2005 LSBC 16
Report issued: September 7, 2005
Citation issued: September 9, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

David John Martin

Respondent

Decision of the Hearing Panel
on Facts and Verdict

Hearing date: April 18 - 22, 2005

Panel: Ross D. Tunnicliffe, Chair, Patricia L. Schmit, QC, Bruce A. LeRose

Counsel for the Law Society: William S. Barardino, QC and Pamely Cyr
Counsel for the Respondent: Josiah Wood, QC

Background

[1] On September 9, 2004 a citation was issued to the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society, pursuant to the direction of the Chair of the Discipline Committee. That citation was amended on March 3, 2004, authorizing the Panel to inquire into the following conduct:

> " That you approved and submitted fraudulent or inflated accounts (the " Accounts") of your client's children to the Reviewer for the months of February and March, 2002 as part of a disbursement to your own Accounts and thereby submitting and representing the Accounts to the Reviewer as valid and proper for the purposes of obtaining public funding for the payment of the Accounts when you either knew that the Accounts were not valid and proper or you were reckless and careless or wilfully blind as to whether the accounts were valid and proper or you were grossly negligent or negligent in aggravated circumstances in approving the Accounts as being valid and proper in the circumstances where you had made an agreement or given assurances to your client in relation to providing employment to members of the client's family which would create a substantial monthly income flow to your client's family and in circumstances which required an inquiry and investigation by you into the validity and propriety of the Accounts."

[2] The citation came before this Panel and was heard from April 18 to 22, 2005.

[3] At the commencement of this hearing, the Respondent admitted that the requirements of Law Society Rule 4-15 regarding issuance and service of the Citation had been met.

[4] The Citation as amended was entered as Exhibit #1.

[5] The matters set out in the Citation were the subject of an Agreed Statement of Facts (" ASOF") submitted by both counsel, and where appropriate in these reasons, we will describe the circumstances that were the subject of that Agreement. The ASOF was filed as Exhibit #2. It is attached to these reasons as Schedule A.

[6] Counsel for the Law Society filed a Book of Documents which was marked as Exhibit #3. Materials from that Exhibit will be referred to throughout this decision by reference to the Exhibit number and the tab number where the particular document occurs.

[7] At the outset of the Hearing, Counsel for the Law Society acknowledged that there was no evidence that the Respondent knew, before their submission, that his client Reyat's children's accounts were fraudulent. Rather, the Law Society submitted that the crux of the Citation centred on whether the Respondent was reckless and careless or wilfully blind as to whether the accounts were valid and proper, or

that he was grossly negligent or negligent in aggravated circumstances in approving the accounts as being valid and proper in the circumstances made out.

Facts

[8] Counsel for both the Law Society and the Respondent filed extensive documents. Those which the Panel found useful will be referred to in these Reasons.

[9] The Panel has deduced the following relevant facts from the ASOF and the viva voce evidence of the witnesses called by the Law Society and by the Respondent and from the evidence given by the Respondent.

[10] The Respondent was called to the Bar of Ontario in 1979 and practised in Ontario for a time. He was called to the Bar of British Columbia on September 26, 1986 and has practised continuously in BC since that time. He is an experienced and eminent criminal law lawyer.

[11] On June 23, 1985 two bombs exploded. The first bomb killed 2 baggage handlers at the Narita, Japan, airport (" the Narita case").

[12] The second bomb exploded aboard Air India Flight 182 and all aboard, being 329 human beings, were lost. This came to be known as the " Air India bombing case" .

[13] In relation to the Narita case, Inderjit Singh Reyat (" Reyat") was charged in Canada with various criminal offences. He was convicted of manslaughter on May 10, 1991 and at the time of these events, was in custody in relation to that conviction.

[14] On June 4, 2001, Reyat was charged with various criminal offences in relation to the Air India bombing case. He needed legal counsel. He initially retained a lawyer, Kuldip Chaggar (" Chaggar"). Chaggar approached the Respondent about acting for Reyat.

[15] The court proceedings resulting from the Air India case were unprecedented in Canadian legal history for many things, including length of investigation, complexity, and the amount of public legal resources consumed.

[16] The Air India case was also unprecedented in other ways. The cost of defending the accused was astronomical. Reyat, who was in custody on the Narita case conviction, could certainly not bear that cost without substantial assistance from the Province of British Columbia. In a novel move, the BC Provincial Government agreed to provide funding for Reyat's defence. There was no precedent for such funding in the Province.

[17] To implement the defence of Reyat, the government entered into an arrangement with counsel to pay them to provide full answer and defence on behalf of the accused. This arrangement was implemented through various agreements and contracts which will be discussed later in these reasons.

[18] Before deciding to take on the case, the Respondent discussed with various friends and colleagues, who testified on his behalf, whether he should take on such a mammoth case. It was clear to all concerned, and it certainly was clear to the Panel that to assume the defence in such a case would involve a huge commitment of time and resources by the lawyer. Craig Sturrock, a friend and legal colleague testified that he counselled the Respondent not to take the case on. He described it as a quagmire.

[19] Some time in the summer of 2001 the Respondent decided to take on Reyat's case. He testified that he felt that somebody had to do it and that he had a duty to take the case. (Transcript, Martin, Evidence in Chief, pg 10, line 17 - 18).

[20] He and another senior criminal law lawyer, David Butcher, gathered a team of 10 senior lawyers and numerous junior lawyers, to form a group, known as " the Reyat Defence Team" . The team included Peter Wilson from Vancouver, (" Wilson") Todd Ducharme from Ontario, (" Ducharme) and numerous other eminent criminal law defence lawyers. The general plan was that the work would be divided up among the Reyat Defence Team with the Respondent heading up and concentrating on the pre-trial motions, and Butcher heading up and concentrating on trial preparation. The Respondent was responsible for managing the administrative issues, not an easy task. These issues involved setting up an office, hiring and supervising support staff, who could manage the huge amount of disclosure and carry out the lawyers' instructions, managing investigations to develop evidence for the defence and substantiate or discredit

Crown allegations, and managing Reyat, who was, the Panel finds, a challenging client. The Respondent's duties also involved preparing and reviewing with the Reviewer, detailed accounts to be submitted to the government, to justify the billings.

[21] The Panel finds that Respondent did not reduce his work load in order to devote himself to the Reyat case. Rather, his evidence and his time sheets filed as Exhibit 5 show that he continued to maintain a crippling work load. He took on cases for clients whose needs took him out of the country on several occasions at critical times when, this Panel finds, prudence dictated that he should stay and deal with developing issues in the Reyat case, including administrative issues.

[22] Turning back to the funding of the Reyat Defence, as befits this extraordinary case, funding for the defence of the accused in the Air India case, including that of Reyat, was organized in a novel manner. A funding agreement (" Funding Agreement") was entered into between the Government of British Columbia and the various defence teams for the various accused persons. In Reyat's case, the Respondent and David Butcher formed a company to conduct the defence. That company was called DISR Management Corporation, an acronym for " the Defence of Inderjit Singh Reyat. (" DISR") which became a party to the funding agreement with the government. Butcher and the Respondent were the shareholders and Directors of DISR, as well as authorized signatories on the accounts. Butcher never exercised his signing authority.

[23] The Respondent was lead counsel and administrator of DISR throughout the material time.

[24] The Funding Agreement was designed to provide a mechanism in order to maintain confidentiality, in effect, a firewall between Reyat and the government funder, while ensuring that the money paid for the defence was spent in a responsible and accountable way.

[25] The mechanism mandated by the Funding Agreement was to hire an independent reviewer who would review all billings and disbursements submitted by DISR and ensure that they were reasonable and necessary and in accordance with the Defence Counsel Agreement.

[26] In the Funding Agreement, the Government agreed to fund a specified team of lawyers at specified rates per hour for the lawyers, and several senior and junior researchers. Detailed time records were to be kept. In addition, the Government agreed to pay for the purchase or lease of computer hardware, software, and office furniture. It agreed to pay for investigators, interpreters and translators who were to be approved by the Reviewer. As it turned out, the Reyat children were paid in a manner similar to that of the lawyers, i.e. on an hourly rate. The Government agreed to pay the usual disbursements, such as photocopying, car rental, hotels, travel etc.

[27] It is notable that office staff such as secretaries and legal assistants are not mentioned in the funding agreement and were therefore, treated as office overhead subsumed within the rate of the lawyer.

[28] The only persons paid on an hourly rate other than the lawyers, were the Reyat children.

[29] In order to maintain confidentiality and distance between the Government and the Accused, a mechanism was established whereby a reviewer reviewed the accounts of DISR before payment was approved and forwarded to the Government for payment. This mechanism was set up through a Review Agreement in order to " ensure that amounts paid to [DISR] on behalf of the Defence Lawyers and Assistants are a reasonable and accountable use of public funds ...." . (Exhibit 3, Tab 2, pg 13)

[30] The process envisioned that DISR would prepare its accounts for fees and disbursements each month, and submit them to the Reviewer in a binder. The Reviewer would consider the accounts and if acceptable, he would certify the account for payment, sign a Review Certificate, redact the accounts to a version that would ensure confidentiality and privilege were maintained for the client Reyat, and submit the redacted account to the government for payment.

[31] This process was followed throughout the material time.

[32] Throughout the material time, it was the Respondent who instructed staff, either his own or that of DISR, to prepare the monthly account, and gather and prepare the supporting documents in the accounts binders.

[33] The Respondent was the only lawyer who reviewed all the lawyers' accounts, the children's accounts and presumably the disbursements, and it was the Respondent, sometimes accompanied by Butcher, who attended before the Reviewer to review them. The Reviewer hired by the Government was

Rick Sugden (" Sugden").

[34] In the management of the Reyat case, a significant issue for the defence was maintaining confidentiality. The Respondent as well as one of his witnesses, Richard Peck (" Peck") who was lead counsel on the legal team representing another accused in the Air India case, Ajab Singh Bagri, (" Bagri") described that a real concern for counsel defending the various accused persons, was the loyalty and discretion of those hired to work on the files. There was concern that persons adverse in interest to the accused might infiltrate the defence team. To attempt to resolve this problem, both Peck in relation to Bagri and the Respondent in relation to Reyat chose to hire family members.

[35] The Panel heard evidence that the Government, or at least the Reviewer, Mr. Sugden, was aware of the problem counsel had identified regarding confidentiality and did not take issue with the solution of employing family members.

[36] Mr. Peck testified that the family member he hired had computer skills and was largely responsible for setting up the document management and tracking system for the Bagri defence.

[37] Following Peck's example, on September 7, 2001, DISR hired Reyat's son, Didar Reyat (" Didar") then 26 years of age, who had some computer skills, on an oral contract as an uncertified translator, interpreter and document manager. On November 7, 2001 DISR hired Reyat's daughter, Prit Reyat (" Prit") then an 18 year old high school student, on an oral contract to assist Didar with document management. They were hired as translators and interpreters, and office assistants. The jobs of translator and interpreter were authorized to be paid for hours worked as disbursements under the Funding Agreement. The last duty, that of document manager, was not authorized to be paid in this way.

[38] Much of the work done by Didar and Prit involved date stamping and numbering the copious documents produced by the Crown. This was described in the ASOF as " menial work" and therefore, impliedly justifying a lower hourly rate of pay.

[39] Didar's account for September, 2001 work recorded his hourly rate at $20.00.

[40] While the Panel was not told this specifically, it concludes that this account was not submitted to the Reviewer. Rather a substitute " corrected" account was apparently submitted.

[41] A problem with Didar's accounts arose early on. In or about October, 2001, Didar submitted his October account recording an hourly rate of $35.00. The Respondent brought this to Reyat's attention, advised him that $35/hr. was excessive and that Didar's continued employment was premised on his work being justifiable. (ASOF para. 43). The Respondent testified that he informed Reyat and Didar in no uncertain terms that the account was not appropriate. (Transcript, Martin, Evidence in Chief, pg 2, line 25 to pg 3, line 1-4)

[42] Didar's name does not appear on the October, 2001 account, or any subsequent accounts. (Exhibit 3 at Tab 6). Rather the payee is listed as " DSR Translating and Data Management" or at other times " DSR Translating and Document Management" and the address is that of Chaggar's law office. The only evidence that this hourly account is being tendered by Didar is his initials.

[43] In October, 2001, Butcher and the Respondent negotiated a rate increase with the Government for Didar to $25/hr.

[44] The rate of $25/hr was consistent with that paid to family members hired by the Peck legal team.

[45] Prit's accounts for hours worked from November 2001 through January, 2002 were billed at $20/hr. Her account for her February 2002 hours bill her time at $25/hr. Her name does not appear on any of her accounts. Rather, only her initials appear, and the payee is said to be " PR Translating and Data Management" and sometimes " PR Translating" .

[46] The Respondent testified his recollection was that Prit's rate was to be $25/hr from the outset of her employment. He had no recollection of, and therefore no explanation for, an increase in Prit's salary from $20/hr to $25/hr in her account for February 2002 hours.

[47] Didar later told Gilbert MacKinnon, (on April 19, 2002) who was the lawyer hired by DISR in mid February, 2002 to work out of and watch over the DISR office, that he didn't recall how it came about that the rate was increased.

[48] During the fall and early winter of 2001, the clerical work load involved in the defence of Reyat was

prodigious. The Reyat defence was starting approximately 11 months behind the other two accused in the Air India case, but was being forced to catch up. This was because Reyat was joined as an Accused, in the same indictment as Bagri and Malik. This resulted in the Reyat defence team being inundated with crown disclosure that the other defence teams had already digested, while being forced to deal with the pace of the court appearances, and applications along with the other Accused. In addition, the Reyat defence had numerous additional issues to deal with, unique to Reyat's facts and history in the entire Air India/Narita litigation.

[49] From the beginning, the Reyat team, particularly the Respondent, was working on an application to sever Reyat from the Indictment with Bagri and Malik. As it turned out, this was unsuccessful.

[50] The pace of work on management of the crown disclosure materials covered a 16 year period, and required competent and dedicated support staff.

[51] By November, the Respondent identified the need to hire more staff for the DISR office to deal with the documentary evidence. On November 14, 2001, he wrote to the government requesting approval to fund a professional document manager. Part of the job description was to supervise and assist the work that Didar and Prit were doing. This request was denied. The consequence of the denial was that during November, and December, 2001, Prit and Didar were working on their own, at the DISR office. Other requests of the government, made during December and January were also denied. This left the lawyers to hire staff at their own cost that would become part of the DISR overhead, cutting into the profit margin. (Transcript, Martin, Evidence in Chief, pg 8, line 5 - 19) This refusal by the government exacerbated a brewing crisis in DISR office administration. The office was understaffed, and proper supervision was not in place.

[52] The Panel concludes from the evidence that the DISR staff consisted of one legal assistant/secretary, terminated in November, 2001, and then Jennifer Seifert (" Seifert") in January, 2002 and a second secretary hired later, and Didar commencing September, 2001 and Prit commencing November, 2001.

[53] In the fall of 2001, DISR leased approximately 3,500 square feet of space across the hall from the office where the Respondent carried on his regular place of practice.

[54] The Respondent's own office staff consisted of his long time legal assistant and an accountant.

[55] The Panel concludes that the DISR office was understaffed with support staff. One secretary hired in the fall of 2001 was terminated in November 2001, and another, Seifert, who was hired to replace her, did not start employment until January, 2002.

[56] On December 3, 2001, Chaggar, the lawyer who had first approached the Respondent about taking on the case, presented his account for November 2001 for 256.8 hours. This account exceeded by 56.8 hours the 200 hours permitted to be charged in any given month by any given lawyer. The Respondent refused to take the account to the Reviewer for approval and asked another senior member of the defence team, Peter Wilson (" Wilson") to look into the matter. The results of the investigation were inconclusive. The Reviewer eventually approved Chaggar's November account at a " base billable allowance" of 200 hours.

[57] Chaggar was discharged from the Reyat Defence Team in December or January.

[58] On December 13, 2001 the Respondent testified that he went to the Remand Centre where Reyat was being held, and had a conversation with him. The conversation was concerning Reyat's desire to have DISR hire his wife. The reason Reyat gave for this was that his family needed $15,000.00 per month in family income. The Respondent told Reyat that Mrs. Reyat, who was subject to a compensation order for welfare fraud, could not be employed unless many conditions were met. In any case the Respondent told Reyat, income from Didar and Prit's employment should be sufficient for the family's needs, as it was possible that they could earn up to $10,000.00 per month if they each performed 200 hours of work of value in a month, at the rate of $25/hr. The Respondent told Reyat that it would be excessive and unreasonable for DISR to employ Mrs. Reyat when Didar and Prit were already working there.

[59] The Panel notes that to earn $10,000.00/month each child would have to work more than nine hours/day, five days/week.

[60] In December, 2001 the Respondent asked Butcher (who worked out of his own office at the firm of Singleton Urquhart) to assume responsibility for Didar's and Prit's billings. Butcher declined. (ASOF para.

47)(Transcript, Martin, Evidence in Chief, pg 10, line 2-8) The Panel concludes that by this point, the Respondent knew he needed help with administration. None was arranged until McKinnon joined the team and started working at DISR in March, 2002.

[61] By January 2002, Butcher noticed that while the Reyat children had been very busy with document sorting during the fall of 2001, the amount of work declined. According to Butcher in the ASOF (para. 48) when he pointed this out to the Respondent, the Respondent emphasized the financial difficulties of the Reyat family.

[62] The Respondent testified that he has no recollection of this January, 2002 conversation with Butcher.

[63] In the meantime, the application the Respondent had prepared to sever Reyat from the Indictment with Bagri and Malik was heard, and denied by Mr. Justice Josephson. The pressure to prepare the defence in tandem with the other accused remained.

January 8, 2002 Meeting

[64] As a result of the failure of the severance application, the Defence team met on January 8, 2002. Another senior member, Todd Ducharme (" Ducharme") attended by telephone. Wilson was present. He testified before the Panel about that meeting.

[65] It was a long and acrimonious meeting.

[66] Among the topics, the Respondent brought up his conversation with Reyat concerning Reyat's desire for DISR to employ Mrs. Reyat. Wilson already knew about this. Wilson testified that the Respondent had previously told him about the conversation, before the meeting, and that the Respondent had said to him that " certainly wasn't going to happen, at least not for the time being." (Transcript, Wilson, Evidence in Chief, pg 8, line 11 - 12) Wilson told the Panel that the Respondent also told the members of the team at the meeting that in addition to seeking employment for Mrs. Reyat, Reyat wanted DISR to employ " Larry" a former cell mate of Reyat's, and a friend of Didar's, Anoop Garcha (" Garcha").

[67] In the course of the discussion, Wilson testified that the Respondent raised the subject of Didar and Prit's billings, and advised that Didar had submitted his account for October 2001 hours at a rate of $35/hr. The Respondent said he had questioned Didar, who told him Reyat had instructed him to increase his hourly rate. The Respondent told the team that he had told Didar this was inappropriate and to resubmit his account at the correct rate, i.e. $25/hr which was what was done.

[68] Wilson and Ducharme expressed objection to the idea of hiring Mrs. Reyat, and the Respondent told the group that he had decided against it.

[69] The ASOF sets out at paragraph 54, 55, 56, 57 and 58 further particulars about the meeting:

> *" 54. Ducharme recalls that Martin said he had promised Reyat that he would get the Reyat family $10,000.00 per month.*
>
> *55. Wilson recalls that Martin said that he had spoken to Reyat about the family's financial needs and had been told by Reyat that the family needed $10,000/month to survive. His notes made at the time state that Martin had " apparently promised" or suggested that he told Reyat that he would see to it that the family got $10,000.00/month.*
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> *56. Martin's recollection of the January 8, 2002 Meeting is that he told the other counsel present that when he discussed with Reyat the proposal from Reyat that his wife be employed, he (Martin) had asked Reyat what his family's needs were. It is in this context that Martin says that he explained to the others that he had been told by Reyat that his family needed $10,000 per month to survive. According to Martin, he told the others that he indicated to Reyat that the employment of Didar and Prit should be sufficient to satisfy the needs of the family (i.e. if each of Didar and Prit legitimately worked and billed 200 hours per month at $25.00 per hour they could collectively earn up to $10,000 per month).*
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> *57. In response to Martin's comments, as perceived by Ducharme and Wilson set*

out above in paragraphs 54 and 55 respectively, they each made the following comments:

> *(a) Ducharme immediately reacted by saying very adamantly " that sounds like a shakedown" . According to Ducharme, Martin then began to defend the arrangement outlining the hardships that the Reyat family had endured since Reyat's first conviction. Ducharme then said that Reyat was in no different position than any other client charged with murder and words to the effect of " Getting charged with murder doesn't mean that you are entitled to a guaranteed annual income." Ducharme also stated emphatically that " You don't pay your client for the privilege of representing him" .*
>
> *(b) Wilson said it was beginning to look as though Reyat saw the government funding of his case as a way to spread largesse around, not only to his family, but to others he favoured such as Larry and Anoop Garcha. In Wilson's view it had the appearance of Reyat showering emoluments on the people he favoured.*

58. At the end of the January 8, 2002 Meeting, Martin turned to Butcher, who had said nothing, and asked, " how did we go so wrong?" This comment from Martin is the only thing that Butcher recalls about the January 8, 2002 Meeting. Butcher says that there were any number of management meetings with various issues discussed and he has no specific recollection of the January 8, 2002 Meeting other than recalling being asked this question. Butcher, who described the tone of Martin's comment as highly sarcastic, perceived this statement as criticism of Wilson and Ducharme not understanding the structure that had been set up with respect to the employment of Didar and Prit. According to Martin, he made this comment in response to the apparent criticism of employing any member of the Reyat family. To Martin, this comment was self-questioning as to whether the decision that he and Butcher had made to hire Didar and Prit was made without sufficient consultation with other counsel, such that the decision was now being revisited and creating discord."

[70] Wilson was cross examined by the Respondent's counsel at the hearing regarding whether, on the basis of the notes he made at the time of the January 8, 2002 meeting, the reference to those notes in paragraph 55 was accurate and whether paragraph 55 of the ASOF reflected the notes he made at the time. Wilson confirmed that the paragraph did reflect his notes and his understanding of what had happened.

[71] The Panel notes that Wilson testified that he habitually makes notes during meetings, and then dictates the notes into a log later on when he gets back to the office. The Panel accepts Wilson's recollection of the events, as the most accurate evidence.

[72] Wilson testified as follows:

> *" At one point there was what I would describe as a bit of an outburst by Todd Ducharme who wasn't present in person for the meeting, Mr. Ducharme was attending the meeting by telephone, people in the room at the time were myself and David Martin and David Butcher and Ducharme's comment was words to the effect that that's a shakedown and he talked about the fact that you don't pay people for the privilege of defending them, comments of that kind. And I stated that I was concerned that Mr. Reyat saw the funding agreement with the government as a means for him to spread largesse around amongst people he favoured."* (Transcript, Wilson, pg10, line 6-19)

[73] The Panel asked Wilson to describe his observations of the reactions of the other people present to the Respondent's comment about the Reyat family needing $10,000 per month. Wilson testified as follows:

> *" Ducharme's reaction was apparent because he sounded quite firm and... I'm trying to find the right word for it. He was extremely emphatic and I think I described his reaction as a bit of an*

outburst. And he said that he had said what he had to say and then I said what I had to say and from... I can remember that I was actually quite grateful for Ducharme's outburst because I was feeling a bit uncomfortable about things and it's one of those situations where you... it is an uncomfortable situation and the fact that Ducharme said what he said kind of broke the ice and made it easier for me to say what I had to say. I don't remember David Butcher saying a word. David was sitting... I was like at this side of the table and David Martin was across from me and Butcher was down at the end and I don't remember Butcher saying a word. I remember that towards the end of that when Ducharme and I stated our objections David Martin looked at Butcher and said where did we go wrong but I don't remember Butcher saying anything to him. (Transcript, Wilson, Panel Questioning, pg 3, line 5 to pg 4, line1)

[74] Later Wilson was asked to describe the Respondent's reaction to his own and Ducharme's reaction. Wilson testified:

" Well, I said a couple of things that didn't... for instance, when he told us that he had advised Mr. Reyat that he would speak to us about interviewing Larry and he wanted to know what we thought, I asked him if he was going to interview Curley and Moe too, and that was all I said. And David Martin didn't say anything to that. And then I think the next thing to come up was Ducharme's outburst and Ducharme said what he had to say about that, which I've related, and I told him that I was not comfortable with the situation because it looked like Mr. Reyat saw the funding agreement with the government as a means for him to spread emoluments around to the people he favoured, which didn't make me very happy, I was not keen on the idea of hiring something like Garcha because I didn't think he was qualified" . (Transcript, Wilson, Panel Questioning, pg 4, line 19 to pg 5 line 10)

[75] When asked to describe his reaction to Wilson's and Ducharme's outburst, the Respondent testified:

" Well so much emphasis is placed on this event. I thought that they were criticizing the decision to hire the children at all and you know, as is set out. I turned to Mr. Butcher and you know, " how did we go so wrong?" and sort of as is set out, that was sort of self critical. Because you know there was obviously a problem - but frankly I didn't dwell on this afterwards because we then had a decision and every one agreed that it was appropriate that the children be hired." (Transcript Martin, Evidence in Chief, pg 14, Line 23 - 25 and pg 15, line 1 -7)

[76] Despite the above, Wilson testified there was no talk of firing the children. The sense of the group was that they were doing valuable, if menial, work and that they could be trusted.

[77] Besides, Wilson testified, hiring of the children had been approved by the Reviewer, was known to the Reviewer, and was communicated to him by the Respondent as being transparent, that the accounts DISR was rendering were completely transparent and that " everybody knew that they were family members, that they were working for DISR and it was approved by Mr. Sugden who was truly the public watchdog in the process" . (Transcript, Wilson, Panel questioning, pg 9) This evidence is interesting as nowhere on the children's accounts are they identified as being the authors of those accounts.

[78] Wilson testified that he thought the Respondent understood after the January 8, 2002 meeting that he and Ducharme found the idea that there might have been a promise to Reyat to fund his family finances, as being completely unacceptable. He felt that this had been brought to the Respondent's attention, and as far as Wilson was concerned, the matter did not come up again until April.

[79] The Respondent's evidence regarding the January 8, 2002 meeting is that he did not think the matter was " significant" . (Transcript, Martin, In Chief, pg 16, line 4 - 9)

[80] Jennifer Seifert, the legal assistant hired to replace the employee terminated in November, 2001, began work at DISR at the beginning of January, 2002. She was hired full time as the office manager and for document management. She reported to the Respondent, and after his hire, to Gil McKinnon. She was also hired to prepare the accounts to go to the Reviewer under the Respondent's supervision in a process where the Respondent would tell her which documents he wanted attached to the application for approval for the Reviewer, and where he dictated all of the submissions.

[81] Seifert observed that after the beginning of February, 2002, Didar and Prit's attendance at the

DISR office became sporadic, and they were not reliable.

[82] She discussed this with the Respondent in mid February, 2002. She testified that she specifically went to the Respondent's office across the hall from the DISR office to discuss her concerns. She testified as follows:

> *" I asked Mr. Martin whether or not...I asked sort of like a general understanding of what their responsibility was as far as how many hours a week they were supposed to be into the office or who was supposed to be supervising them and that it was my understanding that it was sort of a 4-hour work week that I didn't feel very confident that that was actually the case."* (Transcript, Seifert, Evidence in Chief, pg 10, line 23-25 to pg 11, line l-5)

[83] Seifert testified that the Respondent's response to her enquiry was that he would look into it.

[84] On March 5th, 2002, a senior criminal defence lawyer, Gil McKinnon, moved into the DISR offices to " keep an eye on things" and advise the Respondent on matters such as work assignments and administration. (ASOF para. 88) Seifert brought McKinnon up to speed on the office situation. She told McKinnon that " Didar and Prit did not work when they were in the office, particularly Didar, and that no one felt comfortable supervising them." Seifert also questioned the accuracy of the children's accounts with respect to the hours they claimed to be working (ASOF para. 89) According to McKinnon, Seifert described how all hourly billers billed on an honour system. She expressed her concern about the hours the children claimed and told him that she didn't think that they worked very much when they were in the office, particularly Didar, and that no one seemed comfortable supervising them. McKinnon asked Seifert to bring him the children's accounts. This didn't happen and at that time McKinnon didn't follow up on the request.

[85] McKinnon worked closely with Seifert in the DISR offices and had ample opportunity to observe Didar's and Prit's work habits and attendance. Paragraph 90 of the ASOF describes the distressing lack of productive work done by Didar.

[86] McKinnon voiced his concerns about the children to the Respondent twice before the April 16, 2002 meeting. He complained about their work performance or lack thereof. (ASOF para. 90(e)) The Respondent replied " I know" . (ASOF para. 90(d))

[87] Seifert had further conversations with the Respondent about the children's attendance and accounts, subsequent to the February, 2002 conversation.

[88] The Panel finds that when it became apparent to Seifert that her concerns expressed in February, 2002 were not being addressed by the Respondent, she again went to the Respondent's office, this time in mid March, to discuss Didar and Prit. She said:

> *" I again went to Mr. Martin and sort of voiced my concern that they were becoming not-they were becoming not very reliable as far as being in the office when they were supposed to have been there or... I questioned the amount of hours on the...that I had seen on the accounts that were being submitted as being actual time in the office."* (Seifert Transcript, Evidence in Chief pg 10, line 23 to pg 11, line 16)

She was asked what, if anything, the Respondent said to her at that time. She testified:

> *" That although...that he prepared a list of action items and that although he didn't necessarily give everybody on the team an understanding of what his master plan was that he would...he was aware of the situation and..."* (Transcript, Seifert , Evidence in Chief, pg 13, line 3-7)

[89] Seifert felt that Martin had given her the brush-off.

[90] The account for February hours submitted by Didar and Prit and included in the DISR Account submitted to the Reviewer for approval, indicates that Didar billed 224 hours at $25/hr and Prit billed 183 hours at $25/hr.. The total billed by Prit and Didar amounted to $10,887.25. The hours billed by Didar were the highest of the entire defence team. The hours billed by Prit were the third highest of the entire defence team. (ASOF para.71, 72)

[91] DISR received the children's accounts for their February hours in the late afternoon on March 18, 2002 and the DISR account was submitted to the Reviewer on March 19, 2002.

[92] At the meeting with the Reviewer, Sugden asked the Respondent and Butcher to review the February, 2002 account, and informed them that there would be a daily cap of 8 hours on the lawyers' hours.

[93] As noted earlier Prit and Didar were the only persons, other than the lawyers, who submitted accounts based on hours worked. Their accounts were presented in a fashion similar to lawyers' accounts where tasks were identified next to the amount of time each day expended for each task. (ASOF para. 69) However, the accounts submitted by the children for their hours from November 1, 2001 onward do not identify them except by initials and the payee is said to be either " DSR Translating and Document Management" or " DSR Translating and Data Management" or " PR Translating and Data Management" or " PR Translating" .

[94] During midterm break in March, 2002, the Respondent had planned on taking a holiday with his family. However a medical emergency involving his son resulting in a week long stay at the hospital forced the cancellation of those plans. The Respondent spent the last week of March with his son and attending to other family responsibilities.

[95] At the beginning of April, 2002, the Respondent resumed his enormous work load.

[96] At the beginning of April, 2002, it came time to prepare the March, 2002 accounts. Seifert testified that she was tasked to gather up the materials to be submitted. In the course of doing that, she had a conversation with the Respondent's secretary, Mariah Creed regarding Didar's account. As a result of that conversation, Didar submitted a new account for fewer hours than the first account. She testified that she could not now recall whether she discussed this fact with either McKinnon or the Respondent.

[97] The children's revised account for March, 2002 hours totalled $9,650.00, with Didar billing 215 hours at $25/hr and Prit billing 171 hours at $25/hr. Didar's hours billed were the second highest of the entire defence team, second only to McKinnon's hours of 222.35. Prit's hours were the sixth highest of the team. (ASOF para. 73, 74)

[98] Undoubtedly, the Respondent was extremely busy during March and April, 2002. He was spending significant amounts of time on other clients' matters as evidenced by his billings to Reyat when compared to the other members of the team, and his own time dockets, Exhibit 5, in addition to his family responsibilities resulting from his son's medical emergency.

[99] The ASOF indicates at paragraph 82:

> *" Sometime after April 19, 2002, Martin told Butcher that he had only spent 3.5 minutes reviewing the package of materials he submitted to the Reviewer for payment of the March accounts."*

[100] The ASOF indicates at paragraph 83:

> *" Martin does not have a clear recollection of the time when he reviewed the February and March accounts. However, he is able to say, given the pressures of his work and court commitments, the time he spent reviewing these accounts would be no more than half an hour, probably less. Martin is certain that he did review the February and March accounts and he also says that he applied a presumption of good faith to all hours docketed by the Reyat Defence Team, including those submitted by Didar and Prit....."*

[101] After Seifert received and reviewed the children's March accounts, she had another conversation with the Respondent on April 8, 2002. Seifert testified:

> *" Again I voiced my concern that the accounts seemed sloppy and that I wanted to be sure that someone was aware of that fact."* (Transcript, Seifert, pg 13, line 17-19)

When asked what the Respondent's response was, she said:

> *" That he hadn't forgotten my earlier comments and that he would deal with the situation."* (Transcript, Seifert, pg 14, line 18-19)

[102] By this time, McKinnon too had become concerned about the work product of the children, and by

necessary implication, the veracity of the children's accounts. According to Seifert, McKinnon asked her on March 25, 2002 to keep track of the children's hours in the office. After that date, Seifert did that, providing that information to McKinnon on April 18, 2002. (Transcript, Seifert, pg 16, line 17)

April 16, 2002 Meeting

[103] On April 16, 2002 the Respondent, Wilson, Ducharme, Butcher, McKinnon and Sears met. The meeting was to discuss many topics. The first half of the meeting related to matters of the Reyat brief, and the second half to administrative matters. (Transcript, McKinnon, Evidence in Chief, pg 6, line 6-8)

[104] In his testimony, Wilson describes the meeting this way:

> *" Yes, when that meeting had been going on for a while we ended up discussing the employment of the children and that issue was originally raised at that meeting by Gil McKinnon because at that time Gil had actually been working in the offices of DISR on a fairly regular basis and he developed some concerns that he wanted to discuss with us as a result of his presence in the office and his observations about what was happening in there. So we ended up having a fairly long and at times extremely heated discussion about the children and their employment and it was in the context of that, that the discussion of the $10,000.0 a month came up and there was some talk about that and I think it was the position taken by myself and Mr. Ducharme that that had been in the context of a promise that that's what the Reyat family would receive on a monthly basis from the work, I think, of the two children.*
>
> *Q - and in the course of that discussion did Mr. Martin reject the notion?*
>
> *A - Yes, I remember that David had a different view of what that discussion had been about but as I sit here today I can't remember what he said about it."* (Transcript, Wilson, Evidence in Chief, pg 19, line 15-25 to pg 20, line 1 - 16)

[105] Ducharme reminded the Respondent about the January 8, 2002 meeting topic.

> *" At one point during the April 16, 2002 meeting Ducharme and Wilson told Martin that at the January 8, 2002 meeting he proposed to them that the Reyat Defence Team effectively guarantee (sic.) $10,000.00/month to cover the Reyat family's financial needs. Martin emphatically rejected the notion that he had ever discussed figures in those terms at the January 8, 2002 meeting."* (para. 100 ASOF)

and

> *" After a lengthy discussion that was, at times, unpleasant and heated, the attendees were polled on the question of having Didar and Prit continue to work for the Reyat Defence Team. Sears, Butcher and McKinnon favoured firing the Reyat children while Wilson, Ducharme and Martin wanted to keep them on with proper supervision as long as there was work for them to do. The latter group felt it would be unfair to terminate their work abruptly after they had come to rely on this employment over the course of the past 8 months."* (para. 101 ASOF)

[106] After the meeting, Butcher and McKinnon went off for lunch. They discussed some aspects of what had gone on in the meeting. They decided that McKinnon should look at the children's accounts, as the Respondent had invited him to do. McKinnon called Wilson to seek his input, and Wilson agreed with the plan. (Transcript, McKinnon, Evidence in Chief, pg 8, line 7-18)

[107] The next day, April 17, 2002, McKinnon was at the DISR office, working. The Respondent came into the office, and asked to speak with him. McKinnon went into the boardroom where Sears, another team lawyer was present. During the conversation, McKinnon sought and was granted by the Respondent, permission to review the children's accounts.

[108] The next day, April 18, 2002, Seifert brought McKinnon the children's 2001 and 2002 accounts. Seifert also gave McKinnon her calendar outlining the time from the accounts in relation to the dates covering the period of the children's employment (Exhibit 3, Tab 6), a list of her recording of the time Prit and Didar had actually been in the office (Exhibit 3, Tab 12) and a memorandum outlining some of her

concerns (Exhibit 3, Tab 13). Using the calendar, McKinnon focussed on the children's accounts for March hours because he was more familiar with that time period. McKinnon testified that within a few minutes he became concerned about three aspects of the accounts.

[109] Those three aspects were:

(a) the hours claimed seemed too high from McKinnon's observations

(b) the work claimed to be done did not accord with McKinnon's observations

(c) the accounts did not disclose that they were tendered by Didar and Prit. Rather, the tenderer of the accounts for March and April, 2002 was recorded as being a business identified by the children's initials and thus were not transparent. In other words, the Reviewer on the face of things would not be able to identify these particular accounts as being those of Reyat's children.

(Transcript, McKinnon, Evidence in Chief, pg 12, line 16 - 25 to pg 13, line 1 - 15) (ASOF para.104)

[110] Of particular interest to the Panel is a comparison between Seifert's record of Prit's time in the office (Exhibit 3, Tab 12) and Prit's account (Exhibit 3, Tab 6). On March 26, 2002, Seifert records that Prit didn't come into the office at all on that date, yet Prit records having worked at jobs which obviously had to have been performed at DISR's office, for 9 hours.

[111] McKinnon phoned Wilson. He told Wilson there was a problem with the accounts of Didar and Prit, and requested that a meeting be organized for April 19, 2002.

[112] McKinnon called Wilson again on April 18, 2002. In this call, Wilson testified *" he gave me some details at the time and told me he thought there was fraud, basically."* (Transcript, Wilson, Evidence in Chief, pg 23, line 6-7) McKinnon's evidence mirrors that of Wilson.

[113] Just after 5:00 p.m. McKinnon went across the hall to Sears' office to tell her there was a major problem with the children's accounts. While he was asking her to tell the Respondent that a meeting had been set up for the following morning, the Respondent called Sears. Sears put the call on speaker phone. It is worth while to set out what is recited in the ASOF at para 106:

" ....On speaker-phone McKinnon said he had discovered a problem in the accounts of Didar and Prit. Martin asked McKinnon if he had reviewed it with Didar and McKinnon said " no" , as he wanted to discuss it with the Steering Committee the following morning before taking the next step. McKinnon told him the meeting would be at Butcher's office. Martin questioned the location and was reminded of the previous day's discussion that sensitive meetings should be held at Butcher's office. Martin then said something like " well what's the next step, call the police?" Martin said he didn't understand the big fuss as the amount of the Reyat accounts were 2-3% of the overall monthly accounts. There was silence and then Sears said " Because its public funds, David" . Martin then asked Sears for a report on other matters in his office and McKinnon left, saying he would be in the office early the following morning if Martin wanted to discuss the accounts before going to the meeting" .

[114] The Respondent did not call McKinnon before the meeting on April 19, 2002.

[115] That morning, the Respondent, Sears, Wilson, McKinnon, Ducharme and Butcher met at Butcher's office.

[116] McKinnon briefed the group about what he had discovered in relation to the accounts. All had copies of the children's accounts and McKinnon reviewed with them what he had discovered the day before. There was a discussion about what should be done and it was agreed that McKinnon would meet with Didar to confront him about the apparently fraudulent accounts.

[117] McKinnon and the Respondent went back to the DISR office. Oddly, McKinnon and the Respondent felt that the Respondent need not be present so Didar met with McKinnon. McKinnon confronted Didar. McKinnon told Didar he had been in the office in March, 2002 and had observed that Didar's claimed hours didn't appear to be accurate. Didar readily admitted that his and Prit's hours for February and March, 2002

were inflated. After this point, McKinnon took notes. Didar did not.

[118] McKinnon's evidence regarding the conversation with Didar is set out at paragraph 109 of the ASOF. Of note are:

> *" Didar said that in November 2001 Reyat had showed the family debts to Martin and said that the Reyat family needed $10,000.0 per month. Didar indicated that his father understood from that discussion that the family could receive that amount through Didar and Prit's work. Didar said that his father told him he should be billing $10,000.00 per month."* (ASOF para. 109(b))
>
> *" Didar said that he showed his father the accounts of December 2001 [$7,920] and January 2002 [$8,417.50]. Didar said these two accounts were fairly accurate. Didar said that his father pressured him to get the [subsequent] accounts up to $10,000.00 per month. To do that, Didar said he increased Prit's hourly wage [$20 to $25] and inflated both of their hours to reach $10,000 per month [February 2002: $10,887.25 and March 2002: $10,325.50]."* (ASOF para. 109(c))
>
> *" Didar said that he and his sister each had worked about 80-100 hours in March 2002 rather than the hours they claimed [Account Didar: 215 hours and Prit: 171 hours]. He estimated that about 50% of their claimed hours for February and March 2002 were inflated."* (ASOF paragraph 109(d))
>
> *" Didar stated that he never told Martin that he (Didar) was inflating the hours."* (ASOF paragraph 109(e))

[119] Paragraph 110 of the ASOF sets out Didar's version of his conversation with McKinnon.

> *a. With respect to paragraph 109(a), McKinnon did not know the full extent of the hours he and Prit were working in the DISR office because McKinnon was not there all of the time, and McKinnon did not know the extent of the hours that he and Prit were working outside of the office. Didar agrees that he told McKinnon that the hours for he and Prit for February and March were inflated but he says that he never gave McKinnon a number as to the extent of the inflated hours.*
>
> *b. With respect to paragraph 109(b), Didar says that paragraph is essentially correct.*
>
> *c. With respect to paragraph 109(c), Didar says that paragraph is essentially correct. He also says that he cannot recall who gave him permission to increase Prit's hourly rate from $20 to $25 in February 2002, or whether he obtained permission to increase Prit's hourly rate. Didar cannot recall speaking to Martin about increasing Prit's hourly rate. Didar says that he and Prit worked longer hours in February 2002 and March 2002 than they did in December 2001 and January 2002 but with respect to the work in February 2002 and March 2002, Didar also inflated the accounts.*
>
> *d. With respect to paragraph 109(d) and McKinnon's statement that Didar said that he and his sister each had worked 80-100 hours in March 2002 rather than the hours they claimed (account for Didar: 215 hours and Prit: 171 hours), Didar cannot recall making that statement to McKinnon but he does not deny that he made that statement to McKinnon. With respect to McKinnon's statement that Didar estimated that about 50% of the hours that were claimed for February and March 2002 were inflated, Didar denies making that statement to McKinnon.*
>
> *e. Didar agrees with McKinnon that Didar said to McKinnon that he (Didar) never told Martin that he (Didar) was inflating the hours."*

[120] The conclusion this Panel draws from this version is that Didar admitted his and Prit's hours charged were inflated, although he disagrees with McKinnon's particulars, and that while he does not remember telling McKinnon that the accounts for February and March 2002 hours were inflated by 50%, and he denies

saying this to McKinnon, he does admit that he may have told McKinnon that he and Prit worked 80-100 hours in March, 2002 rather than the billed 215 hours and 171 hours respectively. This, of course, works out to more than a 50% inflation of the accounts.

[121] After the meeting with Didar, the Respondent, McKinnon, Ducharme, Wilson, and Butcher met at Butcher's office at 1:30 p.m. on April 19, 2002.

[122] McKinnon gave the group a detailed rendition of what had transpired with Didar.

> *" ...I went through a detailed debriefing of everything that Didar had said to me, using my notes as a guide, and I was asking Mr. Martin specific open-ended questions and Mr. Martin was responding to those questions. The meeting was very subdued. At the end of the meeting Mr. Martin basically said that he would see us next week, as he was going off for a trip to Switzerland, a business trip I believe."* (Transcript, McKinnon, Evidence in Chief, pg 28, line 22-25, pg 29, line 1-5)

[123] Paragraph113 ASOF recites:

> *" At the 1:30 meeting at Singleton Urquhart on April 19, 2002, Martin accepted responsibility for his failure to detect the fraud."*

[124] The Respondent went off to Europe on a client matter and a holiday, leaving Canada later on April 19, 2002 and returning on April 25, 2002.

[125] On April 22, 2002, Butcher wrote to the government advising it that a " billing irregularity" of not more than $11,000.00 per month had been identified in the accounts.

[126] The Respondent telephoned Butcher on April 23, 2002. He admitted he had been negligent. (ASOF para. 114)

[127] On April 26, 2002, having just returned from Europe, Martin told McKinnon that he, Martin had been negligent in failing to detect the fraud and said that he may resign on that basis. (ASOF para. 115)

[128] The Respondent apparently changed his mind. Wilson testified that as of April 29, 2002, he understood that the Respondent was not necessarily prepared to resign from the defence team. McKinnon testified that he had a conversation with the Respondent the morning of April 26, 2002, in a similar vein. By April 29, 2002, the Respondent had resolved not to resign the case, at which point McKinnon told him that he disagreed and thought the Respondent should resign as McKinnon had lost complete confidence in his ability to administer the team, and that if he didn't resign, the other senior lawyers would.

[129] On the morning of April 29, 2002, Wilson, Butcher, his junior Gill, Ducharme, and McKinnon resigned from the Reyat case in open court before Mr. Justice Josephson. Two or three days later, three other members of the team, including Sears, also resigned from the case.

[130] Wilson then met with the Reviewer and provided him with the reasons for his withdrawal from the Reyat case.

[131] The Respondent remained on the Reyat case as a member of a differently constituted defence team.

[132] The Respondent wrote the Attorney General and assumed responsibility for his failure to detect and prevent the submission of the children's improper accounts. (ASOF para.116)

Evidentiary Burden and Standard of Proof

[133] In the course of three and one half days of hearing, evidence was heard from various witnesses on behalf of the Law Society and the Respondent. The Respondent gave evidence on his own behalf.

[134] This Panel instructs itself that the Law Society bears the burden of proving the allegations set out in the Amended Citation throughout this proceeding. The standard to be achieved if the Amended Citation is to be proven is a standard higher than a balance of probabilities but lower than the criminal law standard. See *Ewachniuk v. LSBC* [2003] B.C.J. No.823 (B.C.C.A.).

[135] The decision of Madam Justice McLauchlin in *Jory v. College of Physicians and Surgeons of B .C.* [1985] B.C.J. No. 320. (B.C.S.C.) is instructive:

> *" The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence...The evidence must be sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community."*

[136] This Panel adopts the above interpretation of the burden of proof upon the Law Society.

[137] The Panel instructs itself as follows:

(a) The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct.

(b) The standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

Verdict

[138] Using the classic method of categorization of the alleged offence, the Panel finds that the alleged conduct particularized in the Amended Schedule to the Citation occurred in the context of the Respondent's professional duties, and therefore, would be professional misconduct if those facts are established to support such a finding. Both Counsel for the Law Society and the Respondent agreed that this would be the proper categorization.

[139] Turning to the Amended Schedule to the Citation, the Panel notes that in the proceedings, Counsel for the Law Society conceded, and the Panel so found, that there was no evidence that the Respondent consciously knew that the Reyat children's accounts were not " valid and proper" prior to submitting them to the Reviewer.

[140] The real question is whether on the facts before us, it can be found that the Respondent, in reviewing and approving the Reyat children's accounts, acted in a manner that was a marked departure from the standard expected of a competent solicitor acting in the course of his profession, and therefore amounted to professional misconduct.

[141] This Panel notes that it is settled law that it is for the Benchers to determine the behaviour that amounts to professional misconduct.

[142] Benchers sitting as Panels in disciplinary proceedings are charged with determining the standards of behavior that fall within the parameters of professional misconduct.

[143] As noted in the review decision of *Re: Hops*, [2000] LSDD No. 11, the Benchers are the guardians of the proper standards of professional and ethical conduct and the arbitrators of what behaviour constitutes professional misconduct.

[144] In Lawyers and Ethics: Professional Responsibility and Discipline,, Gavin MacKenzie notes at pg. 26-20, that:

> *" In jurisdictions in which professional misconduct is not defined in legislation or rules of professional conduct, not every breach of the rules of professional conduct will necessarily amount to professional misconduct. Conversely, not every act of professional misconduct will be specifically prohibited by the rules."*

and later, at pg. 26-21:

> *" Whether conduct deserves discipline is determined case by case by the benchers, that is, by lawyers' elected peers and the public's lay representatives."*

[145] Professor MacKenzie cites Mr. Justice P. Cory, sitting on the Divisional Court, in *Stevens v. Law*

Society (Upper Canada) (1979) 55 O.R. (2nd) 405 at 410, speaking of the Ontario system says:

> *" What constitutes professional misconduct by a lawyer can and should be determined by the discipline committee. Its function in determining what may, in each particular circumstance, constitute professional misconduct ought not be unduly restricted. No one but a fellow member of the profession can be more keenly aware of the problems and frustrations that confront a practitioner. The discipline committee is certainly in the best position to determine when a solicitor's conduct has crossed the permissible bounds and deteriorated into professional misconduct. Probably no one could approach a complaint against a lawyer with more understanding than a group composed primarily of members of his profession."*

[146] The Supreme Court of Canada had the opportunity to opine on this issue in *Pearlman v. Law Society (Manitoba)* [1991] 2 S.C.R., 869 when it approved of a decision of the Manitoba Court of Appeal in *Law Society (Manitoba) v. Savino* (1983) 1 D.L.R. (4th) 285 (Man. C.A.):

> *" No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body."*

[147] Thus it is for this Panel to analyze the facts before it and determine whether they amount to professional misconduct.

[148] The definition of " professional misconduct" is organic, changing with the times and the profession. In British Columbia, at least since *Hops*, " professional misconduct" does not have to be conduct that can be described as dishonourable or disgraceful conduct. As noted by Professor MacKenzie in Lawyers & Ethics (Toronto; Carswell; 2001) at p267:

> *" Traditionally, professional misconduct has been defined as " conduct which would reasonably regarded as disgraceful or dishonourable by solicitors of good repute and competency." Moral turpitude was an essential component. Mere negligence was not sufficient.*
>
> *Today, in jurisdictions in which the Law Society's governing statute either defines professional misconduct or authorizes the profession to pass specific rules of professional misconduct and the profession does so. This definition must be qualified in two respects. First, it is now clear that practitioners can be found guilty of professional misconduct for violating regulatory requirements and rules of professional misconduct impose specific duties, whether or not such violations could be said to be disgraceful or dishonourable. Lawyers are frequently reprimanded, for example, for failing to respond promptly to communications from the Law Society or for failing to file required forms and annual reports of public accounts.*
>
> *Second, it is now clear that a series of acts of gross negligence may, taken together, constitute professional misconduct. Since law societies have adopted codes of professional conduct, lawyers have been frequently disciplined for failing to serve clients in a conscientious, diligent, and efficient manner.*

[149] Professor MacKenzie speaks of a series of acts of gross negligence being necessary in order to support a finding of " professional misconduct" . The Panel will have more to say about this later in these reasons.

[150] " Professional Misconduct" is not defined in the *Legal Profession Act*. The leading case concerning the test to be met to support such a finding is found in *Re: Hops*, a decision of the Benchers on review, where it was held:

> *" From the legislated development, the definitions set out above from Oxford and the decisions of the Benchers, it can only be concluded that the Benchers have recently determined it to be appropriate to broaden the scope of professional misconduct in order to more closely regulate the activities of its members. These developments also allow less draconian punishments from those which were available when the standard of disgraceful or dishonourable conduct was required for a finding of professional misconduct. If the standard for professional misconduct still requires " disgraceful" or " dishonourable" conduct, the Benchers have lowered the level of*

impropriety to attract the descriptions."

And later:

" It is clear that conduct matching these descriptive adjectives is no longer required for a finding of misconduct" .

[151] It is clear that lawyers can be found guilty of professional misconduct even if behavior cannot be said to be " disgraceful or dishonorable" .

[152] This Panel finds that it is not helpful to get bogged down in whether the conduct complained of was " dishonourable" or " disgraceful" . The Panel agrees with Counsel for the Respondent who pointed out that the Black's Law Dictionary definition of " dishonourable" , which includes " bad management, mismanagement, malfeasance or culpability, neglect of an official in regard to his affairs, improper conduct, wrong behaviour" could apply to a wide variety of behaviours.

[153] The words " dishonourable" and " disgraceful" imply moral turpitude of an intentional nature even though the definition cited above could conceivably cover many forms of conduct which are simply negligent.

[154] This Panel finds that to use these words is to miss the point. This Panel agrees that the gravamen of the citation alleged is not properly cast in terms of " honour" . The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[155] The Panel finds that the cases discussing gross negligence are helpful, but not determinative.

[156] The authorities indicate that gross negligence can be professional misconduct. It seems however, that the decision makers in those cases focussed on whether the behaviour was characterized as a single act, in which case, they held a single act, even of gross negligence, could not support a finding of " professional misconduct" or whether the behaviour was characterized as numerous acts of gross negligence, which could support such a finding.

[157] Black's Law Dictionary defines gross negligence as:

*" **Gross negligence.** The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.*

It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. It falls short of being such reckless disregard or probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.

Gross negligence consists of conscious and voluntary act or omission which is likely to result in grave injury when in face of clear and present danger of which alleged tortfeasor is aware. Glaab v. Caudill, Fla. App., 236 So.2d 180, 182, 183, 185. That entire want of care which would raise belief that act or omission complained of was result of conscious indifference to rights and welfare of persons affected by it. Claunch v. Bennett, Tex.Civ.App., 395 S.W.2d 719, 724. Indifference to present legal duty and utter forgetfulness of legal obligations, so far as other persons may be affected, and a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence."

[158] The cases cited in the context of motor vehicle accidents, occurred at a time in the development of tort law in Canada when in order to recover damages, gross negligence had to be proven. These cases are not of assistance. They are too far removed from the context of regulation of this profession to be of

assistance. Furthermore, they focus on the policy goal of awarding damages to innocent victims of negligence. The focus is on the victim. This is far removed from the regulation of the legal profession where the focus is on the conduct of a lawyer in disciplinary proceedings.

[159] Turning to the quandary of when gross negligence can support disciplinary findings, the Panel notes that several of the authorities dealing with discipline of lawyers which were cited by Counsel also indicate that conduct which is described as gross negligence amounting to professional misconduct cannot be based on a single act.

[160] The Panel considered the cases dealing with negligence of lawyers in disciplinary settings, for example, *Re Solicitor, ex parte Fitzpatrick* [1924] 1 D.L.R. 981, and *Re: A Solicitor* [1935] W.W.R. 428, and *LSBC v. a lawyer* [1999] L.S.D.D. No.31, a decision of Bencher Tretiak, and notes that they all predate the Review decision in *Re: Hops* and are, therefore, distinguishable on that basis.

[161] Furthermore, the cases *Re Solicitor, ex parte Fitzpatrick* (an improperly executed will) and *Re: a Solicitor* (lawyer's failure to appear at trial) are dated. The fact patterns disclose relatively simple circumstances involving negligence which to this Panel, seem to be more akin to a simple negligent error, even though the court found gross negligence based on that single error.

[162] The case of *LSBC v. a lawyer*, a decision of Bencher Tretiak, is distinguishable on its facts. In that case, the member's error was to assume that the other lawyer on a file would agree to an adjournment, that the adjournment would be granted, and that it would be a general adjournment, not one to a specific date. The member did not ascertain whether, in fact, his view of the facts was correct. The result of the member's lapse was that the complainant was arrested and detained on a warrant when he failed to attend a court date. Counsel for the Law Society, in commenting about how the citation had made its way to hearing, said:

> *" This is one of those very difficult types of cases where there is a tremendous amount of sympathetic circumstances and yet the Law Society finds itself in a position where we have had somebody hauled in off the street, you pretty well have to do something about that."*

[163] Bencher Tretiak specifically referred to the need for conduct to be dishonourable or disgraceful for it to be professional misconduct and found that the facts before him constituted a " single isolated event in an otherwise exemplary practice" and decided that a single act of negligence does not, by itself, amount to either incompetence, or professional misconduct.

[164] The seminal difference between *LSBC v. a lawyer* and the instant case is the context of the behaviour. In *LSBC v. a lawyer* the fact pattern is not, sadly, uncommon in legal practices, involving adjournment requests, telephone messages left and not delivered to the intended party, and neglect or delay in following up. In the case before the Panel, the context was far different and very unusual, being that of a remarkable and extraordinary brief that the Respondent undertook. The brief placed the Respondent in a position akin to that of a fiduciary owing obligations to the funder of the legal services, to ensure the most careful guarding of its purse. The facts disclose an entire series of events which occurred over some eight months, where the Respondent failed to recognize and meet his obligations or where he ignored them.

[165] For this Panel, an analysis of the Respondent's behaviour must start from the beginning of his retainer by Reyat. It must begin by placing his behaviour in the context of this retainer in an extraordinary case, in extraordinary circumstances.

[166] The Panel accepts as a fact that the Air India case was historic and unprecedented in nature. It consumed huge amounts of public resources and the resources of the judiciary and the legal profession, and was, undoubtedly, the largest and most complex case thus far in Canadian legal history.

[167] Because of the historical nature of the case itself, and the funding arrangement with the provincial government, a heavy burden was placed on counsel to be and remain accountable, transparent and vigilant in all dealings regarding that funding.

[168] The question for this Panel to determine is whether the Respondent's non-review of the accounts, allowing Reyat's children's accounts for hours that they did not work to be submitted to the government, for the purpose of obtaining public funding with respect to an extraordinary case and in a context of an unprecedented funding commitment by the government which placed the Respondent in a fiduciary relationship, amounts to gross culpable neglect which is professional misconduct.

[169] There is plenty of precedent in the annals of the Law Society illustrating fact patterns where lawyers have billed a funder, primarily Legal Services Society, for services not performed. Sometimes this occurs in situations where the lawyer was negligent, rather than intending to deceive. The Panel could not find any cases where a full analysis of the misconduct was made. It seems that the conduct is so obviously professional misconduct that a conditional admission is made. See, for example, *LSBC v. Dunn* [1995] LSDD, No. 254, *LSBC v. Payne* [1994] LSDD No. 125, *LSBC v. Mah Ming* [2000] LSDD, No. 22.

[170] The Panel finds that the real issue is not whether the behaviour complained of can be described as a single act, or a series of acts, and whether it is labelled as gross negligence or not.

[171] The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[172] In the circumstances, the Respondent's non-review of the accounts amounted to acting in a manner that was a marked departure from the standard expected of a competent solicitor; it is professional misconduct, because it was conduct which constituted gross culpable neglect in his duties as a lawyer, in particular, his duty to the public funder in this extraordinary case.

[173] The Respondent took on this enormous responsibility without reducing his work load, or hiring enough staff to carry the burden.

[174] The Respondent decided to hire family members. The Panel heard that this was done by other defence teams, notably the Peck team representing Bagri. While it may have been justifiable to hire family members in this unusual case, due to, among other factors, concerns about confidentiality, such an arrangement should have alerted the Respondent to the pitfalls that might be expected from such an arrangement. In these circumstances, counsel who decide to hire family members as employees on public funding of a criminal defendant need to be extremely careful in ensuring accountability for that employment. Thus the very context of the employment relationship mandated a higher level of care.

[175] Red flags began to go up almost immediately, flags that should have put the Respondent on notice that there were problems with this very special and risk filled employment arrangement. These flags were:

a) As early as October, 2001, when Didar unaccountably tendered an invoice at the rate of $35/hr, instead of the agreed upon $20/hr. the Respondent should have been on notice that Didar was someone to be watched.

b) The November 2001 and subsequent accounts did not identify the children by name and therefore were not transparent on their faces.

c) The Chaggar accounting incident in December, 2001. While Chaggar was not a family member, he was a long time legal adviser and friend of Reyat's. Chaggar's account involved an inflation of the hours billed. Again, this occurs in the context of an unprecedented funding arrangement placing a high level of responsibility on the Respondent to ensure veracity of all invoices tendered under his authority.

d) The December 13th 2001 meeting between Reyat and the Respondent. The Panel finds that Reyat was clearly expecting the Respondent to provide his family with kickback type funding from the public purse, through the Funding Agreement. Reyat's proposal for DISR to employ his wife, who was subject to a compensation order to repay the government for welfare fraud makes this very clear. Therefore, it seems improbable that the Respondent would not realize this was what Reyat was proposing. Furthermore, the Respondent should have been alerted to the issue that the children might be pressured by their father to make sure they got enough money from the funding agreement to meet the $10,000.00 goal. The Respondent should have been on notice that the two children, having very minimal office skills, would have a difficult time legitimately working almost 9 ½ hours per day, Monday to Friday especially after the work load started to decline in January. The Respondent should have appreciated that his client, Reyat, had an unethical and improper view of the role of the children as employees or service providers.

e) The Respondent says that he categorically rejected Reyat's arguments. But he then failed to put in place supervision and monitoring that would defeat Reyat's purpose as outlined

in the December conversation.

f) For the Respondent to in essence guarantee to Reyat that the children could earn $10,000.00, which would mean they would each be working well over forty hours per week, indicates even more suspect judgement when by this time the Respondent knew that the Funding Agreement was limiting the lawyers to 200 hours per month.

g) The Respondent must have identified that there was insufficient supervision in place when he asked Butcher to take over the job in December, 2001. When Butcher refused, the Respondent let it go, thus failing to address the problem of lack of supervision. Butcher told the Respondent in January, 2002 that there was less work for the children, but still their accounts were huge.

h) It cannot be overlooked that it was to the Respondent's financial advantage to keep Reyat happy. It appears to this Panel that if that meant (as Ducharme put it) paying the client for the privilege of representing him, then the Respondent was prepared to do so.

i) Even if the Respondent did not recognize his obligations after the December conversation with Reyat, the January 8, 2002 conversation with his colleagues should have brought them home to him. His response, " where did we go so wrong" cannot be anything other than an offputting and sarcastic remark. It indicates that he was acknowledging action was required, but then he completely failed to put in the safeguards called for. The Panel notes that it was in the Respondent's financial benefit to fail to do so or to delay, as such safeguards would have meant more staff having to be hired at DISR's cost, or more time being found from his own very busy schedule, thus reducing his own available billable hours.

j) In January, 2002, Jennifer Seifert approached the Respondent about the problem. He brushed her off, just as he had brushed off the concerns of his colleagues. He failed to deal with his obligations.

k) Jennifer Seifert approached him again in February, 2002. He brushed her off again. She pressed him again in March on the issue. He implied that she didn't understand his plans but that he was dealing with her concerns. Of course, as it turned out, he hadn't dealt with the problem. Again he failed to deal with his obligations.

l) The Respondent continued throughout early 2002 to work on other briefs, which took him away from Vancouver, and away from his duties on the Reyat brief.

m) Despite the specific warnings from Seifert, and other warning signs cited above, the Respondent spent only minutes reviewing the children's accounts for March hours which this Panel finds were fraudulent, before submitting them to the Reviewer. This amounts to wilful blindness.

n) Finally, in the conversation with Sears and McKinnon on April 18, 2002, even after he had been informed by McKinnon that there was a problem with the children's accounts, the Respondent minimized the situation and did not seem to grasp the seriousness of a fraud being perpetrated on the government funder.

[176] The Respondent's neglect amounted to blatant and cavalier disregard for the duty he owed to the funder, in an unprecedented situation which created a fiduciary duty.

[177] This amounted to reckless disregard of the Respondent's obligations, and exhibited a marked departure from the standard of conduct the Law Society expects of its members. It amounts to gross culpable neglect of his duties as a lawyer, and is professional misconduct.

SCHEDULE A

The Law Society of British Columbia

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING CONCERNING

DAVID JOHN MARTIN

Respondent

STATEMENT OF AGREED FACTS

Background: David J. Martin

1. The Respondent David John Martin (" Martin") was called to the Bar in Ontario on April 5, 1979 and practiced in the Toronto area until his call to the Bar in British Columbia on September 26, 1986. He has practiced continuously in British Columbia since that time. Martin is 52 years old.

2. Martin is an experienced criminal lawyer. At the material time, he employed up to two other lawyers through David J. Martin Personal Law Corporation doing business as Martin & Sears (" Martin & Sears"). Martin continues to practice criminal law, employing one other lawyer, through David J. Martin Personal Law Corporation.

3. Martin has no Professional Conduct Record, as that term is defined in Rule 1 of the British Columbian *Law Society Rules,* and has no discipline history with the Law Society of Upper Canada from the time that he was called to the present.

The Air India Case

4. On June 23, 1985 two bombs exploded within an hour of one another. The first, contained in luggage that was destined for transfer to an Air-India flight, exploded in the New Tokyo International Airport in Narita, Japan (the " Narita Bombing"). Two baggage handlers were killed. Inderjit Singh Reyat (" Reyat") was charged in Canada with manslaughter, unlawfully making an explosive device, and acquiring and possessing components for such a device in respect of the Narita Bombing and on May 10, 1991, Reyat was convicted of these offences and later sentenced to 10 years in prison.

5. The second bomb destroyed Air India Flight 182 (the " Air India Bombing") off the coast of Ireland, killing all 329 passengers and crew on board. On June 4, 2001, Reyat was charged with conspiracy to commit first degree murder in respect of the Air India and Narita Bombings. Reyat was joined on the direct indictment along with Ripudaman Singh Malik (" Malik") and Ajaib Singh Bagri (" Bagri"), who were charged on October 27, 2000) (the " Air India Case").

6. On February 10, 2003, Reyat pleaded guilty to manslaughter with respect to the Air India Bombing and was sentenced to 5 years in prison.

7. The Air India Case was an historic case of an unprecedented nature. The product of a sixteen year, multi-national police investigation, it is widely regarded as the largest, most-complex case in Canadian criminal legal history.

Reyat Defence Team

8. Kuldip Chaggar (" Chaggar") initially appeared on Reyat's behalf; however he pressed Martin as early as in or about March 2001 to act as lead counsel for Reyat.

9. Ultimately, a team of ten lawyers was formed to defend Reyat (the " Reyat Defence Team"). Senior counsel were:

a) Martin, as leading counsel (joined July 2001);

b) David Butcher, as co-leading counsel (" Butcher") (joined July 2001);

c) Todd Ducharme (" Ducharme") (joined summer/fall of 2001);

d) Peter Wilson, Q.C. (" Wilson") (joined August 1, 2001); and

e) Gil McKinnon, Q.C. (" McKinnon") (joined February 21, 2002, replacing Chaggar).

10. These lawyers were assisted by junior counsel:

a) Letitia Sears (" Sears");

b) Paula Kalsi (" Kalsi");

c) Chris Nowlin (" Nowlin");

d) Gurprit Gill (" Gill"); and

e) Michael Smith (" Smith").

11. All counsel on the Reyat Defence Team were from Vancouver except for Ducharme, who practiced in Toronto. Ducharme, who was called to the Bar in Ontario in 1988 and in British Columbia in 1997, gave up his practice to join the Reyat Defence Team.

12. On or about December 18, 2001, Chaggar was discharged from the Reyat Defence Team.

13. The Reyat Defence Team was formed into two groups: the pre-trial motions group and the trial group. Martin, assisted by Ducharme, Sears and Nowlin, would lead the pre-trial strategy and pre-trial motions, including applications for disclosure, *Charter* review, national security litigation, adjournment, severance, and, if necessary, prosecution of the special plea of *autrefois convict*. Butcher and Wilson, assisted by Gill, Kalsi and Smith, and initially Chaggar, later McKinnon, were assigned primary responsibility for trial preparation, and ultimately the conduct of the trial if pre-trial motions failed. Within the trial group, Butcher was responsible for expert evidence and factual and legal issues related to the UK consent to prosecute Reyat again in Canada. Wilson was responsible for dealing with Searchlight, and the review of the trial transcripts in respect of the Narita Bombing. Wilson was also involved in the defense investigations.

DISR

14. On August 31, 2001, Martin and Butcher incorporated DISR (an acronym for " Defence of Inderjit Singh Reyat") Management Corporation (" DISR").

15. Martin was the President of DISR and Butcher was the Secretary. Martin and Butcher were the only officers and directors of the company throughout the material time. Butcher and David J. Martin Personal Law Corporation were the only shareholders of the company. Both Martin and Butcher had signing authority for DISR, though Butcher never exercised this authority.

16. DISR was the administering vehicle through which the Reyat Defence Team would contract with the provincial government. Amongst other things, DISR leased office space for the Reyat Defence Team, and hired clerical and legal assistants.

17. The office of DISR was located at #740- 1040 West Georgia Street, Vancouver, immediately adjacent to Martin's law practice, Martin & Sears at #760 - 1040 West Georgia Street.

18. Although Martin did not maintain his own office at DISR, he would attend the DISR office frequently to communicate with counsel who were present, to discuss matters with staff, and to attend counsel meetings. Almost all of the counsel meetings were held at the boardroom of the DISR office. Martin attended the DISR office on most days.

19. Martin was lead counsel of the Reyat Defence Team and administrator of DISR throughout the material time.

Funding of Reyat defence team by provincial government

20. On July 2, 2001, a representative of the Attorney General of British Columbia, Judy Klima (" Klima"), wrote to Chaggar advising that, as the proposed prosecution of Reyat involved a " clearly extraordinary case" to which legal aid tariffs were ill-suited, the Attorney General would be willing to discuss the terms of

funding a defence team for Reyat, along the same lines as the funding for his co-accused Bagri. Klima described the Ministry's position as follows (at page 2):

At the essence of the Ministry's position is the need to provide the defendant with adequate funding to allow for full answer and defence while ensuring that expenditures are a responsible and accountable use of public funds. To ensure that this balance is reached in a reasonable way, the Ministry will:

> - hire an independent reviewer to ensure that all billings are reasonable and necessary, and to make decisions on the payment of bills
>
> - pay counsel less than their normal rates for private clients, and in setting rates, consider years and breadth of experience with complex criminal cases
>
> - base all disbursements on the LSS tariff or government rates.

21. Martin negotiated the Defence Counsel Agreement. Butcher assisted him in this regard. The Defence Counsel Agreement was negotiated at the same time and along with the agreement negotiated by Richard Peck, Q.C.(" Peck")for the Bagri defence team.

22. On September 14, 2001, Martin signed, as President of DISR, the Review Agreement and Defence Counsel Agreement. Both agreements are dated for reference June 5, 2001.

Defence Counsel Agreement

23. The Defence Counsel Agreement between the provincial government and DISR sets out the basis for the payment by the government of legal fees and disbursements for the defence of Reyat. It reads in part as follows:

> ARTICLE 1 DEFINITIONS
>
> 1.01
>
> **" Defence Lawyers and Assistants"** means the lawyers and other identified in Schedule A, as amended form time to time, who have confirmed in writing with Counsel Management [DISR] that they accept and will comply with the provisions of this Agreement and the Review Agreement;
>
> **" Fees and Disbursements"** means those amounts determined, from time to time, pursuant to which a Certificate has been issued under the Review Agreement, in respect of any period during the Term, where such amount referred to in the Certificate represent
>
> (a) the number of hours worked by each of the Defence Lawyers and Assistants, and
>
> (b) the number of items in the column in Schedule B describing types of disbursements,
>
> multiplied by the respective hourly rates for such work and amounts allowed for such disbursements, as the case may be, set out in Schedule A and Schedule B, as amended from time to time; ...

24. The hourly rates of the senior lawyers on the Reyat defence team as approved by the provincial government were as follows:

a) Martin: $255.00 per hour;

b) Butcher: $250.00 per hour;

c) Wilson: $200.00 per hour;

d) Ducharme: $150.00 per hour; and

e) McKinnon: $200.00 per hour.

The Review Agreement

25. The Review Agreement was between the provincial government, DISR, and the Reviewer Rick Sugden, Q.C. (the " Reviewer"). This was the agreement under which the Reviewer was appointed to review for approval all accounts submitted by DISR on behalf of the Reyat Defence Team.

26. Due to confidentiality concerns arising from the Attorney General's connection to Crown Counsel, the Reviewer was to be privy to more information than would ultimately be passed on to the Attorney General. The Review Agreement provides as follows:

a) The overriding purpose is " to ensure that amounts paid to Counsel Management [DISR] on behalf of the Defence Lawyers and Assistants are a reasonable and accountable use of public funds having regard to the right of the Accused Person to make full answer and defence" (Article 2.01);

b) DISR was obliged to keep a daily record of all time spent by each lawyer and assistant, to the nearest 0.1 hour, describing in reasonable detail each activity undertaken, and all disbursements incurred or paid (Article 4.01);

c) The Reviewer was obliged to determine the amount payable in respect of number of hours worked and disbursements (Article 5.01) and was not to make this determination unless the amounts paid " are a reasonable and accountable use of public funds" and taking into account " the likelihood that a reasonable, privately funded client with the funds to do so would agree to pay the particular fees and Defence Disbursements pertaining to those matters" (Article 5.02).

27. The account approval and payment process was as follows:

a) The Reviewer would be presented with the monthly accounts of DISR and the individual law firms in an " account application binder" ;

b) The Reviewer would consider the accounts. If he was satisfied with the accounts, he would endorse the Review Certificate, a standard form document created by DISR summarizing total legal fees and disbursements for services rendered in a given month approved for the given month;

c) The Review Certificate and a heavily redacted version of the accounts were sent by the Reviewer to the provincial government;

d) The provincial government would review the certificate and redacted accounts and, if satisfied with the accounts, issue a single cheque payable to DISR; and

e) In compliance with Law Society requirements, DISR would immediately and entirely deposit the cheque into one of the lawyer's trust accounts, who would then issue cheques in respect of legal fees and disbursements billed for the given month. Janet Clothier, the bookkeeper for DISR, (" Clothier") deposited the government's cheque into Martin's trust account because it was most convenient for her.

28. From the commencement of the Defence Counsel Agreement, the Reyat Defence Team's accounts were personally submitted to the Reviewer monthly by Martin and, usually, Butcher.

29. Although Butcher attended most meetings with the Reviewer, Martin was the only lawyer on the Reyat Defence Team who reviewed all of the team's accounts (DISR and individual law firms). Butcher did not review the accounts of Martin & Sears or their attachments, or those of other counsel. Butcher did review the Singelton Urquhart accounts for which he was responsible. Martin's secretary Mariah Creed (" Creed") received and assembled the material for the Martin & Sears accounts . The account application binders were prepared and assembled by Jennifer Seifert (" Seifert"). Martin reviewed that material shortly before

meeting with the Reviewer.

30. On or about March 19, 2002, the Reviewer advised Martin and Butcher of a pre-trial, eight hour daily cap on counsel's hours.

Staff at DISR

31. Staff that worked at DISR included the following:

a) Creed worked as a legal assistant for David J. Martin Personal Law Corporation from December 1999 to present. She started working on the Reyat file in June or July of 2001, opening the DISR offices in the summer of 2001. Throughout the material time Creed worked as a full-time receptionist and legal assistant at Martin & Sears. She assembled and prepared the DISR account application binders that were provided to the Reviewer up to February 2002. After February 2002, she assembled and prepared the Martin & Sears accounts for the account application binders.

b) Clothier has been responsible for the accounting of Martin in his private practice from 2000 to present. Beginning in September 2001, she worked in the DISR office 3 days per week. Clothier provided some assistance to Creed, and later Seifert, with respect to the DISR account application binders which were ultimately submitted to the Reviewer and the provincial government on a monthly basis.

c) Seifert worked with the Reyat Defence Team from their DISR offices from January 2, 2002 as a full time legal assistant and receptionist. From February 2002 onwards, she compiled DISR's monthly account application binders. Seifert replaced Jessie Gill, who had been terminated on November 1, 2001.

Employment of Didar and Prit Reyat

32. On September 7, 2001, Didar Reyat (then 26 years old), the eldest of Reyat's children (" Didar"), began working for DISR on an oral contract as an uncertified translator interpreter and document manager. Didar's first accounts for September 2001 were rendered at $20.00 per hour. Martin and Butcher together negotiated Didar's rate of pay thereafter at $25.00 per hour. Martin was aware that Peck was employing Bagri's daughter and her husband, the son of unindicted co conspirator Talwinder Singh Parmar, to assist the Bagri defence team. Didar's rate was consistent with those paid by the Bagri team for similar services.

33. On November 7, 2001, Prit Reyat (then 18 years old), Reyat's daughter (" Prit"), began working for DISR on an oral contract, largely to assist Didar with document management. Martin's recollection is that Prit's rate was established orally at $25 per hour from the outset of her employment. Prit's accounts for November 2001 through January 2002 were billed at $20 per hour. Martin has no recollection of, and therefore no explanation for, an increase in Prit's salary from $20 to $25 per hour in February 2002. Butcher does not recall ever discussing Prit's rate.

34. On November 11, 2001 Preetnam Reyat (then 17 years old), Reyat's youngest daughter (" Preetnam"), began working for DISR on an oral contract, largely to assist Didar with document management and other clerical tasks after Jessie Gill was terminated. Preetnam's rate of pay was established orally at $20.00 per hour. Preetnam's time was submitted only for the months of November and December 2001.

35. The reasons for the employment of Didar and Prit were as follows. The Reyat Defence Team needed people who spoke Punjabi. There were concerns about CSIS agents and informants within the Indo-Canadian community and Didar and Prit could be trusted to keep confidences. In addition, there was a tremendous amount of menial work that needed to be done in order to properly conduct the defence.

The Pace of Work on the Reyat Defence Team

36. The work environment on the Reyat Defence Team was generally hectic. From its inception, the Reyat Defence Team worked to get up to speed in what was a case of unprecedented proportions in Canadian criminal history. The Reyat Defence Team started work some 11 months behind the Bagri and Malik defence teams and Martin and his colleagues were under constant and tremendous pressure to catch up. All counsel on the team were constantly working against very difficult deadlines to prepare for an ongoing series of *voir dires* relating to matters that were both complex and involved reviewing tremendous and unprecedented volumes of material accumulated over an investigation which, to that point, had spanned

some sixteen years.

37. Martin's focus in the Air India brief was on strategic issues relating to pre-trial motions and a multitude of *voir dires*. He was also trying to manage the motions schedule, a matter of some contention as between the different defence teams and the Court.

Request for Document Assembly Manager

38. On November 14, 2001, Martin wrote to Jerry McHale (" McHale"), a representative of the Attorney General of British Columbia, requesting approval of funding for a professional document manager. The letter reads in part as follows: " We are presently using $20 to $25 per hour contractors who could continue to support a $60 to $80 per hour professional" . The professional document manager would, if hired, supervise and assist the work that Didar and Prit were doing.

39. On December 10, 2001, at a DISR management meeting, Martin noted that DISR had applied to McHale for a document manager and that he would call McHale that day to follow up on this request. Martin also advised that if McHale did not approve a document manager, then a request for same would be made to the Reviewer pursuant to the Review Agreement.

40. In or about December, 2001 or January, 2002 Butcher telephoned McHale to ask for his approval to engage a paralegal from Singelton Urquhart. McHale later telephoned him back and advised that Deputy Minister Gillian Wallace, Q.C., had refused to approve the request. At the same time, in about January 2002, Butcher noticed that while the Reyat children had been very busy with document sorting during the fall of 2001, the amount of work declined in the New Year. According to Butcher, when he pointed out to Martin that there was less work for Didar and Prit to do, Martin emphasized the financial difficulties of the Reyat family. Martin has no recollection of this January 2002 conversation with Butcher.

41. On January 15, 2002, Butcher wrote to the Reviewer requesting the approval of a paralegal from Singelton Urquhart as a professional document manager for DISR. According to Martin, he and Butcher took this letter, along with the December 2001 Reyat Defence Team accounts, to the Reviewer that same day.

42. A document manager was never approved for DISR.

Discussions Between Martin and Reyat about the Reyat family's employment and financial needs between October 2001 and January 8, 2002

43. In about October 2001, Didar's accounts were submitted at $35 per hour and Martin brought the matter to Reyat's attention and told him that the rate of $35 per hour was excessive. He also advised Reyat that Didar's employment was premised on his work being justifiable and that his accounts would not be redacted for the government.

44. In or about early November 2001, Martin briefly discussed the family finances with Reyat when Prit's employment was considered.

45. Martin had a discussion with Reyat prior to the January 8, 2002 meeting concerning Reyat's desire that Satnam Reyat (" Mrs. Reyat") be employed by DISR. During this discussion, Reyat had asserted that his family needed $15,000 per month. Martin's reply was that, although Mrs. Reyat could not be employed unless many conditions were met, the employment of Didar and Prit should be sufficient as it was possible that they could earn up to $10,000 per month if they each performed 200 hours of work of value in a month. As previously noted, Martin understood that Prit was being paid $25 per hour, like Didar. Martin told Reyat that it would be excessive and unreasonable for DISR to employ Mrs. Reyat when Didar and Prit were already working there.

Review of Chaggar's November 2001 Accounts

46. On December 3, 2001, Chaggar presented his accounts for November to Martin. Chaggar's accounts detailed 256.8 hours of work. Martin refused to take the accounts to the Reviewer for approval and requested that Wilson investigate the propriety of these accounts. The results of this review were inconclusive. In the absence of evidence of impropriety, the Reviewer approved Chaggar's November account at the " base billable allowance" of 200 hours.

Martin Seeks Butcher's Assistance with administrative matters

47. In December 2001, Martin asked Butcher to assume responsibility for the billing of Didar and Prit.

Butcher declined to take on this responsibility.

48. After the January 8, 2002 meeting (described below), Martin asked Butcher to assist with the management of the DISR office. Butcher was prepared to consider this task, provided he could have his own staff in the office. Martin could not obtain approval for additional staffing in the DISR offices. Butcher did retain responsibility for the issue briefs (every aspect of the case, legal and factual, for issues with respect to setting aside the UK consent to prosecute Reyat again in Canada and retainer of experts including structural engineers, chemists, forensic pathologists, and aviation accident experts), which work was undertaken by Gill and Kalsi.

49. During a formal, all-counsel meeting in January 2002, Martin specifically asked Butcher to meet with Kalsi, Gill, Didar and Prit to organize them as a group. This was in response to someone at the meeting complaining that Didar had failed to do some work.

January 8, 2002 Senior Counsel Meeting

50. In consequence of the Court's rejection of Reyat's severance application and following the discharge of Chaggar, Martin, Butcher and Wilson met in the boardroom at Martin & Sears on January 8, 2002 to discuss a variety of administrative matters. Ducharme, who was in Toronto, attended the meeting by telephone (the " January 8, 2002 Meeting").

51. In the course of this meeting Martin brought up a number of matters on which he sought the input of the group. He informed them that Reyat wanted DISR to employ Mrs. Reyat; Larry, a former cellmate of Reyat's who was then working with Chaggar; and Anoop Garcha (" Garcha"), an investigator who was also a friend of Didar's.

52. In the course of the discussion relating to Larry's potential employment, Martin raised the subject of billings by Didar and Prit. Martin advised that Didar had submitted his account for November 2001 at $35 per hour. Martin advised the group that, when questioned, Didar said his father had instructed him to raise his hourly rate. Martin advised Didar this was inappropriate and he should resubmit his accounts. At Martin's instruction, Didar's account was then resubmitted at $25 per hour.

53. Both Wilson and Ducharme expressed objection to the idea of Mrs. Reyat's employment. Martin told the group that he had decided against hiring Mrs. Reyat.

54. Ducharme recalls that Martin said he had promised Reyat that he would get the Reyat family $10,000 per month.

55. Wilson recalls that Martin said that he had spoken to Reyat about the family's financial needs and had been told by Reyat that the family needed $10,000/month to survive. His notes made at the time state that Martin had " apparently promised" or suggested that he told Reyat that he would see to it that the family got $10,000/month.

56. Martin's recollection of the January 8, 2002 Meeting is that he told the other counsel present that when he discussed with Reyat the proposal from Reyat that his wife be employed, he (Martin) had asked Reyat what his family's needs were. It is in this context that Martin says that he explained to the others that he had been told by Reyat that his family needed $10,000 per month to survive. According to Martin, he told the others that he indicated to Reyat that the employment of Didar and Prit should be sufficient to satisfy the needs of the family (i.e. if each of Didar and Prit legitimately worked and billed 200 hours per month at $25.00 per hour they could collectively earn up to $10,000 per month).

57. In response to Martin's comments, as perceived by Ducharme and Wilson set out above in paragraphs 54 and 55 respectively, they each made the following comments:

a) Ducharme immediately reacted by saying very adamantly " that sounds like a shakedown" . According to Ducharme, Martin then began to defend the arrangement outlining the hardships that the Reyat family had endured since Reyat's first conviction. Ducharme then said that Reyat was in no different position than any other client charged with murder and words to the effect of " Getting charged with murder doesn't mean that you are entitled to a guaranteed annual income." Ducharme also stated emphatically that " You don't pay your client for the privilege of representing them."

b) Wilson said it was beginning to look as though Reyat saw the government funding of his case as a way to spread largesse around, not only to his family, but to others he favoured

such as Larry and Anoop Garcha. In Wilson's view it had the appearance of Reyat showering emoluments on the people he favoured.

58. At the end of the January 8, 2002 Meeting, Martin turned to Butcher, who had said nothing, and asked, " how did we go so wrong?" This comment from Martin is the only thing that Butcher recalls about the January 8, 2002 Meeting. Butcher says that there were any number of management meetings with various issues discussed and he has no specific recollection of the January 8, 2002 Meeting other than recalling being asked this question. Butcher, who described the tone of Martin's comment as highly sarcastic, perceived this statement as a criticism of Wilson and Ducharme not understanding the structure that had been set up with respect to the employment of Didar and Prit. According to Martin, he made this comment in response to the apparent criticism of employing any member of the Reyat family. To Martin, this comment was self-questioning as to whether the decision that he and Butcher had made to hire Didar and Prit was made without sufficient consultation with other counsel, such that the decision was now being revisited and creating discord.

59. There then followed a brief discussion about the propriety of the decision to hire Didar and Prit. The consensus of the meeting was that Didar and Prit had a valuable contribution to make to the Reyat Defence Team.

60. During the January 8, 2002 Meeting there was no suggestion at any time that the employment of Didar and Prit be terminated. Wilson records, as part of his notes relating to this meeting, that Didar was doing useful work for DISR in translating documents, assisting his father, whose English is not perfect, with understanding the file, reading the file, navigating around the file on the computer, and generally doing a fair amount of office work for which someone, in any event, would have to be hired. Wilson also records that Prit was also doing work at the office, mostly menial, involving filing, sorting through materials as they came in, date stamping materials, and photocopying.

61. Neither Larry nor Mrs. Reyat were ever hired by DISR.

62. On or about March 8, 2002, after a discussion with Martin and Butcher, Wilson hired Garcha to conduct certain defence investigations. This was done by Wilson with great reluctance and only to demonstrate Garcha's incompetence to Reyat. Wilson sent a memorandum of instruction to Garcha dated March 8, 2002 setting out three points for him to investigate: locating two individuals and motor vehicle department records of Reyat's vehicles and trailers owned by him in 1985. Garcha never responded to Wilson in respect of any of the points.

February 2002 Discussions between Martin and Reyat re: Didar's employment

63. On one or more occasions in February 2002 Reyat pointed out to Martin that Didar was not fully employed because he lacked clear direction with respect to matters on which Reyat felt Didar should be working. Reyat was of the view that certain defence investigations were not being pursued with sufficient urgency. Martin promised to look into and correct the matter. On February 21, 2002, Reyat spoke to Wilson insisting that the defence infvestigations start immediately. On March 4, 2002 Wilson wrote to Martin with respect to Wilson's February 28, 2002 discussion with Reyat regarding the investigations, including on which investigation items Didar would assist. According to Wilson, Didar's involvement in the investigations was limited to the following: (1) providing Wilson with further information with respect to some of the 31 items that Reyat wanted investigated; (2) acting as a contact person for Garcha; and (3) he was to drive Mrs. Reyat to Duncan to attempt to identify a certain person referred to as " Mr. X" .

The Accounts of Didar and Prit

64. The first account of Didar for the month of September 2001 was included as a disbursement of DISR. Didar's second account for October 2001 is attached as a disbursement to the account of Martin & Sears and was clearly signed by Didar under the typed name " Didar S. Reyat" . All remaining accounts of Didar and Prit were attached as disbursements to the accounts of Martin & Sears. Only the October 2001 account reflects Didar's name and signature. Prit's name or signature does not appear on any accounts. Didar and Prit are designated by their initials in the body of all accounts as was the case with their October 2001 account.

65. In October 2001, Didar approached Clothier seeking advice about incorporating and getting a GST number. Clothier suggested that he wait until January, after the current year end. She further advised Didar that the cheapest way to incorporate would be to use a numbered company.

66. The accounts of Didar and Prit for February and March 2002 were addressed to " Martin & Sears Barristers, 740-1040 West Georgia Street, Vancouver BC [the offices of DISR]" from " 642985 Inc. DBA DSR Translating and Data Management (" DSR Translating") (collectively, the " Accounts").

67. The account binders for February and March 2002, presented to the Reviewer for approval, contained the following:

a) A report to the Reviewer signed by Martin summarizing work undertaken by the Reyat Defence Team in the month for which approval of the accounts was sought and anticipated work in the coming months.

b) Documentary material illustrating work that the Reyat Defence Team either had done or was intending to do in the coming months.

c) Review Certificate to be dated and endorsed by the Reviewer.

d) Copies of all statements of accounts of the defence lawyers including copies of all receipts, or logs, for all defence disbursements. Following the Review Certificate, the February and March 2002 Reyat Defence Team accounts were attached in the following order:

i) Accounts of Martin & Sears Barristers signed by Martin with a detailed description of legal services provided by Martin, Sears and Nowlin followed by copies of invoices reflecting disbursements incurred by the firm. The Accounts are included as disbursements incurred by Martin & Sears.

ii) Accounts of Singleton Urquhart signed by Butcher with a detailed description of legal services provided by Butcher and Gill followed by copies of invoices reflecting disbursements incurred by the firm.

iii) Accounts of Wilson, including one half of the accounts of Kalsi and copies of invoices reflecting disbursements;

iv) Accounts of Gil McKinnon with disbursements (March only);

v) Accounts of Ducharme, including one half of the accounts of Kalsi.

vi) Accounts of Smith (March only).

vii) Accounts of DISR, signed by Clothier, for disbursements incurred to date by DISR (e.g. paper supplies, Searchlight data management, computer consulting etc.), attaching relevant invoices.

68. The Accounts were dated, created and submitted to the Reviewer as follows:

a) The February 2002 accounts:

i) DSR Translating's February 2002 account is dated March 1, 2002;

ii) Martin & Sears account is dated March 4, 2002 and signed by Martin;

iii) On March 18, 2002, Didar gave Creed a disc containing Didar and Prit's February 2002 accounts. At approximately 4:11 pm, Creed saved this document into Martin's computer system and printed it out that same day;

iv) On March 19, 2002 at 4:30 p.m., Martin and Butcher attended upon the Reviewer with the account application binder;

v) On March 27, 2002, the Reviewer endorsed the Review

Certificate in respect of the February accounts; and

vi) On April 26, 2002, the government's cheque to DISR for $297,653.04 was deposited in DISR's bank account. The money was immediately transferred into Martin's trust account in accordance with Law Society requirements The money paid in respect of Didar and Prit's February account was held in Martin's trust account and was not disbursed to them.

b) The March 2002 accounts:

i) DSR Translating's March 2002 account is dated April 1, 2002;

ii) Martin & Sears account is dated April 2, 2002 and signed by Martin;

iii) According to Seifert, during the week of April 1, 2002, Didar submitted an account for he and Prit. As a result of a conversation between Creed and Seifert with respect to this account, Didar was requested to submit a revised account. The revised account claimed less hours for March then the first account submitted by Didar. The hours claimed in the revised account were substantially less than the first account submitted by Didar, however the hours still seemed exaggerated to Seifert. Seifert cannot say whether or not she told Martin about Didar submitting a revised account.

iv) On April 8, 2002, Didar gave Creed a disc containing Didar and Prit's revised March 2002 accounts. At approximately 11:50 am, Creed saved this document into Martin's computer system and printed it out that same day;

v) On April 9, 2002 at 4:00 p.m., Martin and Butcher presented the account application binder in respect of the March 2002 accounts to the Reviewer;

vi) On April 12, 2002 the Reviewer endorsed the Review Certificate in respect of the February accounts; and

vii) On or about September 17, 2002, the government's cheque to Martin & Sears and DISR in respect of the March accounts was deposited into DISR's bank account. This cheque was net of all moneys billed by Didar and Prit for February and March 2002. The money was immediately transferred into Martin's trust account in accordance with Law Society requirements.

69. On their face, the Accounts show as follows:

a) The February Accounts:

i) Total $10,175 before tax.

ii) Didar bills 224 hours at $25.00 per hour.

iii) Prit bills 183 hours at $25.00 per hour.

b) The March Accounts:

i) Total $9,650 before tax.

ii) Didar bills 215 hours at $25.00 per hour.

iii) Prit bills 171 hours at $25.00 per hour.

c) The total hours billed on the Accounts are broken down into the following services (the majority of the hours are comprised of (1) and (2)):

(1) Translation & Transcribing Fee

(2) Document Management Fee

(3) Technical Support Fee.

d) The daily billings by Didar and Prit are identified by hours each day next to which there are descriptions of activities.

e) The Accounts are unsigned.

f) The address for DSR Translating is 6789 - 124a Street, Surrey , BC, Canada, V3W 3Y6 is the Reyat family's residence.

Didar and Prit's Hours Relative to Other Counsel

70. From September through March, Didar and Prit billed the following hours [Former Wood para 32]:

Month	Didar's Hours Billed	Prit's Hours	Amount
June to September	150	N/A	$3,000
October	211	N/A	$5,275
November	236.5	168	$10,392.50*
December	182	145.5	$7,920.00**
January	205.5	164	$8,417.50
February	224	183	$10,887.25
March	215	171	$10,325.50

* Included in this figure is Preetnam's billings of 56 hours

** Included in this figure is Preetnam's billings of 23 hours

71. Didar billed more hours in February, 224 hours, than anyone else on the Reyat Defence Team that month. By virtue of the Defence Counsel Agreement, lawyers were limited to 200 hours per month. Didar and Prit were the only other hourly billers on the Reyat Defence Team. In February Prit's billings, 183 hours, were the third highest on the Reyat Defence team (Gill billed 186.40 hours).

72. For the February 2002 accounts, the hours claimed by Didar, Prit and counsel on the Reyat Defence

Team, from highest to lowest, was as follows:

a) Didar: 224;

b) Gill: 186.40;

c) Prit: 183;

d) Ducharme: 174.20;

e) Butcher: 143.50;

f) Martin: 140.50;

g) Kalsi: 155.70;

h) Sears: 102.50

i) Wilson: 100.30;

j) Smith: 39;

k) McKinnon: 35.50; and

l) Nowlin: 25.90.

73. In March, Didar's billing, 215 hours, was the second highest on the Reyat Defence Team that month. McKinnon billed 257.85 hours. Of these, 35.5 were worked in February and 222.35 were worked in March. Prit's billings for the month of March, 171 hours, were the sixth highest on the Reyat Defence Team.

74. For the March 2002 accounts, the hours claimed by Didar, Prit and counsel on the Reyat Defence Team, from highest to lowest, was as follows:

a) McKinnon: 222.35;

b) Didar: 215;

c) Wilson: 192.20;

d) Gill: 183.50;

e) Kalsi: 175.10;

f) Prit: 171;

g) Nowlin: 162.70;

h) Smith: 158.30;

i) Ducharme: 143.80;

j) Butcher: 140.3;

k) Martin: 97; and

l) Sears: 23.50.

Timing and Presentation of the Accounts

75. In early 2002, Martin's administrative concerns were focussed on substantial disbursements payable to Searchlight and his continuing efforts to reach a joint defence and expert sharing agreement with counsel for the other defence teams.

76. Martin was extremely busy in March and April 2002. He was occupied on matters other than the Reyat defence in March and was not around the DISR offices in March and April as much as he had been in

February 2002. This is evidenced by Martin's docketed hours for March, which are as follows:

Date	Total Billable Hours Docketed	Reyat Hours Docketed	Other Client Hours Docketed
March 1, 2002	10.00	5.00	5.00
March 4, 2002	11.00	7.50	3.50
March 5, 2002	13.00	4.00	9.00
March 6, 2002	10.00	6.50	3.50
March 7, 2002	10.00	5.00	5.00
March 8, 2002	10.00	2.00	8.00
March 10, 2002	6.00	4.00	2.00
March 11, 2002	15.00	8.00	7.00
March 12, 2002	9.75	0.00	9.75
March 13, 2002	9.00	5.50	3.50
March 14, 2002	12.00	10.00	2.00
March 15, 2002	11.00	5.25	5.75
March 18, 2002	12.75	8.00	4.75
March 19, 2002	9.75	4.75	5.00
March 20, 2002	11.75	3.00	8.75
March 21, 2002	8.50	7.50	1.00
March 22, 2002	10.75	7.50	3.25
March 23, 2002	3.00	3.00	0.00
183.25		**96.50**	**86.75**

77. Martin submitted the February accounts to the Reviewer on March 19, 2002. His office received Didar and Prit's accounts late in the afternoon of March 18, 2002. On March 18, 2002, Martin billed 12.75 hours on two client files. On March 19, 2002, Martin billed 9.75 hours on two client files, including separate appearances in Provincial Court in Delta, BC, in the morning, and before Josephson J. in Supreme Court in Vancouver in the afternoon. He attended before the Reviewer immediately after court that day, between 4:30pm and 5:00pm to seek approval of the February accounts.

78. At the end of March 2002, Martin had intended to take a brief 8-day holiday during his children's spring break from school. That holiday had to be cancelled, however, when Martin's son suffered an ischemic event, a dangerous dropping of the blood pressure in the brain that can be a pre-cursor to stroke. Martin spent the last week of March with his son in the hospital and tending to other attendant family responsibilities.

79. Upon his return to the office on April 1, 2002, Martin resumed working at a pace equivalent to that which had prevailed in March. This is evidenced by Martin's docketed hours for April, until the 19 th, which are as follows:

Date	Total Billable Hours Docketed	Reyat Hours Docketed	Others Client Hours Docketed
April 1, 2002	12.00	10.50	1.50
April 2, 2002	13.50	7.75	5.75
April 3, 2002	13.00	8.50	4.50
April 4, 2002	10.00	3.00	7.00

April 5, 2002	9.00	4.75	4.25
April 7, 2002	9.75	7.75	2.00
April 8, 2002	8.75	8.75	0.00
April 9, 2002	11.00	8.50	2.50
April 10, 2002	13.00	2.00	11.00
April 11, 2002	15.00	1.00	14.00
April 12, 2002	10.50	1.00	9.50
April 15, 2002	8.00	6.50	1.50
April 16, 2002	10.50	3.00	7.50
April 17, 2002	13.00	6.00	7.00
April 18, 2002	11.00	0.00	11.00
April 19, 2002	1.75	1.50	0.25
169.75		**80.50**	**89.25**

80. Martin submitted the March accounts to the Reviewer on April 9, 2002. His office received Didar and Prit's accounts around noon on April 8, 2002. That day, Martin was in Court during the afternoon, following which he attended a meeting with Crown counsel until 6:00pm. He billed 8.75 hours on the Air India brief. On April 9, Martin appeared in Court both morning and afternoon. Martin billed 5.75 hours on the Air India brief before beginning to draft his report to the Reviewer at 2:00pm. He submitted the March accounts to the Reviewer at 4:00pm.

81. On a few occasions between February and April 2002 Martin advised McKinnon that he expected all of the DISR accounts to be audited by the government at the end of the trial of the matter and he wanted to be sure that there would be no problem with them.

82. Sometime after April 19, 2002, Martin told Butcher that he had only spent 3.5 minutes reviewing the package of materials he submitted to the Reviewer for payment of the March accounts.

83. Martin does not have a clear recollection of the time when he reviewed the February and March accounts. However, he is able to say, given the pressures of his work and court commitments, the time he spent reviewing these accounts would be no more than half an hour, probably less. Martin is certain that he did review the February and March accounts and he also says that he applied a presumption of good faith to all hours docketed by the Reyat Defence Team, including those submitted by Didar and Prit. Paragraphs 77 and 80 above set out the detail of Martin's schedule on the relevant dates.

Tasks assigned to Didar and Prit

84. Martin knew that some of Didar and Prit's responsibilities could result in them frequently working outside of the office. Much of this work, if performed, would have taken place at the Vancouver Pre-trial Centre where Didar and Prit were responsible for assisting Reyat with translation and disclosure review. Only Martin, Wilson and Kalsi knew that Didar was transcribing certain tapes at home. The rest of the Reyat Defence Team and support staff were not privy to this project. Wilson first learned of the tapes from Reyat on January 3, 2002. The Reyat family had the tapes for some time. The first tape was from April 17, 1994 and the second tape was from April 17, 1995. Didar transcribed the first 2 out of a total of 4 tapes. The transcription of the first tape was 53 pages long and the transcription of the second tape was 90 pages long (both double spaced " Q& A" format with a ¼ page header on each page). Wilson gave the last two tapes to his secretary to transcribe at some point in January 2002 because he felt his secretary could complete the transcription more quickly and effectively then Didar.

85. In late February and early March, certain defence investigations were getting underway. Reyat had a list of 31 points for investigation and was impatient that they proceed expeditiously.

86. According to Martin, he knew that there was legitimately a large volume of work on which it was the responsibility of Didar and Prit to work with respect to disclosure, document review and translation. This was confirmed to Martin by the DISR News Bulletins (the " Bulletins"), a weekly document initiated by

McKinnon, briefly describing the ongoing activities and tasks of the Reyat Defence Team.

87. The Bulletins confirmed for Martin work that he understood to be included in the responsibilities of Didar and Prit. The Bulletins provide as follows:

a) **Collection of Media Coverage:** The March 8, 2002 Bulletin notes that Didar is compiling newspaper coverage of the Air India Case. According to Martin, this project was critical to a number of issues central to the defence: the *autrefois* motion; the challenge to the jury array for cause; and the credibility and reliability of key Crown witnesses. This was the first item on Reyat's list of areas of investigation and Didar's potential involvement is noted in Wilson's memorandum dated February 28, 2002. Work related to this project appeared to Martin to be reflected in Didar's accounts for March 5, 6, 12, 15 & 19.

b) **Organization of Crown Disclosure:** The March 8, 2002 Bulletin also notes the disclosure and receipt of 74 volumes of extract files. Some of the work related to this disclosure (i.e. stamping, copying and assembling these documents) was within the responsibilities of Didar and Prit. Included in this disclosure were 19 volumes which were of particular interest to the defence and the Reyat family and which Martin understood Didar was reviewing with his father. The responsibilities of Didar and Prit in respect of this disclosure, as described in this paragraph, appeared to Martin to be reflected in Didar's accounts for March 9, 11, 13, 14, 16, 23 & 24 .

c) **Review and translation of Crown Disclosure:** Martin understood that this new disclosure placed a burden on Didar and Prit for review and translation. It prompted him, on March 6, 2002, to write to Robert Wright, Q.C. requesting his assistance in obtaining special dispensation to allow Reyat's youngest daughter, Preetam, to attend at the Vancouver Pretrial Centre " in order to assist Mr. Reyat in the review of documents and translation of materials from the disclosure that he is attempting to review." At the time, Preetam was only 17 years old. Pretrial Centre policy dictated that no persons under 18 were allowed entry. Martin asked that an exception be made to allow Preetam to assist Reyat because the team was " in a time of very intense disclosure review." On March 26, 2002, after receiving independent legal advice, B. Tole, A/District Director, Vancouver Pretrial Services, Ministry of Corrections, granted Martin's visitation request, advising as follows: " Family members have been permitted to act in a formal capacity in the case preparation for this very unique trial. This has been done to assist in satisfying a criminal justice need for a fair and impartial trial by allowing family members to augment a defence team so as not to under resource defence efforts."

d) **Translation of Punjabi editorials:** The March 20, 2002 Bulletin outlines the difficulties that counsel were having in grappling with late disclosure of information relating to the Punjabi language editorials from the Indo-Canadian Times. Martin understood that Didar was actively involved in assisting counsels' response to this late disclosure by reviewing the translations of these editorials on an emergency basis, which appeared to Martin to be reflected in Didar's accounts for March 17 & 20, 2002.

McKinnon's observations of Didar & Prit in the DISR Offices

88. In February 2002, Martin asked McKinnon to move into the DISR offices when working on the Reyat brief and " keep an eye on things" and advise Martin on matters such as work assignments and administration.

89. On March 5, 2002, McKinnon started working in the DISR offices. Either that day, or the next, McKinnon asked Seifert to explain the procedure for keeping track of everyone's hours and billings. Seifert said it was an honour system whereby everyone submitted their billings at the end of the month. McKinnon then asked Seifert about Didar and Prit's accounts. Seifert questioned the accuracy of Didar and Prit's accounts with respect to the hours they claimed. She also told McKinnon that Didar and Prit did not work when they were in the office, particularly Didar, and that no one felt comfortable supervising them. McKinnon asked to see their accounts. Seifert said that she would get them for him, but she did not. McKinnon did not follow up on it that month.

90. During March 2002, McKinnon was attentive to Didar and Prit's work in the office. The following occurred:

a) He saw that Didar was around a lot but did not appear to be doing very much work. He felt that Didar was not accountable to anyone. Didar sometimes had friends in the office, sitting around his desk. Didar would often carry McKinnon's bags to court and watch proceedings. On two or three occasions, McKinnon saw Didar stamping documents, but never for more than one or two hours.

b) Seifert complained to McKinnon that Didar got a lot of personal calls at the office. Seifert also told McKinnon that she was concerned about the security of the confidential information with Didar's friends coming into the office, particularly after hours. McKinnon did not pass these complaints on to Martin.

c) McKinnon received complaints that Prit did not notify the office if she would not be at work as expected, that she was not very productive and lacked initiative and that she did her homework during office hours. McKinnon expressed to Martin general work quality concerns with respect to Prit, however he did not express to Martin these specific concerns.

d) McKinnon was distressed by the lack of assistance that Didar and Prit provided to Seifert, particularly in preparing motions for the court. McKinnon expressed this concern to Martin who replied, " I know" . According to McKinnon, he expressed this type of work performance concern to Martin and received this response from Martin twice before the April 16, 2002 Meeting.

91. Some time prior to April 16, 2002, McKinnon began to perceive that that there was a problem in that people deferred to Didar and Prit because they were the client's children. Seifert also told McKinnon that Didar was using office supplied CDs to download music from the Internet during office hours. Mckinnon did not mention these concerns to anyone prior to the April 16, 2002 meeting.

Seifert and Clothier Speak to Martin about Didar and Prit

92. Seifert and Clothier spoke to Martin with respect to Didar and Prit's accounts and work habits as follows:

a) Seifert had three conversations with Martin between mid-February 2002 and, according to Seifert, on or about April 8, 2002 with respect to Didar and Prit and Seifert will be called to testify with respect to these conversations.

b) According to Clothier, she asked Martin why Prit's rate had been increased from $20 to $25 per hour. This rate increase was reflected in the February 2002 accounts of DSR. According to Clothier, Martin told her that it was because Prit was involved in more translating work than before. Martin does not recall a conversation with Clothier in respect of Prit's rate increase.

Martin's Conversation with Wilson on April 2, 2002

93. On April 2, 2002**,** in the course of a discussion about the use of DISR funds, Martin expressed concerns to Wilson with respect to **"** the growing size of Didar's accounts" . At the time that Martin made this statement, he would not yet have seen Didar's March account. Wilson responded by asking whether Didar was still being paid at the same hourly rate. Wilson did not review any of DSR Translating's Accounts.

94. Didar's February account recorded 224 hours, up from 205.5 hours the previous month. The Defence Counsel Agreement put a cap of 200 hours per month on lawyers' accounts and, while no such cap was mandated for clerical or administrative staff, that limit created a benchmark in Martin's mind when reviewing Didar's accounts.

Concerns of Clothier and Seifert with respect to Didar and Prit in March 2002

95. In March 2002, Clothier started to wonder what role Didar and Prit were still playing in terms of their employment at the DISR office. According to Clothier, although their reported hours seemed to be much the same, she noticed a marked difference in their work pattern in March in contrast to the earlier months. When Clothier was reviewing the March accounts, after they were submitted to the Reviewer on April 9,

2002, she recalls feeling serious concern over the validity of the February and March accounts submitted by Didar and Prit.

96. Seifert recorded the number of hours she observed Didar and Prit in the DISR offices during the week of March 25, 2002.

Seifert and Clothier Speak to Martin about Didar and Prit in April 2002

97. Seifert and Clothier spoke to Martin with respect to Didar and Prit's accounts and work habits in April 2002 as follows:

a) On April 15 or 17, 2002 (Clothier is uncertain as to which day she spoke to Martin), after she had looked at the March accounts, Clothier spoke to Martin about concerns she had about Didar and Prit's February and March accounts. Clothier does not recall the exact timeline of Martin's responses to her, however she does remember feeling that her concerns were heard by Martin and she was satisfied that he was moving quickly to get to the bottom of it. Clothier recalls that at some point Martin told her that (1) McKinnon had been instructed to investigate the matter; (2) the Attorney General's office had been warned that there may be a problem; and (3) he asked Clothier to hold payment from the government cheque, once she received it, until the investigation was over.

b) In response to a conversation with Jennifer Seifert, which, according to Seifert, took place on or about April 8, 2002, Martin told her that he had a plan, and that he had not forgotten about her earlier comments. He said words to the effect that it was on his list of action items, and that he did not let everyone in on his specific planning. According to Martin, this comment refers to a document that Martin authored on April 9, 2002, headed " Projects" . This document contains a revised project list, complete with the assignment of counsel to each project, together with a planning/hearing management process. According to Martin, this initiative which required each project group to submit detailed work plans with estimated preparation timelines, was part of an effort by Martin to tighten up the management structure of the entire Reyat Defence Team.

The April 16, 2002 Meeting

98. On April 16, 2002, the Steering Committee, composed of Martin, Wilson, Ducharme, Butcher, McKinnon and Sears, met to discuss substantive matters about Reyat's defence and administrative matters (the " April 16, 2002 Meeting"). At this meeting, McKinnon raised a number of concerns that he had about the propriety of employing Didar and Prit and their work habits, including:

(a) Didar and Prit did not appear to be accountable to anyone;

(b) Seifert complained about Didar and Prit's work;

(c) McKinnon felt that the optics of employing Didar and Prit were bad from the public's point of view;

(d) McKinnon felt that the employment of Didar and Prit did not pass the " smell test" ;

(e) Mister Justice Josephson reacted to nepotism on the Malik team; and

(f) Didar used office-supplied CDs to download music from the Internet.

99. In response to the concerns that McKinnon raised about Didar and Prit's work habits, as described in subparagraphs (a), (b) and (f) above, Martin suggested that Didar and Prit's accounts be reviewed.

100. At one point during the April 16, 2002 Meeting, Ducharme and Wilson told Martin that at the January 8, 2002 Meeting he proposed to them that the Reyat Defence Team effectively guarantee $10,000/month to cover the Reyat family's financial needs. Martin emphatically rejected the notion that he had ever discussed figures in those terms at the January 8, 2002 Meeting.

101. After a lengthy discussion that was, at times, unpleasant and heated, the attendees were polled on the question of having Didar and Prit continue to work for the Reyat Defence Team. Sears, Butcher and McKinnon favoured firing the Reyat children while Wilson, Ducharme and Martin wanted to keep them on with proper supervision as long as there was work for them to do. The latter group felt it would be unfair to

terminate their work abruptly after they had come to rely on this employment over the course of the past 8 months.

McKinnon Reviews the Accounts

102. On April 17, 2002, McKinnon followed up on Martin's suggestion of the previous day and McKinnon asked Martin if he could review Didar and Prit's accounts. Martin immediately authorized McKinnon to do so and made the necessary arrangements for McKinnon to view the accounts.

103. On April 18, 2002, McKinnon reviewed the accounts of DSR Translating from September 2001 to March, 2002 along with monthly calendars that Seifert prepared. The monthly calendars noted the hours claimed by Didar and Prit on the corresponding calendar dates.

104. There were three points about the March 2002 accounts which immediately raised McKinnon's suspicions:

a) The accounts claimed significantly more hours than McKinnon (along with Gill and Seifert) observed Didar and Prit to be present in the DISR office;

b) The descriptions of work did not correspond to McKinnon's and Seifert's observations of the work that Didar and Prit performed in the DISR office;

c) The accounts were submitted in the name of DSR Translating; there were no names or signatures of the individuals completing the work, only initials, except for the October, 2001 account which included Didar's name and signature; and, in the later accounts, Didar and Prit described their father as " the client" .

105. On the afternoon of April 18, 2002, McKinnon telephoned Wilson and advised him that there was a problem with the Accounts and that everyone should meet the following morning. On a second call to Wilson, McKinnon expressed his view that some of the accounts of DSR Translating appeared fraudulent.

106. In the early evening of April 18, 2002, McKinnon advised Martin on the telephone that he had discovered a problem in the accounts of Didar and Prit. Around 5:15 p.m. McKinnon was in Sears' office telling her that there was a " major problem" in the accounts. He asked her to tell Martin of the scheduled meeting for the following morning and the nature of the problem. At that time Martin phoned in from Seattle. On speaker-phone McKinnon said he had discovered a problem in the accounts of Didar and Prit. Martin asked McKinnon if he had reviewed it with Didar and McKinnon said " no" , as he wanted to discuss it with the Steering Committee the following morning before taking the next step. McKinnon told him the meeting would be at Butcher's office. Martin questioned the location and was reminded of the previous day's discussion that sensitive meetings should be held at Butcher's office. Martin then said something like, " Well, what's the next step, call in the police?" Martin said he didn't understand the big fuss as the amount of the Reyat accounts were 2-3% of the overall monthly accounts. There was silence and then Sears said " Because its public funds, David" . Martin then asked Sears for a report on other matters in his office and McKinnon left, saying he would be in the office early the following morning if Martin wanted to discuss the accounts before going to the meeting.

April 19, 2002

107. On the morning of April 19, 2002, the Steering Committee met at Singleton Urquhart. At this meeting, McKinnon announced the suspicions raised by his review of the Accounts. At first Martin said that he would meet with Didar, and he would then meet with the client and telephone the Reviewer. Wilson suggested that McKinnon should be with him when he met Didar. As counsel were leaving the meeting, Martin suggested that since " the buck stops on his desk" maybe it should be Wilson and McKinnon meeting with Didar and Reyat. It was agreed that McKinnon should return to the office and interview Didar, and that counsel would meet later that day

108. Upon their return to the DISR offices, McKinnon asked Didar to come into his office. Within minutes Didar entered with Martin, who advised Didar that McKinnon wanted to go over some aspects of the Accounts. Martin said he did not think it was necessary for him to stay, with which McKinnon agreed, and then Martin left.

109. The April 19, 2002 conversation between McKinnon and Didar was as follows:

a) On April 19, 2002 (11:00 am -12:50 pm) McKinnon met with Didar to discuss he

and his sister Prit's accounts to Martin & Sears. McKinnon told Didar that a review of their accounts raised some concerns about the hours they had claimed. McKinnon said he was familiar with their hours for March, as he had been in the office that month, and he didn't think the hours were accurate. Didar readily admitted that their hours for February and March 2002 were inflated.

b) Didar said that in November, 2001 Reyat had showed the family debts to Martin and said that the Reyat family needed $10,000 per month. Didar indicated that his father understood from that discussion that the family could receive that amount through Didar and Prit's work. Didar said that his father told him he should be billing $10,000 per month.

c) Didar said that he showed his father the accounts of December 2001 [$7920] and January 2002 [$8417.50]. Didar said these two accounts were fairly accurate. Didar said that his father pressured him to get the [subsequent] accounts up to $10,000 per month. To do that, Didar said he increased Prit's hourly wage [$20 to $25] and inflated both of their hours to reach $10,000 per month [February 2002: $10,887.25 and March 2002: $10, 325.50].

d) Didar said that he and his sister each had worked about 80-100 hours in March 2002 rather than the hours they claimed [Account Didar: 215 hours and Prit: 171 hours]. He estimated that about 50% of their claimed hours for February and March 2002 were inflated.

e) Didar stated that he never told Martin that he (Didar) was inflating the hours.

110. Didar has the following view of his April 19, 2002 conversation with McKinnon, as set out in paragraph 109 above:

a) With respect to paragraph 109(a), McKinnon did not know the full extent of the hours he and Prit were working in the DISR office because McKinnon was not there all of the time, and McKinnon did not know the extent of the hours that he and Prit were working outside of the office. Didar agrees that he told McKinnon that the hours for he and Prit for February and March were inflated but he says that he never gave McKinnon a number as to the extent of the inflated hours.

b) With respect to paragraph 109(b), Didar says that paragraph is essentially correct.

c) With respect to paragraph 109(c), Didar says that paragraph is essentially correct. He also says that he cannot recall who gave him permission to increase Prit's hourly rate from $20 to $25 in February 2002, or whether he obtained permission to increase Prit's hourly rate. Didar cannot recall speaking to Martin about increasing Prit's hourly rate. Didar says that he and Prit worked longer hours in February 2002 and March 2002 than they did in December 2001 and January 2002 but with respect to the work in February 2002 and March 2002, Didar also inflated the accounts.

d) With respect to paragraph 109(d) and McKinnon's statement that Didar said that he and his sister each had worked 80-100 hours in March 2002 rather than the hours they claimed (account for Didar: 215 hours and Prit: 171 hours), Didar cannot recall making that statement to McKinnon but he does not deny that he made that statement to McKinnon. With respect to McKinnon's statement that Didar estimated that about 50% of the hours that were claimed for February and March 2002 were inflated, Didar denies making that statement to McKinnon.

e) Didar agrees with McKinnon that Didar said to McKinnon that he (Didar) never told Martin that he (Didar) was inflating the hours.

111. The Accounts were in fact fraudulent in that the hours claimed by DSR Translating were higher than the hours actually worked by Didar and Prit.

112. At approximately 1:30 p.m., Martin, McKinnon, Butcher, Ducharme and Wilson met again at Singleton Urquhart, at which time, McKinnon debriefed the group on his interview with Didar. After this meeting, Martin left for Europe for a client meeting and a brief vacation.

Post April 19, 2002 Events

113. At the 1:30 meeting at Singleton Urquhart on April 19, 2002, Martin accepted responsibility for his failure to detect the fraud.

114. In a telephone conversation with Butcher on April 23, 2002, Martin admitted to Butcher that he had been negligent.

115. On April 26, 2002, having just returned from Europe, Martin told McKinnon that he, Martin, had been negligent in failing to detect the fraud and said that he may resign on that basis.

116. In his April 29, 2002, letter to the Attorney General, Martin assumed responsibility for his failure to detect and prevent the submission of the Accounts.

Informing the Government

117. On April 22, 2002, Butcher wrote to McHale advising him that a " billing irregularity" of not more than $11,000 per month had been identified in the accounts of Martin & Sears for February and March 2002.

118. On April 29, 2002, Martin wrote to the government advising that " some components" of the February and March accounts of DSR Translating attached as disbursements to the accounts of Martin & Sears were " unjustified" . Martin formally requested that the amount of $19,825.00, the entire amount of the DSR Translating accounts for February and March, be deducted from the government's next remittance to DISR.

Payment for the Accounts

119. Didar and Prit were never paid for any portion of their accounts for February or March 2002.