

contrary to subsection 76(1) of the *Ontario Securities Act* (the Act). The motion was dismissed by a differently constituted panel (the Prior Panel) in reasons dated July 30, 2004 (the Reasons).

[2] Following the dismissal of the motion by the Prior Panel, Betty Ho filed a Notice of Appeal with the Divisional Court pursuant to section 9(1) of the Act. That appeal, as of this date, has not been argued.

[3] In September 2004, the panel of Commissioners that will preside at the hearing of this matter (the Hearing Panel) was constituted. Shortly thereafter, Betty Ho filed a new notice of motion with the Commission for the same relief as in the prior notice of motion and requesting, on the basis of the Prior Panel's Reasons, that the Hearing Panel hear the motion dismissed by the Prior Panel. The Secretary of the Commission set a date for the hearing of the request and advised Betty Ho that the Hearing Panel would require submissions as to its jurisdiction to consider the new motion. The motion was heard on October 19, 2004.

II. The Facts

[4] In the January 16, 2003 Notice of Hearing in this matter, it is indicated that Staff is seeking an order in the public interest against Betty Ho pursuant to section 127 of the Act. In particular, Staff is seeking:

- (a) an order reprimanding Betty Ho;
- (b) a permanent cease trade order against Betty Ho and an order permanently removing any exemptions she may have under Ontario securities law;
- (c) an order prohibiting Betty Ho from acting as an officer or director of an issuing corporation; and
- (d) an order requiring Betty Ho to pay the Commission's costs of the hearing.

[5] The Statement of Allegations in this matter, dated January 16, 2003, sets out certain allegations of fact concerning Betty Ho and other respondents. In paragraph 9 of the Statement of Allegations, the following allegations are set out:

- 9. The specific allegations advanced by Staff are:
 - (a) That ATI failed to disclose material information forthwith contrary to s.408 of the TSX Company Manual and thereby acted contrary to the public interest. The material information was that ATI would report lower than expected revenue and earnings for Q3-2000.
 - (b) That ATI made a statement to Staff of the Commission during the course of its investigation of ATI that, in a material respect and at the time and

in light of the circumstances in which the statement was made, was misleading or untrue or did not state a fact that was required to be stated or that was necessary to make the statement not misleading. In particular, ATI made the statement that the earliest material meetings, communications, events and developments leading up to the disclosure on May 24, 2000 occurred on May 16, 2000.

- (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.

[6] With respect to Betty Ho specifically, Staff alleges that she committed illegal insider trading inasmuch as she:

- (i) was in a special relationship with ATI;
- (ii) was in possession of material undisclosed information with respect to ATI; and
- (iii) traded ATI shares.

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

[8] Betty Ho argues that Staff has made no factual allegations of misconduct against her other than the allegation that she committed insider trading contrary to section 76 of the Act. However, Staff has indicated in a letter dated February 19, 2004, addressed to Counsel for the various respondents, that the Commission nonetheless has the authority to make an order against the respondents pursuant to section 127 of the Act even if Staff fails to prove the allegations against them. Specifically, Staff's letter contained the following statements:

I confirm that it's Staff's position that the Commission should make an order based on the allegations set out in the Statement of Allegations. Staff does not allege nor intend to make submissions on any other theory of liability than is alleged in the Statement of Allegations.

At the same time, Staff takes the position that in the event the Panel heard evidence during the course of the proceedings that makes it form the opinion it is in the public interest to make an order, it is able to do so, even if it determines that Staff has failed to prove its specific allegations.

[9] As a result of this, Betty Ho brought a motion to the Commission on July 15, 2004, for a ruling in advance of the hearing that, based on the Statement of Allegations, it is not open to the Commission to make an order in the public interest against her unless Staff proves a specific breach of section 76(1) of the Act. She brought that motion on the ground that absent the pre-hearing ruling she requests, Betty Ho will not have received adequate notice of the case against her and will be unable to prepare a proper defence in violation of her right to natural justice.

[10] After this motion was argued on July 15, 2004, the Prior Panel dismissed the motion in Reasons that were reported on July 30, 2004 at (2004) 27 O.S.C.B. 6859. The Reasons state as follows:

[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.

[11] As noted above, following the constitution of the Hearing Panel, Betty Ho served a new notice of motion requesting the same relief as in her July 15, 2004 notice of motion, which had been dismissed by the Prior Panel and it was brought back before the Hearing Panel.

[12] The motion was argued on October 19, 2004, and was supported by ATI. It was agreed at the outset that the submissions of Counsel on both the jurisdiction of the Hearing Panel to re-hear, in effect, the motion and submissions on the merits of the motion would be heard together.

[13] It should be noted that Mr. Gray, Counsel for Betty Ho, advised the Hearing Panel during the course of submissions on the motion that if it accepted Counsel's submissions with respect to jurisdiction and took jurisdiction, the pending appeal would be abandoned.

III. Jurisdiction

[14] Counsel for Betty Ho argued before us that the answer to the jurisdictional question lies in the Reasons of the Prior Panel. These Reasons underscore that the Prior Panel dismissed the motion on the basis that it was premature. Counsel referred us to the following passages contained in the Reasons:

[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 and bind the hearing panel. You're asking for a ruling prior to the commencement of the hearing based on the statement of allegations. . . . I don't feel at all comfortable that we should, without the benefit of knowing what might be disclosed at the hearing, try and bind what the hearing panel may decide.

[15] Counsel for Betty Ho submits that the essence of the Prior Panel's decision is that it is appropriate for the Hearing Panel to deal with the matter. He maintains that Betty Ho was "drafted, if not invited" to bring the motion back again before the Hearing Panel as she has, in fact, done. Accordingly, he submits that there is no jurisdictional impediment to the new motion by Betty Ho because it was brought "at the invitation" of the Prior Panel.

IV. Submissions by ATI

[16] Counsel for ATI made brief submissions before us on its own behalf and on behalf of the other respondents who were not present for the motion.

[17] ATI's Counsel focused on ATI's concerns that arose as a result of various exchanges between Staff and the respondents in relation to the Statement of Allegations, the nature of the evidence to be led at the hearing and the motions before us. In essence, these concerns relate to the need to know the case they must meet.

[18] In oral argument before us, Counsel for ATI indicated that these proceedings before the Hearing Panel led to clarification of the concerns and ambiguities. Counsel for ATI said as follows:

Whether it gets embodied in some kind of an order or direction, and I'm not suggesting that you would need to make a direction to yourselves to that effect, that orders in the public interest would only be based on the facts alleged in the Statement of Allegations, whether that gets embodied in an order or whether that's simply the reason given for why an order isn't necessary, I think that it's important that those clarifications are made. (Page 196 of the transcript from the October 18, 2004 proceedings.)

V. Decision

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

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

[21] Counsel for Betty Ho does not dispute the public interest jurisdiction of the Commission *per se*. Rather, he argues that only three essential facts have been alleged against Betty Ho in the Statement of Allegations: that she traded shares of ATI; that at the time she traded those shares she was in a special relationship with ATI; and that she had knowledge of a material fact that had not been generally disclosed. If any of these facts is not proven by Staff, Counsel for Betty Ho submits that there would be no basis for the Commission to issue an order based on public interest grounds. In support of this position, he points out that Betty Ho is a shareholder of ATI but not an employee, director or officer, or controlling shareholder of the company.

[22] Counsel states that, in the absence of proving the facts as alleged, there will be no basis for the Commission to issue a "public interest order" and he therefore asks that the Hearing Panel issue an order to restrain itself, in effect, from doing so.

[23] This is a most unusual motion. No precedent for such an order was brought to our attention. As noted in the Prior Panel's Reasons, it was not thought appropriate to make an order that "in effect would tie the hands or limit the decision-making power of the Hearing Panel."

[24] We agree. At this time, the Hearing Panel has not heard the evidence or the submissions of Counsel on the evidence. Whatever the decision of this Panel will be, it must be made in accordance with the rules of natural justice. Betty Ho is entitled to a fair and proper hearing, as are all respondents, to know the case she must meet and to make full answer and defence.

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

[26] Counsel's characterization of the Prior Panel's decision does not take into account the importance the Prior Panel placed on the appropriate time to consider Betty Ho's request – not in

advance of the commencement of the hearing but, rather, after the evidence was heard. This is evident from the Reasons of the Prior Panel both as set out above and as follows:

[66] . . . 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. (Emphasis added.)

[27] The Prior Panel made it clear in its Reasons that it is for the Hearing Panel at the conclusion of the hearing to make its decision based upon the proper considerations.

[28] Again, we agree with the Prior Panel. We do not consider it appropriate to be asked to issue the order requested by Betty Ho before we have heard the evidence and closing submissions.

[29] In those closing submission, Counsel for both Staff and all of the respondents, including Betty Ho, will have the opportunity to make submissions as to whether any order should be issued by the Hearing Panel under section 127 of the Act and, if so, what the nature of the order should be, having regard to the Statement of Allegations, the evidence led at the hearing and any other relevant considerations.

[30] For the reasons set out above this motion is dismissed.

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

"Susan Wolburgh Jenah"

Susan Wolburgh Jenah
Chair

"M. Theresa McLeod"

M. Theresa McLeod

"H. Lorne Morphy"

H. Lorne Morphy, Q.C.