Citation: 2013 BCSECCOM 308

Carolann Steinhoff
Investment Industry Regulatory Organization of Canada

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

Hearing and Review

Panel	Brent W. Aitken	Vice Chair
	Audrey T. Ho	Commissioner
	Don Rowlatt	Commissioner
Dates of Hearing	February 26 and 27, 2013	
Date of Decision	August 7, 2013	
Appearing		
Gregory N. Harney	For Carolann Steinhoff	
D. Geoffrey Cowper, QC	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 decisions of a hearing panel of the Investment Industry Regulatory Organization of Canada (IIROC) in the matter of Carolann Steinhoff.

¶ 2 In an April 8, 2010 Notice of Hearing, IIROC specified seven counts of alleged contraventions by Steinhoff of its Dealer Member Rules. The allegations are in connection with funds given to her by a couple for short-term investment. At the time, Steinhoff was employed at the Victoria branch of Wellington West Capital Inc.

¶ 3 The liability hearing was held in August 2010. The IIROC panel issued a liability decision in October 2011.

¶ 4 The panel dismissed the first two counts but found that IIROC met its burden of proof on the remaining counts, which alleged that Steinhoff engaged in unauthorized discretionary trading, that she made and implemented investment recommendations that were not

suitable for the clients' investment objectives, and that she knowingly made false statements to Wellington West.

¶ 5 The IIROC panel accordingly found Steinhoff in contravention of Dealer Member Rules 29.1, 1300.1(p) and (q), and 1300.4.

¶ 6 After a hearing in February 2012, the IIROC panel issued a penalty decision on July 4, 2012. The panel ordered that Steinhoff:

- be suspended for one year;
- be subject to strict supervision for another year, and to close supervision for a further year;
- be prohibited from acting as a director or senior officer of an IIROC member for five years;
- be ineligible for reinstatement until she re-writes and passes the Partners, Directors and Officers examination and the Branch Manager examination; and
- pay a fine of $100,000, costs of $20,000, and disgorgement of commissions of $6,813.

¶ 7 Steinhoff applied for this hearing and review of the IIROC panel decisions, and for a stay of the penalty decision. On July 12, 2012 the Commission, with consent, stayed the penalty decision until the disposition of this review.

II Analysis

A Legislative framework

¶ 8 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.

¶ 9 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."

¶ 10 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.

¶ 11 These are the relevant excerpts of Rule 29.1:

> "Dealer Members and each . . . Registered Representative . . . of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board."

¶ 12 These are the relevant excerpts from Rules 1300.1(p) and (q) and 1300.4:

> 1300.1(p):
> " . . . each Dealer Member shall use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance."
>
> 1300.1(q)
> "Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance."

1300.4
"A Registered Representative may not exercise discretionary authority over a customer account unless:

(a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;

(b) the customer has given prior written authorization in compliance with Rule 1300.5;

(c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;
. . . ."

B 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.

C The Issues

1 The Transactions

¶ 14 The IIROC proceedings arose from the investment of funds that Steinhoff made in the summer of 2008 on behalf of a couple in their 30s, AK and CK. The Ks had received $125,000, representing the equity they had realized from the sale of their house. At the time, these funds were essentially all of their savings.

¶ 15 In early June the Ks deposited $125,000 with Steinhoff for investment. They would need the funds about three or four months later to complete the purchase of their next house, then under construction.

¶ 16 Steinhoff invested the funds in 12 equity investments, 11 on June 26 and the 12th on July 8. The amount invested totalled about $245,000. The $120,000 difference between the Ks' deposit and the total invested was margin, representing a leveraging of the Ks' investment of nearly 100%.

¶ 17 By late August 2008, following the onset of severe market declines associated with the global credit crisis, the portfolio had sustained a serious loss in value. Steinhoff recommended to the Ks to stay the course. The portfolio continued to fall in value, and the Ks' losses were crystallized when the portfolio had to be liquidated so they could have the funds for completion of the purchase of their house.

¶ 18 When the dust settled, the total loss to the Ks was 56% of the amount they invested. After paying off the margin call, the Ks were left about $65,000 short of what they needed to complete their house deal.

2 The IIROC Decisions

¶ 19 In its liability decision the IIROC panel found that Steinhoff invested the funds without proper authorization (Count 3 of the notice of hearing), that the investments she chose, and the use of margin, were unsuitable (Counts 4 and 5), and that her recommendation in late August to stay invested was also an unsuitable recommendation (Count 6).

¶ 20 The panel also found that Steinhoff made a false statement to her employer, Wellington West, in one of her responses to its questions relating to a complaint made by CK (Count 7).

¶ 21 In its penalty decision, the IIROC panel imposed the penalties set out above.

3 The Parties' submissions

¶ 22 Steinhoff says that the IIROC panel erred in its handling of the evidentiary issues, including credibility, and as a result, made its liability decision in the absence of clear, convincing and cogent evidence. We discuss particulars of Steinhoff's submissions in the discussion below.

¶ 23 Steinhoff says that the liability decision is so flawed that the entire decision must be set aside, and it follows that the penalties ought also to be set aside.

¶ 24 IIROC's position is that the panel's liability decision was reasonable and the penalties imposed by the panel are appropriate.

D Discussion

¶ 25 For the purposes of this review, we have assessed the IIROC panel's decisions in four parts:

- its finding that Steinhoff engaged in discretionary trading as alleged in Count 3;
- its finding that Steinhoff contravened the suitability requirements as alleged in Counts 4, 5 and 6;
- its finding that Steinhoff made a false statement to Wellington West as alleged in Count 7; and
- the orders the panel made in its penalty decision.

¶ 26 As discussed in this section, we are confirming the IIROC panel's findings on Counts 4 and 5.

¶ 27 We did not consider the panel's findings on Counts 3 and 6 because we did not consider them relevant to penalty. We are setting aside the panel's finding on Count 7.

¶ 28 We are also setting aside the penalty decision and are asking the parties to make submissions as to the appropriate penalties.

1 Credibility

¶ 29 When discretionary trading and suitability are at issue, the broker's and client's stories invariably differ, often substantially. It was no different here. Steinhoff and CK put forth markedly different versions of the events (AK, CK's wife, did not testify at the hearing).

¶ 30 The IIROC panel's conclusions on credibility, and other evidentiary issues, are a big part of Steinhoff's objections to the panel's decision. Steinhoff made extensive submissions that the IIROC panel made findings in the absence of clear, convincing and cogent evidence. As we state below, we are persuaded by some of those submissions.

¶ 31 Steinhoff objects to, among other things, the IIROC panel's acceptance of statements made by AK and its assessment of the relative credibility of Steinhoff and CK.

¶ 32 We agree with Steinhoff that the panel's handling of AK's statements was wanting. AK was interviewed by IIROC staff but was not under oath. She did not testify, so Steinhoff had no opportunity to cross-examine her on the transcript of her interview, which the panel admitted into evidence at the hearing.

¶ 33 The interview transcript was relevant, but clearly, given that it consisted of unsworn statements that Steinhoff had no opportunity to challenge in cross-examination, the panel needed to consider the issue of the weight to be attached to AK's statements.

¶ 34 In its' liability decision, the IIROC panel did not address the issue of the weight that it ought to give to AK's statements, but it is evident that the panel decided to give her statements the same weight as those of the witnesses who testified at the hearing (the decision refers repeatedly to AK's "evidence" and "testimony"). The panel also relied significantly on her statements.

¶ 35 The weight the panel gave AK's statements and the significance it attached to them tells us that the panel must have concluded that it was not important to them that her statements were not sworn or that Steinhoff was denied the opportunity to cross-examine her. Yet the panel's reasons do not tell us why.

¶ 36 Steinhoff also made some persuasive submissions regarding the IIROC panel's relative assessments of CK's and Steinhoff's credibility.

¶ 37 On the face of the decision, the panel appeared to consider CK's credibility quite properly. This is what it said:

> "158 The Panel took careful note of CK's testimony both in direct and cross-examination. He gave his evidence in a clear and concise manner and was forthright in his answers. He was not argumentative or evasive on cross-examination. His evidence was consistent with his IIROC interview, and with his complaint letters to Wellington West. He had a good recollection of events, and his explanation for failing to mention certain events, such as the portfolio review of their RSP accounts on June 10, was reasonable in the circumstances. He made concessions where appropriate.
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> 159 His testimony was also consistent with the documentary evidence with respect to telephone calls, meetings, emails, etc. He answered questions in cross-examination in a straight forward manner and his demeanour on the stand was good. He was clear in his responses and he held his ground. The Panel found CK to be a credible witness."

¶ 38 As for Steinhoff's credibility, the panel said this:

> "160 The respondent, Ms Steinhoff, caused the Panel a number of concerns. She is a very experienced financial advisor, and says she had 250 to 300 clients, most with a significant net worth. She said she worked long days, and was extremely busy. She set up a software system to permit her assistants to record messages for her and she says she was diligent about returning calls. She admitted that during the severe market decline in the summer and fall of 2008, she was extremely busy counselling her clients. This fact probably affected her ability to recall events.
>
> 161 The Panel found the Respondent's personal demeanour as a witness very troubling and problematic. At times, particularly during her evidence in chief, she was prone not to answer the question, and dissemble into what were irrelevant or peripherally relevant events and considerations. When counsel brought her back to the point of the question, she would shift around in the stand, and look about as if she was trying to figure something out. She often gave her evidence in chief in a very assertive manner, but the Panel found that frequently her evidence did not have the ring of truth.
>
> 162 The Panel found her at times to be argumentative, and prone to cast aspersions on other witnesses, particularly CK. At times she was evasive on cross-examination, and on certain critical points, she was clearly uncomfortable, looking down rather than at the examiner, and failing to respond appropriately. In cross, frequently her answers were non-

> responsive, or self serving, and she would dissemble in her answers. As can be seen from the testimony we have referred to earlier in these Reasons, her evidence in chief and cross at the hearing was often inconsistent and contradictory with her previous testimony under oath at her IIROC interview, and at times inconsistent/contradictory with the self-serving email she sent to W.W. on November 28, and her email answer to the 14 questions of November 30."

¶ 39 As a review tribunal, we are well aware of the importance of giving deference to the original tribunal's assessment of credibility, that tribunal having had the opportunity to observe the demeanour of witnesses while testifying, and therefore being in a better position to assess their credibility.

¶ 40 However, the IIROC panel, having assessed the respective credibility of CK and Steinhoff, apparently then relied on that assessment to accept everything CK said and reject everything Steinhoff said, on more or less a blanket basis:

> "178 Having considered the totality of the evidence, and having had the opportunity to closely observe the Respondent in giving her testimony, we do not find Ms. Steinhoff credible. We don't believe she has any true recollection of the meetings with the Ks, or what was said. In our view, her testimony was at best largely based on her usual practices, and not on a true recollection of actual events as they occurred. The Panel has concluded that where there is a conflict between the evidence of CK and the evidence of the Respondent, we accept and prefer the evidence of CK."

¶ 41 There are times when this could be an appropriate approach, but having reviewed the transcript of CK's testimony, it appears to us that the IIROC panel's assessment of his credibility was generous. We need not have seen him testify to see that his memory of events was selective. We find it hard to believe that he could not recall some events that at the time he would have seen as significant, yet was able to recall more trivial details from the same time frame.

¶ 42 Likewise, having reviewed the transcript of Steinhoff's testimony, it appears to us that not all she said was necessarily untrue.

¶ 43 In our opinion, had the panel assessed the credibility of each witness on each of the significant aspects of the allegations, it may have reached different conclusions on some of the facts. We acknowledge however, that had the panel done so, it is impossible to say whether that would or should have changed its fundamental findings.

¶ 44 All that said, what matters is that the portfolio recommendations were Steinhoff's, and no one else's, and it is those recommendations that are the crux of the case.

2 Discretionary trading – Count 3

¶ 45 In our opinion, it is not necessary for us to consider Count 3 because that Count is not relevant to penalty. The fact is that Steinhoff's recommendation in the circumstances was unsuitable, as discussed below, and that is what is relevant to the determination of penalty.

3 Suitability – Counts 4 and 5

¶ 46 As we stated above, the IIROC panel's findings under Counts 4 and 5 are the heart of the case.

¶ 47 A representative cannot delegate the suitability determination to the client. Whether the Ks knew of the trades she made, whether they were consulted, or whether they consented to them, is irrelevant to the determination of whether Steinhoff's recommendations were suitable.

¶ 48 Steinhoff could perhaps have met her suitability obligation had there been any evidence that the portfolio, or the leveraging, was something the Ks asked for, and which she implemented only in spite of contrary advice she gave them, and with appropriate warnings. There is no evidence of that, and at no point in the proceedings did Steinhoff ever take the position that the recommendation came from anyone other than herself.

¶ 49 Steinhoff suggested that there ought to have been expert evidence to assist the IIROC panel on the issue of suitability.

¶ 50 We disagree. IIROC is the primary regulator of investment dealers and their registered representatives. It is the creator of suitability rules and standards and is therefore highly qualified to determine whether a given portfolio recommendation is suitable for the client in accordance with those rules and standards.

¶ 51 The Commission is also recognized as an expert tribunal in securities regulation and is similarly qualified to assess suitability issues.

¶ 52 The IIROC panel's liability decision is reasonable in finding that Steinhoff's recommendations were clearly unsuitable.

¶ 53 A couple in their 30s meet with a registered representative to discuss how to invest $125,000. The money is the equity from the sale of a house and is needed three or four months hence to complete the purchase of their next house. It is essentially all of their savings. The representative opens a margin account for them and recommends the purchase of $245,000 in equities. Assume, for the purpose of this scenario, that the representative asks them for instructions and they authorize the investment.

¶ 54 In the Ks' circumstances, preservation of capital was clearly paramount. The four-month investment period was too short to risk any market downturn, even one of short duration, and the shortness of the investment period made the importance of the rate of return a distant second compared to preserving the Ks' capital so it would be available for the completion of their house deal. Equity investments in those circumstances were clearly unsuitable.

¶ 55 That takes care of the securities purchased for the account. Leveraging the equity investments by nearly 100% on top of that defies understanding.

¶ 56 The IIROC panel expressed these conclusions clearly and reasonably in the liability decision. These are excerpts:

> "221 In our view, although the Respondent did discuss with the Ks their investment objectives, i.e. to make, if they could, more than the amount they could make on a term deposit, she failed to give them balanced, prudent and responsible advice given that their commitment for the funds were to the down payment for the house in about three months. It appears that the Respondent totally lost sight of that objective, and the fact that this young couple did not appear to have the personal resources to hang on if the market should decline prior to making the down payment. We have no doubt that the Respondent was assuming a docile short term market, without significant fluctuation, and also was supremely confident of her ability to obtain a return, in that short period of time, of perhaps even 10%. She sold the Ks on her ability, and convinced them that it was prudent to invest the funds in the stock market based upon her recommendations. We have no doubt this was done in good faith, but it was an entirely unsuitable and inappropriate recommendation for these clients.
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> 222 The Respondent appears to have ignored certain essential facts: that this young couple were just starting out in their careers, and the down payment funds were essentially their net worth, and they were very inexperienced investors. . . .
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> . . .
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> 224 In this case, it is our view that the portfolio that the Respondent created for the Ks, utilizing extreme margin, was completely unsuitable. It most certainly did not suit their investment knowledge. It most certainly did not reflect their investment objectives, which had to be to have their own down payment funds in hand in approximately three months.
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> . . .
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> 229 Notwithstanding that it wasn't suitable for these clients to invest in the stock market, the Respondent, in her quest to obtain a significant return for the Ks, put them into a very significant margin position. This did not fit

with the Ks investment knowledge, their investment knowledge, or their risk tolerance."

¶ 57 We confirm the IIROC panel's finding on Counts 4 and 5.

4 Suitability – Count 6

¶ 58 In our opinion, it is not necessary to consider Count 6 because it, like Count 3, has no relevance to the determination of penalty. Whether or not the advice Steinhoff gave the Ks in late August 2008 was suitable, the point is that the dilemma in which the Ks found themselves at that time flowed directly from the original unsuitable recommendations.

¶ 59 What happened in the summer of 2008 was the crystallization of the inherent risks in those recommendations, and it is that misconduct which is relevant. Had that not occurred, the Ks would never have been in the position of having to decide what to do later on.

5 Misleading Wellington West – Count 7

¶ 60 This is the allegation in Count 7:

> "On or about November 28, the Respondent made a false statement in response to an inquiry from her firm's Chief Compliance Officer, and Chief Regulatory Counsel, who had requested information from her after receiving a written client complaint from her clients CK and AK. The Respondent stated, in an email, that 'Margin and leverage were brought up by (CK)' when in fact the Respondent knew that was not true. The Respondent thereby acted contrary to IIROC Dealer Member Rule 29.1."

¶ 61 This allegation is very narrow. The alleged false statement is that CK brought up the issue of margin and leverage.

¶ 62 The email in question that Steinhoff sent also contained other statements, which the IIROC panel reviewed in some detail in light of subsequent statements Steinhoff made in interviews with IIROC staff and in response to the allegations in the notice of hearing.

¶ 63 The panel cited several passages from Steinhoff's interview. The only ones relevant to Count 7 are in these excerpts:

> "DZ [IIROC staff investigator]: Whose idea was it to open a margin account and utilize leverage?
>
> CS [Steinhoff]: It was their decision.
>
> DZ: Whose idea was it?

CS: It was nobody's idea.

DZ: Well someone must have brought – put the idea on the table.

CS: Well, I probably put the idea on the table, but I –

DZ: Why would you do that?"

¶ 64 The panel also cited Steinhoff's testimony at the hearing on this issue. This is the relevant excerpt:

> "98 In her evidence-in-chief . . . Ms Steinhoff testified that she called CK back on July 8th, and that CK asked questions about margin. She testified that they had gone over it in their initial meeting, when she made the original suggestions to him for the securities for the portfolio, and that CK said that they wanted to use margin."

¶ 65 The decision makes a number of observations about what Steinhoff did or did not do about informing the Ks about how margin works, its risks, and so on, but those observations can be relevant only to the issue of suitability, because they are not relevant to the narrow allegation in Count 7. The decision makes no further reference to the allegation about who brought up the issue of margin and leverage until the summary of its findings, where it says this:

> "237 Count 7: based on our findings on credibility, and the totality of the evidence, it is our view that margin and leverage were not discussed on June 10th. Therefore, we conclude that the Respondent did make a false statement as alleged in Count 7 and IIROC has proven Count 7."

¶ 66 This finding clearly cannot stand, purely on its face. The allegation in Count 7 is that Steinhoff lied to Wellington West about who brought up the issue of margin, her or CK, not about whether it was discussed. The finding ignores that and instead finds that margin and leverage were not discussed on June 10. In the context of the allegation in Count 7, the finding is of no use.

¶ 67 In our opinion, the IIROC panel erred in law in finding that IIROC proved Count 7. We set aside the panel's finding on Count 7.

6 Penalty

¶ 68 The next question is the reasonableness of the penalty.

The penalty decision

¶ 69 In the penalty decision, the IIROC panel's characterization of Steinhoff's conduct is markedly more harsh than the tenor of its description of her wrongdoing in the liability decision. Although the liability decision generally describes her conduct as a failure to meet her suitability obligations, the penalty decision describes her conduct as manipulative and deceptive and as a planned and deliberate scheme facilitated by making misrepresentations. The panel also describes her actions, not as an isolated event, but as a "pattern of misconduct".

¶ 70 These are excerpts from the penalty decision that illustrate the point.

> "32 Further, in our view, the NCAF form for the joint account was signed due to the manipulation and deception of Mrs. Steinhoff . . . .
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> . . .
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> 37 Mrs. Steinhoff, a very experienced securities advisor, was the sole perpetrator of the scheme . . . .
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> . . .
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> 42 The Guidelines state that evidence of planning and premeditation are aggravating factors, and the hearing panel should consider the degree of organization and planning associated with the misconduct along with the number, size, and character of the transactions. In this case we are of the view on the evidence that the conduct of Mrs. Steinhoff was planned, and deliberate. She may have believed that with her experience, in the timeframe permitted, and by the use margin, she could earn a reasonable return for Mr. and Mrs. K. However, we find that she completely ignored the applicable member rules and regulations governing her activities in order to carry out her plan. . . .
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> . . .
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> 44 In our view this is not an isolated event. Mrs. Steinhoff, through careful planning and organization, and a significant degree of misrepresentation, persuaded her clients to make unsuitable investments, and she failed to explain the risks. Through deception, she had them sign the NCAF for the joint account . . . . Although there was a time span of some six months in total, there was sufficient time, and incidents, to qualify in this category.
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> . . .
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> 50 In our view the evidence establishes that in this case there was a clear pattern of misconduct over a number of months . . . .
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> 51 . . . Based on the evidence in this case, and the Respondent's conduct in her dealings with Mr. and Mrs. K; with her member firm . . . ; and in the Respondent's testimony during the IIROC interviews, and during the Hearing; in our view there is substantial reason to believe that Mrs.

> Steinhoff could not be trusted to act in an honest and fair manner in her dealings with the public, her clients, and the securities industry as a whole. Her conduct in this case proves that she does not feel obligated to follow IIROC's rules and regulations. Mrs. Steinhoff did not deal with her member firm with candour, and in a fair and honest manner. Mrs. Steinhoff did not deal with Mr. and Mrs. K with candour, and in a fair and honest manner; and cannot be trusted to do so with the securities industry as a whole."

¶ 71 All of this is in stark contrast to what the IIROC panel said about her overall conduct in the liability decision. In paragraphs 221, 222, 224 and 229 of the liability decision (cited above in our discussion of Counts 4 and 5), the panel spoke objectively of how the recommendations Steinhoff made to the Ks were not suitable. There is nothing in those findings about manipulative or deceptive behaviour, or about a planned and deliberate scheme to commit wrongdoing.

¶ 72 To the contrary, in paragraph 221, the panel said that they "had no doubt" that Steinhoff's recommendations "were done in good faith."

¶ 73 The new characterizations of Steinhoff's conduct in the penalty decision are not supported by the evidence. In our view, the panel grossly exaggerated the seriousness of Steinhoff's conduct and unnecessarily impugned her character in the process.

¶ 74 In the liability decision the panel summarized Steinhoff's career in the investment industry this way:

> "18 . . . from 1988 to May 1999 [Steinhoff] was an investment advisor, director, and Senior Vice President at Scotia Mcleod Inc. where she was consistently in the top 1 percent of producers; May 1999 to January, 2004, she was a senior investment advisor with United Capital Securities Inc. where she was consistently in the top 1 percent of producers; January, 2004 to 2009, she was an investment advisor, a partner, and Senior Vice President with Wellington West Capital Inc. and where she was consistently in the top 5% of producers. From 2009 to the present she has been an investment advisor and Senior Vice President with Queensbury Securities Inc. where again she says she is in the top 1% of producers.
>
> 19 The Respondent was not only employed at, but was an investor in Wellington West, and that arrangement led to her becoming co-manager of the Victoria office. She said she had 250 – 300 clients and most of her clients had assets under management greater than $1 million."

¶ 75 In its penalty decision, the panel ignored its own description of Steinhoff's successful and unblemished career – a career spanning 24 years, as of the date of the penalty hearing.

¶ 76 The panel found that the NCAF form contained errors, but there is no evidence that Steinhoff made the errors with any manipulative or deception intent toward the Ks.

¶ 77 Neither is there any evidence that there was any "scheme", or that Steinhoff planned a deliberate course of action to bring harm to the Ks.

¶ 78 We disagree with the panel's finding that Steinhoff's behaviour was not an isolated event, but rather a pattern of misconduct. There is no evidence of a pattern of misconduct here. Only one set of clients was involved, and only one set of recommendations was alleged and found to be unsuitable.

¶ 79 That brings us to paragraph 51 of the penalty decision. As noted above, Steinhoff had been a broker for about 24 years when the penalty hearing was held. There was no evidence before the IIROC panel of dishonest conduct on her part to that point in time. Nor is there any evidence, in our opinion, that Steinhoff acted dishonestly in this case. Yes, she contravened the suitability requirements, a serious error, but we see no evidence in the record of a fundamentally dishonest person, which is what the IIROC panel would have people believe.

¶ 80 In our opinion, paragraph 51 is wrongly harsh. There is absolutely no basis in the record for the panel's finding that Steinhoff cannot be trusted to act honestly and in a fair manner.

¶ 81 Steinhoff also says that the panel's fresh characterization of her conduct in the penalty decision came as a surprise, given that there was no hint of that in the liability decision. Steinhoff says that she did not have notice of, nor the opportunity to address, that aspect of the panel's view of her conduct when she made her submissions at the penalty hearing. That, she says, taints the penalty hearing with the stain of unfairness.

¶ 82 We agree. Although an SRO need not include in its finding on liability all of the factors it will consider relevant to the issue of penalty, if it does not do so, it must signal to the parties the issues they ought to address at the penalty hearing, preferably in advance of the hearing if the issues are significant. Failing that, the SRO should put the issues to the parties at the hearing so they have the opportunity to respond.

¶ 83 We find the IIROC panel's re-characterization of Steinhoff's conduct from what it found in the liability decision is an error in law because it was not supported by the evidence. It was also an error in law that the panel re-characterized Steinhoff's conduct without giving Steinhoff notice of, and the opportunity to address, its new views of her misconduct.

Decision respecting the penalty decision

¶ 84 We have set aside the IIROC panel's finding on Count 7, and determined that Counts 3 and 6 are not relevant to penalty in light of the panel's findings on Counts 4 and 5, which we have confirmed.

¶ 85 We have also determined that the IIROC panel made errors in law in its penalty decision.

¶ 86 We set aside the IIROC panel's penalty decision. That said, penalties are appropriate for Steinhoff's misconduct under Counts 4 and 5, and we will order penalties after receiving the parties' submissions.

¶ 87 Based on our decisions in this review, in our opinion the factors relevant to penalty are these:

- Steinhoff's failure to meet suitability requirements as described in Counts 4 and 5;
- No previous findings of regulatory misconduct by Steinhoff;
- No evidence that Steinhoff is dishonest, or acted with improper motives;
- The impact of Steinhoff's misconduct on the Ks;
- The impact of Steinhoff's misconduct on confidence in market integrity; and
- The degree to which Steinhoff's ability to carry on business ought to be affected in the circumstances.

¶ 88 Although we have opined on the factors relevant to sanction, the parties are free to suggest other factors in their submissions.

¶ 89 As to the elements of sanction, we make the following observations, although they are not intended to foreclose the parties from making submissions on penalty that may be inconsistent with them:

<u>Suspension</u>

¶ 90 Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter. A suspension of one year, what the IIROC panel ordered here, is tantamount to the termination of the registrant's career. At a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort. That assumes a clean slate. A person in their mid-fifties, like Steinhoff, attempting the task following the expiry of a mandated suspension, even a person with Steinhoff's apparent energy, is likely to find it impossible to build much more than a shadow of their former career.

¶ 91 Steinhoff made a serious mistake. Does the public interest demand that she lose her career over it? She has been in the business now for 25 years. She has no previous regulatory sanctions. There is no basis to conclude that she acted dishonestly or for an

improper motive, or has ever done so. Although her mistake unquestionably harmed the Ks, there is no evidence that she represents any ongoing threat to her clients, to potential new clients, to the reputation of the securities markets or of IIROC or its members. Although a significant sanction is appropriate given Steinhoff's contravention of the suitability requirement, the parties should address whether a suspension in these circumstances would be appropriate.

¶ 92 There is also the additional aggravating factor of the IIROC panel's findings in paragraph 51 of the penalty decision. That finding, which we have found was grossly unfair in the circumstances, has been a matter of public record for over a year. For that reason alone, we question whether any suspension is warranted.

Supervision

¶ 93 The parties should address whether it is necessary to impose supervision requirements on Steinhoff. The parties should address what those requirements would likely achieve.

Other prohibitions

¶ 94 The parties should also address whether a prohibition against Steinhoff acting as a director or officer of an IIROC member is necessary, and the requirement that she re-write the Partners, Directors and Officers course or the Branch Managers course.

Fine

¶ 95 We agree that a fine is appropriate in the circumstances: Steinhoff's misconduct may be an isolated event, but the Ks suffered severe consequences as a result, and certainly, a representative with Steinhoff's skill and experience ought to have known better. However, we are deferring consideration of whether the fine imposed by the IIROC panel was reasonable in the circumstances until we receive the parties' submissions on that point.

Disgorgement

¶ 96 We think the disgorgement order made by the IIROC panel is appropriate, although it is limited to the commissions on the impugned trades. Submissions on the issue of disgorgement should include the scope of disgorgement order that is available under IIROC rules, and the extent to which, and how, the Ks have been compensated for their losses. We are open to submissions on whether a broader order is appropriate.

Costs

¶ 97 We think the costs order made by the IIROC panel is appropriate. The fundamental issue in this case was the suitability of Steinhoff's recommendation to the K's, and IIROC has succeeded on that issue.

III Decision

¶ 98 We have found that the IIROC panel erred in law in its liability decision in making its finding on Count 7. We set aside that finding.

¶ 99 We have found that the IIROC panel erred in law in its penalty decision. We set aside the penalty decision.

¶ 100 We direct the parties to file submissions as to the appropriate penalty that ought to be imposed in light of our decision as follows:

By September 13	IIROC files its submissions on penalty with the Secretary to the Commission and delivers them to Steinhoff
By September 27	Steinhoff files her response submissions with the Secretary to the Commission and delivers them to IIROC; a party wishing an oral hearing on penalty so advises the Secretary to the Commission and the other party
By October 4	IIROC files its reply submissions, if any, with the Secretary to the Commission and delivers them to Steinhoff

¶ 101 August 7, 2013

¶ 102 **For the Commission**

Brent W. Aitken
Vice Chair

Audrey T. Ho
Commissioner

Don Rowlatt
Commissioner