

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

Pamela Suzanne Boles

Respondent

**Decision of the Hearing Panel
on Facts and Determination**

Hearing date: April 11 and 12, 2012

Panel: Bruce LeRose, QC, Chair, Ralston S. Alexander, QC, Clayton G. Shultz, FCA

Counsel for the Law Society: Thomas R. Manson, QC

Counsel for the Respondent: Henry C. Wood, QC

BACKGROUND

[1] On December 22, 2010, a citation was issued against Pamela Boles (the "Respondent") pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Chief Legal Officer of the Law Society of British Columbia on the direction of the Chair of the Discipline Committee.

[2] An amended citation was issued on February 6, 2012 pursuant to Rule 4-16.1(1)(a) following a pre hearing conference held on February 1, 2012.

[3] The amended citation directed that the Panel inquire into the Respondent's conduct as follows: (the sections underlined indicate amendments to the initial citation)

1. Between 2004 and 2008 the following monetary judgments were entered against you or your law corporation Pamela S. Boles Law Corporation, which you or your law corporation failed to satisfy within seven days after the date of entry of each judgment. You failed to notify the Executive Director in writing of the circumstances of each judgment and your proposal for satisfying each judgment, contrary to Law Society Rule 3-44(1):

(a) Certificate filed in the Federal Court of Canada on October 21, 2008 against you for \$16,348.77 plus interest.

(b) Certificate filed in the Federal Court of Canada on January 9, 2008 against you for \$193,527.48 plus interest.

(c) Certificate filed in the Federal Court of Canada on March 16, 2005 against you for \$157,019.45 plus interest.

(d) Certificate filed in the Federal Court of Canada on August 6, 2004 against your law corporation for \$25,415.75 plus interest.

(e) Certificate filed in the Federal Court of Canada on July 27, 2004 against your law corporation for \$48,005.06 plus interest.

(f) Certificate filed in the Federal Court of Canada on April 20, 2004 against your law corporation for \$22,667.87 plus interest.

(g) Certificate filed in the Federal Court of Canada on February 6, 2004 against you for \$9,371.91 plus interest.

(h) Certificate filed in British Columbia Supreme Court on September 8, 2005 against your law corporation in regard to an obligation in default under the Social Service Tax Act in the amount of \$6,528.46.

(i) Certificate filed in British Columbia Supreme Court on May 11, 2005 against your law corporation in regard to an obligation in default under the Social Service Tax Act in the amount of \$9,152.04.

[4] The citation does not expressly allege that any of the rule breaches alleged amounted to professional misconduct. However, that is a major issue in this hearing, and both the Law Society and the Respondent have made submissions on the question.

[5] The Respondent acknowledged that the service of the citation complied with Rule 4-15 of the Law Society Rules.

[6] Following the commencement of the hearing, counsel for the Law Society advised that certain matters had been agreed with counsel for the Respondent as follows:

1. The Law Society would no longer pursue sub-paragraphs (a), (b), (d), (f), and (i) of the amended citation;
2. The Respondent admitted that sub-paragraphs (e), (g) and (h) of the amended citation were proven and were admitted to be breaches of Rule 3-44;
3. The Respondent admitted that the essential ingredients of sub-paragraph (c) of the amended citation had been made out but reserved the entitlement to argue that the circumstances did not amount to a breach of Rule 3-44.

FACTS

Citation Sub-Paragraph (c):

[7] Pamela Boles did not file income tax returns for the taxation years 2001, 2002 and 2003. As a result of the failure to file such returns, Canada Revenue Agency ("CRA") issued an arbitrary assessment of income earned by Ms. Boles for those years. Following Ms. Boles' failure to pay the amount owing by the arbitrary assessment, CRA issued a certificate under the *Income Tax Act* for \$157,019.45 and, on April 1, 2005, registered it against title to land owned by Ms. Boles.

[8] This obligation was fully paid to CRA on April 28, 2005 from proceeds of the sale of one of the properties owned by Ms. Boles. The time between the registration of the certificate and its payment is 28 days.

[9] The date upon which Ms. Boles became aware of this certificate is uncertain. The lawyer representing her on the sale of one of the properties subject to the certificate testified that he was aware of the certificate on April 18, 2005. His account for legal services in the sale transaction indicates that he spoke to Ms. Boles on five occasions on April 19, 2005, the day after he became aware of the Certificate. We find that Ms. Boles knew about the Certificate on April 19, 2005 (at the latest), nine days before it was paid.

Citation Sub-Paragraph (e):

[10] As a result of non-payment by Pamela S. Boles Law Corporation of Goods and Services Tax (GST) owing on legal fees and disbursements charged to clients by that law corporation, CRA issued a Certificate under the *Excise Tax Act (Canada)* for \$48,005.06 on July 27, 2004.

[11] This debt was likely paid by counsel to the Law Corporation with a payment made to CRA on August 15, 2005. The uncertainty on this issue is that the payment made to CRA was in the nature of an “on account” payment and by a consideration of amounts owing and paid to that date it is “likely” that this GST debt was paid on that date. Further to this issue is the fact that the letter enclosing payment required (by an undertaking) that the payment be applied to the GST debt. Other crown debts existed at the time. The payment was made 384 days after the issuance of the Certificate.

[12] The date upon which Ms. Boles became aware of this Certificate is uncertain. CRA noted the underlying debt of the Law Corporation in a letter to Ms. Boles dated December 10, 2004. The same letter encouraged Ms. Boles to contact CRA to further discuss issues. We find that Ms. Boles became aware of this Certificate in December 2004, at least eight months before it was repaid.

Citation Sub-Paragraph (g):

[13] As a result of non-payment by Ms. Boles of income taxes assessed as owing by her, CRA issued a Certificate under the *Income Tax Act* for \$9,371.91 on February 6, 2004. That certificate was registered on February 19, 2004 against title to land owned by Ms. Boles.

[14] This debt was fully paid to CRA on April 28, 2005 from proceeds of the sale of one of the properties owned by Ms. Boles. The payment was made 402 days after the registration of the certificate.

[15] The date upon which Ms. Boles became aware of this certificate is uncertain. The lawyer representing her in a mortgage transaction involving the refinancing of various debts testified that he became aware of the certificate on March 2, 2004. With this testimony he corrected an earlier written response provided to Law Society counsel where he noted that he became aware of this certificate on April 18, 2005. We find that Ms. Boles became aware of this certificate in March of 2004, at least one year before it was repaid.

Citation Sub-Paragraph (h):

[16] As a result of non-payment by Pamela S. Boles Law Corporation of Social Service Tax owing on legal fees and disbursements charged to clients by that law corporation, the Province of British Columbia issued a certificate under the *Social Service Tax Act* in the amount of \$6,528.46 on September 2, 2005. That certificate was entered by the Supreme Court of British Columbia on September 8, 2005 and a Writ of Seizure and Sale was issued by that Court on the same day.

[17] The Writ of Seizure and Sale was returned by West Coast Court Bailiffs Inc. as fully paid in the amount of \$6,829.61 on October 19, 2005. The payment was made 41 days after the entry of the certificate.

[18] The date upon which Ms. Boles became aware of this certificate is uncertain. In her response to the Law Society on this subject she wrote “I do not know when I was served with that certificate but I expect that I inadvertently breached Rule 3-44(1) in respect of it.”

FACTS GENERALLY

[19] The Respondent advised the Law Society that she was not aware of the change to Rule 3-44 that occurred in December 2003. That change added the words “any certificate, final order or other requirement under a statute that requires payment of any money to any party.”

[20] The Respondent admitted that she did not report any of the filed certificates to the Law Society at any time.

[21] A citation issued against the Respondent in 2000 for her failure to report a monetary judgment entered against her. A hearing panel found that the Respondent had failed to report a judgment registered against her and determined that a breach of Rule 3-44 had occurred. The panel ordered that the Respondent be reprimanded. Evidence of this citation was admitted without objection from the Respondent's counsel.

RESPONDENT'S SUBMISSIONS

[22] The Respondent admits a breach of Rule 3-44 in respect of citation sub-paragraphs (e), (g) and (h) but argues that these breaches are mere breaches of the Rules and that they do not amount to professional misconduct.

[23] With respect to citation sub-paragraph (c) the Respondent argues that she is not in breach of the Rule for two reasons.

[24] Firstly, argues the Respondent, the Rule is not engaged at all because the certificate is flawed for failure to meet certain technical requirements.

[25] Secondly the Respondent seeks to engage the rule of law "de minimus non curat lex", which suggests, simply stated, that the law will not respond where the subject matter of the offence is of such insignificance that its prosecution would bring the law into disrepute. In this respect the Respondent argues that the certificate was repaid within nine days of its discovery and that is a mere two days beyond the seven day time frame permitted by the Rule.

FINDINGS OF FACT

[26] The Panel has considered the objection that the certificate was defective and therefore the Respondent was not obliged to report it under Rule 3-44. In our view, it is not for a recipient of a certificate in these circumstances to determine the validity of the certificate before compliance with the Rule requiring notice to the Law Society. The certificates are prima facie properly issued and must be reported as such. A subsequent determination of invalidity may render the report to the Law Society moot but does not relieve against the initial obligation to report. This view of the Rule is enhanced by reference to the requirement to report the monetary judgment despite the filing of an appeal (Rule 3-44(3)).

[27] On the Respondent's second argument, we find that the pattern that appears in all the circumstances of this case belies the trivial, incidental or inadvertent nature of acts to which the defence of de minimus usually applies.

[28] In the result, we find that the allegations in each of subparagraphs (c), (e), (g) and (h) of the citation are proven on the balance of probabilities and that, in each case, the Respondent breached Rule 3-44.

ISSUE AND ANALYSIS

[29] Section 38(4) of the Legal Profession Act states:

After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

- (i) professional misconduct;
- (ii) conduct unbecoming a lawyer;
- (iii) a breach of this Act or the rules;
- (iv) incompetent performance of duties undertaken in the capacity of a lawyer
- (v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(c) make any other disposition of the citation that it considers proper.

[30] It is for us to decide whether the facts as established and admitted support a finding of professional misconduct as set out in s. 38(4)(b)(i) or the lesser issue of a simple breach of the Rules.

[31] We begin with a consideration of the requirements of the burden of proof that rests upon the Law Society in matters such as those before this Panel.

[32] We instruct ourselves that the burden of proof in such matters rests entirely upon the Law Society with an obligation to prove the allegations on a balance of probabilities with evidence that is sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[33] We next consider what it is that constitutes professional misconduct as that expression is found at section 38(4)(b)(i) of the *Legal Profession Act*, SBC 1998, c.9.

[34] Recent decisions of the Benchers (*Law Society of BC v. Martin*, 2005 LSBC 16, and *Law Society of BC v. Lyons*, 2008 LSBC 09) have established that the test for professional misconduct is:

Whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[35] A distinction must be made between professional misconduct and a breach of the Rules. The *Lyons* decision provides some assistance in considering that distinction. The Panel observed at para. [32] that:

A breach of the rules does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a “Rules breach”, rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from respondent paying little attention to the administrative side of the practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

[36] The *Lyons* panel also noted:

In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent’s conduct.

[37] The duration of these Rule breaches varies for each of the four allegations in the citation upon which a breach of the Rules has either been admitted or determined by this Panel. The issuance of the certificates and, in the case of citation subparagraph (h), the issuance of the Supreme Court certificate, were never reported. In that outcome the existence of the Rules breach and its duration did not come to the attention of the Law Society until it conducted its own investigation and discovered the fact of the CRA certificates and the Supreme Court judgment. The duration of the breaches is therefore in a range from a minimum of three

years two months to four years six months in one instance.

[38] The Respondent argued that the “duration” of the Rule breach should be confined to the time-frame between knowledge and payment. We disagree. The obligation to report a judgment not satisfied within seven days is not relieved by payment. The primary focus of the Rule is to alert the Law Society of potential financial issues in the practice or private life of the lawyer and the fact that the judgment or certificate has been paid does not answer any of the questions the Law Society may have in that respect.

[39] The gravity of the misconduct indicated by the Rules breach and its harm is evidenced by the inability of the Law Society to properly fulfill its regulatory mandate. A report of an unsatisfied judgment will routinely trigger an investigation by the Law Society. The financial interests of the clients of the judgment debtor will be considered. When no report is made, the investigation will not be commenced in a timely manner – in the particular circumstances of this Respondent, certain material information became unavailable in the interim between the incident and the subsequent, but delayed, investigation.

[40] The fact of the prior failure of the Respondent to report an unsatisfied judgment and the consequent citation for that failure must be factored into any consideration of the “*Lyons*” characteristics. It demonstrates that the Respondent was at best, indifferent to the judgment reporting requirements. A lawyer who has suffered a previous citation for that delict should bring an enhanced awareness of the Rule and of the consequences for its breach.

[41] In these circumstances, where Income Tax Act certificates are registered against titles to properties owned by the Respondent, and where those certificates are impacting refinancing initiatives and real estate sales closings, it is not possible that the Respondent was not alive to the reporting requirements. The fact that the certificates were never reported leads us to conclude that the Respondent had a motive of secrecy in respect of these matters and that the breaches of the Rule were intentional and motivated by an intention to mislead and deceive.

[42] The evidence of the “shock” and “anger” expressed by the Respondent upon discovery of the existence of the CRA certificates must be discounted as naïve at best, given the prior experience of the Respondent with CRA and its collection protocols.

[43] If the approach of the Respondent to reporting CRA certificates was accepted as appropriate, it would be necessary for the Law Society to conduct random judgment searches of its members to ensure compliance with Rule 3-44. That approach is not reasonable and is inconsistent with the higher moral standard expected of members of the Law Society by the Canons. Lawyers are expected to self-report, and it is reasonable for the Law Society to expect compliance in all cases.

[44] Counsel for the Respondent urged the Panel to note the difference between deemed and actual knowledge of the Rule and its application to the circumstances. It is the position of the Respondent that she was not aware of the addition of the “certificate” language in 2003 and that her admission of the breach of the Rule is based upon her belief that she is deemed to know the Rule rather than the fact that she actually knows it.

[45] The Panel is of the view that the consequences of the deemed knowledge ought to be the same as those where the knowledge is actual. Knowledge of and adherence to the Rules is fundamental to the protection of the public interest, and no amelioration of consequences can be seen to follow where a breach of a Rule occurs without knowledge of it. Such an outcome would clearly undermine public confidence in the administration of the self-regulation privilege enjoyed by the legal profession.

[46] The Panel agrees with the submission of Law Society counsel that the additional language added to the Rule was more in the nature of clarification than of expanding the scope of matters that must be reported. It

has been clearly indicated to the Respondent from personal experience that “certificates” of this nature are capable of registration in the Land Title system. When so registered, the certificate becomes a charge on the title to the property that must be paid to accomplish any transaction with the land. Whether the additional language is a new rule or a clarification is largely irrelevant in that these events occurred after 2003 when notice of the amendment was provided to the profession.

[47] We give considerable weight to the repetition of the infraction that, to us, suggests a pattern of neglect of the reporting obligations in a recurring series of circumstances spread over several years. Here we have a series of non-reports, at least one of which is for a debt that was not paid for in excess of one year.

[48] The objective of the Rule is to ensure that the Law Society is made aware of financial difficulties of its members in a timely manner so that it may institute protective measures to insulate the public from negative consequences of those difficulties. The Respondent’s failure to follow the required reporting requirement deprived the Law Society of an opportunity to institute prophylactic measures.

[49] It is significant, in the view of this Panel, that the Respondent has a prior citation for failure to report a judgment issued against her. The importance of the prior incident is not to assist with a determination of whether the events identified in this citation took place – that issue is not in dispute. The importance of the prior citation is to assist with a determination of whether the Respondent has learned from the previous experience and carried that knowledge to her current practice. Preliminary analysis would suggest otherwise.

[50] It is clear that the Respondent has a recurring problem with unsatisfied debt. In those circumstances we believe the responsibility to be more vigilant in the observance of rules designed to protect the public interest should be enhanced, but there is no evidence of that characteristic in this Respondent.

[51] In all of the circumstances we are driven to the conclusion that the behaviour of a lawyer that was the subject of a prior citation for a failure to report a judgment, who then fails on four separate occasions of varying duration to report to the Law Society the existence of a certificate that carries financial consequences substantially identical to a judgment, amounts to a marked departure from the standard expected of members of the Law Society.

DECISION

[52] In the result of our determination that the totality of the impugned behaviour represents a marked departure, we find that the Respondent has committed professional misconduct by breaching Rule 3-44 as alleged in paragraphs (c), (e), (g) and (h) of the amended citation.