2009 LSBC 26
Report issued: September 9, 2009
Citation issued: January 16, 2006

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

Re: Lawyer 11

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: September 8, 9, 10, 11, 12, 15, 16, 23, October 7, November 12 and 13, 2008

Supplementary written submissions, as requested by the Panel, provided on March 31, 2009

Panel: **Majority decision**: David Renwick, QC, Warren Wilson, QC **Concurring decision**: Gordon Turriff, QC, Chair

Counsel for the Law Society: David Lunny, Maureen E. Baird and Nicole Ladner
Counsel for the Respondent: David S. Mulroney and Christopher Siver

Majority Decision of David Renwick, QC and Warren Wilson, QC

Background

[1] A citation was issued against the Respondent, a member of the Law Society of British Columbia (the "Law Society"), pursuant to Rule 4-13 of the Law Society Rules on January 16, 2006 (the "Citation"). The Citation was issued to inquire into the conduct of the Respondent and states:

> 1. Your conduct in participating in a scheme or design to mislead the Supreme Court of British Columbia by arranging the acquisition and/or registration of security of a loan from GM, a family member, RM, a family member, and/or attempting to obtain a judgment on that loan for the purpose of putting into place a reduction in the assets of RM prior to and for the purposes of his " *Rowbotham*" application.
>
> 2. Your conduct in participating in a scheme or design to misrepresent the expenses or liabilities of the P and/or K Hotel businesses by:
>
> a) Providing false or misleading information to the Supreme Court of British Columbia on the "*Rowbotham*" application of RM, and for the purpose of misrepresenting the value of his assets, by claiming the existence of previously undisclosed liabilities for unpaid wages now alleged to be owing to you and/or other family members;
>
> b) In respect of the K Hotel business, providing false or misleading information to the Business Development Bank of Canada, and for the purpose of obtaining or attempting to

obtain a benefit dishonestly for the K Hotel business, by failing to disclose liabilities for unpaid wages now alleged to be owing to you and/or other family members;

contrary to Chapter 1, Rule 2(3) and Chapter 4, Rule 6 of the *Professional Conduct Handbook*.

3. As set out in paragraphs 1 and 2 above, your engagement in dishonourable or questionable conduct that casts doubt on your professional integrity and/or competence or reflects adversely on the integrity of the legal profession or the administration of justice contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook*.

[2] Counsel for the Law Society tendered several documentary exhibits at the hearing before us. These were admitted into evidence without objection by the Respondent but subject to a document agreement to which we refer below. The filed documents comprise:

1. Pleadings filed in the Supreme Court of British Columbia, New Westminster Registry No. [number], between SM (Plaintiff) (the family member referred to in the Citation as GM) and RM (Defendant) ("Debt Action").

2. Transcripts of proceedings filed in the Supreme Court of British Columbia, Vancouver Registry No. [number], in Her Majesty the Queen against RM, ("*Rowbotham* Application") heard before a Judge of the Supreme Court of British Columbia, beginning in August, 2003, which transcripts included evidence of:

(a) RM, the father of the Respondent;

(b) the Respondent;

(c) KM, mother of the Respondent;

(d) HM, brother of the Respondent; and

(e) DM, brother of the Respondent.

3. Several exhibits filed on the *Rowbotham* Application, including Affidavits, some of the exhibits to which were missing.

Further, counsel for the Law Society called the Respondent to give *viva voce* evidence at the hearing.

[3] Counsel for the Respondent, in addition to filing a number of exhibits, called David Unterman and Kevin Woodall, both lawyers, to give *viva voce* evidence at the hearing.

[4] In order to protect the confidentiality of information relating to the affairs of RM, some of the oral evidence was heard in camera and some of the exhibits tendered at the hearing were ordered sealed.

[5] A Documents and Transcripts Agreement (the "Agreement"), dated September 11, 2008, and marked as Exhibit 8 at the hearing, provided, among other things, that the filed transcript excerpts formed part of the evidence led on the *Rowbotham* Application. The Agreement further provided:

This agreement does not in and of itself constitute an admission as to the truth of the contents of any document or transcript excerpt.

[6] Accordingly, we did not consider the Transcript Evidence to be proof of any fact unless the fact in question was admitted by the Respondent. However, the Panel did consider the fact that the evidence had been tendered on the *Rowbotham* Application.

FINDINGS

[7] We considered all of the evidence, from which the following narrative emerged:

1. RM and KM were the principal shareholders of K Ltd.

2. In or about 1996, K Ltd. built a hotel in British Columbia known as the Hotel.

3. RM and KM also operated a family business called PE.

4. SM operated a similar business in California.

5. The sons of RM and KM, HM, DM and the Respondent, worked in the family businesses from the time before they were in high school. Until 1997, they were not paid for their work by PE. After 1997, they were paid modest wages, $6,000 to $7,000 annually, by PE. When they were issued paycheques by PE, they immediately endorsed the cheques and gave them to their father, who deposited the funds into the PE bank account, and PE treated the money as shareholders loans. There was no such arrangement for the work the sons did at the Hotel.

6. The Respondent testified that he was not an “hourly employee” at PE and that it was “abnormal” for him to receive a paycheque.

7. When asked why a similar arrangement for payment of wages to the children was not implemented for work done at the Hotel, the Respondent testified:

> A There were ? the first thing is, is actual cash to write a cheque. You have to have funds in the bank to write the cheque, and the hotel was cash poor, I think, all the way until ‘05 or ‘06. So until recently there’s been a cash flow problem at the hotel, so I don't know if a cheque could have been written. It probably would have bounced. That’s one issue. The second issue is when the hotel was built, what my parents told to us is that ? and when I say “told” us, told me and my brothers, was that they were building the hotel for our future. It wasn’t necessarily for their future, because by the time it was profitable, paid the mortgage out and had a good cash flow, it would have been for us, not them. And so that was, I think, part of the thinking about why it wouldn’t have been ? it wouldn’t have made any sense at the time to write a cheque and put it back.
>
> Q But they were building PE for you too, weren’t they?
>
> A No. PE is a very hands-on business. Unless you were there to work it, it wouldn’t make any sense for you to take anything from it. Whereas the hotel was something where you could hire a manager, the manager could manage it, it would turn a profit, and the five siblings could share in that profit after, you know, the manager was paid out. But PE was different, because you actually had to be there. It wasn’t like you could hire a manager and run PE (pp. 304-305).

8. An expert report prepared by Hugh Johnson, Professor Emeritus at SFU, was admitted without objection by the Law Society as evidence of behavioural norms in traditional Sikh households. In his report, Mr. Johnson said, among other things, that it was not uncommon for young adults in traditional Sikh families to work in family businesses without pay:

> Sikh families characteristically function as economic units with members pitching in to achieve family goals ... . They do so within a patriarchal structure in which the father or the senior member of the family provides leadership ... . In this environment, parents do not always see the need to give children the incentive of pay and the children do not always expect it.

…

> In many traditional families, Sikh parents feel duty bound to do everything they can for their children, and Sikh children are conditioned to be obedient to their parents by the affection, loyalty, example and persuasive teaching that they experience within the family. In this culture, most children, even in early adulthood, would find it unthinkable ask [sic] for pay from their parents for helping in a family enterprise. Whatever benefit they receive in gifts or financial support, however we might legally characterize those, they would often, for reasons of traditional [sic] and decorum, characterize as the largess of their parents and particularly their father in his role as the custodian of the family's principal assets ? not the fulfillment of an obligation.

9. The behavioural norms described by Mr. Johnson were norms for the Respondent's family.

10. The financial statements prepared for the Hotel for the years ending December 31, 1997, 1998, 1999 and 2000 made no reference to contingent liabilities for unpaid wages. Other contingent liabilities were recorded. The unpaid wage liabilities were first noted in the 2001 financial statements. Those statements were dated June 21, 2002.

11. The Respondent testified at the hearing before the Panel as follows:

> Q So there was no ? were there ? that's sufficient on that point. With respect to the financial statements for the Hotel and your relationship, your financial relationship with the hotel, in 1997 how much did you expect to be paid during that year by the hotel for the work that you did during that year?
>
> A I wasn't promised any specific sum of money.
>
> Q So how much were you expecting to be paid going to repeat the question as best I can. In 1997 how much did you expect to be paid during 1997 by the hotel for the work that you did in 1997?
>
> A I wasn't expecting to be paid anything in 1997 for work done in 1997.
>
> Q Thank you. In 1998 did you believe that the 1997 financial statements fairly stated the financial activities of the Hotel for the prior year?
>
> A In 1998 I never would have seen the 1997 financial statement, and if I did, it was by accident or in passing.
>
> Q In 1998, 1999, and 2000, in each of those calendar years, how much did you expect you would be paid during each of those calendar years for the work that you did in each of those calendar years?
>
> A In each of those years I didn't have any expectation in those specific years I would get paid for the work done in those years. (pp. 390-391)

12. The Respondent was not involved in the preparation of, nor was he consulted about, the 1997 through 2000 financial statements for the Hotel.

13. In April 2000, the Respondent graduated from law school and in September 2000 he began his articles with a senior criminal lawyer.

14. On October 27, 2000, RM, together with AB, was charged with first degree murder and were imprisoned pending trial.

15. In December 2000, RM applied for Judicial Interim Release ("Bail Hearing"). For the purposes of the Bail Hearing, RM and KM filed a statement showing that their approximate net worth was $11,500,000. Bail was denied and RM remained in custody until he was acquitted on the murder charge in March 2005.

16. Shortly after his arrest, RM began to borrow money from his brother, to help pay the legal expenses he was incurring in connection with his defence. Altogether SM lent RM $330,000 US; the money was paid through PE in the following amounts on the following dates:

(a) December 12, 2000 $100,000 US;

(b) March 23, 2001 $100,000 US;

(c) August 9, 2001 $100,000 US;

(d) December 13, 2001 $ 30,000 US.

17. The amount of $330,000 was not sufficient to cover all the legal expenses incurred by RM through December 31, 2001.

18. The first two loan amounts were advanced without security. However, as consideration for the advance of $100,000 US made August 9, 2001, RM signed a PPSA Security Agreement ("PPSA Agreement"), dated August 10, 2001. This document was drafted by David Unterman, a solicitor employed by RM. Among other terms, the Agreement provided:

(a) That the security was for the $300,000 US that had been advanced.

(b) That RM granted SM a security interest in all of the shares that he held or would hold in K Ltd.

(c) That the advances were payable in full on demand after July 31, 2004 with interest at the rate of 8% per annum, calculated semi-annually, not in advance.

(d) That default could occur if:

> 6(e) the Secured Party deems itself insecure or decides that the Shares are in jeopardy and that the Secured Party has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the Shares are or are about to be placed in jeopardy;

19. The Respondent was not involved in drafting the PPSA Agreement.

20. In 2001, the Respondent was called to the bar in British Columbia. He was then retained by RM as a member of the defence team and he continued in that role until his RM's acquittal.

21. In September or October 2001, the Respondent was given the PPSA Agreement, likely by KM, and was asked to attend to its registration.

22. In October or November 2001, the Respondent asked Mr. Unterman how to register the PPSA Agreement. Mr. Unterman told the Respondent that he should not act for RM in respect of the registration. The Respondent then contacted Rajdeep Deol, a lawyer, and asked him to arrange for the registration of the PPSA Agreement. On November 29, 2001, the PPSA Agreement was registered by Mr. Deol.

23. In October 2001, SM hired Kevin Woodall to negotiate with the Provincial Government for

Rowbotham funding. Mr. Woodall's first bill was dated October 31, 2001. He delivered monthly bills thereafter.

24. On the *Rowbotham* Application, the primary question was whether RM could pay for his defence with his own resources.

25. Mr. Woodall's position for RM on the *Rowbotham* Application was that RM's contribution for funding should be based on his net worth, so that account should be taken of all bona fide liabilities, including the loans from SM and the payment of deferred wages to RM's children, as well as the cost of liquidating assets, and taxes payable upon liquidation.

26. RM's Notice of Motion requesting *Rowbotham* funding was filed in December 2001.

27. On December 18, 2001, Richard Butler, on behalf of the Ministry of Attorney General ("AG"), wrote to Mr. Woodall requesting, among other things:

> ... full particulars and documentation of and relating to the loan(s) by SM to RM, including ... the amount of the loan, the circumstances and/or purpose(s) for which it was made, the terms, and the security, the date(s) and amount(s) of loan money advanced, and what has become of the loan money.

28. It is believed that Mr. Woodall provided a copy of the documents to Mr. Butler.

29. In anticipation of the *Rowbotham* Application, the Respondent was instrumental in determining a "conservative value" for the work that had been performed at the Hotel by him and his two brothers from 1997 through 2001. He worked at the Hotel with PE's in-house accountant, GS, in December 2001 and January 2002 to quantify that value.

30. On January 8, 2002, GS wrote a letter (the "GS letter") to Mr. Woodall in which he explained the basis for what were described as management salaries:

> Contingent Liability: Management Salaries
>
> 2) The Hotel went over budget while construction [sic]. The business was not as good as it was expected. The property was losing money and if the property were to do well K Ltd. would get better interest rate. [sic] As such K Ltd. could not afford to increase the expenses.
>
> The Agreement from the BDC was that K Ltd. would pay a floating interest rate plus a variance based on the success of the business. A more successful business was less risky and the rate could be lowered. The rate was to be the regular rate plus a variance of 2.0%. After construction it was to fall to 1.2% and after showing a profitable business the rate was to fall to 0.6%. The business was not doing well and the rate did not fall even after the construction. After much negotiation the rate fell to 1.2% but because the business has done poorly and below expectations the rate has not fallen to 0.6%.
>
> It was in the businesses [sic] best interest to show a profit so the interest rate would fall. In order to defer expenses K Ltd. has not paid any salary to any of the M Family members.
>
> They are owed and shall be paid contingent on either:
>
> a) The interest rate falls to the BDC Base rate plus a variance of 0.6%, and
>
> b) the covenants of the BDC loan are not violated,
>
> or

c) the business or property is sold,

or

d) The business is able to be refinanced to allow the liability to be paid.

If either of these happens the deferred salary shall become due and payable in reasonably speedy installments.

See Appendix 41B (BDC Loan Agreement and Debit Advice)

a) HM has worked at the Hotel since April 1997 usually 10-12 hours a day, 6-7 days a week. K Ltd. owes him for:

1997 ? $20,000

1998 ? $40,000

1999 ? $40,000

2000 ? $45,000

2001 ? $45,000.

Total Owing to HM: $190,000

b) DM: Graduated from Grade 12 in 1999 and has worked almost full time at the hotel since then. K Ltd. owes him for:

1999 ? $9,000

2000 ? $18,000

2001 ? $25,000.

Total owing to DM: $52,000

c) The Respondent: Worked at the hotel in the summer of 1997, 1998, and 2000. K Ltd. owes him for:

1997 ? $6,000

1998 ? $6,000

2000 ? $6,000.

Total Owing to the Respondent: $18,000

Total Owing to HM, DM and the Respondent: $260,000

31. Mr. Woodall sent a copy of the GS letter to the AG's office shortly after receiving it.

32. About the GS letter, the Respondent said:

Q were you involved in or did you assist in the preparation of this letter?

A I did.

Q Were you involved in or did you assist in the preparation of the part of the letter that's dealing with these management salaries?

A I was not the author of the letter, but I was involved with the contents, assembling the documents and editing the letter and those kinds of things. So I was involved in all of it.

Q Were you aware of the fact that the claims for compensation were set out and disclosed in this letter?

A Yes, I was aware of that. (pp. 439-440)

33. The Respondent also testified:

> … when I worked there, I never worked there under an assumption I was working for ten dollars an hour or eight dollars an hour, or you know, some monthly salary. It was, I was working there, my father promised me we would get paid, we didn't discuss how much, we didn't discuss when. He said, we'll pay you when the hotel becomes profitable. (p. 310).

34. The Respondent further testified:

Q If you remember my question, maybe I phrased it wrongly, but there was no other terms or interim terms agreed to between you and your father as to compensation between 1997 and the date you decided to quantify these things?

A No.

Q You're agreeing with me?

A I agree with you, there was no other terms. It was simply the promise from our father, you will be compensated. We didn't write anything down. There was no, you know, triggering event that would trigger it. It was simply left to our father's discretion.

Q And there was no discussion about how you would be compensated, is that fair?

A Well, I mean, I assumed it would be with some sort of money, but.

Q Well, or benefit?

A It would have to be something beyond what we were already receiving as a benefit. I mean, let me back up for a second. I wasn't expecting that the fact I lived at home, didn't have to pay for the groceries, and didn't have to pay for my schooling, would change. So it would have to be something beyond that.

Q All right. Well, you were going to end up with a hotel though, weren't you?

A Eventually, hopefully.

Q Well, isn't that what people do, is build up equity in the enterprise that they're going to end up with?

A That was an important part of what I expected to happen down the road.

Q Well, that would be very nice compensation, wouldn't it?

A I think that would be very good compensation.

Q All right. And I think we can make it clear, if it isn't already, that neither you nor your brother was expecting at some day to get an accounting of saying, well, you put in so many hours and here's your wages?

A Absolutely. That would be totally foreign, to our family, at least. (pp. 313-314)

35. The Respondent further testified:

A ... don't worry, let this thing turn a profit, you will be compensated. And that was in the spring of 1997.

Q And was that it?

A I mean, I don't remember the exact words. I can only tell you the gist of it, but that's my recollection of the, just of that discussion. Is that the, is that the agreement that you've talked about, that you'd be compensated?

A Yes.

Q Nothing more?

A Nothing more. (p. 312)

36. In June 2002, after long and extensive negotiations, RM and the Attorney General made a defence counsel funding agreement. However, they did not agree on how RM would make his contribution; either in the broad sense, or on an asset by asset, liability by liability, basis.

37. RM and KM owned several properties, including [address], Victoria, BC (the "Y Property"), an office building that was fully leased by the Ministry of Health. In 2000, the Ministry of Health terminated the lease. As RM and KM were unable to find a new tenant, the property became the subject of foreclosure proceedings.

38. On July 15, 2002, an Order Nisi for foreclosure was pronounced in favour of the Imperial Life Assurance Company of Canada ("Imperial Life") in relation to the Y Property. The Order included an order for sale and a judgment against [numbered company], KM and RM in the amount of $1,922,969.62. The property was subsequently sold, resulting in net sale proceeds of $1,244,044.29 and leaving a balance owing on the judgment in the amount of $678,925.33 ("Deficiency Judgment").

39. On or about August 20, 2002, SM's California attorney, Jasdeep L. Ahluwalla, sent to RM a letter stating, among other things:

I have reviewed the [PPSA Agreement] and note that you are obligated to repay my client the sum of US$300,000 after July 31, 2004. I understand that you are also incurring substantial expenses in certain legal matters in which you are presently involved. I have also become aware that you are giving or pledging other assets to the province of British Columbia.

The intent of this letter is to advise you that my client expects repayment of the loan, along with accrued interest, within one week after the July 31, 2004 maturity date. Further, no extension of time for repayment shall be provided as my client is enduring substantial economic hardship in his own business endeavors.

40. The financial statements for K Ltd. for the year ended December 31, 2001, were completed June 21, 2002. One of the notes to the financial statements read:

10. CONTINGENT LIABILITY AND COMMITMENTS

(c) Deferred salaries owing to the following family members from the 1997 to 2000 calendar years:

- DM (1999 and 2000) $ 27,000

- HM (1997 through 2000) 145,000

- the Respondent (1997, 1998 and 2000) 18,000.00

$ 190,000.00

("Deferred Salaries")

The financial statements did not include the Deferred Salaries for 2001 as noted in the GS letter.

41. The financial statements prepared for K Ltd. for the year ending December 31, 2002, were completed on March 14, 2003. These statements also showed the contingent liability for Deferred Salaries of $190,000. These statements also did not include the Deferred Salaries for 2001 as noted in the GS letter.

42. In or about March 2003, SM paid Imperial Life $175,000 and took an assignment of the Deficiency Judgment. That payment was agreed to and accepted by the Respondent on behalf of his father. It allowed RM and KM to renew or modify a mortgage held by Imperial Life over property owned by the Ms on H Street in Vancouver.

43. On March 10, 2003, the Respondent swore an Affidavit that was used by RM on the *Rowbotham* Application (the "Respondent's Affidavit"). The Respondent's Affidavit stated that he "solemnly affirm(ed)" that:

> 56. K Ltd. has promised my siblings and I [sic] payment for our wages when the business first started but had a limited ability to pay. These wages are recorded as contingent liabilities of K Ltd. The wages are payable on either:
>
> (a) the mortgage interest rate payable by K Ltd. to the BDC falling to the BDC Base rate plus a variance of 0.6% and
>
> (b) the covenants of the BDC loan not being violated;
>
> or
>
> (c) K Ltd. or the real property of K Ltd. being sold;
>
> or
>
> (d) K Ltd. is able to obtain refinancing to allow the liability to be paid.
>
> 57. These wages were not paid at the time they were incurred as the cash flow was very tight. Instead we agreed to take lump sum wages once the Hotel reached a targeted debt servicing ratio and having its interest payments reduced or obtaining new financing. Both of these items then would allow more cash flow to pay past wages.

44. Before us, the Respondent affirmed the truth of the quoted statements.

45. The Respondent was asked to reconcile paragraphs 56 and 57 of his Affidavit with his evidence before us that there were no triggering events:

> Q Okay. Well, read paragraph 56 and tell me how that jibes with your earlier statement that there were no other terms that you gave to us, and there was no triggering event for payment.

Read paragraph 56 and tell us how that, help us find how that is compatible with your earlier testimony.

A Absolutely. You had asked me that between the times we did the work, so from 1997 until 2001, when we sat down to quantify them, whether there were any terms or conditions, and there were not. The quantification and the terms and conditions were all decided and agreed upon in 2001. So these conditions that are in the second sentence in paragraph 56 were all agreed upon in 2001.

Q Well, that's not what it says. It says:

> K Ltd. has promised my siblings and I payment for our wages when the business first started but has a limited ability to pay. The wages are recorded as contingent liabilities of K Ltd. The wages are payable on either ...

A Yes.

Q Then these are set out. So you're saying that these terms were put together and then subject of an agreement only in 2001; is that correct?

A That's correct. But I mean, the first sentence, "K Ltd. has promised my siblings and I payment," the promise was made in 1997, so the first sentence relates to 1997. The second sentence, where they're recorded and how they're payable, well, the amounts and the terms were fixed in 2001.

Q Why didn't you put before the court that that was done in 2001 in this affidavit?

A It's in my oral evidence before the court.

Q Now, again you indicate in paragraph 57:

> These wages were not paid at the time they were incurred as the cash flow was very tight. Instead we agreed to take lump sum wages once the Hotel reached a targeted debt servicing ratio and having its interest payments reduced or obtaining new financing.

But that wasn't a term that was discussed at the outset; will you agree that that wasn't discussed?

A Part of the problem is, and maybe my ? I don't know how to explain this to you. Looking back in hindsight, I can only tell you what I recall. And I don't know if I was confusing the 2001 or the 1997 and 1998 issues, because I worked in 1997 and either '98, '99, and then 2000, and I recall several times discussing the operations of the hotel with my father and with my brother HM, and discussing the projection report that has been prepared for the hotel, and discussing this covenant that the BDC had, and how it was one of the first signs of the hotel being profitable, when this debt servicing ratio as going to be hit. So no-one ever said to me in 1997 or '98 or '99, you'll get a whack of money as soon as the debt servicing ratio is met, but I knew that that was one of the signs to show for profitability.

Q Your father never entered into an agreement with you that once the targeted debt servicing ratio was arrived at, that you would get your payment of wages in a lump sum; do you agree with that?

A I agree with that. (pp. 316-319)

46. Before us, the Respondent was referred to excerpts from his Transcript Evidence, but neither

counsel for the Law Society nor for the Respondent asked the Respondent to adopt that evidence. We therefore did not consider it.

47. Before completing his evidence, the Respondent asked to clarify one of his responses:

> A Can I say one thing ?
>
> Q Yes.
>
> A ? Mr. Lunny. You asked me a question this morning, and it's been bothering me over the lunch hour. You took me to my affidavit, and it was the sentence in paragraph 57.
>
> MR. WILSON: Which Tab?
>
> THE WITNESS: Sorry, it's tab 44, paragraph 57, it's on page 13. So it's this ? sorry, is everybody there? It's the second sentence in paragraph 57, "Instead we agreed to take lump sum wages." I think you asked me, I think you suggested to me that I had never had an agreement with my father that I would take lump sum wages once we reached targeted debt service ratio, and we did not have any agreement until 2001. So I wasn't sure if I ? if you asked me there was never an agreement and there was no qualification on the time, but I wanted to be clear about that. There was an agreement in 2001, but not prior to that. I just don't recall if the question had a time limit, or my answer had a time limit. (pp. 357-358)

48. The Respondent and his brothers did work at the Hotel during the period 1997 through 2001. No records of actual hours worked were introduced into evidence before us.

49. Attached to the Respondent's Affidavit were a number of exhibits. The Respondent testified at the hearing that he assisted in the preparation of an updated net worth statement of RM as at November 2001, which did not show any contingent liabilities for Deferred Salaries.

50. The Respondent testified at the hearing that he assisted also in the preparation of the net worth statement dated January 2003, which provided for a contingent liability of $190,000. The Respondent confirmed that this was for Deferred Salaries.

51. On March 13, 2003, counsel for SM, Mr. Deol, issued a letter of demand ("Demand Letter") to RM stating that pursuant to paragraph 6(e) of the PPSA Agreement, his client felt that his security was in jeopardy and demanded the sum of $371,950.68; principal amount of $330,000 US and $41,950.68 in interest.

52. On March 27, 2003, Mr. Woodall sent a copy of the Demand Letter to Mr. Waddell, counsel for the Attorney General.

53. On May 14, 2003, the Attorney General brought on an application to force RM to sign an indemnity payment agreement. The judge ruled that he would not hear the application on an interim basis, and ordered inter alia that RM be "restrained from altering, disposing of, or encumbering in any way, any interest he has in any real or personal property whatsoever situated."

54. On June 5, 2003, Mr. Deol, on behalf of SM, filed a Writ of Summons and Statement of Claim in the Debt Action claiming the sum of $330,000 US together with interest thereon from December 12, 2000 to the date of payment. The Statement of Claim alleged inter alia that the Defendant RM borrowed $330,000 from his brother between December 12, 2000 and December 13, 2001. The particulars of the amount owing and interest calculations were provided by the Respondent to Mr. Deol.

55. Paragraph 7 of the Statement of Claim in the Debt Action alleges, inter alia:

> Pursuant to the Agreement, on March 13, 2003, the Plaintiff deemed itself insecure and had commercially reasonable grounds to believe that the: prospect of payment of the funds advanced by the Plaintiff to the Defendant was being impaired and pursuant to the terms of the Agreement, the Defendant was deemed to be in default of the Agreement.

56. On June 25, 2003, RM, the Defendant, through his counsel, Mr. Woodall, filed a Statement of Defence admitting all of the allegations set out in the Statement of Claim except paragraph 7.

57. On July 22, 2003, Mr. Woodall sent copies of the Statement of Claim and the Statement of Defence that were filed in the Debt Action to Mr. Waddell.

58. On July 25, 2003, Mr. Woodall sent a letter to Mr. Waddell advising, inter alia, that RM would be taking no position on his brother's Rule 18A application.

59. On July 30, 2003, an Appearance was filed in the Debt Action on behalf of the AG, by Mr. Waddell.

60. At some time prior to July 31, 2003, the Respondent told Mr. Deol that he should obtain a summary judgment in the Debt Action before the *Rowbotham* Application was heard. This would result in the Court adjudicating on the claim and, if accepted, might preclude another Court from questioning the validity of the debt.

61. On July 31, 2003, a Notice of Hearing was filed by Mr. Deol regarding the Rule 18A application in the Debt Action, which was to be heard August 1, 2003.

62. The Rule 18A application was heard before a Master of the Supreme Court of British Columbia in August 2003 and opposed by counsel for the Attorney General and the matter was adjourned to be heard with the *Rowbotham* Application, commencing in August, 2003.

63. The *Rowbotham* Application commenced in August , 2003 before a Judge of the Supreme Court of British Columbia.

64. RM testified in the *Rowbotham* Application as did the Respondent and his brothers, HM and DM and his mother.

65. At the *Rowbotham* Application, RM was represented by Mr. Woodall and the Attorney General was represented by Mr. Waddell.

66. In the *Rowbotham* Application, Mr. Waddell questioned, inter alia, the bona fides of the SM loan to his brother.

67. In September, 2003, the Judge denied the *Rowbotham* Application and written reasons were provided.

68. The Reasons for Judgment on the *Rowbotham* Application were marked Exhibit "AA" for identification on the hearing before us. We have not considered Her Ladyship's findings or commentary in coming to our decision; we have treated the judgment as "res inter alios acta". Counsel referred to this judgment as the "elephant in the room".

69. It is, however, common ground that the Reasons for Judgment in the *Rowbotham* Application caused the Law Society to investigate the Respondent.

70. The Respondent was not a party in the *Rowbotham* Application.

71. On October 23, 2007, the AG commenced a lawsuit against RM, KM, the three M children, including the Respondent, and K Ltd. and two numbered companies claiming, inter alia, a conspiracy to defraud the Government by hiding assets and disguising worth (the "Fraud Action").

72. On January 31, 2008, default judgment was obtained against the defendant SM in the Fraud Action.

73. The Panel was told by counsel for the Law Society that the default judgment was subsequently set aside, but the Panel was not given any further particulars about that event.

RULINGS DURING THE HEARING

[8] On the first day of the hearing of the Citation, counsel for the Respondent applied for a direction requiring the Law Society to deliver particulars of the allegations set out in the Citation. The Panel dismissed the application, both because it was not made in a timely fashion and because we were satisfied, having read a letter from Gary Nelson to counsel for the Law Society dated October 19, 2005, that the Respondent had a clear understanding, no later than that date, of the case he had to meet. Mr. Nelson had been counsel for the Respondent. He preceded Mr. Mulroney, who appeared for the Respondent at the hearing before us. On the Respondent's behalf, Mr. Nelson had argued the application we dealt with in our decision dated July 24 and 25, 2007 and indexed as 2007 LSBC 49.

[9] Throughout the hearing, given the nature of evidence taken in confidence, and forming solicitor/client privilege, part of the proceedings were ordered held in camera and a number of the exhibits were also filed in the in camera proceedings.

[10] At the end of the case for the Law Society, the Respondent asked us to determine that there was no evidence to support any of the allegations made against him. The Panel allowed the application as it related to allegation 2(b) in the Citation, but otherwise we dismissed the application. In respect of allegation 2(b), we concluded that the Law Society had adduced no evidence that the Respondent had provided any information of a kind to the Business Development Bank of Canada about the K Hotel business, nor had it adduced any evidence that the Respondent was a party to a scheme or design aimed at obtaining or attempting to obtain a benefit for the K Hotel business by failing to disclose to the Bank liabilities of the K Ltd. company for unpaid wages.

DISCUSSION

[11] Under the *Charter*, the one leading case with respect to an accused's right to a fair trial is *R. v. Rowbotham* (1988), 41 CCC (3d) 1.

[12] In a *Rowbotham* action, the principal questions are:

(a) Does the accused have the means to fund a defence sufficient to ensure he will have a fair trial?

(b) If the accused proceeds to trial without counsel, will he have a fair trial?

(c) Has the accused been denied legal aid?

(d) If the accused has some financial means, but his means are insufficient to fund a trial of the anticipated length and complexity, what contribution should he make to his defence?

[13] The Law Society must prove the allegations against the Respondent on a balance of probabilities: see *F.H. v. McDougall*, 2008 SCC 53, at para. [49], and adopted in *Law Society of BC v. Schauble*, 2009 LSBC 11 (para. [43]).

[14] The elements of the first allegation in the Citation are:

1. participating in a scheme or design to mislead the Supreme Court of British Columbia;
2. arranging the acquisition of security for a loan by SM to RM; and/or
3. arranging the registration of security for the loan; and/or
4. attempting to obtain a judgment on the loan;

all for the purpose of reducing the value of the assets of RM in respect of the *Rowbotham* Application.

[15] The *Concise Oxford Dictionary of Current English* (9th ed.) defines “mislead” as to “cause (a person) to go wrong in conduct, belief , etc.” and to “lead astray or in the wrong direction.” The allegation suggests an element of deception in concealing the truth.

[16] As we see it, it would be enough for the Law Society to prove to the required standard that the Respondent had participated in a scheme to mislead, even if the Court was not in fact misled.

[17] There is no evidence before the Panel that any material fact was not revealed to the Panel and/or in the *Rowbotham* Application.

[18] With respect to the first allegation in the Citation, counsel for the Law Society submitted the alleged loan transaction between SM and RM was a scheme or design to convert a non-arm’s length family transaction into a fully secured commercial style loan and have it crystallized, by obtaining judgment on an undefended claim prior to the *Rowbotham* Application.

[19] Further, counsel for the Law Society submitted that even though this scheme or design failed in the *Rowbotham* Application, it does not absolve the Respondent from the “consequences of his involvement”.

[20] Counsel for the Law Society further submitted that, as the loan was to be repaid within “one week after the August 31, 2004 maturity date”, but that a demand for payment was issued on March 13, 2003 and the “Debt Action” was commenced, which RM did not vigorously defend, goes to the bona fides of this transaction. Furthermore, counsel submitted that, if SM was experiencing financial difficulties, how was he then able to purchase the Deficiency Judgment for $175,000 in or around the same time that he is making demand on the loan?

[21] Finally, counsel for the Law Society submitted that the attempt to obtain default judgment in advance of the *Rowbotham* Application would foreclose a proper inquiry into the facts surrounding the debt.

[22] In analyzing the Law Society’s position, we have to ask specifically what involvement did the Respondent have in the various steps, as it is the Respondent who is cited.

[23] The facts are clear that, once RM was charged, he incurred significant legal fees, and by October 2001, it was apparent to the defence team that Provincial Government funding would be necessary. The Respondent was not involved in the discussions surrounding the preparation of the PPSA Agreement, nor in the preparation of the PPSA Agreement. This was all between Mr. Unterman and RM.

[24] Furthermore, the Respondent did not register the PPSA Agreement. Although on his initiation, he contacted Mr. Deol who subsequently registered the Agreement.

[25] As well, the PPSA Agreement was signed by SM on August 11, 2001, several months before Mr. Woodall was retained and before there was any application to the Provincial Government for funding.

[26] Counsel for the Law Society suggested that it must have been contemplated that funding would have been required prior to retaining Mr. Woodall and therefore the defence team must have known that problems relating to the PPSA Agreement would be encountered. If this argument is to have any merit, one would have suspected that the PPSA Agreement would have been registered immediately after it was signed. However, it was not registered until November 2001, which would negate any suggestion of nefarious conduct.

[27] Counsel for the Law Society also contended that the Respondent undertook to find a lawyer to register the PPSA Agreement when he knew or ought to have known that his father was going to apply for *Rowbotham* funding and that the Respondent ought not to have been involved in a transaction that would reduce the value of the assets that would be available to his father as a contribution to the cost of his defence.

[28] Further, it is important to recognize what role, if any, the Respondent had in the Debt Action. Firstly, the Respondent did not represent his uncle. Secondly, he did not represent his father in defending the claim being advanced by his uncle. This was being handled by Mr. Woodall. The only involvement the Respondent had in the Debt Action was to provide an accounting to Mr. Deol as to particulars of the amounts owing and interest calculations on the debt and suggesting to Mr. Deol that he should obtain summary judgment before the *Rowbotham* Application was heard.

[29] Counsel for the Law Society further suggested that it was improper for RM to, on one hand deny, or not admit, paragraph 7 of the Statement of Claim in his Statement of Defence and then not oppose the application for judgment.

[30] The fallacy of this logic is that a debtor could never consent to judgment. There is no requirement that a debtor do absolutely everything to hinder a creditor. There is no suggestion that the monies were not owed. Furthermore, it is generally improper for a lawyer to ignore instructions from his client.

[31] Furthermore, there is no evidence to suggest that there was a legitimate defence to the Debt Action which appeared to be based on a valid debt. The supporting documentation indicates that it was SM's right to declare default under the PPSA Agreement if he deemed himself insecure or decided that the shares were in jeopardy and that the secured party had commercially reasonable grounds to believe that the prospect of payment or performance was or was "about to be impaired or that the shares [were] or [were] about to be placed in jeopardy." Clearly, given the position of the Attorney General, there were commercially reasonable grounds to believe that the shares would be in jeopardy.

[32] Counsel for the Law Society also contended that there was no change in the circumstances between August 2002, when Mr. Ahluwalla put RM on notice that there would be no extensions, and March 2003, when Mr. Deol sent the demand letter to RM.

[33] No evidence was provided to the Panel as to SM's financial circumstances in August, 2002 or March, 2003, and we do not know whether he was or was not himself under any economic restraint.

[34] The Law Society also contended that the initial $200,000 advance should fall within the norm of traditional Sikh family dealings and would not be expected to have been paid. There is no merit to this contention.

[35] Counsel for the Law Society also contended that the Respondent knew that he could not act against his father's interests by registering his uncle's PPSA Agreement on one hand, but on the other hand, he had no

trouble in instructing SM's counsel to proceed to judgment against his father. Again, there is no merit to this contention.

[36] Counsel for the Law Society also suggested that there was a concerted effort to foreclose the Attorney General from being involved in the Debt Action.

[37] It is clear that the Attorney General was kept informed of all matters relating to the Debt Action. Copies of the Statement of Claim, Statement of Defence, letters advising that RM would be taking no position in the Rule 18A application, and Notice of Hearing were all provided to Mr. Waddell. The Attorney General was not a party in the Debt Action but, nevertheless, was able to oppose the Rule 18A application.

[38] Finally, counsel for the Law Society has suggested that, as SM did not obtain judgment after the *Rowbotham* hearing, this suggests the whole matter was a sham. The Panel is not influenced by this suggestion as there may be any number of reasons why the Debt Action was not pursued.

[39] It is important to keep in mind that the strategy of RM in the *Rowbotham* Application was that the monies that he would be required to make available would be his net worth after taking into account all *bona fide* liabilities, including the loans from his brother and payment of the deferred wages to his children, as well as the costs of liquidating and taxes payable upon liquidation. It is clear that the Respondent participated, in a very limited degree in relation to the Debt Action, to make his father's best case, and what else was he supposed to do?

[40] In relation to allegation 2(a), the Citation suggests that the Respondent participated in a scheme or design to misrepresent the expenses or liabilities of PE and/or K Hotel business in two specific instances.

[41] We are satisfied that there was no evidence that the Respondent participated in a scheme or design to misrepresent the expenses or liabilities of PE. The Respondent was not involved in preparing any of the financial records of PE, nor was there any evidence presented by the Law Society with respect to PE. Further, on a no-evidence motion, the Panel dismissed the allegation, leaving us to deal with the Respondent's alleged conduct in participating in a scheme or design to misrepresent the expenses or liability of the K Hotel business relating to the previously undisclosed liabilities for unpaid wages.

[42] The elements of the allegations in 2(a) are:

> 1. participating in a scheme or design to misrepresent the expenses or liabilities of the K Hotel business;
>
> 2. providing false or misleading information to the Supreme Court of British Columbia in the *Rowbotham* Application; and
>
> 3. misrepresenting the value of the assets by claiming the existence of previous undisclosed Deferred Salaries.

[43] This allegation is somewhat different from allegation (1) as it suggests not only participating in a scheme or design to mislead, but also an element of providing false or misleading information to the Court.

[44] In analyzing the allegation involving the K Hotel business, counsel was asked to provide written submissions on the following question:

> In respect of the allegation numbered 2(a), must the Law Society prove that the Respondent participated in a scheme or design to misrepresent the PE and/or K Ltd. expenses or liabilities by both:
>
> 1. providing false or misleading information; and

2. claiming previously undisclosed liabilities?

[45] Rule 4-14 of the Law Society Rules ("the Rules") sets out the requirements for the contents of a citation:

> 1. A citation may contain one or more allegations.
>
> 2. Each allegation in a citation must
>
> (a) be clear and specific enough to give the respondent notice of the misconduct alleged, and
>
> (b) contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proved against the respondent and to identify the transaction referred to.

[46] We are satisfied that, in the context of a disciplinary hearing, the technical rules pertaining to criminal indictments and information and civil proceedings need not be adhered to with the same precision (James T. Casey, *The Regulation of Professionals in Canada*, pgs 8-15; *Bartell v. Manitoba (Securities Commission)*, 2003 MBCA 30, paras. 35-37; *Roy v. Newfoundland Medical Board*, [1996] MJ No. 234(CA), application for leave to appeal to Supreme Court of Canada denied [1996] SCCA No. 491 (QL); *Golomb v. College of Physicians and Surgeons of Ontario*, [1976] OJ No. 1707 (Div. Ct.), para. 32).

[47] In *Béliveau v. Barreau du Quebec* (1992), 101 DLR (4th) 324 (Que. CA), Beauregard JA wrote, at page 331:

> A complaint to a disciplinary committee is not a criminal or quasi-criminal proceeding: … Nor is professional misconduct a criminal offence …, and it is therefore not necessary, in my opinion, that disciplinary charges be worded with the formalistic and rigid precision of criminal charges.

[48] The Respondent must be given reasonable notice of the allegations made against him so that he can fully and adequately defend himself.

[49] In *Novak v. Law Society of British Columbia*, [1972] BCJ No. 522, McKay J. held at paragraph 12:

> The citation in this matter sets out in detail the conduct to be inquired into and the applicant well knew the complaint he had to meet. He would know that on the basis of that conduct, if established, he could be found guilty of professional misconduct or conduct unbecoming a member of Society or of both, depending on the view taken by the Benchers of that conduct.

[50] We are satisfied that the Respondent was provided with reasonable notice of the nature of the allegations made against him and, as we previously ruled, further particulars were not required.

[51] In *Scaplen v. New Brunswick Real Estate Association*, 2007 NBQB 45, counsel for the realtor argued that use of "and" in the charge:

> Graeme Scaplen, Royal LePage Commercial Eastern and Royal LePage Atlantic failed to comply with article 23 of the *Code of Ethics* and *Standards of Business Practice*, in particular, failing to respect the contractual relationship of the Complainants *and* in failing to negotiate a purchase of the property through the Listing Agent (para. 27, emphasis added).

was conjunctive and that the Association had to prove both elements in order for there to be a finding of professional misconduct. The Discipline Panel concluded that a finding of misconduct could occur if either of the two elements were proved. This decision was upheld on appeal to the Queens Bench.

[52] On appeal, Justice Grant held that:

> [26] In my view these findings match with the allegations of wrongdoing set out in the charge under Article 23 and I therefore find that the particulars provided by the respondent to Mr. Scaplen meet the test of sufficiency …

[53] In dealing with the issue of the use of "and" as a conjunctive rather than a disjunctive term, Mr. Justice Grant stated:

> [31] … While the respondent, in providing particulars to Mr. Scaplen, used the conjunctive "and" rather than a disjunctive term, I am satisfied, based on the Record, that Mr. Scaplen was not denied a fair hearing as a result.
>
> and
>
> [32] Furthermore, what is most important about the particulars, in my opinion, is not how they are worded but that they identify the standard that the member is alleged to have breached. Once that was done it was the Committee's task to interpret the standard, not the respondent's.

[54] The basic thrust of the argument by counsel for the Respondent is that allegation 2(a) has distinct interrelated elements, all of which go towards the allegation claimed, which cannot be read logically in a disjunctive manner. His position is that, in order to find that the Respondent participated in a scheme or design to misrepresent the companies' liabilities or expenses to the Court in the *Rowbotham* Application, it must be shown the previously undisclosed liabilities for labour expenses claimed was done without "colour of right". As such, it is argued that the construction of allegation 2(a) involves the particularization of the false and misleading information as being strictly related to claims of previously undisclosed liabilities, which are in turn interpreted as being related solely to the aforementioned labour costs.

[55] In paragraph 20 of his submissions, counsel for the Respondent states:

> Clearly the reason the Law Society refused to particularize was because the Law Society's theory of the case, and the way they presented their case, was to assert that the claims themselves for compensation for labour were without basis and were a fabrication. That was the meaning and aim they clearly ascribed to the count. It was only part way through the hearing that the Law Society realized there was a legitimate basis for the claims and attempted to shift the theory of its case to saying that if there was any incorrect evidence about anything that the count was made out. Such a shift in the nature of the allegation during a hearing would if permitted and adopted by the panel render the hearing completely unfair and should not be permitted.

[56] Counsel for the Respondent further submits that a failure to give particulars of one component of an allegation, as is argued to be the case under the Law Society's interpretation of allegation 2(a), would be procedurally unfair in not allowing the Respondent to properly refute allegations of providing false or misleading information at his father's *Rowbotham* Application.

[57] In response, the Law Society's position is that a finding that the Respondent was involved in a scheme or design to misrepresent the assets and expenses of PE and/or K Ltd. can be made out either by establishing that the Respondent provided false or misleading information or by his claiming of previously undisclosed assets, or both.

[58] At issue is whether such an interpretation can be supported with due regard to the drafting principles and interpretive framework that govern citations at a hearing.

[59] In discussing the general framework for such an analysis, a useful summary is provided in *Brendzan v. Law Society of Alberta*, [1997] AJ No. 680 at paras. 45 to 48:

45 When notice is given to a member of the Law Society by way of a general citation with separate particulars, the purpose of the citation is essentially no more than a “call to arms” or an initial summons to battle. It is intended to put the member on notice and to engage him for the purpose of the dispute to come. In the same way as a criminal Information, which is drafted very generally for even the most serious offence, *the purpose of a general citation is to give notice together with a formal albeit general indication of the acts and matters which will be in issue. In many cases this is sufficient to meet the rules of audi alteram partem because the member or accused very well knows the facts against him which ground the charge.* If not, then the particulars should function to provide such further information as is required to meet the requirements of natural justice and to enable the member or accused to know the case he has to meet and to be able to prepare a defence.

46 The Supreme Court of Canada in *R. v. Sault St. Marie* (1975), 3 CR (3d) 30 addressed the issue of whether a charge was so wide as to be a nullity. The Court held (within the context of the higher standard required for criminal proceedings):

> In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? (at p. 35)

47 Even before the landmark decision of *Sault St. Marie*, courts were applying common sense and natural justice in the context of challenges to citations based on lack of specificity in the context of professional disciplinary matters. In *Re Novak and the Law Society of British Columbia* (1973), 31 DLR (3d) 89, the Court held:

> I think it can also be said that such administrative tribunals performing judicial functions are not bound by the technical rules involved in the drafting of indictments and informations, provided always that the provisions of the statute involved are carried out and the proceedings are conducted within the bounds of “natural justice”. (at p. 98)

48 I find, on the basis of this law, that the Citation provided to the Applicant in this case was, together with the particulars eventually provided, sufficient to meet the rules of natural justice and the requirements of *audi alteram partem*. The practical test set out in *Sault St. Marie* asks “does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge” and to this I would answer that the Applicant does know the case he has to meet and is not prejudiced by any ambiguity in the charge.

[emphasis ours]

[60] In applying the above passage, allegation 2(a) of the Citation provides sufficient clarity of the scope of the allegation in specifying the precise nature and transactional span of the alleged misrepresentation. As we previously ruled that particulars provided by the Law Society have been sufficient, an attack on the general scope of allegation 2(a) does not appear to have much merit insofar as it relates to the case that must be met.

[61] One issue raised by counsel for the Respondent, in an interesting, albeit obtuse manner, relates to the significance of the second prong of allegation 2(a); specifically, what is the significance of the fact that liabilities were previously undisclosed? A follow-up to this is whether the simple fact that they were previously undisclosed is sufficient to support an allegation of a scheme to mislead the Court?

[62] The Law Society’s position on this is stated at para. 18 of their submissions:

> In this case, the citation makes clear that the conduct under scrutiny is the Member's alleged participation in a scheme to misrepresent PE and/or K Ltd.'s expenses or liabilities. The circumstances of the alleged misconduct include providing false or misleading information to the Court or claiming previously undisclosed liabilities. Proof on a balance of probabilities of either of these circumstances, in and of itself, proves the Member's participation in the alleged scheme or design. This is enough for the Panel to make a finding of professional misconduct.

[63] This was further clarified in the Law Society's reply submissions at para. 2 as follows:

> The question posed by the Panel in its March 3, 2009 memorandum posits two alternative interpretations of Count 2(a) of the Citation. However, both alternatives incorporate the express essential element of the count that the Member "participated in a scheme or design to misrepresent the PE and/or K Ltd. expenses or liabilities." The Law Society, of course, accepts that this must be found by the Panel to have taken place in order for Count 2(a) to be made out.

[64] Ultimately, however, such a question goes to the merits of the case against the Respondent at the disciplinary hearing. A predetermination that the second prong of allegation 2(a) must be read in conjunction with the first prong in order to make out the claim of professional misconduct is to prejudge the merits of the Law Society's case.

[65] The question is whether the events in question amount to professional misconduct, not the specific requirement for such a claim. Such an interpretation is further supported at para. 49 and 50 of *Scaplen, (supra)* which provides that:

> [49] In my opinion Mr. Scaplen's submission is technical at best. While the charge could have been better drafted, the Committee's jurisdiction flows not from the drafting of the charge but from the authority it derives from the *Act* and bylaws. Mr. Scaplen was clearly apprised of the charge and he had full opportunity to reply and to participate in the hearing. See also *Violette v. Dental Society*, 2004 NBCA 1, at para. 42.
>
> [50] In its ruling on this objection the Board was correct in my view in its interpretation of the *Act* and the bylaws and in its conclusion that the *essential charge, professional misconduct, which term is found in the Act, includes failure to comply with the standards set out in the Code of Ethics of CREA*.
>
> [emphasis ours]

[66] The overly formalistic and technical approach to interpreting citations, as is discussed in this excerpt, does not correspond to the essential issue of professional misconduct as defined and interpreted through the governing *Legal Profession Act*, Law Society Rules and *Professional Conduct Handbook*. The nature of a finding of professional misconduct is certainly a broader inquiry than a focus on a singular alleged delict or act of impropriety, as may be the case in a criminal or civil allegation. It would be a strained approach to suggest that the Panel could make findings that the Respondent provided false and misleading information to the Court, but find no basis for his participation in a scheme to misrepresent the PE and/or K Ltd. liabilities based on their failure to find that he claimed previously undisclosed liabilities.

[67] We are satisfied that the Citation provides an allegation with respect to the Respondent's conduct in participating in a scheme or design to misrepresent the expenses or liabilities of K Ltd. by: (i) providing false or misleading information to the Supreme Court of British Columbia on the *Rowbotham* Application; and/or (ii) for the purpose of misrepresenting the value of assets by claiming the existence of previously undisclosed liabilities for unpaid wages. In our view, it is sufficient for the Law Society to establish either or both on the balance of probabilities for the conduct to be considered to be professional misconduct.

[68] Counsel for the Law Society contended that any activities that deal with one's assets to grant priority when a *Rowbotham* Application is contemplated, is generally considered improper and may be itself grounds to deny any *Rowbotham* relief, which is what happened.

[69] Counsel for the Law Society also contended that, with respect to the claim for monetary wages:

> (a) In PE, the M children worked many hours and did not receive monetary wages for the work they provided. Further, there was no expectation that they would receive monetary compensation. When they did receive paycheques, they endorsed them over to their father.
>
> (b) With respect to K Ltd., there was no obligation on the part of K Ltd. to pay any wages, nor did the children expect to receive wages.
>
> (c) The M children volunteered their services for the common good of the family enterprises and that they would be long term beneficiaries of any such success and if they failed that would be their risk. In the interim, they received a number of benefits, including room and board, living expenses, clothes, RRSPs, post secondary-education, books, cars, auto insurance, gas and spending money.
>
> (d) Once RM was arrested and it became apparent that there would be a need for *Rowbotham* funding, steps were taken to create a claim for unpaid wages. These included calculating hours and wage rates details as if there was an employment agreement, which there was not, formulating triggering events and introducing those claims for the first time in financial statements and then asserting those claims to the AG and in the *Rowbotham* Application itself. The first claim recorded in the financial statements was for the year ended December 31, 2001, dated June 21, 2002.
>
> (e) There was something untoward in the framing of the argument by Mr. Woodall in the *Rowbotham* Application and in his testimony before us in characterizing the "claim for unpaid wages" as a claim for restitution and unjust enrichment, as this was not the way the claims were characterized initially in the documentation prepared for the *Rowbotham* Application.
>
> (f) The Respondent's evidence before the Hearing Panel that at no time did he expect to receive an accounting of the amount of time that he had put into the business and then have that translated into payment for wages was contrary to what he testified to at the *Rowbotham* Application.
>
> (g) As the M children were provided with a number of incidentals, including living expenses, payment of tuitions, etc., no claim for unpaid wages is warranted, nor would a claim for unjust enrichment or restitution likely succeed.

[70] Counsel for the Law Society further contended that the Respondent knowingly participated in providing false information to the Court for the purposes of obtaining a benefit.

[71] Counsel for the Law Society referred to paragraphs 56 and 57 of the Respondent's Affidavit, which suggested that this arrangement for payment was an arrangement from the get-go as opposed to having been contemplated and developed in late 2001 and early 2002. Counsel suggested this was a grossly misleading misrepresentation to the Court and was similar to that conduct complained of, as noted in *Re Morse*, 1991 CanLII 461 (On LSDC). This is furthermore compounded when the financial statement presented by RM in his bail application showed no such contingent liabilities.

[72] Counsel for the Law Society also contended that RM could not have his cake and eat it too. The Respondent testified before us that his work at the Hotel could be characterized as sweat equity. Counsel

contended that, if it was truly sweat equity, that would explain the non-reporting, and create no debt owing to the children. However, sweat equity and deferred wages are simply “irreconcilable and incompatible concepts”. For them now to claim a debt that was not sweat equity at all and the failure to record the debt was “dishonest to the Court and to the bank”.

[73] In analyzing the evidence as it relates to each of these allegations, we considered specifically the Respondent’s Affidavit. In that Affidavit, the Respondent affirmed that (paragraph 56) “K has promised my siblings and I [sic] payment for our wages when the business first started, but had a limited ability to pay. These wages are recorded as contingent liabilities of K.” On its face, that sworn evidence was at least misleading if not false.

[74] The evidence before us was that, when the business first started in 1997, there was no agreement made between K and the Respondent or his siblings for the payment of wages. In fact:

> (a) The Respondent testified that wages were not paid, such as they had been paid for work done for P, with the cheques endorsed back to RM.
>
> (b) The Respondent knew that the Hotel was built for his and his siblings’ future.
>
> (c) The Respondent’s labour in the years 1997 ? 2001 was considered by him to be “sweat equity”.
>
> (d) The financial statements for K Ltd. for the years ending December 31, 1997 ? 2000 made no reference to contingent liabilities for unpaid wages.
>
> (e) The Respondent testified that he did not expect to be paid for any of the work that he did in 1997 ? 2000.
>
> (f) The financial statements prepared by the Respondent in November, 2001 did not make reference to any Deferred Wages.

[75] The agreement for payment of wages was not made until late 2001 or early 2002 and from that point onwards was disclosed in the financial statements and ultimately to the AG and clarified before the Hearing Panel.

[76] The failure to explain the true situation in the Respondent’s Affidavit, in our opinion, was misleading. The Respondent should have disclosed in the Affidavit, as he testified before us, that initially there was no discussion on how or when the wages would be paid, but after his father was charged and given the approach taken by his father’s counsel on the *Rowbotham* funding, that in late 2001 or early 2002 steps were taken to show these retroactive wages as “Deferred Salaries”.

[77] Furthermore, in paragraph 57 of his Affidavit, the Respondent stated that the wages were not paid at the time they were incurred as cash flow was tight, but they agreed to take lump sum payments once the Hotel reached a targeted debt servicing ratio. This again is misleading as there was no agreement to take lump sum wages, as suggested. It was not until late December 2001 or early 2002, that this suggested arrangement tied to the debt servicing ratio arose (after RM started his application for *Rowbotham* funding).

[78] It is clear that the Respondent and GS developed a systematic arrangement, or scheme, to record the unpaid wages from 1997 to 2001 as contingent liabilities on the financial records and to develop a payment schedule that would be triggered after a debt service ratio was met. This scheme was consistent with the objectives of RM’s position in the Rowbotham Application, namely to ensure that his personal monies available to fund his defence reflected any and all liabilities. However, in looking at allegation 2(a), the Law Society must prove on the balance of probabilities that the Respondent misconducted himself professionally by “participating in a scheme or design to misrepresent the … liabilities of … the K Hotel [business] by

providing misleading information to the Supreme Court of British Columbia … .”

[79] We are satisfied that the Respondent provided the Court with misleading information by reciting in his Affidavit very precise conditions referable to the deferred wage claims without revealing that these conditions were a late construct, which late construction should have been disclosed to the judge for consideration.

[80] The Respondent is a lawyer and an officer of the Court, and in this case he was also a witness, and as such he had a duty to ensure that the Court was not misled by anything he said as a lawyer, or as a witness.

[81] Allegation 2(a), which the Law Society decided to pursue, suggests that there must be an agreement between the Respondent and one or more persons to misrepresent the expenses or liabilities of the K Hotel business. “Participating”, “scheme” and/or “design” imply a plan executed by more than one person. Although there is substantial evidence to suggest that the Respondent and GS worked diligently in preparing the financial statements and the GS Letter, that was not the allegation before us. The allegation is that the misleading Affidavit was part of the scheme or design in which the Respondent participated with someone. There is no evidence that, when the Respondent completed and signed his misleading Affidavit (March 10, 2003), he worked in concert with anyone. To suggest so would be purely speculating.

Decision

[82] Having made these observations, we are satisfied that the Respondent provided misleading information to the Court, and it would be wrong for us to excuse him just because it was not proved that he participated with at least one other person in providing that information. Following the analogy of included offences in criminal law, we conclude that the Respondent, by providing the misleading information, whether or not he did so in the execution of a plan to which any other person was a party, misconducted himself professionally. We have no difficulty in saying that the Respondent could not reasonably have thought that he did not have to meet the allegation that he provided the Court with misleading information, whether or not it was alleged that he had provided it by participating with one or more persons.

[83] We are satisfied that the Law Society has established on the balance of probabilities that the Respondent provided misleading information to the Supreme Court of British Columbia in the *Rowbotham* Application of RM. This is an included allegation in allegation 2(a), and as such we are satisfied that the Respondent’s actions were professional misconduct.

[84] However, we are also satisfied that the Law Society failed to establish that the Respondent did not disclose the liabilities of unpaid wages as alleged. These unpaid wages were disclosed as early as January 2002 and formed the basis for the position advanced by counsel for RM at the *Rowbotham* hearing, namely that these liabilities were to be used to reduce the amount of RM’s estate to be made available to fund his defence.

[85] We are further satisfied that the Law Society has failed to establish the allegations set out in allegation (1) and as previously noted allegation 2(b) was dismissed on a no evidence motion.

[86] Finally, having made a determination against the Respondent in allegation 2(a), for the reasons previously noted, we are not satisfied that allegation 3 had been made out, as the Law Society has failed to establish that the Respondent participated in a scheme or design, which by necessity was imported into that allegation by the use of the introductory words “as set out in paragraphs 1 and 2 above”.

CONCURRING DECISION OF GORDON TURRIFF, QC

[87] I have had the opportunity to read a draft of the decision of my learned colleagues, David Renwick, QC, and Warren Wilson, QC, in relation to the citation issued against the Respondent on January 16, 2006. I agree with them in the result.

[88] During the course of the hearing I agreed with my colleagues that the Respondent did not need particulars of the allegations made against him. Mr. Nelson's letter to the Law Society dated October 19, 2005 shows that the Respondent was well informed about the Law Society's concerns even before the citation was issued. I also agreed with my colleagues during the course of the hearing that, with reference to allegation 2(b), the Law Society had adduced no evidence that the Respondent had provided false or misleading evidence to the Business Development Bank.

[89] I agree with my colleagues, generally for the reasons they have given with reference to allegation 1, that the Law Society has not proved that the Respondent misconducted himself professionally in anything he did or did not do in connection with the acquisition or registration of loan security, or in connection with obtaining the judgment, in favour of SM.

[90] I also agree with my colleagues, generally for the reasons they have given with reference to allegation 2(a), that the Law Society did not prove that the Respondent had claimed the existence of previously undisclosed liabilities. And, in respect of the same allegation, I agree with my colleagues, generally for the reasons they have given, that it would be enough for the Law Society to prove either that the Respondent had provided misleading information or had claimed the existence of previously undisclosed liabilities.

[91] I adopt what my colleagues have said in paragraphs [79], [80] and [82] of their decision. I agree, as they have said in their paragraph [81], that the words "participating", "scheme" and "design" in allegation 2(a) imply a plan executed by more than one person. While I have no doubt that the Respondent provided misleading information to the Court, I have not been persuaded that it is more likely than not that he participated in a scheme or design to provide the information he provided without revealing the timing of its creation. On the evidence, it is just as likely as it is not that he decided on his own what to say and what to hold back.