

2015 LSBC 27
Decision issued: June 18, 2015
Citation issued: December 22, 2010

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 AN APPLICATION TO QUASH SUMMONSES REQUIRING
PERSONAL ATTENDANCE AND DISCLOSURE OF DOCUMENTS**

Hearing date: June 12, 2015

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

Discipline Counsel: Mark D. Andrews, QC and Gavin Cameron
Counsel for the Respondent: Richard C. Gibbs, QC

- [1] The Respondent, Pamela Suzanne Boles, through counsel sought certain information from discipline counsel on the matter that is the subject of the hearing. Discipline counsel advised counsel to Ms. Boles that it was the position of the Law Society that the information was not relevant and therefore not required to be disclosed. Counsel for Ms. Boles then issued summonses to Timothy McGee, QC, the Executive Director of the Law Society and to Adam Whitcombe, the Law Society's Chief Information Officer (the "Summonses"). Discipline counsel applies to the Panel to set aside the Summonses. This is our decision on that application.

- [2] The Summonses were issued pursuant to Rule 5-4(4) of the Law Society Rules. Rule 5-4 provides:

Compelling witnesses and production of documents

5-4(1) In this Rule, “**respondent**” includes a shareholder, director, officer or employee of a respondent law corporation.

- (2) At any time during a hearing, a panel may
- (a) compel the applicant or respondent to give evidence under oath,
 - (b) order the applicant or respondent to produce all files and records that are in the applicant’s or respondent’s possession or control that may be relevant to the matters raised by the application or in the citation, or
 - (c) make an order under section 44(4) or an application under section 44(5) of the Act.
- (3) A person who is the subject of an order under subrule (2)(a) may be cross-examined by counsel representing the Society.
- (4) A party to a proceeding under the Act and these Rules may prepare and serve a summons requiring a person to attend an oral or electronic hearing to give evidence in the form prescribed in Schedule 5.

- [3] The form described in Rule 5-4 (4), namely Schedule 5, is attached as a schedule to this decision.

- [4] Law Society Rule 5-5(1) provides that, subject to the *Legal Profession Act* (the “Act”) and the Law Society Rules, panels are to determine the practice and procedure at a hearing. This application by the Law Society comes before us in the context of an ongoing hearing involving Ms. Boles, and accordingly, the Panel has authority and jurisdiction to deal with this application by the Law Society to determine the validity of the Summonses.

- [5] It is the position of the Law Society that the Summonses issued by counsel for Ms. Boles are ill-conceived and inappropriate. The Law Society submits that the summons provided for in Rule 5-4(4) is limited to compelling a witness to attend in person and give oral testimony.

- [6] The Law Society further submits that Schedule 5, the form of the summons, does not include language that requires the subject of the summons to bring materials when responding to the summons. The Law Society submits that persons wishing documents to be produced by the Law Society should proceed according to the process provided by Section 44(4)(b).
- [7] Section 44(4) provides:
- (4) For the purposes of a proceeding under Part 2, 3, 4 or 5 of this Act, a tribunal may make an order requiring a person
 - (a) to attend an oral or electronic hearing to give evidence, on oath or affirmation or in any other manner, that is admissible and relevant to an issue in the proceeding, or
 - (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in the proceeding.
- [8] It is noted that Rule 5-4(2)(c) authorizes a panel to make an order requested under Section 44.
- [9] In the course of his submission, counsel for Ms. Boles acknowledged that, if it were thought appropriate for him to do so, he would "morph" his summonses into an application for production of documents pursuant to Rule 5-4(2)(c) as authorized by Section 44 of the Act. We will deal with that suggestion later in these reasons.
- [10] The Panel finds that the Summonses are not properly constituted because they seek to do more than is permitted by Rule 5-4(4). The Summonses purport to require the target of the Summonses to produce documents. We find that there is no authority in Rule 5-4(4) to include in a summons a requirement to produce documents.
- [11] This determination is founded on three principles:
- (a) The language of the Rule is not ambiguous. The plain meaning of the Rule provides a requirement for a person to attend. There is no mention of documents;
 - (b) The form of the summons (Schedule 5) makes no reference to documents; and

- (c) There is a clear (different) process provided in the Act and the Rules to compel the production of documents.

- [12] Subrule (4) of Rule 5-4 establishes the basis upon which Schedule 5 is to be employed and requires that a summons may be served “requiring a person to attend an oral or electronic hearing to give evidence.” The Panel has determined that the power to require attendance and the obligation to produce documents are two separate authorities and are not properly combined in a modified form of Schedule 5 as was attempted by counsel for Ms. Boles.
- [13] It follows from this determination that we must direct that the Summonses be set aside, and we so order. We note parenthetically that, despite the flawed process, the materials requested in Section B of the Summonses have been provided to Ms. Boles.
- [14] Though we are not required to do so, there is merit in a further consideration. Namely, what would this Panel do with a properly framed application for production of the same documents? Counsel for Ms. Boles has urged upon us this approach so as not to frustrate his application on purely procedural objections. He wants the requested documents and is not particular what process produces the same.
- [15] As noted above, Section 44(4) of the Act requires that documents that are sought by a party to a proceeding must be admissible and relevant to the issue in the proceeding. We have concerns on both of those requirements.
- [16] Ms. Boles argues that relevance is established where she seeks information as to the number of instances in which members of the Law Society have failed to report certificates registered against them under the *Income Tax Act*. We believe the argument to be along the lines that knowing the number of lawyers who have failed to report certificates will inform the extent to which such a failure to report is a “marked departure” and if a large number of such failures to report are the result of “inadvertence” then that fact will provide circumstantial evidence in support of Ms. Boles explanation for her failure from that cause to advise the Law Society of the Certificates registered against her.
- [17] We have determined that the argument on relevance fails. The reason for the failure of any other member of the Law Society to report an *Income Tax Act* Certificate against him or her does not assist in any way the determination of the failure of Ms. Boles to report. We find that each such determination must be developed on its own facts and no fact or circumstance from another lawyer’s

failure to report a certificate can assist a panel with deciding what caused the Respondent to act in the manner she did.

- [18] Discipline counsel also argues that the provisions of section 87 of the Act that excludes documents related to complaints about lawyers from requirements for disclosure or production apply in this case, whether or not the materials are relevant. Counsel for Ms. Boles says that section 87 is not relevant to this application because a citation hearing is not a “proceeding” as defined in that section. As we have decided that the material in question is not relevant, it is not necessary for us to decide that question.

SCHEDULE 5 – FORM OF SUMMONS

[Rule 5-4(4)]

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING CONCERNING

(As the case may be: a member of the Law Society of British Columbia/
an articulated student/an applicant for enrolment/call and admission/reinstatement)

SUMMONS

TO: _____

TAKE NOTICE that you are required to attend to testify as a witness at the time, date
and place set out below.

Time: _____

Date: _____

Place: The Law Society of British Columbia
845 Cambie Street
Vancouver BC V6B 4Z9 (or other venue)

Dated at _____, _____

Party/Counsel

this ____ day of _____, 20__