



# DISCIPLINE CASE *DIGEST*

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Case 08-01

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| <b>Member:</b>                 | Robert Ian Histed  |
| <b>Jurisdiction:</b>           | Winnipeg, Manitoba   |
| <b>Called to the Bar:</b>      | June 20, 1991  |
| <b>Particulars of Charges:</b> | Professional Misconduct <ul style="list-style-type: none"><li>▪ Breach of Chapters 1, 9, 13, 15 and 19 of the Code of Professional Conduct</li></ul>   |
| <b>Date of Hearing:</b>        | May 26, 27, 2005, August 26, 2005, October 16, 2006 (Appeal dismissed by the Manitoba Court of Appeal on December 17, 2007; Application for Leave to the Supreme Court of Canada dismissed April 24, 2008) |
| <b>Panel:</b>                  | <ul style="list-style-type: none"><li>▪ Colin R. MacArthur, Q.C. (Chair)</li><li>▪ Bryan D. Klein</li><li>▪ Grant L. Mitchell, Q.C.</li></ul>  |
| <b>Disposition:</b>            | <ul style="list-style-type: none"><li>▪ Fine of \$2,500.00</li><li>▪ Costs of \$7,500.00</li></ul>   |
| <b>Counsel:</b>                | <ul style="list-style-type: none"><li>▪ C. Kristin Dangerfield for The Law Society of Manitoba</li><li>▪ Member Self-Represented</li></ul>   |

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## Writing an Offensive Letter

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### Facts

Mr. Histed was retained by clients engaged in residential school litigation involving the Attorney General of Canada. Mr. Histed and opposing counsel were to agree to a consensual list of three judges from which a case management judge was to be selected. In a letter written to the Federal Department of Justice, with copies to two co-defendants, Mr. Histed rejected names put forward by opposing counsel and declared that one of those named judges "frankly is a bigot". A complaint was made to the Law Society and Mr. Histed was charged with failing in his duties owed to other lawyers, the courts, the profession and the public by writing a letter which was offensive and otherwise inconsistent with the proper tone of a professional communication, and in which he had inappropriately criticized the judiciary.

## **Plea**

Mr. Histed entered a plea of not guilty. He argued that his right to express himself as he did in the letter was protected under Section 2(b) of *The Canadian Charter of Rights and Freedoms* and that in any event, having labelled the letter “strictly confidential and without prejudice”, by virtue of *The Privacy Act* it was rendered inadmissible as evidence in any subsequent disciplinary proceedings brought against him.

## **Decision and Comments**

The Panel ruled that the letter was admissible as it had been authored, signed and distributed by Mr. Histed to counsel. The recipients were therefore in possession of the letter with Mr. Histed’s consent, and *The Privacy Act* was of no application.

The Law Society conceded that Mr. Histed’s opinions or expressions contained in the letter were protected under Section 2(b) of the *Charter*, but argued that the infringement of Mr. Histed’s right to express himself was reasonable and could be demonstrably justified in a free and democratic society under Section 1 of the *Charter*. The Panel conducted a detailed analysis of the provisions of the *Code of Professional Conduct* and the *Charter* and determined that the limits in the Code were demonstrably justified and that Mr. Histed was in breach of the provisions of the Code. The Panel found his comment to be profoundly inappropriate and expressed concern about Mr. Histed’s lack of respect for the role of the Society in limiting the exercise of free expression where those limits are necessary in the interests of the public’s regard for the administration of justice and for the protection of the public generally.

## **Penalty**

The Panel ordered that:

- (a) Mr. Histed be fined \$2,500.00; and
- (b) Mr. Histed pay \$7,500.00 to the Law Society as a contribution toward the costs associated with the investigation, prosecution and hearing of the matter.