

2016 LSBC 02
Report issued: January 14, 2016
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 FACTS AND DETERMINATION**

Hearing date: April 11 and 12, 2012
June 22, 23 & 24, 2015
August 31, 2015
October 1, 2015

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

Counsel for the Law Society: Mark D. Andrews, QC
Gavin Cameron

Counsel for the Respondent: Richard C. Gibbs, 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] By subsequent amendments in Law Society Rules since our initial hearing, Law Society Rule 3-44 has become Law Society Rule 3-50; to avoid confusion between our decisions in this matter we will refer to Rule 3-50 as Rule 3-44 except where the text of the Rule is reproduced at paragraph 46.
- [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 initial hearing, in April 2012, 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.
- [7] At the conclusion of the initial hearing (April 2012), the Panel found the Respondent guilty of professional misconduct. Written reasons (herein called the “Initial Reasons”) were published (2012 LSBC 21).
- [8] The Panel was petitioned to re-open the hearing on the basis that the agreement made between the Respondent and the Law Society (referenced above, in part) had provided unintended consequences. The agreement included additional characteristics as follows. Counsel for the parties agreed that the Respondent’s delay in reporting the various certificates that are the subject of the citation was not to be attributed to any “deliberation or intended obstruction on the part of the Respondent.” The agreement further clarified, “If it is intended to go into suggestions of deliberate or intentional interference with Law Society functioning, then we (the Respondent’s legal “team”) would feel compelled to explore the issues more fully, and/or call rebuttal evidence.” With this clear understanding in place, the Respondent called no evidence at the initial hearing.
- [9] For her part of the agreement, the Respondent provided the factual admissions described above (paragraph 6).
- [10] The Panel was not advised of the “no intention” aspect of the agreement.

[11] In his submissions, counsel for the Law Society urged a finding of professional misconduct in the following terms:

But for the reasons set out above, including the duration, gravity and harm resulting and the presence of *mala fides*, or alternatively wilful blindness, the Law Society respectfully submits that the conduct be characterized as professional misconduct in respect of all or some of the contraventions.

[12] The Panel accepted the submission and made the finding of professional misconduct indicated above. In particular, the Panel determined in its decision that the Respondent had not reported the existence of the certificates to the Law Society because she was motivated by secrecy and that her breaches of the reporting requirements were intentional and motivated by an intention to mislead and deceive.

[13] New counsel for both parties presented a joint submission that, in light of the agreement made and the fact that the Panel had not been advised of the agreement, procedural fairness required that the proceedings be re-opened to permit the Respondent an opportunity to testify to respond to the improper motives attributed to her by discipline counsel and the adverse finding of the Panel on the issue of her intention to mislead the Law Society.

[14] The Panel agreed to re-open the hearing to permit the additional evidence and related argument to be presented.

FACTS

[15] In our Initial Reasons, we described the following facts and some of our findings in respect of these facts. We repeat components of those determinations here to provide a context for what follows.

Citation sub-paragraph (c):

[16] Ms. 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.

- [17] 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.
- [18] In our Initial Reasons, we found that Ms. Boles became aware of the certificate on or about April 19, 2005, nine days before it was paid. The new evidence adduced did not change our view of this finding.

Citation sub-paragraph (e):

- [19] 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.
- [20] 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.
- [21] In our Initial Reasons, we found that Ms. Boles became aware of the certificate in December 2004. The new evidence adduced at the re-opened hearing does not support this finding. The new evidence establishes that the Respondent became aware of this certificate on April 19, 2005, still a period of four months before it was paid.

Citation sub-paragraph (g):

- [22] 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.
- [23] 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.

- [24] In our Initial Reasons, we found that Ms. Boles became aware of the certificate in March of 2004. In her evidence in the re-opened hearing, Ms. Boles took exception with this finding by the Panel and testified that she did not become aware of this certificate until April of 2005.
- [25] In our Initial Reasons we analyzed the factual circumstances by which Ms. Boles' lawyer representing her in a mortgage refinancing transaction 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. In that analysis we had determined that on the balance of probabilities, her lawyer, who we found to be a careful and conscientious practitioner, would have advised Ms. Boles of the discovery of this certificate within days of his learning of its existence.
- [26] The new evidence of Ms. Boles on this issue must be considered in the context of her general disclaimer provided to the Law Society in her letter of February 29, 2012 where she wrote that she was reconstructing matters and that she had little recollection of the material events as they happened so long ago. She added:

Because the events involved in this file occurred anywhere from, say, 8 to 3 years ago, I mistrust my memory as to what I knew and when I knew it and have sought to rely on documents whenever possible. Since September 2011 I have sought copies of my files from Canada Revenue Agency without any resulting production to date. As a result, I have had to reply to [counsel] from my own copies of documents and those documents are not complete or well organized.

- [27] We are not persuaded that our initial finding on this issue was inaccurate, and we confirm that we find Ms. Boles became aware of this certificate in March of 2004, at least one year before it was repaid.

Citation sub-paragraph (h)

- [28] 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.

- [29] 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.
- [30] 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.”

ADDITIONAL EVIDENCE ADDUCED IN THE RE-OPENED HEARING

- [31] The Respondent testified that, at the time that the certificates were issued, her financial affairs were in disarray. She was practising as a sole practitioner, and from sometime in 1997, the accountant she had working for her developed an increasingly neglectful approach to the Respondent’s record keeping requirements. The situation worsened over the next two years, and ultimately she was required to change accountants. She had considerable difficulty recovering her records from the non-functioning accountant, and only after threatening civil action did she receive some (less than half) of her financial records for the years 1998, 1999 and 2000.
- [32] These events signalled the beginning of the end. Her new accountant refiled the 1998 return and made some filings based upon incomplete information (records missing) for 1999 and 2000. It appears that the trauma of this time period had a dramatic effect upon the Respondent and her financial compliance regime fell completely apart. In her words, it was “a disaster.”
- [33] No income tax returns were filed during the ensuing three years. No money was paid to CRA on account of the accruing income tax liability.
- [34] In addition, during this period of time, the Respondent became embroiled in civil litigation involving her mother and other family, and in that proceeding, she was found to have obtained a fraudulent preference in respect of some security taken for monies advanced by her in support of her mother in that litigation. A judgment was entered against her that was neither reported nor paid within the time limit imposed by Rule 3-44.
- [35] A Law Society citation issued for that circumstance and the Respondent received a reprimand following a hearing.
- [36] At this same time the Respondent was neglecting other financial obligations of her practice. She was not compliant with her obligations to file employee deductions,

Employment Insurance contributions, GST, Canada Pension contributions and Social Service tax (Provincial Sales tax) on her legal fees.

- [37] In her evidence, the Respondent described her state of mind during these turbulent times as increasingly “frozen.” The overwhelming pressure of the accumulating financial and CRA compliance burdens caused her to essentially “seize up” and become unable to address any of the financial requirements of the day-to-day administration of the law practice. The neglected financial reporting included filings required of her law corporation.
- [38] The neglected matters came to a crisis point in 2004. In the absence of income tax returns from the Respondent, CRA assessed tax on the basis of “arbitrary assessments.” The CRA collections officer imposed a 90-day deadline to file the returns and advised that, if the returns were not filed, judgment would be entered on the imputed tax calculation. If the returns *had* been filed CRA would have assessed on the basis of the filing, possibly followed by an audit.
- [39] When it became evident that the missing returns, though in preparation, could not be filed within the 90-day limit, an alternative strategy was counselled by the new accountant. A “Notice of Objection” was filed with CRA. This filing is supposed to suspend all collection proceedings until the Notice of Objection is resolved by a hearing officer.
- [40] For reasons not clear to the Panel, this filing did not have the desired effect, and a certificate was filed in respect of the unpaid tax on the imputed income. This certificate was filed against the property of the Respondent just prior to the closing date of the sale of the one property designated by the Respondent to produce funds to retire most, if not all, of the outstanding indebtedness.
- [41] It was the notice of this filing, believed by the Respondent to be contrary to the protection afforded by the Notice of Objection, that caused the outrage described by her lawyer and that the Panel found incredible in our Initial Reasons. With the new evidence regarding the Notice of Objection, we find the reaction of the Respondent to the news of the filing of the certificate to be understandable.
- [42] Other financial difficulties were extant at the same or nearly the same time. The Panel heard evidence of 15 writs of execution that were served upon the law practice of the Respondent or her law corporation. These writs spanned a period of time from April 2004 to September 2005. The Respondent testified that the majority of these writs were paid upon presentation.

- [43] Evidence was led by the Respondent with respect to the content of her required practice reports provided to the Law Society to cover the years from 2005 through 2008. Each of these reports acknowledged that the Respondent had issued general account cheques that had been dishonoured when presented for payment. For 2005, 26 dishonoured cheques, for 2006, 18 dishonoured cheques, for 2007, eight dishonoured cheques, and for 2008, 16 dishonoured cheques or failed automatic withdrawals. The reports indicated for each year, except 2008, that the dishonoured cheques had all been replaced. It is presumed that the 2008 dishonoured cheques were also replaced.
- [44] It appears to the Panel that this evidence was provided for two reasons. First, to meet and negate any suggestion of secrecy surrounding the difficult financial circumstances facing the practice of the Respondent. It was argued that, if secrecy on this issue was the objective, this evidence of systemic general account cheque failures would not have been volunteered to the Law Society with the annual report filings.
- [45] Secondly, it appears that the evidence was offered to suggest that one of the consequences of the non-reporting of the certificates was less significant than argued by the Law Society. It was argued at the first hearing that the Respondent's failure to report the certificates deprived the Law Society of its opportunity to launch an immediate investigation into the extent to which the unsupervised continuing practice of the Respondent constituted a financial risk to the public. This evidence, it was argued, demonstrated that the Law Society was aware of the precarious nature of the Respondent's practice (26 dishonoured general cheques in a single year), and yet the Law Society did nothing to inquire further or send an auditor.
- [46] The Respondent testified 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." to the Rule. Rule 3-44 (now Rule 3-50) provides as follows:

Failure to satisfy judgment

- 3-50(1)** A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of
- (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and
 - (b) his or her proposal for satisfying the judgment.

- (2) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.
- (3) If a lawyer fails to deliver a proposal under subrule (1) (b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee or the chair of the Discipline Committee.

[47] The Respondent admitted that she did not report any of the filed certificates to the Law Society at any time. It was her evidence that, until she received a letter from the Law Society on January 22, 2009, she was not aware that the various certificates described in the citation met the language of Rule 3-44 and were required to be satisfied or reported within seven days of filing.

[48] The Respondent testified that she had resolved to clean up the mess and was working to that end. Though the revenue property had been purchased and renovated as a component of a longer term retirement strategy, she had resolved to sell it to generate money for CRA. Market conditions were not favourable, and the sale took much longer to accomplish than anticipated.

[49] The Respondent's husband testified at the re-opened hearing. His evidence was essentially provided to corroborate the evidence of the Respondent, though in some less material respects he did not do so. He also was clear that there were characteristics of the financial affairs of his wife and her law practice about which he had not been fully informed, if at all. He is also a lawyer, and it was his evidence that he also did not appreciate that the various certificates issued as described in the citation amounted to judgments that needed to be reported to the Law Society if not paid within seven days.

RESPONDENT'S SUBMISSIONS

[50] 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.

[51] With respect to citation sub-paragraph (c), the Respondent argued at the initial hearing that she is not in breach of the Rule and offered two reasons for her belief in that regard. The Panel considered and rejected the argument in our initial reasons and nothing emerged in the re-opened hearing to change our position on this issue.

[52] Generally, the Respondent argues that the Law Society, despite an extensive and comprehensive cross-examination on the subject, has not argued that the Respondent had subjective knowledge of the reporting requirements of Rule 3-44.

To the contrary says the Respondent, the Law Society has accepted that the Respondent did not know that she was required to report the various certificates as falling within the ambit of Rule 3-44. Instead, argues the Respondent, the Law Society is seeking to find a new basis upon which to base a finding of professional misconduct. This new foundation for professional misconduct is that the Respondent *should* have known of the Rule, and that her failure to do so amounts to professional misconduct.

LAW SOCIETY SUBMISSION

[53] The submission of the Law Society is built upon the fact of the long-standing chaos in the financial circumstances of the Respondent, both in her private financial affairs and in her law practice. To this ten-year history of precarious financial brinksmanishp, the Law Society adds the history of the previous successful citation issued against the Respondent for her earlier failure to report a judgment as required by Rule 3-44.

[54] The Law Society borrows from the language of the *Martin* decision (*Law Society of BC v. Martin*, 2005 LSBC 16) to argue that, in the combined circumstances described, it was gross culpable neglect on the part of the Respondent to not familiarize herself with the financial responsibility rules and particularly the reporting requirements of Rule 3-44. In the result of that neglect, the Respondent demonstrated a marked departure from the conduct required of members of the Law Society and a finding of professional misconduct is made out.

FINDINGS OF FACT

[55] Following three days of additional evidence, including testimony from the Respondent and her husband, both of whom were subject to effective and intense cross-examination, we make the following factual determinations that are material to our decision:

- (a) neither the Respondent nor her husband were aware that certificates filed against real property interests were required to be reported as “judgments” by Rule 3-44; and
- (b) the financial affairs of the Respondent and her law practice for the period of time from at least 2000 to 2006 were in abject and abiding disarray.

ISSUE AND ANALYSIS

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

- (4) 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.

[57] It is for us to decide whether the additional evidence adduced and the further arguments advanced still support the finding of professional misconduct we found in our Initial Reasons. That is, does the conduct of the Respondent as clarified by the additional evidence before us still reach the threshold of professional misconduct as set out in s. 38(4)(b)(i) or are we now of the view that the Respondent is instead guilty of the lesser issue of a simple breach of the Rules.

[58] We reiterate our belief that the burden of proof 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.

[59] 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.

[60] We believe it is now well established that the decision of the Benchers in *Martin* has 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.

[61] The Panel must analyze the distinction between professional misconduct and a breach of the Rules. In that analysis we are assisted by the decision of a panel in the case of *Law Society of BC v. Lyons*, 2008 LSBC 09. 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 the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

[62] 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.

[63] These tests have been adopted in other Law Society discipline decisions and have become adopted and colloquially known as the “*Lyons* considerations.” We will consider these factors as they apply to our facts.

[64] We are also assisted in our deliberations by the decision of a panel reported in *Law Society of BC v. Lessing*, 2012 LSBC 19. That case dealt with two citations, one of which was similar in many respects to the facts before us. Mr. Lessing had amassed over a span of years from 2003 to 2008, six different certificates or judgments, none of which were reported to the Law Society. In February 2009 the Law Society wrote to inquire into the failure to report these judgments or certificates. Mr. Lessing responded that he was not aware of the rule requiring the judgments to be reported and confirmed in his response his intention to comply with that reporting obligation in the future.

[65] In December of 2010 a seventh judgment was entered and in February of 2011 an eighth judgment was entered. Neither the filing of these judgments nor the fact of their nonpayment was reported by Mr. Lessing to the Law Society. The explanation for not reporting the judgments offered by Mr. Lessing was found by the panel to be incredible.

- [66] Mr. Lessing was found to be guilty of a breach of the rules for judgments 1 through 6 and was found to have professionally misconducted himself in respect of judgments 7 and 8. The panel found Mr. Lessing's knowledge of the rule to be the distinguishing characteristic and his unacceptable explanation for his neglect or refusal to report the judgments, at a time when he was clearly aware of the requirement, allowed the panel to find *mala fides* and professional misconduct.
- [67] We accept and adopt the wisdom exhibited by the *Lessing* panel in its analysis of the situation where a deliberate breach of the judgment reporting rule is made out.
- [68] There is no description in the *Lessing* reasons of the general state of his financial affairs or the financial state of his practice.
- [69] Our application of the *Lyons* considerations to the facts of this case reveals the following analysis, which is in some ways different from the considerations described in our Initial Reasons.
- [70] 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 CRA certificates and, in the case of citation subparagraph (h), the issuance of the Supreme Court certificate, were never reported. 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.
- [71] In our Initial Reasons we determined that the Respondent's argument to confine the duration of the Rule breach to the time-frame between knowledge and payment was not appropriate. We decided there that 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.
- [72] Though it now appears to be subject to some debate, the argument advanced by the Law Society regarding the harm of non-reporting is the inability of the Law Society to properly fulfill its regulatory mandate. It is suggested that the report of an unsatisfied judgment will trigger a response by the Law Society. The financial interests of the clients of the judgment debtor should be considered.
- [73] The difficulty with the "duration" component of the *Lyons* considerations is that it must be considered in the context of the *mala fides* characteristic. That is, if there is no knowledge in a respondent that a Rule is being breached, and if there is no *mala fides* alleged and proven in that respect, then the duration of the Rule breach

must be a less significant characteristic since in the absence of knowledge, no amelioration of the offending behaviour can be anticipated. Only the duration of the rule breach after it is known to be that, is significant.

- [74] Similar considerations apply to the number or frequency of the breaches of the Rule. If the lawyer is not familiar with the Rule, and is not aware that the impugned conduct is a breach of a Rule, then the number of breaches becomes a less helpful guide to a finding of professional misconduct versus a finding of a breach of the Act or Rules.
- [75] Further *Lyons* considerations include the presence of *mala fides* and the harm caused by the absence of reports. The Respondent, with her steadfast maintenance of her lack of awareness of the application of the Rule 3-44 to CRA certificates, in the face of rigorous cross-examination, has convinced both discipline counsel and the Panel that she did not have any malevolent intentions with her non-reporting. There is no evidence of bad faith, and discipline counsel acknowledged as much in its final submission.
- [76] We find also that no harm was caused to clients of the Respondent from her failure to report these circumstances.
- [77] The Panel has carefully considered the argument urged upon us by discipline counsel. The argument has some appeal in the context of the financial circumstances of the Respondent. There can be no doubt that there was no normalcy exhibited in these financial circumstances. The chaos in the financial circumstances of the Respondent clearly represents a marked departure from a standard that the Law Society expects of its members. However, the state of the Respondent's financial circumstances over the years from 2000 until 2009 is not the subject of the citation before us. The citation charges a failure to report four separate certificates as required by Law Society Rule 3-44.
- [78] The Law Society argued that the array and duration of the financial difficulties facing the Respondent, when taken in the context of her prior history of an unreported judgment for which a citation had issued, placed the Respondent in a position of enhanced awareness. In her circumstances, with all that was going on in her financial world, the Law Society urged that it amounted to gross culpable neglect for her to not be completely up to date with her knowledge of all possible compliance obligations. It is a high bar that is advanced with that argument and one that we cannot adopt. We are satisfied that the Respondent was not aware of the requirement to report the certificates described in the four counts before us. In the absence of her knowledge of the obligation, there can be no finding of professional misconduct for her failure to comply.

[79] We have determined that the Respondent has breached the Rule and this finding is based in part on the admissions provided by the Respondent during the 2012 hearing. After a careful consideration of all of the *Lyons* characteristics and the helpful decision in the *Lessing* case, we have determined that the Law Society has not proven the necessary elements to raise the admitted breaches of Rule 3-44 to constitute professional misconduct.

DECISION

[80] In the result, it is our determination that the totality of the impugned behaviour represents breaches of Rule 3-44 and, to the extent necessary or appropriate, we reverse our earlier determination of professional misconduct and substitute in its place a finding that the Respondent has committed breaches of the Rules of the Law Society.