2016 LSBC 48
Decision issued: December 28, 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 A REVIEW PANEL OF THE BENCHERS

Review dates:	September 28 and 29, 2016
Benchers:	Gregory Petrisor, Chair Jeff Campbell, QC Lisa Hamilton Dean Lawton, QC Sharon D. Matthews, QC Steven McKoen Mark Rushton
Discipline Counsel:	Mark D. Andrews, QC and Gavin Cameron
Counsel for the Respondent:	Richard C. Gibbs, QC

BACKGROUND

[1] This is the review of a facts and determination decision made by a hearing panel and published as 2016 LSBC 02, finding that the respondent, Pamela Boles, had breached Law Society Rule 3-44 (now Rule 3-50) but that those breaches did not amount to professional misconduct. Rule 3-44 required a lawyer against whom a monetary judgment has been entered that has not been paid within seven days to report the monetary judgment to the Law Society. In December 2003, the rule was amended and significantly broadened. The amendments added any certificate, final

order or other requirement under a statute to pay money to any party. Ms. Boles and her law corporation were the subjects of tax certificates issued pursuant to the *Income Tax Act* and other statutes that she did not report to the Law Society. Ms. Boles agreed that her failure to report was in breach of Rule 3-44 but took the position that the breaches did not amount to professional misconduct. The hearing panel agreed.

[2] The Law Society has sought a review of the facts and determination decision on the basis that the hearing panel erred in the determination that, on all of the facts, the conduct that established the breaches did not also amount to professional misconduct.

[3] As the facts reviewed below reveal, this matter has taken some unfortunate twists and turns to get to this point.

[4] The facts and determination decision from which this review is taken is the second facts and determination decision by the same hearing panel. In the first (found at 2012 LSBC 21), the hearing panel held that the conduct did amount to professional misconduct. However, at that time the hearing panel was not apprised of all the elements of an agreement between the parties, in particular that the Law Society would not seek to characterize Ms. Boles' conduct as an intentional breach of the Rules.

[5] In the absence of the all of the elements of the agreement, and in circumstances where counsel for the Law Society (not counsel before us) made submissions asserting *mala fides* on the part of Ms. Boles, the hearing panel made findings inconsistent with the agreement between the parties, including findings of fact characterizing Ms. Boles' conduct as secretive and calculated to deceive.

[6] In the wake of this, the parties – represented by new counsel – made a joint submission to the hearing panel, which agreed to re-open the hearing. When it was advised of the missing details in the agreement and heard further evidence, the hearing panel revised its findings of fact, including retracting the findings relating to secrecy and deception. It also re-analyzed the facts and law based on the new information and determined that the facts amounted to breach of the rules but not professional misconduct.

THE ISSUE ON REVIEW AND SUMMARY OF OUR CONCLUSIONS

[7] The central factual issue that triggered the second facts and determination hearing was Ms. Boles' lack of knowledge and intention relating to her failure to report tax

certificates issued against her for taxes owing as unpaid judgments. The evidentiary linchpin, accepted by the hearing panel, was her assertion that she had no knowledge of the recent change to Rule 3-44 that included tax certificates in the duty to report monetary judgments. From that fact, she argued that she could not have intentionally not reported, been motivated by secrecy or operated based on *mala fides* with regard to her duty to report.

[8] We will refer to this as the knowledge and intention issue. In adopting this shorthand, we are mindful of the fact that the Law Society's argument includes that, in all the circumstances, she ought to have known of her duty to report. We will also address constructive knowledge in our analysis.

[9] There is no doubt that the matter proceeded unsatisfactorily and that some of the findings of fact made and subsequently retracted by the hearing panel cannot be completely erased from the consciousness of those who read them.

[10] Nevertheless, those unfortunate events are not relevant to the central issue of whether Ms. Boles' conduct amounts to professional misconduct. The issue on review before us is whether the hearing panel erred by considering the new evidence on lack of knowledge and intention to the exclusion of the other relevant facts and by concluding that, in the absence of knowledge and intention, professional misconduct could not be made out.

[11] The hearing panel, in its second facts and determination decision, stated that professional misconduct cannot be established where there was no knowledge of the obligation to report. With respect, we do not agree that absent knowledge of the obligation to report, there can be no finding of professional misconduct.

[12] Nevertheless, we are of the view that the hearing panel undertook a complete analysis in which all relevant factors, including Ms. Boles' lack of knowledge and intention, were considered. We are of the view that the determination that her conduct does not amount to professional misconduct was correct. We have undertaken our own analysis and we come to the same result, although with different emphasis.

FACTS

[13] A citation was issued against Ms. Boles, which, as amended, provided that:

> 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.

This conduct constitutes one or more of a breach of the *Act* or Rules, professional misconduct, and/or incompetence of duties as a lawyer.

[14] As will be described below, ultimately the proceedings narrowed to sub-paragraphs (c), (e), (g) and (h) of the citation.

[15] Law Society Rule 3-44 has become Law Society Rule 3-50. We will refer to it as Rule 3-44 because that is what it was during the relevant time and that is what it was when the citation was issued. During the period the citation refers to, 2004

through 2008, it was amended several times. It was also amended in 2003, prior to the relevant time period. The pre-2003 rule and the 2003 amendments (the post-2003 amendments are not germane to this review) are as follows:

as of January 1, 2000:

Failure to satisfy judgment

3-44(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, has failed to meet a minimum standard of financial responsibility, and 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) Monetary judgments to which subrule (1) [sic] include

(a) an order nisi of foreclosure,

(b) a registrar's certificate given under section 76 of the Act that requires a lawyer to pay money to a client, and

(c) a garnishment order under section 224 of the *Income Tax Act* (Canada) if a lawyer is the tax debtor.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

as of December 12, 2003:

Failure to satisfy judgment

3-44(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, has failed to meet a minimum standard of financial responsibility, and 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) Monetary judgments referred to in subrule (1) include

(a) an order nisi of foreclosure,

(b) any certificate, final order or other requirement under a statute that requires payment of money to any party, and

(c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

[16] For the purposes of this matter, the important amendments were that the definition of "monetary judgment" was broadened to include tax certificates of the type that underlie the citation.

[17] In 1999, at the time the previous Rule 3-44 governed, Ms. Boles was cited for failing to report a monetary judgment to the executive director of the Law Society. She was found to have breached the rule: *Law Society of BC v. A Lawyer*, 2002 LSBC 11, [2002] LSDD No. 25.

Citation sub-paragraph (c)

[18] In the taxation years 2001, 2002 and 2003, when Ms. Boles did not file income tax returns, the Canada Revenue Agency ("CRA") issued an arbitrary assessment of income earned by Ms. Boles for those years. Ms. Boles did not pay the amounts set by arbitrary assessment.

[19] 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.

[20] Ms. Boles learned of the certificates when attempting to sell a property against which the certificate was registered. She paid the certificate from the proceeds of sale of the property 28 days after it was registered and nine days after she became aware of it.

Citation sub-paragraph (e)

[21] 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.

[22] The hearing panel was unable to conclude exactly when this debt was paid but concluded it was likely paid on August 15, 2005, 384 days after the issuance of the certificate.

[23] The hearing panel initially held that Ms. Boles became aware of the certificate in December 2004 but revised that finding to April 19, 2005 based on evidence at the second facts and determination hearing. It was paid four months later.

Citation sub-paragraph (g)

[24] 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.

[25] 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.

[26] The hearing panel found that Ms. Boles became aware of the certificate in March of 2004 and, despite evidence led disputing this at the reopened hearing, maintained that finding.

Citation sub-paragraph (h)

[27] 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.

[28] 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.

[29] The date upon which Ms. Boles became aware of this certificate is uncertain, but she conceded that she had inadvertently breached Rule 3-44(1) in respect of it.

The first facts and determination hearing

[30] Following the commencement of the initial hearing on facts and determination, but prior to its conclusion, counsel for the Law Society advised the hearing panel that certain matters had been agreed with counsel for Ms. Boles as follows:

(a) The Law Society would no longer pursue subparagraphs a, b, d, f, and i of the amended citation;

(b) The respondent admitted that subparagraphs e, g and h of the amended citation were proven and were admitted to be breaches of Rule 3-44;

(c) The respondent admitted that the essential ingredients of subparagraph 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.

[31] At the hearing leading to the first Facts and Determination decision, counsel for the Law Society (not counsel before us) urged a finding of professional misconduct on the entirety of the facts, including what he characterized as "*mala fides* or alternatively wilful blindness."

[32] The hearing panel held that the conduct amounted to professional misconduct relying in part on its findings that Ms. Boles "was motivated by secrecy and that her breaches of the reporting requirements were intentional and motivated by an intention to mislead and deceive."

The second facts and determination hearing

[33] Counsel for the Law Society and counsel for Ms. Boles made a joint submission to the hearing panel to re-open the hearing on the basis that the agreement made between Ms. Boles and the Law Society included additional elements that had not been made known to the hearing panel:

> 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.

[34] The hearing panel was not advised of the "no deliberation or intended obstruction" aspect of the agreement or the link between that aspect of the agreement and Ms. Boles not calling evidence to provide more context to her conduct.

[35] The hearing panel agreed to re-open the hearing to permit the additional evidence to be led and related argument to be presented.

[36] At the re-opened hearing, Ms. Boles testified that, at the time that the certificates were issued, her financial affairs were in disarray due to problems with her accountant, including retrieving her records from her accountant after she changed

accountants. She fell behind on tax filings, which her new accountant attempted to rectify, but the accountant did so with incomplete information.

[37] In addition, in 1999, a British Columbia Supreme Court monetary judgment was entered against Ms. Boles that was neither reported nor paid within the time limit imposed by Rule 3-44. That resulted in a citation, a finding of a rule breach and a reprimand: *Law Society of BC v. A Lawyer*.

[38] Ms. Boles described her state of mind at this time 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. She was not compliant with her obligations to file employee deductions, Employment Insurance contributions, GST, Canada Pension Plan contributions and Social Service tax (Provincial Sales tax) on her legal fees. The neglected financial reporting included filings required of her law corporation.

[39] With regard to the personal income tax returns that were not filed, the CRA assessed tax on the basis of "arbitrary assessments." The CRA collections officer imposed a 90-day deadline to file the returns with which Ms. Boles was not able to comply, so she filed a "Notice of Objection" with the CRA on the understanding that this filing is supposed to suspend all collection proceedings until the Notice of Objection was resolved by a hearing officer. The Notice of Objection did not have the desired effect, and a certificate was issued in respect of the unpaid tax on the imputed income. This certificate was filed against the property of Ms. Boles just prior to the closing date of the sale of a property owned by Ms. Boles, the proceeds of which she intended to use to retire outstanding indebtedness.

[40] In addition, there was evidence of 15 writs of execution that were served upon the law practice of Ms. Boles or her law corporation. These writs spanned a period of time from April 2004 to September 2005. The majority of these writs were paid upon presentation. However, this situation led to the characterization of the overall financial disarray as "sheriffs at the door."

[41] Ms. Boles also led evidence that she had not tried to hide her financial difficulties from the Law Society. Her practice reports provided to the Law Society from 2005 through 2008 disclosed dozens of general account cheques that had been dishonoured. The disclosure of these dishonoured cheques each year for several years did not prompt the Law Society to inquire into whether her financial circumstances posed a threat to her clients or the public.

[42] Ms. Boles testified that she was not aware of the change to Rule 3-44 that occurred in December 2003. She said 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.

[43] Ms. Boles' husband testified at the re-opened hearing. 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.

[44] At the review hearing before us, both counsel for the Law Society and Ms. Boles agreed that the recitation of evidence tendered at the second hearing, which is summarized above and provided in more detail at paragraphs 31-49 of the second facts and determination decision, were findings of fact by the hearing panel.

[45] In addition, the hearing panel set out the following factual determinations that they described as material to their second facts and determination decision at paragraph 55:

(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.

POSITION OF THE PARTIES

The Law Society

[46] The basis for the Law Society's review is an alleged error in principle pertaining to the hearing panel's treatment of Ms. Boles' knowledge and intention (including constructive knowledge) in relation to her failure to report the tax certificates.

[47] The Law Society asserts that the finding that Ms. Boles was not aware of the duty to report these tax certificates does not preclude a finding of professional misconduct and the hearing panel ignored the jurisprudence that establishes that professional misconduct can be made out in the absence of deliberate and intentional breach of a rule. The Law Society points to the concept of gross culpable neglect that has formed the foundation for findings of professional misconduct in other cases. The Law Society says that, when all the circumstances

are taken into account in this case, Ms. Boles ought to have known of her duty to report or she was grossly neglectful of her duty to report.

[48] The circumstances the Law Society relies upon include: Ms. Boles' prior breach of Rule 3-44; the number of tax certificates issued against her; the sheriffs at the door; the fact that the tax certificates were deemed to be judgments or had the same force and effect as judgments; the fact that her tax solicitor described them to her as judgments; her failure to familiarize herself with the rule change or make any inquiries about it; and the number and duration of the rule breaches.

The Respondent

[49] Ms. Boles argues that the failure to communicate the agreement not to allege an intentional obstruction of the Law Society and then arguing *mala fides* at the first facts and determination hearing is the important context for this review.

[50] She further argues that gross culpable neglect cannot be made out because the changes to Rule 3-44 were inadequately publicized and because these tax certificates were different from the previous BC Supreme Court monetary judgment entered after trial. Ms. Boles submits that, in these circumstances, the Law Society would need to prove recklessness to prove gross culpable neglect, but the Law Society does not assert recklessness. Her previous citation under Rule 3-44 did not alert her, nor could it have, that the subsequent changes would include the duty to report tax certificates.

[51] Ms. Boles argues that cases such as *Law Society of BC v. Lessing*, 2012 LSBC 19, and *Law Society of BC v. McLean*, 2015 LSBC 39, are cases in which hearing panels have differentiated the consequences of failing to report under Rule 3-44 based on whether the respondent was aware of the obligation to report. She says those cases should apply with the same result.

STANDARD OF REVIEW

[52] The issue on this review is whether the hearing panel erred in application of legal principles on the question of professional misconduct. The parties do not dispute the findings of fact made by the hearing panel.

[53] On review pursuant to s. 47 of the *Legal Profession Act*, questions of law, including the application of legal principles, attract the correctness standard of review: *Kay v. Law Society of British Columbia*, 2015 BCCA 303, para. 41 and *Law Society of BC v. Nguyen*, 2016 LSBC 21.

ANALYSIS

Professional misconduct

[54] As is well understood, the test for whether conduct reaches the threshold of professional misconduct is whether it amounts to a marked departure from the conduct the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16. It is also not in question that conduct that is in breach of the Law Society Rules or the *Legal Profession Act* is not necessarily professional misconduct.

[55] The determination of whether certain conduct, rule breach or not, amounts to professional misconduct is based on a number of factors. The factors that may be appropriate to consider, depending on the circumstances of the case, include 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 misconduct: *Law Society of BC v. Lyons*, 2008 LSBC 09.

[56] It is not necessary, in every case, to consider each *Lyons* factor. Nor are the factors water tight containers: some elements of the case might be relevant to more than one factor. No single factor is presumptively determinative: *Law Society of BC v. Harding*, 2014 LSBC 52 at paras. 78-79. While some cases may have a fact or set of facts going to a factor that decisively pushes the case over the marked departure threshold or, conversely, clearly stops short of it, there is no rule in that regard. Indeed, the very nature of a multifactorial approach precludes presumptively determinative factors and instead calls on a hearing panel to exercise discretion to determine how much weight to assign each relevant factor.

[57] In *Harding*, the hearing panel considered the authorities that describe an element of culpability in the marked departure analysis, and whether a lack of intention precluded a finding of professional misconduct. The hearing panel rejected this argument, and held that, in all the circumstances, notwithstanding the lack of intention, professional misconduct was made out, stating at paragraphs 74-79 :

> [74] Counsel for Mr. Harding relies on *Re: Lawyer 10*, 2010 LSBC 02, and submits that the element of culpability cannot be satisfied without evidence of something more than an error on the lawyer's part. He says that the cases read in context (and this is most pronounced in the cases involving delay) all involve some element of culpable behaviour that goes beyond inadvertence or a mistake.

[75] Counsel for the Law Society says that culpability means that the conduct is the fault of the lawyer and marked departure refers to the degree of culpability (*Martin*). The degree of culpability requirement is satisfied if the conduct rises to the level of being aggravated (*Re: Lawyer 12*, 2011 LSBC 35).

[76] In our view, given all the cases and the guiding principles from *Stevens* [*v. Law Society (Upper Canada)*, (1979), 55 OR (2d) 405 (Div. Ct.),] and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.

[77] As *Stevens* and *Re: Lawyer 12* (both the single-bencher and the review decision) make clear the panel must look at all of the circumstances. In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:

(a) the gravity of the misconduct;

(b) the duration of the misconduct;

(c) the number of breaches;

(d) the presence or absence of *mala fides*; and

(e) the harm caused.

[78] The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.

[79] Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not

> automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

The hearing panel's analysis of professional misconduct

[58] This brings us to the gravamen of the Law Society's argument on this review, namely that the absence of intention or knowledge was relied upon by the hearing panel to preclude a finding of professional misconduct.

[59] While the second facts and determination decision can be read as focused on what the hearing panel accepted as Ms. Boles' lack of knowledge and intention, that is understandable given that the hearing panel was in the very unusual situation where it reversed its previous findings with regard to intention and knowledge and had to revisit its earlier analysis given those different facts. The object of the exercise was set out by the hearing panel at paragraph 57 of the second facts and determination decision:

> ... 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.

[60] The Law Society points to paragraph 78 of the hearing panel's second facts and determination decision:

> 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.

[61] With respect, we do not agree with the last sentence of this paragraph. It is too definitive. Absence of knowledge of a rule cannot, on its own, preclude a finding of professional misconduct. If the sentiment expressed in that sentence had been the only factor weighing against a finding of professional misconduct, on its own, then it would be an error in principle that might cause us to substitute a different outcome if a complete analysis supports a finding of professional misconduct.

[62] However, we are of the view that the last sentence of paragraph 78 should be read with the entire decision. That sentence was written in the context of considering the Law Society's argument that the circumstances were such that Ms. Boles should have had knowledge and her lack of knowledge amounted to gross culpable neglect. The panel, we believe correctly, held that the lack of actual knowledge, in the particular circumstances of this case, was not gross culpable neglect. In considering the Law Society's argument that it was gross neglect for Ms. Boles not to be fully aware of all possible compliance obligations, the hearing panel concluded that "[i]t is a high bar that is advanced with that argument and one that we cannot adopt." We agree. We are also of the view that the hearing panel's decision was properly multifactorial, notwithstanding the last sentence of paragraph 78.

[63] A review of both the first facts and determination decision (paragraphs 37 to 48) and the second facts and determination decision (paragraphs 61 to 63 and 69 to 76) demonstrate that the panel considered the relevant *Lyons* factors. The Law Society argues that, in the second facts and determination decision, the *Lyons* analysis was inappropriately focused on Ms. Boles' lack of knowledge and intention.

[64] The Law Society says these facts were relevant to the presence or absence of *mala fides* but the hearing panel erred by also considering them with regard to other factors such as duration of the rule breach and number and frequency of the breaches. We do not accept this argument because we are of the view that the factors are not watertight compartments. Some facts will be relevant to more than one of them. For example, a very long period of misconduct will usually affect the assessment of gravity, as will misconduct that is associated with *mala fides.*

[65] The hearing panel relied on *Lessing*, in which a lawyer who had more judgments against him than Ms. Boles was found to have breached the rule for failing to report all eight, but that failure only amounted to professional misconduct for the last two because, before the last two were entered against him, the Law Society had advised him of the duty to report. The hearing panel in *Lessing* drew a line between rule breach and professional misconduct based on the knowledge of the rule on the facts of that case. There is no error in the hearing panel in this case considering that

decision. It was obviously germane to the analysis. However, it does not define a bright line for all cases, and the hearing panel below did not ascribe such a bright line to the reasoning in *Lessing.*

[66] We conclude that the hearing panel did not reduce its consideration solely to the lack of knowledge and intention on the part of Ms. Boles. But those facts were relevant to the overall analysis and to the consideration of the *Lyons* factors, and so it was appropriate for the hearing panel to consider them in all the ways they were relevant to the multifactorial analysis.

Our analysis of professional misconduct

[67] Although we are of the view that the hearing panel did not err in its overall approach, we are also of the view that the last sentence of paragraph 78 is, if taken alone, an error of principle. Accordingly, we have also analyzed the *Lyons* factors to determine whether the circumstances of this case establish professional misconduct. Our analysis differs in emphasis from that of the hearing panel, but comes to the same result.

[68] First, we consider the gravity of the conduct. The gravity is diminished by the fact that all of the certificates were repaid relatively promptly after Ms. Boles became aware of them, except one that was repaid more than a year after she became aware of it. The fact that she had a previous citation for failing to report a judgment is important and at first blush enhances the gravity. But that fact must be considered in light of the rule changes. Her previous citation pertained to a BC Supreme Court judgment, a completely different instrument than a tax certificate, at a time when tax certificates were not deemed to be judgments by Rule 3-44. The hearing panel found that Ms. Boles was not aware of the change to Rule 3-44. That finding diminished the gravity of failing to report in light of her previous citation for failing to report.

[69] It is relevant to this analysis, as discussed by the hearing panel in both the first and second facts and determination decisions, that the reason for Rule 3-44 is to provide the Law Society with an opportunity to intervene to determine whether the unpaid judgment is evidence of financial issues in the lawyer's practice that could put the public at risk. In this case, the hearing panel found that Ms. Boles' practice was indeed in financial disarray. In the event, no harm came to a client or any other member of the public, but the lack of reporting did result in a missed opportunity for the Law Society to undertake its regulatory function.

[70] On the other hand, Ms. Boles was reporting other facts demonstrating the financial disarray of her practice during this timeframe, i.e.: the dozens of dishonoured

general account cheques (which were subsequently honoured) between 2005 and 2008. In the context where reporting dishonoured cheques did not result in regulatory action by the Law Society, it is impossible to say whether reporting tax certificates that were paid more than seven days after they were issued would have triggered such regulatory action.

[71] In all the circumstances, the gravity of her failure to report is a slightly aggravating factor.

[72] Analysis of the duration of the misconduct is, in this case, a quagmire. Rule 3-44 requires judgments to be reported within seven days "after the date of entry." This was the language inherited from the previous version of the rule, which defined judgments as instruments that are entered such as judgments of courts and Registrar's certificates. The tax certificates in this case were issued *ex parte.* It is not clear whether any of them were "entered," but it may be that the certificate that is the subject of allegation (h) was "entered" by the British Columbia Supreme Court *ex parte* after it was issued *ex parte*.

[73] Ms. Boles became aware of the certificates weeks or months after they were issued. If one takes the issuance of the certificate to be the starting point for the Rule 3-44 requirement, Ms. Boles was in breach for some time before she even knew about the existence of the certificates.

[74] Instead of utilizing the time of "entry" as the trigger for the Rule 3-44 duty to report, it was argued before the hearing panel that the duration of the breach should be assessed as the time between when Ms. Boles became aware of the certificates and when she paid them. This too, as noted by the hearing panel, does not comport with the wording of Rule 3-44. The duty to report is not relieved by payment unless the payment occurs within seven days of the entry of the judgment.

[75] The hearing panel concluded that duration could not be considered apart from *mala fides* because the failure to report was less significant during the time that Ms. Boles did not know she had anything to report. We agree with this. Even if constructive knowledge is substituted for actual knowledge, there was a time when there was no knowledge of any sort because Ms. Boles did not know of any of the certificates at the time they were issued.[1]

[76] Constructive knowledge does not assist with this analysis. There is no clear marker or suggestion of when along the continuum of time during which these certificates

[1] We observe that this line of reasoning assumes "issuance" is an enforceable substitute for "entry" under Rule 3-44, a matter we have not been asked to decide.

were being issued and the financial disarray of Ms. Boles' practice was worsening that the constructive knowledge is said to have set in. Absent actual knowledge or a start time for constructive knowledge, there is no way to assess duration of failing to report in the face of constructive or actual knowledge. This also demonstrates that there can be no error in the hearing panel considering knowledge and intention on the duration point. The Law Society's assertion of constructive knowledge requires it.

[77] On these facts, the duration of the breaches is not something that can be adequately defined. It could be characterized as a neutral factor, but it is really a non-factor.

[78] With regard to the number of breaches, the abiding disarray of the financial circumstances of Ms. Boles' practice, the number of times sheriffs were at her practice demanding payment, and the serial discovery of these *ex parte* tax certificates, are the most compelling facts in support of the Law Society's argument that Ms. Boles should have been aware of the Rule 3-44 duty to report. However, not all of the times the sheriff was at the door involved these certificates, and as the hearing panel correctly observed, the citations relate only to the failure to report these certificates, not to being in financial disarray.

[79] The number of breaches is slightly aggravating.

[80] The presence or absence of *mala fides* was dealt with at length by the hearing panel. In the absence of actual knowledge, *mala fides* would have to be based on constructive knowledge. There is no suggestion that the constructive knowledge urged by the Law Society should be characterized as *mala fides.*

[81] With regard to harm, we have dealt with the missed opportunity for the Law Society to intervene under the gravity factor analysis. That analysis addressed the potential for harm. Ultimately, no one suffered any actual harm. This factor is neutral.

[82] The Law Society submits that, given Ms. Boles' circumstances, she ought to have been aware of her reporting requirements. As discussed above, we find that constructive knowledge is relevant to the analysis of the *Lyons* factors, most notably the factor considering the number of breaches. It is also relevant as an additional factor; the *Lyons* factors are not an exhaustive list of considerations. However, as we have also set out above, we do not consider knowledge, whether constructive or actual, to be determinative of the question of professional misconduct.

[83] In our view, the circumstances of this case, considering all of the factors including the circumstances the Law Society says support constructive knowledge, do not amount to a marked departure from the conduct expected by the Law Society and do not support a finding of professional misconduct.

CONCLUSION

[84] Although our analysis differs in some ways from that of the hearing panel, we are of the view that they undertook an appropriate analysis and came to the correct result, notwithstanding our view that the last sentence of paragraph 78, taken on its own, is not a correct statement of principle.

[85] The decision of the hearing panel is confirmed.

[86] We did not receive any submissions on costs of this review. If the parties are unable to agree on costs, they may make submissions in writing within 30 days of this decision.