February 13, 2017

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: ARTHUR LEON SCHELLENBERG

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	Mr. J.W. Hedley
Member:	Mr. D.G. Murray
Member:	Ms. S.C. Rolland

Appearances:

S. Gingera	)	Counsel for Commission Staff
A.L. Schellenberg	)	On his own behalf

Allegations

By a Statement of Allegations dated November 18, 2013, staff of The Manitoba Securities Commission (the "Commission") commenced the proceeding against Arthur Leon Schellenberg to consider, based on allegations set out in the Notice of Hearing, whether Mr. Schellenberg should be ordered to pay an administrative penalty, compensation for financial loss, costs and be prohibited from using certain exemptions described in the Manitoba Securities Act (the "Act").

The Statement of Allegations referred to six clients of Mr. Schellenberg, alleging that he had conducted trading and advising activities for them contrary to the Act and contrary to the public interest.

The Statement of Allegations was amended in December of 2015 by adding an additional complainant, also a former client of Mr. Schellenberg.

All told, the Statement of Allegations, as amended, expressed in detail a number of actions which, if proved, would constitute violations of the Act from in or about 2001 to in or about 2013. In essence what staff of the Commission allege is that Mr. Schellenberg, not being registered under the Act, traded in securities for these named clients, acted as a securities adviser, investment counsel and/or adviser as defined in the Act, and, in general, acted "in a manner contrary to the public interest". The Statement of Allegations contends that the named complainants relied, to their detriment, on advice from Schellenberg that he was not qualified to provide.

Pre-hearing issues

Mr. Schellenberg represented himself throughout the hearing of this matter. However, from the time the matter was commenced in 2013 to the date upon which he dismissed his last lawyer, Mr. Schellenberg was represented by three law firms and it appears from testimony and correspondence on the record that Mr. Schellenberg had previously received legal counsel from two other lawyers on matters relative to his relationship with the Commission and in respect of the Act.

By Notice of Motion dated April 28th, 2014, Mr. Schellenberg's counsel at the time brought a motion for an order staying these proceedings.

The grounds set out in his motion were that:

a) The totality of the dealings by Commission staff ("staff") with the Respondent from 2001 to 2013, demonstrates a violation of procedural fairness and constitutes an abuse of process. In particular:

    i) The activity which staff alleges in these proceedings as contravening the Act is activity which staff previously advised the Respondent did not contravene the Act – namely – the ability to hold Powers of Attorney for clients' investment accounts;
    ii) Notwithstanding repeated requests by the Respondent and/or his counsel to discuss and be provided with staff's interpretation of the exemptions available to Chartered Accountants when advising clients regarding their investments, staff failed so to do, thereby depriving the

Respondent of an ability to ensure compliance with staff's interpretation of The Securities Act, Regulations and Rules;

iii) Notwithstanding its knowledge by 2001, of the type of client related activity the Respondent was conducting, staff allowed the Respondent to continue with that activity for 11 years before issuing a formal investigation order and 12 years before commencing these proceedings.

Mr. Schellenberg's motion was dismissed and the panel which heard it determined that the remedy of staying proceedings is indeed a step to be taken at last resort. A stay would have to be in the public interest. This required the panel to weigh seemingly competing rights; that is Mr. Schellenberg's rights as a Respondent versus the public's right to protection, as well as public confidence in the fairness of administrative institutions, balanced against protection of the public.

Mr. Schellenberg had not convinced the panel that sufficient prejudice to his ability to defend himself had occurred. The panel did find that staff had not acted in an ideal manner saying that: "those issues may well arise again during the course of a hearing on the merits. However, we have determined that a hearing on the merits is clearly the preferred course of action to take."

The panel anticipated at the outset of the hearing on the merits that the position taken by Mr. Schellenberg in his preliminary motion – that staff's actions or lack of action had seriously impaired his ability to defend himself – would again be raised as a part of his defense, and this indeed was the case. We mention this because the preliminary motion provided an opportunity for Mr. Schellenberg to air a number of grievances in connection with staff and with the process in which he finds himself involved.

Given the number of witnesses, the nature of staff's case against Mr. Schellenberg and other circumstances, it was a challenge to set hearing dates. The initial challenge involved the familiar problem of accommodating busy legal counsel. That became a non-issue of course once Mr. Schellenberg opted to conduct his own defense. However, prior to being dismissed by Mr. Schellenberg, his last counsel requested a hearing which took place on November 9, 2015. At this preliminary hearing, Mr. Schellenberg's counsel sought a stay of proceedings based on Mr. Schellenberg's "impression" that he was being denied access to witnesses by operation of a section of the Act which he contended was illegal by virtue of the Canadian Charter of Rights. He further requested an adjournment to the new year. While the stay of proceedings was denied, the adjournment was granted and dates were set for a hearing in January, 2016

On December 23, 2015, the hearing dates which had been previously set for January, 2016 were postponed to dates in February and in April, 2016, at the request of Mr. Schellenberg's counsel.

Then on February 10, 2016, having been previously advised that Mr. Schellenberg's counsel had been dismissed, the panel convened again. Mr. Schellenberg had requested further changes to the scheduled hearing dates. Mr. Schellenberg advised that he had had surgery on January 27th and a further appointment to meet with his

physician on February 23rd, one of the dates for the hearing. More importantly, he urged the panel to postpone all of the hearing dates set in April because of this being his busiest season as an accountant in public practice. The panel granted the adjournment and, despite staff counsel's urging to the contrary, did not make a specific order for costs. During this hearing both counsel for staff and Mr. Schellenberg expressed frustration over the discovery process – either the lack of disclosure or sheer volumes of documents to be read in anticipation of the hearing. The panel assured both parties that the preliminary matters were concluded and that the hearing on the merits must proceed.

The hearing on the merits started on February 24th, 2016 following the several adjournments to which we have referred.

During the February 10th, 2016 hearing, the panel did ask Mr. Schellenberg if it was his intention to retain legal counsel although it had become quite clear by this time that he had no intention of doing so. He expressed, in response to questions posed to him, that he had a basic understanding of administrative procedure having represented people at the informal Tax Court of Canada. It did become evident as the hearing moved along that Mr. Schellenberg's knowledge of the administrative tribunal system was less than adequate but his decision to represent himself, as we have mentioned, had been made.

The self-represented litigant presents a unique set of challenges to finders of fact. Mr. Schellenberg appeared unable to distinguish among sworn testimony of his own, cross examination of witnesses, direct examination of witnesses and legal argument. His cross examinations featured more testimony on his part and argument than questions.

It still remains somewhat mysterious to this panel as to why Mr. Schellenberg chose to self-represent in the face of volumes of documentary evidence and allegations which carry serious consequences. It wasn't just the fact that he had dismissed all his lawyers; his health issues were sometimes evident to the panel without Mr. Schellenberg having to describe them. He appeared tired at times and sometimes even confused. Some excerpts from his submissions during the May 2nd, 2016 hearing helped to illustrate the point. Staff counsel had informed the panel that Mr. Schellenberg was going to make an adjournment request and Mr. Schellenberg proceeded to submit as follows:

> "This is the busiest day of the year at my office, and I haven't had more than four hours sleep in the last 120 days. I have other health issues, but here I am.
>
> And even if, right now, I'll tell you right now, even if I wasn't at the panel, I wouldn't be at the office today. I'd be going to see my doctor or whatever, or getting some treatments. I've got some kind of a rash all over my body. My shoulder is still not working. My diabetes is acting up. I've got all kinds of health problems."

He went on to complain that the Commission had made it difficult for him to issue subpoenas and plan his defense. The panel expressed some concern on the record

over the fact that some additional cooperation on the part of the Commission staff would be in order in view of his being unrepresented.

This was a difficult process for him and it bears stating that the panel recognizes that Mr. Schellenberg was not in good health throughout the process and that his ill health could have an affect on putting his best foot forward in his defence. The panel is not aware of the level of assistance Mr. Schellenberg in fact received from staff but we believe recognition of the pressures under which he was operating is necessary when considering some of the flaws in his defence.

Additional Background

Mr. Schellenberg is a Chartered Accountant in public practice. His evidence, which we have no reason to question, is that his accountancy business has “350 corporate clients, a bunch of U.S. clients, 1,200 personal tax returns.” He operates a farm and once owned a restaurant in rural Manitoba. By his own description, he is an independent person; he has always been self-employed. No doubt, he is a very busy and normally energetic individual.

Although there was no real evidence led on this point, it does appear to us that Mr. Schellenberg was skilled and also successful in the area of investing in the general sense. Certainly he is experienced in this field. The following exchange took place in the cross-examination by staff counsel:

Q Mr. Schellenberg, I would like to speak a little bit about your experience investing.

A Fine.

Q Fair to say it's extensive?

A Yes.

Q You have experience trading stocks?

A Since 1973.

Q Okay. You also have experience trading energy trusts?

A I must admit, I was probably one of the first ones to discover energy trusts in Manitoba, in my sphere of people who trade, yes…..

Q And you held energy trusts in some of your own accounts in the 2005, 2006 period?

A No, no.I'm an option trader. I'm a commodities trader. If I did, it was only for short term in my own accounts……..

Q Okay. So you will agree you have experience --

A Yes.

Q -- trading energy trusts?

A Yes.

Q …. You have experience trading options?

A Yes.

Q Extensive experience?

A Since 1973 when they first came, when they first allowed to come out in Canada, yes.

Q. Okay. US options, correct?

A. Yes.

Q. You're familiar with puts?

A. Yes.

Q. Calls.

A. Yes.

Q. ….you have had experience trading commodity futures?

A Yes.

Q Forex?

A As late as this morning, yes.

…..

Q …So you would consider yourself a very knowledgeable and sophisticated investor, would that be correct?

A Well, that's what Judge Edmond said.

Q Judge Edmond?

A Judge Edmond in the DISNAT case, he said I was a sophisticated investor."

We accept as a fact that Mr. Schellenberg is a sophisticated investor. We further note that some of the strategies mentioned in the cross-examination, such as trading U.S. options, are strategies which would not normally be used by inexperienced and unsophisticated investors.

Registration

We turn now to the issue of registration as contemplated by the Act. The fact that Mr. Schellenberg was not registered with the Commission is not in dispute. Nor is it in dispute that Mr. Schellenberg had no interest in becoming a registrant:

Q So you knew what investment counsel was as of April 24, 2002?

A Well, basically you had to go work for a bank. You had to be supervised. You had to go work for a bank. There was a whole plethora of educational requirements.

Like I'm just an accountant. I'm not interested in going to work for a bank. I'm not interested in becoming an investment counsel. I'm not interested in being registered or regulated.

The case of *Doulis and Liberty Consulting Ltd. ("Doulis") (Unreported Ontario Securities Commission September 18, 2014)* cited by staff counsel explored the reasoning behind the registration requirement for advisers:

> Registration requirements are an essential element of the regulatory framework. Its purpose is achieving the regulatory objectives of the Act. The Commission has previously stated that "registration serves an important gate-keeping mechanism ensuring that only properly qualified and suitable individuals are permitted to be registrants". (R*e: Limelight Entertainment Inc*. (2008), 31 OSCB 1727 (at para. 135))
>
> Registration is a privilege, not a right, that is granted to individuals and entities that have demonstrated their suitability for registration (*Re: Trend Capital Services Inc*. (1992) OSCB 1711)) (at para. 111) Individuals must meet certain requirements based on the fundamental principles of proficiency, integrity and solvency, in order to be registered and participate as a registrant in the capital markets. …….these requirements help protect investors and the integrity of the capital markets. (Section 13.2 of the Companion Policy to National Instrument 31-103).
>
> Registrants hold positions of trust in the securities industry and towards their clients, creating responsibility on their part to fulfill an important role directed towards the protection of investors and fostering fair and efficient capital markets and confidence in capital markets. (*Re: Sawh* (2012) 35 OSCB 7421) (at para.309))

Of course, it is fundamental to staff's case that Mr. Schellenberg engaged in activities in which only registered persons are entitled to engage. There was some evidence that Mr. Schellenberg did not himself have confidence in the ability of many registrants to serve their clients properly. Be that as it may, we do accept the foregoing statements on the registration requirement.

<u>The case to be met</u>

The case against Mr. Schellenberg must meet the applicable standard of proof before any of the outcomes sought by staff can be realized. The applicable standard of proof has been expressed by the Supreme Court of Canada for example in the case of *FH v. McDougall* [2008] 3 SCR 41:

> "….in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

The Court further stated that:

> "….evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

That is the standard which will be applied by this panel in assessing the evidence presented and the standard is one which must be met by staff.

In summary, the allegations against Mr. Schellenberg are that Mr. Schellenberg:

1. traded in securities without having been registered under the Act;

2. acted as:

   a) a securities adviser;
   b) investment counsel; and
   c) adviser

   under the Act without being registered; and

3. acted in a manner contrary to the public interest.

In the Act, "investment counsel" means "any person or company that engages in, or holds himself or itself out as engaging in, the business of advising others as to the advisability of investing in, or purchasing or selling, specific securities, and that is primarily engaged in giving continuous advice as to the investment of funds on the basis of the individual needs of each client". "Securities adviser" means any person or company that engages in or holds himself or itself out as engaging in the business of advising others, either directly or through publications or writings, as to the advisability of investing in or purchasing or selling specific securities".

Staff counsel took the position that it was only necessary to establish that Schellenberg either "traded" or "advised" in connection with the complainants' accounts in order to make him liable for an administrative penalty and/or compensation for financial loss. Staff counsel further asserted that a finding that Mr. Schellenberg acted in a manner "contrary to the public interest", while not forming the basis for financial penalties, would nonetheless support a denial of access to the exemptions under the Act.

We will deal first with the concept of advising as it pertains to securities law and the allegations against Mr. Schellenberg. Aside from the material time during which Mr. Schellenberg was alleged to have conducted his investment activities, to which we will often refer as the "material time", another date of interest is September 28, 2009, the date on which National Instrument 31-103 came into force in Manitoba.

Prior to September 2009, the relevant registration requirements set out in the Act were as follows (with some edits):

> Registration required
> 6(1) …. no person … shall trade in a securities unless that person … is registered as a broker, investment dealer, broker-dealer, sub-broker-dealer or security issuer, or as a salesperson of a registered broker, investment dealer, broker-dealer or security issuer.
>
> Investment counsel
> 6(5) … no person … shall act as an investment counsel unless that person … is registered as an investment counsel.
>
> Securities adviser
> 6(6) … no person … shall act as a securities adviser unless that person … is registered as a securities adviser.
>
> Advising
> 6(7) No person … shall advise others by means of a publication or writing as to the advisability of investing in or purchasing or selling a security specified therein unless that person … is registered or is exempted from registration.

Precedent

Staff counsel referred the panel to case law in support of its case on the subject of advising, beginning with the aforementioned case of *Doulis et a*l, a case out of the Ontario Securities Commission decided in September of 2014.

In that case, Alexander Doulis and Liberty Consulting Ltd. were alleged to have engaged in the business of advising with respect to securities without being registered in accordance with Ontario securities law. Staff counsel submitted that the activities of Mr. Doulis were similar in many ways to Mr. Schellenberg's activities. Evidence in that case was to the effect that Mr. Doulis acted as an adviser to a number of people, that he had managed accounts through a power of attorney and made decisions on buying and selling in those accounts. There was testimony as to fee arrangements. He was found to have been in the business of acting as an adviser without being duly registered.

On the subject of advising, the panel in *Doulis* made the following observation on the definition of "adviser" in relation to the registration requirement of securities legislation (at paragraph 190):… "a person is acting as an adviser if the person i) offers an opinion about an issuer or its securities, or makes a recommendation about an investment in an issuer or its securities, and ii) if the opinion or recommendation is offered in a manner that reflects a business purpose (the "business trigger" or "business purpose"). A person who recommends an investment is advising in securities."

As to the definition of advice or advising (at paragraph 192):… "providing mere financial information as to specific securities does not constitute the giving of advice,

but providing an opinion on the wisdom or value or desirability of investing in specific securities does. …. (at paragraph 194)… "since advising involves offering an opinion or recommendation to others, the Act requires advisers to be registered with the Commission and to meet certain conditions as to their education and experience."

On the subject of the business trigger, the panel in *Doulis* said the following: "(at paragraph 197) The Commission has held that a business purpose exists where the adviser expects to be remunerated in some respect. Remuneration or expected remuneration, whether direct or indirect, reflects a business purpose."

The case of *Brian K. Costello and the Ontario Securities Commission* (2004 CarswellOnt 2902) *("Costello") is* a case heard by the Ontario Superior Court of Justice on appeal from decisions of the Ontario Securities Commission. The Ontario Securities Commission had found that Mr. Costello had acted as an "adviser" without being registered to do so and the Court cited the following provisions of the Ontario Act:

1. **1(1)**Adviser means a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities.

2. 25(1) No person or company shall….. c: act as an adviser unless the person or company is registered as an adviser ….

The Court approved of the analysis made by the Commission panel and the following extracts from *Costello* reflect the two essential principles to be derived from that case: the broad definition of advising and the business purpose set forth in securities law. Those extracts are: "(at paragraph 49) …the clear intention of the Act was to define "adviser" broadly and to provide exemptions for specific limited circumstances that were not met in this case."

Next, quoting from the case of *Re: Donas* ([1995] 14 BCSCCWS 39, B.C. Securities Commission) (at paragraph 57):… "a person who recommends an investment in an issuer or the purchase or sale of an issuer's securities, who distributes or offers an opinion on the investment merits of an issuer or an issuer's securities, is advising in securities. If a person advising in securities is distributing or offering the advice in a manner that reflects a business purpose, the person is required to be registered under the Act." Again referring to the *Donas* case, the BCSC set this "business purpose" threshold very low, observing that "his business was nascent, but it was still a business"."

Mr. Costello had submitted that his business of advising boiled down to certain isolated incidents and that his business involved many other topics including RRSPs and tax planning to which the Court stated: "These submissions cannot be accepted. There is nothing in this legislation to suggest that the business of advising must be the only business in which a person must be involved in order to trigger the requirement of registration. … The Commission found quite specifically … that there were more than isolated incidents involved. It found that isolated incidents would not have been enough; that the totality of the evidence showed that Costello offered advice in a manner reflecting a business purpose …"

As to the matter of trading in securities, the definition of trade or trading has remained constant both pre-September 2009 and post September 2009:

> "trade" or "trading" includes:
>
> a) any sale or disposition of or other dealing in or any solicitation in respect of a security for valuable consideration, whether the terms of payment be on margin, installment or otherwise, or any attempt to do one of the foregoing …
>
> d) Any act, advertisement, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

Staff counsel submits that trading by its very definition is to be broadly interpreted for present purposes.

With the introduction of NI 31-103 in September of 2009, the business trigger was brought into effect for trading as well as advising.

We were referred to one case on the subject of trading, namely in the matter of *Fawad Ul Haq Khan et al*, a case out of the Ontario Securities Commission decided in December of 2014.

As to the definition of trading, the panel in *Khan* observed that:

> The Commission has established that trading under The Securities Act is a broad concept that includes any sale or disposition of a security for valuable consideration, as well as any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.
>
> This interpretation has been confirmed by the Ontario Courts in their acknowledgement that "regarding trade", the legislature has chosen to define the term … broadly in order to encompass almost every conceivable transaction in securities … the Commission discussed the inclusion of the word "directly" in the description of acts in furtherance of trades, and stated that it "reflects the intention of the legislature to capture conduct which seeks to avoid registration requirements by doing indirectly that which is prohibited directly.

Regarding the matter of public interest, staff counsel submits that the primary goal of securities legislation is protection for investors as well as the integrity of capital markets. In the text Securities Regulation in Canada (Mark R. Gillen) states that "the underlying purpose of securities regulation, it is said, is the "protection of the investing public"." In connection with other objectives of securities regulation, "there are two related objectives, namely, to ensure that capital markets facilitate the mobility and transferability of financial resources and to provide facilities for the continuing valuation of financial assets. In short, securities regulation should promote the efficiency of capital markets."

Conflicts with staff

Before dealing with evidence of a more material nature, we might indicate that there was a great deal of discussion and evidence on the subject of the obviously difficult relationship between Mr. Schellenberg and Commission staff. Mr. Schellenberg repeatedly described what he considered to be improper tactics on the part of staff. We will examine this relationship further in these Reasons but the facts are essentially as follows.

Mr. Roy, the Commission's Senior Investigator, testified that his initial involvement with the Schellenberg file occurred on February 3, 2012 when he received a phone call from Mr. Sylvan Castonguay, Vice-President of Compliance at Interactive Brokers. His call apparently was made in his capacity as gatekeeper and he was concerned about Mr. Schellenberg's trading sub-accounts for his clients. He played a tape of the conversation.

This call, according to Mr. Schellenberg, had little to do with the allegations now before us. Firstly, he considered Mr. Castonguay's call to have been motivated by a law suit in which he and Mr. Schellenberg were involved on opposite sides. In other words, Mr. Castonguay was motivated to call the Commission by ill feelings toward Mr. Schellenberg. Secondly, Mr. Schellenberg regards the gatekeeper call as an excuse to make Mr. Schellenberg's already difficult life even more difficult by encouraging formal charges against him.

To make matters worse, according to Mr. Schellenberg, Mr. Castonguay, obviously seen by Schellenberg as part of the regulatory establishment, further used his position to close down accounts of Mr. Schellenberg's friends and clients.

He also had two specific complaints about Len Terlinski, a staff Investigator, aside from the contents of his evidence. First, Mr. Terlinski apparently did an interview with CBC which Mr. Schellenberg contends resulted in some adverse publicity and therefore damaged his reputation and business. Second, Mr. Schellenberg believes Mr. Terlinski took a business card, which incorrectly stated that he held the CFP designation, from Mr. Schellenberg's desk and reported the contents of the card to the Financial Planning Standards Council.

The FPSC in turn wrote to Mr. Schellenberg in December, 2013, to censure his activity in that regard. Mr. Schellenberg's evidence:

> "Mr. Terlinski saw on my desk, I had a whole bunch of, 10,000, in fact, business cards that I had uncirculated. And the reason they were uncirculated is because they still had the designation "CFP" on them. ……..Mr. Terlinski asked me if he could take one of my cards. He opened the box, took one of these cards ……. two weeks later I get this letter from the Financial Standards Council, and on it, I wasn't using an old one or anything, but it still had their designation on my card …… the point is, only one person had a card, out of those 10,000 cards, only one person had it, and that was Mr. Len Terlinski, because they sat uncirculated."

One of Mr. Schellenberg's additional complaints was that, aside from one complainant, Ms. Warkentin-Geras, all of the complaints before this panel were

solicited by Commission staff, specifically Messrs. Roy and Terlinski. In his cross-examination of Mr. Terlinski, Mr. Schellenberg directed Mr. Terlinski's attention to several instances in which Peter Ilchyna, one of the complainants and witnesses was asked leading questions to which he often gave vague answers. His evidence under cross-examination, on his relationship with Commission staff:

> "Q My understanding is you feel that MSC staff has it in for you?
>
> A Oh, definitely.
>
> Q Mr. Roy and Mr. Terlinski have nothing better than to try and make life difficult for you?
>
> A Well they go out and tell people – they phone up 40 of my clients and do you know Leon Schellenberg? Have you ever lost money on the stock market. Work with us and we'll get it back for you. That's what they say. That's what they …. and out of those 40 people they called how many are here, four plus one … so that's fair? You don't think that's …. yes, I'd say that MSC has had it out for me for quite a long time … I should have moved to Switzerland when I had a chance to. Then I wouldn't have to put up with this crap."

Mr. Schellenberg's position, reiterated throughout these proceedings, is that he has unfairly been treated poorly by Commission staff. (He obviously feels the same way about the aforesaid Mr. Castonguay). For his part staff counsel suggests that Mr. Schellenberg's negative attitude represents a clear and continual disregard for authority, securities laws and rules and by extension the complainants he purported to assist. Illustrative of this is the following statement made by staff counsel … "the disregard (he) showed for complying with The Securities Act, law and legislation, disregard he showed to the clients whose investments he was managing, and the disregard of trust people who didn't know better put in him as their accountant to take care of their money … time and time again, the disregard he showed the law and the people."

The clients

Mr. Schellenberg's case alternated between the contradicting and disputing of evidence given by staff's witnesses and the raising of substantive defences, even if based solely on his version of the facts. These defences included:

- the use of powers of attorney;
- the "accountants' exemption";
- officially induced error; and
- "negative assurance".

First though, the panel will deal with the evidence of the witnesses named as Mr. Schellenberg's clients in the Amended Statement of Allegations. Related to their evidence was the testimony of Len Terlinski who analyzed for us certain of the documentary evidence he had accumulated and assembled. His analysis is included in the sections below setting out the evidence of the witnesses.

Garnet and Beverly Williams

Garnet and Beverly Williams are husband and wife. Mr. Williams appeared as a witness; Mrs. Williams did not.

We begin with Mr. Williams evidence although he was not the first witness called by staff counsel. We will have a further discussion regarding credibility later in these Reasons but do note that, by Mr. Schellenberg's own evidence, Mr. Williams appears to have unimpeached credibility, as opposed to others whose credibility has been put to question one way or the other. Mr. Schellenberg stated the following regarding Mr. Williams:

> "Yes. I believe the man. He was a fairly honest guy."

We observed Mr. Williams to be an articulate witness with a good memory in the circumstances and despite the passage of time.

Mr. and Mrs. Williams are dairy farmers who have lived and farmed in Canada since 1999. They reside in St. Claude, Manitoba. Mr. Schellenberg was introduced to Mr. and Mrs. Williams by another farmer who was having his taxes done by Mr. Schellenberg. He was engaged as the Williams' accountant in around March of 2000.

Mr. Terlinski introduced documents in the nature of account statements. The first bundle of documents began with TD Waterhouse in 2001, which account was subsequently moved to CIBC (Investors Edge) and finally to Interactive Brokers of Canada (IBC) in 2008. The statements introduced by Mr. Terlinski covered a period from July, 2001 to the end of 2010. They were all margin trading accounts. Mr. Terlinski testified that the volume of activity in the Williams accounts "varied greatly, sometimes multiple times in a week and sometimes no trading for quite some period of time. Highly variable."

The Williams accounts, in the beginning, held energy trusts and were later switched to what Mr. Terlinski called an option trading strategy. Mr. Terlinski's evidence basically followed the course of the Williams investments until the IBC account was liquidated in January, 2011.

As he had done in connection with most of the Schellenberg clients, Mr. Terlinski had prepared and tendered into evidence a "cash flow" statement summarizing basic activities in the various trading and investment accounts. (Exhibit 14) The cash flow statements were essentially intended to demonstrate whether a particular client experienced losses or gains over the period of time material to that client's dealings with accounts in which staff alleges that Mr. Schellenberg was involved. According to Mr. Terlinski's evidence, the Williams realized a profit of $4,762.27 during this period.

Mr. and Mrs. Williams had some capital to invest left over from their purchase of their farm. According to Mr. Williams, "Mr. Schellenberg had stated that he probably could get a better return for us if we wished to use him". Mr. Schellenberg advised them that they need not have any involvement in the choosing of investments – that is, Mr. Schellenberg would make the necessary choices.

The following exchange took place on the issue of fees:

> Q How about fees, Mr. Williams, was there any discussion prior, any discussion about him charging you fees for providing this advice and buying and selling?
>
> A Yes, there was.
>
> Q What was the arrangement that was discussed?
>
> A If the investments made a certain percentage, I don't remember offhand what that was, but if we made a certain percentage profit then we would be charged."

Mr. Williams was referred to the TD Waterhouse account opened in July, 2001 and at that time, he testified, had "no investment experience in market trading of any sort." The TD Waterhouse application was completed with Mr. Schellenberg's help. Mr. Williams signed a "trading authorization" (Exhibit 48) which named Mr. Schellenberg as having trading authority.

Mr. Williams testified that he had no role whatsoever in the choice of trades in the TD Waterhouse account, which were mainly trust units in the energy sector.

Staff then tendered documents relating to the opening of a CIBC Investors Edge investment account, a change from TD Waterhouse upon Mr. Schellenberg's advice. Again, Mr. Schellenberg was granted trading authority on the account opening documentation. The TD Waterhouse investments were transferred to the CIBC account. Mr. and Mrs. Williams did not have any role in the choosing of which investments would be bought and sold in that account.

Mr. Williams went on to describe the closing of the CIBC Investors Edge account in favour of Interactive Brokers, again on Mr. Schellenberg's advice. Mr. and Mrs. Williams went to Mr. Schellenberg's office and filled out the IBC forms there.

Mr. Williams indicated the neither he nor Mrs. Williams had any role in the choosing of investments in the IBC account. Staff counsel asked: "Did Mr. Schellenberg have access to this account to trade securities?" To which the answer was: "Yes he did".

Mr. Williams took us through a variety of stages in this investment process, some of them in which he experienced losses and expressed some concern to Mr. Schellenberg. However, during the last phase of their investment experience, Mr. Schellenberg had invested in a Chinese technology stock (Baidu): "Did you have any idea what the company or the investment did to make money?" "No, none whatsoever." The Williams investments had rebounded but they chose to close their account: "We pretty much gained back most of the money, up until the amount that we originally invested, so I did not understand any of these statements, I still don't and I just wanted out of it."

On the subject of margin calls, Mr. Williams indicated that he had several and when asked to describe what happened when a margin call took place he testified: "The first initial few that we would try and – I would actually go on the website and sell a

few to try to bring us back in line to the margin, but it was just margin call after margin call. And I spoke to Mr. Schellenberg about that and he assured us that Interactive Brokers would sell what was needed to bring us back within the margin, themselves, without anybody else doing anything with that."

Mr. Williams was shown three statements of account dated June 29, 2004, June 28, 2005 and July 1, 2006 (together, Exhibit 51). Mr. Williams' testimony was that he understood all those bills to have been for the "services of investing". It is our understanding that the claim of Mr. and Mrs. Williams for compensation rests solely on the fact that they were charged for investment services and therefore we will be discussing the matter of these accounts further in these Reasons.

Under cross-examination, Mr. Williams did say that he did not have the feeling that Mr. Schellenberg was trying to do something behind his back. Mr. Williams steadfastly maintained though that Mr. Schellenberg was fully in control of the Williams investment strategies and each and every one of the trades within their three accounts.

In Mr. Schellenberg's evidence-in-chief he describes the beginning of this relationship as: "I took on the job of giving them some advice and looking after their money, trading authority. I had trading authorization and I had a Power of Attorney, which no longer exists and if it does exist, it wasn't presented in the evidence and I certainly don't have any copies of it. …. My role with the Williams' was to help them out, educate them …. so basically I just want to agree that I had Power of Attorney. I had something. I had trading authority over those accounts at the time, trading authority or Power of Attorney." He indicated that he spent a fair amount of time with Mr. Williams, and with Mrs. Williams to a lesser degree, "explaining how these energy trusts worked".

Mr. Schellenberg was reluctant to acknowledge that he did the trading for Mr. and Mrs. Williams as Mr. Williams testified. He did say "I mean I can say one thing, I'm sure they were made together. Who pressed the buttons, whether it was him or me, but it was something that was done in consultation with each other …. My role was as an adviser and that's it. I don't have time for this stuff. And that's why I tried to set these people up so they'd get a decent return with the least amount of aggravation for them. And he would call me often and he had intelligent questions and I'd answer them."

One thing he did reveal was that he had phoned up "other clients who had these energy trusts" and forewarned them that the tax treatment of energy trusts was about to have an adverse affect on the value of the investments.

Again, the panel had received evidence from Mr. Williams that Mr. Schellenberg was making all investment decisions and we have already expressed the view that Mr. Williams appeared to be credible. Mr. Schellenberg did seem to observe to the contrary, or at least differently, when it came to the making of decisions: "He made all the decisions. I mean I recommended stuff. He made all the decisions whether to take it on or not take it on. He made the decision to close the account. He made the decisions to open the account. I was there instructing him, educating him. … Did I ever have his password? Yes, a couple of times."

Mr. Schellenberg's evidence with respect to accounts rendered for investment services was to the effect that the accounts covered other services aside from investment services.

We make a general observation here on the Williams evidence. As mentioned, we considered Mr. Williams to be a credible witness with a reasonably good memory. Mr. Schellenberg acknowledged that Mr. Williams is credible and honest but persisted in attempting to color the business relationship between the Williams' and himself in a different way, if not contradicting some of Mr. Williams evidence completely. Mr. Schellenberg persisted in being certain about many details about which he likely should not have been certain at all, an example being the location of the computer in Mr. and Mrs. Williams house which Mr. Schellenberg was certain to have been in the kitchen. Apparently it was not.

Bernadette Warkentin-Geras

Bernadette Warkentin-Geras is the complainant most recently added to staff's Amended Statement of Allegations. Among the general details set forth in the Statement of Allegations it was alleged that, on Mr. Schellenberg's instructions, Ms. Warkentin-Geras attended at and completed a new client account form at TD Waterhouse.

Mr. Terlinski's evidence focused on a margin account and an RRSP account belonging to Ms. Warkentin-Geras. He did indicate that he had reviewed three of Ms. Warkentin-Geras' accounts and deemed one of them not to be relevant. The RRSP account was transferred from the Bank of Montreal.

The TD Waterhouse RRSP account was opened in February of 2004 and Mr. Terlinski presented statements covering the period from the date of opening to September of 2015. According to Mr. Terlinski the account consisted of "….energy trust units from beginning to end." For the last several years there was no trading activity at all within the account.

By July of 2004, all of the mutual funds which had been transferred in kind to Ms. Warkentin-Geras' RRSP account had been liquidated and the proceeds were used to buy energy trust units. The statements also showed the "DRIP" a plan wherein the trust units had been set up for dividends to automatically reinvested .

In summary, the following exchange summarizes the activity in the RRSP account of Ms. Warkentin-Geras:

> Q Alright. So … to close the loop on the RRSP account, Mr. Terlinski, again your observations about the types of securities that had been purchased in the account?
>
> A It never traded anything – well, after it was opened and the mutual funds liquidated, it never traded anything except energy trust units.
>
> Q Alright …. Is it correct to say that the mutual funds had been liquidated in its entirety at that point in time, in July of 2004?

A Yes.

Q … I think you noted that trust energy units were subsequently purchased. Is that correct?

A Yes.

Q Are you able to comment as to the extent of the trading activity after July, August 2004?

A There was none.

Energy trust units were also purchased in the margin account in 2004. Ms. Warkentin-Geras used this account in the same way as she would a bank account. Mr. Terlinski's evidence demonstrated a number of withdrawals and other activity not related to the purchase and sale of securities. From around November of 2006, as Mr. Terlinski noted, "again virtually all the activities related to the brokerage firm's automated trading system. …. Aside from the cash deposits and withdrawals, there isn't any trading that would have been initiated by the accountholder …. The last time an active equity order was placed in the account was in November of 2006. After that it was on auto pilot."

Aside from miscellaneous deposits and withdrawals the account was not being actively managed.

Mr. Terlinski's further evidence was that there were margin calls which Ms. Warkentin-Geras funded by withdrawals from her RRSP account.

In Mr. Terlinski's analysis, Ms. Warkentin-Geras experienced a loss of $29,600.00 from the RRSP account and $17,329.46 from the margin account. As far as the margin account is concerned the number represents the "difference that isn't attributable to cash going in or cash being taken out."

Mr. Schellenberg began his role as the tax accountant for Ms. Warkentin-Geras and her then common-law partner in 1993. During the material time, she was self-employed as a piano teacher.

Prior to opening the accounts described by Mr. Terlinski at TD Waterhouse, Ms. Warkentin-Geras had non-registered investment accounts at Assante. When asked by staff counsel whether Mr. Schellenberg ever talked about Ms. Warkentin-Geras' account at Assante she answered "yes, he did … I believe he started talking about it in 2002."

Her description of these conversations included the following:

> I was paying high taxes, and he said that my Assante financial adviser was not aware of the consequences of some of the things he had me involved in, and I was paying margin calls through the Assante things, plus paying high taxes because they were of course selling within the mutual funds, and I was having to pay taxes on the capital gains from that. So he told me that that was a really bad situation and I should be getting out of it.

That seems to us to be an appropriate area for advice coming from Ms. Warkentin-Geras' tax accountant. She went on to say:

> He told me that he could take care of my retirement portfolio and he would adjust it and invest in stocks, bonds, GICs, and he could do better than what I was doing …. He advised me to go to TD Waterhouse and open up an account, open up accounts.

She said that fees were discussed: "If he made a profit of more than 12%, the fee would be 2%. And if he made more than 10%, it would be 1%. And then if he didn't make that amount there would be no fees."

When Ms. Warkentin-Geras went to TD Waterhouse to open the two accounts she had with her notes in Mr. Schellenberg's handwriting the following:

> Bernadette wants to open a TD Waterhouse RRSP account, and an investment margin account … RRSP funds to be transferred from BMO Montreal … margin account funds to come from Assante. (Exhibit 57)

After she had opened the accounts she sent Mr. Schellenberg a note informing him that she had transferred the Assante account and gave him her account numbers and passwords. Her evidence was that Mr. Schellenberg was personally responsible for selling the mutual funds and acquiring the energy trusts.

By the summer of 2006, Ms. Warkentin-Geras' RRSP account had a market value of approximately $93,000.00. She was happy with the investments chosen for her by Mr. Schellenberg at that time; the account was performing well. However, that was the high water mark for the account. There were no more increases in value from that time on.

After 2006, the values of the RRSP and margin accounts declined over the years. She acknowledges that she did not try to contact Mr. Schellenberg to discuss that deterioration and he did not contact her to discuss either of the accounts. She did advise that she sent some emails to Mr. Schellenberg which made references to her investments but that she did not get a response to any of them. The following exchange took place on the subject of communications between Ms. Warkentin-Geras and Mr. Schellenberg on the subject of her accounts after 2006:

Q At that point in time Ms. Warkentin-Geras, after 2006 did you understand, or did you think Mr. Schellenberg was looking after your account, margin account?

A Yes.

Q Did you attempt to contact him to discuss your margin account do you recall?

A Yes.

Q What would be the gist of the content?

A Well as I mentioned earlier, the email saying my margin account was killing me. The letters in the final years, the final couple of years on my tax return I had a cover letter and I said at the bottom, I believe of 2012, no, wait, 2014 I think it was, that it's time we talked about my investment account. And then the next year I just made reference to walking around with a shopping cart … Well, it meant that my retirement was gone.

Q I wonder if, was there any point in time that Mr. Schellenberg contacted you and say, I'm not looking after your account anymore, go find someone else? Words to that affect?

A No

The cross-examination of Ms. Warkentin-Geras by Mr. Schellenberg focused essentially on whether or not Mr. Schellenberg was obligated to Ms. Warkentin-Geras: "Why do you think I'm obligated to you? Why should I be obligated to you? Because I do your tax return once a year and charge you three hundred bucks?" She answered, "No. Because you got me into this thing, and you can't just drop somebody after you do that."

Cross-examination consisted of some rambling exchanges, many of them emotionally charged. Mr. Schellenberg's stance with Ms. Warkentin-Geras was essentially that she had not complained to him in over 10 years about the status of her investment accounts and, at this late date, she now sees fit to claim compensation for losses for which he admits no responsibility whatsoever.

Up to one point in these proceedings, Mr. Schellenberg was certain that the emails to which Ms. Warkentin-Geras referred did not exist. Later though he produced a witness in the person of Brenda Scott who has worked for Mr. Schellenberg for about 30 years as a bookkeeper. She produced a series of emails from Ms. Warkentin-Geras which made requests or enquiries of Mr. Schellenberg concerning investments. These emails were sent to an email address which Mr. Schellenberg advises he no longer uses but they are still monitored by his staff. One email dated October 20, 2008 states: "They are still "harassing" me even though I covered all the margin calls right away. They are threatening to take action if I don't monitor my account more closely. I think it's time to change. Where should I move to? Thanks, Bernie."

The evidence was not clear as to whether Mr. Schellenberg personally received any of these emails although they do indicate that at least Ms Warkentin-Geras was paying attention to her margin account – Mr. Schellenberg certainly was not.

In his direct testimony Mr. Schellenberg stated: "Now in spite of what Ms. Warkentin-Geras has stated in her evidence, basically she was in control of her account. She was doing the trading. But I was, to some degree, advising her, not on specific investments".

The Warkentin-Geras evidence illustrates, among other things, five subject matters of interest: a) the subject of tax advice coming from Mr. Schellenberg and the apparent legitimacy of such advice; b) the fee arrangement; c) the nature of his

advice other than pure tax advice; d) the duty of care owed to his clients; and e) the client's duty to herself.

Firstly, it appears clear that Ms. Warkentin-Geras and Mr. Schellenberg had an important discussion on issues which were plainly within the purview of Mr. Schellenberg's accountancy practice in which Ms. Warkentin-Geras was already a client. When Ms. Warkentin-Geras was investing with Assante it appeared to Mr. Schellenberg that she was also paying more income tax than was justified in the circumstances. Mr. Schellenberg had some advice for Ms. Warkentin-Geras in this regard, part of which involved her divesting herself of products acquired through Assante. In this manner, Mr. Schellenberg provided advice as a tax accountant would be expected to provide to his clients.

Secondly, there does not appear to be any dispute as to whether there was a fee arrangement between Ms. Warkentin-Geras and Mr. Schellenberg. In cross-examination the question was asked: "The arrangement was as long as the account made over a certain amount, you would be able to charge a percentage on the account, to that affect?" To which the answer was: "Yes, something like that, yes." Mr. Schellenberg sent billings to Ms. Warkentin-Geras including on June 28, 2005 and on June 30, 2006. Mr. Schellenberg acknowledges that he spent a lot of time with both Ms. Warkentin-Geras and her common-law partner and that the billing rendered in 2006 was "based on profit". (Exhibits 61 and 62)

Thirdly and fourthly, Mr. Schellenberg's evidence is to the affect that, after spending a great deal of time with Ms. Warkentin-Geras on the subject of investment strategies and the like, he had "no obligation to the woman……..after June, 2006. I had no obligation to the woman after that period of time. Whether I returned her emails or didn't return her emails or whatever is superfluous. I had no obligation to her, except for accounting matters." His evidence is that the email she wrote probably never reached him: "Well, she was asking the wrong way. In my world you phone me up or you make an appointment at my office. That's how you get my attention." This evidence appears remarkable in the way in which Mr. Schellenberg allowed the plight of one of his clients to fall into a void. In cross-examination, staff counsel asked numerous questions on the subject of Ms. Warkentin-Geras' attempts to get Mr. Schellenberg's attention, mainly by way of email. At one point, Mr. Schellenberg responded: "I didn't get the god damn email. I seen her every year. She brought in her tax return. There is nothing in the tax returns to indicate that she was having problems with her RRSP or any other stuff. I never had anything to do with her for 10 years … I never did because she never told me that she was losing all her money. She never told me that."

Lastly, the evidence just reviewed also raises the subject of the duty actually owed by the client to herself. Why did she not make an appointment to meet with Mr. Schellenberg when her investments were beginning to dissipate? Why did she not question why Mr. Schellenberg was not returning her emails? Had the relationship between adviser and client been effectively terminated by the actions of both Mr. Schellenberg and Ms. Warkentin-Geras? Mr. Schellenberg's evidence is that the contractual relationship was verbally terminated by Ms. Warkentin-Geras in 2006 when she said to him that she could no longer afford his services. He stated: "My evidence, that we agreed, because she couldn't afford my services, that she was not going to call me to make these investments for her."

A determination must be made as to whether that discussion took place and if so, whether Mr. Schellenberg's standard of care owed to Ms. Warkentin-Geras was altered in any way in 2006 and, in any event, what standard of care was owed to Ms. Warkentin-Geras in the final stages of the decline of her investment accounts.

On the face of it, the panel sees little reason to doubt any of her evidence. Although she had some difficulty in presenting her evidence, appearing fairly nervous and somewhat emotional, she did not appear to us to be fabricating any facts or distorting any of her recollections. Having said that, the question remains as to whether it was reasonable for Ms. Warkentin-Geras to have believed that Mr. Schellenberg was continuing to serve her in the capacity of adviser on investments from and after 2006.

Peter Ilchyna

The client/complainant Peter Ilchyna appeared as staff's first witness. In the Statement of Allegations, it is alleged that, in or about August or September of 2005, with Mr. Schellenberg's assistance, Mr. Ilchyna transferred $100,621.05 in cash and securities to an account opened at Desjardins Securities ("DISNAT"). The Statement goes on to say that Mr. Schellenberg was given access to the DISNAT account in order to trade securities for Mr. Ilchyna. Later the DISNAT account was transferred to Scotia Bank Trade Freedom ("Trade Freedom").

At the time of his appearance before the panel, Mr. Ilchyna was 88 years of age, a retired farmer with no knowledge of the use of computers.

Mr. Terlinski, in his evidence, indicated that Mr. Ilchyna had not kept any of his own documentation regarding his investment accounts. Mr. Terlinski was able to obtain records from DISNAT and from Trade Freedom and his testimony was limited to those two firms. There was nothing from TD Waterhouse from which funds and other investments were transferred to fund the DISNAT account.

The material time covered by those documents is from August of 2005 to June of 2012. The accounts in question were margin accounts. Mr. Terlinski noted that the volume of activity during the period between 2005 and 2012 "varied wildly from sometimes several times a day to nothing for months." As to the types of securities: "Near the beginning when the accounts were opened, it traded almost exclusively in energy trusts, and that later switched to an options strategy", the latter described as "options, puts and calls". These would appear to be appropriate for a sophisticated investor.

Referring to the cash flow statement, (Exhibit 11) Mr. Terlinski noted the transfer of $16,051.06 in cash and $49,570.00 in kind which represented the value of units transferred from TD Waterhouse. As mentioned, we were provided with no documentary evidence regarding the TD Waterhouse account, nor any other reliable evidence for that matter aside from the DISNAT statement which identified the makeup of the units transferred in kind to DISNAT from TD Waterhouse. The cash flow statement indicated a later cash transfer to DISNAT in September of 2005 in the sum of $35,000.00. In 2007, the sum of $22,322.96 was transferred to Trade

Freedom and by September of 2012 the sum of $22.54 remained. The account at Trade Freedom was open but not active at that time. The loss noted by Mr. Terlinski from the opening of the DISNAT account to the closing of the Trade Freedom account was $100,598.52.

When Mr. Ilchyna gave his evidence it soon became clear that his recollections regarding his dealings with Mr. Schellenberg or with respect to the investment accounts we have described were not particularly clear. His evidence would have to be described as unreliable. It is mainly the passage of time which presented these challenges; apart from his age, Mr. Ilchyna appeared to be an intelligent and responsive witness.. However, when we describe Mr. Ilchyna's evidence it is still to be noted that his statements of fact were really never expressed with a great deal of certainty.

Mr. Ilchyna testified that Mr. Schellenberg advised him that he was being overcharged by financial advisers who, at the time, were handling Mr. Ilchyna's investments: "In fact, he said he would do better than the adviser I had." He had a vague recollection about a discussion regarding fees and, as with the clients we have discussed previously, that a fee would be charged if a profit was made.

Mr. Ilchyna testified that he had very limited knowledge of the types of investments shown in his account statements. As to whether there was a discussion about risk between Mr. Schellenberg and Mr. Ilchyna: "Not really. He knew my age. I don't know why he put me in high risk investment to begin with."

As to why Mr. Ilchyna's investments were transferred from TD Waterhouse, he testified that Mr. Schellenberg suggested the transfer because he was no longer allowed to trade in TD Waterhouse accounts. Later, Mr. Schellenberg would explain that Mr. Ilchyna was tired of dealing with recorded messages at TD.

Mr. Ilchyna was unable to provide any useful information about the $35,000 transferred into the DISNAT account after it was opened. He was essentially unable to recount any of his discussions with Mr. Schellenberg: "I can say to you that the money was put into TD Bank and then after awhile it was taken out, and I asked Leon, why did you take it out? He says, they wouldn't let me trade at TD Bank. And that's where it all started. I never even heard of DISNAT or Desjardin or Freedom, Trade Freedom. I never heard of those things. They're all news to me."

We have said that Mr. Ilchyna's evidence presented a challenge to us. Mr. Schellenberg's evidence regarding Mr. Ilchyna did nothing to clarify the picture.

One of the issues raised in cross-examination was the amount of money invested by Mr. Ilchyna in his TD Waterhouse account prior to its being transferred to DISNAT. One possible explanation suggested by Mr. Schellenberg was a settlement of $50,000 reached with Manulife as a result of a class action law suit over Portus Alternative Asset Management. Mr. Schellenberg suggested to Mr. Ilchyna that $35,000.00 of that $50,000.00 settlement went into the DISNAT account.

Mr. Schellenberg suggested to Mr. Ilchyna in cross-examination that the TD Waterhouse was opened when Mr. Schellenberg "walked" Mr. Ilchyna over to the TD

Bank at which time he “sat down with some people and opened some accounts.” The following exchange illustrates the void of evidence regarding TD Waterhouse:

Q …. So how much money did you put in there? You must have done pretty good, right, if it was only $40,000.00 you put in?

A Well, all I can say, you know, I don’t know, all I can say is this. I recall you putting the money in there. You helped me put the money in there. You were helping me to put the money into TD Waterhouse.

Q I walked you over there. I did not fill out any of the forms. All I did was introduce you to somebody at TD Waterhouse. So have you got any evidence of that, sir?

A Well, how can I remember all that? That’s way back.

Then, as to how the DISNAT account came into being, the following exchange is just as baffling:

Q ….anyways, do you have any evidence that I had anything to do with DISNAT direct in 2005, except that I had an account there myself from 2001?

A You made all the arrangements at TD Waterhouse, right? You said all the – you made all the arrangements there.

Q I just sent you over there.

A If you made all the arrangements at TD Waterhouse, why did you take the money out and put it into DISNAT?

Q I didn’t do that, sir.

A I never heard of DISNAT, Desjardin …. I’m being honest and thorough about it. I never heard about Desjardin or DISNAT, never.

Q Fair enough, but somebody did.

A That’s my honest opinion.

Q Well, I never did, I never transferred your stuff over.

A Well, who did?

Q Good question.

There were a number of similar exchanges in which Mr. Ilchyna professed to know nothing about DISNAT and later nothing about Trade Freedom although there is no dispute that Mr. Ilchyna’s signature appeared on account documents for both of those institutions. Confusion continued to be apparent during the cross-examination of Mr. Ilchyna by Mr. Schellenberg. As of the conclusion of that cross-examination,

the impression which Mr. Schellenberg urged us to take out of the evidence was that the DISNAT and Trade Freedom accounts were opened without Mr. Schellenberg's participation and that the mystery as to how that could happen would remain a mystery.

Mr. Schellenberg did little to shed much light on this mystery throughout his own testimony. He began by questioning the amount of money claimed by Mr. Ilchyna to have been lost at the hands of Mr. Schellenberg even though his "defense" to that point was to the affect that he had had no involvement in those accounts: "Now the whole problem on this file is that we don't have any documents from TD Waterhouse. …so this Peter Ilchyna cash flow … is looking from the 7th inning on. It's not looking from the beginning." Mr. Schellenberg did produce income tax evidence to the affect that Mr. Ilchyna had earned some income on the TD Waterhouse account but, in any event, "we don't know what he started with. It's my evidence that over half of what he took out, $65,000.00, over half of that – actually at one time maybe even higher than that, just – but I'm saying at least half of that is profit."

He believes that the TD Waterhouse account was opened in approximately 2001: "I believe it would have been in the hay day when I was doing that, which was about 2001." His further evidence regarding the outset of the TD Waterhouse account was that he had spoken to Donald Ilchyna, Peter's nephew and asked him "if he would be willing from time to time to help his uncle, whom he lived with, to log into his TD Waterhouse account and look at his investments. And the type of investments that I had given Mr. Ilchyna to buy were basically pretty staid, by my standards, stable at the 2001, 2000 time, energy trusts, which paid him monthly dividend. And basically all he had to do is look at them once in awhile. It wasn't an actively traded account. …now what happened after that I have no idea."

Following that was the first change in position relative to Mr. Ilchyna's introduction to DISNAT: "Peter came to see me in mid-June 2005 and complained about logging into his account or having to wait on the phone, having to wait on hold on the phone. … so I believe that I was the one that suggested he move to DISNAT direct, where you, at least at the time, didn't have to sit on hold very often because it was a young firm and, guess what, they answered the phone right away. … I'm saying this without any … actual recollection, but I do believe that I downloaded the application forms for him and gave them to him to fill out. I did not complete any part of the form, nor did I have access to his password, nor did I do any trading on the DISNAT account, nor did I receive any monthly statements on his account or monitor in any way."

After stating that he had simply referred him to DISNAT he again said "I admit that I met with Peter at my office during the week ending September 16, 2005 and he logged into his new DISNAT account and together we placed some lowball, good until limit orders for energy trust units, to use up the un-invested cash sitting in the account, and then he went away."

The above illustrates a trend in Mr. Schellenberg's evidence regarding Mr. Ilchyna of going from denials to admissions and then back again.

Thus appeared the admission that Mr. Ilchyna "came to see me about his DISNAT account, which had lost a lot of money. He told me that he had not been monitoring it or looking at his monthly statements and received some phone calls from DISNAT,

but didn't take any action and had trouble logging into his account. He wanted to move his account money somewhere else. … so for some reason, Trade Freedom, which was not part of the Scotia Bank at that time, was chosen. … this time I did assist him in completing the application form and I did a complete Power of Attorney form. Again with Peter at my side, we agreed to put some covered call positions on Research in Motion and perhaps on something else, I don't remember. Other than that, I never exercised the Power of Attorney and again was never issued a password."

Later, a meeting took place at the Pony Corral near Mr. Schellenberg's office. This was a meeting which Mr. Ilchyna did recollect although he was not sure when giving his evidence of exactly what was discussed. Mr. Schellenberg's evidence was that he suggested to Mr. Ilchyna that he get "another adviser".

In the second week of September, 2007, Mr. Schellenberg and Mr. Ilchyna "parted amicably". Mr. Schellenberg noted that "that is the last time I ever had to do with Peter and his investments…."

His closing comments regarding Mr. Ilchyna: "I'm very sorry he lost his money, but I was never obligated to look after his accounts in any capacity", reminiscent of the duty or standard of care question we posed regarding Ms. Warkentin-Geras.

Under cross-examination, Mr. Schellenberg, among other things, had to deal with many apparent admissions he had made in connection with Peter Ilchyna:

He said the following regarding the shares purchased on behalf of Mr. Ilchyna in Research in Motion: "With respect to my admission that I maybe had purchased shares of RIM and sold some calls in an effort to start, kick start Mr. Ilchyna's account. On further reflection I realize I could not have because of the timing of the trades. The reason I made that admission is because, when I looked at the evidence, it appeared that that was something that I might have done or could have done, but upon reflection, because of the timing, those trades were put on after I had met with him and told him I was no longer interested in helping him, and I have to retract that statement."

Later he indicated that he did not help Mr. Ilchyna open the TD Waterhouse account but did help him log into that account and likely acquired the password and login number in order to do so. With respect to the Trade Freedom account, the possibility was raised for the first time that an employee in Mr. Schellenberg's office, one Darren Rivers, might have met with Mr. Ilchyna to help him switch his accounts to Trade Freedom and that it was possibly Mr. Rivers who was trading in the Trade Freedom account.

However, once again after raising that subject, he agreed with staff counsel that he helped Mr. Ilchyna move funds from DISNAT to Trade Freedom in August of 2007.

It is very difficult in these circumstances to separate conjecture from reality. Unfortunately, Mr. Ilchyna is understandably unable to provide a concise narrative on the subject of the TD Waterhouse account about which there is no documentary evidence at all. He is similarly unclear about the DISNAT and Trade Freedom accounts although perhaps we can draw some conclusions from the documentary

evidence tendered as exhibits. Perhaps it is just as understandable, as we have previously suggested, that Mr. Schellenberg is as unclear in his recollection of his meetings.

During cross-examination staff counsel did refer to some circumstantial evidence in the case of trades within one of Mr. Ilchyna's accounts. This was the matter of two exhibits which evidenced one on behalf of Mr. Ilchyna and one on behalf of Mr. Schellenberg himself. Quoting staff counsel: "If you look at Mr. Ilchyna's account in April of 2008, you will note that on what the dates characterized as 04/21, 04/18, there's a certain transaction. It says sold … call – 100 ETFC … We look at Mr. Schellenberg's April statement, I note on 04/21, 04/18 there's sold – call – 100 ETFC, same day a transaction in the exact same security." Staff counsel suggested that this could not have happened by co-incidence; Mr. Schellenberg disagreed although he would concede that Mr. Ilchyna could not have made either of the trades himself.

Barry Konzelman

Barry Konzelman, formerly a long-time close friend and client of Mr. Schellenberg's, appeared as a witness. He is not making a claim for compensation and was asked, in effect, why he was appearing to testify against his friend Mr. Schellenberg:

> Q I'm going to ask you this question: I understand you cooperated with the investigators?
>
> A That's correct.
>
> Q And why was that?
>
> A Just like I said, I just – apparently other people have suffered from this, and I did somewhat, too. There's always risks with investing, but I just would like him to stop doing these sorts of things.

He went on to say: "I just think that he was negligent in informing me or assessing my risk tolerance, which, after I went to Investors Group, they did a very thorough assessment, which I thought was very good. Well, none of that was done. But I really didn't think of it at that time. I trusted him. So, I just wish he would stop doing this sort of thing."

Mr. Konzelman was interviewed by Mr. Terlinski and had provided him with account statements for a margin trading account at DISNAT. The account was opened in February of 2005 and Mr. Terlinski tendered account statements ending in January of 2011.

Mr. Terlinski reviewed for us a cash flow statement (Exhibit 17) indicating an amount of $152,768.28 being transferred into newly opened margin and RRSP accounts. They were made up of an option accounts in Canadian and U.S. dollars and margin accounts in Canadian and U.S. dollars.

The statement shows that, during April of 2005, the securities transferred in kind into the accounts were sold and energy trust units were purchased. Later, the U.S. dollar option account traded in options.

In January of 2009 the closing value of all Konzelman accounts was $81,226.78.

The cash flow statement shows 5 margin calls - $7,000.00, $5,000.00, $1,300.00, $200.00 and $700.00.

Mr. Konzelman is a meteorologist by profession, having been retired for 7 ½ years. As indicated, he acknowledged knowing Mr. Schellenberg since 1972 and had used Mr. Schellenberg's accounting services since the early 1980s.

He described the beginning of his investment dealings with Mr. Schellenberg as follows:

> Well, I had been investing through Wood Gundy and others, and Mr. Schellenberg was doing my income tax returns, and he saw the statements from those other companies and said, you know, I can do better than this. He suggested that for a few years, and then eventually I thought maybe I would give that a try. Him, Mr. Schellenberg, a try.
>
> Q And when you decided to give it a try, what was the arrangement for the choosing of investments?
>
> A Well, I don't know. It was his say. I really have no idea.

He went on to say that Mr. Schellenberg made practically all the decisions regarding investments and trades.

According to Mr. Konzelman there were discussions concerning a fee for services: "Yes, he said that he can do well, and that if he made over 12%, 12 or 12 and over, I can't remember which, that 1% of the entire account would be charged as a fee.

Mr. Konzelman was asked about his knowledge of margin and option accounts. He described his knowledge as extremely limited. As to options: "Nothing. I'd heard of it, but I knew nothing." He was shown the account opening document and testified that the document grossly overstated his experience and knowledge in the investment areas covered by the document. As to any discussions he might have had with Mr. Schellenberg on the subject of risk he said there had been no discussion about risk nor about suitability of investments.
Mr. Konzelman was referred to the section of the document entitled "information required under regulations". Section 5, "does anyone else have trading authorization over this account?" The box "no" is checked off. Mr. Konzelman testified that he did not consider that appropriate, "because that's not true."

He was asked:

> Q Did Mr. Schellenberg have ability to trade on your account?
>
> A Yes.

Q Now how was he able to do so? … Did you give him the password?

A Yes, I did.

He indicated that he said to Mr. Schellenberg that he didn't really understand any of the information on the account opening documentation to which Mr. Schellenberg stated "don't worry, I'll do all the trading."

Mr. Konzelman was led through a number of transactions contained in the statement he had provided to staff and was asked "would he have consulted you prior to engaging in those transactions?" To which the answer was "no". "There may have been once or twice, but practically no."

Mr. Konzelman described a number of margin calls saying that they were distressing at the start. He began to pay little attention to the DISNAT accounts. When asked "did it ever come to your attention that he was not looking after your accounts?" He answered "you know, I wasn't even looking at these things anymore." I'd just throw the envelopes in a pile because I couldn't explain them, and I would just – no, nothing came up." In fact, Mr. Konzelman acknowledges not having any conversations with Mr. Schellenberg about who was taking care of his accounts. He closed them in April, 2013.

As he finished his testimony in chief, Mr. Konzelman remarked that he did not consider that Mr. Schellenberg "acted in a malicious fashion".

Under cross-examination, Mr. Konzelman expressed a concern that he thought Mr. Schellenberg was still trading for people and, again, that his idea of risk is perhaps quite different from other people's.

Mr. Schellenberg wondered why Mr. Konzelman .had not taken advantage of several opportunities he had to complain to Mr. Schellenberg about the state of his investments and suggested to him that Mr. Konzelman was bitter toward Mr. Schellenberg and as a result went out of his way to bring his investment relationship with Mr. Schellenberg to the Commission's attention.

In his direct testimony, Mr. Schellenberg denied that Mr. Konzelman followed his advice in respect of the DISNAT account. It was Mr. Konzelman who initiated the opening of the DISNAT account: "At some point in time he came to me and he was complaining about his – his account wasn't growing very fast or whatever, it was losing money or whatever, at Wood Gundy. As a friend, I suggested that I could teach him a few things about the stock market, and at that time he welcomed the idea, and we had several discussions about how things worked." We should note here that Mr. Konzelman accepted the fact that there had been some discussions about investments but Mr. Konzelman stressed that any discussions were brief in nature and not particularly informative.

Mr. Konzelman did have some energy trust units prior to his opening the DISNAT account and Mr. Schellenberg suggested that those energy units might have been purchased by Mr. Konzelman on Mr. Schellenberg's suggestion. He noted "for some reason he had his own energy trust before I got involved with him." Mr. Schellenberg

was fairly satisfied that the acquisition of energy trusts would be trouble free as far as Mr. Konzelman's account was concerned. He testified that he did not do any trades without a discussion with Mr. Konzelman: "if he was at my house, he would log into the account and we'd put in some trades, when we were together. As far as these energy trust things, once you buy them basically you just don't touch them; you invest your dividends and that's it, they start handling themselves.

According to Mr. Schellenberg, the fault is Mr. Konzelman's that he stopped looking at his own account: "he told me directly that when he retired he never looked at his emails for four years. He never looked at these accounts for four years four and a half years, until 2012." To Mr. Schellenberg, Mr. Konzelman "turned turtle" and lost an opportunity to get into some interesting strategies with Mr. Schellenberg. It is unclear to us as to whether Mr. Schellenberg lost interest or whether it was Mr. Konzelman. It does seem that the account was active in the hands of Mr. Schellenberg but later was inactive. It does not appear that Mr. Schellenberg did much, if any, educating of Mr. Konzelman in the area of sophisticated investment strategies. It appears that, to Mr. Konzelman, he was pleased to show what he could do and to exhibit his skills.

During cross-examination, Mr. Schellenberg acknowledged being able to log into Mr. Konzelman's account prior to 2007. He agreed that he purchased and sold stocks for Mr. Konzelman and provided advice.

He denies that there was a fee arrangement with Mr. Konzelman, despite Mr. Konzelman having stated to the contrary. He denies having Mr. Konzelman's password after March 2007.

In the final analysis, Mr. Konzelman presented as a witness who, having been a very close friend of Mr. Schellenberg's for many years, was extremely disappointed in the role played by Mr. Schellenberg in connection with investment activities. Although, he certainly expressed a distaste for his own experience, our impression was that he did not have a great deal of difficulty moving on from that experience. Our further impression was that Mr. Konzelman's motivation in appearing as a witness was public-spirited and not out of bitterness (Although Mr. Schellenberg thinks he is just too respectful of authority, a trait the two of them do not share.) He acknowledged that Mr. Schellenberg's own motivation in dealing with Mr. Konzelman's investments was neither greed nor malice. He was certainly disappointed in his old friend though.

As far as his memory is concerned, he appeared to us to be able to testify as to what he clearly remembered and what he did not and did not avoid any questions put to him.

The Deleurme Family

Three witnesses appeared representing the Deleurme family, namely Richard Deleurme, Aurele Deleurme and Marie-Anne Loeppky. Aurele Deleurme is the father of Richard Deleurme and Marie-Anne Loeppky and we will refer to them collectively at times as the Deleurmes. We will identify them individually in these Reasons as Richard, Aurele and Marie-Anne respectively.

Richard was the first of the Deleurmes to give evidence. He was at the time a 55 year old individual employed part-time in an agricultural business prior to which he

had been a farmer all of his life and dabbled in other businesses as well. He has a Grade 12 education. Richard and Aurele met Mr. Schellenberg approximately 30 years ago when Mr. Schellenberg took over the business of a local accountant in the Deleurmes' home village of St. Claude, Manitoba.

The evidence presented by Mr. Terlinski regarding the Deleurmes included account statements from DISNAT Direct from May 2004, then to Trade Freedom, then to IBC. The accounts were joint accounts in the names of Richard and Aurele.

The only evidence relating to the substance of the DISNAT account was account opening documents and then transfers from the DISNAT account into the Trade Freedom account. Staff were unable to obtain any records regarding the DISNAT account either from the Deleurmes or from DISNAT.

The Trade Freedom and IBC accounts traded in options for the most part. Activity volume varied widely from time to time.

Keeping in mind the absence of substantive evidence relative to the DISNAT account, we were taken through what appears to be a series of transactions leading to the injection of capital by a combination of Richard, Aurele, Marie-Anne and Mr. Schellenberg to that account.

The Deleurmes' cash flow statement, presented by Mr. Terlinski, indicated an account opening at DISNAT on May 3, 2004 and he produced a cheque supplied by Richard in the amount of $100,000 payable to DISNAT Direct dated May 10, 2004. Then, there was another contribution by Aurele of $100,000.00.. He then produced another two cheques, one dated November 10, 2004 payable to A.L. Schellenberg in the sum of $50,000.00 and then another, again payable to A.L. Schellenberg dated November 10, 2004 in the sum of $50,000.00 on the account of Aurele. Richard, in his interview with Mr. Terlinski, indicated that the cheque he signed represented one-half of Aurele’s contribution of $100,000.00.

The cash flow statement disclosed a further $25,000.00 contribution by Richard in response to a margin call regarding which Mr. Terlinski indicated: “there seems to be agreement that Richard answered a margin call and put $25,000.00 into the account.” On the same date, there is a further entry for $25,000.00 shown as a contribution by Mr. Schellenberg. As to how he traced that contribution to Mr. Schellenberg, Mr. Terlinski noted: “Mr. Deleurme said that. Mr. Schellenberg has said that. And there is again a document that seems to support that.” The document to which he referred is a handwritten noted dated January 19, 2010 which purports to describe the investments made by all four parties to the various Deleurme accounts, namely Aurele, Richard, Marie-Anne and Mr. Schellenberg.

The cash flow statement contains entries, prior to the transfer to Trade Freedom, as follows:

May 10, 2004 cash transfer in (Richard)	$100,000.00
November 10, 2004 cash transfer in (Aurele)	$100.000.00
June 9, 2005 cash transfer (Marie-Anne)	$30,000.00
Cash transfer in (margin call)	$25,000.00
Cash transfer in (Schellenberg)	$25,000.00

Mr. Terlinski's evidence on that portion of the cash flow statements was:

> We have cheques from Richard and Aurele Deleurme totaling $100,000.00 each. We have a cheque from Marie-Anne Loeppky for $30,000.00 that was put into the account. We know this. … We have a contribution from Leon Schellenberg of $25,000.00. That seems to be in agreement. We also have a verbal statement from Deleurme (Richard) saying he put $25,000.00 in on a margin call. We have no documentation of that. We also have a verbal statement from Mr. Deleurme (Richard) saying he took out about $22,000.00 of that at a later date. Now if you assume that he put in $25,000.00, you look at the totals for Aurele and Richard of $101,700.00, it would appear that of the $25,000.00, he took out $21,600.00, leaving the remaining $3,400.00 in the account. … Mr. Deleurme (Richard) has said he took that money out at the time of the transfer to IBC. So he put in $25,000.00 at some point in 2005 and he took that money, the majority of that money back out in 2008. The residual amount shows up as that extra $3,400.00 on this letter.

By "this letter" he is referring to the aforementioned handwritten document dated January 19, 2010 which states that both Aurele and Richard had injected a total of $101,700.00.

It is to be noted that there is no complete agreement about the inflow and outflow of funds into the Deleurme account. This will be examined further as we discuss the testimony of the Deleurmes and of Mr. Schellenberg on the subject of the Deleurme account.

Still dealing with the DISNAT account, there was a statement obtained by staff for August of 2007. Mr. Terlinski took the panel through the statement noting "he's both going long and short in RIM options …. It's being very actively traded on a strategy." The DISNAT account was valued at $92,287.81 by the end of August, 2007 and was transferred to Trade Freedom at that time. The Trade Freedom statement for September of 2007 shows an entry for $116,837.47 U.S. transferred into the Deleurme account. In January of 2008 $131,819.00 was transferred to Interactive Brokers and the cash flow statement shows: "less money withheld by Richard as margin repayment $21,600.00."

We will deal briefly with a discrepancy around the time of the transfer to IBC from Trade Freedom that arose during Mr. Terlinski's testimony. Staff counsel asked: "Do those transfer outs match the amount that went into IBC? The answer: "No, it's exactly $28,000.00 U.S. short. … we have been told by Mr. Deleurme that a part of that accounts for his getting, bringing back his, refunding himself his margin call cash, but the numbers still don't add up. … I don't know where the $8,000.00 went." Staff asked: "So you're just pointing out the discrepancy to the panel, which they will have to resolve at the end of the day?" The answer was "Yes".

Finally, Mr. Terlinski was asked, based on his investigation and the information provided to him, to provide his best assessment as to what happened in these accounts. He replied: "I added up all the money that went in, not including Mr. Schellenberg's, of course, all the money that was taken out by Mr. Deleurme (Richard), and the discrepancy is $218,081.00. That's assuming Mr. Deleurme

(Richard) only took out $21,600.00. That loss would be less of course if – depending how you read that figure."

We now touch on the issue of the IP addresses which we will examine further in these Reasons. Mr. Terlinski had referred us to the Interactive Broker's records of IP addresses and extracted Deleurme trades, and others including Mr. Schellenberg's, for the sake of comparisons.

Staff counsel referred Mr. Terlinski to an IP address used for activity in the Schellenberg account with Interactive Brokers and Mr. Terlinski agreed that several of the Deleurme trades came from the same IP address as the Schellenberg trades and noted "and almost at the same time. … So in the same half hour time period, you can see that the account is traded on the Schellenberg account, or one of the Schellenberg accounts, and several trades on the Deleurme account from the same device, within the same half hour period." The evidence, according to Mr. Terlinski's analysis, was that Mr. Schellenberg, during the times in question, was trading on his account and the Deleurme account.

Richard Deleurme

Richard Deleurme testified that Mr. Schellenberg referred him to DISNAT: "When we used to do our income taxes and he would say that he was investing in the stocks and it was doing very well, and over a couple of years he kept saying that and then we decided to invest with Leon."

As to discussion regarding compensation to Mr. Schellenberg: "There was supposed to be a 1% charge and I believe that's when it was making money. I don't really remember, but there was supposed to be a 1%."

Richard was shown an exhibit in the form of a cheque dated July 12, 2005 in the sum of $3,509.97 the memo on the cheque stating "investment fees". (Exhibit 30, Tab 3A)

He agreed with staff counsel that Richard and Aurele each invested $100,000.00 at the outset and he confirmed that the cheques to which we have referred previously constituted the $200,000.00 investment made cumulatively by Richard and Aurele.

At the time of the opening of the DISNAT account, Richard Deleurme's experience, according to his evidence, in connection with margin accounts, options and the like was negligible. He agreed that Mr. Schellenberg was expressly given trading authorization in respect of the account. As to other connections amongst the Deleurmes and Mr. Schellenberg, an area of some disagreement, some of the evidence given by Richard was as follows:

Q It (the account opening document) also mentions a friend. In 2004 was he a friend of yours?

A No, he was not …. he was our accountant.

Q Did you socialize with him?

A No.

Q Belong to service clubs with him?

A No

He was unable to describe the investments in the DISNAT account in the early days. He denied having any involvement whatsoever in the choosing of investments and could not explain any of the terminology contained, for example, in the August statement to which we have previously referred.

There was a discussion about margin calls from DISNAT. Richard testified that "when there was a margin call, they called me. Then I called Leon and that's how that went. But he still did the trades on his computer." He stated that Mr. Schellenberg had access to the account for the purpose of doing so.

Richard made reference to when Mr. Schellenberg had "lost his privileges" at DISNAT, hence the requirement that Richard speak to DISNAT when there was a margin call. He indicated that Mr. Schellenberg would tell him what to say to DISNAT on these occasions: "I was writing down what he would say very quickly, because I had to repeat this to the brokerage firm." He was asked by staff counsel "So when you say here, I have option experience" did Leon tell you to write that down?" The answer was "yes".

From DISNAT, the Deleurmes' account went to Trade Freedom on the choosing, according to Richard, of Mr. Schellenberg. The evidence from Richard was that Mr. Schellenberg made all the investment decisions while the account was at Trade Freedom.

Asked to review a document titled "Power of Attorney, Trading Agent", Richard identified his signature and that of Aurele. As to the meaning of the document: "That would give Leon trading authority on the account, power of attorney." That is what Richard understood the document to mean at the time it was signed. (Exhibit 30, Tab 1, Page 5)

Richard testified that he had no understanding of the "calls and puts" described in the Trade Freedom statements.

From Trade Freedom, the Deleurme account was transferred to Interactive Brokers because, as Richard recalled it, transaction costs were lower according to Mr. Schellenberg. . The account was approved November 30, 2007. As with the previous accounts, the Interactive Broker's account was jointly held by Richard and Aurele. . The account document names Mr. Schellenberg as the "adviser". Asked what involvement Mr. Schellenberg was to have with the Interactive Broker's account the answer was "the same as the other two companies, trade all our, the stocks, bonds, whatever and calls and puts with our money." The phrase "our money" meant Richard, Aurele and Marie-Anne. Richard actually opened the account with Interactive Brokers because, as he stated, "Leon had no time and he told me to open up the account."

The amount of $127,980.00 was deposited into the Interactive Broker's account. As to what money was taken out of the Trade Freedom account during the transition between companies, Richard testified: "We had put in $25,000.00 previously on a margin call at one time and when the money was being pulled out from Trade Freedom to Interactive Brokers, I pulled out just over the twenty some thousand dollars and that was to buy my dad a truck. So that was the reason that I pulled that money out."

He was unable to explain the $8,000.00 discrepancy which we have previously mentioned.

By November of 2008, the value of the account had dropped dramatically. Richard indicated that he took up his concern over the decrease in value with Mr. Schellenberg to which he was told: "Well, he would just say that the markets weren't doing well and that's what was happening." His opinion was that Mr. Schellenberg was ignoring their account during income tax season or for other reasons.

By January 2010, the account was down to $7,965.98 at which time the parties, including Mr. Schellenberg, met to plan on "kick starting" the account. Mr. Schellenberg suggested that each person in the group make a further contribution to the account. The Deleurmes declined to do so and the account was eventually closed in May of 2013. Richard withdrew $2,569.00 Canadian funds and $12,546.00 U.S. funds at the time the account was closed.

Richard described the basis for his loss claim as follows:

> "The money that was lost, that was my – I sold my farm. That was my retirement money. I can't make it up for now, I'm too old. The biggest thing is that we trusted Leon and he didn't come through. He's manipulative. He'll run you down. He'll do everything in his book. And yes, it's stressful. Health has already declined because of it. And that's all I have to say. Thank you."

Cross-examination by Mr. Schellenberg began with the suggestion to Richard that he had himself invested $100,000.00 into the account. Richard was shown evidence of a transfer from Mr. Schellenberg's DISNAT account to the Deleurme account and an exhibit purporting to be written instructions to DISNAT on November 10, 2004. He filed a further exhibit, being a cheque stub bearing a notation "Richard Deleurme Deleurme Loan $25,000.00 dated June 12, 2006 and a further cheque dated January 20, 2010 to Richard Deleurme from Mr. Schellenberg in the sum of $10,000.00." Richard indicates that the $10,000.00 cheque was never cashed, in fact he said he had never seen the cheque.

An exchange ensued as to who had invested what into the account and the exchange did not generate a great deal of reliable evidence. There was still no dispute as to whether Mr. Schellenberg invested $25,000.00 into the account but Richard did not acknowledge that $100,000.00 was invested by Mr. Schellenberg and, as stated by Mr. Schellenberg, repaid to him shortly thereafter: "My recollection is that I put up $100,000.00 you put $100,000.00 in and then after the account went up, about a few months, you guys said, okay, well, here, we'll give you your $100,000.00 back." "That never happened, Leon, and you know it."

As Mr. Schellenberg cross-examined Richard the two individuals for the most part failed to come up with anything upon which they could agree. Even on the subject of fence posts: “By the way, I believe I sold you 2,000 fence posts at a low cost when I moved my ranch from La Broquerie up to north of Beausejour?” To which Richard replied: “You sold us one half ton truck load of posts not 2,000 posts. We bought 100 posts from you.”

Mr. Schellenberg also introduced the proposal during cross-examination, as he would later flesh out in his direct testimony, to the effect that Richard took over the account in or about 2006:

> Q Do you remember that I was – you told me that I was too busy to look after the stuff during tax season, I was too busy to look after the stuff and that you’d look after the stuff yourself?
>
> A I would look at the account to see if the money was going up and down, yes, but that’s all I could do. And you’re trying to tell me what?
>
> Q That you were running the account for that period of time.
>
> A No, absolutely not, Leon.

Mr. Schellenberg pressed Richard on that subject, putting to him to a meeting among all parties in January of 2010 at which the Deleurmes asked Mr. Schellenberg to take over the account again in the place of Richard. To that, Richard stated: “That is a total lie.”

One point that was established to the agreement of both Richard and Mr. Schellenberg was that Mr. Schellenberg had power of attorney in connection with each of the three Deleurme accounts at DISNAT Direct, Trade Freedom and Interactive Brokers. Otherwise the cross-examination featured flaring tempers and minimal substance. Very little was said by one that wasn’t contradicted by the other. Mr. Schellenberg described the two of them at one point as “drinking buddies for 20 years”, a relationship which was obviously not nearly as convivial on May 4th when Richard Deleurme appeared before the panel.

In Mr. Schellenberg’s direct examination of Richard Deleurme, he began by denying that $25,000.00 was ever deposited to the Deleurme account by Richard or Aurele: “There was only one $25,000.00 deposit ever put in that account, and that was Leon Schellenberg’s. …Whenever Mr. Deleurme changed brokerage firms, I think he went from DISNAT to Trade Freedom, from Trade Freedom to Interactive Brokers, he would skim a little bit off the top.”

He repeated his claim that he had also deposited $100,000.00 at the outset and was repaid after the account had gone up about $50,000.00: “Why I agreed to do that? Stupid, busy, whatever, but I did”.

Back on the subject of Richard’s withdrawals from the accounts: “The problem was, quite frankly, Richard Deleurme wouldn’t keep his fingers out of the pie. He’d keep going into the account and closing transactions out or doing things like that. And I was very ticked off at him.” His position is that the Deleurme account should never

have been closed and that losses could have been mitigated if Mr. Terlinski had not suggested that the Deleurmes cease their relationship with Mr. Schellenberg. He went on to say: “And, the worst part about it is the way he closed the account. The account had some positions in it, and he just sold – bought the calls back willy nilly. He just bought them back for a high premium and closed the account, just willy nilly, without trying to mitigate the losses or whatever, he just sold it off …. So he himself injured himself to the tune of I would say at least $20,000.00, $25,000.00 by just willy nilly closing the account, paying high premium on these calls.”

On the subject of the quantum of the Deleurme’s claim for compensation he raises three points:

1. The $25,000.00 Mr. Schellenberg insists was never deposited by any of the Deleurmes.

2. $28,000.00 Richard took out that was never accounted for.

3. Failure to mitigate losses.

A fourth factor should be added: “At some point in time he told me that he was going to look after the account himself. He didn’t want to pay me to do it.”

Regarding the role he played with regard to the Deleurme account, Mr. Schellenberg does not dispute that, until a certain date, probably in 2006, he was actively trading: “Basically of all the five complainants, the Deleurme case is the only one where I ever really actively traded.” He does indicate that early in the process, the Deleurmes were quite pleased with the progress they were making which does stand to reason and, aside from disagreement as to whether Mr. Schellenberg injected $100,000.00, it appears that all parties agreed that the Deleurme account was experiencing success, met by enthusiasm on the part of the Deleurmes:

> So I throw $100,000.00 into the account, open an account. They throw $100,000.00 and they open an account. The account goes up like crazy.....
> And then in November, the same year, or the following year, or the same year, they put in another $100,000.00, because it was going up like crazy. They were quite aggressive. They were happy. They were making money. They couldn’t believe it. The energy trusts were going up like crazy.

The gist of Mr. Schellenberg’s evidence on direct is that he did trade in the Deleurme account as he was expected to do and was given power of attorney and other authority to do so. At some point, likely shortly after the one account was rendered to the Deleurmes for investment services, Richard decided that he could take over the investment account and run it himself. During this period of time, the market generally declined drastically and the Deleurmes lost a significant amount of money. Mr. Schellenberg wants it noted that he himself lost money and in fact was in partnership with the Deleurmes. His defense therefore is two-fold:

1. that he acted with the legitimate benefit of powers of attorney.

2. that he was part of a business venture along with the Deleurmes, advising them or trading for them as partners, not clients.

When Mr. Schellenberg was cross-examined by staff counsel he made a comment which does appear to characterize the totality of evidence in the Deleurme matter:

> Q So I want to ask you a few questions about Aurele and Richard. I want to try and figure out what's not in dispute with respect to your dealings with them, start with that.
>
> A It will be a short list.

It would be a short list indeed.

In any event, as we have mentioned, what does appear to be undisputed is that each of Richard and Aurele Deleurme put $100,000.00 into the Deleurme account Marie-Anne Loeppky put $30,000.00 into the same account. It is also not disputed that Mr. Schellenberg invested $25,000.00.

The issue of the period of dispute – the period during which Mr. Schellenberg states that Richard was doing trades – was raised. Mr. Schellenberg stated that Richard was doing trades when the Interactive Brokers account was opened. However, the following exchange occurred:

> Q I'm going to suggest to you, Mr. Schellenberg, that once the Deleurmes opened their account at IBC, you were trading in securities in their account?
>
> A Well I wasn't trading until January, 2010 when they basically handed it over to me.
>
> Q So your answer to my suggestion is no?
>
> A You know what, if I looked at some of the trades that went through there, maybe I could identify them as being my trades versus Richard. …. Probably there was a period of time where we were both looking at the account, but I mean if you showed me certain trades, I could probably say, oh, yes, that's something I would have put on or that's something Richard would have put on.

In other words, Mr. Schellenberg retreated from his position that Richard had sole control over the account during the period of time in dispute.

The cross-examination on the subject of Richard Deleurme closed in this way:

> Q You're suggesting Richard Deleurme lied in his evidence?
>
> A Yes, he did. Yes, he did, sir. He lied and he lied more than once.

<u>Aurele Deleurme</u>

Aurele Deleurme's testimony offered little in the way of clarification on the subject of the Deleurme accounts.

At the time of his appearance, Aurele Deleurme was 85 years of age having fully retired from farming three years prior. He farmed all his life, had been married, now widowed, with three children including Richard and Marie-Anne. He professed no knowledge on the subjects of options, derivatives, income trusts or even mutual funds: “No, I don’t know nothing about investing.” He confirmed that Mr. Schellenberg had been doing the family’s income tax for many years but otherwise he was not a friend nor did he socialize with Mr. Schellenberg.

He recalls his investment of $100,000.00 but otherwise had no clear recollection or understanding of the accounts:

> Q Did Mr. Schellenberg tell you what type of investments he was going to put your money into?
>
> A No, no. I don’t know nothing about that.

He identified his signature on a number of documents but, again, had little else to add, perhaps because he was having memory difficulties or, more likely, because he had little to do with the Deleurme investments from start to end.

One interesting exchange on cross-examination arose from Mr. Schellenberg’s suggestion to Aurele that for some 20 years they had a tradition of sharing a case of beer after Mr. Schellenberg had completed his appointments in Heywood, where he would visit many of his rural clients. Mr. Schellenberg asked: “You don’t remember a case of beer every year?” To which Aurele replied “no … I didn’t know you drank.”

Aurele appeared to have little or no interest in providing any information either to staff counsel or to Mr. Schellenberg. We were frankly puzzled over the matter of whether Mr. Schellenberg traditionally shared a case of beer with Richard and Aurele. Even given Mr. Schellenberg’s difficulty recalling details of meetings with a great number of his clients, it would seem strange to us that he fabricate or invent a series of social get-togethers with Richard and Aurele Deleurme. It seems just as strange that Aurele would deny that any of those get-togethers had taken place. It is possible that the relationship with the Deleurmes had been fractured to the extent that they were all in a consistent state of denial to the point where much of the evidence heard from all parties seems somewhat tainted.

Marie-Anne Loeppky

As indicated, Marie-Anne Loeppky is Aurele’s daughter and Richard’s sister.

She and her husband were accounting clients of Mr. Schellenberg starting in or around 2005. The income tax relationship concluded in or around 2011 when, in Marie-Anne’s words: “I’d invested some money with Mr. Schellenberg and when things weren’t going very well, I decided that I didn’t want him to do my income tax anymore. And then he sent me a letter saying that he no longer wanted me as a client and that’s when I stopped.”

Later we were shown the letter addressed to Marie-Anne, signed by Mr. Schellenberg stating “As you are no longer a client of this firm, please be advised that I can no longer represent you as a “master adviser” with respect to your interest

in the Interactive Brokers account with your brother and father. Therefore, I am asking you to renounce your interest in this account so that I can continue to represent Richard and Aurele." The letter is dated April 25, 2011. (Exhibit 76)

We were shown account documents which had been signed by Marie-Anne and it is acknowledged that she invested $30,000.00 into the Deleurme's account with DISNAT.

She confirmed that she had no role whatsoever in the choosing of investments and left all these decisions to Mr. Schellenberg. Asked if she received her money back she replied no. She is making a claim for compensation.

One of the matters raised in cross-examination began with Mr. Schellenberg's suggestion to Marie-Anne that it was Aurele who insisted that Marie-Anne be allowed to invest in the account, although Marie-Anne had no recollection of that.

Marie-Anne and Mr. Schellenberg had a disagreement on an interesting aspect of the investment of her $30,000.00. Mr. Schellenberg suggested that Marie-Anne gave him a cheque dated June 23rd which was not negotiated and later a $30,000.00 cheque payable to DISNAT somehow made it into Mr. Schellenberg's account when he was in Portugal. Mr. Schellenberg has a rather vivid memory of this occasion:

> It was a great inconvenience. I had to drive to the city of Quinvios, about an hour away, find a – go to a bank and write a fax to DISNAT to make sure they put it in this right account. And that's what I did. That was the responsible thing to do. …. So all of a sudden I'm obligated to handle her affairs, whether I want to or not, even though I told her in person I wouldn't …. I was obligated to take on hers because it was thrown into this big family pot, which now included her, me, Richard and Aurele.

We were shown the fax purportedly sent from Portugal.

Mr. Schellenberg's evidence in direct was again to the effect that he, as a matter of personal preference, would not have wanted Marie-Anne included in the group which included Richard, Aurele and him. This was mainly because Marie-Anne did not have the business experience that Richard and Aurele had. So, when Marie-Anne met him to complete account documents and produce a cheque, he had second thoughts and advised her that he was not going to go through with opening an account for her. However, according to his testimony, Aurele insisted they "take on a new partner". He repeated the Portugal event: "When she did get around to putting money in the account, I was in Portugal, at a wedding, and I drove an hour and a half through the mountains …. to the nearest city and went to a bank and faxed DISNAT Direct and told them, move the money from my account to Aurele and Richard's account. So, I did whatever I could."

It was evident to us that Marie-Anne was a mere silent partner in her connection with the Deleurmes's account. Although she did relinquish her "interest" in the account at Mr. Schellenberg's request, she certainly did not receive her $30,000.00 back.

<u>IP and MAC addresses</u>

Mr. Terlinski, in addition to his evidence regarding individual complainants in his analysis of their investment accounts, shared with us the results of his investigations regarding internet protocol (IP) addresses, maintained by certain firms. Before going into this, we acknowledge the concerns expressed by Mr. Schellenberg that Mr. Terlinski was not qualified as an expert in this area. We have indicated to him that Mr. Terlinski's evidence on the subject of IP addresses would be allowed and assigned whatever weight the evidence merits in the circumstances.

Mr. Terlinski explained that IP addresses are assigned to internet providers. Although IP addresses are subject to change over time, particularly when a computer is disconnected from the internet, Mr. Terlinski went into his investigation of IP addresses wanting "to show or not show that the orders entered into the various accounts came from the same location, which would tell me if, presumably if this same person was entering all the orders or not."

Mr. Terlinski found that the only firm which retained IP addresses was Interactive Brokers. He had contacted all other firms connected to this matter only to be informed that they did not retain IP addresses because they are not required by IIROC to do so.

Interactive Brokers provided Mr. Terlinski with material from the Deleurme and Williams accounts along with two Leon Schellenberg accounts. The material included IP addresses and media access control (MAC) numbers. The MAC number identifies the actual device on a network.

The analysis presented by Mr. Terlinski was extracted onto a spreadsheet which identified the Deleurme trades, the Williams trades and the Schellenberg trades by colors.

Mr. Terlinski found: "There's a high correlation between IP addresses and MAC numbers to the trades in all three accounts, which would indicate that on at least a considerable amount of the time, the orders were originating from the same location on the same device, not all the time, but there's a high correlation." Giving an example, on February 23, 2012, in one-half hour period there were trades in one of the Schellenberg accounts and several trades on the Deleurme account from the same device. Mr. Terlinski does acknowledge that there is no way of knowing where the device from which multiple trades emanated nor who is sitting behind the keyboard. However, "trades are being entered around the same time on three different accounts (Deleurme, Williams, Schellenberg) from the same device at the same location."

The conclusion reached by Mr. Terlinski was that "the same person is doing the trading."

While cross-examining Mr. Terlinski, Mr. Schellenberg did concede that three of the eight MAC addresses shown in Mr. Terlinski's presentation matched computers either at his home or in his office.

Finally, in his own evidence, Mr. Schellenberg observed that most of the trades made on the Williams' accounts with IB did not display any IP address or MAC address, perhaps because the "rural nature of his hook-up". In Mr. Schellenberg's view, the IP

address analysis by Mr. Terlinski did not shed a great deal of light on the Williams trades.

He made no mention of the Deleurme accounts with Interactive Brokers in the context of IP or MAC addresses. We might indicate here that, in agreement with Mr. Terlinski and counsel for staff, there is a high degree of correlation among Schellenberg and Deleurme trades with Interactive Brokers although, again as conceded by Mr. Terlinski, this does not mean that it was Mr. Schellenberg making the Deleurme trades.

Findings of credibility

In some cases, findings of fact turn on the difficult and elusive matter of assessing the credibility of witnesses. Such assessments are typically based on observations of the demeanor of witnesses as they give their evidence. Findings of credibility can, as we have suggested, be more difficult to make when the passage of time has affected witnesses' memories.

In this case, Mr. Schellenberg has stated that most, if not all, of staff's witnesses have either lied or twisted the truth. Some of those witnesses have made the same accusations of Mr. Schellenberg.

Mr. Schellenberg had difficulty recalling what happened in meetings, perhaps understandably so. At times he would retract an observation made previously. For example, he at first flatly denied having done any trading for the Deleurmes during a certain period of time and later acknowledged that certain trades recorded in the records of a brokerage could have been his trades. He had also denied that Bernadette Warkentin-Geras had sent him any emails as she had stated in her testimony. However, later he produced a member of his staff who had looked into whether any such emails had been received and produced them to us when he found that they had been received. He denied having actually read the emails although at one point he acknowledged that he might have done so.

He was also given at times to theatrics and vitriol and made statements which he might later have regretted – not necessarily lies. It was evident that he had had words and disagreements with staff prior to and during the hearing. He began his cross-examination of Jason Roy by apologizing for intemperate language he had used in discussions and correspondence. He made a number of statements on the record which clearly demonstrated disdain toward regulatory authorities, not just this Commission. He also gave statements showing similar disdain for registered advisers and traders, particularly those with whom his clients had been investing.

His perception of the adversarial nature of these proceedings and of the roles played by the various witnesses testifying for staff went beyond the merely adversarial. As he saw it, it wasn't just Commission staff who were out to make his life miserable there was also the witness Sylvan Castonguay, commented upon by Mr. Schellenberg as follows:

> So here you have a fellow that I'm at odds with, in 2003, 2004, and now all of a sudden 9, 10 years, 7, 8, 9 years later he turns up at another brokerage as the Compliance Officer. And he's had this animosity towards me for all those

> years. And the fact that I sued two of his colleagues, and his former boss, probably doesn't help. But that action can be seen in the way he has undertaken unilaterally to close my friend's accounts … my clients, my clients call up Chicago, which is U.S. headquarters for Interactive Brokers, and ask what's wrong, they don't know, and then they dig a little further, oh, there's something in Canada, you have to phone up to Canada. Phone's up to Canada and says, sorry, we have to close you down. You know Leon Schellenberg, that emanates from Sylvan Castonguay.

He fully described his conflict with DISNAT which apparently culminated in a law suit in which Mr. Schellenberg claimed a loss of $2,000,000.00 because of ineptitude on the part of DISNAT staff. We were told that Mr. Schellenberg was unsuccessful in his claim, but his testimony suggested that he was victimized with the resulting loss of a considerable amount of money.

Although Mr. Schellenberg's credibility was often in these proceedings open to question, we have reservations as to whether he is the consummate liar he has at times been made out to be. As to whether his testimony could be considered reliable, that is a different question.

At times, it was obvious to us that Mr. Schellenberg was not exaggerating when complaining about how he was operating with no sleep or while in pain. Without trying to excuse his frequent outbursts, we do observe that he was often having difficulty, in these circumstances, overcoming the challenges of self-representation.

Mr. Schellenberg's memory was nowhere near precision but he was not alone in his apparent inability to recall meetings, conversations and activities from the past with any clarity. Some of staff's witnesses had their own struggles with memory, for example, Messrs. Ilchyna and Aurele Deleurme, both very senior in years.

We have commented on the ability of Garnet Williams to give clear and credible evidence. It seems to us as well that Barry Konzelman displayed a similar ability. Mr. Schellenberg commented himself as to the credibility and honesty of Mr. Williams.

When faced with conflicting testimony among those two individuals and Mr. Schellenberg, we considered it appropriate to prefer their evidence over that of Mr. Schellenberg.

As to Mr. Ilchyna and the Deleurmes, because of the lack of clarity and degree of confusion among them and Mr. Schellenberg, our view is that much of the verbal testimony of those clients fails to meet the cogency and clarity tests set out in the McDougall case.

Mr. Ilchyna simply could not remember much. Mr. Schellenberg maintains he was open to suggestions on the part Commission staff and could have been led to certain conclusions as a result.

The Deleurmes and Mr. Schellenberg seemed to be determined to contradict and insult each other. From our perspective, that state of mind tainted their evidence and affected their memories.

Our view is that we cannot allow important findings in this matter to turn on our findings of credibility in favour or against some of the participants in these proceedings. There is simply not a solid enough foundation for us to do so with some of the exceptions we have noted.

Powers of Attorney

Among the documentary evidence tendered as exhibits were documents which expressed or implied that Mr. Schellenberg was authorized to trade in securities on behalf of a named individual. Mr. Schellenberg has defended himself, in part, by claiming that these "powers of attorney" operated as an exception to the rules requiring registration. Without dealing with any of the specific documents in question, we have the following comments and observations.

Mr., Schellenberg called Glenn Lillies as one of his witnesses. Mr. Lillies, then a Compliance Officer with the Commission, and Mr. Schellenberg had a series of meetings and correspondence beginning in 2001. Mr. Lillies prepared a memorandum to file dated June 21, 2001:

> "Leon telephoned this date to indicate that he received our letter. He stated that he had full Power of Attorney over several other people …. I stated that we weren't concerned about those situations, it was the trading authority granted on the brokerage accounts of his other clients that was the concern. ….he said it would be difficult to assist his clients without having access to the info in the accounts and that having the client bring in a Statement of Account to review was not good enough and was too far after the fact. I advised him that staff required him to cancel all of the trading authority granted to him by his clients. He seemed to be reluctant to do that. I advised him that he had better write to us and provide his arguments on the matter."

Mr. Schellenberg's concern over the subject matter of Mr. Lillies' evidence was that he was asking for, and rarely received, any real guidance on the nature and effect of Powers of Attorney signed by clients naming him as attorney.

The Act, as it was from 2001 to date contains no references to Powers of Attorney and therefore no guidance is offered as to the justification of Mr. Schellenberg's argument that he was acting legitimately as the attorney for some of his clients thereby rendering the accountant's exemption academic.

The appearance of David Cheop, called by Mr. Schellenberg as a witness, involved to a great extent a discussion of Powers of Attorney and of their applicability to securities trading and advising. Mr. Schellenberg asked: "Do you more or less agree that "….nothing in The Manitoba Securities Act prohibits you or anyone else from acting under the valid Powers of Attorney of your clients to engage in discretionary trading in your client's accounts"? (excerpt from a letter to Mr. Schellenberg from Charles Phelan) Mr. Cheop replied: "Well, that comes down to interpretation of securities law, but every ……. it's always a factual situation. If I've got a Power of Attorney for my wife …. I mean that's, you know, that's one thing, or even for a close friend or perhaps even the odd client, but what I mean, what I understood at the time is if one had a whole series of them ….. then you run into the problem of perhaps being in the business …. of like investment management, which is always the real

concern …. so facts are important." Mr. Schellenberg proceeded to put a series of hypothetical fact situations before Mr. Cheop in an effort to give better definition to what a person in Mr. Schellenberg's position was entitled to do under Power of Attorney. At one point, the panel interjected: " … I'm still of the view, unless you can convince me otherwise, that the questions you are asking, or the answers to the questions you are asking will ultimately be for us to answer."

We note here that Mr. Cheop was not formerly qualified as an expert and that the panel did not accept his opinion evidence as being that of an expert in the usual sense.

What the evidence intended to imply - and Mr. Cheop's observations were valuable in this regard – is that the legitimacy of trading or advising under a Power of Attorney will be based on the facts surrounding the Power of Attorney just as much as the strict wording of the document put forward to demonstrate such legitimacy. Secondly, the answer must ultimately be given by the Commission (or the Courts on appeal) and not by counsel or witnesses.

Staff counsel made four points regarding Power of Attorney which we will examine in greater detail:

1. Ignore the label on the document … you have to look at the body of the document, see what's involved, what (it) entails."
2. You can't contract out of the law.
3. You can't use Powers of Attorney to do indirectly what you can't do directly.
4. You can't circumvent The Securities Act by having people sign Powers of Attorney.

Mr. Schellenberg made the following point about Powers of Attorney: "To me there's two. There's general and then there's limited. … A limited Power of Attorney, once it's complete, once it's been completed and ratified and signed off and witnessed, it's complete. So it's a matter of terminology. A complete Power of Attorney or a completed Power of Attorney could still be a limited Power of Attorney." We do not disagree with that observation.

It is our view that the use of Powers of Attorney to justify acting as a portfolio manager, must be restricted to the narrowest of circumstances. As stated by the Ontario Securities Commission panel in *Khan*: "… the unregistered trading prohibition in the CFA prohibits achieving indirectly what is prohibited directly….. If a person engages in activity which would otherwise require that person to register with a securities commission, it would be offensive to the underlying purpose of the registration requirement if people were permitted to conduct themselves in a manner reserved for registrants simply by arranging to have Powers of Attorney signed by clients."

There will of course be exceptions to that rule and we refer again to Securities Regulation in Canada by Gillen in which the author discusses "isolated trades by persons who are not in the securities business": "If a trade is made by a person who does not engage in any of the businesses carried on by securities industry participants (who are the focus of the regulation), then the trade is not likely to create the kind of problems that the regulation was designed to address. Consequently,

requiring persons to register and comply with the regulatory requirements for registrants would be unnecessary. Compliance might also be costly … since the cost of compliance would not be amortized over numerous future trades, as it would be in the case of persons regularly engaged in the business of trading in securities".

The author cites the work of executors, administrators, guardians, trustees and others who "generally do not act for a large clientele of investors whom they are likely to become financially obliged to. These trades are usually not done on an ongoing basis, but are instead done for the period necessary to accomplish the purpose of their appointment. Thus these activities are less likely to raise the kinds of problems encountered with respect to those who regularly engage in trading."

The author also cites "A general exemption for isolated trades where the trade is not made by the issuer of the security, is not in the course of continued and successive transactions of a like nature, and is not made by a person whose usual business is trading in securities."

The passages cited above could apply to advising or trading on behalf of persons who have given the adviser Power of Attorney to do so. In these circumstances, we would expect that it would not matter whether the written document contemplated a full, general Power of Attorney or a limited Power of Attorney as long as it was clearly and effectively drawn with the full knowledge of the donor of the Power of Attorney. One would suppose that this could be done with or without the benefit of legal assistance but it's purpose and use must reflect the observations made by Professor Gillen as to whether the attorney would have to be registered in order to carry out the powers stated therein.

We agree with the following observations made by David Cheop in his evidence when questioned as to whether the Act prohibits a person from engaging in trading under "valid Powers of Attorney": "that comes down to interpretation of securities law … If I've got a Power of Attorney for my wife … or even for a close friend or perhaps even the odd client … but if one had a whole series of them then you run into the problem of perhaps being in the business of investment management … so facts are important." He went on to say: "If I was under disability or became incompetent and I had given you a Power of Attorney, that's one situation. On the other hand, if someone was doing a series of these that would be very different."

There is a clear distinction between those acting in isolated instances for a client, for example, of a Chartered Accountant, whose assistance for trading and advising purposes arose on an isolated basis, and a routine of acting under Power of Attorney for a number of clients. This was addressed in the *Khan* case by the Ontario Securities Commission. The activities of Mr. Khan were described as "engaging in a scheme" whereby he obtained a number of Powers of Attorney from his clients and proceeded to engage in trading activity on their behalf.

In any of those circumstances, the expression of the intention of the donor of the Power of Attorney must be clear and concise and, again, with full knowledge as to the intent and consequences of the powers contained in the document.

We find that, in instances where any document referred to as "power of attorney" has been introduced in evidence, Mr. Schellenberg's defence in this regard cannot be

seen as based on a claim of isolated instances. To the contrary, he has professed to have had some form of Power of Attorney for many of his so-called investment clients.

If there is a fact situation which might lend itself to an effective defence in the manner suggested by Mr. Schellenberg, it would be that of the Deleurmes. We have noted that Richard Deleurme acknowledged having given Mr. Schellenberg full control over the Deleurme accounts and that the Deleurmes did so by granting written Powers of Attorney. We have also taken note of a tenable argument on Mr. Schellenberg's part that he was in partnership with the Deleurmes when he acted as their attorney.

However, we have concluded that an association of this nature would have to bear more attributes of a true donor/attorney relationship in order for a Powers of Attorney exemption to succeed on these facts. It is true that Richard Deleurme has referenced Powers of Attorney in his testimony but we have no evidence as to the true nature and intent of any such document; nor do we have any clear evidence as to how Mr. Schellenberg was expected to act in an attorney's capacity. He was acting as an advisor to the Deleurmes and, from time to time, traded in their accounts; but if he was using a Power of Attorney to justify acting as a portfolio manager, we would invoke the previously quoted passage from the *Khan* case:
"If a person engages in activity which would otherwise require that person to register with a securities commission, it would be offensive to the underlying purpose of the registration requirement if people were permitted to conduct themselves in a manner reserved for registrants simply by arranging to have Powers of Attorney signed by clients."

The accountants' exemption

The portion of legislation containing the accountants' exemption was repealed in mid-2006. It was set out in Section 18 of the Act:

> "Registration as an investment counsel or securities adviser is not required to be obtained by …. (b) a lawyer, accountant, engineer or teacher whose performance of such services is solely incidental to the practice of his profession …."

Mr. Schellenberg maintains that much of the investment activity he carried on with or for his clients was done with the benefit of the exemption so the panel's interpretation of the limitations of the exemption is essential. That said, Mr. Schellenberg's discussions with staff about the exemption (and powers of attorney) which we detail below began in 2001 and form an integral part of his own case, not only including the parameters of the exemption itself but also the defences of "negative assurances" and officially induced error.

Two witnesses were called in this connection by Mr. Schellenberg – Glenn Lillies and Doug Brown.

Mr. Schellenberg testified that he met with staff members Glenn Lillies and Marc Boily in May of 2001. That meeting was to deal with matters unrelated to any of the allegations. Subsequent to the meeting, Mr. Lillies wrote to Mr. Schellenberg:

> "….your meeting with staff on June 1, 2001 (sic) relating to the exemption under paragraph 18(b) of The Securities Act which, among other things, exempts accountants from the registration requirements for activities which may be incidental to their practice as an accountant …. Commission staff are of the view that, by having trading authority (clients') accounts, the advice only aspect of the exemption has been exceeded."

Doug Brown, now employed as the Public Guardian and Trustee of Manitoba, was General Counsel, Director of Legal, Enforcement and Registrations and Secretary to the Commission at the times material to these proceedings.

The onset of Mr. Brown's involvement in the Schellenberg matter was in or about February of 2003. He wrote a letter dated February 26, 2003 to Tom Kormylo (Exhibit 92) who, at the time, was acting as legal counsel to Mr. Schellenberg. He was responding to a letter written by Mr. Kormylo addressed to Lyle Martin, a staff investigator. The letter (Exhibit 90) to which Mr. Brown was responding is set out in part as follows:

1. Mr. Schellenberg, as you know, is a Chartered Accountant, and as such is entitled to conduct certain trading activity with clients in reliance to subsection 18(b) of The Securities Act Manitoba.

2. Requesting that Mr. Schellenberg cease all trading activity with clients indefinitely is asking Mr. Schellenberg to cease doing indefinitely those activities that he is entitled by law to perform. Mr. Schellenberg has, in an act of good faith, agreed not to conduct any trading activities for a limited period of time. The reason Mr. Schellenberg did so was to afford us with an opportunity to meet and discuss the scope of the exemption Mr. Schellenberg is relying upon in the context of his practice. Hopefully, after meeting we will be able to agree on what activities are contemplated by that exemption and what activities are clearly outside the exemption. My sense of it is that there will be a significant "grey area" where some uncertainty remains as to whether or not some activities are or are not exempt. Once such an analysis has been completed, Mr. Schellenberg will undertake, on an indefinite basis, not to conduct those activities that we agree are outside the scope of the exemption. I suspect further research and discussions may be necessary in order to resolve how the "grey area" activities should be treated and a further undertaking to refrain from conducting those activities until the uncertainty has been resolved might be appropriate at that time. Mr. Schellenberg would, nevertheless, be entitled to continue to conduct those activities that we agree fall within the scope of the exemption.

3. Mr. Schellenberg has a number of clients that rely heavily on advice that is given in the context of the available exemption. It would be contrary to the public interest, and certainly contrary to Mr. Schellenbergs' clients interests, if Mr. Schellenberg were to agree to stop providing that advice, particularly at this time of year where RRSP contributions are being considered and advice sought in respect thereto.

4. On the basis of the foregoing, I would respectfully suggest that there is a very real need to meet and discuss these issues further. While Commission staff

has met with Mr. Schellenberg in the past, I was not present with Mr. Schellenberg and, therefore, cannot advise my client on the reasonableness of the position taken by Commission staff, if indeed the relevant issues were discussed at that time. Although Mr. Schellenberg was represented by counsel, his counsel proved not to be sufficiently familiar with securities laws to be able to advise Mr. Schellenberg appropriately and as a consequence Mr. Schellenberg has sought my advice. It is, therefore, imperative that we meet and discuss this matter further. I trust Commission staff would be interested in definitively resolving the scope of the exemption for the due administration of The Securities Act now and in the future.

5. With respect to the "investigation" you mentioned in your letter, the fact that staff was investigating a complaint against Mr. Schellenberg only became known late last week. Prior to that time, my understanding is that concern about the scope of the exemption was the only matter that was being discussed. That issue continues to remain largely unresolved. Mr. Schellenberg and I would like to definitively resolve the uncertainties as soon as possible. If we cannot agree on what activities are covered by the exemption, then there are several possibilities that could be explored, including referring the matter to the Commission or the Courts for a determination.

6. With respect to this recent investigation (which I understand is based upon a complaint that was made late last week), I indicated, when we spoke last week, that Mr. Schellenberg and the writer are fully prepared to attend at your offices to address the allegations. At that time, I requested particulars of the matters complained of so that I could review the circumstances with my client and have him attend with the appropriate file(s). You indicated you would provide me with that information once the potential complainant came in and made a formal complaint. Please provide me with the name of the client complaining, the matter complained of and the time periods involved and I will have Mr. Schellenberg pull the appropriate files and we will attend at your offices to discuss the allegations.

Mr. Brown, in the aforementioned letter to Mr. Kormylo, stated that "the nature and extent of Mr. Schellenberg's trading activities with clients appears to exceed what would be permitted by the exemptions under the Act. Whether this statement is in fact true is of course the reason the matter is being investigated by the Commission." He further says that "it is difficult to understand why a further meeting would be of any benefit." In his evidence before the panel, Mr. Brown further explained that "you don't have a meeting with somebody who is potentially the target of an investigation unless you're sure about what you need to discuss and what the circumstances surrounding the situation are."

Mr. Schellenberg asked several questions of Mr. Brown as to why a request for a meeting by Mr. Schellenberg's counsel to explore the parameters of the "accountant's exemption" was turned down by Mr. Brown. In this regard, Mr. Schellenberg's self portrayal is that of an individual acting in good faith and requesting information on the interpretation of the accountant's exemption set out in the Act. He says in a question posed to Mr. Brown: "Do you feel that Commission staff has an obligation to assist members of the public in interpreting those statutes?"

Mr. Brown replied: “I think members of staff can give some direction as to where to look and what to consider, but, no, staff doesn’t give legal opinions on these matters. …. Securities law has always been an area which has to be fact, based on the facts of a given situation, or else it doesn’t work. You’re regulating an activity which in any particular situation there will be lots of factors to consider on that activity. So the Courts over the years and tribunals, that’s the types of things that they’re dealing with in trying to decide at what point do a particular set of facts warrant a conclusion that there’s been a violation of the securities law.”

Discussions relative to the accountant’s discussion had taken place prior to the date of Mr. Brown’s letter to Mr. Kormylo but all discussions on the subject of the accountant’s exemption had been of a fairly general nature. We are aware that staff still regards Mr. Schellenberg’s reaching out for advice on the accountant’s exemption to have been disingenuous but in our view it is regrettable that the olive branch offered by Mr. Schellenberg’s counsel was not taken up by staff in 2003. Whether or not this hearing might have been avoided as a result is a matter of mere speculation but there is no denying that clarity over the accountants' exemption and powers of attorney was potentially there for the taking.

Be that as it may, Mr. Schellenberg requires a decision as to whether the accountants’ exemption affords him a defence to the allegations before us.

Clearly, an accountant can provide advice to a client on subjects which affect the client’s financial welfare. It seems reasonable and logical to us that an accountant can review a client’s investment portfolio and provide a critique or opinion as to whether such portfolio has a negative or positive impact on a client’s exposure to taxation. One would expect to see registered investment advisors and accountants working together to maximize an individual’s net gain from investments.

However, it is equally clear that an accountant, who is not registered in some capacity, may not fill both roles. There is, in other words, a line which must not be crossed.

The following extracts from our discussion of the evidence regarding Bernadette Warkentin-Geras illustrates this point. As Ms. Warkentin-Geras’s accountant, provided certain advice:

> I was paying high taxes, and he said that my Assante financial adviser was not aware of the consequences of some of the things he had me involved in, and I was paying margin calls through the Assante things, plus paying high taxes because they were of course selling within the mutual funds, and I was having to pay taxes on the capital gains from that. So he told me that that was a really bad situation and I should be getting out of it.

However, he took a further step when they talked about a change in management of her investment portfolio:

> He told me that he could take care of my retirement portfolio and he would adjust it and invest in stocks, bonds, GICs, and he could do better than what I was doing …. He advised me to go to TD Waterhouse and open up an account, open up accounts.

Here, he is crossing the line; the accountant's exemption is not available to him as he begins to "take care of (her) retirement portfolio". Nor would it avail in respect of other clients to whom he has provided similar services.

Officially induced error

If the discussions among Messrs. Schellenberg, Lillies and Brown serve to demonstrate any element of this case, it is that, although there is a fairly active series of communications between 2001 and 2003 among Mr. Schellenberg or his representatives and staff, no clear resolution of the legitimacy of Mr. Schellenberg's relationship with some of his clients regarding investment strategies was reached at that time. Mr. Schellenberg's evidence suggests that he was receiving at best mixed messages on the subject of Powers of Attorney and, regarding the accountants' exemption, he appeared on one hand to be prepared to ignore the advice of staff and on the other attempting without success to meet with staff to obtain advice with the implication that he was willing to act on such advice.

In his cross-examination of Mr. Schellenberg, staff counsel suggested that Mr. Schellenberg was prepared to ignore advice he had received from Mr. Lillies "that by having trading authority over the account that the advice only aspect of 18(b) has been exceeded". Mr. Schellenberg appeared to be willing to act despite such advice: "I still must have felt comfortable doing it. Why would I do it then?" Staff counsel asked: "Even though Mr. Lillies told you not to?" "Well Mr. Lillies is not the be all and end all." "Who's Mr. Lillies?…. Is he some kind of authority around here? Back then he was just another guy at the Securities Commission."

Mr. Schellenberg observed the following regarding the lack of assistance provided by Mr. Lillies and both other members of staff at the time:

> "Ok, I'm asking for guidance, I'm asking for help, and all of a sudden, well, you can't do this, you can't do this, you can't do this, you shouldn't do this. Why? Well, because we said so, because we're God."

He also made this point about his attitude toward directions he was receiving from staff, particularly Mr. Lillies: "Just because Mr. Lillies says, thou shalt not do something, well, why? Give me the reasons. That's all I was asking for. The whole 15 years, that's all I was asking. … I'm not the kind of person that would voluntary agree, voluntarily, unless I could show the error of my ways, to file an undertaking just because somebody said so. I mean if they said, well, you know, they said, you may have exceeded the exemption. Well, let's have a ruling on it. Let's see, you know, not just you may have done this."

Mr. Schellenberg's own lawyer had advised him in an email dated February 11, 2003 (Exhibit 103): "(W)hat you are doing includes activity that may be perceived to) constitute that which is above and beyond what one would expect to be solely incidental to the provision of accounting services. As such the activities involving your clients trading accounts would constitute a breach of The Securities Act Manitoba with the attendant consequences."

Mr. Schellenberg suggests that the communications with staff by him or others on his behalf conform with the recognized legal defence of officially induced error. On the subject, staff counsel referred us to *Randy Jorgenson and 913719 Ontario Limited* v. *R*, ([1995] 45 SCR 55 a Supreme Court of Canada decision from 1995 which authoritatively sets forth the criteria required in order to meet the defense of officially induced error. The defence in essence is intended to excuse the conduct of persons who do their best to conform their conduct to the law but are mislead by officials charged with the administration of the law:

> The number of laws under which any person in Canada may incur criminal liability is nothing short of astounding. While knowledge of the law is to be encouraged, it is certainly reasonable for someone to assume he knows the law after consulting a representative of the state acting in a capacity which makes him expert on that particular subject.

In summary, the criteria to be established for the defence of officially induced error are:

1. That the error was in fact one of law or of mixed law and fact;
2. The accused considered the legal consequences of his actions;
3. That the advice obtained came from an appropriate official;
4. That the advice was reasonable in the circumstances;
5. That the advice obtained must have been erroneous;
6. That he relied on the official advice.

As we have said, the underlying evidence on this subject would essentially be the conversations and correspondence between Mr. Schellenberg and Messrs. Lillies and Martin on the subject of Powers of Attorney. It is to be noted here of course that Mr. Schellenberg to this date doubts that Mr. Lillies advice to him carried much if any authority and, in our view, he is unable to establish that he followed the advice given to him in proceeding as he did. Staff counsel suggests that he acted despite advice given to him by Mr. Lillies not because of it.

Another difficulty with the evidence underlying Mr. Schellenberg's reliance on officially induced error, as half-hearted as his reliance appears to be, is the conversation he suggests he had with Mr. Bruce Gingell, formerly a senior Manitoba Securities Commission representative, who has since passed away. Mr. Schellenberg has made reference to conversations from well before 2001 in which Mr. Gingell apparently told him that Mr. Schellenberg could rely on the accountant's exemption if his activities were incidental to Mr. Schellenberg's accountancy practice. Again, the frailty of the evidence of such conversations is clear.

Such evidence is of little use to us and of course the advice which Mr. Schellenberg says he received from Mr. Gingell flies in the face of advice he received from his own legal counsel, Mr. Kormylo, whose advice, given his experience in securities law, should in our view to have been taken by Mr. Schellenberg as persuasive even if not of an "official" nature. Mr. Kormylo, in the aforementioned email to Mr. Schellenberg in early 2003 said "It seems to me, based upon our initial meeting, that what you are doing includes activity that may be perceived to constitute that which is above and beyond what one would expect to be solely incidental to the provision of accounting services. As such, the activities involving your clients' trading accounts could

constitute a breach of The Securities Act (Manitoba) with the attendant consequences. … While an extensive examination of the circumstances surround (sic) the nature of the services you perform for each client and how you perform those services may result in my concluding that what you are doing is not a breach of The Securities Act, we would have to convince MSC staff and possibly the MSC itself of that. … The question is how important it is for you to continue to do what you are doing."

This to us is clearly not a case of officially induced error. We cannot find that Mr. Schellenberg either obtained or relied upon advice from a person in authority such that he could be justified in trading and advising activity on behalf of his clients.

Negative assurance

Mr. Schellenberg then introduced a principle which he says owes its source to audit reports or review engagements. The phrase he used was "negative assurance". We have observed from the evidence that, at least from Mr. Schellenberg's perspective, Commission staff were aware of what he was doing, and the exemptions he was claiming to be protected by, at around the time, and probably before, the time material to these proceedings beginning in 2001. We have reviewed some of the correspondence in which staff and Mr. Schellenberg engaged. Once that correspondence waned and Mr. Schellenberg's request for meetings were rebuffed, staff apparently ceased to have any blatant interest in what Mr. Schellenberg was doing. He says, therefore: "So by them doing nothing, by The Manitoba Securities Commission doing nothing, they gave me a negative assurance."

Indeed, Doug Brown stated clearly in testimony that Mr. Schellenberg's alleged advising and trading activity was under investigation by staff in early 2003. The investigation was sufficiently intensive that it seemed to rule out meetings among Mr. Schellenberg, his representatives and staff. No formal allegations arose from that investigation. Nor did any allegations arise from correspondence among Messrs. Lillies, Martin, Kormylo and Schellenberg dating from 2001. It wasn't until Sylvan Castonguay approached staff with a gatekeeper alert as to a large trading volume in the Deleurme and Williams accounts that the present allegations were acted upon and those allegations involve parties that would certainly have been subjects of the investigation in 2003. Was the absence of formal proceedings a signal to Mr. Schellenberg that his conduct was not in violation of the Act? This is part of the factual backdrop to which Mr. Schellenberg refers as negative assurance.
While staff counsel suggests that no such legal principle exists, he did refer to the panel the 2013 Supreme Court of Canada case of *La Souveraine, Compagnie d'assurance générale* v. *Autorité des marches financiers* (AMF) ([2013 3 SCR 756) (*"La Souveraine"*). This case dealt with a complaint to AMF that an insurance broker had sold some insurance products in Quebec while not authorized to do so. The broker was convicted despite his defense that, for various reasons, he was unaware that a license was required. In the case head note, it was stated that "the objective of public protection … militated strongly against accepting a general defense of reasonable mistake of law." In the body of the case, the Court held that (at paragraph 78): "The regulator at issue in the instant case, the AMF, is not required by law to reply to those to whom the law applies or to inform them about their rights and obligations. As a result, it was not reasonable in this case for the appellant to view the AMF's silence as a confirmation of its interpretation of that law."

The *La Souverain*e case deals essentially with the defense of due diligence, in other words a defense that the accused took reasonable steps to avoid breaking the law. There's a passage in this case which is noteworthy in the sense that the "attitude" of AMF was commented upon by one of the Supreme Court Justices who had the following to say: (at para. 78)"… the AMF's attitude is of concern. Nevertheless, although it's attitude does not reflect the greater transparency a regulator is normally expected to show, and as unfortunate as that might be, that attitude cannot be equated with improper conduct or bad faith on its part. Furthermore, even if the AMF's conduct were so vexatious as to justify accepting a new exception to the rule with respect ignorance of the law, which I cannot find to be the case here, I am of the opinion that the steps taken by the appellant to avoid breaking the law do not meet the requirements for the due diligence defense."

This suggests that a finding of fact on this panel's part that staff's attitude and conduct were extremely vexatious, the door might be open for the creation of a "new exception to the rule". In the present circumstances, we would be reluctant to find that staff acted in bad faith. To do so, would require us to find, in our opinion, that staff's conduct in its investigation and ultimately in its prosecution of its case was of an intolerably egregious nature. We have already declined to do so in response to Mr. Schellenberg's preliminary motion.
Staff counsel also referred us to the case of *R. v Barrett et al,* (2009 CarswellNfld 376) ("*Barrett*") a Newfoundland Provincial Judge's Court case from 2009. In that case, the Judge observed that "it is a fundamental principle of Canadian criminal law that ignorance of the law is not accepted as a means to erase or mitigate criminal liability. That principle … is not confined to the criminal law proper but applies equally to regulatory offences." The Judge further quoted *R v. Shiner,* (2007 CarswellNfld 101) a Newfoundland Court of Appeal case: "The failure of a regulatory body to enforce a regulation cannot constitute a representation as to the legality of the conduct in issue. To hold otherwise would compel regulatory bodies to prosecute minor violations or risk the defense of officially induced error being successfully raised when serious violations are prosecuted."

Another case cited with approval in *Barrett* was the *Alexander* case (*R v. Alexander,* (1999 CarswellNfld 19) ("*Alexander*") a 1999 Newfoundland Court of Appeal case) in which the Newfoundland Court of Appeal stated: "If the legislation, properly interpreted, applies to the facts of the case, then it must be applied unless it can be said that by proceeding against the appellant, the Crown is abusing the process of the Court. There is no indication of that here.

Staff counsel referred us to our own preliminary decision in response to Mr. Schellenberg's abuse of process motion to state that the "door was closed on abuse". Mr. Schellenberg may or may not have believed that he was acting properly by advising ("mentoring") his clients without being registered to do so for many reasons including the benefit of Powers of Attorney or the accountant's exemption. It is clear to us that he had no reason to believe that and it is our view that he was cognizant from 2001 on that he might eventually receive an adverse ruling on the issue of his investment activities with and on behalf of his clients. He states in his argument "Well let's have a ruling on it. Let's see, you know, not just you may have done this."

The result for Mr. Schellenberg may be similar to the outcome of his testing the retail sales tax exemption for consulting services. He made his consulting bills to clients higher than the bill for taxations services with the result of less PST being payable. However, he says “at some point in time I woke up and decided I was offside and I went back five years and I made a voluntary payment.” There is nothing unusual and nothing “sinister”, as Mr. Schellenberg expresses it, for an individual in Mr. Schellenberg’s profession to test the limits of regulatory frameworks. In tax law, there is a clear distinction between tax avoidance and tax evasion and sometimes the gray area must be ruled upon by judicial authorities. The same can be said about the obvious gray areas within securities regulation. Sometimes the difference between onside and offside is not clear and admittedly sometimes directions in the form of interpretations by staff can be misleading. Even so, the individual who tests those waters and is found to be in violation of securities law or simply acting against the public interest must be prepared to accept the consequences of doing so.

Advising and the business purpose

Having analyzed the *Doulis* and *Costello* cases, along with the cases referred to by the panel in *Doulis* and the Court in *Costello*, staff counsel then took us through the evidence and how it applies to the advising and business trigger tests set forth in the cases and securities law in Manitoba.

First, there of course is no dispute that Mr. Schellenberg has never been registered to act as an adviser of any kind under securities legislation.

Staff counsel then took the panel through the Statement of Allegations as amended and submitted that evidence supports each and every one of the allegations contained therein.

In any event, staff counsel submits that the advising test as broad as case law suggests it can be, has been met in connection with all of the clients named in the Statement of Allegations. Going onto the business purpose test, again according to the Donas case, the business purpose threshold is low. Staff counsel referred the panel to four general areas within the business trigger requirement:

1. solicitation of investors;
2. fee arrangements/remuneration;
3. repetitive nature of the giving of advice;
4. acting as a registrant.

As to the soliciting of investment business, staff counsel directed us to evidence that in all cases, aside from Ms. Loeppky, “it was Mr. Schellenberg’s idea that he manage their investments, and that came up during conversations, whether it was in review of their previous holdings, troubles with previous advisers or just meeting with him as a result of seeing him as an accountant.”

The matter of fee arrangements and remuneration is of course a significant factor. All of the clients, again with the exception of Ms. Loeppky, testified as to a verbal fee arrangement based on a percentage of profit. Again, we have dealt previously in these Reasons with accounts rendered by Mr. Schellenberg and paid by his clients Staff counsel submits that the acts of providing advice were not isolated citing:

1. The number of clients. We are mindful in this regard that Garnet and Beverly Williams would be considered one account as would Richard and Aurele Deleurme and Marie-Anne Loeppky. In other words we are dealing with eight individuals but five accounts.

2. The number of years during which investing or advising activities took place. This generally ranged from 2001 to 2012 when the Williams' account was closed.

3. The switching of accounts at Mr. Schellenberg's direction. With the exception of Ms. Warkentin-Geras and Mr. Konzelman all clients had accounts at more than one place.

4. The volume of activity as noted in Mr. Terlinski's evidence.

The last factor in the business purpose discussion is whether or not Mr. Schellenberg acted like a registrant. Staff's submission is that the totality of evidence shows that Mr. Schellenberg throughout the material time acted as a registrant and that he solicited investors, opened accounts with or for them, arranged for the transfer of money into those accounts, arranged for fees and made trading decisions.

These are precisely the activities and duties a registrant would perform, with one notable exception. There appears to be no Know Your Client (KYC) analysis to determine the risk tolerance and return expectations of each client to determine investment suitability. Part of the KYC process is ongoing monitoring of clients and their investments to ensure continued suitability. This function was not completed, most notably in the case of Ms Warkentin-Geras.

Trading

Following submissions on advising, staff counsel presented a similar analysis of the allegation that Mr. Schellenberg traded in securities without registration.

Counsel submits, that by virtue of the definition set forth in the *Khan* case, Mr. Schellenberg "solicited, directly or indirectly, clients. He assisted in accounts, clients in opening accounts. He entered arrangements where he would place trades for buys and sells and decide what securities to be bought, for the trading he would place the buys and sells, and again, he would decide what securities to buy. He did place the buys and sells in the accounts or at least assisted at minimum assisted the clients in doing so."

Public interest.

Staff counsel argues that the allegation that Mr. Schellenberg acted contrary to the public interest is an area of misconduct which can be established without the necessity of proving technical breaches of the legislation and other regulations regarding advising and trading in securities. Counsel cited the *CTC Dealer Holdings Ltd.* v. *Ontario Securities Commission* case (1987 CarswellOnt 1733) in support of his contention. This is an Ontario Divisional Court Decision which confirmed, based on a review of relevant case law, that a specific breach of legislation or a policy

statement does not have to be shown before the public interest wording of the Act can be invoked. That appears to be settled law.

He also made comments regarding the unsuitability of many of the investments he chose on behalf of some of his clients and pointed out that this panel may make a finding on suitability and that such finding would be determinative as to whether or not we should find that Mr. Schellenberg acted in the public interest. He took us through various scenarios in which Mr. Schellenberg is alleged to have involved his clients with unsuitable investments. Staff counsel submits that Mr. Konzelman summed up that situation best by stating:

> "well … I don't think that Mr. Schellenberg acted in a malicious manner, I think he was careless in getting me involved in investments that were over my head, that I wasn't advised of that type of risk, that was so short fused it required action on the same. That was quite distressing when that occurred … he was negligent in informing me or assessing my risk tolerance …"

Mr. Schellenberg did, at certain points in his testimony, suggest that the issue of suitability ought to have been left for the gatekeepers, they being the discount brokers to which his clients had been referred, for example Trade Freedom.

The unsuitability of some of the investments as well as the failure on Mr. Schellenberg's behalf to assist certain of his clients in monitoring and understanding those investments goes a long way, according to staff counsel, toward allowing us to rule that certain remedial powers contained in the Act would be in the public interest if applied against Mr. Schellenberg.

Analysis and conclusions

Mr. Schellenberg's argument largely focused on the theme of "mentoring" or "educating" as opposed to advising throughout his dealings with most of the clients/complainants.

He started his argument with the following:

> "I'm to going to start off with a quote, and I hope this – I believe it applies to me. It says – and it was done by a lawyer, said by a lawyer. You may recognize this quote, I don't know. "The best way to find yourself is to lose yourself in the service of others". And that's the way I try to live my life. Now who said that? It was a lawyer named Mahatma Gandhi."

He gave us some examples of his services. With respect to Bernadette Warkentin-Geras: "I did spend a lot of time with her previous years giving her general advice how the market worked." But he went on to say: "No obligation to her whatsoever, as far as I'm concerned." Questioned by the panel as to whether he left Ms. Warkentin-Geras in the lurch: "I didn't abandon her, you know. I didn't."

As we have indicated, and for reasons we have discussed, we do not consider that the various defences raised by Mr. Schellenberg such as officially induced error and "negative assurance provide answers to the allegations raised by staff. The same would apply to Powers of Attorney and the accountants' exemption."Although Mr.

Schellenberg has not admitted to making trades on behalf of all his clients, or all complainants, he has conceded that he has traded for clients on occasion. He freely admits to advising his clients on their investments, preferring the use of “mentoring” or “educating” to advising. What was his motivation for doing so, particularly with Commission staff raising their concerns? Mr. Schellenberg understandably denies that his motivation was one of financial gain. There is of course evidence as we have indicated that Statements of Account were issued to clients for various forms of investment activities but it is plain to us that this small number of billings and the relatively small amounts involved represented a very small part of Mr. Schellenberg’s business practices including his accountancy practice, farming and other businesses not to mention his own trading activities.

Similarly we are of the view that Mr. Schellenberg did little to promote himself as an investment adviser or trader. His trips to the rural areas of Manitoba where most of the complainants would be found were not for the purpose of promoting his investment skills. Mr. Schellenberg simply presents as a hardworking accountant with an affinity for serving rural clients based in large part on his own background and interests.

He obviously takes pride in his own experience and skills as a trader in sophisticated products and is proud of his willingness to pass along his knowledge to clients in his accountant’s practice. His willingness to do so is fuelled by an obvious distain for a number of institutions in the world of securities. This would include many registrants, notably including mutual fund dealers and registrants associated with banks as well as the regulators themselves. We are prepared to find as a fact that Mr. Schellenberg did hold himself out to certain of his clients as having superior skills and perhaps a higher standard of care than the advisers/registrants with whom his clients had been dealing. As indicated, he professes a high standard of care for his clients and in many ways he succeeds in maintaining those standards in his accounting practice. This is made clear by the size of Mr. Schellenberg’s practice and the fact that he has sustained it for so long. Perhaps it was the very fact that Mr. Schellenberg had such a busy professional practice during the material time that he failed in our opinion to maintain those standards when it came to those of his “investment clients” who were ignorant of how to proceed through varying tax regimes and economic downturns with the investments in which they had been placed.

As we have previously stated, the underlying purposes of securities legislation are protection for investors and integrity of capital markets. The broad definition of “advisor” suggested in the cases awe have cited is founded on those purposes.

We do recognize that, by “mentoring” his clients in the matters of investment strategies and methods of making savings grow he did not do so primarily for financial gain. However, in our opinion, the business purpose or business trigger tests were not intended to be used as shields by persons in Mr. Schellenberg’s position. The facts are that he did charge some of his clients fees and that, while he apparently did not set out to create a side business in investment counseling, he did promote himself, or his skills, to some of his clients.

We offer some examples of statements made by Mr. Schellenberg which imply that he advised his clients as if he were a registrant.

Regarding the Williams, he said “my role was as an advisor and that’s it”. He conceded that he spent time with Mr. Williams “instructing him, educating him”. Those services might not, in and of themselves, require registration but he undeniably chose investments for Mr. and Mrs. Williams as he did for the other clients named in these proceedings.

Among some of the confusing evidence regarding Mr. Ilchyna, Mr. Schellenberg acknowledged having acted as his investment advisor. He named himself as “advisor” in one of the Deleurme accounts. He has mentioned in passing “other clients” with investments in energy trusts leaving us to wonder whether he was managing more portfolios than the ones described to us.

There is, in other words, ample evidence, including credible testimony from staff’s witnesses and admissions on Mr. Schellenberg’s part, that he advised his clients on many occasions on investment matters which we find encroach into activities for which registration with the Commission is required.

We have mentioned, without a great deal of discussion, the question of whether Mr. Schellenberg’s clients, having been placed in investment positions by Mr. Schellenberg with no effective follow-up on his part, have a duty to mitigate their losses by taking a more active interest in their accounts. Where there has been a breach within a contractual relationship, the aggrieved party normally has an obligation to mitigate the damages caused by the breach. However, once someone in Mr. Schellenberg’s position has crossed the threshold into conducting registerable activities the relationship with the client is no longer one merely of contract but one governed by the legal obligations a registrant owes to his client supported by industry rules and statute. The client does not operate from an equal position.

This is a subject which will have to be examined further detail as this matter proceeds to the penalty phase but we were unimpressed with Mr. Schellenberg’s professing to have no duty to clients for whom he opened accounts and selected investments.

A case in point is the situation of Ms. Warkentin-Geras. On the advice of Mr. Schellenberg she was put into investments of which she had no understanding and which she watched, apparently helplessly, as they declined in value when a knowledgeable intervention by Mr. Schellenberg could have prevented the loss. She had been put into what Mr. Schellenberg referred to as energy trusts. These are income trusts. She became concerned when she received her statement for December 31st, 2006 (Exhibit 20, Tab 16) that showed the account had dropped from over $90,000.00 to approximately $66,000.00 in a period of a few months and she called Mr. Schellenberg. She testified that Schellenberg advised that due to a margin call he had given instructions for some of her investments to be sold to cover it. He told her the account would again rise in value. This would have been in early 2007. Later as the evidence shows, she contacted him by email again seeking advice on her dwindling account.

The Government of Canada announced changes to the tax treatment of income trusts in late 2006 that Mr. Schellenberg acknowledged in testimony would have, in his opinion, a negative effect on their value. He testified that he called some of his

clients to advise them of this. There is no evidence that he warned Ms. Warkentin-Geras even though, if her evidence is accepted, and it is, he took some steps in connection with her account in late 2006. After that the value of these investments steadily declined.

Mr. Schellenberg strenuously argued that after June, 2006 he had no further duty to her because she apparently indicated she was unwilling to pay his fees. Although he felt that it was quite acceptable to put her into investments that were over her head and that needed oversight and simply leave her to her own devices, she believed that he still had a connection to her investments and sought his counsel by telephone in early 2007 and subsequently by email. Clearly she could have been more assertive but the panel observed that she is not an assertive person. Having got her into the situation we do not agree that it was reasonable for Mr. Schellenberg to have abandoned her in 2006.

Our findings of liability regarding Mr. Schellenberg focus on the second of the three allegations expressed in the Statement of Allegations (as amended), namely that he "acted as a securities advisor, investment counsel and/or adviser under the Act without being registered". Securities law requires registration by advisers, as we have stated, for reasons including the protection of the investing public. There were ample facts presented to us which fully justify that rationale. The essential duties owing by a registrant to investment clients are key components of a registrant's training whether in the areas of suitability or a continuing duty of care. In our opinion, it is clearly in the public interest that we find Mr. Schellenberg to have conducted himself as only a registrant is lawfully entitled to and to find him in breach of the Act accordingly.

While it is not necessary for the purposes of affixing liability to make a specific finding that Mr. Schellenberg also "traded in securities without having been registered" we find that the evidence also supports such a finding.

This matter will now proceed to the penalty phase.

"J.W. Hedley"
J.W. Hedley
Chair

"D.G. Murray"
D.G. Murray
Member

"S.C. Rolland"
S.C. Rolland
Member