

Section 47 Benchers review: see 99/02 for summary of panel decision

Vancouver, B.C.

Called to the Bar: May 17, 1952

Retired member: January 1, 1997

Benchers review panel: April 29, 1999

Majority decision: Ralston S. Alexander, Q.C., William M. Everett, Q.C., Gerald J. Kambeitz, Q.C., D. Peter Ramsay, Q.C.

Dissent: Richard C. Gibbs

Abstentions from decision:* Warren T. Wilson, Q.C., Chair, and Peter J. Keighley

Gerald A. Cuttler, for the Law Society

Richard R. Sugden, Q.C., for Mr. Volrich

Discipline hearing report indexed as [1999] LSBC 6

Summary

Mr. Volrich applied under section 47 of the *Legal Profession Act* for a review by the Benchers of a discipline hearing panel decision to suspend him from practice for three years. Mr. Volrich argued that the hearing panel's delay of 28 months in rendering a penalty decision was inordinate and resulted in the panel losing jurisdiction. The majority of the panel found that, while the delay was unreasonable, the potential for prejudice to the public interest (if serious misconduct attracted no penalty) far exceeded any prejudice to Mr. Volrich. The majority found that Mr. Volrich was not in fact prejudiced by the delay since, on the day verdict was rendered, he chose to become a retired member and undertook not to practise. The majority dismissed the review, but ordered that Mr. Volrich's three-year suspension run, not from January 27, 1999, but from December 19, 1996 (the date by which the decision on penalty ought to have been rendered).

In dissenting reasons, one member of the panel concluded that the delay was unreasonable and inexcusable, and it deprived the hearing panel of jurisdiction to render a penalty.

Facts

Mr. Volrich applied to the Benchers under section 47 of the *Legal Profession Act* for a review of a discipline hearing panel decision to impose a penalty on him, on the basis that the hearing panel had delayed 28 months in rendering its decision on penalty. Mr.

Volrich's position was that the delay was inordinate, constituted a breach of natural justice and resulted in the hearing panel losing jurisdiction.

The panel of Benchers summarized the sequence of discipline proceedings that had led to the section 47 review. A discipline hearing had been held in February, 1995 to inquire into Mr. Volrich's conduct in allegedly practising law while suspended. Findings of fact were issued in October, 1995. There were two adjournments of the hearing, one agreed to by Mr. Volrich's counsel and the other unopposed. The hearing continued on September 19, 1996 with submissions as to verdict and penalty, and the panel issued its verdict that day. The panel found Mr. Volrich guilty of professional misconduct in that, while serving a two-year suspension following an earlier discipline hearing, he had practised law for a particular client. The hearing panel issued its decision and reasons on penalty on January 27, 1999. The panel ordered that Mr. Volrich be suspended and ineligible to apply for reinstatement for three years, that he pay hearing costs and that, if reinstated, he be forbidden from being a signatory to a trust account: *see Discipline Case Digest 99/02 for a summary of the case.*

Majority decision

The majority of the Bencher review panel found that the 28-month delay was unexplained and far too long. Mr. Volrich was not in any way responsible for the delay. The hearing panel found, however, that unreasonable delay in itself does not necessarily result in loss of jurisdiction. From its review of the authorities, the panel noted that delay should only result in judicial interference in the administrative process if it has compromised the procedural fairness of that process and only in the clearest of cases. In considering the foregoing, the Benchers, as the reviewing authority, must determine that the damage to the public interest in the fairness of the disciplinary process going ahead would not be exceeded by the damage to the public interest if the process were halted.

The review panel weighed several factors: whether the delay was unreasonable, whether there were reasons for it, prejudice to the complainant, prejudice to Mr. Volrich and the public interest. Although the delay was unreasonable, the panel found that, if the citation against Mr. Volrich were dismissed and his serious misconduct attracted no penalty, this would bring the discipline process into disrepute and the complainant and the public would be seriously prejudiced. The panel found that this prejudice far exceeded any prejudice to Mr. Volrich.

In this regard, the panel noted that the delay on penalty occurred after all the evidence and submissions were heard, such that there was no evidence lost and it was a fair hearing. On the day of the verdict, although he was still free to practise law, Mr. Volrich instead chose to apply for retired member status and undertook not to practise as of January 1, 1997. He could not, in the circumstances, complain that the delay impaired his ability to earn an income. While Mr. Volrich testified about damage to his practice and a negative impact on his family and himself, this related to the citation and the previous findings of the hearing panel, not to the delay in reasons on penalty being rendered.

The majority found that the hearing panel had not lost jurisdiction. Accordingly, the review of the panel's decision was dismissed, except that Mr. Volrich's three-year suspension was to run from December 19, 1996 (the date by which the decision on penalty ought to have been rendered).

Mr. Volrich was ordered to pay costs of the review.

Dissent

There was an inordinate delay of 28 months between the hearing of submissions on penalty, which took place on September 19, 1996 and the delivery of judgment on penalty, which took place on January 27, 1999. The hearing panel members procrastinated in their duties, which was inexplicable, unreasonable and inexcusable.

The delay at issue deprived the hearing panel of its jurisdiction to proceed further. In the alternative, the delay was so long that an irrefutable presumption of prejudice arose such that individual prejudice to Mr. Volrich need not be shown or, in the further alternative, there was prejudice to such an extent that a remedy of dismissal should have been granted in the exercise of a discretion.

** Following the review, Mr. Wilson and Mr. Keighley drew to the attention of counsel that they were members of other hearing panels that had failed to deliver reports in a timely way. They abstained from participating in any decision on this review.*

Discipline Case Digest — 1999: No. 30 September (Volrich)