



*Taman Inquiry*  
*into the investigation and prosecution of Derek Harvey-Zenk*  
Honourable Roger Salhany, Q.C., Commissioner

**PROSECUTORIAL STANDARDS  
AND ETHICS**

**TAB 9**

**OVERSEEING PROSECUTORIAL  
DISCRETION**

**Relevant Passages from the *Federal Prosecution Service Deskbook*,  
ch. 8, “Independence and Accountability in Decision Making”  
(2005)**

...

**8.3 Accountability**

...

An equally important form of accountability is internal accountability. All counsel for the Attorney General, whether employees within the Department of Justice, or standing or ad hoc agents, are accountable to their superiors for decisions taken. The Department of Justice is organized to foster principled, competent and responsible decision making. One of the goals of the Federal Prosecution Service Deskbook is to assist counsel in making the numerous difficult decisions which arise in criminal litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.

Individual prosecutors are also subject to a form of public accountability through their membership in provincial law societies. Another form of public accountability occurs through judicial review of a prosecutor’s actions, for example through the abuse of process doctrine, or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses. Accountability is also enhanced because of the availability to the public of the Federal Prosecution Service Deskbook, since the public is able to assess the actions of Crown counsel against the standards set out in the policies. Finally, recognition of the importance of public accountability imposes a duty on Crown counsel in certain circumstances to communicate the reasons for certain decisions to the public through the media.

The Law Society of Manitoba  
La Société du Barreau du Manitoba

**CODE OF  
PROFESSIONAL CONDUCT**

**CODE DE  
DÉONTOLOGIE PROFESSIONNELLE**

Adopted by the Benchers of the  
Law Society of Manitoba on February 1st, 1992

Adopté par les conseillers de  
la Société du Barreau du Manitoba le 1<sup>er</sup> février 1992

# *Code of Professional Conduct*

## Chapter 1

### INTEGRITY

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#### RULE

**The lawyer must discharge with integrity all duties owed to clients, the court, other members of the profession and the public.<sup>1</sup>**

#### **Disciplinary Action**

3. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession and the administration of justice as a whole.<sup>3</sup> If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action.<sup>4</sup>

4. Cf. IBA, Chapter 2  
"The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list." (p.36). "Membership of a . . . professional body is generally treated as an indication of good character in itself . . .". *Bennion*, p.111.

THE LEGAL PROFESSIONS ACT  
Disciplinary Proceeding Provisions

**CHAPTER 44**  
**THE LEGAL PROFESSION ACT**

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## DIVISION 7

## SECTION 7

## COMPLAINTS AND DISCIPLINE GENERALLY

## PLAINTES ET MESURES DISCIPLINAIRES

**Definitions**

**63** The following definitions apply in this Division and Divisions 8, 9 and 11.

"**charge**" means a charge of incompetence, professional misconduct, or conduct unbecoming a lawyer or student, as the case may be. (« accusation »)

"**conduct**" includes an act or omission. (« conduite »)

**Disciplinary jurisdiction**

**64(1)** The society has disciplinary jurisdiction over

- (a) members in respect of their conduct in Manitoba or in any other jurisdiction;
- (b) lawyers from foreign jurisdictions in respect of their conduct in the course of practising law in Manitoba;
- (c) the competence of members to practise law in Manitoba or in any other jurisdiction; and
- (d) the competence of lawyers from foreign jurisdictions to practise law in Manitoba.

**Member disciplined in foreign jurisdiction**

**64(2)** A member may be disciplined under this Act even if he or she is or has been subject to a disciplinary proceeding in a foreign jurisdiction in respect of the same or related conduct.

**Contravention of Act or rules**

**65** The benchers may make rules

- (a) to establish consequences for contravening this Act or the rules;
- (b) to prescribe which contraventions of this Act or the rules may constitute professional misconduct.

**Définitions**

**63** Les définitions qui suivent s'appliquent à la présente section et aux sections 8, 9 et 11.

« **accusation** » Accusation d'incompétence, de faute professionnelle ou de conduite indigne d'un avocat ou d'un étudiant. ("charge")

« **conduite** » Acte ou omission. ("conduct")

**Compétence en matière disciplinaire**

**64(1)** La Société a compétence en matière disciplinaire à l'égard :

- a) des membres relativement à leur conduite au Manitoba ou ailleurs;
- b) des avocats d'autorités législatives étrangères relativement à leur conduite lorsqu'ils exercent le droit au Manitoba;
- c) de l'aptitude des membres à exercer le droit au Manitoba ou ailleurs;
- d) de l'aptitude des avocats d'autorités législatives étrangères à exercer le droit au Manitoba.

**Mesures disciplinaires prises dans le territoire d'une autorité législative étrangère**

**64(2)** Un membre peut faire l'objet de mesures disciplinaires sous le régime de la présente loi même s'il fait ou a fait l'objet de telles mesures dans le territoire d'une autorité législative étrangère relativement à la même conduite ou à une conduite connexe.

**Contravention à la Loi ou aux règles**

**65** Les conseillers peuvent, par règle :

- a) fixer les sanctions qu'entraînent les contraventions à la présente loi ou aux règles;
- b) déterminer les contraventions à la présente loi ou aux règles qui peuvent constituer des fautes professionnelles.

## DIVISION 8

## COMPLAINTS AND INVESTIGATIONS

**Complaints investigations**

**66** The benchers must establish a complaints investigation committee and processes for

- (a) receiving and responding to complaints or other information concerning the conduct or competence of members; and
- (b) investigating a member's conduct, competence or practice.

**Right to obtain information**

**67** For the purpose of conducting an investigation of a member under this Division, the chief executive officer, the complaints investigation committee or any person designated by either of them may request, and is entitled to obtain, any file or record regarding a client or former client of the member that is reasonably required to further the investigation, whether or not the file or record or any part of it is

- (a) subject to solicitor-client privilege; or
- (b) the subject of a charge or complaint.

**Committee may suspend or impose conditions**

**68** The complaints investigation committee may do one or more of the following:

- (a) issue a formal caution to the member;
- (b) direct that a charge be laid against the member and referred to the discipline committee;
- (c) if the committee considers it necessary for the protection of the public, and after directing that a charge be laid,
  - (i) impose restrictions on the member's practice of law or suspend him or her from practising law pending completion of the investigation and any disciplinary proceeding that may follow, and

## SECTION 8

## PLAINTES ET ENQUÊTES

**Enquêtes sur les plaintes**

**66** Les conseillers peuvent constituer un comité d'enquête sur les plaintes et établir un processus en ce qui a trait :

- a) à la réception des plaintes et des autres renseignements concernant la conduite ou la compétence des membres et à la suite à donner à ces plaintes et à ces autres renseignements;
- b) à la tenue d'enquêtes sur la conduite, la compétence ou les affaires des membres.

**Droit d'obtenir des renseignements**

**67** Aux fins de la tenue d'une enquête relative à un membre sous le régime de la présente section, le directeur général, le comité d'enquête sur les plaintes ou toute personne désignée par l'un d'eux peut demander, et a le droit d'obtenir, un dossier ou un document qui concerne un client ou un ex-client du membre et qui est nécessaire à l'avancement de l'enquête, et ce, que l'ensemble ou une partie du dossier ou du document :

- a) soit ou non assujetti au privilège du secret professionnel de l'avocat;
- b) donne ou non lieu à une accusation ou à une plainte.

**Suspension ou imposition de conditions**

**68** Le comité d'enquête sur les plaintes peut :

- a) donner un avertissement formel au membre;
- b) ordonner qu'une accusation soit déposée contre le membre et renvoyée au comité de discipline;
- c) s'il estime que la protection du public l'exige et après avoir ordonné le dépôt d'une accusation :
  - (i) imposer des restrictions au membre relativement à l'exercice du droit ou le suspendre jusqu'à la fin de l'enquête et de toute procédure disciplinaire qui peut en résulter,



(d) the president, the vice-president, the chief executive officer or the chair or vice-chair of the complaints investigation committee have a duty to disclose to a law enforcement authority any information about possible criminal activity on the part of a member that is obtained during an investigation under this Division.

d) le président, le vice-président, le directeur général ou encore le président ou le vice-président du comité d'enquête sur les plaintes ont l'obligation de communiquer à une autorité chargée de l'application de la loi tout renseignement qui concerne les activités criminelles éventuelles d'un membre et qui est obtenu dans le cadre d'une enquête tenue sous le régime de la présente section.

## DIVISION 9

### DISCIPLINE PROCEEDINGS

#### Discipline committee

70 The benchers must establish a discipline committee and make rules about its duties and powers that are consistent with this Act. The rules

(a) must require disciplinary hearings to be conducted by a panel of committee members;

(b) may permit preliminary disciplinary proceedings to be conducted by a panel or a single committee member; and

(c) may permit any other duties and powers given to the discipline committee under the Act or the rules to be carried out by a panel or a single committee member.

#### Provisions applicable to hearings

71 The following provisions apply to a hearing on a charge under this Division.

##### *Subpoena*

1. The society may subpoena a witness to attend the hearing or to produce books, documents or other things at the hearing.

##### *Witness allowance*

2. A witness at the hearing is entitled to the same allowance as a witness at a trial before the Court of Queen's Bench.

## SECTION 9

### PROCÉDURE DISCIPLINAIRE

#### Comité de discipline

70 Les conseillers constituent un comité de discipline et prennent des règles, compatibles avec la présente loi, concernant les attributions de celui-ci. Les règles :

a) exigent qu'un sous-comité composé de membres du comité de discipline tienne des audiences disciplinaires;

b) peuvent permettre que la procédure disciplinaire préliminaire ait lieu devant un sous-comité ou un membre unique du comité de discipline;

c) peuvent permettre qu'un sous-comité ou qu'un membre unique du comité de discipline exerce les autres attributions que la présente loi ou les règles confèrent au comité de discipline.

#### Dispositions applicables aux audiences

71 Les dispositions qui suivent s'appliquent aux audiences tenues sous le régime de la présente section relativement à des accusations.

##### *Assignment*

1. La Société peut assigner un témoin à comparaître à l'audience ou à y produire des livres, des documents ou d'autres objets.

##### *Indemnités accordées aux témoins*

2. Les témoins qui comparaissent à l'audience ont droit à la même indemnité que celle à laquelle ont droit les personnes qui témoignent dans le cadre d'un procès tenu devant la Cour du Banc de la Reine.

*List of scheduled hearings made available*

10. A list of scheduled hearings must be made available to the public upon request.

**Consequences of professional misconduct or conduct unbecoming**

72(1) If a panel finds a member guilty of professional misconduct or conduct unbecoming a lawyer or student, it may do one or more of the following:

- (a) if the member is a lawyer, disbar the member and order his or her name to be struck off the rolls;
- (b) if the member is a student,
  - (i) expel the student and order his or her name to be struck off the student register,
  - (ii) deny the student the opportunity to write the required examinations,
  - (iii) defer the student's admission as a lawyer,
  - (iv) attach conditions to the student's admission as a lawyer;
- (c) for any period the panel considers appropriate,
  - (i) confirm, vary or impose restrictions on the member's practice, or
  - (ii) suspend the member from practising law;
- (d) order the member to pay a fine;
- (e) order the member to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the member was found guilty;
- (f) reprimand the member;
- (g) permit the member to resign his or her membership;
- (h) if the member is a director, officer or shareholder of a law corporation, revoke or suspend the corporation's permit, or impose conditions on the permit;

*Examen de la liste des audiences prévues*

10. Toute personne peut, sur demande, examiner la liste des audiences prévues.

**Sanctions — faute professionnelle ou conduite indigne**

72(1) S'il déclare un membre coupable d'avoir commis une faute professionnelle ou d'avoir eu une conduite indigne d'un avocat ou d'un étudiant, le sous-comité peut :

- a) si le membre est avocat, le radier et ordonner que son nom soit rayé des tableaux de la Société;
- b) si le membre est étudiant :
  - (i) l'expulser et ordonner que son nom soit rayé du registre des étudiants,
  - (ii) refuser de lui permettre de se présenter aux examens obligatoires,
  - (iii) reporter son admission à titre d'avocat,
  - (iv) assortir de conditions son admission à titre d'avocat;
- c) pendant la période qu'il estime indiquée :
  - (i) imposer au membre des restrictions relativement à l'exercice du droit ou confirmer ou modifier de telles restrictions,
  - (ii) suspendre le membre;
- d) ordonner au membre de payer une amende;
- e) ordonner au membre de payer tout ou partie des frais engagés par la Société à l'occasion de toute enquête, procédure ou instance relative à l'affaire ayant donné lieu à la déclaration de culpabilité;
- f) réprimander le membre;
- g) permettre au membre de démissionner;
- h) si le membre est administrateur, dirigeant ou actionnaire d'un cabinet d'avocats à responsabilité limitée, révoquer ou suspendre le permis du cabinet ou assortir ce permis de conditions;

(i) order the member to take instruction or submit to examinations, or both, as the panel considers appropriate;

(j) rescind or vary any order made or action taken under this subsection;

(k) make any other order or take any other action the panel thinks is appropriate in the circumstances.

i) ordonner au membre d'obtenir la formation et de se présenter aux examens qu'il estime indiqués ou de faire l'une de ces choses;

j) annuler ou modifier toute ordonnance rendue ou toute mesure prise en vertu du présent paragraphe;

k) rendre toute autre ordonnance ou prendre toute autre mesure qu'il estime indiquée dans les circonstances.

**Order of fine or costs may be filed as court order**

**72(3)** An order under this section to pay a fine or costs may be certified by the chief executive officer and filed in the Court of Queen's Bench. Upon filing, the certified copy may be enforced as a judgment of the court.

**Dépôt de l'ordonnance à la Cour du Banc de la Reine**

**72(3)** Une copie de l'ordonnance de paiement d'une amende ou de frais, laquelle ordonnance est visée au présent article, peut être certifiée conforme par le directeur général et être déposée à la Cour du Banc de la Reine, auquel cas elle peut être exécutée au même titre qu'un jugement de ce tribunal.

**Additional consequences: interjurisdictional law firm**

**73(1)** If a panel finds a member guilty of incompetence, professional misconduct or conduct unbecoming a lawyer or student in connection with his or her practice as a member, associate or employee of an interjurisdictional law firm, the panel may, in addition to anything it may do under section 72, reprimand the firm or order it to pay a fine of not more than \$100,000., or both.

**Sanctions supplémentaires — cabinet d'avocats multiterritorial**

**73(1)** Le sous-comité qui déclare un membre exerçant sa profession à titre de membre, de collaborateur ou d'employé d'un cabinet d'avocats multiterritorial coupable d'incompétence, d'une faute professionnelle ou de conduite indigne d'un avocat ou d'un étudiant peut, en plus des mesures qu'il est autorisé à prendre en vertu de l'article 72, réprimander le cabinet et lui ordonner de payer une amende maximale de 100 000 \$, ou lui imposer l'une de ces peines.

**Contravention of rules by interjurisdictional law firm**

**73(2)** If a panel finds an interjurisdictional law firm guilty of contravening this Act or the rules, the panel may reprimand the firm or order it to pay a fine of not more than \$100,000., or both.

**Contravention aux règles par un cabinet d'avocats multiterritorial**

**73(2)** S'il déclare un cabinet d'avocats multiterritorial coupable d'avoir contrevenu à la présente loi ou aux règles, le sous-comité peut réprimander le cabinet et lui ordonner de payer une amende maximale de 100 000 \$, ou lui imposer l'une de ces peines.

**Failure to pay fine**

**73(3)** The benchers may prohibit a member from practising law in Manitoba as a member, employee or associate of an interjurisdictional law firm that has not paid a fine imposed on it under this section.

**Défaut de paiement de l'amende**

**73(3)** Les conseillers peuvent interdire à un membre d'exercer le droit au Manitoba à titre de membre, d'employé ou de collaborateur d'un cabinet d'avocats multiterritorial, si celui-ci n'a pas payé l'amende imposée en vertu du présent article.

**Relevant Passages from *Krieger v. Law Society of Alberta* (S.C.C., 2002), paras. 50-53, 58-59**

[2002] 3 S.C.R. 372 (Iacobucci and Major JJ.)

...

*F. Prosecutorial Discretion vs. Professional Conduct*

**50** There is a clear distinction between prosecutorial discretion and professional conduct. It is only the latter that can be regulated by the Law Society. The Law Society has the jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown prosecutors in connection with their prosecutory discretion. This is important as the interests of the Attorney General in promoting the administration of justice may differ from those of the Law Society in regulating the legal profession and maintaining public confidence. The remedies available to each entity differ according to their respective function. The Attorney General's office has the ability to discipline a prosecutor for failing to meet the standards set by the Attorney General's office for prosecutors but that is a different function from the ability to discipline the same prosecutor in his or her capacity as a member of the Law Society of Alberta. It may be that in some instances the conduct required by the Attorney General to retain employment will exceed the standards of the Law Society but of necessity that conduct will never be lower than that required by the Law Society. In addition, the Attorney General, after finding that a Crown prosecutor has acted in bad faith, does not have the power to restrict a member's practice or disbar a member. An Attorney General can do nothing to prevent a Crown prosecutor from practising law in another area.

**51** Review by the Law Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General. As stated by McIntyre J. in his concurrence in *Nelles, supra*, at p. 211: "public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities". We agree with the observation of MacKenzie J. that "conduct amounting to bad faith or dishonesty is beyond the pale of prosecutorial discretion" (para. 55).

**52** A finding that the Law Society does not have the jurisdiction to review or sanction conduct which arises out of the exercise of prosecutorial discretion would mean that prosecutors who act in bad faith or dishonestly could not be disciplined for such conduct. A prosecutor who laid charges as a result of bribery or racism or revenge could be discharged from his or her office but, in spite of such malfeasance, would be immune to review of that conduct by the Law Society.

**Relevant Passages from *R. v. Regan* (S.C.C., 2002), paras. 151-161  
[2002] 1 S.C.R. 297 (LeBel J.)**

...

A. Abuse of Process

**49** In the Charter era, the seminal discussion of abuse of process is found in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in *O'Connor*, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer C.J. and Sopinka and Major JJ. dissenting on the application of law to the facts), subsumed the common law doctrine abuse of process into the principles of the Charter in the following terms, at para. 63:

[I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of [page326] decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

**50** L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in *O'Connor*, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail (see *O'Connor*, at para. 71). In this manner, while it acknowledged that the focus of the Charter had traditionally been the protection of individual right, the *O'Connor* decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.

(R. v. Scott, [1990] 3 S.C.R. 979, at p. 1007)

**51** Under the Charter, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see O'Connor, at para. 73).

...

#### B. Stay of Proceedings

**53** A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: "that ultimate remedy", as this Court in *Tobiass*, supra, at para. 86, called it. It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the 'clearest of cases'" (O'Connor, supra, at para. 68).

**54** Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice. [O'Connor, at para. 75]

The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

**55** As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the Charter, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (O'Connor, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (Tobiass, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (Tobiass, at para. 91).

**56** Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

**57** Finally, however, this Court in Tobiass instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". In these cases, "an egregious act of misconduct could [never] be overtaken by some passing public concern [although] ... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding" (Tobiass, at para. 92).

...