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Carolann Steinhoff Investment Dealers Association of Canada

Section 28 of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Brent W. Aitken Robin E. Ford Joan L. Brockman	Vice Chair Commissioner Commissioner
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Dates of Hearing October 27 and 28, 2004

Date of Decision October 28, 2004

Reasons Issued November 24, 2004

Appearing

Winton K. Derby and For Carolann Steinhoff
Robert Cooper

Barbara G. Lohman For the Investment Dealers Association of Canada

Ralph Sahrman For the Executive Director

Reasons for Decision

- ¶ 1 These are the reasons for the decision we delivered on October 28, 2004 in a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418. Carolann Steinhoff asked us to set aside the findings made by an IDA District Council hearing panel on April 22, 2003, and the penalties imposed by that panel on July 21, 2003. The IDA asked us to confirm the IDA panel's findings and increase the penalties. In these reasons we refer to the IDA panel's April decision as its findings, and to its July decision as its penalty decision.
- ¶ 2 The IDA panel found that Steinhoff, a Victoria broker, contravened IDA By-Law 29.1 (engaging in conduct or a practice unbecoming or detrimental to the public interest) because she executed one unauthorized transaction consisting of 4 trades, and traded securities in Ontario without being registered. For the unauthorized trading, the IDA panel directed Steinhoff to pay a fine of \$5,000 and re-write the Conduct and Practices Course. For trading without registration, it directed

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Steinhoff to pay a fine of \$250. On August 29, 2003, the Commission stayed the penalties, with consent, pending the outcome of this hearing and review.

- ¶ 3 At the hearing and review, after considering the parties' submissions on the IDA panel's findings, we decided to set aside the IDA panel's findings and its penalty decision. We delivered that decision in the hearing and told the parties that we therefore did not need to hear their submissions on the IDA panel's penalty decision.

I Background

- ¶ 4 In a revised notice of hearing issued on January 13, 2003 (the first notice of hearing was dated December 18, 2002), IDA staff alleged that Steinhoff engaged in business conduct or a practice unbecoming a registered representative or detrimental to the public interest, contrary to IDA By-Law 29.1 because:

- Between January 1996 and January 1999 Steinhoff executed 23 trades in the account of one client, without the client's authorization, and
- Between 1999 and October 2002, Steinhoff represented clients resident in Ontario without being registered there.

- ¶ 5 The notice of hearing acknowledged that Steinhoff had not previously been the subject of professional discipline by any securities regulatory body, and had cooperated with the IDA's investigation.

- ¶ 6 The following is a synopsis of the events leading to the allegations.

A. *Unauthorized trading*

- ¶ 7 The allegations were based solely on a complaint made on August 2, 1999 by Dr. Mary Conley, a general practitioner in Victoria. Although 23 trades were involved, the IDA panel found that they were grouped in 9 composite transactions, for which 9 authorizations would have been required. Ultimately, the IDA panel found that Steinhoff failed to get Conley's authorization on only one of these composite transactions, which consisted of 4 trades.

- ¶ 8 During the relevant period, Steinhoff was employed by ScotiaMcLeod Inc. in its Victoria office. Steinhoff was a major producer for the firm. With about 500 clients having accounts valued at over \$250 million, she was Scotia's second-ranked broker in western Canada, and among its top ten brokers Canada-wide. Steinhoff accounted for more than 50% of the business in Scotia's Victoria branch. At the IDA hearing, Steinhoff testified that her invariable practice was to get authorizations for each and every trade, including all the trades in Conley's accounts.

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- ¶ 9 Conley had been Steinhoff's client since 1992. Conley's accounts were active and the IDA panel found that the trades Steinhoff made were consistent with Conley's stated investment objectives. Conley received confirmation slips for all trades, as well as monthly and annual account statements from Scotia. She also met with Steinhoff, roughly annually, for a portfolio review. However, by her own admission, she did not pay much attention to her investment accounts.
- ¶ 10 Many of Steinhoff's clients were doctors. Because their work schedules made it difficult to contact them during the day, it was Steinhoff's practice to call her doctor clients in the evenings and on weekends.
- ¶ 11 Sometime in late 1998 Conley began to think about transferring her account from Scotia to another investment dealer. In late January 1999, she signed transfer papers to make that happen. In mid-February, Steinhoff met with her to discuss the proposed transfer. After the meeting, Conley decided to leave her accounts with Steinhoff at Scotia.
- ¶ 12 The trades that ultimately led to the IDA sanctions against Steinhoff took place in January 1999. An automatic cash deposit was made to Conley's RRSP account some time during the day (there is no evidence as to when) on January 21st. On January 22nd, beginning at about 0900, Steinhoff redeemed units in 3 of Conley's mutual funds and used the proceeds, along with the cash deposit from the day before, to buy a bond. These are the 4 trades in issue. Steinhoff says she had authority from Conley to make these trades; Conley says she did not. It is common ground that the trades were suitable and that Conley lost no money as a result of them.
- ¶ 13 Meanwhile, the relationship between Scotia and Steinhoff had begun to sour, and in May 1999 Scotia terminated her employment. Steinhoff sued for wrongful dismissal, which led to a settlement. After Scotia terminated Steinhoff, its advisers called her clients, including Conley, and gave them critical and misleading information about the state of their investments. Conley testified that as a result she was upset and felt that Steinhoff had deceived her. In December 1999, Scotia issued a general retraction of these statements and apologized to Steinhoff's clients, including Conley.
- ¶ 14 Conley developed what the IDA panel described as "a strong animus" against Steinhoff. The IDA panel noted that Conley made "several reckless and unsupported allegations" against Steinhoff, which are described in its findings.
- ¶ 15 On July 14, 1999, Conley complained to the IDA that Steinhoff was making "overly aggressive attempts" to persuade Conley to follow Steinhoff to her new

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firm. This complaint, which the IDA ultimately dismissed, included no allegation of unauthorized trading; Conley's first complaint of unauthorized trading, since becoming Steinhoff's client in 1992, came about 2 ½ weeks later, on August 2, 1999.

- ¶ 16 Steinhoff obtained employment with another firm, United Capital Securities Inc. At the time, the member regulation jurisdiction the IDA now exercises over its member firms was exercised by the Vancouver Stock Exchange. In the Uniform Termination Notice that Scotia filed with the Exchange, it cited wrongdoing by Steinhoff as the reason for her dismissal. Steinhoff vigorously denied these allegations, but in order to facilitate approval by the Exchange of her transfer from Scotia to United, she agreed in June 1999 to submit to strict supervision pending the Exchange's review of the allegations. In August 1999 the Exchange told Steinhoff that its review of the allegations was complete, that it would not be proceeding with a regulatory investigation, and that it had closed its file. However, it refused to lift the strict supervision requirement on the basis that there were other unresolved complaints (which it refused to disclose to Steinhoff).
- ¶ 17 Despite Steinhoff's requests that the complaints be explained or the requirement be removed, it remained in place for nearly another 3 years. It was lifted as a result of a policy decision made by the IDA in June 2002, but United and Steinhoff were not notified for 2 months.
- ¶ 18 In January 2000, the IDA assumed jurisdiction for member regulation from the Exchange. For most of the next 2 ½ years, Steinhoff made inquiries of the IDA on almost a weekly basis about the nature of the complaints so that she could address them. Nothing was revealed to her until the fall of 2002, just before the IDA issued the first notice of hearing in December. Warren Funt, the IDA's Vice President, Western Canada, Member Regulation, testified at the IDA hearing that the IDA's investigation into Steinhoff's conduct was not the IDA's "highest priority". He also testified that even if all of the complaints outstanding against Steinhoff had been substantiated (they were not, except the Conley complaint that is the subject of this hearing and review), none would have justified the imposition of strict supervision for that period of time.

B. Steinhoff's registration in Ontario

- ¶ 19 In November 2001 the IDA published Member Regulation Notice MR-114. This notice told members that, effective March 2002, the IDA expected all individual representatives to be registered in every jurisdiction in Canada or the US in which they had clients. This marked a change in the IDA's enforcement policy. Steinhoff had clients in a number of provinces outside British Columbia, including Ontario. United provided Steinhoff and its other brokers with registration application forms for the purpose of complying with this requirement, and

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Steinhoff completed hers and forwarded it to United's compliance department. (United followed the practice common in the industry of managing the registration process on behalf of its individual brokers.)

- ¶ 20 The IDA approved the Ontario applications of all of United's representatives, except, for reasons never explained, Steinhoff's. Steinhoff's applications for registration in all of the other jurisdictions were granted. In October 2002 when, as she was trying to get the Ontario Securities Commission to deal with the slowness of the IDA's investigation, Steinhoff was surprised to learn that both the OSC and the IDA were taking the position that she had no standing before the OSC because she was neither registered, nor required to be registered, in Ontario.
- ¶ 21 The IDA hearing concluded on February 7, 2003. The IDA registered Steinhoff in Ontario on March 17, 2003, about a month before the date of the IDA panel's findings.
- ¶ 22 At the IDA hearing, Funt testified that the IDA would not have pursued the Ontario registration matter, absent the Conley complaint.

II The IDA Panel's Decisions

A. *The findings*

1. Conley's testimony

- ¶ 23 The IDA panel expressed considerable skepticism about Conley's evidence. It put it this way in its findings:
24. There are a number of reasons that require us to scrutinize the evidence of Dr. Conley very carefully.
25. First, it is difficult to accept that an educated, intelligent person would receive countless confirmation slips, monthly and annual statements and portfolio reviews recording many transactions over six or seven years and never complain that she was not being consulted. . . . Failure to respond to a single confirmation slip may not have much, if any, probative value . . . [but] ignoring six or seven years of them without comment or complaint raises some doubt about the lack of authorization. . . .
26. Second, Dr. Conley admits she was consulted three times None of these transactions is within in the Notice of Hearing, but they have some probative weight, raising questions about Dr. Conley's evidence that no consultation took place.

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27. Third, Dr. Conley did not complain about unauthorized trading in her first complaint. That makes one wonder if the complaint we are considering was an afterthought.

28. Fourth, and more serious, it is apparent that Conley has a strong animus against Ms. Steinhoff. She made several reckless and unsupported allegations against her as we have already described. It is apparent that Dr. Conley accepted the false information distributed by Scotia's replacement advisers about Ms. Steinhoff, for which Scotia has apologized. . . . It may be that Dr. Conley has been unable to resile from her first reaction to the untruths distributed about Ms. Steinhoff

29. Last, considering the length of this relationship, and the enormous amount of phoning Ms. Steinhoff did, day after day throughout that long period, including evenings and weekends, it is unlikely that there would not have been more than the three calls we have described. . . . There is no reason shown in the evidence why Ms. Steinhoff would have neglected a client such as Dr. Conley over such a long period to the extent she describes. . . .

¶ 24 This is the IDA panel's description of some of the "reckless and unsupported" allegations made by Conley:

15. . . . Dr. Conley was featured in an article published in a local publication, "The Business Examiner". It quoted Dr. Conley as saying that Ms. Steinhoff's "departure left her investment portfolio in a shambles" and that she had expressed concern about the commissions she had paid and about the appropriateness of her "present asset mix". These statements were without foundation.

2. Evidence of Steinhoff's assistants

¶ 25 One of Steinhoff's former assistants, Nancy Murdock, testified at the hearing. Murdock had no knowledge of any dealings with Conley.

¶ 26 Marnie Williams was another Steinhoff assistant. According to the testimony of both Conley and Steinhoff, Williams had frequent contact with Conley. In the course of its investigation, IDA staff interviewed Williams. A transcript of that interview was in its possession and was disclosed to Steinhoff prior to the hearing.

¶ 27 Despite Steinhoff's request, IDA staff objected to the admission of the Williams transcript into evidence at the hearing. During the hearing, the IDA panel ruled on this issue as follows (transcript, vol. 5, p. 841):

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The Chairman: I should tell counsel that we discussed the matter of the statement made by Marnie Williams and we are not disposed to direct that the statement be somehow made into evidence, but we are prepared to say that we think that if it isn't put before us, in view of the course of history of these proceedings, that we would have to draw an adverse inference that the evidence is not favourable to the IDA. . . . When the IDA have a statement from what could be a knowledgeable witness and the IDA took that statement and has provided it to counsel, it simply isn't satisfactory to have it just left in that state, where we can't get the evidence and we can't know what she says.

¶ 28 This is how the IDA panel dealt with the evidence of these two assistants in its findings:

30. We also have evidence from one of Ms. Steinhoff's assistants who described some unquantified trading without authorization. She had no knowledge of any dealings with Dr. Conley. Balanced against that was a statement in the possession of one of Ms. Steinhoff's other assistants who chose not to give evidence. [Counsel for Steinhoff] asked the IDA to consent to present this evidence in the form of the statement given by this assistant to the IDA, but that consent was not given. In those circumstances we infer that the statement would have been favourable to Ms. Steinhoff. On balance, we think the evidence of the assistants does not help us with respect to the specific complaints we have to decide.

3. Evidence of Steinhoff's business practices

¶ 29 The IDA panel also devoted much discussion in its findings to Steinhoff's general business practices:

17. . . . Whether or not [Conley] had given Ms. Steinhoff tacit approval to trade on her behalf without specific authorization for each and every transaction in her accounts does not supercede [*sic*] industry requirements for an advisor to obtain specific authority for each trade prior to effecting the transaction. . . .

18. We believe Ms. Steinhoff is partly a victim of her own success in operating such a successful retail business. With so many clients, it must have been difficult for her to obtain specific instructions for each of the huge number of trades she made each day, year and month. . . . the numbers are quite remarkable. . . .

19. . . . Ms. Steinhoff . . . has persuaded herself, notwithstanding her somewhat frenetic regime, that she did have approval for each trade. . . .

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20. . . . We believe there is a high likelihood that from time to time Ms. Steinhoff operated her business in a discretionary manner because, despite her admirable work ethic, we doubt she could always effect as many transactions as she does and still respect specific IDA regulations regarding the execution of trade authorizations.

21. At issue here is Ms. Steinhoff's and her clients' understanding of "trading authorizations". It is our view that many clients, including Dr. Conley, probably gave Ms. Steinhoff authority to manage their accounts using her best judgment. These clients likely did not want to be involved in the handling of their accounts on a daily basis and fully trusted Ms. Steinhoff to manage their affairs appropriately. As such, it is entirely reasonable to understand that Ms. Steinhoff may have felt she had "trading authorization", and believed, in all likelihood, that she was providing her clients with the exact service they expected of her. . . .

31. . . . we are also troubled by the difficulty Ms. Steinhoff must have had in obtaining authority for the enormous number of trades she was making on a regular basis. Some approvals may have fallen through the cracks.

32. Considering all the evidence, we are not persuaded that there is clear, cogent and convincing evidence that Ms. Steinhoff did not have approval for many of her trades. There are, however, two matters that trouble us greatly.

33. First, a careful examination of Ms. Steinhoff's trading blotter shows such a huge number of transactions for which specific instructions including price, quantity, security and timing of the order that would have required consent from the client. We do not believe she could possibly have complied with the Conduct and Practice Handbook. . . .

36. However, we are not persuaded by clear, cogent and compelling evidence that Ms. Steinhoff engaged in general, discretionary trading in Dr. Conley's account as she has described.

¶ 30 Similarly, in its penalty decision, the IDA panel said this (at page 2):

By way of explanation, the [IDA penalty] Guidelines also describe factors to be considered in the determination of penalty sanctions. They include:
. . .

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- underlying reason for executing unauthorized trades (in this case, probably, too much business) . . .

¶ 31 At the same time, the IDA panel also mentioned several times the importance of restricting its focus to the allegations in the notice of hearing. These are the relevant excerpts (from some of the same paragraphs quoted above) from its findings:

18. . . . We, of course, are only concerned with nine transactions.

22. . . . We also recognize that Ms. Steinhoff must defend herself only against the specific charges that have been made against her and not against a general charge of discretionary trading.

33. . . . We remind ourselves, however, that we are dealing only with 23 transactions that would have required just nine authorizations.

¶ 32 This is the relevant excerpt from the penalty decision (at page 2):

While it is difficult to understand how Ms. Steinhoff could obtain prior approval for every trade she made, having regard to the huge volume of business she transacted, there was evidence that she spent hours every day on the telephone with her clients and we had to remind ourselves that she was only required to respond to the limited number of actual transactions that were alleged against her. . . .

¶ 33 Finally, Steinhoff was hampered by the fact that she had no access to the relevant client files. They were in Scotia's possession, not hers, and IDA staff did not demand them from Scotia so that they could be made available to her. Not surprisingly, Steinhoff could not remember the January 1999 trades, or the circumstances around them, in detail. Without access to the client files she maintained at Scotia, she had no way of responding to Conley's complaint, other than to assert that it was her invariable practice to obtain authorization.

4. Evidence of the January 1999 trades

¶ 34 The IDA panel considered the records and circumstances surrounding the January 1999 trades that it ultimately concluded were unauthorized. This is what it said:

34. . . . as already mentioned, Dr. Conley decided to move her accounts in late January, 1999. She said she had decided not to invest any further funds with Ms. Steinhoff, and she actually signed transfer papers on January 26, 1999. She was obviously paying close attention to her

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accounts at that time. On January 27 [*sic*; the actual date was January 22], Ms. Steinhoff made a 4-trade composite transaction resulting from an automatic deposit into the RRSP account of \$3375 on January 21, a Thursday. Ordinarily, Ms. Steinhoff would not learn about this deposit until she saw it on [a report] the following morning, but she says she could have learned about it on the 21st. In any event, she initiated the sale of 10% of four mutual funds [*sic* – only 3 mutual funds were involved] in Dr. Conley’s RRSP account shortly after 9:00 am on the morning of January 22. . . . With the proceeds of those sales and the automatic deposit, she purchased a fixed interest guaranteed Govt. of BC Bond. If approved, this was an entirely appropriate transaction.

5. The finding of unauthorized trading

¶ 35 The IDA panel found as follows:

35. Considering the very limited time there was to obtain authority for these transactions, and considering that Dr. Conley was concerned about her account at this time we have reluctantly concluded that Ms. Steinhoff truly believed that she had the general approval of Dr. Conley to manage her account in the way she did, and that this transactions slipped through the cracks and was not authorized.

6. The finding of trading in Ontario without registration

¶ 36 The IDA panel found that Steinhoff was required to be registered in Ontario and went on to say:

37. . . . We understand Ms. Steinhoff’s frustration that her application for registration in Ontario has been so long delayed but we can only hope that it will now be processed quickly.

¶ 37 In its penalty decision, the IDA panel had this to say (at p. 4):

The circumstances in which Ms. Steinhoff traded for clients in Ontario were fully canvassed in the evidence. This was, to say the least, a “tag on” because the IDA witnesses fairly and frankly conceded that, but for the other allegations, no charges for trading in Ontario would have been advanced, and because there is no history of bringing such charges solely for this technical violation. Ms. Steinhoff and her employers were not aware that such registration was required.

. . .

This technical charge seems to be very much an afterthought . . .

B. The penalties

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- ¶ 38 IDA penalty guidelines suggested a minimum penalty for unauthorized trading of: a minimum fine of \$15,000; disgorgement; close supervision; rewriting the Conduct and Practices Course; and a period of suspension. Instead, the IDA panel fined Steinhoff \$5,000 and ordered that she rewrite the Conduct and Practices Course.
- ¶ 39 The IDA panel assessed a fine of \$250 for Steinhoff's failure to register in Ontario, saying, "we do not think this technical infraction deserves the imposition of more than a minimal fine".

III Analysis

- ¶ 40 The Commission's standard for reviewing decisions of a self regulatory organization like the IDA is set out in section 4.7(b) of BC Policy 15-601 as follows:

In a hearing and review of a decision of an SRO when the Commission does not proceed by way of a new hearing, the Commission will generally confirm the decision of the SRO unless

- (1) the SRO has erred in law,
- (2) the SRO has overlooked material evidence,
- (3) compelling evidence is presented to the Commission that was not tendered at the original hearing, or
- (4) the Commission's view of the public interest is different from the SRO's.

- ¶ 41 In our opinion, the IDA panel:

- erred in law, overlooked material evidence, and relied on speculation as to facts not in evidence, in finding that Steinhoff engaged in unauthorized trading, and
- erred by failing to consider all the circumstances in determining whether Steinhoff's trading in Ontario without registration was a contravention of IDA By-Law 29.1.

A. *Unauthorized trading*

- ¶ 42 The IDA panel erred in failing to direct that the transcript of Williams' interview with IDA staff be entered into evidence, and in finding that Steinhoff did not have authority for the January 1999 trades.

1. The Williams transcript

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- ¶ 43 Williams' evidence was clearly relevant. Unlike Murdoch, who testified, Williams had direct contact with Conley. Her transcript was also disclosed to Steinhoff, and we can safely conclude that Steinhoff, being aware of its contents, would not have sought to have it admitted unless it was helpful to her case.
- ¶ 44 The issue is one of procedural fairness. Procedural fairness was not met because the IDA panel failed to admit relevant evidence that was readily available. In failing to admit the evidence, it denied Steinhoff the right to a fair hearing.
- ¶ 45 The IDA panel could possibly have recovered from this error had it drawn the correct inference from its exclusion. Instead, it compounded its error. Referring to Murdoch's testimony, the IDA panel said that the Williams transcript was "balanced against" it. The IDA panel then said, "In those circumstances (referring to IDA staff's refusal to consent to its admission), we infer that the statement would have been favourable to Ms. Steinhoff." This was the IDA panel's opportunity to conclude that Williams would have corroborated Steinhoff's version of the events in question, the only inference that could meaningfully substitute for failing to admit Williams' relevant evidence.
- ¶ 46 Instead, the IDA panel concluded, "On balance, we think the evidence of the assistants does not help us with respect to the specific complaints we have to decide." Here the IDA panel entered the realm of speculation. The Williams evidence was not before it, so there was no basis on which it could weigh the relative probity of the Williams and Murdoch evidence, much less conclude that the Williams evidence, at least, was of no use to it.

The IDA panel therefore erred in law in failing to admit the Williams evidence.

2. January 1999 trades

- ¶ 47 The apparent basis for the IDA panel's finding that Steinhoff executed the January 1999 trades is found in this paragraph of its findings:

35. Considering the very limited time there was to obtain authority for these transactions, and considering that Dr. Conley was concerned about her account at this time we have reluctantly concluded that Ms. Steinhoff truly believed that she had the general approval of Dr. Conley to manage her account in the way she did, and that this transactions slipped through the cracks and was not authorized.

- ¶ 48 This appears to disclose three reasons for the IDA panel's finding:

Reason 1: Steinhoff could not have obtained authority because there was not enough time.

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- Reason 2: Conley's concern "about her account at this time" corroborates the view that Steinhoff did not obtain authority.
- Reason 3: Steinhoff never asked for authority because she was managing Conley's account on the basis of some general approval (that is, on a discretionary basis).

¶ 49 Individually, these reasons are not supported by the evidence. Collectively, they are logically inconsistent. For example, reason 1 is that Steinhoff did not seek authority because there was not enough time, yet reason 3 is that Steinhoff did not ask for authority because she was operating under Conley's general approval, and the transactions "slipped through the cracks". Reason 3 is inconsistent with the IDA panel's theory under reason 1. If reason 3 is the reason that Steinhoff did not ask for instructions, then the time she had to obtain instructions is irrelevant. Reason 3 is also internally inconsistent. If Steinhoff in fact believed that she was operating under a general authority, she would have thought there was no need to ask for specific instructions, so nothing would have "slipped through the cracks."

Reason 1 – Not enough time

- ¶ 50 The evidence was that Steinhoff usually reviewed each morning the cash balances in her clients' accounts from the day before, in this case, January 21st, and then called her clients to give them investment recommendations and seek their approval. The January 1999 trades were executed starting just after 0900 on the 22nd, so the IDA panel apparently put these two pieces of evidence together and concluded that there was not enough time for Steinhoff to get instructions from Conley.
- ¶ 51 However, Steinhoff testified that the morning report was not the only point in time in which she learned of the status of her clients' cash balances. She said that she sometimes acquired this information on the same day that money came into a client's account. She said that she therefore could have known about the RRSP deposit in Conley's account on the day it came in, the 21st. Steinhoff's evidence on this point was not refuted by IDA staff nor rejected by the IDA panel.
- ¶ 52 There is no evidence as to the time of day on the 21st that the RRSP deposit was made. It could have been made early in the business day. The evidence also established that it was Steinhoff's practice to call her doctor clients in the evenings.
- ¶ 53 An equally reasonable explanation is that Steinhoff learned of the RRSP deposit on the 21st, called Conley that evening with a recommendation, got Conley's approval, and executed the orders on the 22nd.

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¶ 54 The IDA panel said it reviewed the evidence to determine whether there was “clear, cogent and compelling evidence” of wrongdoing, which is toward the high end of the range of evidentiary requirements within the “balance of probabilities” standard of proof. The evidence relied on by the IDA panel did not tip the balance of probabilities against Steinhoff on that test (nor would it have done so on a simple test of the balance of probabilities). This is particularly so given the IDA panel’s failure to draw the appropriate inference from the missing Williams evidence.

¶ 55 The IDA panel therefore overlooked material evidence or failed to give it proper weight in finding that Steinhoff did not obtain instructions because there was insufficient time to do so.

Reason 2 – Conley’s concern

¶ 56 The IDA panel did not make clear exactly how it thought Conley’s concern about her account supported its finding that Steinhoff failed to get instructions. Probably the IDA panel meant to convey that, because Conley was paying uncharacteristic attention to her account at the time of the January 1999 trades, she would have remembered if Steinhoff had sought her approval for the trades. If so, that would tend to corroborate its finding that Steinhoff did not ask for instructions. (The IDA panel could not have meant that Conley had refused consent to the trades – having found that Conley had not been asked, the IDA panel could not also find that she withheld consent.)

¶ 57 However, the IDA panel’s own assessment of Conley’s evidence was that it warranted careful scrutiny. The IDA panel’s suspicion that her unauthorized trading complaint was an afterthought, and its mention of Conley’s animus toward Steinhoff, are particularly significant to the credibility of her purported recollections about the January 1999 trades.

¶ 58 Therefore, the corroborative value of this reason is marginal at best. The IDA panel erred, to the extent it relied on it to support its finding of unauthorized trading.

Reason 3 – Managing under a general approval

¶ 59 As noted above, this reason is inconsistent with reason 1. However, there is a more serious problem with reason 3: despite the IDA panel’s frequent statements in the findings and the penalty decision that it must restrict its consideration to the allegations in the notice of hearing, we cannot help but conclude that it did not.

¶ 60 The allegations of unauthorized trading in the notice of hearing were that Steinhoff failed to get instructions for 9 transactions comprising 23 trades.

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¶ 61 The IDA panel ultimately found unauthorized trading in only 1 transaction comprising 4 trades. In its findings it did not say explicitly why it did not find unauthorized trading for the other 8 transactions comprising 19 trades. Instead, it said this:

32. Considering all the evidence, we are not persuaded that there is clear, cogent and convincing evidence that Ms. Steinhoff did not have approval for many of her trades. There are, however, two matters that trouble us greatly.

33. First, a careful examination of Ms. Steinhoff's trading blotter shows such a huge number of transactions for which specific instructions including price, quantity, security and timing of the order that would have required consent from the client. We do not believe she could possibly have complied with the Conduct and Practice Handbook. We remind ourselves, however, that we are dealing only with 23 transactions that would have required just nine authorizations.

¶ 62 In the next paragraph (34) of its findings the IDA panel describes its concern about the timing issue, described above.

¶ 63 We do not know the extent to which the IDA panel relied on Conley's testimony. It expressed significant concern about it, but did not go on to say which aspects, if any, of her story it believed and which it did not. However, if despite its concerns about Conley's testimony the IDA panel had largely accepted it, then it would have had to have found that Steinhoff was guilty on more counts of unauthorized trading (perhaps almost all of them), than it did. Therefore, Conley's testimony does not seem to be a significant factor in the IDA panel's finding, except to the extent discussed above under *Reason 2 – Conley's concern*.

¶ 64 Therefore, we conclude that paragraph 35 of the findings, quoted above, does not reveal all of the reasons relied on by the IDA panel in making its finding. It is apparent, reading the findings and penalty decision as a whole, that the IDA panel believed that Steinhoff was too busy to be able to play by the rules, and therefore must have broken them. This takes two forms in the findings and penalty decision. At times, the IDA panel notes the difficulty Steinhoff would have had to get instructions for all her trades as a result of their sheer volume. At other times, the IDA panel speculates that perhaps Steinhoff was improperly managing her accounts on a discretionary basis. Despite its frequent self-admonitions that its role was only to adjudicate the allegations in the notice of hearing, the IDA panel keeps coming back to this issue. It is an underlying theme throughout the findings and the penalty decision.

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- ¶ 65 It starts in paragraph 17 of the findings, where the IDA panel raises the issue of whether Conley had given Steinhoff “tacit approval to trade on her behalf without specific authorization”. This was not an allegation before the IDA panel.
- ¶ 66 In paragraph 18 of the findings, the IDA panel says it believes Steinhoff “is a victim of her own success”, and notes that “it must have been difficult for her to obtain specific instructions for each of the huge numbers of trades she made each day” This issue was not before the IDA panel, nor did it cite any evidence in support of this conclusion. This is where the IDA panel says for the first time that it was “of course, . . . only concerned with nine transactions”.
- ¶ 67 However, in the next paragraph of the findings (19), the IDA panel refers to Steinhoff’s “somewhat frenetic regime”, and in paragraph 20 concludes that Steinhoff operated from time to time “in a discretionary manner” because she could not “effect as many transactions as she does and still respect . . . IDA regulations”. Again, this issue was not alleged in the notice of hearing, and the IDA panel cited no evidence in support of its conclusion.
- ¶ 68 In paragraph 21, the IDA panel speculates that many of Steinhoff’s clients “*probably* gave Ms. Steinhoff authority to manage their accounts using her best judgment”, that “these clients *likely* did not want to be involved in the handling of their accounts”, and that “it is entirely reasonable to understand that Ms. Steinhoff *may have felt* she had ‘trading authorization’ [our emphasis]”.
- ¶ 69 Then, in the same paragraph, the IDA panel concludes that although Steinhoff “*may have been* expertly doing what clients wanted her to do, she was not properly registered to do so, and the client arrangements that would allow for the accounts to be managed in such manner were not in place [our emphasis]”.
- ¶ 70 This amounts to a finding by the IDA panel that Steinhoff engaged generally in discretionary trading, an issue not before it, and supported only by its own speculation about how Steinhoff operated.
- ¶ 71 In paragraph 22 of the findings, the IDA panel notes, for the second time, that “Steinhoff must defend herself only against the specific charges”.
- ¶ 72 However, a few paragraphs later in the findings, at paragraph 31, the IDA panel says it is “troubled by the difficulty Ms. Steinhoff must have had in obtaining authority for the enormous number of trades she was making on a regular basis” and goes on to say that “Some approvals *may* have fallen through the cracks [our emphasis]”

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- ¶ 73 All of which brings us to paragraphs 32 and 33 of the findings where we started this discussion. The last sentence of paragraph 33 is the IDA panel's third mention of the importance of adjudicating only the allegations in the notice of hearing.
- ¶ 74 The theme carries over into the penalty decision. At page 2, the IDA panel says "it is difficult to understand how Ms. Steinhoff could obtain prior approval for every trade she made, having regard to [her] huge volume of business" and then says, for the fourth and final time, "we had to remind ourselves that she was only required to respond to the limited number of actual transactions that were alleged against her".
- ¶ 75 Finally, it is telling that on page 3 of the penalty decision, the IDA panel identified "probably too much business" as the underlying reason for the unauthorized trading.
- ¶ 76 Despite its 4 statements in the findings and penalty decision that its job was to adjudicate only the allegations of unauthorized trading in the notice of hearing, it expressed concern about Steinhoff's general business practices after each of those statements. It appears the IDA panel was having difficulty with what it surmised was going on with Steinhoff's business, otherwise it would not have felt it necessary to keep referring to it in the findings and penalty decision. If the IDA panel really had restricted its focus to the allegations in the notice of hearing, none of that commentary would have been necessary.
- ¶ 77 We therefore find that in making its finding that Steinhoff engaged in unauthorized trading because she had the general approval of Conley, the IDA panel improperly relied, at least in part, on its own speculation about how Steinhoff conducted her business. This issue was not before it, and its conclusions relied on speculation as to facts not in evidence. The IDA panel therefore erred in law.

B. Ontario registration

- ¶ 78 The IDA panel's reasons in support of its finding that Steinhoff traded in Ontario without being registered are sparse. It says simply, "we think the combination of the Ontario legislation and the rules of the IDA clearly require registration." In its penalty decision, the IDA panel was somewhat more expansive, noting that the allegation was a "tag on" and an "afterthought".
- ¶ 79 The IDA panel's finding that Steinhoff was required to be registered in Ontario is correct. However, its finding is not correct that her failure to be registered amounted to conduct or a practice unbecoming or detrimental to the public interest, contrary to IDA By-Law 29.1.

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- ¶ 80 In considering whether it was a contravention of IDA By-Law 29.1 for Steinhoff to serve her Ontario clients without being registered there, the IDA panel ought to have considered all the circumstances. It is evident from its findings that it did not.
- ¶ 81 This was not a case of a broker simply ignoring a registration requirement. To the contrary, in response to IDA Member Regulation Notice MR-114, both Steinhoff and United took the steps necessary to ensure that she was registered in all relevant jurisdictions, including Ontario.
- ¶ 82 United followed the practice of many firms in the industry of taking responsibility at the corporate level for ensuring that their brokers are registered in all jurisdictions in which they have clients. United's compliance department managed and controlled Steinhoff's registration process, contacting her only as necessary to obtain the necessary information. She apparently responded in a truthful and timely manner to those requests for information.
- ¶ 83 According to Steinhoff's evidence (which was neither refuted by the IDA nor rejected by the IDA panel), United submitted Steinhoff's application for registration in Ontario early in 2002. The record includes an application for Steinhoff's registration in Ontario dated in August 2002, which Steinhoff says was a re-submission of the original application as a result of the IDA's request for more information.
- ¶ 84 Because her Ontario application was re-submitted in August 2002, she would have known that she was not registered in Ontario at that point, but there was no suggestion from United or from the IDA that she should suspend her dealings with clients in Ontario pending completion of her registration. She had a reasonable belief that the registration matter was being handled properly and would be regularized in due course.
- ¶ 85 Steinhoff and United were therefore surprised when they learned in October 2002 that the IDA had not yet granted Steinhoff's registration.
- ¶ 86 Other relevant circumstances are (a) the IDA's unexplained delay in processing her application, and (b) the nature of the allegation, being, as described by the IDA panel, a "tag on", a "technical charge" and an "afterthought". We know there were no substantive issues relating to Steinhoff's registration, because the IDA eventually registered her without conditions or restrictions.
- ¶ 87 The IDA panel therefore erred by failing to consider all the circumstances in determining that this conduct contravened IDA By-Law 29.1.

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¶ 88 Taking into account all the circumstances, we find that Steinhoff's conduct in serving her Ontario clients without being registered there was not conduct or a practice unbecoming or detrimental to the public interest.

IV Decision

¶ 89 We found that the IDA panel:

- erred in law, overlooked material evidence, and relied on speculation as to facts not in evidence, in finding that Steinhoff engaged in unauthorized trading, and
- erred by failing to consider all the circumstances in determining whether Steinhoff's trading in Ontario without registration was a contravention of IDA By-Law 29.1.

¶ 90 We therefore made the following decision in the hearing on October 28, 2004:

1. We granted Steinhoff's application, setting aside the IDA panel's findings and its penalty decision.
2. We dismissed the IDA staff application.

¶ 91 At the hearing, we said we would give the parties the opportunity to make submissions on whether we should make an order under section 174. However, we do not think it would be appropriate to make an order under that section in this case.

¶ 92 November 24, 2004

¶ 93 **For the Commission**

Brent W. Aitken
Vice Chair

Robin E. Ford
Commissioner

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Joan L. Brockman
Commissioner