

**IN THE MATTER OF THE SECURITIES ACT**

**R.S.O. 1990, c. S.5, AS AMENDED**

**- AND -**

**ATI TECHNOLOGIES INC., KWOK YUEN HO,  
BETTY HO, JO-ANNE CHANG, DAVID STONE,  
MARY DE LA TORRE, ALAN RAE, AND SALLY DAUB**

**Hearing:** April 12 - 14, 18, 20, 22, 25, 27, 29, May 13, 16, 18 - 20, 30, June 1 - 3, 10, 2005

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

John Lorn McDougall, Q.C. - For Kwok Yuen Ho  
Randy Bennett

Joel Wiesenfeld - For Betty Ho  
Andrew Gray

## DECISION AND REASONS

### Overview

1. On May 24, 2000, ATI Technologies Inc. ("ATI"), a corporation whose shares trade on the TSX and Nasdaq, announced that there would be a shortfall in its forecasted revenue and earnings for Q3-2000.
2. Following that announcement, the price of ATI shares fell, in a two-day period, from \$25.45 to \$12.00, a loss of 52%.
3. As a result of the investigation that followed, this proceeding was commenced on January 16, 2003.
4. In the proceeding, the respondents Kwok Yuen Ho (K.Y. Ho) and Betty Ho (the "Respondents") were alleged to have traded in the securities of ATI prior to the above announcement contrary to subsection 76(1)<sup>1</sup> of the *Securities Act*, R.S.O. 1990, c. S. 5, (as amended) (the "Act").
5. At the relevant time, K.Y. Ho was an insider in that he was the chief executive officer and a member of the board of ATI. Betty Ho, his wife, while having no involvement in

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<sup>1</sup> Subsection 76(1) of the Act states:

No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

ATI, treated herself as an insider because of her spousal relationship with K.Y. Ho. Both of them were substantial shareholders of ATI.

6. This hearing involved only the allegations against the Respondents. The allegations against the other respondents have been previously dealt with by the Commission. Those allegations differ from those against the Respondents.

### **The Issues**

7. In paragraph 9(c) of the Statement of Allegations the specific allegations of the alleged breaches by the Respondents of subsection 76(1) of the Act are set out:

*(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.*

8. There is no issue that the shares were disposed of by the Respondents between April 24, 2000 and May 2, 2000 as alleged, or that K.Y. Ho was a person in a special relationship with ATI given that he was an insider.

9. Also, there is no issue that the fact that ATI would suffer a shortfall in its forecasted revenue and earnings for Q3-2000 was a material fact for the purpose of subsection 76(1) of the Act. It is also not contested that the Respondents must be shown to have had subjective or actual knowledge of that fact at the time of the disposition of the shares.

10. The two main issues that are in dispute as against the Respondents are:

- (a) was the fact that ATI would suffer a shortfall in its forecasted revenue and earnings for Q3-2000 a material fact at the time of the disposition of the shares?  
and
- (b) if it was, did the Respondents have knowledge of it at the time they disposed of their shares?

11. There is one further issue concerning K.Y. Ho. It is alleged that he “traded” 254,000 shares of ATI by donating them to charities and that by donating them prior to the issuance of the news release, he was able to maximize his tax benefit. This raises the question as to whether a donation to a charity is a “sale” for the purpose of subsection 76(1) of the Act.

12. Each of these issues will be considered after discussing the standard of proof and the use of hearsay evidence.

### **The Standard of Proof**

13. While the standard of proof in administrative proceedings is the civil standard of the balance of probabilities, Staff conceded that, this being an alleged violation of subsection

76(1) of the Act, it could only discharge its burden by clear and convincing proof based on cogent evidence.

14. This standard of proof was recently affirmed in *Investment Dealers Association of Canada v. Boulieris* (2004), 27 O.S.C.B. 1597 (O.S.C.) at paras. 33 and 34, affirmed [2005] O.J. No. 1984 (Div. Ct.) where the Commission considered the standard required for proving a serious complaint against a person. The Commission noted in that case that the standard of proof and the nature of the evidence which is required to meet that standard, are integral to the duty of administrative tribunals to provide a fair hearing.

15. We accept, as a matter of a fundamental fairness, that reliable and persuasive evidence is required to make adverse findings where those findings will have serious consequences for a respondent.

### **The Use of Hearsay Evidence**

16. Early in the hearing, an issue concerning hearsay evidence arose from the manner in which Staff chose to lead its evidence.

17. Staff did not call as witnesses anyone who had been employed at ATI during the period of Q3-2000 or at any other time. The three witnesses that Staff did call were Jody Sikora, a Staff investigator, Keith Patterson, an expert on the income tax implications that flowed from donations of shares to charities and Konstantino Papageorgiou, a market analyst who at the relevant time followed technology stocks, including ATI.

18. Mr. Sikora, during the course of his investigation, with the assistance of an order issued under section 11 of the Act, obtained documents from ATI and other sources. Those documents included e-mails sent to and by senior sales and other executives of ATI. K.Y. Ho was a recipient of many of these e-mails and also authored some of them.

19. Staff introduced into evidence through Mr. Sikora several large books of these documents. Objection was taken by the Respondents' counsel to the admissibility of many of these documents on the basis that they were hearsay evidence and that the authors of the documents could have and should have been called by Staff.

20. Staff relied on subsection 15(1) of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S. 22, (as amended) (the "SPPA") as the basis for permitting the introduction of this hearsay evidence. It provides:

*15(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,*

*(a) any oral testimony; and*

*(b) any document or other thing,*

*relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.*

21. There are numerous rationales for permitting tribunals to accept hearsay evidence under this provision. Generally, those rationales focus on the fact that administrative tribunals are expected to be less formal and less contentious than court proceedings and, accordingly, the evidentiary requirements for admissibility may or should be less stringent.

22. Tribunals have a discretion under subsection 15(1) of the SPPA as to what evidence they will admit. In exercising that discretion, a tribunal must have regard to the complaint before it. The more serious and contentious the complaint, the more a tribunal in exercising its discretion under subsection 15(1) of the SPPA, must have regard to the rights of the person who is the subject of the complaint.

23. Insider trading is a serious violation of the Act. The mere allegation of insider trading can have significant adverse repercussions for a respondent. The finding of insider trading can have consequences that are even more severe.

24. The courts have determined that the discretion under subsection 15(1) of the SPPA must be exercised so as not to infringe the *Rules of Natural Justice*. In *Lischka v. Criminal Injuries Compensation Board* (1982), 37 O.R. 2<sup>nd</sup>, 134 (Div. Ct.), Justice Galligan in giving the judgment of the court stated at page 135:

*It is my opinion that the evidence of the police officer, albeit from a technical point of view hearsay and opinion, was admissible because of the provisions of s. 15(1) of the Statutory Powers Procedures Act, R.S.O. 1980, c. 484. I am not prepared to say that there could be no case in which admission of hearsay and opinion evidence could not amount to denial of natural justice even though its admission is authorized by s. 15. I do not think that this is one of those cases.*

25. However, *Re B and Catholic Children's Aid Society of Metropolitan Toronto* (1987), 59 O.R. 2<sup>nd</sup>, 417 (Div. Ct.), was such a case. In that case, hearsay evidence had been admitted pursuant to subsection 15(1) of the SPPA. After referring to the above dictum, Craig J., stated at page 421:

*It is our view that in the circumstances mentioned, where the appellant was denied the right to cross-examine the alleged victim, the admission of the hearsay evidence did amount to a denial of natural justice; the hearing in this case fell below the minimum requirement of fairness.*

26. The concerns raised by the Respondents focus on this fundamental issue of fairness. While it is for Staff to determine the form and substance of the evidence it will present, it is incumbent upon the Panel to be satisfied that both the nature and the form of that evidence is such that a respondent has a fair hearing.

27. The Panel's ruling at the time was to admit the books of documents into evidence. However, it was indicated in the ruling that the ultimate weight to be given to the hearsay documents would involve considerations of both natural justice and reliability.

28. In considering the issue of reliability, regard must be had for the fact that many of the e-mails included in the books of documents are expressions of the opinions and concern of some ATI executives as to whether the Q3-2000 forecasts would be met.

29. Without the authors of those e-mails being called, the opinions or expressions of concern expressed in those e-mails could not be tested by cross-examination and it is not known what facts were or were not considered by them at the time the e-mails were sent. By reason thereof, in considering the ultimate reliability of such evidence, little weight can be given to those e-mails sent by persons who were not called as witnesses.

30. With that background, we will now turn to the specific issues.

**Issue 1 – Was it a Fact at the Time of the Disposition of Shares that ATI Would Fall Short of its Forecasted Revenue and Earnings for Q3-2000?**

31. One of the key elements of subsection 76(1) of the Act is the existence of a material fact with respect to the reporting issuer that had not been generally disclosed at the time of the disposition of the shares.

32. The material fact alleged in this case is that ATI would fall short of its forecasted revenue and earnings for Q3-2000. That fact was made public on May 24, 2000 and the shares were disposed of by the Respondents between April 24 – May 2, 2000.

33. The question this first issue raises is whether in the time period of April 24 – May 2, 2000, it was already an established fact that ATI would fall short of its forecasted revenue and earnings for Q3-2000 as Staff alleges, or was it not a fact, as the Respondents assert, until shortly before the public announcement on May 24, 2000.

34. As already noted, Staff did not call anyone as a witness who had been employed at ATI in Q3-2000 or at any other time. Rather, the evidence led by Staff on this issue was confined to e-mails and other documents which had been obtained from ATI and other sources and were contained in the books of documents entered into evidence.

35. Of those e-mails and documents relevant to this issue, Staff relied heavily on e-mails that had been sent by certain members of ATI's senior management in April 2000. Many of these e-mails contained expressions of concern and opinions regarding whether or not ATI

would achieve its forecasts for Q3-2000. Some of them were very pessimistic as to the state of sales and revenue and whether the Q3-2000 forecasts would be met.

36. Certain of the authors of those e-mails were called as witnesses by K.Y. Ho. Those witnesses rejected the inferences that Staff would have us draw from their e-mails. Rather, those witnesses testified that during the period April 24 – May 2, 2000 they believed the forecasts of Q3-2000 would be achieved.

37. K.Y. Ho called seven witnesses including himself. These witnesses included a number of senior executives of ATI and two directors. Most of these witnesses had direct knowledge of ATI's affairs not only in Q3-2000 but also for numerous previous quarters. Together, they gave a very complete picture as to the nature of the graphic card industry of which ATI was a part, the factors that affect ATI's operations and performance and, in particular, ATI's situation in Q3-2000.

38. Their evidence was credible and we accept it. What follows about ATI and its operations and where ATI was in meeting Q3-2000 forecasts at the time that the Respondents disposed of their shares, is based on their evidence.

39. ATI commenced operations in 1985 and by 2000 was a leader in the high-tech graphic card industry. In 1993 it went public and its shares traded on the TSX and Nasdaq.

40. Evidence was given that the graphic card industry is highly competitive both as to technological innovations and price. By reason of these strong competitive factors, customers can and do significantly control the market and the buying patterns.

41. We heard evidence that this has resulted in a "hockey stick" pattern of sales, not only in the graphic card industry, but also in other high-tech industries. This pattern of sales is so named in that typically for a major part of a sales quarter, sales will be flat like the blade of a hockey stick and then, in the last few weeks of a quarter, they will rise rapidly like the shaft of a hockey stick.

42. Major customers contribute to the sales pattern by delaying purchases until the last few weeks of a quarter with the expectation that suppliers, such as ATI, anxious to make their quarterly forecasts, will offer better prices or other concessions in those last few weeks of a quarter in order to induce sales.

43. The effect of this hockey stick pattern is that, in a typical quarter, it will not be known with any degree of certainty until the last few weeks of that quarter whether or not the forecasted revenue and earnings will be achieved.

44. ATI's fiscal year was September 1 – August 31, 2000 so that Q3-2000 was March 1 – May 31, 2000.

45. On April 6, 2000, ATI had its quarterly conference call in which guidance was given on its forecasts for Q3-2000 to brokerage analysts who followed the high-tech industries and ATI in particular.

46. In preparation for the conference call, e-mails were received from those within ATI who were responsible for the various sales channels in which they provided their best

estimates of sales revenue for the quarter. Based on this and other data, the then CFO gave revenue and margin guidance for the Q3-2000 to the analysts on April 6, 2000.

47. We also heard evidence as to the procedures that ATI had in place in order that both the directors and senior executives could consistently monitor sales revenue and other data. These procedures included weekly reports which were distributed to both directors and executives. These reports traced actual against forecasted sales as well as the amount of committed orders that had been received but not yet filled.

48. While these weekly reports in April 2000 were showing sales lagging behind forecasts, K.Y. Ho and the other ATI executives and directors called by him as witnesses during the hearing, testified as to the confidence that existed within ATI that Q3-2000 forecasts would be achieved or even surpassed. This confidence was based in part on the fact that ATI had in the past, with one exception, achieved its forecasts. It was also based on the extent of the committed orders in hand and the fact that with the "hockey stick pattern of sales" it was not unusual to have sales lagging until the last few weeks of a quarter.

49. The one exception when ATI did not meet its forecasts was in Q3-1994. As a result of this, there was an awareness within ATI of the adverse repercussions of that failure and, in order to avoid its reoccurrence, the weekly reports to executives and directors of ATI and other procedures had been implemented in order that forecasted sales and revenues could be more closely and carefully monitored.

50. April 26, 2000 was the day on which K.Y. Ho instructed his broker to make the donations of shares to three charities which formed the basis of the allegations against him.

51. On that same day, the then CFO of ATI prepared an analysis of projected revenue for Q3 based on recent sales reports. As a result of this review, he again projected Q3 revenue in an amount very similar to that which he had given on the April 6 guidance call to analysts.

52. It was not until the second week of May 2000 that serious doubts started to emerge as to whether the Q3 forecasts would be achieved. We heard evidence that May 10 was the key turning point in the quarter in this regard. At the May 10 weekly sales meeting, the sales report from Europe referred to the cancellation of an order from Fujitsu due to a shortage of Intel CPUs. Intel was the largest manufacturer of CPUs in the world at the time. K.Y. Ho testified that this information was “scary” because, if a large company like Fujitsu was on allocation of CPUs from Intel, smaller companies too would be on allocation. Without CPUs, computers could not be built, and without computers, there would be no need for anyone to purchase components such as the graphic boards produced by ATI.

53. After taking time to assess the impact of this development and with the benefit of input from ATI’s sales teams in the various channels, the decision was made to issue the announcement on May 24 that the Q3 forecasts would not be achieved due in large part to the component shortage described above.

54. With this evidence called by K.Y. Ho, we have been able to place in context the e-mails and other documents relied upon by Staff to support its allegations against the Respondents. After having carefully considered all of the evidence, we find that it has not been established that it was a fact at the time of the disposition of the shares by the Respondents that ATI would fall short of its forecasted revenue and earnings for Q3-2000.

**Issue 2: What was the Respondents' Knowledge at The Time They Disposed of The Shares as to Whether ATI Would Fall Short of its Forecasted Revenue and Earnings for Q3-2000?**

55. In that we have determined that it has not been established that it was a fact at the time the Respondents disposed of the shares that ATI would fall short of its forecasted revenue and earnings for Q3-2000, it follows that we could not find that the Respondents had actual knowledge of that fact. That the Respondents had such knowledge is a requirement in order to establish a violation of subsection 76(1) of the Act.

56. However, for completeness, we propose dealing with what the Respondents knew when they disposed of the Shares and the allegations that Staff has made in that regard.

57. It should be noted at the outset that Staff in its closing written submissions has changed its position as to what the Respondents knew when they disposed of the Shares.

58. As to K.Y. Ho, Staff states:

*It is respectfully submitted that there is an abundance of evidence that K.Y. Ho possessed material facts, including confidential information about poor sales and low margins at the time of his trading. There is also evidence that K.Y. Ho would have "known" that there was some probability that ATI would fall short of its forecasts revenue and earnings for Q3. (emphasis added)*

59. As to Betty Ho, Staff states:

*Given all the circumstances, the Panel is entitled to draw the inference from the evidence that Betty Ho traded her shares on the advice of her husband with the intent of applying the tax credit received from his donations and avoiding the capital gains tax incurred on the sale of her shares.*

60. We are of the view that these new allegations are significantly at variance with the allegations against the Respondents made in paragraph 9(c) of the Statement of Allegations. We do not accept that it is open to Staff in its closing submissions to change its allegations from those asserted in the Statement of Allegations, particularly without seeking an order permitting an amendment to the Statement of Allegations.

61. These new allegations are also at variance with a letter sent by Staff to counsel for the various respondents, dated February 19, 2004. This letter is referred to in a pre-hearing decision in this proceeding, dated on October 19, 2004 following a motion brought by K.Y. Ho. That letter contains the following statement:

*I confirm that it is Staff's position that the Commission should make an order based on the allegations as 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.*

62. Even if we were prepared to accept this revised allegation against Betty Ho, the content of the allegation is not one that is prohibited by subsection 76(1) of the Act.

63. A requirement of subsection 76(1) is that the person trading be in a special relationship with the reporting issuer. Subsection 76(5) defines when a person will be considered to be in such a relationship.

64. That definition does not include a person who has received advice from an insider to trade shares as is the new allegation against Betty Ho.

65. Even if it did, Staff has not demonstrated that Betty Ho sold her shares on the advice of her husband, K.Y. Ho. In submitting that she had sold her shares based on such advice, Staff argued that K.Y. Ho had a direct interest in Betty Ho's shares even though he had gifted them to her. Staff maintained that despite her being legally able to sell the shares, she could only do so with her husband's input.

66. Staff augmented this submission by asserting that Betty Ho was aware that there were trading windows at ATI and that her only source for determining when they were open was her husband. The fact that Betty Ho chose to govern herself and her trades in ATI shares in accordance with the applicable trading guidelines at ATI and to voluntarily respect the trading windows of ATI, as a non-insider of ATI, seems to the Panel to be a reasonable and prudent course of action on her part. Accordingly, we do not draw any adverse inferences from this.

67. We heard no other evidence that would support the inference that Staff would have us draw that Betty Ho sold her shares because K.Y. Ho advised her to do so. In fact, the evidence of Betty Ho was that she did not sell her shares because of anything she knew concerning ATI or on the basis of any advice that she received from her husband.

68. In so testifying, Betty Ho noted that there was a rule of conduct within ATI that the wives of the executives could not be informed of anything concerning the corporate business affairs of ATI and that this rule was observed.

69. Contrary to the inferences that Staff would have us draw, it was the evidence of Betty Ho that the disposition of her shares was effected in reliance upon the advice of her broker. She had her own brokerage account in which she had very substantial holdings of ATI shares

which had been gifted to her by K.Y. Ho in May 1999, as well as shares of several other companies. Betty Ho's broker, Andrew LeFeuvre, who appeared as a witness on her behalf, advised Betty Ho that she should sell some of her ATI shares in order to diversify her holdings. He was concerned that she should do so because of her very large ATI holdings relative to her remaining portfolio of securities. In that the trading window for insiders of ATI was open at the end of April and early May 2000, and the market price of ATI shares had reached the target level at which Betty Ho had previously expressed an interest in selling, he urged her to sell some of her ATI shares while the window was open.

70. Mr. LeFeuvre confirmed this advice in the evidence he gave. He stated that all of Betty Ho's trades in ATI shares were solicited by him. In fact, despite the persistent reminders from Mr. LeFeuvre that Betty Ho ought to diversify, he testified that she was extremely reluctant to sell any ATI shares. She finally agreed to sell some shares but only if she could sell in the \$30 range, and even then, her orders were in very small amounts relative to her remaining holdings.

71. The trades effected by Betty Ho were carried out through her long established brokerage account and there was no attempt on her part to in any way conceal her trading as is often seen in insider trading cases.

72. As with Betty Ho, even if we were prepared to entertain the new allegation made in closing submissions by Staff as to what K.Y. Ho knew at the time he disposed of his shares, the evidence does not support this new allegation.

73. To establish, for the purposes of subsection 76(1) of the Act, that a respondent knew an undisclosed material fact at the time of the disposition of shares, it must be shown that the respondent had subjective or actual knowledge of that alleged fact at that time.

74. The evidence of K.Y. Ho was that he had no knowledge that ATI would not meet its forecasts of Q3-2000 when he disposed of the shares. To the contrary, his evidence was that he was confident that the forecasts for Q3-2000 would be achieved. He based that confidence on a number of factors including the hockey stick effect on sales in the graphic card industry and on the fact that ATI had received a considerable number of orders which he expected would be filled before the end of the quarter. He further gave reasons as to why he thought that certain executives in ATI who had expressed concerns or pessimism in their e-mails about whether sales and revenue forecasts would be achieved, were incorrect in those beliefs.

75. This evidence of K.Y. Ho stood the test of cross-examination and we accept it.

76. Accordingly, we find that the allegations in paragraph 9(c) of the Statement of Allegations as to what the Respondents knew as a fact at the time they disposed of the shares have not been established.

**Issue 3 - Did the Charitable Donations by K.Y. Ho Constitute "Trades"?**

77. As noted earlier in these Reasons, in addition to the usual issues to be determined in an insider trading case, there was a novel issue raised as to whether the donation of shares by K.Y. Ho to charities were "sales" for the purpose of subsection 76(1) of the Act.

78. This question does not appear to have been previously considered by the Commission.

79. Staff did not refer us to any case law or legal analysis in support of its position.

In their written closing submissions, Staff states as follows:

*There is evidence that a donation of shares can result in considerable tax savings for a donor. The value of the donation is determined at the time that the sales are donated to the charity. By donating his shares in advance of the general disclosure of the material fact that ATI would not make its Q3 earnings and revenue expectations, K.Y. Ho avoided a loss in the value of the charitable donations. (emphasis added)*

80. Staff's argument that a considerable tax benefit can result from charitable donations appears to be in aid of establishing valuable consideration so that the donations in question would be equated to "sales". While this position was advanced by Staff in hypothetical terms, there was no direct evidence led by Staff during the hearing to establish that K.Y. Ho did, in fact, realize considerable tax savings as a result of his donations of ATI Shares. As Betty Ho's counsel put it in closing submissions, Staff failed to adduce evidence of the size of any capital gain or tax benefit that may have been incurred or obtained and Staff failed to ask the Respondents, who testified at the hearing, if either of them actually made use of the tax receipts received by Mr. Ho. This leaves the Panel to speculate on this aspect of Staff's case.

81. Furthermore, even if the donor received some tax benefit from having made a gift of shares to a charity, this alone does not clear the hurdle of establishing that such a gift should be deemed to constitute a "sale" for purposes of the Act in these circumstances.

82. Counsel for K.Y. Ho cited the U.S. decision of *Truncale v. Blumberg et al.*, 80 F. Supp. 387 (S.D.N.Y. 1948), where it was held that a gift made in good faith is not a "sale" for the purpose of the U.S. securities law.

83. In the *Truncale* decision, it was argued that a donor's gift of donations to charities were "sales" so as to constitute insider trading, with the alleged profits consisting of a tax deduction to the donor. The Court rejected this argument, stating as follows:

*By no stretch of the imagination, however, can a gift to charity or indeed to anyone else when made in good faith and without pretense or subterfuge, be considered a sale or anything in the nature of a sale. It is the very antithesis of a sale; and there is no reason to suppose that the Congress intended the statute to apply to gifts. (emphasis added)*

84. In a similar vein, in OSC Policy 57-602, in the context of applications to vary cease trade orders to permit a party to establish a tax loss, the Commission states as follows at paragraph 3:

*If the disposition is by way of gift, the Commission is of the view that it is not a "trade" within the meaning of section 1(1) of the Act even though it may be viewed as a "disposition" for the purposes of the Income Tax Act (Canada).*

85. Although this Policy Statement remains in effect, it was not addressed by Staff, nor was any effort made to distinguish it from the case at hand.

86. There was no submission made by Staff – nor could there be on the evidence – that the gifts of shares by K.Y. Ho to the three charities were other than gifts made in good faith. They were each made to a significant charity and each is a matter of public record.

87. K.Y. Ho testified that his commitment to make the donations of shares to the subject charities began to take shape during 1998 and 1999. He had hoped and planned to carry out these commitments earlier than the actual date of the donations, but, for various reasons described below, he had been unable to complete the transfer of shares to the charities as the trading windows for insiders were not open for much of the time leading up to April 2000.

88. K.Y. Ho's commitment to make a donation to Princess Margaret Hospital began in the fall of 1998 at the urging of Dr. Fleck, a fellow ATI director who testified at the hearing. It was apparently agreed that the donation would be made in the summer of 1999. The actual donation of shares did not occur until April 2000 due to the following combination of factors:

- (i) the trading windows at ATI were closed for a good portion of this time due to the loss of a Dell design contract to nVidia in the summer 1999, followed by an ATI share buyback in October 1999 and the ArtX acquisition in February 2000;
- (ii) in Q3, the trading window for ATI insiders did not open until April 10, 2000 at which time K.Y. Ho. was traveling in the Far East; and
- (iii) in order to make the donations as planned, K.Y Ho needed to borrow 150,000 shares from Betty Ho (which he subsequently repaid) and Betty Ho forgot to make the

necessary arrangements for the transfer to occur until prompted by her husband to do so on April 22 or 23, 2000.

89. We also heard evidence that K.Y. Ho's planned donation to Havergal, a private school, which his two daughters and two nieces were attending, dated back to 1999. Similarly, in September 1999, K.Y. Ho toured the Yee Hong Centre and at that time indicated to his fundraising Chairman that he intended to make a significant donation.

90. Accordingly, we have determined that the donations of shares by K.Y. Ho to the charities were not "sales" for the purpose of subsection 76(1) of the Act.

### **Conclusion**

91. For all of the above reasons the allegations against the Respondents are dismissed.

Dated at Toronto this 14<sup>th</sup> day of October, 2005.

"Susan Wolburgh Jenah"

Susan Wolburgh Jenah

"M. Theresa McLeod"

M. Theresa McLeod

"H. Lorne Morphy"

H. Lorne Morphy