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

Robert Collingwood Strother

Respondent

Decision of the Hearing Panel on Respondent's Application Relating to "Abuse of Process"

Hearing date: December 6, 2010 and March 31, 2011
Panel: Gavin Hume, QC, Gregory Petrisor, Alan Ross

Counsel for the Law Society: Henry Wood, QC, Lars Kushner
Counsel for the Respondent: Peter Gall, QC, Robert Grant and Joanne Thackeray

Preliminary Matters

[1] At the outset of this hearing, the Law Society indicated the manner in which it intended to attempt to prove the allegations against the Respondent. The Respondent takes issue with a portion of the Law Society's proposed evidence. The Respondent says that the introduction of the evidence proposed by the Law Society constitutes an abuse of process because it will lead to a relitigation of issues that were explored, and decided upon, in a civil action.

[2] The Respondent applies for an order limiting the evidence to be relied upon by the Law Society in this proceeding. This is our decision on that application.

The Citation

[3] The Law Society issued a Citation against the Respondent on September 8, 2009 and amended it on September 14, 2010. In effect, the Citation alleges that the Respondent placed himself in a conflict of interest by:

(a) taking a financial interest in a client (SH Corp.) which was a potential competitor of an existing client (ME Corp.); and

(b) breaching his duty of loyalty to a client (ME Corp.) by failing to provide material disclosure of his financial interest in the other client and failing to advise that a previous negative legal opinion should be reconsidered and failing to advise the existing client of a favourable advance tax ruling.

Background

[4] The background to this disciplinary proceeding dates back to 1997. As a result of certain acts and omissions by the Respondent between 1997 and 1999, former clients of the Respondent (ME Corp.) sued him for alleged breaches of his retainer agreement and fiduciary obligations. The trial of that action occupied some 46 days in court. The majority of the factual background is set out in Reasons for Judgment issued by the Supreme Court of British Columbia (2002 BCSC 1179). That decision was appealed to the British Columbia Court of Appeal (2005 BCCA 35) and then the Supreme Court of Canada ([2007] 2 SCR 177, 2007 SCC 24).

[5] Each decision from the three levels of court discusses the factual background to the case. Of note, the three levels of court came to different conclusions about the legal implications deriving from certain facts.

[6] This hearing deals with the ethical standard to be applied to the Respondent in respect of his conduct in the period from 1997 through 1999.

[7] At the opening of the hearing in this matter, the Law Society indicated that it intended to prove its case by:

> (a) relying, to a large extent, upon the evidence tendered and the findings of fact made in the BCSC, BCCA and SCC decisions; and
>
> (b) leading further evidence on points that were not deliberated upon in those courts.

[8] As noted, the Respondent takes issue with the Law Society's intention to lead further evidence. He brings this application to limit the evidence that will be considered by this Panel.

[9] Since the Respondent's application, the parties further clarified their positions. The Law Society drafted a "Statement of Evidence to be Relied Upon" (the "Law Society's Statement of Evidence") consisting of 64 paragraphs with 18 attachments as well as a statement of "Applicable Legal Principles".

[10] The Respondent provided two responses to the Law Society's Statement of Evidence, dated June 3, 2011 and October 4, 2011. In the October 4, 2011 Supplementary Response, the Respondent indicated that he took issue with 13 of the paragraphs in the Law Society's Statement of Evidence.

[11] Although the further written submissions of the parties have clarified certain evidentiary issues, the Respondent's initial procedural objection remains. The Respondent says that the Law Society should not be allowed to introduce new evidence because it would be an abuse of process.

[12] The Respondent contends that this Panel should be restricted to the evidence adduced at the trial and is precluded from questioning the findings of fact made by the trial judge. The Respondent says that to allow any further evidence would constitute an abuse of process.

[13] The Respondent says in his written submission that the Law Society seeks "in effect, to challenge the findings of fact of the trial judge … It proposes to call witnesses and tender evidence to contest facts that have been decided by Mr. Justice Lowry, either expressly or by necessary implication, and which were adopted by the Supreme Court of Canada."

[14] It should be noted that both sides agree that evidence tendered at the civil trial is admissible and can be used by both the Law Society and the Respondent in this proceeding.

The Law

[15] Both the Respondent and the Law Society rely on the Supreme Court of Canada's decision in *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 ("*Toronto v. CUPE*"). Both parties argue that the case supports their respective positions.

[16] The *Toronto v. CUPE* case involved a grievance arbitration. The city employed a man as a recreation instructor. He was charged with, and convicted of, sexually assaulting a boy under his supervision. The conviction was upheld on appeal. The city dismissed the employee. The employee grieved his dismissal. The city did not call the complainant to testify in the arbitration. It sought to prove the assault by other means. The employee testified that he did not assault the boy. The arbitrator ruled in favour of the employee, finding that the city had not proved that the assault occurred and that the presumption raised by the criminal conviction had been rebutted.

[17] The Ontario Divisional Court quashed the arbitrator's decision. The Ontario Court of Appeal upheld the decision of the Divisional Court. The Supreme Court of Canada dismissed the union's appeal.

[18] The court relied on the doctrine of abuse of process for its ultimate conclusion that the grievor could not relitigate the factual basis for his conviction. In Toronto, Arbour J. described the doctrine of abuse of process by relitigation as follows:

> (3) Abuse of Process
>
> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that

they are contrary to the interest of justice" (*R. v. Power*, [1994] CanLII 126 (SCC), [1994] 1 SCR 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 SCR 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 SCR 979, at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

…

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of res judicata while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Donald J. Lange, *The Doctrine of Res Judicata in Canada*. Markham, Ont.: Butterworths, 2000, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, supra, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

…

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty JA's reasons (55 OR (3d) 541), at para. 65; see also *Demeter v. British Pacific Life Insurance Co.* (1983), 150 DLR (3d) 249 (Ont. HC), aff'd (1984), 48 OR (2d) 266 (CA), at p. 264, and *Hunter v. Chief Constable of the West Midlands Police*, [1982] AC 529 (HL), at p. 536.)

43 … In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. …

46 … A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[19] It is evident from the reasoning in *Toronto v. CUPE* that the evil to be avoided is the relitigation of the same facts before a different tribunal. The possibility of inconsistent findings is to be avoided so that the credibility of the judicial process is not undermined.

The Submissions of the Parties

[20] The Respondent argues that all relevant facts were squarely before the trial judge. The trial judge fully canvassed all of the relevant aspects of the factual circumstances as between the Respondent, his law firm and the two clients involved. He argues that, because the conduct alleged in the Citation relates to precisely the same factual matrix that was before the courts, the Citation must be considered on the basis of the factual findings of the judge at the Supreme Court.

[21] The Respondent argues that he should not be subject to relitigation of the same facts. It would be wrong to revisit the exact same factual issues that were before the trial judge and call evidence from witnesses with a view to challenging any of the trial judge's findings.

[22] In addition, the Respondent submits that the Law Society should not be entitled to undertake an open-ended, roving inquiry into the conduct of the Respondent. He says that the Law Society seeks to:

> (a) rely on facts that are clearly irrelevant to the subject matter of the Citation;
>
> (b) relitigate the findings of fact already found in the civil proceedings;
>
> (c) mischaracterize the factual findings of the courts in the civil proceedings;
>
> (d) expand the scope of the Citation; and
>
> (e) have this Panel begin a roving inquiry with the object of discovering some new misconduct by the Respondent.

[23] Of these five bases for the Respondent's objection to any portion of the proposed evidence of the Law Society, we are only called upon to rule on (b) (relitigation) at this time. If the Law Society seeks to introduce evidence that is irrelevant or outside the scope of the Citation, the Respondent will be at liberty to object to that evidence at the appropriate time. If the Law Society appears to be expanding the scope of the Citation or conducting a roving inquiry, the Respondent will be at liberty to object to the evidence on those bases as the evidence is tendered. If the Respondent believes that the Law Society is mischaracterizing factual findings that will be a matter for final argument.

[24] It should be noted that, in his first submission on this issue, the Respondent took the position that the Law Society is bound by the findings of fact found in the Reasons for Judgment of the trial judge. In later submissions the Respondent has allowed that other evidence from the trial, not mentioned in the Reasons for Judgment from the trial, can be referenced. He has further allowed that the findings from the other levels of court can be referenced, but with limitations.

[25] In response to the Respondent's application, the Law Society takes the following position:

> (a) The current proceeding deals solely with issues of ethics and professional conduct. It can be distinguished from the civil trial, which dealt with legal duties arising from alleged breaches of fiduciary duty and retainer agreements.
>
> (b) The Law Society does not seek to relitigate the facts or issues decided by the courts. It does not intend to "challenge the integrity of the adjudicative function of the court."
>
> (c) The doctrine of "abuse of process" is an extraordinary remedy that is inappropriate in this situation.

Discussion

[26] First, we note that the issues decided by the courts and the issues facing this Panel are not identical. The trial judge specifically indicated that he was not dealing with the ethical issues raised by the Respondent's conduct. He stated (at paragraph 34):

> However, the present inquiry is not concerned with professional reputation and, apart from legal implications that may arise, this is not the place to engage in an analysis of ethical considerations upon which there may well be disagreement. The principal issues to be addressed here are necessarily confined to an assessment of whether what was done was other than the law allows.

[27] It was further noted by McLachlin CJC (dissenting in part):

> 142 … The question then is whether these duties conflicted with the lawyer's duties to a second client, or with his personal interests. If so, the lawyer's duty of loyalty is violated, and breach of fiduciary duty is established. This is the position on the authorities which the courts must follow. *This does not, of course, preclude law societies from imposing additional ethical duties on lawyers. They are better attuned than the courts to the modern realities of legal practice and to the needs of clients. If the obligations of lawyers are to be extended beyond their established bounds, it is for these bodies, not the courts, to do so.*
>
> [Emphasis added]

[28] There is no discussion of the *Legal Profession Act* or the *Professional Conduct Handbook* in the SCC decision, although the *Handbook* is mentioned as part of the factual background.

[29] It is clear from these paragraphs that, while there will be significant overlap between the factual matrix that formed the basis of the court decisions and the evidence the Law Society seeks to introduce in this case, the issues, and therefore the factual basis, will not be identical.

[30] As a result, we cannot say that the Law Society's proposed course of action in calling evidence in this hearing constitutes a "relitigation" of the prior civil proceedings. This is not a case, like *Toronto v. CUPE* (*supra*), where the very subject matter of the criminal proceeding (the conviction) became the basis for the employee's dismissal and the issue in the arbitration. In this case, the Respondent's conduct in the period 1997 to 1999 formed the basis of the civil proceeding against him. The question before this Panel is whether any of the Respondent's conduct constituted a breach of his ethical obligations. The evidence on that issue does not have to be drawn exclusively from the evidence adduced at the civil trial.

[31] Second, as noted above, through the process of disclosure and the production of the Law Society's Statement of Evidence, the scope of the Law Society's proposed evidence, and the purposes to which it will be put, have been significantly clarified. The Law Society makes clear in its submission that it has no intention of relitigating the issues or impugning the factual findings of the trial judge.

[32] In that respect we note that the Law Society's Statement of Evidence comprises 64 paragraphs. When invited to provide comment on the admissibility of the Law Society's evidence, the Respondent took issue with a total of 13 paragraphs. The Respondent's position with respect to most of those paragraphs relates not to the doctrine of abuse of process but to the inferences to be drawn from the evidence and the ability of the Law Society to make certain legal arguments. Those arguments do not fall within the scope of this application. They do not form the basis of a finding that the Law Society's proposed evidence constitutes an abuse of process.

[33] Below we have dealt specifically with the Respondent's position on the paragraphs that, he says, would constitute an abuse of process. We have noted the other paragraphs where the Respondent objects to evidence on other grounds. As set out below, those arguments will be dealt with in the course of the hearing. They do not constitute a proper preliminary objection.

[34] For ease of reference, we have tracked the objections in accordance with the headings in the Respondent's Supplemental Response (October 4, 2011).

The Development of the Idea

[35] The Respondent opposes the admissibility of the evidence proposed in paragraph 29 of the Law Society's Statement of Evidence. It states:

> In January 1998, the Respondent agreed to prepare a request for an advance tax ruling based upon the development with PD of a possible "technical fix" for getting around the matchable expenditure rules based on s. 18.1(15)(b) of the *Income Tax Act*. The Respondent was to share in any success ultimately achieved by means of a financial interest in the venture, and in SH Corp. in particular.

[36] The Respondent opposes the admissibility of any evidence suggesting the idea that formed the basis of SH Corp.'s business was co-developed by the Respondent and PD. He says that evidence is "directly contrary to the facts as found by Justice Lowry …"

[37] It should be noted that the Law Society, in its Response to the Respondent's Supplementary Response,

has clarified that it is not concerned with establishing whether or not there was "co-development" of the idea that formed the basis of the SH Corp. business.

[38] The Respondent argues that Lowry J. specifically found that PD devised the idea that formed the basis of the SH Corp. business. He cites paragraph 91 of Lowry J's Reasons, which state, in part:

> I find that the origin of the SH Corp. tax credit/shelter concept, which underlay its request for an advance tax ruling based on the 15(b) exception, was substantially as described by PD and Mr. Strother. And, I find that Mr. Strother concealed nothing from ME Corp. in 1997 in order to take a benefit for himself.

[39] However, paragraph 91 specifically deals with the period in time up to the end of 1997. Lowry J's comments in that paragraph were limited to the period when ME Corp. had a general retainer with Davis & Co. As noted above, paragraph 29 of the Law Society's Statement of Evidence specifically deals with January, 1998.

[40] We further note that, whatever findings Lowry J may have made regarding the decision-making process in 1998, he did not specifically find that PD was solely responsible for the idea that formed the basis of the SH Corp. business. At para. 145 he wrote:

> The key distinction between the SH Corp. financing structure and all structures which preceded it was, of course, the provision for the fixed 80.1% fee originated by PD and Mr. Strother to render the Matchable Expenditures Rules inapplicable.

[41] Hence, evidence of co-development would not threaten to impugn any finding by the trial judge.

[42] Second, we note the Memorandum that the Respondent provided to his firm on August 4, 1998. That document was the subject of significant analysis in the Reasons for Judgment at the trial. It stated, in part (at. p. 2) when discussing the development of the idea "[i]n the early spring (April), 1998":

> The structural elements were drawn from a number of sources including PD's accounting knowledge and experience, … an idea supplied by Joel Nitikman of Fraser & Beatty and elements provided by me.

[43] The Respondent argues that the trial judge made specific findings regarding the timing and development of the idea and that those findings should not be overturned. However, we note that Lowry J's Reasons indicate that he was left with significant questions on this exact topic. At para. 78, when discussing discrepancies between the facts adduced at trial and the statements in the August 4, 1998 Memorandum, Lowry J states:

> Mr. Strother gives no satisfactory explanation for these inconsistencies in his evidence. It is difficult to understand why he was so careless in what he said to his partners, and considerable doubt arises about his interest being focused on the development of a tax credit business. But be that as it may, the inconsistencies go little distance toward establishing, as ME Corp. contends, that PD and Mr. Strother were acting in concert during the last two months of 1997 to subvert ME Corp.'s interests on some concealed view of the use to be made of the 15(b) exception.

[44] Hence, we cannot say that admitting evidence on this point would "undermine the clear factual finding of the trial judge" as the Respondent submits.

The Respondent's Financial Interest in SH Corp.

[45] The Respondent also opposes the evidence set out in the last sentence of paragraph 29 of the Law Society's Statement of Evidence, which states:

> Mr. Strother was to share in any success ultimately achieved by means of a financial interest in the venture, and in SH Corp. in particular.

[46] The Respondent says that the Law Society's evidence on this issue would be "misleading and contrary to the evidence that was before the trial judge." It should be noted that the Respondent does not state that any such evidence would be contrary to the findings of the trial judge. The Respondent's argument on this point draws the distinction between the first agreement that the Respondent made with PD, and the second agreement. The gap between the two agreements was required because Davis & Co. would not allow the Respondent to have a financial interest in SH Corp. while it was a client. The Respondent's Supplemental Response refers to significant excerpts from the transcripts, which do not appear to be referenced in any of

the Reasons for Judgment.

[47] Despite the evidence excerpted by the Respondent, it is clear that Lowry J and the other levels of court saw the evidence through a different lens. Binnie J synthesized the findings regarding the Respondent's financial interest at paras. 66 and 67:

> 66 The trial judge found that Strother agreed to pursue the tax ruling on behalf of Sentinel in return for an interest in the profits that would be realized by Sentinel if the ruling was granted:
>
> > Mr. Strother prepared the request for the ruling without charge in return for PD's agreement that Mr. Strother would participate equally (55% on the first $2 million) [and 50% thereafter] in any profit realized through a share option should the desired ruling be granted. Responsibility for expenses associated with the request would be equally borne ... .
>
> …
>
> > ... Mr. Strother agreed to seek for him an advance tax ruling and, as indicated, to prepare the request without charge, in return for an equal share in any success ultimately realized. [paras. 23 and 57]
>
> 67 Strother had at least an "option" interest in Sentinel from January 30th until at least August 1998 (when he was told by Davis to give up any interest). This was during a critical period when ME Corp. was looking to Strother for advice about what tax-assisted business opportunities were open. The precise nature of Strother's continuing financial interest in Sentinel between August 1998 and March 31, 1999 (when Strother left Davis) is unclear, but whatever it was it came to highly profitable fruition in the months that followed. The difficulty is not that Sentinel and ME Corp. were potential competitors. The difficulty is that Strother aligned his personal financial interest with the former's success. By acquiring a substantial and direct financial interest in one client (Sentinel) seeking to enter a very restricted market related to film production services in which another client (ME Corp.) previously had a major presence, Strother put his personal financial interest into conflict with his duty to ME Corp. The conflict compromised Strother's duty to "zealously" represent ME Corp.'s interest (*R. v. Neil*, [2002] 3 SCR 631, 2002 SCC 70 at para. 19), a delinquency compounded by his lack of "candour" with ME Corp. "on matters relevant to the retainer" (ibid.), i.e. his own competing financial interest: …
>
> [Emphasis in original]

[48] It is evident from paragraphs 66 and 67 of Binnie J's decision that the majority of the SCC was left in some considerable doubt as to the exact nature of the financial arrangement between PD and the Respondent, at least after August, 1998. One wonders how this Panel is supposed to be bound by an alleged finding of fact that either does not exist in the trial Reasons or, if it does, was so vague that it could not be discerned by the Supreme Court of Canada.

[49] It follows that it would not be an abuse of process to hear further evidence on this topic. There is no risk of a finding that impugns the trial judge's findings.

The Allegation that, in May, 1998 the Principals of ME Corp. Continued to Rely on the Respondent's Advice Concerning TAPSF Investments

[50] The Respondent takes issue with the proposed evidence in paragraphs 38 and 50 of the Law Society's Statement of Evidence. Those paragraphs state, in part:

> 38. Mr. Strother was cognizant that the principals of ME Corp. continued to rely upon his advice about anything that might be done to work around the new tax ruling concerning TAPSF investments. …
>
> > 50. In 1998, Strother met with ME Corp. executives on January 15, 21, 27 and May 19, June 26, July 24, August 4 and (by chance) in mid-September. SC and HK [ME Corp. executives] testified that they asked Mr. Strother what business opportunities might be available to ME Corp. in the wake of the new tax rules. They said they relied on him to advise if there was a "way around" the matchable expenditure rules that would allow them to resume their TAPSF business.

[51] Those paragraphs relate to the nature of the discussions between the Respondent and ME Corp. in 1998.

[52] The Respondent submits that it would be an abuse of process to hear evidence on that particular issue

because the trial judge rejected the clients' evidence at para. 100 of the BCSC decision. It states:

> [100] What was said at the meetings in 1997 and 1998 was obviously said in the context of the government's termination of tax shelters and of ME Corp. having stopped doing that business in the same way as had both Grosvenor Park and Alliance. In other words, HK and SC were not consulting Mr. Strother for advice on the Rules that had put an end to their tax shelter business or to explore whether there was any possibility of that business in some way being continued. They had no reason to do so and had no expectation of receiving any advice in that regard. What they wanted to know was whether ME Corp. could do anything else apart from tax-sheltered financing. Mr. Strother says that, in general terms, the focus of the meetings he had with HK in January was to consider what ME Corp. might do, and HK says that it was not until the end of January that he was able to get Mr. Strother to sit down and focus on talking about new business opportunities. The subject of tax-shelter financing never arose. The only real advice Mr. Strother appears to have given was with respect to the loss-co idea. He was not asked to advise on tax-shelters and he did not do so.

[53] However, the wording of the disputed paragraphs (38 and 50) is taken, almost verbatim, from the majority decision of the SCC Reasons (para. 15 – 16 under the heading "Facts"):

> 15 In 1998, Strother met with ME Corp. executives on January 15, 21, 27 and May 19, June 26, July 24, August 4 and (by chance) in mid-September. They testified that they asked Strother what business opportunities might be available to ME Corp. in the wake of the new tax rules. They said they relied on him to advise if there was a "way around" the MER that would allow them to resume their TAPSF business. SC testified in cross-examination as follows:
>
> > Q. And I suggest, sir, that in fact that you did not -- ME Corp. did not approach Strother and Davis to request Strother and Davis to develop a means to amend the structure. Isn't that correct, sir?
> >
> > A. It's not correct. As I've said to you what happened is ME Corp. had a general agreement and understanding in their being represented by Davis & Company that *that was a principal function of the law firm for us, is when there is a change of tax law to find a way around it.* When the tax law was changed and we were told in 1996, November of '96, that there was no absolutely no way around it, we followed Strother's advice to lobby the government, try to get an exception, and try again to get grandfathering. But we were told, and we relied absolutely on his legal advice that there was absolutely no way to get around the rules. The general instruction though of our employment stayed in effect all the time. If there is a way, Strother, if you know it now, if you know it in the future, that's your job for us. *Find a way to get around any changes of the law. It was first implicit, possibly not explicit at that point, but it was clearly the central part of the retention of Davis & Company and Rob Strother for our business.*
>
> [Emphasis added by Binnie, J]
>
> (ME Corp.'s RR, vol. 1, at p. 84)
>
> In his evidence-in-chief, the Respondent testified:
>
> > A. And I think we had a general discussion, that I had very little recollection of, which I've, I guess come to be refreshed through the course of this litigation, and I think it was a, where-are-we-going-now meeting with HK *where we talked about some of the things that I said earlier that we sort of put on hold* while he was getting closed and, and worrying about those issues.
>
> [Emphasis added by Binnie, J]
>
> (Strother's AR, at p. 94)
>
> In his factum, Strother emphasizes the trial judge's conclusion that:
>
> > HK and SC were not consulting Mr. Strother for advice on the rules that had put an end to their tax shelter business or to explore whether there was any possibility of that business in some way being continued. They had no reason to do so and had no expectation of receiving any advice in that regard.
>
> [Emphasis deleted by Binnie, J; para. 24.]
>
> 16 Throughout 1998 and into 1999, Davis continued to do some work for ME Corp. on outstanding

matters relating to film production services transactions that had closed by the end of October 1997 as well as unrelated general corporate work. Through 1998 and into January 1999, Davis invoiced ME Corp. more than $98,000 in legal fees.

[54] Similar wording is contained in the BCCA Reasons (paras. 15 – 17). It is clear that the evidence proposed by the Law Society in this disputed paragraph was considered by both appellate levels of court.

[55] It is also evident that the appellate courts were unclear on the extent of the trial judge's factual findings on this topic. We note, for example, paragraph 15 from the BCCA Decision:

15 It is unclear whether the trial judge accepted the testimony of HK and SC concerning their meetings with Mr. Strother in 1998. He stated at para. 99 of his Reasons that the testimony of HK and SC fell "far short of supporting what [was] pleaded". …

[56] Further, we note the comments made by the BCCA relating to the findings of the trial judge on the discussions between the parties in 1998 and legal and ethical implications arising from them:

> 17 One must not, however, equate the scope of a lawyer's contractual duty to advise his client - usually a matter of fact like that at issue in *Smith v. McInnis*, [1978] 2 SCR 1357 - with his fiduciary duties, including the duty not to place himself in a position of conflict and the duty to disclose any personal interest he may have that might affect his loyalty and dedication to the client's cause. The latter duties are implied by law and are unlikely to be validly excluded or diminished by contract. (See, e.g., s. 65(3) of the *Legal Profession Act*, SBC 1998, c. 9 and the various Guidelines in the Law Society's *Professional Conduct Handbook*, breach of which may lead to disciplinary proceedings.) Certainly when ME Corp. asked 'what was to be done', it was entitled to an honest and complete answer, whether or not Mr. Strother had a file open for continuing TAPSF work. The fact that the client did not ask about s. 18.1(15)(b) specifically, or seek repeated confirmations that Mr. Strother had not yet become aware of the possibility of a "technical fix", is surely not conclusive of his duty to respond candidly. The very reason ME Corp. had abandoned its TAPSF business, had discontinued the meetings of its "deal team", and was looking around for other alternatives, was that Mr. Strother had told them there was 'nothing to be done' (in the way of TAPSF syndications) under the new rules. In my opinion, it does not lie in his mouth to say now, as Mr. Macintosh contends, that HK and SC "were not consulting Mr. Strother on tax shelters and they had no expectation of receiving any advice in that regard." They were not legally knowledgeable, and whether they " *expected*" to be told that there was a possible solution to their predicament, they were *entitled* to candid and complete advice from a lawyer who was not in a position of conflict.
>
> [Emphasis added]

[57] The Respondent submits that any possibility of a finding by this Panel that impugns the trial judge's finding relating to the 1998 conversations would lead to a result similar to *Toronto v. CUPE*. We disagree. It is evident that the BCCA was "unclear" whether the trial judge accepted the evidence of the ME Corp. executives. That uncertainty also appears in the SCC decision, which cites the relatively equivocal evidence of the Respondent on the issue. We do not see that further evidence on this issue could lead to an impugning of the trial judge's findings when the exact nature of those findings has already been questioned by two levels of appellate court.

The Respondent Took Pains to Ensure that No-one at Davis Disclosed to ME Corp. the Firm's Involvement with SH Corp.

[58] The Respondent refers to two paragraphs (37 and 38) from the Law Society's Statement of Evidence. However, the majority of the evidence in those paragraphs is not controversial. The only piece that concerns the Respondent is the following statement:

> He took pains to ensure that nobody at Davis disclosed their involvement with SH.

[59] The Respondent's submission in respect of paragraphs 37 – 38 of the Law Society's Statement of Evidence is that the Law Society is trying to have this Panel infer that the Respondent "knowingly and deliberately 'deceived' ME Corp." by proving that he misled his own partners as to the nature of his agreement with SH Corp.

[60] The Law Society accepts that it has not alleged, as part of the Citation, that the Respondent misled his partners at Davis. However, the Law Society does allow that, as part of the final argument, it will submit that

the Respondent's August 4, 1998 memo to his partners "is highly significant to any consideration of the several alleged breaches of duty to ME Corp. …"

[61] The Respondent says that this evidence should not be allowed on three grounds:

1. It falls outside of the Citation.

2. The "evidence" is not evidence, but is, in fact, "commentary" by the appellate judges.

3. There is no basis in the evidence supporting any inference that the Respondent was deceiving his partners.

[62] In short, none of these three grounds falls under the rubric of the "abuse of process" doctrine. As a result, it is not necessary to deal with these objections at this preliminary juncture. The Respondent will be at liberty to raise these objections either during the course of evidence, or when making his arguments during final submissions.

The Date when the Advance Tax Ruling became Public is Inadmissible

[63] The Respondent raises an objection to the facts set out in paragraphs 52 and 53 of the Law Society's Statement of Evidence. Those paragraphs relate to the Advance Tax Ruling that SH Corp. obtained and the date upon which it became public.

[64] According to his Supplemental Response, the Respondent "does not dispute this portion of the Law Society's Statement of Evidence." Instead, the Respondent disputes the inferences that the Law Society wishes to draw from these facts.

[65] We do not interpret the doctrine of "abuse of process" as extending to the inferences to be drawn from evidence or factual findings. We do not believe that an exploration of this evidence could lead to a finding that is inconsistent with that of the trial judge.

[66] On that point, we note that Lowry J's Reasons appear to make minimal findings on the issue of the timing of making the Advance Tax Ruling public. At para. 33 he writes:

> 33 ME Corp. learned of SH Corp.'s request for a tax ruling only after it was issued. Neither PD, Mr. Strother, nor anyone at Davis disclosed it to ME Corp. When HK and SC learned that Mr. Strother had obtained a ruling for PD, ME Corp. promptly severed its relationship with Davis and sought alternative legal representation, first for litigation advice and then for tax advice on how it could re-enter the tax-assisted production services financing business.

[67] There is no portion of the trial judgment that is more precise than paragraph 33 on the issue of publication of the Advance Tax Ruling. The issue is discussed, in detail in the appellate decisions. The majority decision at the SCC suggests that the Advance Tax Ruling became public on the date it was made. Both the Law Society and the Respondent agree that statement was incorrect.

[68] Given these circumstances, we do not believe that it would be an abuse of process for the Law Society to adduce further evidence on this issue.

What the Respondent did not Disclose to ME Corp.

[69] This portion of the objection arises from paragraph 53 of the Law Society's Statement of Evidence. As noted in the heading, it relates to the information that the Respondent did not disclose to ME Corp.

[70] The Respondent does not dispute the "factual allegation" of the Law Society that he did not disclose certain information to ME Corp.

[71] Instead, the Respondent disagrees with the legal implications of the admitted facts.

[72] That objection is not a matter that falls within the umbrella of this preliminary application. It is not an abuse of process to argue the legal implications of facts.

The Loans from PD's company to the Respondent

[73] The Respondent takes issue with the proposed evidence in paragraphs 56 and 60 of the Law Society's

Statement of Evidence. The evidence relates to loans that PD's company made to the Respondent in February and March, 1999. We note that the Respondent's submissions (at para. 70 of his Supplementary Response dated October 4, 2011) suggests that these loans were made in February and March of 2010. That date appears to be an error. The loans occurred in 2009.

[74] We also note that there is no mention of the loans from PD's company to the Respondent in the trial Reasons. It is first mentioned in the BCCA decision. Hence, it is impossible for any finding this Panel makes to impugn the trial judge's finding on this issue.

[75] The Respondent does not object to the evidence contained in paragraphs 56 and 60. His concern is that the Law Society will attempt to argue that the loans were not loans but were evidence of the Respondent maintaining a financial interest in SH Corp. throughout 1998 and beyond despite the contrary instruction from his managing partner in August 1998.

[76] The Respondent objects "to the Law Society's attempt to make this argument."

[77] The doctrine of "abuse of process" does not extend to a party's entitlement to make any argument it sees fit. It is certainly not the basis of a preliminary objection on the basis that one party intends to argue a point that the other party does not like.

Allegations Regarding Awareness of Wrongdoing and Culpability

[78] Paragraph 64 of the Law Society's Statement of Evidence states that:

> … a significant additional aspect of fact-finding peculiar to this proceeding is an assessment of Mr. Strother's awareness of wrongdoing during 1998. This is a determination which cannot be summarized in advance, of course, and which would necessarily involve the Panel's evaluation of some direct testimony by him [Strother]. It will be material to evaluations of the gravity of his misconduct and of the degree of culpability generally, including, for example, consideration of whether his behaviour was a gross manifestation of self-interest or a genuine product of ethical confusion.

[79] In his Supplemental Response (October 4, 2011) at paragraphs 75 – 90, the Respondent argues that to allow this fact-finding is wrong for the following reasons:

> (a) it is an attempt to relitigate the questions that ME Corp. put before the trial judge;
>
> (b) it goes outside of the scope of the Citation;
>
> (c) the potential for prejudice to the Respondent far outweighs any probative value because it would result in a roving and open-ended inquiry into the Respondent's conduct; and
>
> (d) any such evidence would be irrelevant.

[80] Of these four objections, we find that only the first argument "relitigation" falls under the doctrine of "abuse of process" and is properly considered in this preliminary application. The other objections can be raised during the course of the evidence or in final argument.

[81] Because the Law Society has not particularized the evidence that it intends to call in this regard, except to indicate that the Respondent will be examined, we are not in a position to rule on whether the admission of such evidence could be considered an abuse of process. As a result, we are not in a position to exclude the Law Society's proposed method of proceeding.

[82] For the reasons set out above, we do not find that there is a reason to limit the scope of the evidence to be tendered by the Law Society on the basis of the doctrine of abuse of process. We do not see that the Law Society is attempting to relitigate the issues that were before the trial court or impugn the findings of the trial judge. The issue that this Panel must decide is not identical to the issues before the courts. There is little or no likelihood that the findings of this Panel, based on the evidence it hears, will call the administration of justice into disrepute.