# 2011 BCSECCOM 147

**Carolann Steinhoff**
**Investment Industry Regulatory Organization of Canada**

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

**Hearing and Review**

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| **Panel** | Brent W. Aitken | Vice Chair |
| | Bradley Doney | Commissioner |
| | Kenneth G. Hanna | Commissioner |
| **Dates of Hearing** | March 7, 8 and 9, 2011 | |
| **Date of Decision** | March 31, 2011 | |

**Appearing**

| | |
|---|---|
| Gregory N. Harney<br>Paul F. Waller<br>Ronald Pelletier | For Carolann Steinhoff |
| Paul Smith | For the Investment Industry Regulatory Organization of Canada |

**Decision**

## I Introduction

¶ 1 This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of a March 5, 2010 decision of a hearing panel of the Investment Industry Regulatory Organization of Canada (IIROC). The IIROC hearing panel found that Carolann Steinhoff contravened IIROC bylaws and rules.

¶ 2 Steinhoff is asking us to set aside the decision; IIROC is asking us to confirm it.

## II Background

¶ 3 In a June 30, 2009 Notice of Hearing IIROC alleged three counts of Steinhoff's contravention of its By-law 29.1 and its Dealer Member Rule 29.1 while she was employed at the Victoria branch of Wellington West Capital Inc. We set out the three counts in detail below. In summary, they allege that Steinhoff:

1. over a roughly three-year period beginning in January 2004, encouraged, instructed, or condoned a practice among her assistants to create false documents by cutting and pasting signatures and by replacing information on old forms to create new ones,

2. in March 2007 instructed her assistants to change a date on a document previously signed by a client to create a new document, and to cut and paste the client's signature from one document to another, and

3. frustrated and obstructed investigations into her conduct by not responding truthfully or completely to investigators' questions, by altering a courier slip to corroborate her story, and by counselling a witness to make evasive or misleading statements to investigators.

¶ 4 In its March 5, 2010 decision on liability, the IIROC hearing panel found that IIROC met its burden of proof on all three counts and accordingly found Steinhoff in contravention of By-Law 29.1 and Dealer Member Rule 29.1.

¶ 5 In a penalty decision on September 17, 2010 the IIROC hearing panel ordered that Steinhoff:

- be suspended for one year,
- be subject to strict supervision for another year,

- be prohibited from acting as a director or senior officer of an IIROC member for three years,
- be ineligible to act in that capacity until she re-writes and passes the Partners, Directors and Officers examination, and
- pay a fine of $60,000 and costs of $45,000.

¶ 6 On October 7, 2010 the Commission stayed the penalty decision until the disposition of this review.

¶ 7 Steinhoff also applied to have the penalties reduced, should we not set aside the liability decision; IIROC applied to have them increased. At the conclusion of the hearing we told the parties we would defer hearing their submissions on penalty until after we released this decision.

## III Issues

¶ 8 Steinhoff says the IIROC hearing panel erred in law by making findings based on insufficient evidence, by overlooking material evidence, and by drawing unreasonable inferences from the evidence.

## IV Discussion and Analysis

### A Legislative framework

¶ 9 Under section 28 of the Act the Commission may review a decision of a self regulatory body like IIROC. The Commission may confirm or vary the decision or make another decision it considers proper.

¶ 10 The Commission's standard for reviewing decisions under section 28 is set out in section 5.9(a) of BC Policy 15-601 *Hearings* as follows:

> **"5.9 Form and scope of reviews**
>
> **(a)** ***Where the review of an SRO decision proceeds as an appeal*** – The Commission does not provide parties with a second opinion on a matter decided by an SRO. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the SRO responds to that case.
>
> In these circumstances, the Commission generally confirms the decision of the SRO, unless

- the SRO has made an error of law
- the SRO has overlooked material evidence
- new and compelling evidence is presented to the Commission or
- the Commission's view of the public interest is different from the SRO's."

¶ 11 As stated in BCP 15-601, the Commission is reluctant to interfere in SRO decisions that, among other things, are reasonable. However, if the Commission finds that an SRO decision under review is not reasonable, it will consider whether to confirm or vary the decision, or make another decision it considers proper.

## B Introduction

### 1. Versions of the panel's decision

¶ 12 There are two versions of the panel's March 5 decision. The first version, the one the panel signed, contains numerous errors in paragraph numbering. It is the version that formed the record for this review and is the source of the quoted passages in this decision. The second version, the one published by IIROC, is identical with the numbering errors corrected.

### 2. Standard of proof

¶ 13 The IIROC hearing panel correctly set out the standard of proof: the allegations in the notice of hearing must be proved on a balance of probabilities on the basis of clear, convincing and cogent evidence. Citing *Re Shanahan*, [2006] IDACD No. 5, the panel noted, "Evidence that is 'fragile or suspect' cannot be relied upon."

## C. Analysis

### 1. The IIROC hearing panel's statements about Steinhoff's character and demeanour

¶ 14 The IIROC hearing panel's statements about Steinhoff's character and demeanour are relevant to this review.

¶ 15 In *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] BCJ No. 320 the Supreme Court of British Columbia overturned a decision of a Committee of Inquiry of the College. In doing so, it noted the following passage in the Committee's decision:

> "On several occasions the counsel for the College charged Jory with being the perpetrator of a scam. The committee finds that Jory's performance as a witness contained all the elements of a confidence man who would be guilty of Charge 4. The

> committee found him to be smooth and glib, shrewd and manipulative, pompous and condescending. At times he feigned a certain deference and humbleness, but at all times his egotism and feeling of self-importance and superiority was very apparent. The committee found his contrived performance irritating and obnoxious. In addition, the committee was not impressed by Dr. Jory's credibility or his integrity as a witness which will be discussed at greater length later in this report."

¶ 16 The court had this to say about that passage:

> "**83** Several comments must be made about this passage. The first is that the Committee appears not to have relied on it with respect to credibility, since credibility is referred to as a separate matter in the last sentence. Second, the comments, directed as they are to the substance of the charge, reveal a dangerous method of reasoning. Our courts have recognized the danger in inferring from a person's character that he committed a reprehensible act. Thus, apart from certain carefully circumscribed exceptions, character evidence is excluded. . . . Therefore any conclusions based on Dr. Jory's personality traits should have been made with great caution, so as to be certain that the Committee was not convicting Dr. Jory because it found his general character or demeanour repugnant.
>
> **84** At the hearing counsel for the College dwelt at great length on a picture of Dr. Jory as a shrewd, manipulative person. . . . In my view the Committee by its Report revealed itself ready to castigate Dr. Jory, to draw inferences against him wherever possible, and finally to place significant weight on the fact that his testimony contained 'all the elements of a confidence man who would be guilty of Charge 4'.
>
> **85** An emphasis on personality factors does not in itself vitiate the validity of the Committee's findings. However, it may be a factor to be borne in mind in determining whether the conviction is supported by cogent evidence, or whether, on the other hand, 'some injustice occurred': Latimer v. College of Physicians and Surgeons of B.C. [(1931), 55 CCC 132]."

¶ 17 It appears to us that similar dynamics were in play when the IIROC hearing panel made its findings in this case.

¶ 18 Steinhoff clearly made a negative impression on the panel. After enumerating her qualifications, experience and achievements, the panel said this:

> "[11] One does not achieve results like these without intelligence, a degree of single-mindedness and dedication. Mrs. Steinhoff impressed us as having all of those qualities: sophisticated, vastly experienced, exceptionally hard-working, energetic and, to a degree, driven. While testifying, however, Mrs. Steinhoff seemed to us to display a highly developed sense of entitlement and station that at times verges on hubris. While she seems to have been a loyal and generous employer of her assistants she was also demanding, at times impatient, occasionally insensitive and, it was our impression, quick to anger. The combination of the size of her client base, her energy and her demanding and impatient nature was a frequent source of stress to those around her. It is not insignificant, in our view, that Mrs. Steinhoff's relationship with each of her former assistants ended on terms of something less than endearment.
>
> [12] We should say here that in addition to hearing Mrs. Steinhoff give evidence before us, we also had the opportunity to watch and listen to videotaped excerpts from her interviews with IIROC investigators. As a witness on her own behalf, Mrs. Steinhoff did not in our opinion serve herself well. Although she was unfailingly courteous, she often seemed to us, particularly on matters 'close to the bone', as it were, more concerned to make an argument, to justify herself, or to divine some point she suspected might be hidden behind a question than to provide a direct answer to it. On some of those matters her evidence often seemed to have little connection to the questions put to her, was sometimes rambling and confusing, occasionally unintelligible and, as we shall explain below, in some respects inconsistent and in our view unconvincing. We have come to the conclusion that on some of these 'sensitive' matters her evidence simply strains credulity."

¶ 19 Like *Jory*, the panel's discussion of Steinhoff's character and demeanour in paragraph 11 of the decision are separate from its conclusions about her credibility in paragraph 12 and elsewhere in its decision. And, like *Jory*, the panel's comments about her character and demeanour are directed to the substance of the charge.

¶ 20 The panel considered Steinhoff's credibility and, generally speaking, did not accept her evidence as truthful. It was of course appropriate for the panel to consider Steinhoff's credibility. However, the panel's conclusion that Steinhoff was not truthful, in combination with its belief that Steinhoff had "a highly developed sense of entitlement and station that at times verges on hubris" led the panel to err.

¶ 21 It appears to us that the panel, having concluded that Steinhoff was both untruthful and possessed a strong sense of entitlement and station, made its findings against her on that basis, instead of rigorously testing whether the evidence in support of the allegations was "clear, convincing and cogent". In the case of counts 1 and 3, the evidence was not, in our opinion, clear, convincing and cogent, even if the panel was correct in concluding that most of what Steinhoff said in her defence was untrue (if in fact it was not). In the case of count 1, the panel also overlooked material evidence.

¶ 22 In our opinion, comments of the court in *Hamilton v. Law Society of British Columbia*, 2006 BCCA 367 are relevant:

> "**57** It is my respectful view that the Panel fell into the trap of attempting to choose between two conflicting versions of events as if it were obliged to resolve the factual question of what happened, which it was not. The result is a failure not dissimilar to the one that the instruction suggested by Cory J. in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742, was designed to avoid. In order to render a verdict in this case, the Panel did not have to decide whether to believe one or the other version of events. What the Panel ultimately had to decide was whether there was clear and cogent evidence to establish that the appellant had done what she was alleged to have done in the citation."

¶ 23 We have set aside almost all of the panel's significant findings on the basis that they were not supported by clear, convincing and cogent evidence. That the panel consistently made findings without that evidence, and the language the panel chose to express those findings shows, in our opinion, that the panel was influenced by its views of her character.

¶ 24 For example, in considering Steinhoff's activities in connection with Count 2, the panel said:

> "[137] . . . Mrs. Steinhoff prided herself on the quality and efficiency of her service to her clients. Understandably, she was annoyed, frustrated and perhaps even outraged by the prospect

> that her client might be deprived of this opportunity because of what she considered the stubborn stupidity of Wellington's head office. She did what she thought was necessary to enable [the client] to make its gain."

¶ 25 The panel's conclusion that Steinhoff "did what she thought was necessary" (which in the context, involved cutting and pasting signatures) was, in our opinion, influenced by its view of her character. It is clear that the panel believed that Steinhoff, when faced with what she considered a "stupid" requirement from head office, was susceptible to acting out of annoyance, frustration and outrage, and on that basis the panel found that she chose to break the rules.

¶ 26 As we discuss later, the panel described Steinhoff, in circumstances that we found to be more a matter of form than substance, as "content to…create fake documents with fake signatures."

¶ 27 In finding that Steinhoff altered a courier slip with the intent of frustrating or obstructing the investigation, the panel said:

> "[172] In our view it is impossible to characterize these actions in any other way than as acts of unvarnished and calculated dishonesty deliberately undertaken for the purpose of misleading the investigators. . . ."

¶ 28 Yet, as we discuss later, Steinhoff's explanation of the circumstances was equally plausible. It was not impossible to characterize her actions in another way. In our opinion, the panel was influenced by its view, not only that Steinhoff was not truthful, but that her "highly developed sense of entitlement and station that at times verges on hubris" would have led her to attempt to frustrate or obstruct the investigation.

¶ 29 In the final paragraph of its decision, the panel says:

> "[179] We wish to add this. There has been no evidence, nor even a suggestion, that any of Mrs. Steinhoff's clients was harmed by any of the activities that form the subject of this decision. None of her clients has complained of any of these matters. We accept that she was motivated by a desire to serve them well. That does not, however, justify her thumbing her nose at the laws and regulations that govern her in the conduct of her business."

¶ 30 As our analysis makes clear, it is a serious overstatement to say that Steinhoff's conduct as alleged by IIROC amounted to "thumbing her nose at the laws and regulations". In our opinion, this is another example of the panel's view that Steinhoff's drive and hubris meant she was prepared, if necessary to accomplish what she wanted, to break the rules.

¶ 31 These examples reflect a tone that pervades the decision and which, in our opinion, reveals a "dangerous method of reasoning" of the kind that concerned the court in *Jory*.

**2. The allegations**

***Count 1***

¶ 32 The foundation of the allegation in Count 1 that Steinhoff contravened By-Law 29.1 is that Steinhoff, over a period spanning more than three years beginning in 2004, "encouraged, instructed, or condoned" a practice among her assistants whereby they:

- photocopied or cut client signatures from old documents and pasted or copied them on new documents, "or"
- whited out instructions and dates on previously-signed documents and faxed them to Wellington's head office as properly executed documents.

¶ 33 The IIROC hearing panel found Steinhoff contravened IDA By-Law 29.1, as alleged in Count 1, in these terms:

> "[49] Taking into account the whole of the evidence on this subject, we have reached the conclusion that IIROC has discharged its burden of proof on Count 1 in the Notice of Hearing and that Mrs. Steinhoff did, as alleged in that Count, "encourage, instruct or condone" the use of the cut and paste procedure to create fake documents."

¶ 34 We note that this finding of the panel is limited to only one of the specific allegations in Count 1 – the practice of photocopying or cutting signatures from old documents and pasting or copying them on new documents. The IIROC panel did not find that Steinhoff encouraged, instructed or condoned the whiting out of instructions and dates on documents.

¶ 35 We are setting aside the panel's decision on Count 1 because it made two errors of law, each of which is sufficient on its own to set aside the panel's finding:

- there was insufficient evidence to prove the allegation, and
- the panel overlooked material evidence.

¶ 36 In the following paragraphs we summarize and discuss the evidence that was relevant to Count 1 at the IIROC hearing.

Insufficient evidence

¶ 37 It is not disputed that there was a practice of altering documents among at least some of Steinhoff's assistants during the relevant period. The question is whether Steinhoff "encouraged, instructed, or condoned" the practice.

¶ 38 Steinhoff testified that she was unaware that her assistants were engaged in this practice and that she did not condone it. She said that she left administrative matters to her assistants and did not review their work.

¶ 39 The panel accepted Steinhoff's testimony about how she divided work between herself and her assistants, although in doing so it said:

> "[31] . . . it does not follow . . . that she did not 'encourage, instruct (which we have taken to mean "direct", rather than demonstrate or explain) or condone' use of the cut and paste procedure by [her assistants]. We would in any event have thought that if indeed her focus is on her clients, her responsibilities would surely include *all* [*sic*] of the work that is done on their behalf. In addition, as co-branch manager she had a duty to supervise the operation of the branch and ensure that the work done on behalf of clients is in full compliance with legal and regulatory requirements."

¶ 40 There are three problems with this paragraph. The first is the panel's observation that, even accepting Steinhoff's description of how she organized the work of her assistants, "it does not follow" that she did not encourage, instruct or condone cutting and pasting. This language seems to suggest that Steinhoff's evidence was not sufficient to disprove the allegation. If that is the thought the panel wished to express, the panel was in error because its statement would have implied that Steinhoff had an onus to disprove the allegation. It was not up to Steinhoff to disprove the allegation, but for IIROC to prove it.

¶ 41 Second, the panel's observation that "her responsibilities would surely include *all* [*sic*] of the work done on their behalf" is a bare conclusion, and irrelevant. Whatever views the panel held about what Steinhoff's responsibilities may have been, those views are not evidence as to whether she encouraged, instructed or condoned a practice among her assistants of cutting and pasting.

¶ 42 Third, the panel's observation that Steinhoff had a duty to supervise and to ensure that work done on behalf of clients was in full compliance with requirements is

another bare and irrelevant conclusion. The panel cited no evidence about the scope of Steinhoff's supervisory responsibilities under regulatory requirements, and in any event that is irrelevant to the issue of whether Steinhoff encouraged, instructed or condoned a practice of cutting and pasting.

¶ 43 There was testimony at the hearing from three former assistants of Steinhoff to the effect that Steinhoff had instructed them to cut and paste signatures and, on one occasion, observed with approval one of the assistants showing another how to do the cut and paste procedure. The panel rejected the evidence of these assistants, describing their evidence variously as not rising "to the required level of clarity, cogency or conviction", as unable to "safely be relied on", and as "fragile".

¶ 44 The only evidence the panel cited to prove that Steinhoff encouraged, instructed or condoned the practice of altering documents is:

- Steinhoff's conduct relating to an April 2006 transaction in her own personal account, and
- the two March 2007 emails that are the basis of Count 2.

¶ 45 In the April 2006 transaction, Steinhoff asked her assistant to take the necessary steps to pay, out of Steinhoff's own personal account, an invoice to a third party for some renovation work to her home. In doing so, the assistant photocopied and pasted the signatures of Steinhoff and her husband on a letter of authority, a document required by Wellington to issue third-party cheques. The assistant sent Steinhoff an email summarizing the steps that she had taken. These included her faxing the LOA to Wellington's head office. The email also mentioned that Wellington wanted a copy of the third party invoice.

¶ 46 Steinhoff's response to the email shows that she was upset that Wellington's head office wanted to see a copy of the invoice. She was indignant that they thought it their business to assess how she was spending her own money.

¶ 47 Steinhoff testified that she was not aware whether an LOA was required or whether she had signed one. She also said that she was not curious or concerned about the references to the LOA in her assistant's email.

¶ 48 The panel did not believe this evidence from Steinhoff. We do not find that unreasonable, but the panel went on to draw this conclusion:

> "[47] . . . Her seeming indifference to the fact that she had not signed the LOA can only be explained on the basis that the activity was nothing out of the ordinary and she was content to have [her assistant] do whatever was needed to ensure that

> Wellington's head office was satisfied that the proper documentation existed, including, if need be, creating fake documents with fake signatures by cutting and pasting."

¶ 49 The panel cited no evidence to support its finding that Steinhoff's response to questions about the LOA "can only be explained on the basis that the activity was nothing out of the ordinary".

¶ 50 The panel also failed to cite evidence to support its conclusion, based solely on Steinhoff's statement she was not curious or concerned about the references to the LOA in her assistant's email, that she was content with her assistant's "creating fake documents with fake signatures." For example, the panel overlooked the possibility that Steinhoff's irritation over Wellington's interest in how she was spending her own money may have distracted her from the information in the email about the LOA.

¶ 51 Even if Steinhoff had an arrangement with her assistant that, where her own account was concerned, she authorized her assistant to attach her signature in photocopied form to necessary documents in order to expedite her instructions, it does not follow that she followed a similar practice in dealing with the accounts of arms-length clients. This evidence relating to a transaction in her own account does not support the allegation that she encouraged, instructed or condoned the practice of cutting and pasting documents in her clients' accounts.

¶ 52 It also seems to us that the panel's choice of language was unsuited to the circumstances. There was nothing improper, much less sinister, about this event. Steinhoff was simply attempting to expedite the payment from her own funds of a legitimate invoice related to a personal matter. If there was any irregularity involved, it was a matter of form, not substance. In our opinion, it did not rise to the level of conduct that was unbecoming or detrimental to the public interest. In these circumstances, the panel's statement that Steinhoff was content with "creating fake documents with fake signatures" was unduly pejorative.

¶ 53 The two emails that Steinhoff sent to her assistants on March 13 and March 14, 2007 (that are also the basis of Count 2) are both about a form in connection with the opening of a new account for an existing client. Wellington's head office required a form of guarantee for the new account, a requirement Steinhoff overlooked when she opened the account.

¶ 54 The March 13 email purports to instruct the assistants to white out and change the date on a guarantee previously signed by the client. The March 14 email purports to instruct the assistants to cut and paste the client's signature on a new guarantee.

¶ 55 The panel relied on both the March 13 and the March 14 emails as evidence of the practice of cutting and pasting. It said:

> "[48] In our view the evidence is clear that in at least two instances Mrs. Steinhoff did in fact 'instruct' assistants to employ the cut and paste procedure. Those two instances are the subject-matter of Count 2 and relate to the [March 13 and 14, 2007 emails]."

¶ 56 As for the March 13 email, we have noted that the panel's finding on Count 1 is restricted to only one of the two allegations under that count: cutting and pasting signatures (not the allegation about whiting out). The March 13 email, which purports to instruct a whiting out, is not relevant to the panel's finding about cutting and pasting signatures.

¶ 57 In our opinion, the evidence the panel purported to rely on to prove Count 1 was not clear, cogent and convincing evidence that Steinhoff encouraged, instructed or condoned the practices alleged. Even if one accepts the panel's characterization of the emails relating to the April 2006 transaction and the March 2007 emails, those emails are evidence of only two events, a year apart, during the period of more than three years that the practice was alleged to have been carried on.

¶ 58 Two events widely spaced in time do not constitute a practice over a three-year period. The *Canadian Oxford Dictionary* defines "practice" as "a way of doing something that is common, habitual, or expected" and as "a habit or custom". In our opinion, the evidence the panel purported to rely on was not sufficient for it to reasonably conclude that IIROC had discharged its burden of proof on Count 1.

¶ 59 In our opinion, the panel erred in law in finding that the evidence in support of Count 1 was clear, convincing and cogent.

Material evidence overlooked

¶ 60 There was testimony from interviews of other current and former assistants and co-workers of Steinhoff to the effect that Steinhoff never asked them to cut and paste signatures, or to otherwise alter documents, that they were not aware of the practice, or that they were aware of the practice but did not believe Steinhoff knew it was happening. There was also testimony of the IIROC investigator that he undertook a comprehensive search of Steinhoff's emails during the relevant period (numbering perhaps as many as 4,000) and found only three that contained instructions from Steinhoff to cut and paste signatures or to otherwise alter documents – the one in April 2006 relating to her own account and the March 13 and March 14 emails described above.

¶ 61 On its face, this evidence is corroborative of Steinhoff's statement that she did not condone a practice among her assistants of cutting and pasting, and did not know about her assistants' cutting and pasting signatures. As such, it is potentially exculpatory, and therefore material, evidence.

¶ 62 Despite the significance of this evidence, the panel made no reference to it in its decision. In the circumstances, the only conclusion open to us is that the panel did not consider it.

¶ 63 In our opinion, the panel erred in law by overlooking material evidence relevant to the allegation in Count 1.

¶ 64 We find that the panel erred in finding that Steinhoff contravened By-law 29.1 on the basis of the allegations in Count 1. We set aside the panel's finding on Count 1.

***Count 2***

¶ 65 The foundation of the allegation in Count 2, that Steinhoff contravened By-Law 29.1, is that Steinhoff, on March 13 and March 14, 2007 directed two of her assistants to create a false client guarantee and fax it to Wellington's head office as a properly executed document. The allegation is that Steinhoff instructed her assistants to:

- change the date on an existing guarantee signed by that client and to insert a new date, without having the client sign it, and
- cut out the client signature from another document and to paste it onto a new guarantee

¶ 66 Steinhoff had recommended a client sell certain shares short. The client would then earn a profit through the purchase of an imminent prospectus offering of subscription receipts for the same stock at a discount to the short-sale price. To implement the strategy, the client, who had two existing cash accounts, had to open a margin account. Time was short – there were only a few days before the prospectus offering closed.

¶ 67 Steinhoff had the client come in to sign the necessary account opening forms. She apparently was not aware that in these circumstances, Wellington required the client to sign a guarantee (he had already signed guarantees for each of his two existing cash accounts).

¶ 68 The March 13 email arose when Steinhoff learned from one of her assistants that the guarantee was required. In it, she replied as follows:

> "Just go to the file and get the guarantee and change the date on it, and fax it to them. thx"

¶ 69 The assistant made inquiries internally about that request, ultimately asking Lesley Walters-Sagher, a Wellington compliance manager, if that would be acceptable.

¶ 70 Walters-Sagher replied it would not be, and the assistant forwarded that answer to Steinhoff.

¶ 71 In the March 14 email, which Steinhoff sent to another of her assistants, Tjerk De Gruijter, Steinhoff said:

> "Just get a new form; cut out his signature from something we have already and paste it on form and fax. Send him one in the mail to sign and when u get it back, sent it to head office.
>
> Trish or Bonnie: please show Tjerk how to cut and paste signatures. Thx :-)"

¶ 72 Steinhoff says the March 13 email was in the nature of an inquiry as to whether changing the date on an existing form would be acceptable. She says the March 14 email was in jest – wry humour perhaps – that reflected the Victoria office's continuing frustration with its perception of Wellington's compliance procedures as unnecessarily technical. (She points to the "happy face" emoticon at the end of the email as an indicator that the email was not intended seriously.)

¶ 73 The instructions in the March 14 email were never acted upon. A new guarantee was prepared and sent to the client, who signed and returned it.

¶ 74 Steinhoff says that immediately after sending the March 14 email, she came out of her office, told her assistants it was not meant seriously, and asked De Gruijter to send a new guarantee to the client by courier. The panel found that Steinhoff did instruct De Gruijter to courier a new guarantee to the client, noting that (at paragraph 118), "there is, however, some lack of clarity about just when this happened."

¶ 75 In fact, De Gruijter, for reasons that are unclear, did not send the guarantee until the following day – March 15. Steinhoff sent De Gruijter an email in the morning of that day, asking him "Did you send [the client] out a new Guarantee form yesterday as per my request?" De Gruijter replied, "I sent it by courier." In our opinion, it was reasonable, from this exchange, for Steinhoff to have believed that De Gruijter had couriered the guarantee on March 14 as instructed. However, it

was not until about 20 minutes after the email exchange on March 15 that De Gruijter called the courier to pick up the guarantee.

¶ 76 The panel did not accept Steinhoff's story that the March 14 email was meant in jest. It found the emails on their face unequivocal, and did not accept Steinhoff's explanation of the circumstances surrounding them. Having rejected Steinhoff's explanations, the panel concluded that she "did what she is alleged to have done".

¶ 77 It is not necessary for us to make a finding as to whether the panel's rejection of Steinhoff's explanation of the circumstances was reasonable because, in our opinion, even if her explanation is rejected, the conduct as alleged is not a contravention of Bylaw 29.1.

¶ 78 The panel's finding was that, "in the circumstances" Steinhoff's conduct "amounted to business conduct or practice that was unbecoming or detrimental to the public interest and a breach of Bylaw 29.1."

¶ 79 The finding consists only of that statement. The decision contains no analysis or reference to any authorities that would support a finding that Steinhoff's conduct, in the circumstances, rose to the level of conduct unbecoming or detrimental to the public interest. Neither did IIROC provide any analysis or authorities to us in this hearing to support that finding.

¶ 80 We do not condone a registrant's altering documents, nor the instructing of staff to do so, whether or not those instructions are ultimately implemented. That said, a single instance of instructing staff to do so, as is alleged here, is not necessarily conduct that is unbecoming or detrimental to the public interest – the circumstances must be considered.

¶ 81 Steinhoff's instructions were not acted upon – she promptly arranged for the client to sign the guarantee. No altered document was ever faxed to Wellington's head office masquerading as an original. There was no issue of prejudice to the client. There was no issue of prejudice to Wellington – the guarantee form, albeit required, was collateral to the opening of the account.

¶ 82 In our opinion, the panel did not give sufficient weight to these circumstances in considering whether IIROC proved that Steinhoff's conduct was sufficiently serious to constitute conduct unbecoming or to be detrimental to the public interest.

¶ 83 In these circumstances, we find that Steinhoff's instructions to her assistants, even if her explanation is not believed, do not rise to the level of conduct unbecoming or detrimental to the public interest.

¶ 84 For the reasons stated above, we find that the panel erred in law in finding that Steinhoff contravened By-law 29.1 on the basis of the allegations in Count 2. We set aside the panel's finding on Count 2.

***Count 3***

¶ 85 The foundation of the allegation in Count 3 that Steinhoff contravened By-law 29.1 and Dealer Member Rule 29.1 is that Steinhoff, attempted to "frustrate and/or obstruct" the investigations by Wellington and IIROC into the conduct alleged in Counts 1 and 2 by:

- not responding truthfully or completely to Wellington and IIROC staff
- altering a courier delivery receipt and presenting it to IIROC staff as corroboration of her explanation of her conduct related to Counts 1 and 2 with a view to deceiving IIROC investigators
- "counselling or otherwise encouraging or influencing" her assistant, Bonnie Reside, to make evasive or misleading statements to Wellington and IIROC staff that were favourable to Steinhoff and consistent with Steinhoff's explanation of her conduct related to Counts 1 and 2.

¶ 86 The IIROC panel dealt with these three particulars in reverse order, and so will we.

Counselling or influencing Reside

¶ 87 The panel did not find that Steinhoff counselled or otherwise encouraged or influenced Reside to make evasive or misleading statements to Wellington, but it found that she did so in relation to Reside's statements to IIROC. The basis for its finding is all about the happy face emoticon at the end of the March 14 email.

¶ 88 When IIROC staff asked Reside about the March 14 email at an interview on December 14, 2007, she said she assumed Steinhoff was joking:

> "Because she wouldn't ask us to do that. She had never asked us to do that, so I would assume it's a joke. . . . She's put a happy face on it."

¶ 89 In her testimony before the IIROC hearing panel, Reside said she did not take the March 14 email seriously, not simply because of the happy face, but because in her view Steinhoff would not have seriously asked what the email purported to ask. Under cross-examination, Reside denied she had invoked the happy face as evidence that Steinhoff was joking because she knew Steinhoff had advanced the same explanation.

¶ 90 Here is the panel's conclusion:

> "[150] We simply do not believe this. In our view, Ms. Reside did not tell the truth to the investigators and she did not tell the truth about this matter to us. As we have said we consider that the claim that the 'happy face' is evidence of the jocular intent of the [March 14 email], is one that would not naturally occur to anyone; and we not think that it occurred naturally to Ms. Reside.
>
> [151] The conclusion seems to us unavoidable that Ms. Reside must have been coached by Mrs. Steinhoff to refer to the 'happy face' as part of her explanation for why she regarded the [March 14 email] as having been intended as a joke. Putting this another way, although there is no direct evidence that Mrs. Steinhoff 'coached' Ms. Reside to rely on the 'happy face', in our view it is reasonable in the circumstances to infer that she did so and we find that she did. We should add, in this connection, that we consider it significant that by December 14, 2007 Ms. Reside was the only one of those who were her assistants in the first two weeks of March 2007 who was still employed by her. The others had all departed on bad terms. She was the only one, in other words, with a reason to support Mrs. Steinhoff's claims. Mrs. Steinhoff conscripted a loyal employee to her cause."

¶ 91 In our opinion, the panel's reasoning does not support its conclusion.

¶ 92 First, in choosing not to believe Reside's testimony, it appears that the panel became fixated on her reference to the happy face instead of considering her evidence as a whole. Reside made it clear that she had other reasons for believing that the March 14 email was not intended to be taken seriously – it would, she said, be out of character for Steinhoff – yet the panel rejected her testimony in its entirety because of its view that "it would not naturally occur to anyone" that the presence of the happy face on the March 14 email indicated jocular intent.

¶ 93 Even if the panel's finding that Reside was lying was reasonable, that, in and of itself, does not prove that Steinhoff "coached" Reside to testify in a certain manner.

¶ 94 We disagree that it is an "unavoidable" conclusion that Steinhoff coached Reside. As the panel acknowledges, there was no direct evidence that Steinhoff coached Reside to include the happy face in her explanation why she did not treat the March 14 mail seriously.

¶ 95 We also disagree that it was "reasonable in the circumstances to infer" that Steinhoff in fact did coach Reside.

¶ 96 To draw that inference, the panel purported to rely on the evidence that both Steinhoff and Reside referred to the happy face as one factor showing that the March 14 email was not intended seriously. In our opinion, that is not clear, convincing and cogent evidence that Steinhoff counselled or otherwise encouraged or influenced Reside to testify in a certain fashion. The panel also placed undue significance on Reside's continued employment with Steinhoff, comparing it to "the others [who] had all departed on bad terms." Reside's apparent continuing loyalty to Steinhoff may perhaps have been a motive for Reside not to tell the truth (if in fact she did not) but it is not evidence that Steinhoff counselled or otherwise encouraged or influenced Reside.

¶ 97 In our opinion, the panel erred in law in finding that Steinhoff counselled or otherwise encouraged or influenced Reside to make evasive or misleading statements to IIROC staff that were favourable to Steinhoff and consistent with Steinhoff's explanation of her conduct related to Counts 1 and 2. We set aside the panel's finding.

Altering the courier slip

¶ 98 One of the documents Steinhoff provided to IIROC in connection with its investigation was the courier slip for the March 15, 2007 delivery arranged by De Gruijter to the client, all as described above.

¶ 99 Steinhoff sought Wellington's copy of the courier slip to show that the original guarantee was delivered to the client on March 14. When the office copy of the slip was found, the date box was blank. This was not unusual. According to Wellington's receptionist, the date box was not filled in at the time of pickup. On pickup, the courier tore off the top (white) page of the slip, leaving the next page, a pink carbonless copy, with the box undated. The date box was then filled in on the white top copy at the time of delivery. In this case, the white copy shows the guarantee was delivered to the client on March 15.

¶ 100 Noticing that the date was blank on the pink slip, Steinhoff asked her staff what date the courier was sent. She was told it was sent on March 14. Steinhoff then wrote, in blue ink, on the pink copy page, "03 14 07".

¶ 101 Steinhoff says she wrote in the date to show that the courier slip was the one that accompanied the couriered package to the client on, she thought, the 14th – not knowing at that point that in fact the package was not picked up and delivered until the 15th.

¶ 102 When she provided her documents to the IIROC investigators, they were photocopies, so it would not have been apparent to the reader that the date on the courier slip had been written in.

¶ 103 In a later set of documents delivered on Steinhoff's behalf, the slip again appeared, again in photocopied form, with the date highlighted in yellow, and a blue arrow with the legend "NOTE" pointing at the date.

¶ 104 IIROC investigators did not learn that she wrote in the date until later, when they had the opportunity to see the original pink slip. Asked about it, Steinhoff did not at first admit that she had filled in the date, but did so eventually and gave the explanation above.

¶ 105 IIROC placed great emphasis on this issue, both at the IIROC hearing and before us. Its theory is that Steinhoff, by inserting the date on the courier slip, did so as part of a cover-up. IIROC says the date on the courier slip was central to Steinhoff's story that she instructed De Gruijter to send a new guarantee to the client on March 14. Her insertion of the date therefore shows her intent to mislead IIROC investigators about what really happened.

¶ 106 This theory was adopted by the IIROC hearing panel:

> "[138] It is significant in our view that the instructions she gave to Mr. De Gruijter in the [March 14 email] included a direction to send a guarantee form in the mail, not by courier, to [the client] to sign and send back and once it was received to fax it to Wellington. This does not suggest that there was any great urgency about getting an originally signed document from him. The proper documents would be in place within a few short days, the phoney documents could then be dispensed with and nobody would be any the wiser. The emails would then be irrelevant since no-one would have any occasion to examine them. Mrs. Steinhoff is not a fool. She calculated the risk of discovery and concluded that it was worth taking. Unfortunately for her, the calculation did not take into account the possibility that Ms. Terrell and Ms. Trites, whatever their motivation might have been, would set in motion a chain of events that led to her being where she is now. But for their actions, and the enquiry based on them that Mrs. Steinhoff received from Ms. Walters-Sagher on the afternoon of March 14 everything would have proceeded in an orderly and relatively leisurely way. But that email changed everything; and necessitated the creation of a new and somewhat

> more urgent plan. Hence the enquiries to Mr. De Gruijter the next day."

¶ 107 In its decision (at paragraph 167), the panel notes that the allegation was that Steinhoff attempted to frustrate or obstruct the investigation by altering the courier slip and by presenting the altered slip as corroboration of her explanation of the actions. The panel then said:

> "[168] This is a charge – fabricating a story designed to mislead and obstruct a lawful investigation and, in that connection, creating and tendering a false document – of high seriousness.
>
> [169] There is little doubt that the effect of Mrs. Steinhoff tendering the altered courier receipt without disclosing that she had altered it was to prolong the investigation and to make necessary certain inquiries as to what had actually happened that otherwise would not have been required. . . . Indeed, there is little doubt . . . that the fact that the courier was sent out, and she gave instructions for it to be sent out, on March 14 was central to her contention about the nature and significance of both the [March 13 email] and, in particular, the [March 14 email].
>
> [170 In connection with the [March 14 email] we explained our conclusion that Ms. Walters-Sagher's email made it necessary for Mrs. Steinhoff to embark upon a new and more urgent plan to deal with [the client's] guarantee in place of the more leisurely course that until then she had been content with. It was this that created the urgency and the need to demonstrate. . . that she had proceeded smartly to do things properly. It was this that gave Mrs. Steinhoff's contention that the key events had taken place on March 14, 2007, its centrality.
>
> [171] The carbon copy of the courier receipt that Mrs. Steinhoff somehow obtained in Wellington's office did not support her story. It did not contain the critical date. So she wrote it in. A simple visual examination of the carbon copy as altered makes it evident . . . that her insertion . . . is quite different in appearance from the other writing on it . . . . This difference would not, however, be evident on a photocopy of the altered receipt. So, to conceal what she had done she carefully refrained from tendering original [*sic*].

> [172] In our view it is impossible to characterize these actions in any other way than 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.
>
> [173] Considering the whole of the evidence on this aspect of the matter, we have little hesitation in concluding that IIROC has, by evidence that is clear, convincing and cogent, discharged its burden of showing that it is more likely than not that Mrs. Steinhoff inserted the March 14 date into the courier receipt and tendered it to the investigators in a form that concealed what she had done and did so with a view to deceiving them in the conduct of their investigations."

¶ 108 We disagree.

¶ 109 First, it is an overstatement to characterize her insertion of the date on the courier slip as an "alteration". She did not alter an existing date. She merely inserted a date – a date that the evidence shows she thought was the correct date.

¶ 110 Second, it makes sense to us that she would rely on the advice about the date that she got from her staff. The March 15 email exchange between her and De Gruijter had led her to believe the courier was sent on March 14.

¶ 111 Third, the date she inserted was not materially misleading. The guarantee was sent in fact the next day. The point is, she caused the document to be couriered to the client, and returned, expeditiously. The executed guarantee was sent to Wellington's head office on March 19 (the Monday following March 15, a Thursday, the date that the guarantee was sent to the client, signed, and returned). Steinhoff says it was not the precise date on the courier slip that was important, it was the existence of the slip that mattered – it showed the guarantee was sent to the client promptly.

¶ 112 In our opinion, Steinhoff's explanation is as consistent with the evidence as is the theory advanced by IIROC and adopted by the panel in paragraph 138 of its decision. Steinhoff's explanation is also more reasonable and far less complicated. Steinhoff's description of the circumstances of how she came up with the March 14 date for the slip is plausible. Her explanation that the date on the slip was important only for showing that the slip was the one relating to the sending of the guarantee makes sense. The issue was, did she in fact promptly send an original guarantee for the client to sign as she claimed? The evidence is that she instructed De Gruijter to do so on March 14. Whether it was actually sent

that day or the next is of little consequence. That could also explain why she failed to draw the investigators' attention to the fact that the date was written in.

¶ 113 In our opinion, there was not clear, convincing and cogent evidence that it was more likely than not that Steinhoff inserted the date of March 14 in an attempt to frustrate or obstruct the investigation.

¶ 114 As for the impact on the investigation, we disagree with the panel's opinion that "there is little doubt" that the effect of her failure to disclose that she had inserted the date on the courier slip was to "prolong the investigation" and that "it is impossible to characterize [her] actions in any other way than as acts of unvarnished and calculated dishonesty deliberately undertaken for the purpose of misleading investigators."

¶ 115 The allegation is that through her conduct, Steinhoff attempted to frustrate or obstruct the investigation. The panel does not explain, and IIROC did not explain to us in this review, how her failure to disclose earlier that she inserted the date on the slip, not merely prolonged the investigation, but frustrated or obstructed it. Furthermore, as we have found, her explanation is at least as plausible as, and in some respects preferable to, IIROC's theory.

¶ 116 We therefore do not think it was reasonable for the panel to find that it was impossible to interpret her actions as anything but deceptive, with an intention to mislead the investigators.

¶ 117 Steinhoff ought to have disclosed to the IIROC investigators that she had inserted the date on the courier slip, but in our opinion, the panel drew inferences not supported by the evidence.

¶ 118 In our opinion, the panel erred in law in finding that Steinhoff altered the courier slip and then provided it to IIROC investigators with a view to deceiving them in the conduct of their investigation. We set aside the panel's finding.

Not responding truthfully or completely

¶ 119 When Steinhoff's conduct was being investigated by Wellington and IIROC staff, she gave several explanations of her conduct. These explanations took place both formally and informally. The formal occasions included her interviews with IIROC staff. As pointed out by the IIROC hearing panel in its decision, and by IIROC before us, those explanations were not always consistent, and aspects of the explanations changed over time.

¶ 120 Through that process, Steinhoff provided explanations for her conduct that, after the Notice of Hearing was issued, became her defence. It was her version of the

facts, as opposed to IIROC's. Despite the panel's findings, it remained her defence in this review.

¶ 121 It is those explanations that are the basis of the allegation that Steinhoff did not respond truthfully or completely to Wellington and IIROC staff.

¶ 122 This is the IIROC hearing panel's description of the evidence it relied on in finding that Steinhoff did not respond truthfully or completely to Wellington or IIROC staff:

> "[175] We have, in fact, already dealt with this aspect of Count 3 in our consideration of Counts 1 and 2 and it is not necessary, therefore, for us to embark upon any extended analysis. We have found that:
>
> (a) Mrs. Steinhoff was aware of the use of the cut and paste procedure and condoned it, at least in connection with her own account; and that her denials of such knowledge prior to March 2007 were untrue;
>
> (b) Mrs. Steinhoff did not tell the truth to Ms. Walters-Sagher when she denied that she had ever asked a staff member to change the date on a previously signed guarantee;
>
> (b)[*sic*] at least in the [March emails] Mrs. Steinhoff explicitly instructed her assistants to employ the cut and paste procedure and that her denials the [*sic*] she did so were untrue;
>
> (c) [*sic*] in connection with her claim that the [March 13] email was a jest or an enquiry Mrs. Steinhoff did not tell the truth and that she did not tell the truth to Wellington or to the IIROC investigators about her intentions in sending it;
>
> (d) [*sic*] in connection with her claim that the [March 14] email was intended as a jest Mrs. Steinhoff did not tell the truth to Wellington or to the IIROC investigators about her intentions in sending it;

> [175] [*sic*] The untruths that we have listed were not casual, inadvertent or immaterial inaccuracies of the kind that all of us commit from time to time. They went to the heart of the matters that were under investigation by Wellington and by IIROC and were in our opinion demonstrably calculated, deliberate and designed to mislead."

¶ 123 Giving misleading information to an investigator under the *Securities Act* is specifically prohibited under the Act. Steinhoff was not cited for any equivalent specific prohibition under IIROC rules, although frustrating or obstructing an IIROC investigation by lying to an IIROC investigator would, in our opinion, be detrimental to the public interest.

¶ 124 That said, a respondent is entitled to a defence, and that defence often takes the form of an explanation for the respondent's conduct alternative to the theory of the prosecution. Moreover, it is not unusual for a respondent to deny the allegations outright.

¶ 125 The parties cited no authorities to us about when a respondent's decision to defend himself or herself by denying the allegations or offering an alternative explanation goes beyond the assertion of a defence and becomes obstruction of justice.

¶ 126 However, it seems to us that where the statements made by a respondent to an investigator fall within the category of a simple denial of the allegation or an explanation alternative to the theory of the prosecution, something more is required to put it into the category of obstruction of justice than merely that the tribunal did not accept the denial or alternative explanation. Otherwise, in virtually every instance where a panel rejects an element of a respondent's defence, the respondent would be exposed to an allegation of obstruction of justice.

¶ 127 These are the statements Steinhoff made that the panel used as a basis for its finding:

- Steinhoff's denial that she condoned the practice of cutting and pasting. In our opinion, for the reasons stated above, a simple denial of the allegation would not normally amount to obstruction of justice. Her denial therefore cannot be a basis for the allegation for that reason alone. Furthermore, we found that the panel did not have sufficient evidence to find that she condoned the practice, so her denial cannot be evidence of the allegation.

- Steinhoff's denial to Walters-Sagher that she had ever asked a staff member to change the date on a previously signed guarantee. The panel found that Steinhoff had indeed done exactly that in the March 13 email, not accepting her explanation that it was more in the nature of an inquiry. However, the panel did not explain how this denial by Steinhoff had the effect of frustrating or obstructing Wellington's investigation, even if the denial could otherwise be evidence of the allegation. To the contrary, it appears that Wellington ignored her denial and continued with its inquiry.

- Steinhoff's denial that it was her intention to instruct her assistant to employ the cut and paste procedure in the March 14 email; Steinhoff's statement that the March 13 email was a jest or an inquiry; Steinhoff's statement that the March 14 email was a jest. The panel found she did intend to instruct her assistants to employ the cut and paste procedure, and rejected her other evidence about the nature of the March emails. We found that even if Steinhoff's evidence is rejected, her misconduct did not rise to the level of a contravention of By-law 29.1. Her statements can therefore not be evidence of an allegation of frustrating or obstructing the investigation.

¶ 128 In our opinion, the panel erred in law in finding that Steinhoff did not respond truthfully and completely to IIROC staff about her conduct relating to Counts 1 and 2. We set aside the panel's finding.

¶ 129 For the reasons stated above, we find that the panel erred in law in finding that Steinhoff contravened By-law 29.1 and Dealer Member Rule 29.1 on the basis of the allegations in Count 3. We set aside the panel's finding on Count 3.

## V Decision

¶ 130 We find that the IIROC hearing panel erred in law in making its findings. We set aside its liability decision of March 5, 2010 and, accordingly, its penalty decision of September 17, 2010.

¶ 131 March 31, 2011

¶ 132 **For the Commission**

Brent W. Aitken
Vice Chair

Bradley Doney
Commissioner

Kenneth G. Hanna
Commissioner