

Corporate Securities Law

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OSC Releases ATI Insider Trading Decision

A panel of the Ontario Securities Commission has recently released its unanimous decision in dismissing allegations by OSC Staff of insider trading by Kwok Yuen Ho, the Chairman and Chief Executive Officer of ATI Technologies Inc., and his wife Betty. Three issues that were discussed by the OSC in the *ATI* decision are relevant to corporate insiders and are worth reviewing.

Use of E-mail Messages as Evidence in Insider Trading Cases

The first issue of interest discussed in *ATI* is the use of e-mail messages as evidence. In this case, Staff attempted to use e-mail messages authored by Mr. Ho and others at ATI to prove that Mr. Ho had inside information (knowledge that ATI would not achieve its projected earnings for Q-3 2000) at the time he traded in the company's securities. Staff did not call the authors of those e-mails to the witness stand, and as a result the authors of the e-mails could not be cross-examined by the lawyers for Mr. and Mrs. Ho.

Under the rules of civil procedure used in courts of law, a document that is offered as evidence without calling the author of such document to the witness stand to testify under oath is considered hearsay evidence and is usually not admissible. Since Staff offered certain e-mails without calling the authors as witnesses, those e-mails were considered hearsay evidence.

Staff relied on a section in the *Statutory Powers Procedures Act*, allowing administrative tribunals (such as the OSC) to admit documentation evidence (such as e-mails) whether or not proven under oath (that is, whether or not the authors of such

documents were called as witnesses). Staff argued that the panel should admit the e-mails as proof of knowledge of inside information.

The panel disagreed, reasoning that the SPPA must be exercised so as not to infringe on the rules of natural justice. To that end, the panel stated, the SPPA must be applied with regard to the type and severity of an allegation being considered by a tribunal. The more serious the allegation, the more stringent a tribunal must be regarding hearsay evidence. Since insider trading is a serious violation and both the allegation and the finding of insider trading can have significant adverse repercussions for a person alleged to have engaged in insider trading, the panel decided that it should apply the SPPA stringently and therefore chose to give "little weight" to e-mails sent by persons who were not called as witnesses and accepted the oral evidence provided by Mr. Ho and others.

It is quite clear that the OSC considers insider trading a serious violation, and thus it refused to admit hearsay evidence in this case. It remains to be seen whether the OSC will continue to view hearsay e-mail messages as warily as it did in this case.

Insider Trading Requires Actual Knowledge of Inside Information and Insider Status

The Staff argued that Mr. Ho acted on insider information and that Mrs. Ho acted on insider information received as advice from Mr. Ho.

Because the OSC was not able to find that ATI was unable to achieve its earnings projection at the time of Mr. Ho's transactions, the OSC could not find that Mr. Ho had actual knowledge of such material fact and, therefore, the actual knowledge requirement for insider trading was not met.

Charitable Donations Not Considered Sales

The dispositions of ATI securities by Mr. Ho in issue were the completion of charitable donations committed to by Mr. Ho months before. The Staff advanced the argument that donations should be treated as sales for the purposes of violations of the *Securities Act* and that the tax deductions received by a donor as a result of such donations should be viewed as the profits of the disposition.

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The OSC rejected that view, stating that charitable donations made in good faith are not considered “trades” for purposes of the Act even if the donor received some tax benefit. Since the Staff was not able to introduce credible evidence that the donations were anything but good faith charitable donations, the OSC refused to characterize them as trades or dispositions. It remains to be seen how the OSC would view a charitable donation if there were some evidence of irregularity with respect to the donation.

If you wish to further discuss this decision, please contact any member of the Goodmans’ securities team.

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