. Theresa McLeod

DISSENTING REASONS OF COMMISSIONER MORPHY

[32] I have had the opportunity to consider the decision of my two colleagues. While I concur with them that a motion for non-suit should be available in proceedings before the Commission, I do not concur in their decision in not requiring Betty Ho to be put to an election as to whether she intends to call evidence.

[33] This motion was brought on the basis that Staff had not led sufficient evidence to establish a *prima facie* case against Betty Ho of a breach of section 76 of the *Ontario Securities Act*.

[34] The Commission has no rule of practice or jurisprudence concerning motions for non-suits. There is, however, a long history in the Ontario courts of non-suit motions being brought in civil cases on the same basis as the motion of Betty Ho. Consistently the courts have held that the applicant on the motion should be put to his or her election. In *Ontario v. Ontario Public Service Employees Union* [1990] O.J. No. 635 (Ont. Div. Ct.), Mr. Justice Reed indicated that administrative tribunals should conform to the law that governs the courts on this issue.

[35] We have been referred to a number of decisions of the Ontario Labour Relations Board and certain labour arbitrators where the directions have not been followed. I am not convinced that the Commission should follow their practice.

[36] Accordingly, I would require Betty Ho to elect as to whether or not she intends to call evidence before considering the merits of her motion.

[37] Having regard to this determination, it would not be appropriate that I deal with the issue as to whether a *prima facie* case has been led.

Dated at Toronto this 11th day of May, 2005

"H. Lorne Morphy, Q.C."

H. Lorne Morphy, Q.C.