Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 Reasons for Decision

3.1.1 ATI Technologies Inc., Kwok Yuen Ho, Betty Ho, Jo-Anne Chang, David Stone, Mary de la Torre, Alan Rae and Sally Daub

IN THE MATTER OF
THE SECURITIES ACT
R.S.O. 1990, c. 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

Motions Hearing: July 15, 2004

Panel:	Paul M. Moore, Q.C.	-	Vice-Chair of the Commission (Chair of the Panel)
	Suresh Thakrar	-	Commissioner
Counsel:	Jessica Kimmel	-	For ATI Technologies Inc.
	J.L. McDougall		For Kwok Yuen Ho
	Randall Bennett		
	Joel Wiesenfeld		For Betty Ho
	Lawrence Ritchie		For Jo-Anne Chang
	Valerie Wise		For Mary de la Torre, Alan Rae
	Matthew Britton	-	For the Staff of the Ontario Securities Commission

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the motions hearing, including oral reasons delivered at the hearing, 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. The transcript has been edited, supplemented and approved by the chair of the panel for the purpose of providing a public record of the panel's decision in the matter.

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CHAIR:

[1] We are here this morning 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, to deal with two motions that have been made.

[2] One is a motion by Mr. Kwok Yuen Ho requesting an order striking the words "contrary to the public interest" in paragraph 62(c) of the statement of allegations, dated January, 16, 2003.

[3] The other is a motion by Betty Ho for a ruling prior to the commencement of the hearing of this matter, that based on the statement of allegations issued January 16, 2003, it is not open to the Commission to make an order in the public interest under section 127 of the *Securities Act* against Betty Ho unless the prosecuting staff of the Commission proves with clear and cogent evidence that Betty Ho's conduct breached section 76(1) of the Act.

. . . .

[4] My name is Paul Moore. I'm a Vice-Chair of the Commission and I will be Chair of this panel today. To my right is Commissioner Thakrar, and we are going to be the motions panel today. The hearings panel will be differently constituted.

. . . .

[5] We will now move to the first motion, which is that of Mr. Ho.

SUBMISSIONS BY MR. MCDOUGALL:

[6] As the Chairman pointed out, this is a motion to strike the allegation of insider trading "contrary to the public interest," contained in paragraph 62(c) of the statement of allegations, which is the penultimate paragraph in the statement of allegations where the relief is claimed.

[7] What is alleged against K.Y. Ho is that he –

CHAIR:

[8] Could I ask you a question before we start? What authority does this panel have to write staff's statement of allegations? What authority do we have to start tinkering with it and drafting it? That's what I would like to know. Staff has made a statement of allegations. They are going to have to live with it. If it's sufficient, fine. If it's deficient, that's their problem. But why should we, the Commission panel, tell staff what they can say or cannot say in their statement of allegations?

MR. MCDOUGALL:

[9] The answer is perhaps found in the fact that Mr. Wiesenfeld and I differed in the way we framed the claim for relief. What's being sought here is a disclosure of what

it is that supports the claim for the relief sought, and what is sought is a remedial order, in effect, from this Commission requiring the statement of allegations to conform to what is being sought so there is an underpinning –

CHAIR:

[10] But isn't that a contradiction? Because what is being sought is what is said in the statement of allegations. Let's assume for the moment that you are absolutely right in your argument. Well, then, that just means that when staff presents its case it will not succeed on that particular matter because it hasn't proved what it's alleged because it hasn't put in proper proof.

[11] Why should we – I'm really troubled by, first of all, our authority, and even if we have the authority, the propriety of the Commission, which has deliberately separated itself from staff -- these are staff allegations – start writing those allegations or correcting them or improving on them or changing them. It is contrary to what we're trying to do as a tribunal – separating ourselves from staff – staff will prosecute the allegations, and we will be the adjudicators.

MR. MCDOUGALL:

[12] Well, I'm certainly not suggesting that there is any relationship between staff and the Commission, but the Commission has to determine the case, as I think you've just said, in accordance with what's contained in the statement of allegations. That's the case that our client has to meet.

[13] Now, what we have here, though, is – and I'm going to take you to the correspondence. No doubt you've already read it. My friend says, well it's no part of my case that there was anything here but a contravention of section 76(1), insider trading. However, it's open to the Commission *ex propio motu*, if you will, to determine that they find conduct that's offensive and that an order should be made in the public interest.

CHAIR:

[14] My second problem, and I have read all the correspondence, is why should we even look at the correspondence? Why should we as a motions panel of the Commission care or concern ourselves about the discussions that may be going on between staff, as to what it might do, and you, as to what you might object to? It seems to me something that we should stay out of and we should leave it to what transpires in fact before the hearing panel. Everything else is speculation.

[15] I've read the correspondence, and I'm saying, why are we reading this? Why is that our concern? That's your concern and staff's concern and will be the hearing panel's concern depending on what unfolds before the hearing panel. But I don't see how that is relevant to the statement of allegations.

. . . .

[16] The reply that you've put in says, in paragraph 2 of your reply, "A respondent has an inalienable right to know the case against him or her." And I say amen. That is correct. That's a statement of the law.

[17] The case your client has to meet is the case set out in staff's statement of allegations and the notice of hearing. And as I read those two documents, the case could be stated as: based upon the conduct alleged, the Commission should form the opinion that it's in the public interest to make one or more of the orders under section 127 as outlined in the notice of hearing. That's the case you have to meet. Now, why should we change the statement of allegations that has been provided by staff? I don't see that it's appropriate for us to get into that.

. . . .

MR. MCDOUGALL:

[18] Mr. Moore, Commissioner Moore, there is only one kind of insider trading that I'm aware of and that's insider trading contrary to the *Securities Act*, that's section 76(1). If it's other than that, as I understand the law, it isn't insider trading.

CHAIR:

[19] You may be right.

MR. MCDOUGALL:

[20] That's the gravamen of the submissions we are making before you today, that if there's something else that supports some other conduct that's – even if it's contained in here, that supports this creature called insider trading contrary to the public interest, staff is obliged to tell us. Otherwise this Commission shouldn't address the issue, and as a consequence of that you should request or demand that it be –

CHAIR:

[21] That may well be an argument that would be very appropriate to be made to the hearing panel based on what staff may argue at the time after all the evidence is in, and you may object to some of the evidence they try put in because it doesn't fall within the allegation.

. . . .

MR. MCDOUGALL:

[22] Perhaps the first thing I should say is why we're here today. You are quite right Mr. Moore, we could bring this before the hearing panel. But what you do here today will shape the hearing and will shape our preparation. If we have to meet a case that we don't know about, if we're having to deal with some conduct unspecified that is allegedly contrary to the public interest and we have to satisfy the hearing panel that that conduct is not unsatisfactory conduct, we need to know it now.

CHAIR:

[23] But can we deal with the motion? The motion is to amend the statement of allegations, and I am saying to you – and I don't think you're asking for an amendment of 9(c) of the statement of allegations. You're asking for an amendment of –

MR. MCDOUGALL:

[24] Paragraph 62(c), which is at page 20.

CHAIR:

[25] Yes.

MR. MCDOUGALL:

[26] And the reason we're asking for that is because we – you'll notice that 62(c) does refer to 76(1) of the *Securities Act*.

CHAIR:

[27] But also that section 62 – although this isn't an allegation, it's argument, because it says "Staff submit that." Paragraph 9 sets out the allegations. Paragraph 9 is prefaced by – not prefaced, but the opening words of paragraph 9 are on page 2, "The specific allegations advanced by staff are" – and then 9(c), and that's the case you have to meet. Section 62 is argument. It says, "staff submit that." And then they say that – in paragraph (c) that K.Y. Ho, Betty Ho, Chang, Stone and de la Torre committed insider trading contrary to section 76(1) of the Act and contrary to public interest.

[28] Now, that's the submission or argument that staff is making to the Commission based on the allegations.

. . . .

MR. MCDOUGALL:

[29] Let me just read [paragraph 40 of the statement of allegations].

[30] "K.Y. Ho was a founder of ATI and had a thorough knowledge of the computer chip business. He was aware of the positive information that ATI was providing to analysts and investors. At the same time, he was aware of problems at ATI. He was aware of the concerns raised in the 2000 Operating Plan. He was aware of the difficulties that ATI had in achieving Q1 and Q2 sales. He received the weekly sales summary. He attended the weekly sales meetings. He knew the importance of European sales to the overall sales picture. He received or was copied with e-mails from Europe indicating that their sales staff would be unable to meet their sales objectives. Indeed, on April 21st . . . he was copied with e-mail from the General Manager of ATI Technologies (Europe) Limited informing senior management that Europe would fall short of its requested target by 35 million."

[31] Now, all I ask on behalf of my client is to know if there is something there more than is – more than just section 76(1) that staff says warrants an order in the public interest absent a finding of insider trading.

CHAIR:

[32] Why are you asking us that? I mean why won't you – what you should be doing is that you should be waiting to see whether staff has made proper disclosure to you, or whether they try to introduce other things that aren't set out in the – we'll call them the particulars here, and object at the time that that happens, if it happens.

MR. MCDOUGALL:

[33] Well, first of all, I have no reason to think that staff hasn't made full disclosure. There hasn't been any problem with that at all in this case.

CHAIR:

[34] But there would be if, in fact, they tried to do what you suggest they might try to do, and that is refer to some other conduct or some other things that you don't have knowledge of and use that as the basis for arguing that there was conduct contrary to the public interest.

MR. MCDOUGALL:

[35] Well, I think that's exactly what they're doing. I think that's exactly what's going to happen in this hearing, and if it's going to happen I think that my client is entitled to be advised beforehand so that we can arrange our defence to meet –

CHAIR:

[36] No, I disagree. You would object at the time and the panel would not allow the introduction of material that was outside the case.

MR. MCDOUGALL:

[37] Commissioners Morphy and Shirriff last week – or April the 26th, I should say – in the *Anderson* case, said at paragraphs 24 and 25:

[38] "It should be noted, but for possibly the submission that the Browns were part of the organizing group, that none of the acts of the Browns which were submitted by staff in the submissions as constituting acts in furtherance of trade are set out in the statement of the allegations. This is troubling, and it means we are being asked to find that the Browns acted contrary to the Act on three acts in furtherance of trade, two of which are not set out the statement of allegations.

[39] "It is now well established that the rules of natural justice and procedural fairness necessitate that the respondent be given notice of the conduct that is being called into question and will be the subject of the hearing. To give such notice is a function of the statement of

allegations."

[40] And he goes on to say –

CHAIR:

[41] Mr. McDougall, that was the hearing panel. That was the hearing panel in the case, and staff – exactly the point I'm making. If your speculation takes place and actually happens, and the hearing panel is faced, as Mr. Morphy and Mr. Shirriff were faced, with the fact that after the evidence was in, they looked at the statement of allegations and the arguments that were made, and came to the conclusion that the statement of allegations did not cover some of the matters. . . . But quite rightly, they, at the time, said that the arguments that were advanced didn't properly encompass the statement of allegations.

[42] But we are not the hearing panel. We are a motions panel. We don't know what's going to be introduced. All we have is the statement of allegations and your suggestion that we amend the statement of allegations. All I'm saying is that I don't see the authority for us to do that or the desirability.

MR. MCDOUGALL:

[43] Well, reading the next paragraph:

[44] "But for our disposition in this matter, we would have required further submissions from staff concerning the effect of this lack of notice in the statement of allegations of the specific acts relied on by staff in the submission as acts by the Browns in furtherance or the trade."

[45] And that's exactly what I'm asking on behalf of my client that this panel do, ask staff – tell staff to develop their allegations to be consistent with the relief they're claiming in paragraph 62. Let's say –

CHAIR:

[46] That case is not relevant to us because that case – what you're missing is the time frame. That was a hearing panel, not a pre-hearing panel such as we are here. They had the benefit of what went on and the submissions that were made, and if they were going to dispose of the case otherwise they would have required further submissions, and the indications are that they would have rejected those submissions because the statement of allegations was not correct. But that – they had the benefit of the record of what had happened.

[47] Here it is pure speculation on your part as to what might happen. You're asking us to change the statement of allegations out of fear that something might happen.

. . . .

MR. MCDOUGALL:

[48] Well, let me be utterly frank. What I'm afraid of in this hearing is that the panel is going to be taken tortuously through the business dealings of the ATI in three areas of the world they do business, the Far East, Europe and North America, and you're going to be asked to examine all the business practices and all the – those other related matters, and you're going to be invited if they fail, as fail they must in my submission, on the insider trading allegation against my client, find something lesser, some mud, and I don't want to go through that and I don't want the Commission to go through that. I'd like to know now if there's something else that they say that my client did. What is it? And you today are the only panel that I can ask for such relief, and I can't let it go until the middle of the hearing not knowing what's going on –

CHAIR:

[49] You can object when they start raising those business practices and say "what do they have to do with the allegations?"

. . . .

[50] Why don't you accept that the case you have to meet is only that limited to and is only that disclosed in the statement of the allegations?

MR. MCDOUGALL:

[51] Because of the letter. I asked my friend to amend the allegations to solve the problem. We all did. He refused, but he wrote a letter saying, well I'm going to ride the section 76(1) horse but the Commission, à la *Donnini*, could find misconduct of some kind on its own motion.

CHAIR:

[52] Well, in *Costello*, the allegation was that Costello advised, without registering; that Costello did not make certain disclosures; and that Costello had breached sections 40 and 25 of the Act.

[53] Section 40 of the Act provides that registered advisors must make certain disclosures. The panel in that case found that because of the failure of Mr. Costello to register as an advisor under section 25, he was not a registered advisor and, therefore, he did not breach section 40. But the panel formed the opinion that Costello's conduct was contrary to public interest. They found that his conduct was not contrary to section 40, but that it was still conduct that caused them concern.

[54] Now, in that particular case all of the allegations supported the finding of the Commission on the question, but the fact that technically Mr. Costello did not violate section 40 of the Act was not proved by – or that he did breach the Act, was not agreed to by the Commission. In that particular case the Commission felt that it was in the public interest to make the order. Now, that could conceivably happen here if all of the facts alleged were established.

[55] You may be right. I can't see how it wouldn't have been also a violation of section 76, but I want to wait and

see what comes out at the hearing before the Commission makes a determination.

MR. MCDOUGALL:

[56] Well, the *Costello* case, which I have read, of course, before coming up here, it's illustrative, perhaps, of the problem that I am trying to expand upon for the Commission. There was no breach of the Act, but there was a wrong, a wrong in the broadest layman's sense. As I understand the public interest jurisdiction of this Commission, if there is a wrong or a breach of ethics, a breach of conflict rules or whatever, if there is such a wrong then if the Commission considers that it's necessary in the public interest to prevent such repetitions of such activities it can interfere, even if there was not a breach of a policy statement, for example, as long as it's within the section 1 of the – section 1.1 of the *Securities Act*, this Commission could intervene. All I want to know is what the wrong is? What is the wrong that the Commission could pin absent a section 76(1) conviction, a finding of – for an order in the public interest? That's all I ask.

CHAIR:

[57] But that, I believe, is a problem we all have with words like "reasonable", "undue", and "in the public interest."

. . . .

[58] Well, I guess where I come back to is the narrow motion, that (1) we, the panel, are being asked to change the statement of allegations (and I think it's inappropriate for us to do that); and (2) we, the panel, are being told that we should be concerned or interested in what kind of arguments, correspondence and exchange of views have been exchanged between staff and the parties (and I think that's not right). The hearing panel should be concerned with what actually happens before the hearing panel and they shouldn't be concerned about anything else. . . . I think that we at this stage should look at the notice of hearing and the statement of allegations and stop there.

[59] Again I come back to the fact that Mr. Morphy and Mr. Shirriff were dealing with a different situation. They were the hearing panel where various things were – where they had specifics before them. Here we have no specifics of what – what staff may argue in the future.

MR. MCDOUGALL:

[60] The letter that Mr. Britton wrote to me, I could have put an affidavit in to prove –

CHAIR:

[61] We've read it. . . . As I read the correspondence it's all speculation. Staff is saying we have no alternative theory of liability and we will be limited by the allegations in the particulars, but they reserve the right to argue certain matters. I don't think it's appropriate for us to tell counsel what they may or may not argue. So I don't see there are any additional particulars or anything that we could order staff to do because we don't know what the particulars are.

. . . .

[62] Can we then move to the second matter. Mr. Wiesenfeld.

SUBMISSIONS BY MR. WIESENFELD:

[63] While the claim for relief in the notice of motion is phrased differently than Mr. McDougall, essentially it's the same motion. But what I will try to do is take into account your comments, Commissioner Moore, and not repeat Mr. McDougall's, although quite frankly I heartily endorse his submissions.

. . . .

CHAIR:

[64] If I could zero in on my concern – and it was helpful to get material in advance so we have a chance to really study it, and I want to assure you that we're not up here this morning not having read this material, and that's one reason why I wanted to cut to the chase and get to the point.

[65] I'm not saying your arguments or, indeed, Mr. McDougall's arguments are wrong. I'm not – with respect to what the law is as far as the necessity for the case against the respondents being made known (the statement of allegations and the notice of hearing together set forth what that case is), the necessity to limit the evidence and the submissions to what has been properly disclosed ahead of time according to our rules and the rules of natural justice, and the fact that staff may well fail if it tries to argue that the public interest has been violated and base that on some conduct that has not been alleged – you know, I'm not – I'm not saying that I disagree with any of your submissions.

[66] My main concern with respect to your motion is that – I don't want to say it's premature, but I guess that's the best word that I can think – I think it's inappropriate for this panel, not having heard what might come out, to try to bind the hearing panel. You're asking for a ruling prior to the commencement of the hearing based on the statement of allegations. Your request should be, in my view, something that you would make to the hearing panel at the appropriate time after the case has been put in. It may well be that all of this material that you have submitted to us will hit the mark if, in fact, staff does what you fear it may do. But I really don't know what staff might try to do or try to argue before the hearing panel. I don't feel at all comfortable that we should, without having the benefit of knowing what might be disclosed at the hearing, try to bind what the hearing panel may decide.

MR. WIESENFELD:

[67] Let me just say one last thing and I then I will retire and have Miss Kimmel give her shot. The hearing

panel does not hear evidence and make decisions in a vacuum. They are circumscribed by what is in the notice of hearing, the statement of allegations, which, in my respectful submission in this particular case includes the correspondence from Mr. Britton. If there is not a mechanism prior to hearing for the Commission to deal with issues other than just pure disclosure, to deal with the particulars that are provided in accordance with the Rules of Practice, then I think it will lead to an inappropriate appearance and reality regarding the process of the Commission.

[68] It's fundamentally unfair for Betty Ho to prepare a case, a defence to insider trading, which can only be insider trading contrary to section 76 of the Act, that's the first step to a section 127 finding, and wind up in what promises to be at least a 19-day hearing with the potential of a finding that there is not insider trading and yet conduct contrary to public interest. That's the conundrum.

CHAIR:

[69] Let me – I hear what you're saying, but the problem that I have is this. Now, let me speculate, which I say we're not supposed to do. One of the orders being sought is an order to prevent – is Betty Ho a director?

MR. WIESENFELD:

[70] No, she's not. She is not a market participant or a registrant.

CHAIR:

[71] There is, I guess, one of the persons here who is a director – Mr. K.Y. Ho is a director, if I'm correct. Yes, he's a director. Now, it may well be that when all the evidence is in, and it's limited strictly to all the conduct that's referred to in the statement of allegations, it may be that staff will argue that a director of a company shouldn't have done what Mr. Ho did and that he should be banned from being a director for a period of time. I'm assuming that that is an argument that would be made because that is one of the orders that staff has suggested or is suggesting in the notice of hearing be made.

[72] If, in fact, staff were to try to refer to other conduct, like the way Mr. Ho keeps records – nothing alleged here – and if this insider trading related material were found to not constitute any offence under the Act – then at that point in time, again I'm speculating, and I don't want to limit what the hearing panel may say – but I can see, at that point in time, your objections would be made and probably listened to and agreed to by the panel.

[73] But for this panel now to purport to tie the hands of what the hearing panel may decide after it listens to all the evidence and all the arguments, by issuing an order today saying that the hearing panel may not make an order unless the prosecuting staff proves with clear and cogent evidence certain things just strikes me as not being helpful at all.

. . . .

[74] I come back to the fact that this order would be no more than a declaration of what the law is. I fear that we might get it wrong because this is just a motion without the benefit of what will go on at the hearing. This would be much better left to a real problem that might arise at the hearing or to argument that may be made at the time.

. . . .

[75] I want the hearing panel to be free to interpret section 127 after listening to counsel and after listening to all of the evidence, and I don't want anything that we do today to tie their hands unless it's appropriate. And I look at section 127, and it says, and the key words:

[76] "The Commission may make one or more of the following orders if, in its opinion, it is in the public interest to make the orders."

[77] Now, when I go to Mr. Britton's statement, staff takes the position that in the event the panel heard evidence during the course of the proceedings that make it form the opinion it is in the public interest to make an order, it is able to do so. I don't think that any of us have a quarrel with that. The quarrel then comes with "even if it determines that staff has failed to prove its specific allegations."

[78] I then go to subsection 4:

[79] "No order shall be made under this section without a hearing subject to section 4 of the *Statutory Powers and Procedure Act*."

[80] That's where we have to look at all of the rules of natural justice that Mr. Morphy and Mr. Shirriff were concerned with in the *Anderson* case. I don't know what staff meant when they said "even if it is determined that staff has failed to prove its specific allegations." If all they're saying is, as in the *Costello* case, there doesn't have to be an actual breach of the Act, I have no problem with that. If what they're saying, as they unsuccessfully argued in *Anderson*, is the panel is completely free to make an order if something pops up that wasn't alleged, then I would disagree with them.

[81] But, Mr. Wiesenfeld, the problem that I am having is that I don't feel at all comfortable that it's appropriate for us to grant the order that you requested. I think hopefully this hearing today will give reason for not worrying that *Anderson* will be ignored by the hearing panel.

. . . .

SUBMISSIONS BY MS. KIMMEL:

[82] I will be very brief. The company supports the submissions and requests that have been made by the two particular individual respondents, and, in fact, maintains the position that whatever comes out of today is important in fact for all of the respondents in terms of circumscribing the

issues, and really what's come out of the discussion that's taken place here today is that there's been some concern on the respondents' side arising out of the comments of Mr. Britton in the letter and in particular the suggestion that the Commission might be able to independently form an opinion regarding the conduct of any of the respondents and make an order in the public interest.

[83] I take Mr. Britton's submission to be even if staff isn't making that request, and I think that's where the problem arises, and I take some solace from your comments. . . . I take some solace in your comments to the effect that you don't agree that the law would necessarily permit the Commission to just make an order just because something happens to pop up during the hearing and that, in fact, the Commission will govern itself by the pleadings or in this case the statements of allegations, and staff will obviously be, as they have undertaken to do, limiting their requests, but that the suggestion that somehow an order could be made nonetheless just by the Commission sort of taking off on some independent jurisdiction was really what I think the concern was from the respondents' side.

[84] To the extent that that's an issue, obviously that was why we came forward today, to make sure that there wasn't any lack of clarity or uncertainty in that regard going into the hearing. I think Mr. Wiesenfeld has dealt with the question.

. . . .

[85] The speculative issue that was raised – and I think I would just like to give you this context because I think it may give you some assistance in understanding the concern of the respondents. Staff, in the response submissions to the ATI submissions on this hearing – it's a very thin white brief. It's entitled "Response of Staff to the" –

CHAIR:

[86] We have it.

MS. KIMMEL:

[87] – "Submissions." In paragraph 6, staff gives an example of what might happen at the hearing, and this example goes to the heart of the concern of the company, and I just – I raise it as an example.

. . . .

[88] In paragraph 6, which is on page 2, what staff suggests for purposes of this hearing is that in this case it is conceivable that the Commission could be satisfied that while staff failed to prove the specific allegations made against ATI, the Commission may still be satisfied that ATI acted contrary to the public interest. For example, the Commission could be satisfied that ATI disclosed that it would report lower than expected revenues and earnings for Q3 2000 in a timely fashion. Yet if the Commission concluded that ATI failed to have systems in place to track and assess quarterly reviews and earnings in a timely manner, it could conclude that such conduct was contrary to the public interest.

[89] This is not what this hearing is about vis a vis ATI. This is exactly the type of example that created the concern on the part of the respondents. If that's the case that ATI is meeting, that's a different case, that's different evidence, that's different witnesses, and that's an entirely different proceeding, in my respectful submission, than the case about the timeliness of the disclosure, which is the case that's set out in the statement of allegations.

[90] What I understand Mr. Britton to be saying is, staff is not going to ask for that. At least he suggested he is not asking for anything other than things that have been particularized and he is not going to allege conduct other than what's been particularized, and there's nothing in the statement of allegations about any failure of systems and things like that. But what's being suggested is that somehow the Commission could just on its own decide to make an order, and ATI's concern would be that they would not have necessarily led all of the evidence that they might otherwise have wanted to put before the Commission on the question of the sufficiency of its systems or the way in which its recording and procedures worked because ATI didn't know that that's what the case was. I just wanted to provide you with that contextual example.

CHAIR:

[91] I appreciate that. I find your submissions very, very helpful, and I see where you would have a concern. Let me say that when I read this – first of all, it's under "Law and Argument" – and it seems like exactly the kind of argument in law that should be made to hearing panel so they don't go off on a frolic. If the Commission went off on a frolic, which I'm sure it won't, there is always the right of appeal.

[92] The rules of natural justice that you counsel have capably pointed out are there. The section 127, which says – section 127(1), which says the Commission may form the opinion that an order is in the public interest and may make any of these rulings is limited by subsection 4, which requires a hearing pursuant to the *Statutory Powers and Procedure Act*, and all the rules of natural justice come into play.

[93] So whether staff has correctly chosen its example or not, it's under the section "Law and Argument". I guess the point that I'm making is that I don't hear anything that we can specifically order as far as further particulars are concerned under rule 3.1 and 3.2. I think your concern is that staff has suggested that the Commission may be free to go on a frolic on its own – I don't want to issue an order that the subsequent panel must not go on a frolic of its own. I would rather leave it to counsel to keep the subsequent panel duly informed on what it may or may not do. I'm reluctant to purport to give direction to that subsequent panel now just because I would be concerned that it would be misconstrued or we might not get things completely right. So I'm not objecting to your concerns, and I see the basis of your concerns, and I'm not saying

that they're totally unfounded. I'm just concerned that this is not the time or place to speculate about what might happen at the hearing.

[94] I will reiterate. The case you need to know about is the case set out in the statement of allegations.

. . . .

SUBMISSIONS BY MR. BRITTON:

[95] Not surprisingly, Mr. Chairman, I don't have a lot to say. Just a few things, though, in response to Mr. Wiesenfeld's comment that the Commission consider issuing a warning. I don't think that's necessary or appropriate in the circumstances. He is suggesting that the Commission should warn staff that we not try to lead any inadmissible evidence or developing evidence. I think if that happened at the hearing the panel would be quick to correct staff at that time. I don't think it's necessary to warn staff to stick to the case that is alleged. We know what the conduct is that we've alleged and we intend to prove that.

[96] The only other point that I was going to make is that the comment that I made in the letter is essentially, in my view, what the case of *Costello* stands for, and is really now binding on the Commission; and what I really came prepared today to argue, and that is, does the Commission have jurisdiction and power to order, to make a section 127 order, where staff fails to prove a specific allegation that's made in the statement of allegations. And I think that *Costello* is authority for the proposition that it can.

[97] In response to Ms. Kimmel's concern that we're concerned that the Commission may go off on a frolic on its own and make orders that staff isn't specifically requesting, I will make this observation. I don't think it makes any difference what position staff takes. For example, in *Costello*, I don't think it makes any difference whether staff took the position in its submission to you that Mr. Costello violated section 40, that he satisfied the definition of registered advisor, that he breached the Act. That's a position of staff. You rule, no, we've decided that that isn't a contravention of the Act; however we're satisfied that he violated – his conduct was contrary to the public interest, and this is a situation in which we should make a section 127 order.

[98] So I don't think it's necessary for staff to make that supplementary submission. If you don't find contravention, then look at the issue of – his conduct being contrary to the public interest. The example that I used – and I thought it was good example; and let me just say that these examples that I used in my factum were argument but they were prompted by the suggestion that the Commission couldn't make these kinds of orders where there hadn't been a contravention, so I was trying to be helpful and say well, here's some examples where this might be a possible scenario. I wasn't trying to say these are the – this is the case of staff. I was saying, you know, this is something that could unfold.

. . . .

ORAL REASONS FOR DECISION:

CHAIR:

[99] Our decision is to reject both the motions.

[100] The first motion, which is the motion of K.Y. Ho, for an order striking out the provisions of the statement of allegation, would result in us telling staff how to draft its statement of allegations. We do not believe that is appropriate. Staff should satisfy itself that the case it's going to present and the arguments it's going to make are sufficiently covered by the statement of allegations. Staff will have to decide – it's staff's concern that it not end up in the situation, which I will refer to as the *Anderson* situation, where the panel that actually hears the matter is faced with the fact that certain conduct alleged wasn't particularly referred to in the statement of allegations or wasn't made an allegation.

[101] We've had a good discussion today of what the concerns of counsel are. Particularly, Ms. Kimmel referred to the concerns that staff may be of the view that the hearing panel might go off on a frolic of its own and find conduct contrary to the public interest that was not covered in the statement of allegations in which particulars were given, because of certain evidence that came out in the case.

[102] I think it's inappropriate for this panel to warn the hearing panel that the hearing panel ought to follow the rules of natural justice – of course they will have to. Anything we say here today shouldn't be viewed as a warning to the hearing panel.

[103] With respect to staff, I don't think it's appropriate for us to warn staff to do its job. Mr. Britton has heard the argument and has had the benefit of listening to the discussion here, and there would certainly be no shame involved in any clarification amendments, if staff chooses to make any. We're not going to direct staff to do that.

[104] The second motion was the motion by Betty Ho for a ruling, or an order of this panel that, in effect, would tie the hands, or limit the decision-making power, of the hearing panel. Again, it's inappropriate for us to do that. We must rely on the hearing panel to do its job, to do its duty, to conduct a fair hearing, to apply the law, including the rules of natural justice that are required because of subsection 4 of section 127 of the Act. We leave it to that panel to come to the opinion that it has to come to; and if it can form the opinion required under section 127(1) of the Act that certain orders are in the public interest, and there has been a proper hearing, taking into consideration *Anderson* and other considerations, then it can make the orders that it, in its discretion, determines are necessary.

[105] Therefore, we reject the second motion as being premature and inappropriate for this hearing panel to deal with.

[106] Counsel for Betty Ho requested us to issue a warning to staff as to its conduct before the hearing panel.

I don't think it is appropriate to do that. What we will do, however, is prepare edited reasons based on what I've said here orally. We will include edited extracts of the discussions that went on today as a helpful precedent for counsel and others.

APPROVED:

"Paul M. Moore"