Re Steinhoff

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

The By-Laws of the Investment Dealers Association of Canada

And

Carolann Steinhoff

2010 IIROC 42

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District Council)

Heard: July 6, 2010
Decision: September 17, 2010
(46 paras.)

Hearing Panel:
Leon Getz, Q.C., Chris Lay, and Don Teatro

Appearances:
Paul J. B. Smith for the Investment Industry Regulatory Organization of Canada
Ronald N. Pelletier and Gregory N. Harney for Carolann Steinhoff

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DECISION ON SANCTIONS

Introduction

¶ 1 On March 5, 2010, following a lengthy hearing, we issued a Decision (*Re Steinhoff*, [2010] IIROC No. 8) in which we found that Mrs. Steinhoff had violated Dealer Member Rule 29.1 in that in a number of instances itemized in a Notice of Hearing dated June 30, 2009, she had engaged in business conduct or practice that was unbecoming or detrimental to the public interest.

¶ 2 In summary, we found that Mrs. Steinhoff:

(a) condoned the creation by her staff of false documents, and in two instances explicitly instructed them to do so and submit them to her firm's head office as genuine;

(b) attempted to mislead her firm's compliance department by giving deceptive answers to its enquiries about the activities involved in (a); and

(c) attempted to mislead IIROC investigators in various ways including giving deceptive answers to various enquiries, instigating a witness to give false evidence and tendering as genuine a copy of a document that she had altered by inserting a date that did not appear in the original.

¶ 3 In each of these respects, we found that Mrs. Steinhoff had committed a violation of IDA By-law 29.1 (now IIROC Rule 29.1) which among other things required her to observe high standards of ethics and conduct in the transaction of her business and to refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

Our powers with respect to the imposition of sanctions

¶ 4 In these circumstances IIROC Dealer Member Rule 20.33 (1) permits us to impose a sanction or a combination of sanctions varying in severity from a reprimand to a substantial fine (of up to $1 million or, in certain circumstances, more) and including a permanent or a time-limited ban from approval. In addition, Dealer Member Rule 20.49 authorizes us to "assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances."

The positions of IIROC and Mrs. Steinhoff

¶ 5 IIROC contends that in view of our conclusions we should permanently prohibit Mrs. Steinhoff from acting in the investment industry in any capacity, fine her $200,000, and require her to reimburse some $89,000 in respect of its investigation and prosecution costs. In support of its contentions IIROC relies upon both its Dealer Member Disciplinary Sanction Guidelines (the "Guidelines") and a number of previously decided cases.

¶ 6 Not surprisingly, Mrs. Steinhoff strenuously disagrees that the sanctions that IIROC seeks are appropriate. She, too, relies on the Guidelines and upon a number of previously decided cases. Simply put, she contends that our findings do not warrant the imposition of a "ban" or suspension, certainly not one as draconian as IIROC seeks; and that if a fine is to be imposed, it should at most be in the $10,000 to $15,000 range. Mrs. Steinhoff says that the sanctions sought by IIROC are, in a word, excessive. She makes a similar point about IIROC's costs.

¶ 7 While we have not found it easy to decide these matters, we have come to the conclusion that Mrs. Steinhoff must:

a. be suspended for a period of 12 months starting on October 15, 2010 and ending on October 15, 2011;

b. upon the expiry of the 12 month period of suspension, be subject to strict supervision for a further period of 12 months;

c. on or before January 1, 2011 pay a fine of $60,000[1];

d. effective immediately be deemed to have resigned any position that she now holds as a director or senior officer of a Member and for a period of 3 years from the date of publication of this Decision, be prohibited from holding any such position; and

e. be ineligible thereafter to be approved as a director or senior officer of a Member unless she has first re-written and passed the Partners, Directors and Officers examination of the Canadian Securities Institute.

We have also concluded that Mrs. Steinhoff must, on or before October 15, 2011, pay IIROC $45,000 on account of its costs in this matter. Payment of this amount as required is a condition of Mrs. Steinhoff's eligibility for reinstatement on that date. Our explanation for our conclusions follows.

Some general principles and relevant considerations

¶ 8 Sanctions in proceedings such as this are imposed with a view to protecting the investing public, the integrity of the securities markets and of IIROC's regulatory processes and its membership and to deter similar misconduct, whether by a respondent or others, in the future. See *Re Derivative Services Inc*., [2002] I.D.A.C.D No. 26, at page 3.

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[1] In fixing this amount we have borne in mind that the 12 month suspension that we have ordered will effectively add to this a penalty in the form of loss of income in an amount that we are unable to determine but which we infer may be significant.

¶ 9 The selection of a sanction or combination of sanctions likely to achieve the stated objectives will be influenced by a diverse array of considerations, among them such factors as: the "intrinsic" seriousness of the misconduct; whether the respondent has derived some benefit, financial or otherwise, through it; whether others, such as clients or an employer, have been harmed, financially or otherwise; whether the respondent's record in the industry demonstrates a propensity to cut corners or otherwise misbehave; whether the conduct was in some sense planned and deliberate or rather inadvertent, the product of inattention or a temporary lapse of judgment; and (see *Re Mills*, [2001] I.D.A.C.D. No. 7, at p. 3) whether the chosen sanction or combination of sanctions is consistent with industry expectations as to what is appropriate in the circumstances.

¶ 10 Not all of these factors will be relevant in every case nor will they always operate to the same effect. In coming to our conclusions we have been influenced by a number of considerations.

Mrs. Steinhoff's activities were intended to mislead

¶ 11 We found that Mrs. Steinhoff had forged a document (the courier slip) and either counselled (the First Email and the Happy Face Email) or acquiesced in others doing so; had provided deceptive and misleading information and answers to both her employer and to the IIROC investigators and had "coached" Ms. Reside to give misleading information to the latter. What is common to all of these activities is that they were designed to deceive and mislead (although they did not always have this effect) and hence involved dishonesty.

The misconduct was serious

¶ 12 As a matter of principle or policy, as it were, dishonesty of the kind involved here is a serious matter, especially so when, as here, it is engaged or acquiesced in by a seasoned member of an industry that at its core depends upon the honesty and integrity of its members.

¶ 13 It is not surprising, therefore, that the Guidelines would describe forgery as being "always a serious regulatory matter because it shows that the Respondent lacks the honesty required of a professional in the securities industry [and] [a]s a result, forgery often attracts severe sanctions."[2] They suggest a minimum fine of $25,000 (but do not suggest a maximum); they also recommend that anything from a suspension of up to 10 years or a permanent ban on approval could be appropriate, depending on whether there are any mitigating circumstances.

¶ 14 Though the approach of the Guidelines to the "obstruction" aspect of the matter covered by Count 3 is perhaps less direct and explicit than in the case of forgery[3], there can be little doubt that it is regarded with a comparable degree of seriousness. For example, in discussing the "key considerations" to be taken into account when determining sanctions, they note (paragraph 3.7) that "full cooperation with the Corporation's investigations by registrants is expected" and (paragraph 3.13) that "a failure to cooperate can be taken into account as an aggravating factor."

¶ 15 Section 5.1 of the Guidelines, which relates to Dealer Member Rules 19.5 and 19.6 (failure to co-operate), though not directly in point, notes that

> [f]ailure to cooperate/impeding a Corporation investigation . . . is serious misconduct because it subverts the Corporation's ability to perform its regulatory function. this category of misconduct is broad enough to include the following: failure to cooperate or respond in a timely manner; failure to respond truthfully; failure to cooperate or respond completely.

¶ 16 The policy involved here has been invoked in a number of prior decisions. See for example, *Re Hryniw*, (O.S.C. June 16, 2005); *Re Johnson*, 2007 BCSECOM 257 and 2007 BCSECCOM 437 and *Re Dass,* [2009] IIROC No. 22 (April 20, 2009). It is also implicit, at least, in the provisions of section 168.1 of the Securities Act (British Columbia).

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2 Section 2.1.

3 See, for example, "key considerations", paragraphs 3.7 and 3.13.; and see Section 5.1 (Failure to Cooperate – Dealer Member Rule 19.5 and 19.6).

Degrees of seriousness

¶ 17 Whatever the position may be in the universe of abstract morals, in the work-a-day world that most of us inhabit not all forms of dishonesty are regarded with equal gravity. The Guidelines recognize this by suggesting a general range of sanctions – sometimes quite broad - rather than prescribing a particular disciplinary response to a particular species of dishonesty. They speak about general categories of misconduct. Some forgeries, for example, are considered more serious than others.[4] Among the factors that a panel is directed to consider are the nature of the documents forged, whether the client knew or consented to the forgery, whether the respondent obtained any financial benefit and whether there was any attempt to conceal the conduct involved.

How serious was Mrs. Steinhoff's conduct

¶ 18 It is one thing to say that Mrs. Steinhoff's misconduct, in all its aspects, was serious. Involving as it did various forms of dishonesty and deception it represented in every aspect a departure from the standards of conduct that her employer had a right to expect from her, that IIROC had a right to expect from her, that her industry colleagues had a right to expect from her and that the public has a right to expect from a participant in the industry. The Introduction to the Guidelines emphasizes this:

> The securities industry is a business of trust and confidence . . . . Approved persons must above all conduct themselves with trustworthiness and integrity, and act in an honest and fair manner in all their dealings with the public, their clients and the securities industry as a whole.

¶ 19 It is much more difficult to quantify, as it were, the degree of seriousness of given conduct, to place it on the spectrum from less to more egregious.

¶ 20 The authorities[5] indicate that elements that tend to move a case towards the less serious end of the spectrum include the fact that the dishonest activities were not steps in furtherance of some other improper objective such as misappropriation of client funds, or securing some other direct[6] personal financial benefit. In contrast, they also suggest that repetitive and frequent acts – a pattern of conduct sustained over a fairly lengthy period of time – weigh in a different direction and are regarded as an aggravating consideration.[7]

¶ 21 There was no hint in the evidence that we heard that Mrs. Steinhoff's conduct was intended to harm her clients or her employer; or that to the extent that it involved documents relating to client accounts it resulted in any loss or other harm to those clients. There is no evidence that any of the fake documents that underlay Count 1 was inconsistent with her client's wishes; nor was there any evidence that if fake documents had been created as suggested in the two emails that are the foundation of Count 2, these would have been inconsistent with the instructions of Dr. P. On the contrary, the evidence is that the activities embraced in those two Counts were undertaken almost exclusively with a view to implementing expeditiously the wishes or instructions of clients in the face of and in response to what Mrs. Steinhoff and her assistants considered bothersome, inconvenient and unnecessary documentation requirements imposed by Wellington's head office in Winnipeg. There is, in addition, no evidence that Mrs. Steinhoff's conduct was motivated by, or resulted in, any personal financial gain.

¶ 22 The Particulars in the Notice of Hearing[8] alleged that during the period between January 2006 and

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4 See also, *Re Bell,* [2005] I.D.A.C.D. No. 15 (Bulletin No. 3417, May 6, 2005) at paragraph [35]; and *Re Blaker*, [2007] I.D.A.C.D. No. 15 (Bulletin No. 3627, May 11, 2007).

5 See, in particular, *Re Bell, supra*.

6 We use the word "direct" in this connection because we cannot entirely discount the possibility that Mrs. Steinhoff derived an "indirect" financial benefit from the activity, in the sense that given the substantial size of he book, meticulous compliance with Wellington's requirements could only be achieved by hiring additional assistants – something which recourse to fake documents obviated. All of this is entirely speculative, however, and we do not think that we can properly take any account of it.

7 Re Bell, supra; and see Re Holowatiuk, [2004] I.D.A.C.D. No. 67 (November 4, 2004).

8 Particulars, paragraphs 17 to 22.

March 17, 2007 recourse to the "cut and paste" procedure was widespread. While we made no express finding on any matters of detail under Count 1 in this connection, we did conclude (Decision, paragraph [27]) that the procedure was "fairly widely" used by Mrs. Steinhoff's assistants and that she knew about that. This fact, as we have noted, might be considered an aggravating consideration.

¶ 23 Our findings in respect of Count 3 in the Notice of Hearing cover disparate acts of deception – giving less than honest or complete answers to questions of her employer and from IIROC investigators in the course of lawful investigations by each of them,[9] inserting an incorrect date on a copy of a courier receipt with a view to corroborating an earlier and untrue account of the facts relevant to Count 2 without disclosing that she had done so[10]; and influencing the evidence of her assistant, Ms. Reside, about the meaning and purpose of the so-called Happy Face Email[11].

¶ 24 The component elements of our findings under Count 3 are not all of equal seriousness. For example, when Mrs. Steinhoff, in answer to a question from Ms. Walters-Sagher, said that she had "never *ever"* instructed an assistant to change the date on a previously signed guarantee, this was untrue.[12] But we do not think, and did not find, that this was a calculated act of deception. It is quite conceivable to us that Mrs. Steinhoff had simply forgotten that she gave that instruction. In her evidence at the hearing she acknowledged the untruth and that she was wrong to have answered that way. Even had she not made those acknowledgments, however, we do not think that a fair-minded person would assign to that untruth the same weight on the scale of seriousness as, for example, to her conduct in influencing Ms. Reside to make statements to Wellington and IIROC that were favourable to Mrs. Steinhoff and consistent with the story she herself had told them; or her completely misguided decision to insert a date on the copy of a courier receipt that differed from the date on the original. That was inexcusable.

¶ 25 In *Re Bell*[13] the panel observed:

> It should first be noted that the present case involves three separate violations and that it is not possible to arithmetically break down global penalties into separate components for individual violations. Sanctions must be remedial and appropriate to the overall situation so, where that situation involves multiple violations, it is somewhat speculative to consider what sanction might be appropriate if a particular violation were considered in isolation.

¶ 26 We agree with this approach. While the "arithmetic" approach might be thought to have some appearance of logic and rationality, it tends to obscure the fact that when all has been said, the selection of an appropriate disciplinary response has about it large elements of instinct and impression. Moreover, the arithmetic approach carries with it a risk of unfairness by, on the one hand, magnifying the significance of relatively minor matters and on the other hand, minimizing the seriousness of the more important matters

¶ 27 The considerations that have led us to this view have also persuaded us that, while we have read carefully the various decisions that were cited to us, it is not particularly helpful to examine their minutiae or to essay an attempt at calibrating the factual similarities and differences among them. It is, however, relevant to note that several of those cases concerning the imposition of discipline for acts of forgery involved settlement agreements accepted by hearing panels.[14] In our view decisions of panels explaining why they have accepted a

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9 See Decision, paragraphs [175] and [176].

10 See Decision, paragraphs [152] to [173].

11 See Decision, paragraphs [141] to [151].

12 See Decision, paragraph [110].

13 Above, note 3, at paragraph [57].

14 *Re Blaker,* [2007] I.D.A.C.D No. 15 (May 11, 2007) where a respondent who had committed a number of forgeries over an extended period of time and a number of other transgressions, who had no disciplinary record and had derived no financial benefit from her activities, agreed to a permanent ban on approval in any capacity; *Re Holowatiuk,* [2004] I.D.A.C.D. No. 67 (November 4, 2004), where a respondent who had committed a significant number of forgeries entered into a settlement

settlement agreement are of limited precedential value to a panel faced with having to determine an appropriate sanction after a contested hearing. The reasons for this were explained in *Re Milewski.*[15] It is unnecessary to repeat them here.

¶ 28 We noted in our Decision that Mrs. Steinhoff impressed us as having "a highly developed sense of entitlement and station that at times verges on hubris . . . demanding, at times impatient, occasionally insensitive and . . . quick to anger".[16] In our view it is these characteristics, combined with a tendency, as we put it elsewhere,[17] to "thumb her nose" at what she considered the inconvenience and stupidity of some of the rules that governed her, that explain most of the activities that formed the subject-matter of Counts 1 and 2, rather than any fundamental and pervasive lack of integrity. This does not, however, minimize their seriousness.

¶ 29 As to the principal matters embraced by Count 3 – the tendering of a false copy of a courier receipt and the subornation of Ms. Reside - we said in our Decision[18], that the charge of "fabricating a story designed to mislead and obstruct a lawful investigation and, in that connection creating and tendering a false document" is one "of high seriousness". Elsewhere we described Mrs. Steinhoff's actions in this connection as "acts of unvarnished and calculated dishonesty deliberately undertaken for the purpose of misleading the investigators on a matter that was central to her case and, therefore, to their investigation".[19] Those remarks were not explicitly linked in our Decision to the suborning of Ms. Reside though they are apposite in that connection as well.

¶ 30 We are inclined to the view that the actions embraced by Count 3 were also to some extent the product of the qualities of character we have already noted, combined with healthy doses of arrogance, foolishness and thoughtlessness. We do not think that Mrs. Steinhoff is a pathological and inveterate liar or an unreconstructed crook. Over more than 20 years in the investment industry, she has been assiduous in improving her professional skills and has compiled an unblemished disciplinary record. On the other hand, while we think that these are considerations properly to be taken into account they cannot operate to diminish the seriousness of her obstructive conduct.

¶ 31 There is a wide diversity in the sanctions that have been imposed – both in terms of bans/suspensions and monetary impositions - for conduct that is in one way or another comparable to that of Mrs. Steinhoff. We are not persuaded, however, that it would advance the objectives of the sanctioning regime, either with respect to Mrs. Steinhoff in particular or the broader general considerations sought to be served, to impose on her a permanent ban from approval in any capacity or a $200,000 fine, both as requested by IIROC.

¶ 32 Had we been required to consider only an appropriate sanction for the misconduct covered by Counts 1 and 2, we might have been content with a suspension of the order of 6 months. In our opinion, however, the misconduct embraced by Count 3 represents such a departure from the standards of behaviour reasonably to be expected of an approved person that something more significant is appropriate. Having given the matter the best consideration we are capable of, we have come to the conclusion that the following combination of sanctions would best serve the required objectives and we accordingly order that Mrs. Steinhoff must:

a. be suspended for a period of 12 months starting on October 15, 2010 and ending on October 15, 2011;

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agreement, accepted by a hearing panel, in which he agreed to a fine of $40,000 and to a permanent ban on approval in any capacity. *Re Elder,* [2007] I.D.A.C.D. No. 36 (Bulletin No. 3671, September 15, 2007), though not involving a settlement agreement is, in a sense, a companion case to *Re Blaker*. Ms.. Blaker was Mr. Elder's assistant. He was found to have known of or been willfully blind to acts of forgery committed by her, and, among other sanctions, was fined $100,000 and placed under close supervision for a period of 12 months.

15 [1999] I.D.A.C. No. 17, August 5, 1999.

16 Decision, paragraph [11].

17 Decision, paragraph [179].

18 Decision, paragraph [168].

19 Decision, paragraph [172].

b. upon the expiry of the 12 month period of suspension, be subject to strict supervision for a further period of 12 months;

c. on or before January 1, 2011 pay a fine of $60,000[20];

d. effective immediately be deemed to have resigned any position that she now holds as a director or senior officer of a Member and for a period of 3 years from the date of publication of this Decision, be prohibited from holding any such position; and

e. be ineligible thereafter to be approved as a director or senior officer of a Member unless she has first re-written and passed the Partners, Directors and Officers examination of the Canadian Securities Institute.

¶ 33 We think that this combination of sanctions will properly mark our view of the seriousness of Mrs. Steinhoff's collective transgressions, and will operate persuasively as a deterrent to others in the industry who might be tempted by the idea that the rules and processes that govern them, whether imposed by law, by IIROC or by their employers, are only to be observed when it is not inconvenient to do so or by the idea that a little bit of dishonesty, not adversely affecting their clients or the markets generally, really matters little, and that the integrity of the investigation process, both of employers and regulators, matters not much more.

Costs

¶ 34 Dealer Member Rule 20.49 (1) is as follows:

> In addition to imposing any of the penalties set out in Rule 20.33, Rule 20.34, or Rule 20.35, the Hearing Panel may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

¶ 35 The drafting of this provision is not a model of clarity. As we understand it, however, what it says we must do is decide the amount of IIROC's investigation and prosecution costs that we consider it appropriate and reasonable to order Mrs. Steinhoff to pay. It does not, however, explain what is meant by "costs".

¶ 36 In this connection IIROC has tendered a statement of what purport to be Staff Investigation and Prosecution Costs. They total $89,300.13. IIROC says it is appropriate and reasonable for us to order Mrs. Steinhoff to pay that amount in full. The $89,300.13 claimed by IIROC is made up as follows:

Staff investigative time	201.75 hours at $106.00 per hour	$21,385.50
Staff transcription time	56.25 hours at $73.00 per hour	$4,106.25
Staff prosecution time	221 hours at $130.00 per hour	$28,795.00
Investigative and prosecution disbursements		$6,137.04
Hearing disbursements		$28,876.34
Total costs claimed		$89,300.13

Each of the components of this claim is supported by detailed schedules.

¶ 37 We have absolutely no reason to question the accuracy of the information contained in the supporting schedules tendered by Mr. Smith. They were not challenged by counsel for Mrs. Steinhoff. We do not for a moment doubt that the time claimed was actually spent nor do we have any reason to think that it was not reasonably spent. As to the assigned hourly rates, however, we simply have no way of measuring whether they are reasonable. We are somewhat troubled, however, by the proposition, implicit in IIROC's calculations, that the product of hours spent and hourly rates necessarily yields an accurate assessment of the actual costs incurred by IIROC, given that almost all of those whose time is involved appear to be members of IIROC's staff who,

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[20] In fixing this amount we have borne in mind that the 12 month suspension that we have ordered will effectively add to this a loss of income in an amount that we are unable to determine but which we infer may be significant.

we assume, are salaried employees. This fact, if indeed it is such, does not mean that IIROC should be disentitled to claim costs on account of their work[21]. It does, however, create at least the possibility – this depends upon how the hourly rate was arrived at - that the aggregate pro-rated salaries of the employees in question is less than the product of hours spent and hourly rates attributed to those hours. In the result, the amount claimed could in fact contain a significant profit element. It seems to us that to make the member pay any element of "profit" would be quite wrong. While we have no reason to suggest that this is the case here, the possibility justifies us in taking a somewhat cautious approach to IIROC's information.[22]

¶ 38 There are other reasons for taking a conservative view on the subject of costs. In *Re Credifinance Securities Ltd*.[23], cited with approval in *Re Van Hee,*[24] the panel noted:

> In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach to costs is not unwarranted.

¶ 39 The authorities are clear that, as it was put in *Re Jeske*[25]:

> The amount of costs the respondent is required to pay should be a function of the actual costs incurred by the Association and what portion of that amount the District Council believes the respondent should bear. The costs incurred by the Association will vary from case to case, but will be a sum certain introduced in evidence by the Association at a discipline hearing. It will then be left for the District Council to determine what portion of those costs are to be borne by the respondent.

¶ 40 In *Re Van Hee* the Panel suggested a non-exhaustive catalogue of factors to be taken into account in determining "what portion of [IIROC's] costs are to be borne by [Mrs. Steinhoff]." It is as follows:[26]

(a) The degree of success of the Respondent in resisting any or all of the charges;

(b) The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing;

(c) Whether the persons presenting the case against the Respondent could reasonably have anticipated the result based upon what they knew prior to the hearing;

(d) Whether those presenting the case against a member could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing;

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21 Cf. Rule 14-1 (11) of the British Columbia Supreme Court Civil Rules: "A party is not disentitled to costs merely because the party's lawyer is an employee of the party."

22 We note that the "investigation costs" include the time spent attending the hearing to give evidence. There is a question as to whether including this time as an amount compensable by the member violates the general principle that ordinarily witnesses should not be paid for their evidence. We have also been concerned in our consideration of the subject of costs whether the costs formula used by IIROC is tantamount to creating in effect an *ad hoc* tariff of costs for a particular case that may or may not be the same as that applied in some other case; and, if that is the case, whether it amounts to an ad hoc amendment to the Dealer Member Rules; and, if it does, whether it is permissible in the light of IIROC Bylaw 13.1. None of these questions are before us, however, and we express no view about them.

23 [2006] I.D.A.C.D. No. 30 at paragraph 56.

24 [2009] IIROC No. 34 (July 22, 2009).

25 [2004] I.D.A.C.D. No. 40, at paragraph 25.

26 [2009] IIROC No. 34, at paragraph [106].

(e) Whether the member cooperated with respect to the investigation and offered to facilitate proof by admissions or other means;

(f) Financial circumstances of the member and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed;

(g) The seriousness of the charges;

(h) Whether the amount of the costs proposed would in effect be a "penalty", and if so, they should not be awarded on that basis;

(i) Whether the amount of the costs proposed are so large that they would deny an innocent person a fair chance to dispute allegations made against them;

(j) Costs awarded on a full indemnity basis should not be the default position, nor, in the case of mixed success, should cost be a straight mathematical calculation based on the number of convictions divided by the number of charges; and

(k) The evidence of the actual costs submitted by the Association.

¶ 41 In *Van Hee* the IDA tendered to the panel particulars of its investigation and prosecution costs. They were divided into two aggregate amounts, one ($224,428) described as the "actual amount" and the other ($167,062.70) as the "amount relied on". The difference, apparently, was that the latter amount excluded costs that might involve some duplication in relation to two other concurrent investigations. The IDA asked for costs of $20,000, which it described as "a function of the actual costs incurred" considered in the light of the various factors that had been identified by the panel.

¶ 42 The panel in that case, having regard to all of the relevant factors including the serious nature of the charges, the success of the Association on four out of five of the counts, the length of the Hearing (six days plus written argument), the significant cooperation given by the Respondent" decided that an appropriate and reasonable award of costs was $15,000.[27]

¶ 43 We mean no disrespect to the panel in that case, but notwithstanding its valiant attempt to articulate some "relevant considerations" we have absolutely no idea how it actually arrived at its conclusion that $15,000 was "appropriate and reasonable". No guidance is obtainable from Member Rule 20.49. The fact is that that conclusion is little more than an act of magic, virtually impossible to explain. It is similarly almost impossible to explain a decision that it is reasonable and appropriate to order that Mrs. Steinhoff pay costs of $89,300.13 or any other amount. As a practical matter, the costs "regime" is neither more nor less than an invitation to the members of the panel to appeal to their private instincts about propriety and reason.

¶ 44 So we do not think it is helpful – indeed we think it would be misleading - to try and invest our conclusion with a purportedly rational explanation or justification. The best we can do is state it and make for it the unchallengeable assertion that it satisfies our sense of propriety and reasonableness in the circumstances.

¶ 45 We have decided that Mrs. Steinhoff's appropriate and reasonable share of the Association's costs is $45,000. Payment of this amount as required is a condition of Mrs. Steinhoff's eligibility for reinstatement on October 15, 2011.

¶ 46 There is, we feel bound to say, something highly unsatisfactory about Member Rule 20.49 (1). It creates enormous uncertainty and unpredictability and great potential for unfairness, not only to respondents but to IIROC itself. We respectfully suggest to IIROC that it may be in the public interest to reconsider the provisions of that Rule and either develop its own tariff of recoverable costs, perhaps along the lines widely employed by superior courts in the various provinces or, in the alternative provide for some form of review of costs claimed by a judicial officer, as is provided for in section 174 of the British Columbia Securities Act.

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27 [2009] IIROC No. 34, at paragraph [110].

Leon Getz, Q.C.
Chris Lay
Don Teatro
September 17, 2010