

Vancouver, B.C.

Called to the Bar: September 13, 1973

Discipline hearing panel: May 5, 1999 and April 8, 2000 (*penalty reconsideration*)

Robert W. Gourlay, Q.C., Chair, William M. Everett, Q.C. and Patricia L. Schmit

Bencher review: November 5, 1999

Majority decision: Ralston S. Alexander, Q.C., Richard C. Gibbs, Gerald J. Kambeitz, Q.C., Peter J. Keighley, Marjorie Martin, Anita Olsen, G. Ronald Toews and Bruce D. Woolley, Q.C.

Dissents: Richard S. Margetts, Chair, and Russell S. Tretiak, Q.C.

Robert A. Kasting and Jessica S. Gossen (*on review*), for the Law Society

George C.E. Fuller, for Mr. Dobbin

Summary

Mr. Dobbin failed to respond to Law Society communications respecting a complaint against him. A hearing panel found that Mr. Dobbin's conduct breached Chapter 13, Rule 3 of the *Professional Conduct Handbook*, but did not amount to professional misconduct or conduct unbecoming. The panel recommended that the Discipline Committee rescind the citation and order a conduct review of Mr. Dobbin. The Discipline Committee applied to the Benchers for a review of the panel decision. On review, a majority of Benchers overturned the panel decision and found that Mr. Dobbin's failure to respond to the Law Society was professional misconduct and ordered that the matter return to the hearing panel for imposition of penalty. On reconsideration of penalty, the hearing panel ordered that Mr. Dobbin be reprimanded and pay \$2,500 towards the costs of the discipline proceedings on or before July 1, 2000.

The majority on the Bencher review held that the review of a hearing panel decision is based on a standard of correctness. A minority dissented and stated the appropriate test is that of reviewable error, which is often cited as "palpable error," "overriding error" or "clearly wrong," and which is the test applied in appellate reviews.

Facts

The Law Society wrote to Mr. Dobbin on September 30, 1997, enclosing a complaint from a California lawyer who alleged that Mr. Dobbin (as agent for the California lawyer) had failed to provide him documentation in a litigation and had not filed a statement of

claim. The Law Society requested Mr. Dobbin's response to this complaint. The Law Society sent Mr. Dobbin reminder letters on October 15 and 30 and on November 14. Having received no response, the Society called his office on November 20 and Mr. Dobbin said he would send a reply the next day. He wrote to the Law Society on November 21 and stated that he would file a statement of defence for the California lawyer once there were arrangements for the payment of his fees and disbursements.

The Law Society wrote again on March 17, 1998 to request the file from Mr. Dobbin in order to review what payment issues were under active discussion between Mr. Dobbin and the California lawyer. The Society sent reminder letters on April 17 and 27 and May 11 and called Mr. Dobbin on May 19. Mr. Dobbin said he was just back in the office following the death of his brother-in-law and would call back that afternoon, but he did not. The Law Society wrote again on June 4, 1998, noting that a referral to the Discipline Committee would be held over because of the death in Mr. Dobbin's family but in the absence of a substantive response would be referred in July. Mr. Dobbin did not respond.

A citation was issued against Mr. Dobbin in September, 1998.

Decision

The hearing panel determined that Mr. Dobbin did not respond adequately to communications from the Law Society between March 17 and June 4, 1998, which Mr. Dobbin admitted in his evidence. The panel found that a sudden death in his family was a relevant factor and noted that Mr. Dobbin also invited a review of his file by the Law Society staff lawyer investigating the complaint. His failure did not amount to professional misconduct, conduct unbecoming or breach of the *Act* or Rules, but was a serious action in breach of Chapter 13, Rule 3 of the *Professional Conduct Handbook*, which states "A lawyer shall reply promptly to any communication from the Law Society."

The hearing panel noted that section 38(4)(c) of the *Legal Profession Act* permitted disposition of the citation as the panel considered proper. The panel ordered that the citation be referred to the Discipline Committee, with the panel's recommendation that the citation be rescinded and a conduct review be held.

The Discipline Committee directed that the panel's decision be referred to the Benchers for review pursuant to section 47 of the *Act*.

Bencher review

Majority reasons

In considering the scope of a review under section 47(3) the majority of the Benchers determined that the proper standard for review is correctness, with the sole exception of deference to a hearing panel's advantage in making findings of fact from controverted sworn evidence. The majority declined to adopt a standard of deference to the hearing

panel's exercise of judgement or discretion, as may be applied by courts of appeal reviewing triers of fact in certain circumstances. The majority noted a difference in function between the Benchers and the courts of appeal.

The majority noted that Mr. Dobbin failed to respond to five letters and a telephone call from the Law Society in the 11 weeks between March 17 and June 4, 1998. His position that he had answered all the concerns in his letter of November 21, 1997 was untenable. In that letter Mr. Dobbin noted that he had reviewed his file with a Law Society lawyer on an earlier practice review and that he would proceed on behalf of the California lawyer once payment arrangements had been made. The majority noted that, in the March 17 letter, the Law Society requested Mr. Dobbin's file to probe his position that his delay related to lack of an arrangement over fees and disbursements. Mr. Dobbin never provided the file to the Society and there was, in fact, no evidence that he had even broached the subject of fees with the California lawyer or that his taking action depended on payment arrangements. The majority noted that two years after the Law Society received the complaint, it still lacked basic information about the case because of Mr. Dobbin's intransigence. The majority stated that the duty to reply to the Law Society is at the heart of the regulation of the practice of law.

While the majority further noted that Mr. Dobbin was away from practice for up to three weeks in April, 1998 because of the death of his brother-in-law, this did not explain his failure to respond or make arrangements to defer matters over the entire period. He had not responded by the date of the citation in September, 1998 or the date of the hearing or review in 1999.

The hearing panel's decision could not be sustained. The majority found that Mr. Dobbin's conduct amounted to professional misconduct and ordered that the matter be referred back to the panel for a determination of penalty.

Dissenting reasons

Mr. Tretiak dissented from the majority decision. He found the standard of correctness applied by the majority is a departure from the law of appellate review, was unsupported by policy considerations relating to certainty, comity and finality and represented a radical departure in Bencher jurisprudence. The appropriate test, and that applied in most past Bencher reviews, is that of "reviewable error," which is often cited as "palpable error," "overriding error" or "clearly wrong." A Bencher review is a review on the record, with the power for Benchers to hear new evidence. Nothing in section 47 authorizes the Benchers to substitute for the hearing panel's discretion where no new evidence has been called.

Mr. Margetts agreed with Mr. Tretiak's dissent. He further observed that section 38(4)(c) expressly permits a panel to "make any other disposition of the citation that it considers proper." This section is intended to give a panel utmost flexibility in considering an appropriate resolution. In this case, the panel took an action (recommending a citation rescission and a conduct review) that might be the administrative equivalent of a

conditional discharge in the criminal context. He could not find the panel's decision to be incorrect or unreasonable.

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Penalty

Following the Bencher review, the matter of penalty was referred back to the hearing panel. On April 8, 2000, the panel noted that the Benchers on review had found that Mr. Dobbin's failure to respond to the Law Society for a lengthy period was a serious case of professional misconduct. The panel took that finding into account and also the fact that this case had certain features of a test case, which was relevant in assessing costs. The panel ordered that Mr. Dobbin:

1. be reprimanded; and
2. pay \$2,500 towards the cost of the discipline proceedings on or before July 1, 2000.

Discipline Case Digest — 2000: No. 7 April (Dobbin)