

MINUTES OF SPECIAL CONVOCATION

Thursday, 26th May, 1994
9:15 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Bastedo, Bragagnolo, Brennan, Carter, Curtis, Finkelstein, Graham, Hickey, Howie, Lamont, Lerner, McKinnon, Moliner, Palmer, Peters, Richardson, Somerville and Topp.

.....

.....

IN PUBLIC

.....

The reporter was sworn.

DISCIPLINE COMMITTEE

Re: BRYAN THOMAS DAVIES, Whitby

The Secretary placed the matter before Convocation.

Ms. Graham withdrew for this matter.

Mr. Neil Perrier appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

An adjournment was granted on consent to the Special Convocation in June.

Counsel retired.

.....

Re: ROSS HAINSWORTH, Edmonton

Ms. Peters and Mr. Carter withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Frank Marrocco appeared for the solicitor who was present.

Counsel for the solicitor requested an adjournment to the Special Convocation in September in order to review the material and consult with his client.

Counsel for the Society did not oppose the adjournment.

There were questions from the Bench.

Mr. Marrocco advised that in September the matter could be heard by Convocation as it then constituted and that his client was waiving his right to have the matter proceed before those members seised of the matter.

Thursday, 26th May, 1994

Convocation confirmed that the Undertaking given by the solicitor not to practice would remain in effect.

An adjournment was granted to the Special Convocation in September.

Counsel and solicitor retired.

.....

Re: WAYNE DOUGLAS BERTHIN, Midland

The Secretary placed the matter before Convocation.

Ms. Palmer, Ms. Graham and Mr. Brennan withdrew for this matter.

Mr. Neil Perrier appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Mr. Perrier advised that the solicitor was unable to attend Convocation as he was scheduled to be in court on a trial. Mr. Perrier further advised that he had received a great deal of material from the solicitor and needed more time to reply. An adjournment was requested on consent to the Special Convocation in June.

An adjournment was granted to the Special Convocation in June.

Counsel retired.

.....

Re: RAYMOND VINCENT DONOHUE, Sarnia

The Secretary placed the matter before Convocation.

Ms. Moliner withdrew for this matter.

Mr. Foster appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Mr. Foster requested an adjournment on consent to the next Special Convocation in June. He advised that the solicitor had been injured and was unable to attend Convocation.

The adjournment was granted to the Special Convocation in June peremptory to the solicitor.

Counsel retired.

.....

Re: KISHORE PREMJI TANNA, Etobicoke

The Secretary placed the matter before Convocation.

Ms. Graham and Mr. Howie withdrew for this matter.

Mr. Foster appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Counsel for the Society advised that the solicitor had not been properly notified of the date for his attendance at Convocation and was unable to attend due to a number of real estate closings.

An adjournment was granted to the next Special Convocation in June peremptory to the solicitor.

Counsel retired.

.....

ADMISSIONS COMMITTEE

APPLICATION FOR READMISSION

Re: JAMES FREDERICK HARRIS GRAY, Toronto

The Secretary placed the matter before Convocation.

Messrs. Finkelstein, Bragagnolo and Topp withdrew for this matter.

Mr. Michael Brown appeared for the Society and the applicant appeared on his own behalf.

Counsel requested an adjournment in order to prepare a factum which would be provided to Mr. Gray by June 10th.

The adjournment was granted on consent to the Special Convocation in June.

Counsel and applicant retired.

.....

DISCIPLINE COMMITTEE

Re: ROGER PATRICK PETER COONEY, Toronto

The Secretary placed the matter before Convocation.

Ms. Curtis and Ms. Moliner withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Society and Mr. Charles Mark appeared for the solicitor who was present.

Counsel for the solicitor requested an adjournment as the solicitor's two children were writing exams. Mr. Mark also wished to put further evidence to the issue of penalty.

An adjournment was granted to the June Special Convocation.

The Undertaking given by the solicitor not to practice would remain in effect.

Counsel and solicitor retired.

.....

Re: HARVEY SAMUEL MARGEL, North York

The Secretary placed the matter before Convocation.

Ms. Graham withdrew for this matter.

Mr. Gavin MacKenzie appeared for the Society and Mr. Brian Greenspan appeared for the solicitor who was present.

Thursday, 26th May, 1994

Convocation had before it the Report of the Discipline Committee dated 18th March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Ron Hoppie that he had effected service on the solicitor by registered mail on 21st March, 1994 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th May, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Abraham Feinstein, Q.C., Chair
J. James Wardlaw, Q.C.
Netty Graham

In the matter of
The Law Society Act
and in the matter of

Gavin MacKenzie
for the Society

HARVEY SAMUEL MARGEL
of the City
of North York
a barrister and solicitor

Brian Greenspan
for the solicitor

Heard: December 6, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 16, 1993, Complaint D105/93 was issued against Harvey Samuel Margel alleging that he was guilty of professional misconduct.

The matter was heard in public on December 6, 1993 before this Committee composed of Abraham Feinstein, Q.C., Chair, J. James Wardlaw, Q.C. and Netty Graham. Mr. Margel attended the hearing and was represented by Brian Greenspan. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D105/93

40 Paulart Drive, Etobicoke

- (a) On or about November 14, 1988, he falsely reported to his client the Royal Bank of Canada that as of June 16, 1988, the client had a valid first mortgage registered against title to 40 Paulart Drive, Etobicoke, when in fact the mortgage registered on June 16, 1988 was a fourth mortgage, and did not become a first mortgage until June 29, 1989.
- (b) He failed to serve his client, the Royal Bank of Canada, in a conscientious, diligent and efficient manner in the circumstances referred to in paragraph (a).
- (c) He reported to his client, Ruth Perlmutter, on or about March 10, 1988 that she had purchased a \$50,000 mortgage registered against title to 40 Paulart Drive, Etobicoke that was second in priority to a \$50,000 first mortgage. On or about April 12, 1989, he asked Mrs. Perlmutter to sign an agreement whereby she postponed her mortgage to a mortgage to the Royal Bank of Canada without disclosing to her that the value of the prior encumbrance had increased from \$50,000 to \$184,000, in circumstances in which his non-disclosure resulted in Mrs. Perlmutter's realizing a significant loss upon the sale of the property under power of sale on May 27, 1991 for \$235,000.
- (d) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:
 - (i) Beaver Bend Investments Limited sale of \$50,000 first mortgage to Hindy Greben, January 20, 1988;
 - (ii) Beaver Bend Investments Limited sale of \$50,000 second mortgage to Ruth Perlmutter, January 26, 1988;
 - (iii) Royal Bank of Canada \$184,000 first mortgage loan to Barry and Karen Benson, June 16, 1988;
 - (iv) Extension of Ruth Perlmutter \$50,000 second mortgage to Barry and Karen Benson, January 18, 1990.

680 Tennent Court, London

- (e) On or about August 10, 1988, he falsely reported to his clients, Vaughn and Colleen Kaleniuk that 680 Tennent Court, London, had been transferred to Barry Benson on July 18, 1988, whereas in fact the property was not transferred until November 30, 1988;
- (f) He failed to serve his client, Airmark Travers Ltd., in a conscientious, diligent and efficient manner in representing it in relation to a \$50,000 loan to Barry Benson to be secured by a second mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, October 13, 1988, Barry Benson was not the registered owner of the property;
- (g) In the transaction referred to in paragraph (f), he breached his duty to his client, Airmark Travers Limited, in that he failed to inform it of either the priority of the mortgage or the particulars of prior encumbrances;

- (h) He failed to serve his client, Jack Faulkner, in a conscientious, diligent and efficient manner in representing him in relation to a \$31,000 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, October 13, 1988, Barry Benson was not the registered owner of the property;
- (i) In the transaction referred to in paragraph (h), he breached his duty to his client, Jack Faulkner, in that he failed to inform him of either the priority of the mortgage or the particulars of prior encumbrances;
- (j) In representing both the purchaser, Barry Benson, and the vendors, Vaughn and Colleen Kaleniuk, on the sale of 680 Tennent Court, London, on or about November 30, 1988, he prepared an affidavit under the Land Transfer Tax Act that specified that the value of the consideration for the property was \$84,000 when to his knowledge the agreement of purchase and sale provided that the value of the consideration for the property was \$180,000;
- (k) On or about January 5, 1989, he breached his duty to his client, Vernon Moeller, for whom he acted in relation to a \$25,681.50 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that he failed to inform him of either the priority of the mortgage or the particulars of prior encumbrances;
- (l) On or about January 5, 1989, he breached his duty to this client, Edyth McAfee, for whom he acted in relation to a \$37,009.71 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that he failed to inform her of either the priority of the mortgage or the particulars of prior encumbrances;
- (m) He failed to serve his client, the Royal Bank of Canada, in a conscientious, diligent and efficient manner in representing it in relation to a \$111,750 loan to Barry Benson to be secured by a first mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, May 11, 1989, the mortgage was in fact a seventh mortgage, and for a period of more than five months thereafter, ranked no higher than fifth in priority;
- (n) On or about May 7, 1990, he breached his duty to his client, Gus Lazarakis, for whom he acted in relation to the extension of a \$35,000 loan to Barry Benson that was to be secured by a second mortgage registered against title to 680 Tennent Court, London, in that he failed to inform him that the mortgage in fact ranked sixth in priority and failed to inform him of the particulars of prior encumbrances;
- (o) On the following transactions in relation to the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:
 - (i) Vaughn and Colleen Kaleniuk sale to Barry Benson, October 13, 1988;
 - (ii) Airmark Travers Ltd. \$50,000 mortgage loan to Barry Benson, October 13, 1988;
 - (iii) Jack Faulkner \$31,000 mortgage loan to Barry Benson, October 13, 1988;
 - (iv) Ruth Margel \$46,000 mortgage loan to Barry Benson, December 22, 1988;

- (v) Vernon Moeller \$25,681.50 mortgage loan to Barry Benson, December 22, 1988;
- (vi) Edyth McAfee \$37,009.71 mortgage loan to Barry Benson, January 10, 1989;
- (vii) Royal Bank of Canada \$111,750 mortgage loan to Barry Benson, May 10, 1989; and
- (vii) Extension of Gus Lazarakis \$35,000 mortgage loan to Barry Benson, May 7, 1990.

186 John Street, Ingersoll

- (p) On or about April 26, 1989, he falsely reported to his client, Rose Glowinsky, that as of April 19, 1989, she had a valid second mortgage registered against title to 186 John Street, Ingersoll, when in fact the mortgage was a fourth mortgage.
- (q) In or about January 1990, he failed to serve his client, Rose Glowinsky, in a conscientious, diligent and efficient manner in that he failed to cause a search of title to be performed and failed to report to his client upon arranging for the renewal of what the client believed to be a second mortgage but which in fact ranked third, in circumstances in which it is doubtful that the value of the property was adequate to support the third mortgage;
- (r) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:
 - (i) Rose Yermus \$50,000 first mortgage loan to First Western Ontario Properties Inc. in trust, November 30, 1987;
 - (ii) Carl and Belle Grossman \$100,000 second mortgage loan to First Western Ontario Properties Inc. in trust, January 12, 1989;
 - (iii) Rose Glowinsky \$50,000 second mortgage loan to First Western Ontario Properties Inc. in trust, January 25, 1989; and
 - (iv) Extension of Rose Glowinsky \$50,000 second mortgage to First Western Ontario Properties Inc. in trust, January 1990.

451 The West Mall, Etobicoke

- (t) On the following transaction involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 to rule 5 of the rules of professional conduct:
 - (i) Beaver Bend Investments Limited \$50,000 second mortgage loan to Maureen Harris, May 2, 1989.

564 Durham Crescent, Woodstock

- (u) A syndicate in which he had a substantial (12.5 percent) interest borrowed \$160,000 from a client of his firm, namely, Ganwood Inc., in circumstances in which the solicitor failed to disclose his interest and to ensure that the client's interests were fully protected by the nature of the case and by independent legal representation and in circumstances that resulted in Ganwood Inc.'s entire investment being lost, all contrary to rule 7 of the rules of professional conduct.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitors admit service of Complaints D104/93 and D105/93 and are prepared to proceed with a hearing of these matters on December 6 and 7, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that these matters should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitors have reviewed Complaints D104/93 and D105/93 with their counsel, Brian Greenspan. The Solicitors both admit that they are guilty of professional misconduct on the facts as hereinafter set out.

IV. BACKGROUND FACTS

4. Harvey Margel and David Warga were both called to the bar in 1973. They practised in partnership as Warga and Margel at all times material to the complaints. Their partnership was dissolved on April 27, 1991, and each is now practising as a sole practitioner. Neither lawyer has a discipline record.

V. FACTS RELEVANT TO COMPLAINTS D104/93 and D105/93

5. Most of the allegations of professional misconduct particularized in the complaints result from Warga and Margel's representation of the First Western group of companies, the directing mind of which was Barry Benson.

6. Warga and Margel first acted for Benson in 1975 when he purchased two apartment buildings. The firm had few business dealings with Benson over the next eleven years, as Benson retained Keyser, Mason, Ball & Lewis of Mississauga, as his principal solicitors during that period. Keyser, Mason, Ball & Lewis acted for Benson or companies that he controlled on the purchase of approximately sixteen apartment buildings between 1975 and 1986. Keyser, Mason, Ball & Lewis also represented Benson on the incorporation of some of the companies in the First Western group.

7. Benson and Keyser, Mason, Ball & Lewis had a falling out over fees in 1986, and Benson retained Warga and Margel to act on apartment purchases thereafter. Margel was primarily responsible for servicing the First Western group.

8. The First Western group generated a huge volume of legal work for the firm and in retrospect it is evident that the firm was poorly equipped to deal with such a sudden surge of new business. Much of the misconduct that has been admitted by the Solicitors may be explained in part by the firm's inadequate resources and poor state of organization, for which Margel, with respect to the First Western legal work, must accept the principal responsibility.

9. Benson had offices across the hall from the firm's offices for a period of several months. Four members of Warga and Margel's staff moved into the offices occupied by Benson and his colleagues during this time as well.

10. Typically, a First Western company, namely First Western Ontario Properties Inc. ("First Western") acted as trustee for various investors and title was taken in its name. Margel on several occasions found investors for First Western properties. Warga also found investors for First Western properties on at least two occasions when he was asked to seek out investment opportunities by potential investors. Both Margel and Warga, and their spouses, were themselves investors in the purchase of rental properties by First Western as trustee.

11. Margel and Warga, through four mortgage companies that they controlled, also provided mortgage financing for the purchase of apartment buildings by First Western as trustee. On a number of occasions, their mortgage companies eventually sold mortgages that they held to mortgage investors who approached them or who were approached by them. The mortgages were second or lower in priority, and interest rates were high.

12. Margel and Warga on many occasions acted for multiple parties both at the times the apartment buildings were purchased and at the time mortgages were sold.

13. On July 19, 1990, Margel and Warga learned that the First Western group was in serious financial trouble, and was realizing a cash flow shortfall of \$400,000 to \$600,000 a month. Mortgages on most of First Western's 150 properties went into default thereafter. Power of sale proceedings have been initiated on many of the properties. Some have been sold, generally at a price that has resulted in a shortfall for some mortgage holders.

14. Margel and Warga say that on September 4, 1990, they learned that Benson had misappropriated the August and September rents, and that the First Western group was insolvent.

15. The Society has received a number of complaints from investors, and numerous civil actions have been commenced in which Margel and Warga are named as defendants. Two claims in the total amount of \$200,000 in respect of Warga and thirteen claims in the total amount of \$2,000,000 in respect of Margel have been made to the Lawyers' Fund for Client Compensation.

16. The misconduct alleged involves conflicts of interest, false reporting of mortgage priority and prior mortgage encumbrances, failing to disclose material facts and failing to serve clients in a conscientious manner, among other things. The Solicitors' position is that at no time did they act dishonestly and that the admitted shortcomings in their practice were unintentional.

17. Margel and Warga have themselves lost a great deal of money as a result of the collapse of the First Western group. Warga has declared bankruptcy. Margel and Warga say that Benson was a charismatic person who victimized them and many others. They acknowledge that they did not provide legal services of a quality that their clients were entitled to expect, and that client-investors' funds were placed at risk as a result.

18. Warga and Margel increased the size of its staff as a result of the First Western work to approximately 14 employees. The firm's staff included an employed lawyer, a senior mortgage administrator, and a number of real estate secretaries. Some of the problems described below resulted from inadequate supervision of staff and misplaced confidence in their competence, for which Margel and Warga accept responsibility. The words "Warga and Margel" are used below to designate the joint responsibility of the partners for the acts of their staff.

19. The complaints concern seven transactions, most of which have been the subject of complaints by investors. In all, Warga and Margel acted on approximately 900 transactions on approximately 150 First Western or Benson buildings, and those examined by the Society exemplify the types of problems encountered by investors. The Solicitors' professional misconduct is addressed in relation to each of the seven transactions below.

40 Paulart Drive, Etobicoke

20. Margel acted for Benson and Benson's wife in November 1987, when they purchased 40 Paulart Drive in Etobicoke for \$201,000 cash. By a letter dated December 29, 1987, Margel reported to Benson that the transaction had been completed on November 30.

21. On the same date, December 29, 1987, Mr. and Mrs. Benson applied to one of Warga and Margel's companies, Beaver Bend Investments Limited, for a loan of \$50,000 to be secured by a first mortgage to be registered against 40 Paulart Drive. On the same date, Beaver Bend issued a cheque for \$50,000 to Mr. and Mrs. Benson.

22. The following month, Margel arranged a second loan in the amount of \$50,000 by Beaver Bend to Mr. and Mrs. Benson to be secured by a second mortgage to be registered against 40 Paulart Drive. The funds were advanced on January 18, 1988. Neither mortgage was registered at the time.

23. On January 20, 1988, Beaver Bend sold its first mortgage to Hindy Greben and on January 26, 1988, it sold its second mortgage to Ruth Perlmutter. Greben and Perlmutter each paid \$50,000 to Beaver Bend.

24. On March 10, 1988, Margel reported to Greben on the first mortgage purchase and to Perlmutter on the second mortgage purchase.

25. On March 25, 1988, Warga caused the two mortgages in the amount of \$50,000 to be registered. They were both registered, however, in Beaver Bend's name.

26. On March 30, 1988, assignments to Greben and Perlmutter were registered.

27. On May 31, 1988, Beaver Bend loaned a further \$50,000 to Mr. and Mrs. Benson. On June 7, 1988, a third mortgage in that amount was registered in favour of Beaver Bend against title to 40 Paulart. The mortgage sheet used by the firm for internal purposes specified the value of the property to be \$201,000, presumably on the basis of the November 1987 sale; no appraisal is in the file.

28. On June 16, 1988, the Royal Bank loaned \$184,500 to Mr. and Mrs. Benson to be secured by a first mortgage. As in the case of the loans mentioned above, Margel acted for both the mortgage lenders and the Bensons with the knowledge and agreement of both. A mortgage in the bank's favour was registered against title to 40 Paulart Drive on the same date as the funds were advanced, June 16, 1988.

29. The mortgage was registered by a freelance title searcher instructed by Margel. In his letter of instructions, Margel directed the title searcher as follows:

"1. Subsearch (There should be a first mortgage in favour of Hindy Greben and second mortgage to Ruth Perlmutter and third to Beaver Bend);

2. Get execution certificate;

3. Please register the enclosed mortgage."

30. Margel released \$132,983.34 of the mortgage advance to the Bensons on June 16, 1988. By a cheque dated June 16, 1988 and picked up by Greben on June 20, 1988, Margel paid \$50,291.66 to Greben, whose first mortgage was discharged on June 21, 1988.

31. Margel did not report to the Royal Bank until November 14, 1988. In his reporting letter, Margel said that the bank had a first mortgage in the amount of \$184,500. As of that date, the bank in fact had a third mortgage.

32. On November 30, 1988, Murray Ehrlick Insurance Agencies Limited purchased the Beaver Bend mortgage for \$58,080.96, which sum was deposited in Beaver Bend's bank account the same day. Warga wrote to Ehrlick on November 30 to confirm that Ehrlick had purchased a \$50,000 third mortgage, which stayed behind a \$50,000 first and a \$50,000 second mortgage. In fact, the mortgage was then in second position, behind Perlmutter's first but prior to the Royal Bank's \$184,500 third. The Royal Bank's mortgage was intended to be a first; however, this would have resulted in the Ehrlick mortgage ranking third behind total encumbrances of \$234,500 if this intention had been effected. No assignment of the Beaver Bend mortgage to Ehrlick was registered at that time.

33. In January 1989, Perlmutter entered into a written agreement to extend her mortgage for a year. The extension agreement was in a standard form and Margel arranged for it to be signed by Perlmutter and by the Bensons. The agreement does not specify either the priority of the mortgage or anything about any other mortgage.

34. On April 4, 1989, Warga (over Margel's signature) reported to Ehrlick that it had a \$50,000 third mortgage that ranked behind a \$50,000 first and a \$50,000 second. An assignment of the Beaver Bend mortgage to Ehrlick was registered the next day, April 5, 1989. As mentioned above, the Ehrlick mortgage was in fact a second mortgage, but the Royal Bank's \$184,500 loan was intended to be secured by a first mortgage rather than a third, and the Ehrlick mortgage would have ranked behind \$234,500 of encumbrances rather than only \$100,000 of encumbrances if this intention had been effected.

35. On April 12, 1989, by a standard form report over Margel's typewritten name, Ruth Perlmutter was informed that she had "purchased" a second mortgage in the amount of \$50,000. The report specified that there was a first mortgage to the Royal Bank registered on title, but did not disclose the amount of that mortgage. (By way of contrast, when Margel reported in a similar standard form report to Mrs. Perlmutter on the original purchase of her second mortgage on March 10, 1988, the value of the first mortgage, \$50,000, was specified.) The report is also inaccurate in that Margel confirmed the purchase of a second mortgage when in fact Mrs. Perlmutter was extending a mortgage that she had purchased a year earlier.

36. With the reporting letter, Margel enclosed a postponement of mortgage agreement to be signed by Mrs. Perlmutter. Mrs. Perlmutter signed the agreement on April 21. The postponement is in favour of the Royal Bank mortgage but again does not specify the amount of that mortgage. The postponement agreement is on a standard Newsome and Gilbert form that does not include a space for the amount of the mortgage which is the subject of the postponement.

37. On May 30, 1989 Murray Ehrlick, on behalf of Murray Ehrlick Insurance Agencies Limited, signed a postponement in favour of the new Royal Bank mortgage and signed an amending agreement that increased the interest rate from 14% to 17%. Again, the amount of the Royal Bank mortgage was not specified in the postponement agreement. The agreements were not registered until June 29, 1989. The registration of the postponement agreement finally put the Royal Bank mortgage in first position.

38. In June 1989, Warga acted for Ben, Esther, Steven and Francine Ross on their purchase of the \$50,000 Ehrlick mortgage.

39. On September 25, Warga reported to the Rosses that they had purchased a second mortgage in the amount of \$50,000 that was subject to a first mortgage in favour of the Royal Bank. The amount of the first mortgage was not specified. More importantly, the mortgage was in fact a third mortgage.

40. On January 3, 1990, Ruth Perlmutter signed a renewal agreement whereby she agreed to renew her mortgage for another year.

41. During the spring and summer of 1990, the Bensons defaulted on the various mortgages on 40 Paulart Drive. On May 27, 1991, the property was sold for \$235,000 under a power of sale exercised by the third mortgagees, the Rosses. The sale resulted in the Royal Bank mortgage being paid off and the second mortgagee, Ruth Perlmutter, receiving approximately \$20,000. The Rosses recovered only their legal fees for enforcing their security.

42. In each of the mortgage transactions referred to above, Margel or Warga represented more than one client. Although generally speaking investors knew that Margel and Warga were both investors in Benson transactions and acted on his behalf, nevertheless the Solicitors did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) They did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although Benson was a person with whom the Solicitors had a continuing relationship and for whom they acted regularly, they did not recommend that the clients obtain independent legal representation; and
- (iii) They neither obtained the clients' written consent to their acting nor recorded their consent in separate letters to each client.

680 Tennent Court, London

43. In July 1988, Margel acted for both the purchaser and vendor on Benson's purchase from Benson's business associate, Vaughn Kaleniuk of 680 Tennent Court, London. Kaleniuk was a registered real estate broker with considerable experience who knew that Warga and Margel were also acting for Benson. In the agreement of purchase and sale, the purchase price was said to be \$180,000, consisting of a \$1,000 deposit, the assumption of an \$82,700 mortgage to the Royal Bank and the balance to be paid on closing.

44. On August 10, 1988, Margel wrote to Kaleniuk to report that the property had been transferred on July 18, 1988. In fact, the property was not transferred until November 30, 1988.

45. In October 1988, Warga and Margel acted for Benson and Airmark Travers Ltd. on a \$50,000 loan to be secured by a mortgage registered against title to 680 Tennent Court. On October 6, 1988, Airmark Travers advanced \$50,000 and the mortgage, granted by Benson, was registered on October 13, 1988. On that date, Benson was not in fact the registered owner of the property.

46. On January 9, 1989, Warga and Margel reported to Airmark Travers that the transaction had been completed. The closing date was not specified in the reporting letter, but October 6, 1989 was specified as the maturity date. In the standard form report that was sent, the priority of the mortgage was not designated; nor was the space on the form allocated for details of prior encumbrances completed.

47. Also in October 1988, Margel acted for Benson and Jack Faulkner on a \$31,000 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced on October 4, 1988 and the mortgage granted by Benson was registered on October 13, 1988, immediately after the mortgage to Airmark Travers. On that date, again, Benson was not in fact the registered owner of the property.

48. On January 5, 1989, Margel reported to the trustee of Faulkner's R.R.S.P., the Laurentian Bank, that the \$31,000 mortgage had been registered on October 13, 1988. Again, neither the priority of the mortgage nor any information about prior encumbrances are specified in the report.

49. As mentioned above, title to 680 Tennent Court was transferred from Kaleniuk to Benson on November 30, 1988. Both the deed and the land transfer tax affidavit recite the consideration paid for the property to be \$84,000, rather than \$180,000 as specified in the agreement of purchase and sale. The deed and land transfer tax affidavit were prepared by Margel or under his supervision. The land transfer tax that was paid was based on the amount specified in the land transfer tax affidavit. Margel has explained the discrepancy on the basis that Kaleniuk agreed to transfer the property to Benson "as security for their business relationship" and that "as far as we were aware", Benson's only obligation was to assume the Royal Bank mortgage.

50. In November and December 1988, Margel acted for Benson and for Margel's wife, Ruth Margel, on a \$46,000 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of Ruth Margel's R.R.S.P., the Laurentian Bank, on November 1, 1988. The mortgage was registered on December 22, 1988.

51. Also in December 1988, Margel acted for Benson and for Vernon Moeller on a \$25,681.50 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of Moeller's R.R.S.P. the Laurentian Bank, on December 5, 1988. The mortgage was registered on December 22, 1988, immediately after the mortgage to Ruth Margel.

52. In December 1988 and January 1989, Warga and Margel acted for Benson and for Edyth McAfee on a \$37,009.71 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of McAfee's R.R.S.P., the Laurentian Bank, on December 21, 1988. The mortgage was registered on January 10, 1989.

53. On January 5, 1989 (the same date on which he reported to the Laurentian Bank on the Faulkner R.R.S.P. mortgage) Margel reported to the Laurentian Bank, in its capacity as trustee for the R.R.S.P.'s of Moeller and McAfee, that their mortgages were registered on December 22, 1988 and January 20, 1989 respectively. Like the report on the Faulkner mortgage, these reports said nothing about either the mortgages' priority or prior encumbrances.

54. In May 1989, Margel acted for both the Royal Bank as mortgagee and Benson as mortgagor on the refinancing of the bank's mortgage loan with the knowledge and agreement of both. The new loan was to be in the amount of \$111,750 and was to be secured by a first mortgage registered against 680 Tennent Court.

55. On May 10, 1989, the Royal Bank advanced the \$111,750 and the mortgage was registered the same day by a London law firm retained by Warga and Margel to act as its agent. The London firm wrote to Warga and Margel (to Warga's attention) on May 11, 1989 to report on the registration. In this letter, the London firm confirmed that the Royal Bank mortgage ranked seventh, information communicated already to Warga and Margel by telephone.

56. On May 15, 1989, Benson provided \$23,000 to Warga and Margel, in trust. These funds, together with the \$111,750 advanced by the Royal Bank, were used on May 15 and 16 to discharge the first and second mortgages registered against title in favour of the Royal Bank and Airmark Travers, respectively. As of May 16, the new Royal Bank mortgage stood in fifth position rather than first, and all funds advanced by the Royal Bank had been disbursed.

57. Also in May 1989, Warga acted for both Gus Lazarakis as mortgagee and Benson as mortgagor on a \$35,000 loan to be secured by a second mortgage registered against 680 Tennent Court.

58. Lazarakis advanced the \$35,000 on May 25, 1989, and the mortgage was registered on May 26, 1989. Warga never reported to Lazarakis on the completion of the mortgage loan. Lazarakis was in fact a sixth mortgagee on May 26, 1989. As mentioned above, Warga and Margel had been informed on May 11 that the new Royal Bank mortgage ranked seventh when it was registered.

59. On October 20, 1989, Margel wrote the Laurentian Bank to obtain agreements on behalf of Faulkner, Ruth Margel, Moeller and McAfee to postpone their mortgages to the Royal Bank mortgage Margel enclosed authorizations from the R.R.S.P. account holders. The postponement agreements were executed on behalf of the Laurentian Bank and registered on October 30, 1989. Neither the R.R.S.P. mortgage lenders nor the Laurentian Bank were asked by Warga and Margel to postpone their mortgages to the Lazarakis mortgage.

60. On November 7, 1989, Margel reported to the Royal Bank that it had a valid first mortgage. In light of the registration of the postponement agreements on October 30, 1989, this report was accurate as of November 7, though the Royal Bank's mortgage had stood in no higher than fifth position since it was registered on May 11, 1989.

61. On May 7, 1990, Benson and Lazarakis signed a renewal agreement whereby Lazarakis agreed to renew his mortgage for a year. The agreement does not specify either the mortgage's priority or the particulars of prior encumbrances. Warga and Margel arranged for the renewal agreement to be signed and gave a copy of the agreement to the clients, but did not otherwise report on the renewal to either client.

62. Lazarakis' mortgage went into default in the fall of 1990 and on Warga's advice he retained another lawyer who informed him, and Warga and Margel, that his mortgage was not a second but a sixth. Warga reported the matter to the office of the Director of Insurance for the Law Society and explained that the R.R.S.P. mortgagees were at all times willing "to postpone to prior financing" but through an oversight were not asked to postpone their security to the Lazarakis mortgage. Perhaps because Benson's financial position was known to be weak by the fall of 1990, it was not possible to obtain postponement agreements from the R.R.S.P. lenders at that time.

63. In each of the mortgage transactions referred to above, Margel or Warga represented more than one client. Although generally speaking investors knew that Margel and Warga were both investors in Benson transactions and acted on his behalf, nevertheless the Solicitors did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) They did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although Benson was a person with whom the solicitors had a continuing relationship and for whom they acted regularly, they did not recommend that the clients obtain independent legal representation; and
- (iii) They neither obtained the clients' written consent to their acting nor recorded their consent in separate letters to each client.

186 John Street, Ingersoll

64. Margel acted for First Western in trust on the purchase of 186 John Street, Ingersoll in November 1987. The purchase price was \$320,000. The purchase was financed by way of a \$220,000 first mortgage loan from Montreal Trust and a \$50,000 second mortgage loan from Rose Yermus, for whom Margel also acted.

65. On January 12, 1989, Margel acted for Carl and Belle Grossman as mortgagees and for First Western in trust as mortgagor on a \$100,000 loan that was to be secured by a second mortgage against title to 186 John Street. Although Margel reported to the Grossmans that their loan was secured by a second mortgage, it in fact ranked third as of the date of registration, January 12, 1989.

66. On January 25, 1989, Margel acted for Rose Glowinsky as mortgagee and First Western in trust as mortgagor on a \$50,000 loan that was also to be secured by a second mortgage against title to 186 John Street. Mrs. Glowinsky's funds were advanced on January 25, 1989 and were used to pay off the Rose Yermus second mortgage, which had matured. The Glowinsky mortgage was not registered until April 19, 1989, though Mrs. Glowinsky received mortgage payments beginning on February 23, 1989. On April 26, 1989, Margel reported to Mrs. Glowinsky the registration of a second mortgage. At that time, the Glowinsky mortgage in fact ranked fourth, as no discharge of the Yermus mortgage had been registered and the Montreal Trust and Grossman mortgages were also on title.

67. In March 1989, Margel acted for First Western in trust on the refinancing of the first mortgage in favour of Montreal Trust. The amount of the first mortgage was increased from \$220,000 to \$320,000. Montreal Trust's solicitors requisitioned the discharge on postponement of both the Yermus and the Grossman mortgages before advancing the funds (the Glowinsky mortgage was not registered until April).

68. The new Montreal Trust mortgage was registered on March 23, 1989. It was guaranteed by Margel who had no direct interest in the property.

69. On June 5, 1989, Margel caused to be registered a postponement of the Grossman mortgage to the Montreal Trust mortgage.

70. In January 1990, Margel acted for First Western in Trust and Rose Glowinsky on the renewal of the latter's mortgage. He did not search or subsearch the title or report to either client.

71. First Western defaulted on its payments to Rose Glowinsky. It is likely that she will lose her \$50,000 investment as her mortgage, which was to have been a second, ranks behind the \$320,000 Montreal Trust first and the \$100,000 Grossman second.

72. On each of the transactions referred to above, Margel represented more than one client. Although generally speaking, investors knew that he acted on First Western's behalf, nevertheless Margel did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and
- (iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

451 The West Mall, Etobicoke

73. In May 1988, Warga and Margel acted for Maureen Harris as mortgagor on a \$70,000 loan from the Royal Bank secured by a first mortgage on Ms. Harris' condominium at 451 The West Mall in Etobicoke. Ms. Harris used the proceeds of the loan to invest in a First Western property, 66 Mooregate Crescent, Kitchener. She was induced to invest in First Western properties by Benson.

74. In May 1989, Warga and Margel acted for Maureen Harris as mortgagor and Beaver Bend as mortgagee on a \$50,000 loan secured by a second mortgage on 451 The West Mall. Ms. Harris used the proceeds of the loan to invest in another First Western property, 30 Bradmon Drive, St. Catharines.

75. In June 1989, Warga acted for Beaver Bend and Rick-Har Investments Limited on the sale of the second mortgage. Although Rick-Har Investments Limited were aware that Margel and Warga controlled Beaver Bend, Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) He did not advise the client that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;
- (ii) He neither obtained the client's written consent to his acting nor recorded their consent in separate letters to each client.

76. Power of sale proceedings have been commenced on both 66 Mooregate Crescent and 30 Bradmon Drive. Warga and Margel's representation of various parties in transactions relating to 66 Mooregate Crescent is dealt with below.

66 Mooregate Crescent, Kitchener

77. On July 7, 1989, Margel acted for First Western as trustee on the purchase of this rental property for \$8,150,000 from Kingsgold Investment Inc.. First Western assumed a \$5,300,000 first mortgage to Canada Trust. On closing, Margel registered second, third and fourth mortgages to Beaver Bend (\$1,300,000), Kingsgold Investment Inc. (\$300,000) and Kingsgold Investment Inc. (\$1,150,000) respectively. Thus \$8,050,000 in mortgages were registered against title as of the date of closing. Kingsgold was independently represented on this transaction.

78. In September and October, 1988, Warga acted for Werger Holdings Inc. as mortgagee and First Western as mortgagor on a \$500,000 loan to be secured by a second mortgage on 66 Mooregate Crescent. The \$500,000 was advanced on September 30, 1988. Werger Holdings Inc. had over 30 years of experience in real estate acquisition, evaluation, and mortgage lending, and had a portfolio measured in the millions of dollars.

79. On October 12, 1988, a member of Warga and Margel's staff wrote to a freelance conveyancer in Kitchener to instruct him to register a discharge of the \$1,150,000 fourth mortgage to Kingsgold and the \$500,000 mortgage to Werger Holdings. The conveyancer was instructed that no execution search or subsearch would be required. The Werger Holdings mortgage was registered on October 18, 1988.

80. On October 25, 1988, Warga reported to Werger Holdings that it had purchased a second mortgage in the principal amount of \$500,000, and that the only prior encumbrance on title was a \$5,300,000 first mortgage. In fact, the Werger Holdings mortgage was a fourth mortgage, ranking behind the \$1,300,000 second mortgage to Beaver Bend and the \$300,000 third mortgage to Kingsgold.

81. On February 10, 1989, Warga wrote to Werger Holdings as follows:

"You have a 2nd mortgage on this property which my clients purchased for \$8,250,000 or so. At that time there was a first mortgage of 5,300,000.00 with Canada Trust, leaving about \$2,450,000 equity.

My clients have recently received a rent review approval for \$1,569,000 (from \$1,250,000) effective this year. On that basis Canada Trust has agreed to increase the first mortgage to \$6,650,000 from the prior \$5,300,000. The value of the property is now between \$10,000,000 (conservative) to \$11,000,000 depending on the capitalization rate used. I am enclosing a schedule of analysis.

Thursday, 26th May, 1994

Would you have any objection to leaving your mortgage in place and postponing to the new first with Canada Trust. I believe your equity is well protected. I would be glad to answer any questions I can."

82. Again, as of the date of the letter, the Werger Holdings mortgage was in fact a fourth mortgage. However, on March 8, 1989, the Kingsgold third mortgage was discharged and on April 4, 1989, the Beaver Bend second mortgage was discharged. The Werger Holdings mortgage then ranked second.

83. Warga's statement that the value of the property "is now between \$10,000,000 (conservative) to \$11,000,000" was based entirely on what he was told by Benson, although Warga's statement that First Western had recently received permission from the rent review board to increase rents in the building was accurate.

84. As a result of Warga's February 10, 1989 letter, Werger Holdings agreed to postpone its second mortgage to a new and larger Canada Trust first mortgage. Werger Holdings' willingness to postpone was communicated to Canada Trust's solicitors in a letter from Warga dated February 27, 1989, in which Warga identified himself as Werger Holdings' solicitor.

85. On February 27, 1989, a new first mortgage to Canada Trust in the amount of \$7,250,000 (not \$6,650,000 as represented by Warga in his letter of February 10, 1989 to Werger Holdings) was registered. Only \$6,650,000 including the original \$5,300,000 was advanced, however. Werger Holdings' postponement was registered on March 14, 1989.

86. On September 25, 1989, Warga wrote to Werger Holdings to suggest that Werger Holdings consider increasing its second mortgage from \$500,000 to \$750,000. Werger Holdings agreed to do so, and advanced \$250,000 on September 28, 1989. The new mortgage was registered on the same day, and the original Werger Holdings mortgage was discharged on October 10, 1989.

87. As mentioned above, the property is at present the subject of power of sale proceedings.

88. Although Werger Holdings was aware that Warga and Margel were acting for First Western as well as itself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and
- (iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

564 Durham Crescent, Woodstock

89. On September 2, 1986, Barry Benson in trust purchased 564 Durham Crescent for \$915,888.69. Margel acted for the purchaser.

90. On October 18, 1989, Benson in trust transferred the property to First Western in trust. In the land transfer tax affidavit, Benson swore that the consideration was \$2, and that First Western was a new trustee for the same beneficial owner of the property. Margel acted for both parties. This change was effected at the request of the first mortgagee, Montreal Trust (see below), which wanted a corporate trustee.

91. On the same date, October 18, 1989, First Western gave a first mortgage in the amount of \$1,334,160 to Montreal Trust, which was independently represented. The proceeds of the first mortgage loan were used to pay out a prior first mortgage and a vendor take-back second mortgage. Margel acted for First Western.

92. In November 1989, Warga acted for Ganwood Inc. as mortgagee and First Western in trust as mortgagor on a \$160,000 loan to be secured by a second mortgage on 564 Durham Crescent. The mortgage was registered on November 17, 1989.

93. This mortgage was arranged as a result of a request of First Western that Warga and Margel arrange secondary financing on this property. Margel was one of the beneficial owners of the property, holding a 12.5 per cent interest. Warga did not disclose that fact to Ganwood Inc.

94. The annual payments required on the first and second mortgages exceeded the net income expected to be generated by rents by \$14,000 in 1990 and \$5,000 in 1991.

95. In July 1990, First Western in trust defaulted on its mortgage payments on 564 Durham Crescent. The first mortgagee, Montreal Trust, initiated power of sale proceedings. On September 4, 1991, the property was sold for \$1,275,000. The proceeds of sale were insufficient to pay the amount due to Montreal Trust; the shortfall was about \$10,000. Ganwood Inc. lost its entire investment, \$160,000 together with interest, and has brought a civil action against Warga and Margel in relation to this and other second mortgages.

96. Although Ganwood Inc. was aware that Warga and Margel were acting for First Western as well as itself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and
- (iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

85 Willow Road, Guelph

97. On September 20, 1988, Barry Benson in trust agreed to purchase 85 Willow Road. The agreement (as amended on October 26, 1988) provided that the purchase price was to be \$2,410,000, with the purchaser to arrange financing of \$1,700,000 and the vendor to take back a second mortgage for \$360,000. The closing date was to be February 23, 1989.

98. On January 16, 1989, Canada Trust agreed to provide a first mortgage loan in the amount of \$2,125,000 but to advance only \$1,575,000 initially.

99. The closing date was extended to February 27, 1989, at which time the transaction was completed. Margel acted for First Western, in whose name title was taken. Both the vendor and Canada Trust were independently represented. In addition to the Canada Trust first mortgage, a second mortgage to Beaver Bend in the amount of \$125,000 and a third mortgage back to the vendor, Noble Property, in the amount of \$400,000 were also registered. Although the agreement of purchase and sale called for the vendor to have a second mortgage for \$360,000, the vendor did not take exception to the changes in the financing arrangements at that time.

100. On May 28, 1990, Sharon Noss (who was employed as a secretary by Warga and Margel) advanced \$125,000 to Warga and Margel to purchase the Beaver Bend second mortgage. Warga acted for Ms. Noss, Beaver Bend, and First Western.

101. On June 5, 1990, a new mortgage to Sharon Noss and a discharge of the Beaver Bend mortgage were registered. Though Ms. Noss' mortgage was to rank second, it was in fact a third mortgage.

102. On June 21, 1990 and August 14, 1990, Warga and Margel wrote to Noble to ask that Noble postpone to Ms. Noss' mortgage. The August 14 letter was signed by Warga.

103. On August 17, 1990, Noble's solicitors wrote to Warga to say that Noble would not postpone the second mortgage because pursuant to the agreement of purchase and sale, the vendor was entitled to a second mortgage, and accordingly "the priorities now rank as they should."

104. On September 19, 1990, First Western defaulted on all three mortgages and power of sale proceedings were commenced on October 9, 1990.

105. On June 9, 1991, the property was sold under power of sale for \$1,923,000. Sharon Noss lost her entire investment of \$125,000 plus interest.

106. Although Sharon Noss was aware that Warga and Margel were acting for First Western as well as herself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

- (i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;
- (ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and

- (iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

DATED at Toronto this 6th day of December, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Harvey Samuel Margel be suspended for a period of nine months.

REASONS FOR RECOMMENDATION

The Solicitor failed to conscientiously and diligently serve clients and practised in a reckless and careless manner.

The Solicitor advanced mortgage funds prior to the registration of security documents, advanced mortgage funds prior to the registration of a deed to the borrower and failed to disclose his interest in a syndicate that borrowed from a client. The Solicitor inaccurately reported to clients, falsely reporting priority of mortgages, failing to report particulars and dollar value of prior encumbrances, failing to report mortgage priority and falsely reporting the registration of a deed.

The Solicitor acted for more than one party in a number of transactions without making disclosure to and obtaining the consent of his client as required by Commentary 5, Rule 5.

Counsel for the Law Society recommended a suspension of nine months, while Counsel for the Solicitor argued that a lesser suspension would be more appropriate.

The Solicitor practised in a busy office with enormous activity. The Solicitor misplaced confidence in staff and proper standards were not met by unsupervised staff. Some of the problems occurred when the Solicitor was on vacation. Counsel advised that there was no dishonesty here and that the Solicitor has suffered financially. Numerous letters of support from colleagues and clients were filed on behalf of the Solicitor. In addition, there is medical evidence that a medical problem contributed to his performance. The Solicitor has suffered personally, professionally, financially and has undergone medical treatment as a result of serious stress.

However, these were not isolated incidents or technical deficiencies. Here there was repeated registration of mortgages in wrong priority, putting lenders at risk in the interim period until postponements could be registered. We were advised by Counsel that claims have been made against the Insurance Fund and the Compensation Fund. A solicitor must act conscientiously and with skill. Here the Solicitor acted recklessly and carelessly.

The public must be protected and the profession must know that clients must be served conscientiously and diligently. Much of what happened to this Solicitor may have been prevented if Convocation prohibited solicitors from acting for both parties in financing transactions.

Thursday, 26th May, 1994

Harvey Samuel Margel was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 18th day of March, 1994

Abraham Feinstein, Q.C.
Chair

It was moved by Mr. Lerner, seconded by Mr. Topp that the Report be adopted.

Mr. MacKenzie asked that the Report be amended by substituting the word "incorrectly" for the word "falsely" in the following paragraphs:

- paragraph (a) - page 1 - 1st line;
- paragraph (e) - page 2 - 1st line;
- paragraph (p) - page 5 - 1st line
- paragraph (l6) - page 9 - 1st line ("incorrect");
- 2nd paragraph - page 32 - 4th & 6th lines.

Following a discussion Convocation decided that the Report be sent back to the Committee for consideration of the amendments put forward by counsel.

Counsel and solicitor retired.

.....

Re: MEYER KORMAN, Brampton

The Secretary placed the matter before Convocation.

Ms. Graham withdrew for this matter.

Mr. Don Jack appeared for the Society and Mr. Arnold Zweig appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 30th March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th April, 1994 (marked Exhibit 1), together with an Acknowledgement, Declaration and Consent signed by the solicitor on 19th April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Roger D. Yachetti, Q.C., Chair
Paul D. Copeland
Mrs. Netty Graham

In the matter of
The Law Society Act
and in the matter of

Don Jack
for the Society

MEYER KORMAN
of the City
of Brampton
a barrister and solicitor

Arnold Zweig
for the solicitor

Heard: November 16, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Complaint D61a/93 was issued against Meyer Korman alleging that he was guilty of professional misconduct.

The matter was heard in public on November 16, 1993 before this Committee composed of Roger D. Yachetti, Q.C., Chair, Paul D. Copeland and Mrs. Netty Graham. Mr. Korman attended the hearing and was represented by Arnold Zweig. Don Jack appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D61a/93
Huculak/Ubale

3. In representing Anne Golden-Huculak ("Golden-Huculak") and Pramila and Bhausahab Ubale ("the Ubales") in respect of the purchase of Laws Gas Bar, the Solicitor acted in a conflict of interest and preferred the interests of Golden-Huculak to those of the Ubales;
4. The Solicitor failed to both report and account to the Ubales in respect of this transaction;

Huculak/Darrah

5. The Solicitor misapplied the sum of \$21,727.20 from his mixed trust account in favour of his clients, Golden-Huculak and the Golden Investment Group, and subsequently debited the said amount from the trust ledger of his client, Christopher Darrah ("Darrah"), without Darrah's authority or consent. The Solicitor also made a variety of other payments from Darrah's trust monies which were not authorized by Darrah.
6. The Solicitor has failed to account to Darrah;
7. The Solicitor attempted to obstruct the Society's investigation of this matter by offering a financial benefit to Darrah and/or his business partners in exchange for Darrah's withdrawal of his complaint to the Society;

Misleading Financial Institutions/False Statutory Declarations

8. In representing his client Central Guaranty Trust Company ("Central Guaranty") and the purchaser(s) in the following transactions:
 - Anastacio purchase from Allen - 25 Gailwood Court, Brampton - April, 1990;
 - Vernon purchase from Matera - 7475 Goreway Drive, Unit 3, Mississauga - July, 1989;
 - Allen purchase from Kermire - 24 Newlyn Crescent, Brampton - March, 1989;
 - Brownie purchase from Schmale - 5 Merton Road, Brampton - July, 1990;
 - Brownie purchase from Cassell and Miller - 36 Swennen Drive, Brampton - May, 1990,
 - a) the Solicitor preferred the interests of his purchaser client to that of Central Guaranty and misled Central Guaranty by preparing false statutory declarations for signature of the purchaser(s) in which the purchaser(s) falsely declared that the purchaser(s) was (were) providing a certain required minimum amount of funds (not borrowed) to finance the purchase, when the Solicitor knew that the said declarations were false, and by providing the false statutory declarations to Central Guaranty;
 - b) in respect of the Anastacio purchase from Allen, the Solicitor prepared a false, or in the alternative, misleading Land Transfer Tax Act Affidavit, which failed to disclose a vendor takeback mortgage; and
 - c) in respect of the Brownie purchase from Cassell, the Solicitor misled his client, Central Guaranty, by failing to bring to the attention of Central Guaranty a change in the purchase price prior to Central Guaranty advancing money to fund the transaction;
9. In respect of his representation of Bayshore Trust Company ("Bayshore Trust") and the purchasers in the Keane and Steele purchase from Hunt - 49 McLaughlin Road, Brampton:

- a) the Solicitor preferred the interests of his clients, Keane and Steele, to those of his client, Bayshore Trust, by completing the said transaction contrary to the instructions of Bayshore Trust. Bayshore Trust had instructed the Solicitor that it was a condition of the mortgage loan that Keane and Steele provide a certain required minimum amount of funds (not borrowed) to finance the purchase. The Solicitor requested that Bayshore Trust fund the transaction although he knew that Keane and Steele had not satisfied the said condition;
 - b) the Solicitor failed to report to his client, Bayshore Trust, upon the completion of the transaction;
10. In representing First Choice Realty Ltd. ("First Choice") and Community Trust Company Ltd. ("Community Trust") in respect of a mortgage loan by Community Trust as administrator for RRSP 9000484 to First Choice secured on the property known as 84 Enmount Drive, Brampton, the Solicitor falsely reported to Community Trust that it was obtaining a second mortgage when in fact it obtained a third mortgage;
11. In acting for Surjit and Saroj Ghandi (the "Ghandis") and the Royal Bank of Canada (the "Royal Bank") in respect of a mortgage loan from the Royal Bank to Saroj Ghandi:
- a) the Solicitor participated in the evasion of land transfer tax by his clients First Choice and Saroj Ghandi by preparing and commissioning a Land Transfer Tax Act Affidavit sworn by Saroj Ghandi which falsely deposed that this transaction was a transfer from a trustee to a beneficial owner, in circumstances where the Solicitor knew or ought to have known that there was no arrangement of trust between the parties;
 - b) the Solicitor misled his client, the Royal Bank, by reporting that it received a first mortgage when in fact its mortgage, at the date of registration, was in fourth position; and
 - c) the Solicitor breached the Commissioners for Taking Affidavits Act by preparing and having his client, Saroj Ghandi, sign affidavits under the Land Titles Act in blank;
12. The Solicitor failed to advise the Errors and Omissions Insurance Department promptly or at all of a potential claim against him upon receipt of correspondence from the then-solicitor for the Royal Bank dated March 12, 1991;

Failure to Serve Client - White Loan to Thompson

13. The Solicitor acted for both Franklyn White ("White") and Lennox Thompson ("Thompson") in respect of a loan of \$10,000 from White to Thompson. White received a mortgage on Thompson's residence as security. When the said mortgage went into default, the Solicitor acted in a situation of conflict of interest by commencing a Power of Sale proceeding on behalf of his client White against his client Thompson;
14. The Solicitor failed to serve his client, White in a conscientious, diligent and efficient fashion in respect of the said loan by failing to fully explain to him the risk involved in postponing his mortgage to that of the Royal Bank;
15. The Solicitor failed to report to White upon the completion of the loan transaction;

Failure to Serve Client - White Loan to Murray

16. In respect of the Solicitor's representation of White and Charles and Judith Murray (the "Murrays") in respect of a loan of \$9,150 from White to the Murrays:
- a) the Solicitor breached his duty to his client White by directing him to a mortgage which he knew or ought to have known was not secure, by failing to fully explain to White the state of title, as he knew that White was fully reliant upon him, and by failing to ensure that White obtained whatever other or additional security was available for his loan;
 - b) the Solicitor acted in conflict of interest by issuing a Notice of Sale on behalf of his client, White, against his clients the Murrays, in respect of a mortgage transaction on which he had acted for both parties;
 - c) the Solicitor failed to make prompt payment of the deductible under the Society's Errors and Omissions Insurance Plan when properly called upon to do so as a result of the insurer's payment to White;

Failure to Serve Client - Ashworth Loan to Golden-Huculak

17. In connection with a \$25,000 loan made by his client, Ronald Ashworth ("Ashworth"), to his client, Golden-Huculak, the Solicitor breached his duty to his client Ashworth as follows:
- a) in circumstances where he was aware of Golden-Huculak's financial position, he failed to ensure that Ashworth's loan was properly secured; and
 - b) he acted in a position of a conflict of interest, and preferred the interests of his client, Golden-Huculak, over those of his client, Ashworth;

Failure to Serve Client - Singh Mortgage to Kovacs

18. The Solicitor acted for both Diljit Singh ("Singh") and Stephen and Dianna Kovacs ("the Kovacs") in respect of a \$22,000 mortgage loan from Singh to Kovacs. In so doing, the Solicitor preferred the interests of the Kovacs over those of Singh and failed to serve his client Singh in a conscientious, diligent and efficient fashion, as follows:
- a) the Solicitor advanced the mortgage funds provided by Singh to the Kovacs notwithstanding that an execution search had been conducted which revealed liens in the amount of \$17,000 encumbering title to the property which was being mortgaged. These liens had the effect of reducing Singh's mortgage to third position when the Solicitor had been instructed that the mortgage should rank second in priority; and
 - b) the Solicitor failed to advise his client Singh or the Errors and Omissions Insurance Department of the potential claim against him in respect of this matter;

Failure to Co-operate with the Law Society

19. The Solicitor has failed to co-operate with the Society by failing to provide documents requested by the Society and by failing to provide explanations requested by the Society, in respect of the transactions under investigation by the Society.

Evidence

The evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D61a/93 and is prepared to proceed with the hearing of this matter on November 16 and 17, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D61a/93 and admits the particulars contained in paragraphs 3 through 19 thereof. The Solicitor admits that these particulars in the Complaint, together with the facts as hereinafter set out, constitute professional misconduct.

IV. FACTS

- A. Huculak/Ubale - Complaint Paragraphs 3 and 4

4. In or about June 1989, Pramila and Bhausahab Ubale ("the Ubales") agreed to a proposal made to them by their acquaintance Anne Golden-Huculak ("Golden-Huculak") to purchase and operate a Brampton, Ontario gas bar. Golden-Huculak suggested that they retain the Solicitor, whom she described as her "family" lawyer and her "friend". The Ubales agreed.

5. Golden-Huculak's husband, William Huculak ("Huculak"), and one Michael Shaw ("Shaw"), were also to be involved in this transaction. In late June, Shaw met with the Solicitor to discuss the transaction and instructed him that it would be a purchase of the vendor company's shares.

6. On or about July 8, 1989 the Solicitor prepared an "Offer to Purchase". The said document called for a purchase of the assets and shares of the vendor company 577848 Ontario Limited, contrary to the instructions given by Shaw. The vendor, whose principal is one Nicholas Whitelaw, accepted the offer that same day. The offer provided for a closing date of July 24, 1989. However, the vendor and purchasers reached an agreement whereby the purchasers went into possession of the gas bar on July 16, 1989, prior to the closing of the transaction. Golden-Huculak and her associates Huculak and Shaw began operating the gas bar. The Ubales were not involved in the day-to-day operation of the gas bar.

7. On or about July 18, 1989, the solicitor for the vendor company, Richard Chuback, prepared a new Agreement of Purchase and Sale, which was eventually signed by all the parties to the Agreement. The Agreement provided for the sale of the shares at a purchase price of \$425,000, payable as follows:

Thursday, 26th May, 1994

- a) \$100,000 upon acceptance, which sum is non-refundable provided that the vendor has satisfied all of his obligations under the Agreement;
- b) \$100,000 on closing;
- c) The balance by way of a vendor takeback first mortgage.

The Agreement was also conditional upon the vendor obtaining consent to the assignment to the purchasers of the following leases:

- a) As tenant, a lease on which the gas bar was situated;
- b) As lessor, a lease to Shell Canada by which Shell made payments to the gas bar based on the amount of gasoline sold.

The Agreement further provided that the vendor was to provide financial statements of the corporation prior to closing.

8. Golden-Huculak and the Ubales had agreed that each would fund one-half of the \$200,000 which had to be paid by the date of closing. In order to fund the transaction the Ubales retained the Solicitor to act on their behalf to place a mortgage on their personal residence, 83 Kingslake Road, Willowdale. On August 3 and 4, 1989, the Solicitor received \$225,000 from Royal Trust on behalf of the Ubales. After disbursements, he paid \$219,330 to the Ubales.

9. At the same time, Golden-Huculak had also retained the Solicitor to obtain mortgage financing to fund her obligations in the transaction. On August 3, 1989, the Solicitor obtained a mortgage from Royal Trust on behalf of Golden-Huculak which provided approximately \$39,135 for use in the transaction. Golden-Huculak thus required a further \$61,000 to meet her obligations.

10. While Golden-Huculak attempted to find further financing, the Solicitor continually delayed the closing of the transaction. On July 26 he told Mr. Chuback that he expected that the transaction could close on or about August 4. Thereafter, he indicated that the closing must be extended to August 14. Meanwhile, by August 4, the Ubales had contributed their half of the funds due for closing. The Solicitor sent the amount received from the Ubales (\$103,124) and the amount received from Golden-Huculak (\$40,000) to Chuback on or about August 14.

11. By September, 1989, the transaction still had not closed. Dr. Ubale contacted the Solicitor who told him for the first time that Golden-Huculak had not been able to raise her share of the funds required to close.

12. Eventually the vendor demanded that the transaction close by September 29 or he would withdraw. Thereafter the Solicitor spoke with Chuback and wrote to him on September 27 confirming that the closing would be extended to October 6 and that the purchasers would pay a \$5,000 extension fee, as the vendor had demanded. The Solicitor did not discuss the issue of an extension fee with the Ubales.

13. The closing finally took place on October 3, 1989. For the closing, Chuback prepared a revised Statement of Adjustments and provided it to the Solicitor. The Statement of Adjustments contained one significant amendment from the original one provided to the Solicitor. It credited the purchasers with \$5,000, which was described as "amount owing to Nicholas Whitelaw re his agreement...to retain the Shell cross-lease for a two year period". This is the lease referred to at paragraph 7(b) above. The transaction was structured to close on the basis that Whitelaw would retain the lease, which provided income

Thursday, 26th May, 1994

to the gas bar of approximately \$2,700 per month. The Solicitor closed the transaction on this basis. He did not consult with or obtain the instructions of the Ubales to agree to this amendment, which had significant impact on the financial viability of the gas bar.

14. The balance payable on the closing of the transaction was \$66,600, and this sum was paid to Chuback on closing. The sum was originally to have been paid by the Solicitor from the following funds received on behalf of Golden-Huculak:

- a) \$46,666 received from a mortgage broker on behalf of Golden-Huculak;
- b) two cheques provided to the Solicitor by Golden-Huculak -
 - i. a cheque in the amount of \$15,000; and
 - ii. a cheque in the amount of \$6,727.

However, both the cheques from Golden-Huculak were returned NSF. Accordingly, the Solicitor transferred \$21,727 belonging to his client Christopher Darrah from the mixed trust account and applied those funds to this transaction. Darrah was not involved in this transaction and was not consulted, nor did he consent to this unauthorized use of his trust monies.

15. At no time prior to the closing did the Solicitor request or receive the financial statements of the vendor company as required under the Agreement of Purchase and Sale, nor did he seek or receive consents to the assignment of the leases. When the Ubales attended at the Solicitor's office to execute the final documentation before closing, the Solicitor was not present. The Ubales met with the Solicitor's clerk who did not provide this information.

16. Relations between the Ubales and Golden-Huculak and her associates deteriorated quickly. The Ubales became concerned that monies were being misapplied by their partners in favour of another gas station owned by Golden-Huculak and her husband. In November, Golden-Huculak's payment on the chattel mortgage to the vendor was returned NSF. Accordingly, the Ubales consulted an independent solicitor. David McGregor wrote to the Solicitor on December 7, 1989 and requested an immediate report and accounting. The Solicitor did not reply and has never provided a report and accounting to the Ubales.

17. In December 1989, the vendor repossessed the gas bar. Litigation ensued, but possession of the gas bar was not recovered. The Ubales have now commenced proceedings against the Solicitor, Golden-Huculak and her associates, and others in an attempt to recoup their losses.

B. Huculak/Darrah - Complaint Paragraphs 5, 6 and 7

18. Christopher Darrah became acquainted with William Huculak and Michael Shaw, and the three men decided to go into business together. The goal of their business venture was to acquire and operate service stations. They agreed to incorporate "Petroleum Plus Group Inc.". Huculak and Shaw agreed to put a service station which they owned in Brampton into the company. Darrah was to raise the sum of \$130,000 as his contribution to the venture.

19. Anne Golden-Huculak told Darrah that the Solicitor was her solicitor and long time friend and she suggested that the Solicitor be retained. Darrah agreed.

20. In order to raise the required \$130,000, Darrah retained the Solicitor to act in the placement of a mortgage on his home. On October 13, 1989, that transaction was completed by the Solicitor. On October 16, 1989, the Solicitor received \$125,300 into trust.

21. The Solicitor was aware that these funds were to be used variously in pursuit of the business venture's goals. In that regard, Darrah instructed the Solicitor from time to time to release certain funds for the purposes of the business venture. However, in or about December 1989, Darrah contacted the Solicitor's office regarding the balance in the trust account, and became concerned when he was told that it contained less than he thought it should. He asked the Solicitor from time to time for an accounting and for copies of cancelled cheques but received nothing from the Solicitor. Accordingly, he complained to the Law Society in April, 1990.

22. The Society's audit has determined that the Solicitor made a variety of payments from Darrah's trust monies which were not authorized by Darrah, including an October 1989 transfer of \$21,727.20 to file 89/541 - Golden Investment Group (see paragraph 14 above).

23. On or about February 5, 1990 the Solicitor wrote to Darrah telling him that his trust funds had now been exhausted.

24. Darrah complained to the Society in April 1990. In May 1990, he wrote indicating his desire that the Society's investigation be brought to an end. He did so on the basis of an offer by the Solicitor to Golden-Huculak that the Solicitor would make a loan of \$20,000 to "the group" if Darrah would withdraw his complaint. On May 28, 1990, the Solicitor, through his RRSP, loaned \$22,000 to Golden-Huculak in exchange for a fifth mortgage on her home. The Solicitor already held the fourth mortgage on her home.

25. The Solicitor did not disclose his loans to Golden-Huculak to the Law Society during the audit. The Society asked the Solicitor personally and through counsel for copies of the cheques at issue as referred to at paragraph 22 above. The Solicitor initially failed to provide them, but subsequently did provide them through counsel on or about November 1, 1993.

C. Misleading Financial Institutions/False Statutory Declarations - Complaint Paragraphs 8, 9, 10, 11, and 12

(i) Anastacio purchase from Allen - 25 Gailwood Court, Brampton

26. Desmond Allen ("Allen") is a real estate agent and a regular client of the Solicitor. He acquired the property known as 25 Gailwood Court on April 6, 1990, and on the same day flipped it to Mr. and Mrs. Anastacio ("the Anastacios"). The Solicitor acted for Allen, the Anastacios and the mortgagee Central Guaranty Trust ("Central Guaranty").

27. The Agreement of Purchase and Sale disclosed a purchase price of \$219,500. Central Guaranty agreed to loan \$192,300 to the Anastacios. Its instructions to the Solicitor required the provision of a statutory declaration from the Anastacios deposing that they had equity of \$31,300 in the property (not borrowed).

28. The Anastacios did not have this money. The Solicitor knew so. In fact, he arranged with Allen that the latter would take a second mortgage on the property to help finance the purchase. Allen loaned the Anastacios \$35,534.52 to fund the transaction.

29. The Solicitor prepared and had the Anastacios sign a statutory declaration, and forwarded same to Central Guaranty, by which the clients falsely deposed that they had equity of \$31,300 (not borrowed) in the property. In fact, the Anastacios contributed only \$1,000 to the purchase and that was their total equity.

30. The Solicitor also prepared a Land Transfer Tax Act Affidavit, commissioned by one of his employees, which failed to disclose the vendor takeback mortgage.

31. The Solicitor did not report the Allen second mortgage to Central Guaranty.

32. On October 30, 1991, Central Guaranty sold the property under Power of Sale and suffered a loss in excess of \$40,000.

(ii) Vernon purchase from Matera - 7475 Goreway Drive, Unit 3, Mississauga

33. The Vernons purchased this property for \$170,000 on July 14, 1989. They received a mortgage commitment from Central Guaranty, which agreed to provide a first mortgage in the amount of \$127,500. Central Guaranty retained the Solicitor and instructed him, inter alia, to confirm that the Vernons' down payment (not borrowed) was in the amount of \$42,500.

34. The Solicitor prepared and had the Vernons sign such a statutory declaration. This declaration was false as the Solicitor arranged and acted on a second mortgage which was used to help fund the transaction. The Vernons provided only \$33,441. The Solicitor provided the false statutory declaration to Central Guaranty and did not disclose the second mortgage.

(iii) Allen purchase from Kermire - 24 Newlyn Crescent, Brampton

35. The Solicitor acted for the Allens on this purchase and for Central Guaranty which had agreed to fund a first mortgage. The Allens purchased the property on March 2, 1989 for \$178,000, and received a mortgage from Central Guaranty in the amount of \$158,773.

36. Central Guaranty requested a statutory declaration from the Solicitor that the clients were providing a down payment (not borrowed) in the amount of \$23,100. The Solicitor prepared and had the clients sign such a declaration and forwarded it to Central Guaranty together with his interim report. The Solicitor was aware that the Allens were borrowing the balance due on closing from a relative. The Allens put up no money of their own and the Solicitor knew it.

(iv) Brownie purchase from Schmale - 5 Merton Road, Brampton

37. The Brownies purchased this property for \$185,000. They arranged for financing of the property with Central Guaranty. The Solicitor acted for both the Brownies and Central Guaranty.

38. Central Guaranty agreed to fund a mortgage of \$164,512.50. It instructed the Solicitor to provide confirmation of a down payment (not borrowed) in the amount of \$24,500.

39. The transaction closed on July 31, 1990. The Solicitor prepared, had the Brownies sign and provided to Central Guaranty a statutory declaration indicating that they had provided a down payment of \$24,500 from their own resources and not from borrowed funds. This was false as the Brownies had arranged, through the Solicitor, a second mortgage of \$10,000, on which the Solicitor acted for both mortgagors and mortgagee. The Brownies advanced, in total, \$18,724.12 of their own funds to finance the transaction.

(v) Brownie purchase from Cassell and Miller - 36 Swennen Drive, Brampton

40. The Brownies agreed to purchase the above property at a price of \$210,000. They obtained a commitment from Central Guaranty of a \$173,400 mortgage. The Solicitor acted for the Brownies and for Central Guaranty.

41. Central Guaranty instructed the Solicitor to obtain from the clients confirmation of a down payment (not borrowed) of \$40,000.

42. The transaction was scheduled to close on May 31, 1990. On May 29, 1990, the vendors' solicitor, Steven Mucha, informed the Solicitor by letter that the parties had agreed to a new sale price of \$190,000 and that the transaction would be closing on that basis.

43. The Solicitor did not inform Central Guaranty of this amendment to the Agreement. Instead, he prepared, had the clients sign and provided to Central Guaranty a statutory declaration confirming a down payment of \$40,000 from the Brownies' own resources and not from borrowed funds. The Brownies did not provide this sum. In fact, the only money provided by the Brownies was \$421.63.

44. The transaction was funded, in part, by a second mortgage in the amount of \$20,000 which was given back to one of the vendors, of which the Solicitor was aware.

(vi) Keane and Steele purchase from Hunt - 49 McLaughlin Road, Brampton

45. The Solicitor was retained by Mr. Keane and Ms. Steele to act for them in respect of their purchase of this property. They had arranged a mortgage with Bayshore Trust and, on November 5, 1991 the Solicitor was retained by Bayshore to act for it in preparing a new first mortgage. Bayshore agreed to loan the sum of \$169,900 in exchange for a first mortgage. Bayshore provided to the Solicitor a copy of the commitment letter together with its instructions. The commitment letter required satisfactory proof of a down payment of \$15,000 (not borrowed).

46. The Solicitor prepared, had the clients sign and provided to Bayshore, with his "Interim Report On Title and Request For Funds", a statutory declaration by which the clients declared that there is a down payment of approximately \$15,000 from their own resources, not from borrowed funds.

47. The Solicitor's ledger statement discloses that the purchasers actually provided \$500 to close the transaction. In fact, they were so short of funds that the Solicitor financed the transaction by loaning them \$1,906.16.

48. The Solicitor prepared a final report on title for delivery to Bayshore. However, it was never sent to Bayshore.

(vii) First Choice Realty Limited/Community Trust Company Limited - 84 Enmount Drive, Brampton

49. Surjit S. Gandhi is a real estate broker and a long time client of the Solicitor. Mr. Gandhi is also the principal of First Choice Realty Limited ("First Choice").

50. In February, 1987, First Choice purchased the above-noted property. The Solicitor acted for First Choice. The purchase was financed by the assumption of a first mortgage in favour of the Bank of Montreal and a second mortgage in favour of a private mortgagee. This second mortgage was discharged shortly thereafter.

51. On January 16, 1989, First Choice entered into another mortgage transaction with Security Trust Company ("Security Trust"). This mortgage was registered against this property and other properties owned by First Choice. The Solicitor acted on this transaction.

52. On July 6, 1989, First Choice gave a mortgage to Community Trust Company Limited ("Community Trust"). This mortgage was given to Community Trust as administrator for the RRSP of Palvinder Gandhi, a relative of Surjit Gandhi. It was in the amount of \$50,000.

53. When this mortgage was registered, it was a third mortgage, with priority subsequent to that of the Bank of Montreal and Security Trust. However, the Solicitor's reporting letter dated October 30, 1989 to Community Trust falsely reported that Community Trust had received a good and valid second mortgage against the property. This was the basis upon which Community Trust advanced the mortgage funds.

(viii) Surjit and Saroj Gandhi and the Royal Bank of Canada - 84 Enmount Drive, Brampton

54. Some months later Surjit Gandhi wished to borrow more money against the security of this property. The Royal Bank of Canada was approached and Mr. Gandhi's wife Saroj was proposed as borrower. On November 22, 1989, the Royal Bank retained the Solicitor to act for it in this transaction. The Royal Bank's instructions were that it was loaning \$113,100 to Mrs. Gandhi in exchange for a first mortgage on the property. Surjit Gandhi was to be a guarantor.

55. The transaction could not be completed as initially contemplated because the property was owned by First Choice, not Saroj Gandhi. On December 8, 1989, the Solicitor's staff spoke with the Royal Bank on three occasions, asking the bank what would be necessary to change the name of the borrower to First Choice from Saroj Gandhi. The bank advised that it would take approximately two weeks to obtain a new approval and prepare new paperwork. The Solicitor's staff communicated this to Surjit Gandhi who advised the Solicitor's office that he wanted the property transferred into the name of Saroj in order to be able to obtain this mortgage loan.

56. On December 14, 1989, the Solicitor registered a transfer from First Choice to Saroj Gandhi. The transfer recites that there was no consideration for the transfer and that no land transfer tax was payable because the transfer was from trustee to beneficial owner. The Solicitor's file contained no trust declaration nor is there any evidence in his file on the original purchase that the property was in any way being purchased by Mrs. Gandhi or held in trust for her by First Choice. No land transfer tax was paid on the transaction.

57. The Solicitor registered the mortgage to the Royal Bank that same day. At the time it was registered, this mortgage stood in fourth position behind the Bank of Montreal, Security Trust, and the Community Trust RRSP. The funds obtained from the Royal Bank were used to obtain a discharge of the Security Trust mortgage. Also, Community Trust had agreed to postpone its RRSP mortgage to that of the Royal Bank (although the Solicitor did not obtain a written postponement and register it until April 4, 1990). Before April 4, the Royal Bank mortgage stood in third position. After April 4, it stood second. It never reached first position.

58. In or about February, 1991, the Royal Bank was served with a Notice of Sale issued by the Bank of Montreal under its first mortgage. This put the bank on notice that it had not received a first mortgage. The property was eventually sold in March 1992 for \$93,000. The Royal Bank will lose up to \$80,000.

59. On March 12, 1991 the Royal Bank's solicitor, Brian Batchelar, wrote to the Solicitor putting him on notice of this claim and advising him to contact his insurer. The Solicitor failed to advise the Society's Errors and Omissions Insurance Department of the potential claim against him.

60. When the Society reviewed the Solicitor's file on the Royal Bank mortgage, it discovered two affidavits under the Land Titles Act which Saroj Gandhi had signed. These were "fill in the blanks" type of affidavits, which had been partially completed. One had already been commissioned by the Solicitor and the other had not been. Saroj Gandhi had signed these affidavits, and the Solicitor had commissioned one of them in blank, contrary to the provisions of the Commissioners for Taking Affidavits Act.

D. Failure to Serve Client - White loan to Thompson - Complaint Paragraphs 13 to 15

61. In May 1989, the Solicitor acted for both Franklyn White ("White") and Lennox Thompson ("Thompson") in respect of a loan of \$10,000 from White to Thompson. In exchange for the loan, White received a second mortgage on Thompson's home. Thompson had purchased the property in December 1987 for \$115,000. There was a first mortgage to the Toronto-Dominion Bank of \$96,900. White received a second mortgage for \$10,000.

62. In or about July, 1989, the Solicitor acted for Thompson in respect of a further mortgage loan transaction. The Royal Bank advanced \$26,250 in exchange for a mortgage on the same property.

63. In August 1989 the Solicitor summoned White to his office and asked him to sign some documents. White knew that his mortgage was initially a second mortgage, and learned it became a third mortgage. The Solicitor told him that his mortgage was "still good" so he agreed to the change. Although he had a common sense understanding that a second mortgage was better than a third mortgage, he relied completely on the Solicitor. The Solicitor did not explain the matter to him, and did not give him any advice regarding the possibility that his risk would increase by accepting a third mortgage. The Solicitor knew that this was the first time that White had made a mortgage loan. The Solicitor also knew that White has a great deal of difficulty reading and writing English, and that White was an extremely unsophisticated person.

64. White executed a Postponement Agreement postponing his mortgage to that of the Royal Bank, and the Solicitor registered it on August 22, 1989.

65. The mortgage to White eventually went into default. Accordingly, the Solicitor, on behalf of White, issued a Notice of Sale against the client Thompson in respect of this mortgage on which he had previously acted on his behalf. Eventually, the Solicitor recovered White's money from Thompson and asked him to come to the office to receive it.

66. The Solicitor did not report to his client White in respect of any aspect of this transaction.

E. Failure to Serve Client - White Loan to Murray - Complaint Paragraph 16

67. The Solicitor recovered White's money from Thompson in early 1990. The Solicitor suggested to White that the Solicitor had some friends who required money for a short period to purchase a home. He told White that he would guarantee that White would lose no money and that he would be adequately secured. White accordingly agreed to loan \$9,150 to the Solicitor's friends/clients, Judith and Charles Murray ("the Murrays").

68. The Murrays had purchased 238 Albion Road, Suite 210, Rexdale in June 1988 for \$138,000. At this date, the property was encumbered by a first mortgage to Central Guaranty in the amount of \$141,750. There was also a second mortgage, on which the Solicitor had acted, to a private mortgagee for \$20,000. There was also a lien in favour of the condominium corporation in the amount of \$903. White's mortgage was registered on March 14, 1990, subsequent to those encumbrances.

69. The Solicitor did not perform a search, relying on his knowledge of the property. At no time did the Solicitor obtain an appraisal of the property in question and he took no steps to satisfy himself that White's investment was properly secured.

70. The Solicitor had told White that this mortgage would be a second mortgage. Although he had told White that the Murrays owned two properties, he did not say against which property the mortgage would be registered. The Solicitor's reporting letter to White referred to the mortgage as a third mortgage, but this was the first indication that White had to this effect. In fact, the mortgage was fourth in priority.

71. The mortgages went into default almost immediately. The first mortgagee, Central Guaranty, commenced Power of Sale proceedings on September 4, 1990. On the same date, the Solicitor issued an Notice of Sale on behalf of White. On September 17, 1990 the Murrays made assignments in bankruptcy. On June 17, 1991, the property was sold under Power of Sale for \$128,000, and all of White's mortgage money was lost.

72. The Solicitor knew throughout that the Murrays also owned another condominium at 81 Irwin Avenue, Etobicoke. That property had been purchased by the Murrays in September 1989 for \$189,900. At or about the date White's mortgage was given, it was encumbered by two mortgages and a lien totalling over \$176,000. The Solicitor did not advise White, who completely relied upon him, that his security would be enhanced by registration of his mortgage against this property as well. Further, the Solicitor knew, or ought to have known, that the Murrays were having financial problems. The Solicitor did not bring this to the attention of White when advising him about this investment.

73. In or about May 1991 the Errors and Omissions Insurance Department paid out \$9,150 to White in respect of his claim and by letter dated May 10, 1991 asked the Solicitor for payment of the deductible owing in the amount of \$5,000. The Solicitor failed to pay the deductible and it is still outstanding.

F. Failure to serve Client - Ashworth loan to Golden-Huculak - Complaint Paragraph 17

74. The Solicitor's friend and client, Anne Golden-Huculak, and a partner, had agreed to purchase a property known as 46 Talbot Road, North York, for investment purposes. In order to complete the transaction, she required \$75,000. In April, 1989, the Solicitor contacted Ronald Ashworth ("Ashworth") to inquire about his willingness to loan monies to Golden-Huculak. Ashworth had been a client of the Solicitor for some years and the Solicitor had acted for him on previous loan transactions.

75. The Solicitor told him that he would be making a loan to "Golden Investments". The Solicitor told him that his loan would be secured by a demand promissory note, which he explained to mean that this would enable Ashworth to obtain repayment of his money whenever he wanted it. The Solicitor did not tell him why the money was being borrowed, nor did he suggest obtaining any other form of security. The Solicitor made various representations to Ashworth regarding Golden-Huculak's financial position. Inter alia, he said that Golden Investments had previously owned seven gasoline service stations, still owned one, and that Golden-Huculak owned other property.

76. Ashworth agreed to loan \$25,000 to Golden-Huculak and on April 17, 1989, provided these funds to the Solicitor. The Solicitor did not provide Ashworth with a reporting letter or a copy of the promissory note. No other security was obtained. The Solicitor has told the adjuster for Errors and Omissions that the promissory note was intended to have been secured not just by the Talbot Road property but also by Golden-Huculak's personal residence and other business interests.

77. In or about October or November, 1989, Ashworth contacted the Solicitor and asked to have his money repaid. The Solicitor said that he could not have his money repaid at that time and that he would have to wait until the real estate market improved. Ashworth asked the Solicitor for documentary evidence that the monies were owing to him.

78. Thereafter, the Solicitor arranged a meeting between him and Golden-Huculak. At that meeting, Golden-Huculak signed a promissory note. This was the first time Ashworth received any document in connection with this transaction. Golden-Huculak also gave him four cheques representing payments under the note, two of which failed to clear the bank. Thereafter, Ashworth contacted the Solicitor who said that he would "take care of" the matter, but he did not. Eventually, the Solicitor told Ashworth to retain another lawyer. He told him that his (the Solicitor's) insurance would take care of repaying Ashworth's loss. The Solicitor told Ashworth that he had personally loaned \$40,000 to Golden-Huculak and that he himself was in a worse position than Ashworth.

79. The Solicitor was extremely well acquainted with Golden-Huculak's financial position. Between August 1989 and May 1990 he acted on five mortgage transactions on Golden-Huculak's personal residence alone. The fourth and fifth mortgages were loans from the Solicitor's RRSP in January and May 1990, in the amounts of \$25,000 and \$22,000 respectively.

G. Failure to serve client - Singh mortgage to Kovacs - Complaint Paragraph 18

80. The Solicitor was retained in August 1990 to act on the refinancing of a mortgage for Stephen and Diannah Kovacs ("the Kovacs"). He had previously acted for the Kovacs on their purchase of the property in question (also acting in that transaction for the vendors). That transaction included a first mortgage and a vendor takeback second mortgage. The latter mortgage was maturing and the Solicitor was retained by the Kovacs to discharge it and register a new second mortgage. That mortgage had been arranged through a mortgage broker. The lender was to be one Diljit Singh ("Singh"). The broker arranged for the retainer of the Solicitor to act for Singh on this transaction as well.

81. On August 29, 1990, Singh provided a cheque payable to the Solicitor in trust, in the amount of \$21,000, to the mortgage broker. The Solicitor received those funds from the broker the same day. On August 31, 1990 he retained a conveyancer, his brother Fred Korman, to attend at the Registry Office to close the transaction.

82. On August 31 at the Registry Office, Fred Korman conducted an execution search. An execution certificate was obtained, together with copies of four liens in favour of the Ontario Legal Aid Plan registered against the Kovacs. The execution certificate is stamped as having been issued at 10:45 a.m. on August 31. At 11:04 a.m. Fred Korman registered the discharge of the vendor takeback mortgage and the new Singh mortgage.

83. From the funds received from the Singh mortgage, the Solicitor paid out the previous second mortgage and made a number of other disbursements. He also paid an excess of \$4,325 to the Kovacs. This money was paid to them on August 30, the day before the transaction closed.

84. The Solicitor did not report this transaction to Singh.

85. The mortgage fell into arrears in May 1991. Singh spoke to the Kovacs directly. The Kovacs revealed the existence of the liens to the Ontario Legal Aid Plan which totalled \$17,000. This was the first that she had heard of any such liens or any problem with the transaction. She subsequently conducted inquiries and learned that her mortgage had been registered behind these liens. She attended at the Solicitor's office to discuss the matter with him. She asked him for a reporting letter and the Solicitor told her that he had already sent it to her, or perhaps to the mortgage broker. He promised to send her another copy. She told him about the problem with the Legal Aid liens and he said that he would "take care of it". He gave her a copy of a letter dated September 17, 1990 that he wrote to Legal Aid. That letter asked Legal Aid to vacate its liens in order that Singh's mortgage be in second position. He did not provide her with Legal Aid's letter of reply, dated September 28, 1990, in which Legal Aid advised that it required payment.

86. On August 6, 1991, Singh complained to the Law Society. Eventually, Errors and Omissions Insurance appointed an adjuster. The Solicitor told the adjuster that he was familiar with the property and therefore did not think that there were any executions against the Kovacs. In this case, he did not do an execution search in advance. His explanation on the issue of whether he knew about the Legal Aid liens prior to instructing Fred Korman to register the mortgage is inconsistent. Initially he indicated that he did not recall whether he had spoken with Fred Korman about the matter of the executions. Later, he said that Fred Korman may have brought them to his attention but that he simply cannot recall.

87. The Solicitor did not advise Singh of the problem and he did not report the matter to E&O as he thought it would be something he could resolve with Legal Aid. The Solicitor was unable to resolve the matter with Legal Aid.

88. Singh has commenced civil proceedings against the Solicitor which are pending.

89. In February 1992, the property was sold under Power of Sale by the first mortgagee, Central Guaranty. The market had deteriorated and the property was sold for \$90,000. At the date of sale the amount owing under the first mortgage was \$84,647. Accordingly, Singh's investment was lost.

H. Failure to cooperate with the Law Society -Complaint Paragraph 19

90. The Society wrote to the Solicitor on August 20, 1991. That letter listed a variety of matters that the Society had been investigating (including many of the matters covered by this Complaint) and advised that the Society wished to meet with the Solicitor to obtain his representations regarding the matters at issue. Despite numerous communications since that time, directed both to the Solicitor and to his counsel, the Solicitor has refused to meet with the Society's representatives to review these transactions with them. The Solicitor has been generally responsive to requests from the Society that he provide copies of his files in respect of the matters under investigation. The Solicitor has also discussed some of the matters particularized in this complaint with adjusters appointed by the Errors and Omissions Insurance Department. However, he has steadfastly refused to review these matters with the Society's investigators.

DATED at Toronto this 15th day of November, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Meyer Korman be granted permission to resign.

REASONS FOR RECOMMENDATION

It is quite clear from the evidence in the Agreed Statement of Facts that the Solicitor must leave the profession, and this Committee submits that by virtue of the mitigating circumstances found in this case, that it is appropriate that the Solicitor be given permission to resign.

Even though there was no evidence submitted by way of a psychiatric report or proof of alcohol addiction, the Committee accepts that there was indeed a severe alcohol problem and the Solicitor had entered Donwood in 1991, the Renaissance Centre in 1992 and again in 1993 as well as Brazen Hospital.

The Solicitor is a 48 year old man who never married. He has always been a very lonely man and his only close relative is his younger brother Fred, who he feels he has really let down. He is almost a bankrupt, having been sued many times for negligence and his Errors and Omissions insurance has paid out many claims, to the extent that he can no longer pay the deductible. His money is gone and the house he did own, he gave to his father, who had supported him throughout.

His severe loneliness led to the drinking problem and in 1990 he was consuming about ten ounces of alcohol daily and even more on weekends. There were periods of time in his life at this point, where he realized what was going to happen to him as a result, attempted suicide on two occasions, which he called "foolhardy". There is no doubt that he lived a truly sad life.

The Committee heard evidence that the Solicitor has not had a drink since August 27, 1993 and is presently seeing a doctor, and at the time of the hearing, had attended about six sessions and it was his intention to continue these. Unfortunately, we were advised that a medical report had been requested but none was forthcoming at the time of the hearing. We were also advised that he is being treated for depression.

In light of all of these circumstances and of the need to protect the public from the severe sloppiness of this Solicitor's practise, he must leave the profession and the Committee is satisfied that the appropriate penalty in this case is that the Solicitor be granted permission to resign.

Meyer Korman was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 20th day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 30th day of March, 1994

(Mrs.) Netty Graham

It was moved by Mr. Lerner, seconded by Mr. Topp that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Mr. Lerner that the Recommendation as to Penalty be adopted, that is, that the solicitor be permitted to resign.

Both counsel made submissions in support of the recommended penalty. Counsel for the Society submitted a Record Book of further evidence with the consent of Mr. Zweig.

Counsel, the solicitor, the reporter and the public withdrew.

The Recommendation as to Penalty was adopted.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

Counsel and the solicitor retired.

.....

Re: JOHN ALLEN ZINSZER, Kitchener

The matter was stood down.

.....

The Treasurer withdrew from Convocation as one of the ineligible Benchers listed in the following Discipline Report. Mr. Howie took the Chair as Acting Treasurer.

Re: CALUM DONALD GRAHAM, Mississauga

The Secretary placed the matter before Convocation.

Messrs. Topp and McKinnon and Ms. Peters withdrew for this matter.

Mr. Neil Perrier appeared on behalf of the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 21st February, 1994, together with an Affidavit of Service sworn 21st April, 1994 by James Gooding that he had effected service on the solicitor personally on 16th April, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th May, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Frances Kiteley, Chair
David W. Scott, Q.C.
Colin McKinnon, Q.C.

In the matter of
The Law Society Act
and in the matter of

Stephen Waisberg, Neil Perrier
for the Society

CALUM DONALD GRAHAM
of the City
of Mississauga
a barrister and solicitor

R. Burke
for the solicitor

Heard: July 23, November 29, 1991
January 9, 24, February 28,
May 28, June 26, September 10,
October 26 and November 26, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 25, 1990 Complaint D191/90 was issued on December 11, 1990 Complaint D237/90 was issued, on March 14, 1991 Complaint D35/91 was issued, on April 23, 1992 Complaint D75/92 was issued, on May 22, 1992 Complaint D81/92 was issued and on August 24, 1992 Complaint D138/92 was issued against Calum Donald Graham alleging that he was guilty of professional misconduct.

The matter was heard in public on July 23, 1991, November 29, 1991, January 9, 1992, January 24, 1992, February 28, 1992, May 28, 1992, June 26, 1992, September 10, 1992, October 26, 1992 and November 26, 1992 before this Committee composed of Frances Kiteley (Chair), David W. Scott, Q.C. and Colin McKinnon, Q.C. Mr. Graham attended the hearings on July 23, 1991, February 28, 1992, September 10, 1992 and October 26, 1992. The Solicitor was represented by Mr. R. Burke on February 28, 1992 and May 28, 1992. On June 26, 1992, Norman Scott appeared for Robert Burke on behalf of the Solicitor. Mr. Burke attended on September 10, 1992 for the limited purpose of being removed as Solicitor of record. Ron Cohen, Stephen Waisberg and Neil Perrier appeared on behalf of the Law Society from time to time.

BACKGROUND

The circumstances of Mr. Graham reflect a personal tragedy of immense proportions, the consequences of which have been to leave Mr. Graham in a position where he was in the view of the Committee, at the time of the last hearing, incapable of practicing law. The circumstances are unique. This uniqueness requires a degree of sensitivity to understand the circumstances in which the Solicitor has found himself, to address the concerns of the public and in particular those members of the public who were formerly represented by Mr. Graham, and yet show compassion and understanding.

Thursday, 26th May, 1994

A detailed summary of the procedural aspects of this case will follow. However, it is important to keep in mind some of the key events in the circumstances of the Solicitor.

As will be referred to below, the Solicitor indicated at the hearing on July 23, 1991 that by the late 1980's, he had come to realize that he was not conscientious enough as a record keeper to be a sole practitioner. In other words, he had recognized that an administrative ability was lacking in him. The absence of that administrative ability combined with the Solicitor's personal tragedies has led to the many failings which ensued.

On June 1989, the only child of the Solicitor and his wife (a son) was killed in a car accident. According to the Solicitor, he "gave up" for about one and a half years after the death of his son. Unfortunately, his circumstances did not improve in 1990. By the spring of 1991, he became "convinced" that he could again enjoy the practice of law.

In August of 1991, a boy who had been a classmate of his son was killed in an auto accident in virtually identical circumstances in a location not far from the accident location in which his son died. The Solicitor was greatly affected by these circumstances and recognized the negative affects on him of attending at the funeral.

By the time this tragedy occurred in August 1991, the Solicitor had accepted employment and was, according to his submissions on July 23, 1991 successfully reintegrating as in-house counsel.

The effects of the death of the classmate were significant to the Solicitor. To compound his tragedy, on November 29, 1991 he was sleeping in his home in Mississauga and was awakened by a fire from which he was able to escape uninjured but which caused significant damaged to his home. His wife was not in the home on that occasion.

It took many months for the Solicitor and his wife to repair the home to make it habitable and in the meantime, temporary accommodation was arranged.

As a result of a previous discipline matter (about which more will be said below), Convocation made an order on April 25, 1991 that the Solicitor would be suspended on September 1, 1991 unless he filed his Form 2/3 for the previous fiscal year by that date. He failed to do so. The Solicitor has been under suspension from the previous discipline matter since September 1, 1991.

The hearing of this matter has taken place on many different occasions as enumerated above. The reasons for the hearing by installments will be detailed as follows.

November 27, 1990 - Complaint D191/90

On this first appearance, the matter was adjourned to December 11, 1990 to set a date for hearing.

December 11, 1990 - Complaint D191/90

On this occasion, on consent the matter was adjourned to March 19, 1991 to proceed.

March 19, 1991 - Complaints D191/90 and D237/90

By this point, two complaints have been served. The matter was adjourned to proceed peremptorily on May 14, 1991.

April 25, 1991

As indicated above, on this date, Convocation received a report of a committee on an unrelated complaint. The tragic circumstances of the Solicitor were taken into consideration by Convocation and as a result, the Solicitor was given until September 1, 1991 to file his Form 2/3 for the previous fiscal year failing which an indefinite suspension would apply.

May 14, 1991 - Complaints D191/90, 237/90 and D35/91

By this point, the third complaint had been served. All matters were adjourned to proceed peremptorily on July 23, 1991.

July 23, 1991 - Complaints D191/90, D237/90 and D35/91

On this occasion, the Committee began the process of dealing with the outstanding complaints. An agreed statement of facts with respect to the three complaints was received. All particulars were admitted. A finding of professional misconduct was made with respect to all of the particulars with the exception only of paragraph 2.(b) in D191/90.

The Committee was very impressed by the insight of the Solicitor. It was at this point that he indicated that he had come to realize prior to the death of his son that he was not conscientious as a record keeper and that a career as a sole practitioner was probably not appropriate. He also indicated that prior to the death of his son, he had been depressed about referral expectations not materializing. He indicated the effect on him of the death of his only son and described himself as having given up for one and a half years after the death to find only that 1990 brought worsened circumstances to him.

On July 23, 1991, the Solicitor reported that he had successfully obtained employment as in-house counsel for a corporation where the person who hired him had been involved in sales in vacation time shares and was participating in various litigation. He was pleased to report that he was able to do the advocacy work which he enjoyed without the administrative work. He did however indicate that he was contemplating the prospects of a potential bankruptcy as a result of creditor problems materializing following the death of his son.

The Solicitor reported that he had been involved in counselling with Mary MacPherson, a grief therapist, and that he intended to continue.

The Solicitor provided a letter from his employer which was marked Exhibit 6 which reflected on the terms of the Solicitor's employment and appeared to positively describe the status quo. The text of the brief letter is as follows:

We began employing Cal Graham on a part-time basis in the fall of 1990 and on a full-time basis since January 1991.

We have approximately sixty collections in litigation and several matters pending with government authorities. Mr. Graham has become familiar with a very complicated fact situation and set of issues and he has become extremely important to the continued survival of our Business.

Any loss of his services would work a real hardship on our business.

To quote the Solicitor on this occasion, he reported to the Committee that he "thought that he had turned things around".

The Committee made the findings of professional misconduct with respect to the first three complaints accepting only paragraph 2.(b) in D191/90. The Law Society made submissions seeking a reprimand in Convocation.

Thursday, 26th May, 1994

The Solicitor, on the other hand, asked that the reprimand be made but that it be made in Committee. The primary reason for such request was that his wife is also a lawyer who is well regarded. He had grave concern for her feelings and wanted to shield her from the embarrassment of his public reprimand.

The Committee was very impressed with the Solicitor's insights and outlook. However, in view of the two-year period since the initial tragedy had occurred, the Committee was anxious to determine whether the recent recovery would continue.

Toward that end, the Committee adjourned to November 29, 1991 for purposes of reporting on penalty with the exhortation to the Solicitor that he should make continued efforts to improve in the meantime. The Solicitor signed an undertaking which was made Exhibit 5, the text of which is as follows:

- (a) to reply promptly to all communications from the Law Society and from other lawyers; in the case of written communications, within one week of receipt of such communications, and, in the case of telephone communications, within three business days of receipt;
- (b) to continue in counselling or therapy with Mary MacPherson or such other therapist as recommended by her, for such period as the therapist recommends;
- (c) to not engage in the private practice of law but to restrict my practice to that of in-house counsel, until such time as I am relieved of this condition by the Senior counsel/Discipline or by his or her designate.

I acknowledge that any breach of this undertaking may lead to further discipline proceedings, and I hereby consent to this document being introduced in evidence at those proceedings. I have retained an executed copy of this undertaking.

August 1991

As indicated above, the classmate of the Solicitor's son was killed in an auto accident.

September 1, 1991

As indicated above, the Solicitor was suspended by Convocation for not filing his Forms 2/3.

November 10, 1991

The Solicitor was awakened in his home by fire and escaped without injury.

November 29, 1991 - Complaint D191/90, D237/90 and D35/91

While the date had been scheduled four months earlier, the Law Society sought an adjournment. The Solicitor did not attend on November 29, 1991 and it became apparent some months later that the fire had affected his ability to cope.

January 9, 1992 - Complaints D191/90, D237/90 and D35/91

This was the date which the Committee had adjourned on November 29, 1991. Mr. Waisberg appeared for the Law Society. The Solicitor did not appear. Correspondence between the Law Society and the Solicitor was produced and marked Exhibit 7. Three letters were forwarded to the Solicitor all in late November 1991. However, the correspondence was not consistent. The letters variously reflected that the matters would proceed on January 24, 1992, in January or

February of 1992, and on January 9, 1992. This created a most unfortunate situation. It was apparent that the Solicitor had not received the second communication ("January or February 1992") since the envelopes were returned. It was not certain whether he had received the correspondence reflecting January 9 or January 24.

In the event the Solicitor had received notification of the January 24th date and would attend on that occasion, the matter was adjourned to Friday, January 24. Counsel for the Law Society were instructed by the Committee to forthwith serve the Solicitor with notice strictly in accordance with Section 33(13) of the Law Society Act. It was apparent on January 9, that a member of the panel would not be available on January 24, 1992 but that it was important to sustain that date in the event the Solicitor did receive notice and intended to attend. In the event the matter could not proceed on January 24, 1992, the endorsement specified that the matter should be adjourned to February 28, 1992 and that counsel should, forthwith after the aborted January 24th date, forthwith serve the Solicitor with notice of the February 28, 1992 attendance strictly in accordance with Section 33(13) of the Law Society Act.

January 24, 1992 - D191/90, D237/90 and D35/91

The Solicitor did not appear on January 24, 1992. Consequently, the matter was further adjourned to February 28, 1992 as was indicated in the January 9th endorsement.

February 28, 1992 - D191/90, D237/90 and D35/91

The Solicitor attended on this occasion. He was represented by Mr. R. Burke. The Society was represented by Mr. S. Waisberg. Mr. Burke asked for an adjournment in view of his retainer approximately ten days earlier. Mr. Burke indicated that his client was not practicing law; however, he was not "confident" that he could take instructions from his client. He indicated that his client would give an undertaking that he would not practice pending the adjournment.

Mr. Waisberg approximately observed that it appeared that the Solicitor's undertaking given on July 23, 1991 had been breached insofar as his failure to respond, and Mr. Waisberg queried whether the Committee should accept another undertaking under such circumstances.

Mr. Waisberg also reported that two further authorizations had been made by the Discipline Committee and that he expected them to be formalized in a complaint and served on the Solicitor.

In the end result, the matter was adjourned to May 28, 1992 on the following conditions:

- (a) If the two additional complaints were formalized and served by May 1, 1992, they would be dealt with on May 28, 1992.
- (b) Ms. Goodfield had been much involved in the matters and was expecting a child in the first few days of June 1992. If she was unavailable on May 28, 1992, her evidence would be received by affidavit.
- (c) The Solicitor's previous undertaking of July 23, 1991 was modified to require an undertaking from him as follows:
 - (i) to provide full and complete replies to all communications from the Law Society;
 - (ii) to not engage in the practice of law pending conclusion of the existing complaints; and

Thursday, 26th May, 1994

- (iii) to provide the Law Society with information as to a change of address within forty-eight hours of change.

While Mr. Waisberg had pointed out that there was no psychiatric evidence, the Committee closed the hearing on that occasion by indicating that it was not in a position to make a requirement that psychiatric evidence be provided but that it would be helpful if it were available on the date of the hearing.

The hearing was adjourned to May 28, 1992 peremptorily against the Solicitor.

May 28, 1992 - Complaints D191/90, D237/90, D35/91, D75/92 and D81/92

Mr. Burke attended on this occasion without his client. He provided a brief letter from Dr. Robert K. Saito, which was marked as Exhibit 11, the text of which is as follows:

May 27, 1992 - To Whom It May Concern

I have been Mr. Graham's physician for thirteen years.

He is suffering from:

- (a) severe depression, stress related;
- (b) chest pains, origin to be determined.

I examined the patient today and feel he is not able to attend tomorrow's meeting due to the above medical conditions.

I have consulted our psychiatric advisor Dr. M. Kodri and we have made the appropriate referral to a psychiatrist. He will be followed regularly by a psychiatrist for the next three months after which a prognosis can be made.

Yours truly,

Robert K. Saito M.D.

Mr. Burke asked for a further adjournment in order that he could get more information.

Complaints D75/92 and D81/92 had been formalized as complaints but had not been served by May 1, 1992 as had been expected on the occasion of the hearing on February 28, 1992.

The matters were all adjourned to June 26, 1992 for counsel only to attend. On that occasion, Mr. Burke agreed to provide a report to the Committee from a physician in writing as to the status of the health of the Solicitor.

June 26, 1992 - Complaints D191/90, D237/90, D35/91, D75/92, D81/92

On this occasion, Norman Scott attended on behalf of Mr. Burke and made a request that Mr. Burke might be removed as Solicitor of record. In view of the responsibility imposed upon and accepted by Mr. Burke on the May 28, 1992 attendance, the Committee was unwilling to allow Mr. Burke to withdraw based on brief submissions by Norman Scott. Accordingly, the matters were all adjourned to September 10, 1992 to enable Mr. Burke to attend and inform the Committee as to what steps he had taken with respect to obtaining a psychiatric report (as he had agreed to do) and on that occasion to speak to his own removal as counsel of record for the Solicitor.

September 10, 1992 - Complaints D191/90, D237/90, D35/91, D75/92, D81/92, D138/92

The Solicitor attended on this occasion. Mr. Burke was present but only briefly while the Solicitor specifically indicated that he no longer wished to be represented by Mr. Burke at which time, Mr. Burke was permitted to withdraw.

Unfortunately, one of the members of the Committee was unavoidably detained in another trial. Mr. Graham was present and ready to proceed, but the hearing could not proceed without a full Committee.

On September 10, Complaint D138/92 was served on Mr. Graham.

The Committee was advised that agreed statement of fact had been assembled with respect to complaints D75/92 and D81/92.

Counsel for the Law Society indicated that if the matter had proceeded on that occasion, a joint submission would have been made on behalf of the Law Society and the Solicitor that there should be an indefinite suspension until all outstanding matters reflected in the complaints have been addressed by the Solicitor and until the Solicitor satisfied a Section 35 Committee that he was capable of practicing law.

In the absence of a full Committee, all matters were adjourned to October 26, 1992.

October 26, 1992 - Complaints D191/90, D237/90, D35/91, D75/92, D81/92 and D138/92

The Committee received agreed statements of fact with respect to complaints D75/92, D81/92 and D138/92. The Solicitor admitted that the particulars constituted professional misconduct. Findings of professional misconduct on complaints D75/92, D81/92 and D138/92 were made.

Counsel for the Law Society pointed out that the particulars alleged against the Solicitor in the accumulated six formal complaints included failure to reply, failure to follow instructions from clients and breaches of undertakings both to the Law Society and other counsel. Counsel for the Law Society indicated that, but for the tragic personal circumstances of the Solicitor, consideration should be given to a conclusion that the Solicitor was ungovernable. However, in view of those tragic personal circumstances and the difficulties encountered by the Solicitor in overcoming the effects of those tragedies, counsel for the Law Society reported that there was a joint submission on penalty namely an indefinite suspension until all outstanding complaints were answered by the Solicitor and until the Solicitor could satisfy a Section 35 Committee that he is fit to return to practice. Counsel for the Law Society reported that while there had been occasionally some difficulties in communicating with the Solicitor, that he was generally very cooperative in dealing with the Law Society and specifically in arriving at agreed statements of fact.

On this occasion, there was some concern that the Solicitor may have been practicing in September 1991 following the suspension by Convocation effective September 1, 1991 notwithstanding his undertaking not to practice except as in-house counsel. While it was not by sworn evidence, the explanation given by the Solicitor was that documentation was generated by his former employer (such as backing pages on motion records) which reflected his name after September 1, 1991 notwithstanding that he had ceased practicing as required by the Convocation suspension. The Committee was satisfied with his explanation. The allegation, however, remained that the Solicitor had failed to respond to the Law Society when complaints were made that he had been practicing notwithstanding his suspension.

Thursday, 26th May, 1994

The Solicitor acknowledged on October 26, 1992 that he had a need for psychiatric assistance but had not followed up on various psychiatric referrals. He indicated that he knew that he dealt with problems "by running away" from those very problems and described it as a "catch 22".

The Committee expressed a concern that in order for the Committee to be receptive to the joint submission that it would be helpful if a medical report were provided. For that purpose, the matter was further adjourned to November 26, 1992.

November 26, 1992 - Complaints D191/90, D237/90, D35/91, D75/92, D81/92, D138/92

The Solicitor did not attend on this occasion. When the hearing began at 4:30 p.m., Mr. Perrier reported that the Solicitor had contacted him that afternoon to advise that he had a severe case of the flu and could not attend. He also indicated that he had just made an appointment to see a Dr. Colthard in the week following. Mr. Perrier reported that the Solicitor had requested an adjournment to call character evidence if the Committee declined to accept the joint submission which had been made on October 26, 1992.

In view of the expectations which were clearly communicated to the Solicitor on October 26, 1992 that the Committee intended to proceed one way or the other on November 26, 1992, the Committee elected to proceed in the absence of the Solicitor. The Committee was mindful of the fact that on the previous occasion on October 26, 1992 when the Solicitor was in attendance, that the Solicitor indicated his acquiescence in the joint submission.

For reasons which will be elaborated upon below in the penalty portion of this report, the Committee unanimously agreed that it would recommend to Convocation the Solicitor should be suspended indefinitely until a Committee appointed by Convocation is satisfied that:

- (a) the Solicitor is capable of practicing law; and
- (b) the Solicitor has responded to all issues in all complaints before this Committee.

April 16, 1993

In view of the protracted nature of these proceedings, the Committee concluded that it was necessary to have a transcript of the various attendances when Mr. Graham had been present. Those transcripts became available on April 16, 1993.

This Report to Convocation - February 1994

In the intervening period of time, other responsibilities of the chair of the Committee (and drafter of the report) were of such preoccupation as to prevent completion of this report.

DECISION

The following particulars of professional misconduct were admitted and found to have been established:

Complaint D191/90

- 2.(a) He has failed to provide a reply to the Society regarding a complaint by Jill Purdy despite letters dated June 11, 1990 and August 31, 1990 and a telephone request on August 7, 1990;

- (c) He has failed to provide a reply to the Society regarding a complaint by Roy Wise, despite letters dated July 18, 1990 and September 7, 1990 and a telephone request on August 7, 1990;
- (d) He has failed to release a file to another Solicitor upon termination of his retainer, although provided with a duly executed direction.

Complaint D237/90

- 2.(a) He has failed to provide a reply to the Society regarding a complaint by Karl Radix despite letters dated March 2, 1990, March 23, 1990 and November 21, 1990, and telephone requests on March 23, 1990 and May 1, 1990;
- (b) He has failed to provide a reply to the Society regarding a complaint by Richard Furlong; LL.B., despite letters dated August 13, 1990 and November 19, 1990;
- (c) He has failed to honour a financial obligation to a fellow Solicitor.

Complaint D35/91

- 2.(a) He has failed to provide a reply to the Society regarding a complaint by Caroline Henry, despite letters dated December 13, 1990, January 15, 1990 and January 31, 1991.

Complaint D75/92

- 2.(a) He failed to provide a reply to the Law Society with respect to the ongoing investigation of a complaint by Karl Radix, despite letters dated July 18, 1991 and August 20, 1991 and telephone calls placed on August 14, 1991 and August 16, 1991.
- (b) He breached his undertaking to the Law Society, dated July 23, 1991, to reply to communications from the Law Society within one week after receipt of such communications with respect to an ongoing investigation of a complaint by Karl Radix.
- (c) He failed to serve his client Karl Radix, in a conscientious, diligent and efficient manner in that:
 - (i) he failed to prosecute Mr. Radix's divorce in a timely manner;
 - (ii) he failed to respond to Mr. Radix's telephone calls;
 - (iii) he misled Mr. Radix as to the status of his divorce.
- (d) He failed to provide a reply to the Law Society regarding a complaint by Gerard Lanthier despite letters dated December 3, 1991 and January 27, 1992, and telephone messages left on December 30, 1991 and January 6, 1991.
- (e) Upon termination of his retainer by the client, Gerard Lanthier on November 16, 1991, he failed to:
 - (i) deliver to the client Gerard Lanthier, all papers and property to which he was entitled;

- (ii) give the client, Gerard Lanthier, all information which may be required in connection with his case;
- (iii) account for all funds of the client, Gerard Lanthier, then held or previously dealt with, including the refunding of any remuneration not earned during the employment;
- (iv) promptly render an account to the client, Gerard Lanthier;
- (f) He breached his undertaking to the Law Society, dated July 23, 1991, to reply to communications from the Law Society within one week after receipt of such communications with respect a complaint by Gerard Lanthier.

Complaint D81/92

- 2.(a) He failed to provide the Society within a reasonable time a reply to the complaint by his client, William Taylor, despite letters on July 8, 1991 and August 14, 1991 and telephone calls on August 2, 1991 and August 7, 1991;
- (b) He has failed to provide a reply to the Society regarding a complaint by Boguslaw Drabiszczak, Mike Grzelak, Leszek Kociuba, and Anna Piedadel, despite letters dated October 11, 1991 and November 4, 1991 and telephone requests on October 29, 1991 and November 1, 1991;
- (c) He has breached his Undertaking to the Society dated July 23, 1991 in connection with particulars 2(a) and (b) above, by failing to promptly reply to written and verbal communications from the Society within one week and three business days respectively.

Complaint D138/92

- 2(a) He failed to provide a reply to the Society, regarding a complaint filed by Paul Scovil, L.L.B., despite letters dated May 1, 1992 and June 4, 1992, and telephone messages of May 22, 1992 and May 29, 1992;
- (b) He has breached an undertaking dated July 23, 1991, wherein he agreed to provide prompt and meaningful replies to future communications received from the Law Society, with regard to a complaint by Paul Scovil, L.L.B.

Evidence

The evidence before the Committee contained the following Agreed Statements of Facts:

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D191/90, D237/90 and D35/91 and is prepared to proceed with a hearing of these matters on July 23, 1991.

II. IN PUBLIC/IN CAMERA

2. The parties agreed that these matters should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D191/90, D237/90 and D35/91, admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1979 and is in-house counsel for a corporation in Downsvew.

Complaint D191/90 - Particulars 2(a) and (b) - Purdy Matter

5. The Society first received correspondence from Gordon Purdy who, by letter dated April 26, 1989, advised that his solicitor, Yolanta Lewis, had sent a cheque in the amount of \$1,500 to the Solicitor as a retainer for the Solicitor who was acting in a matrimonial matter on behalf of Mr. Purdy's wife, Jill Purdy. Mr. Purdy advised that neither he nor Ms. Lewis had been successful in contacting the Solicitor with respect to the \$1,500. Mr. Purdy advised that he and his wife did not wish to pursue a divorce.

6. Several letters were written by the Law Society to the Solicitor and, on November 14, 1989, a Law Society staff lawyer met with the Solicitor to discuss several matters. At that meeting the Solicitor agreed to provide a response in writing concerning this matter within seven days. By letter dated November 24, 1989 the Solicitor provided to the Law Society a written response. With that letter the Solicitor provided a copy of a letter dated December 14, 1988 which he advised had been sent to Mrs. Purdy.

7. By letter dated January 4, 1990, Jill Purdy wrote to the Society advising that she and her husband did not wish to continue with their divorce action and requesting that the Solicitor submit his statement of account and return the balance of the \$1,500 provided to him in September, 1988. By letter dated February 1, 1990, the Solicitor was advised that, subject to a review by a Complaints Commissioner, the file would be closed.

8. By letter to the Solicitor dated June 11, 1990 the Society advised the Solicitor that, notwithstanding the correspondence from the Society of February 1, 1990 which advised of the Society's intention to close the file, the issue of the account had to be addressed. The letter requested that the Solicitor provide to the Society a copy of his account to Mrs. Purdy within a period of three weeks.

9. No reply having been received, on August 7, 1990 a Society staff member telephoned the Solicitor who advised that the Society could expect a response by August 8, 1990.

10. No response having been received, a registered letter dated August 31, 1990 was sent by the Society to the Solicitor. That letter drew the Solicitor's attention to the obligation upon lawyers to respond promptly to communications from the Society and that failure to do so could lead to disciplinary action being taken. The letter advised that if no response in writing were received within a period of seven days the matter would be referred for disciplinary proceedings.

11. The Solicitor did not respond to the correspondence from the Society by the date of issuance of Complaint D191/90 (October 25, 1990) nor did he request an extension of time nor provide an explanation for his failure to reply.

12. By letter dated May 10, 1991, the Solicitor replied to the Society. A copy of the Solicitor's account to Mrs. Purdy has been received by the Society.

Particulars 2(c) and (d) - Wise Matter

13. The complainant, Roy Wise, a solicitor, wrote to the Law Society by letter dated October 27, 1989 advising that a client had previously retained the Solicitor on a construction lien matter. Mr. Wise complained about difficulties in contacting the Solicitor and of his inability and that of his client to retrieve the client's file, despite a direction executed by the client to the Solicitor authorizing and directing him to deliver the file to Mr. Wise.

14. The Solicitor met with a Law Society staff lawyer on November 14, 1989 to discuss this and several other matters. During the meeting the Solicitor was provided with a copy of the complainant's letter to which he agreed to respond in writing within a period of seven days. He also agreed to transfer the file and to advise the insurer of a potential claim.

15. By letter dated November 17, 1989 the Society staff lawyer wrote to the Solicitor confirming the discussion and requesting the Solicitor's written reply within a period of seven days. By letter to the Society dated November 24, 1989, the Solicitor advised that he was delivering the file to Mr. Wise.

16. By letter to the Law Society dated February 13, 1990 Mr. Wise advised that he had not as yet received the file from the Solicitor.

17. By letter to the Solicitor dated July 18, 1990, the Society wrote to the Solicitor about the status of the matter, noting the meeting with the Society's staff lawyer on November 14, 1989 and the Solicitor's letter of November 24, 1989 in which he had advised that the file was being delivered to Mr. Wise. A written response was requested within two weeks.

18. By letter to the Society dated August 17, 1990, Mr. Wise advised that the file still was not in his possession.

19. On August 7, 1990, a Society staff member had a telephone discussion with the Solicitor who advised that he would respond by August 8, 1990.

20. No response having been received, a registered letter dated September 7, 1990 was sent to the Solicitor. That letter drew the Solicitor's attention to the obligation upon lawyers to respond promptly to communications from the Society and that failure to do so could lead to disciplinary action being taken. The letter advised that if no response in writing were received within a period of seven days the matter would be referred for disciplinary proceedings.

21. The Solicitor did not respond to the correspondence from the Society by the date of issuance of Complaint D191/90 (October 25, 1990) nor did he request an extension of time nor provide an explanation for his failure to reply.

22. By letter dated May 10, 1991, the Solicitor replied to the Society.

Complaint D237/90 - Particular 2(a) - Radix Matter

23. The complainant, Karl Radix, wrote to the Law Society by letter dated February 10, 1990 advising that the Solicitor had been retained in relation to a matrimonial matter. Mr. Radix complained of difficulties in contacting the Solicitor, about the Solicitor's inactivity in the matter, and that, in his view, the Solicitor had not accomplished anything for him despite his retainer.

24. The Law Society wrote to the Solicitor by letter dated March 2, 1990 requesting a response in writing within a period of two weeks.

25. On March 23, 1990 a staff member employed by the Society spoke to the Solicitor who advised that he had not received the letter dated March 2, 1990. The Society forwarded a copy of that letter to the Solicitor by courier with a covering letter dated March 23, 1990.

26. On May 1, 1990 a staff member employed by the Society called the Solicitor to enquire about when the Society could expect a reply. A message was left but the Solicitor did not return the call.

27. No reply having been received to the message or the earlier correspondence, on November 21, 1990 a registered letter was sent to the Solicitor. That letter drew the Solicitor's attention to the obligation upon lawyers to respond promptly to communications from the Society and that failure to do so could lead to disciplinary action being taken. The letter advised that if no response in writing were received within a period of seven days the matter would be referred for disciplinary proceedings.

28. The Solicitor did not respond to the correspondence from the Society by the date of issuance of Complaint D237/90 (December 11, 1990) nor did he request an extension of time nor provide an explanation for his failure to reply.

29. By letter dated May 10, 1991, the Solicitor replied to the Society.

Particulars 2(b) and (c) - Furlong Matter

30. The complainant, Richard L. Furlong, a solicitor, by letter dated July 18, 1990, complained to the Law Society of the Solicitor's failure to pay an outstanding account. The correspondence disclosed that in October, 1988 the Solicitor had requested that the complainant file a Dispute in the Provincial Court (Family Division) as it then was, in Milton, Ontario.

31. The complainant obliged and rendered an account to the Solicitor dated October 18, 1990 in the amount of \$75.00.

32. The complainant stated in his letter of complaint that, despite four letters to the Solicitor, the account remained unpaid and the Solicitor had never expressed any dissatisfaction with the service performed nor objected to the amount of the account.

33. By letter dated August 13, 1990 the Society wrote to the Solicitor and requested a reply in writing within a period of two weeks.

34. No reply having been received, a staff member employed by the Society attempted to contact the Solicitor on October 17, 18, and 24, 1990. The Solicitor's telephone was not answered.

35. A registered letter dated November 19, 1990 was sent to the Solicitor. That letter drew the Solicitor's attention to the obligation upon lawyers to respond promptly to communications from the Society and that failure to do so could lead to disciplinary action being taken. The letter advised that if no response in writing were received within a period of seven days the matter would be referred for disciplinary proceedings.

36. The Solicitor did not respond to the correspondence from the Society by the date of issuance of Complaint D237/90 (December 11, 1990) nor did he request an extension of time nor provide an explanation for his failure to reply.

37. By letter dated May 10, 1991, the Solicitor replied to the Society.

38. On July 22, 1991 the Solicitor delivered a cheque to the Society payable to Richard Furlong in the amount of \$100.00.

Complaint D35/91 - Henry Matter

39. By letter dated October 11, 1990, Toni Blackman, a counsellor at Women's Habitat, wrote to the Law Society on behalf of Caroline Henry. Ms. Blackman advised that Ms. Henry had retained the services of the Solicitor in a matrimonial matter but had experienced certain difficulties in terms of meeting the Solicitor in order to obtain some documents and part of the retainer that she believed was to be returned to her.

40. By letter dated December 13, 1990 the Law Society wrote to the Solicitor and requested a reply in writing within a period of two weeks.

41. A staff member employed by the Law Society attempted to reach the Solicitor by telephone on January 8, 9, 10 and 11, 1991. There was no answer.

42. A second (undated) letter was sent to the Solicitor on or about January 31, 1991 to the address shown on the Law Society's records. That letter was returned unclaimed.

43. Another registered letter dated January 31, 1991 was sent to the same address. That letter was also returned unclaimed.

44. The Solicitor did not respond to the correspondence from the Society by the date of issuance of Complaint D35/91 (March 14, 1991) nor did he request an extension of time nor provide an explanation for his failure to reply.

45. By letter dated May 10, 1991, the Solicitor replied to the Society.

Past Discipline

46. On March 1, 1988 the Solicitor was Reprimanded in Committee and ordered to pay the costs of the Society's investigation fixed in the amount of \$1,000 for his failure to maintain proper books and records and to make his annual filings.

47. On June 19, 1990 the Solicitor was found guilty of professional misconduct for his failure to file Forms 2 and 3 for the years ending February 28, 1988 and February 28, 1989. On April 25, 1991 Convocation ordered that if the Solicitor's Forms 2 and 3 are not filed and his books and records are not in order in the judgment of the Secretary of the Society by September 1, 1991, then the Solicitor at that date be suspended until those requirements are satisfied.

DATED at Toronto this 22nd day of July, 1991".

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D75/92 and is prepared to proceed with a hearing of this matter on September 10, 1992.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D75/92 and admits the particulars contained therein. The Solicitor admits that the particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1979 and has been suspended from the practice of law since September 1, 1991 pursuant to an Order of Convocation, dated April 25, 1991, which states:

CONVOCATION HEREBY ORDERS that the rights and privileges of the said Calum Donald Graham be suspended on September 1st, 1991, if the Solicitor's Forms 2/3 are not filed and his books and records are not in order in the judgment of the Secretary of the Law Society. The suspension to continue until the Solicitor's Books and Records are in a form satisfactory to the Secretary.

Complaint 2(a) - Failure to reply to the Law Society regarding the ongoing investigation of a complaint by Karl Radix.

5. The complainant, Karl Radix, wrote to the Law Society by letter dated February 10, 1990 advising that the Solicitor had been retained in relation to a matrimonial matter. Mr. Radix complained of difficulties in contacting the Solicitor, about the Solicitor's inactivity in the matter, and that, in his view, the Solicitor had not accomplished anything for him despite his retainer.

6. A formal complaint D237/90 was issued against the Solicitor on December 11, 1990 with respect to his failure to reply to the Law Society regarding the complaint by Karl Radix, despite letters dated March 2, 1990, March 23, 1990, and November 21, 1990, and telephone requests on March 23, 1990 and May 1, 1990.

7. By letter dated May 10, 1991, the Solicitor advised the Law Society that he was handling Mr. Radix's file on behalf of another solicitor named David Proctor, with whom he shared office space. The Solicitor believed that the file had been left with Mr. Proctor when the Solicitor ceased sharing office space with Mr. Proctor. Mr. Proctor requested that the Solicitor provide him with the file in the fall of 1989. The Solicitor had been unable to locate the file and had assumed that Mr. Proctor, prior to the complaint being filed by Mr. Radix, had continued to handle the file by using the pleadings in the Court file. The Solicitor further apologized to Mr. Radix and stated "if there is anything I can do by way of recompense I will endeavour to do so."

8. By letter dated July 18, 1991, the Law Society advised the Solicitor that Mr. Radix's complaint had been reviewed with the Solicitor's former counsel, Roger Bourque, and his counsel had been provided with a copy of the letter of complaint. The Solicitor was provided with another copy of Mr. Radix's letter of complaint and requested to either personally report to the Law Society or have Mr. Bourque respond on his behalf to Mr. Radix's concern regarding the Solicitor's delay while acting for Mr. Radix. The Solicitor was requested to provide his reply with two weeks from the date of this letter. No reply was received.

9. On July 24, 1991, the Solicitor appeared before the Discipline Committee and admitted professional misconduct with respect to Complaints D191/90, D237/90 and D35/91.

10. A Law Society staff employee called the Solicitor by telephone on August 14, 1991 and August 16, 1991. The telephone was not answered.

11. By registered mail dated August 20, 1991, the Law Society reminded the Solicitor of his obligation to reply to the Law Society pursuant to Rule 13, Commentary 3. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

Complaint 2b) - Breach of Undertaking with respect to an ongoing investigation of a complaint by Karl Radix

12. The Solicitor provided the Law Society with a written undertaking dated July 23, 1991 which stated:

1. To reply to all communications from the Law Society and from other lawyers; in the case of written communications, within one week of receipt of such communications and, in the case of telephone communications, within three business days of receipt.

13. The Solicitor did not reply to a letter from the Law Society dated August 20, 1991 with respect to the ongoing investigation regarding a complaint by Karl Radix.

Complaint 2c) - Failure to Serve his client, Karl Radix, in a conscientious, diligent and efficient manner in that:

- (i) He failed to prosecute Mr. Radix's divorce in a timely manner;
- (ii) He failed to respond to Mr. Radix's telephone calls;
- (iii) He misled Mr. Radix as to the status of his divorce.

14. By letter dated February 10, 1990, Karl Radix advised the Law Society that he had retained a solicitor named David Proctor during the month of February, 1986, and paid a monetary retainer of \$500.00 in relation to a matrimonial matter.

15. Sometime in the spring of 1986, Mr. Proctor recommended to Mr. Radix that the file be turned over to his associate, Calum Graham. Mr. Radix agreed to Mr. Proctor's recommendation.

16. During the Summer of 1986, Mr. Radix met with the Solicitor. The Solicitor requested further information and a further financial statement. The Solicitor assured Mr. Radix that the matter was going well and that he had spoken to Mrs. Radix's counsel on numerous occasions.

17. In May, 1987, Mr. Radix received an account from the Solicitor, dated May 15, 1987 in the amount of \$2,027.50. The \$500.00 retainer paid to Mr. Proctor was deducted from this account and Mr. Radix paid the balance of \$1,527.50 to the Solicitor on May 16, 1987.

18. In the summer or fall of 1987 both Mr. and Mrs. Radix were examined at discoveries.

19. Subsequent to the discoveries taking place, Mr. Radix attempted to contact the Solicitor by telephone. Mr. Radix was unable to reach him.

20. In late 1988, Mrs. Radix wrote to Mr. Radix asking him why he was not interested in a divorce as she had not heard from her lawyer in over a year.

21. Mr. Radix attempted to contact the Solicitor, however, the Solicitor had closed his office.

22. Mr. Radix contacted Mr. Proctor who spoke with the Solicitor by telephone in early 1989. The Solicitor requested that Mr. Radix attend at his office to sign an affidavit as the matter was going to be heard in court.

23. Mr. Radix attended at the Solicitor's office however, the Solicitor failed to keep the appointment. Mr. Radix attended at the Solicitor's office on a later date. His signature was commissioned by an associate of the Solicitor's. The Solicitor was to call Mr. Radix after the court date. As Mr. Radix did not hear from the Solicitor he attempted to contact the Solicitor by telephone. Mr. Radix was unable to reach the Solicitor by telephone.

24. On November 14, 1989, Mr. Radix attended at Mr. Proctor's office, at the request of the Solicitor, to execute a further affidavit. At this meeting the Solicitor advised Mr. Radix that the Court office had requested he provide further information on the status of his son and therefore, a further affidavit was required before the Motion could be set down. Mr. Radix attended on the Solicitor at Mr. proctor's office on Friday, December 1, 1989 and signed another affidavit. The Solicitor informed Mr. Radix that the affidavit would be served and filed with the Court on Monday or Tuesday of the following week and that the matter would soon be finalized. The Solicitor stated that he would call Mr. Radix after the court date. Mr. Radix did not receive a call from the Solicitor.

25. Just prior to Christmas 1989, Mr. Radix spoke to the Solicitor at his home. The Solicitor advised that he would attend at the Court the following week to finalize the matter and that he would call him afterwards. Mr. Radix did not receive a call from the Solicitor.

26. On numerous occasions Mr. Radix left telephone messages on the Solicitor's answering machine at his home and with Mr. Proctor's office. The calls were not returned.

27. On January 5, 1990 Mr. Radix spoke with the Solicitor on the telephone. The Solicitor advised Mr. Radix that things were being finalized and that he would call Mr. Radix the following week. Mr. Radix did not receive a call from the Solicitor the following week.

28. On January 27, 1990 Mr. Radix attended at the Supreme Court and found that there had been no further action on his matter since 1987. The last document filed with the court was a financial statement dated March 27, 1987.

29. By letter dated February 10, 1990, Mr. Radix advised the Law Society of the aforementioned difficulties with the Solicitor.

30. By letter dated May 10, 1991, the Solicitor advised the Law Society that he was handling Mr. Radix's file on behalf of another solicitor named David Proctor, with whom he shared office space. The Solicitor believed that the file had been left with Mr. Proctor when he left his offices. He further advised that Mr. Proctor requested the file from the Solicitor in the fall of 1989 so that Mr. Proctor could complete it. The Solicitor had been unable to locate the file and had assumed that Mr. Proctor, prior to the complaint being filed by Mr. Radix, had continued to handle the file by using the Pleadings in the court file. The Solicitor further apologized in his letter to the Law Society to Mr. Radix and stated "if there is anything I can do by way of recompense I will endeavour to do so."

31. On February 26, 1990, Mr. Radix telephoned Mr. Proctor to seek his assistance in contacting the Solicitor. Mr. Proctor advised Mr. Radix that he would contact the Solicitor's spouse to get the solicitor to call Mr. Radix. At no time during this conversation did Mr. Proctor mention to Mr. Radix that he had requested the file from the Solicitor so that Mr. Proctor could complete it.

Complaint 2e) - Upon termination of his retainer by the client, Gerard Lanthier on November 16, 1991, he failed to;

i) Deliver to the client, Gerard Lanthier, all papers and property to which he was entitled;

- ii) Give the client, Gerard Lanthier, all information which may be required in connection with his case;
- iii) Account for all funds of the client, Gerard Lanthier, then held or previously dealt with including the refunding of any remuneration not earned during the employment;
- iv) Promptly render an account to his client, Gerard Lanthier.

32. The Complainant, Gerard Lanthier, retained the Solicitor to represent him in seeking compensation from the Criminal Compensation Board as a result of injuries received in July, 1987.

33. In his letter of complaint, dated November 16, 1991, Mr. Lanthier indicated the following:

- (i) The Solicitor advised Mr. Lanthier that he would attempt to obtain for him from the Criminal Compensation Board, the maximum amount of \$10,000.00 and a pension for life.
- (ii) The Solicitor advised Mr. Lanthier that he had been granted \$3,000.00 and no pension.
- (iii) The Solicitor provided Mr. Lanthier with a cheque in the amount of \$2,700.00 and advised him that the remainder was for his persistent telephone calls.
- (iv) Mr. Lanthier received payment from the Solicitor nineteen months after compensation was awarded.

34. Mr. Lanthier takes the position that he retained the Solicitor to bring a negligence action against a restaurant in which he was injured for compensation of \$1,000,000.00. The Solicitor takes the position that he communicated to Mr. Lanthier that he would not act on his behalf until he received a retainer in the approximate sum of \$500.00. The retainer was never paid. At the time of writing his letter of complaint, dated November 16, 1991, four years had elapsed since Mr. Lanthier had requested the Solicitor seek compensation on his behalf. Mr. Lanthier had executed a medical form (direction) so that the solicitor could obtain a medical report. The Solicitor obtained a medical report from the surgeon with regards to Mr. Lanthier's operation. The Solicitor subsequently lost the report and requested Mr. Lanthier to re-execute a second medical form (direction) so that a further medical report could be obtained. The Solicitor took these steps because Mr. Lanthier was insistent on proceeding with the claim. However it is the Solicitor's position that the said retainer was required prior to commencing any legal proceedings.

35. By letter dated November 16, 1991, Mr. Lanthier advised the Law Society of the aforementioned difficulties he had encountered as a result of the Solicitor's actions being: the Solicitor's failure to account for his services regarding his Criminal Compensation Claim; the Solicitor's delay in providing payment from the Criminal Compensation Claim; the Solicitor's failure to proceed with his claim against a restaurant; and the Solicitor's failure to return his telephone calls.

36. By letter dated December 4, 1991, Mr. Lanthier directed the Solicitor to turn his files over to Mr. Frank Gabriel, a solicitor, who was attempting to assist Mr. Lanthier in obtaining his files from the Solicitor. The files were: 1) his whiplash injury case; 2) his criminal compensation case; and 3) his negligence case against a restaurant.

37. By letter dated December 12, 1991 Mr. Lanthier provided Mr. Frank A. Gabriel, a solicitor, with a Direction to accept his files from the Solicitor.

38. Mr. Lanthier has requested the Solicitor on numerous occasions to provide him with photocopies of his files. Mr. Lanthier has not received any documentation from the Solicitor.

Complaint 2d) - Failure to Reply to the Law Society regarding a complaint by Gerard Lanthier

39. The Complainant, Gerard Lanthier, first wrote to the Law Society on November 16, 1991, advising of the difficulties he had encountered in obtaining his files from the Solicitor.

40. By letter dated December 3, 1991, the Law Society provided the Solicitor with a copy of the letter of complaint and requested his comments to the same within two weeks. No reply was received.

41. By letter dated December 5, 1991, to the Law Society Mr. Lanthier provided copies of his correspondence to the Solicitor in which he requested his three files; a whiplash injury claim, a criminal compensation claim and a negligence action against a restaurant.

42. A Law Society staff employee spoke with the Solicitor's secretary on December 30, 1991. The Secretary advised that she did not know when she would hear from the Solicitor as he did not often call in or come into the office. The Solicitor had not picked up his mail or messages in quite sometime. A message was left with the Solicitor with his secretary, requesting he return the call. The call was not returned.

43. A Law Society staff employee spoke with the Solicitor's secretary on January 6, 1992. The Secretary advised that the Solicitor had not been in contact with the office. The secretary provided the Law Society with the Solicitor's wife's name. A messages was left for the Solicitor with his secretary, requesting that he return the call. The call was not returned.

44. By registered mail, dated January 6, 1992, the Law Society reminded the Solicitor of his obligation to reply to the Society pursuant to Rule 13, Commentary 3. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. This letter was returned by the post office marked "moved, no forwarding address".

45. By letter dated January 16, 1992, the Law Society's Staff Trustee, Patricia Rogerson, requested the Solicitor call her to discuss Mr. Lanthier's matter, as quickly as possible, as it was understood there was civil litigation involved and that the client wished to proceed but was unable to do so without the file. No reply was received.

46. By registered mail, dated January 27, 1992, the Law Society reminded the Solicitor of his obligation to reply to the Society pursuant to Rule 13, Commentary 3. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

47. The Solicitor met with Stephen Waisberg, Discipline Counsel, on February 5, 1992. Discipline Counsel suggested to the Solicitor that he contact the Complaints Department with respect to their requests for a reply regarding Mr. Lanthier's complaint.

Thursday, 26th May, 1994

48. The Solicitor spoke with Lori A. Goodfield, a staff lawyer with the Law Society, on February 28, 1992. The Solicitor advised that Mr. Lanthier's files were in storage and that they would be pulled on Monday or Tuesday of next week. To date, the files have not received by Mr. Lanthier or the Law Society.

Complaint 2f) - Breach of undertaking with respect to a complaint by Gerard Lanthier

49. The Solicitor provided the Law Society with a written undertaking dated July 23, 1991 which stated:

1. To reply promptly to all communications from the Law Society and from other lawyers; in the case of written communications, within one week of receipt of such communications, and, in the case of telephone communications, within three business days of receipt.

50. The Solicitor failed to reply to the Law Society regarding a complaint by Gerard Lanthier, despite letters dated December 3, 1991 and January 27, 1992.

V. DISCIPLINE HISTORY

51. The Solicitor received a reprimand in committee on March 1, 1988 with respect to his failure to maintain books and records and his failure to file. The Solicitor was also ordered to pay costs of \$1,000.00.

52. The Solicitor was suspended by Convocation on September 1, 1991 and indefinitely thereafter until his Forms 2/3 are filed and his books and records in order.

53. The Solicitor was found guilty of professional misconduct on July 23, 1991 with respect to the following:

- a. five instances of failure to respond to the Society;
- b. one instance of failure to release a file; and
- c. one instance of failure to honour a financial obligation.

The penalty portion of this matter has been adjourned to September 10, 1992.

DATED at Toronto this 8th day of September, 1992."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D81/92 and is prepared to proceed with a hearing of this matter on September 10, 1992.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D81/92 and admits the particulars contained therein. The Solicitor admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1979 and has been suspended from the practice of law since September 1, 1991 pursuant to an Order of Convocation dated April 25, 1991, which stated:

CONVOCATION HEREBY ORDERS that the rights and privileges of the said Calum Donald Graham be suspended on September 1, 1991, if the Solicitor's Forms 2/3 are not filed and his books and records are not in order in the judgment of the Secretary of the Law Society. The suspension to continue until the Solicitor's books and records are in a form satisfactory to the Society.

Particular 2(a) - William Taylor Complaint

5. The complainant, William Taylor, wrote to the Law Society by letter dated June 14, 1991, advising the Society that while he was a process server and an investigator, his services had been engaged by a Mr. D. R. Burton to collect outstanding Accounts. After exhausting his legitimate attempts at collecting these accounts, the complainant retained the Solicitor in April, 1988 and provided the Solicitor with a retainer in the amount of \$150.00 to collect the outstanding accounts on behalf of his client.

6. In his letter dated June 14, 1991, the complainant set out various complaints concerning the services provided by the Solicitor. Among those complaints were the following:

1. The Solicitor prepared and filed an incorrect Statement of Claim on April 25, 1988;
2. The Solicitor failed to appear at an Examination for Discovery scheduled in the month of March, 1989;
3. In the fall of 1989 the Solicitor removed his personal files from his office at 1252 Lawrence Avenue East, leaving his office in a deplorable state. The complainant attended at the office and found his file behind a door on the floor;
4. The complainant contacted the Solicitor and turned the file back over to him. He informed the Solicitor of information he believed would now permit the Solicitor to bring the collection matter to a successful conclusion. After several months, Mr. Taylor spoke with the Solicitor on April 16, 1991 and demanded the return of his file and his money;
5. On May 12, 1991, the Solicitor complained directly to Mr. Burton that his bill had not been paid that he would not proceed with the matter until his bill, including disbursements, was paid;
6. On May 13, 1991, the Solicitor received partial payment of his account in the amount of \$550. The complainant disputes the validity of the Solicitor's account;
7. The Solicitor, having received sufficient notice, failed to attend at a Status Hearing on April 22, 1991. As a result, the action was dismissed.

7. By letter dated July 8, 1991, Lori A. Goodfield, staff lawyer with the Law Society, forwarded a copy of the complainant's letter dated June 14, 1991 to the Solicitor and requested that the Solicitor provide his written reply in respect thereto within a period of two weeks. The Solicitor was also advised that if he could not reply in writing within two weeks, to contact Ms. Goodfield by

Thursday, 26th May, 1994

telephone. The Solicitor was further advised that in view of the fact that a claim may be made which would involve the Society's "Errors & Omissions" insurance policy, a copy of the complaint was forwarded to the Director of Insurance. The Solicitor was further advised that he may wish to contact the Director of Insurance in this regard. The Society has received no reply from the Solicitor with respect to its letter of July 8, 1991.

8. On July 30, 1991, Ms. Wendy Joseph, a former Society staff member and secretary to Ms. Goodfield, called the Solicitor at his office at 2:22 p.m. On each occasion there was no answer.

9. On July 23, 1991, Ms. Joseph called the Solicitor's office and spoke with a person named "John". Ms. Joseph left a message for the Solicitor to call her.

10. On August 2, 1991, in a telephone conversation with the Solicitor, the Solicitor informed Ms. Joseph that he would provide his response to the complainant's letter by facsimile transmission either on August 2 or 6, 1991. To date, the Law Society has received no response.

11. On August 7, 1991, a person named "Nancy" at the Solicitor's office took a telephone message left by Ms. Joseph to have the Solicitor call her. Ms. Joseph did not receive a return call from the Solicitor.

12. By registered letter dated August 14, 1991 addressed to the Solicitor, Ms. Goodfield informed the Solicitor of his failure to respond to her letter dated July 8, 1991, and his telephone conversation with her secretary on August 2, 1991 wherein he indicated he would provide a response by facsimile transaction on August 2 or 6, 1991. Ms. Goodfield pointed out that no response had yet been received and that pursuant to Rule 13, Commentary 3 of the Rules of Professional Conduct, the Solicitor was obliged to respond promptly to communications from the Law Society. Failure to do so could lead to discipline action being taken. Ms. Goodfield also informed the Solicitor that she was diarizing her file ahead seven days and that if she did not receive a written response within that time frame from the Solicitor, the matter would be turned over to the Chair of the Discipline Committee for further instructions. To date the Solicitor has failed to provide any response, but disputes the validity of the complaint by Mr. Taylor.

Particular 2(b) - Boguslaw Drabiszczak, et al.

13. By letter dated September 27, 1991 addressed to the Law Society, Complaints Department, and signed by each of the complainants listed in particular 2(b) of D81/92; the Law Society received the following complaint:

'Recently we have obtained information from your department that Cal Graham is under suspension. Despite that fact, he is still acting as the solicitor for John Teskey. Cal Graham not only sends us letters, but also represents John Teskey in Court. In the last few weeks, he notified us about motions and discoveries. There is a possibility that Cal Graham is going to act at a Status Hearing on October 21, 1991.

Because of this situation, we would like to have a letter stating Cal Graham's legal status. We would like to use it in court. Your immediate response would be greatly appreciated."

14. By letter dated October 11, 1991, Lori Goodfield wrote to the Solicitor and requested that he provide the Society with his reply to the complainants' letter dated September 27, 1991. A copy of the complainants' letter was enclosed.

15. In her letter of October 11, 1991, Ms. Goodfield pointed out that she was most concerned with the allegation being raised that the Solicitor was practising while under suspension. She indicated that the letter was merely a request for information necessary to make a preliminary evaluation of the complaint. The Solicitor was requested to provide a written response within a period of two weeks or if he were unable to do so, or if he had any questions or comments, he was requested to telephone Ms. Goodfield. To date the Law Society has received no response to this letter.

16. On October 29, 1991, Ms. Goodfield's secretary, Ms. Joseph telephoned the Solicitor's office at 9:51 a.m. and spoke with a person by the name of "Nancy". Nancy advised Ms. Joseph that if the Solicitor called in, she would give him her message to reply to the Law Society. The Solicitor did not respond to this message left with his office.

17. On November 1, 1991, at 3:08 p.m., Ms. Joseph again called the Solicitor's office and spoke with Nancy. Nancy informed Ms. Joseph that she had given the earlier message of October 29, 1991 to the Solicitor. Ms. Joseph left a further message with Nancy to inform the Solicitor that he had received this further call from the Law Society.

18. By registered letter dated November 4, 1991, Lori Goodfield wrote the Solicitor and advised him that the Society had not yet received a response to her letter dated October 11, 1991, or to telephone messages left by her secretary on October 29, and November 1, 1991. Ms. Goodfield again pointed out that Rule 134, Commentary 3 of the Rules of Professional Conduct obliges lawyers to respond promptly to communications from the Law Society and that failure to do so could lead to discipline action being taken. She also informed the Solicitor that she was diarizing this file ahead seven days and that if she did not receive the Solicitor's written response within that time frame, then the matter would be turned over to the Chair of the Discipline Committee for further instructions. To date, the Solicitor has not responded to this letter.

Particular 2(c) - Breach of Undertaking in Regard to 2(a) and (b) of D91/92

19. The Solicitor provided the Law Society with a written Undertaking dated July 23, 1991 which stated, among other things:

To reply promptly to all communications from the Law Society and from other lawyers, in the case of written communications, within one week of receipt of such communications, and, in the case of telephone communications, within three business days of receipt.

20. The Solicitor failed to comply with his Undertaking in regard to the Taylor complaint by not responding to Law Society letters dated July 8, 1991, August 14, 1991 and by not responding to telephone calls to the Law Society made on August 2 and 7, 1991.

21. The Solicitor failed to comply with his Undertaking in regard to particular 2(b) by failing to respond to Law Society's letters dated October 11, 1991 and November 4, 1991 and failing to respond to telephone requests made on October 29 and November 1, 1991.

Discipline History

22. The Solicitor received a reprimand in Committee on March 1, 1988 with respect to his failure to maintain books and records and his failure to file. The Solicitor was also ordered to pay costs of \$1,000.

23. The Solicitor was suspended by Convocation on September 1, 1991 and indefinitely thereafter until his Forms 2/3 are filed and his books and records are in order.

24. The Solicitor was found guilty of professional misconduct on July 23, 1991 with respect to the following:

- a) Five instances of failure to respond to the Society;
- b) One instance of failure to release a file; and
- c) One instance of failure to honour a financial obligation.

25. The penalty portion regarding the misconduct found on July 23, 1991 has been adjourned to September 10, 1992.

DATED at Toronto this 8th day of September, 1992."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D138/92 and is prepared to proceed with a hearing of this matter on October 26, 1992.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D138/92 and admits the particulars contained therein. The Solicitor admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1979 and has been suspended from the practice of law since September 1, 1991 pursuant to an Order of Convocation dated April 25, 1991, which stated:

CONVOCATION HEREBY ORDERS that the rights and privileges of the said Calum Donald Graham be suspended on September 1, 1991, if the Solicitor's Forms 2/3 are not filed and his books and records are not in order in the judgment of the Secretary of the Law Society. The suspension to continue until the Solicitor's books and records are in a form satisfactory to the Society.

Particular 2(a) - Paul Scovil Complaint

5. The complainant, Paul Scovil, initially wrote to the Society on April 6, 1992, stating that he was representing William Coffrin with respect to a matrimonial matter and that the Solicitor represented his client's spouse, Mrs. Coffrin.

6. A separation agreement had been entered into between Mr. Scovil's client and the Solicitor's client, which allowed, in part, for a \$20,000 mortgage to be taken back by Mr. Coffrin. In return, Mr. Coffrin would sign over his interest in the matrimonial home to his spouse. The Solicitor drafted the requisite documentation and forwarded same to Mr. Scovil for his client's signature on January 11, 1991. The Solicitor was requested to register the mortgage and return a duplicate registered copy to Mr. Scovil.

7. Mr. Scovil returned the documentation, executed by his client, to the Solicitor on January 22, 1991, and asked that he be provided with a copy of the transfer and mortgage, once the Solicitor had registered same. Mr. Scovil did not receive a response from the Solicitor and wrote to him again on February 26, June 6 and November 13, 1991. Despite these requests for a response, the Solicitor did not correspond and a complaint was ledged with the Society by Mr. Scovil.

8. The Society wrote to the Solicitor on May 1, 1992, enclosing a copy of the complainant's letter. The Solicitor's reply was requested within the time frame set out in the Solicitor's undertaking of July 23, 1991, being one week.

9. Following the expiry of the one week period, a Society member called the Solicitor on May 23 and 29, 1992, to enquire when the Society could expect a reply. Messages were left requesting that the Solicitor return the calls. The Solicitor did not return the calls. A second letter was sent to the Solicitor on June 4, 1992, by registered mail. In that letter, the Solicitor was advised that the matter would be referred to Chair and Vice-Chairs of Discipline if a reply was not received within seven days from the date of that letter.

10. As of this date, the Solicitor's reply has not been received by the Society. There has been no request for a time extension.

Discipline History

11. The Solicitor received a reprimand in Committee on March 1, 1988 with respect to his failure to maintain books and records and his failure to file. The Solicitor was also ordered to pay costs of \$1,00.

12. The Solicitor was suspended by Convocation on September 1, 1991 and indefinitely thereafter until his Forms 2/3 are filed and his books and records are in order.

13. The Solicitor was found guilty of professional misconduct on July 23, 1991 with respect to the following:

- a) Five instances of failure to respond to the Society;
- b) One instance of failure to release a file; and
- c) One instance of failure to honour a financial obligation.

14. The penalty portion regarding the misconduct found on July 23, 1991 has been adjourned to September 10, 1992, and further adjourned to October 26, 1992.

RECOMMENDATION AS TO PENALTY

As indicated above, the Committee came to the conclusion that the Joint Submission should be accepted, namely that the Solicitor should be suspended indefinitely until a Committee appointed by Convocation is satisfied that:

- (a) the Solicitor is capable of practicing law; and
- (b) the Solicitor has responded to all issues in all complaints before this Committee.

REASONS FOR RECOMMENDATION

As indicated at the outset of this report, the tragedies experienced by the Solicitor had been very significant. In any individual, any one of such events would have had a debilitating effect. The Solicitor, however, has encountered a proliferation of sad and traumatic, not to say, stressful circumstances.

There has never been any allegation of immoral or deceitful behaviour. All of the allegations relate to the Solicitor's dysfunctional behaviour.

The Committee was concerned about the medical evidence, or rather, the relatively superficial, medical evidence. Exhibit 11, being the letter from Dr. Saito, was the only medical "evidence" heard. At the hearing on October 26, 1992, the Committee made it clear that more thorough medical evidence would be helpful. The failure of the Solicitor to follow through with that suggestion notwithstanding his acquiescence in it, reflects yet another manifestation of his inability to function, and is consistent with his own assessment that he deals with problems by running away.

Over the protracted period during which this matter was addressed, replies to many of the complaints were received. Replies were received as indicated in the Agreed Statements of Facts for Complaints D191/90 (paragraphs 12, 22), D237/90 (paragraphs 29, 37, 38), Complaint D35/91 (paragraph 45). However, it is apparent that there are clients of the Solicitor (see Complaints D75/92, D81/92 and D138/92) who have not received satisfactory responses, indeed any responses to their legitimate complaints, even in the wake of an undertaking by the Solicitor on July 23, 1991 to reply promptly to all communications from the Law Society.

The Committee was both impressed and optimistic with the attitude and insight of the Solicitor on July 23, 1991. Unfortunately, subsequently various events occurred. He was suspended by Convocation as a result of failing to file Forms 2/3 and as a result had to stop practicing in the in-house environment in which he appeared to be getting on his feet. He attended the funeral of a classmate of his son with traumatic negative implications. He escaped his burning home without injury.

The Committee could only express its sympathy for the tragedy visited upon this Solicitor. Compassion is appropriate; in these unique circumstances, deterrence is not relevant.

The Solicitor acquiesced in the joint submission. The Committee has only modest reservations that more comprehensive medical evidence is not available. However, the pattern of dysfunctional behaviour (to which the Solicitor admitted in the agreed Statements of Fact) combined with deterioration from the most optimistic point on July 23, 1991, enable the Committee to make its conclusions without more medical information. The only appropriate resolution is that advocated in the joint submission.

The Committee was referred by counsel for the Law Society to the decisions of Robert Andrew Kominar, Donald Allan Zaldin, and James Douglas Ross. In each case, the counsel for the Law Society indicated that such cases supported the position taken in joint submission.

As indicated above, the Solicitor has had previous discipline experience. On March 1, 1988, he was reprimanded in Committee as a result of his failure to maintain books and records and his failure to finalize forms. On April 23, 1991, Convocation ordered a suspension effective September 1, 1991 and indefinitely thereafter until the Solicitor's Forms 2/3 were filed.

Thursday, 26th May, 1994

The allegations in these various six complaints primarily refer to the Solicitor's omissions, such as failures to respond, failures to comply with undertakings. It is the case that the original discipline intervention was a reprimand on March 1, 1988. This occurred before the death of the son of the Solicitor. However, as indicated above, the Solicitor had already begun to appreciate that administrative strengths were not his. His weaknesses in that area can be said to have been exacerbated by the tragedies which subsequently arose.

For all of these reasons, the Committee is unanimously and firmly of the view that a humane resolution is required and that that can be accomplished by way of the indefinite suspension on the terms indicated above.

The Solicitor was called to the Bar of Ontario on April 6, 1979.

ALL OF WHICH is respectfully submitted

DATED at Toronto this 21st day of February, 1994

Fran Kiteley, Chair

It was moved by Ms. Palmer, seconded by Ms. Graham that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Graham, seconded by Mr. Bragagnolo that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended indefinitely until a Committee appointed by Convocation was satisfied that the solicitor was capable of practising law and that the solicitor responded to all issues in all complaints before the Committee.

Counsel for the Society made submissions in support of the recommended penalty. There were no submissions by the solicitor.

Counsel, the solicitor, the reporter and the public withdrew.

The Recommendation as to Penalty was adopted.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

Counsel and solicitor retired.

.....

The Treasurer returned to Convocation.

RESUMPTION OF THE JOHN ALLEN ZINSZER

The Secretary placed the matter before Convocation.

Messrs. Topp and Howie and Ms. Peters withdrew for this matter.

Mr. Neil Perrier appeared for the Society and Mr. Peter Madorin appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 15th June, 1993, together with an Affidavit of Service sworn 2nd March, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th February, 1994 (marked Exhibit 1) together with an Acknowledgement, Declaration and Consent signed by the solicitor on 26th May, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
J. James Wardlaw, Q.C.
Earl Levy, Q.C.

In the matter of
The Law Society Act
and in the matter of

Neil Perrier
for the Society

JOHN ALLEN ZINSZER
of the City
of Kitchener
a barrister and solicitor

Peter Madorin
for the solicitor

Heard: June 15-16 and
December 2, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 29, 1991, Complaint D69/91 was issued, on February 11, 1992, Complaint D 16/92 was issued and on March 23, 1992, Complaint D48/92 was issued against John Allen Zinszer alleging that he was guilty of professional misconduct.

The hearing was heard partially in camera on June 15, 16, and December 2, 1993, before this Committee composed of Kenneth E. Howie, Q.C., Chair, J. James Wardlaw, Q.C. and Earl Levy, Q.C. Mr. Zinszer attended the hearing and was represented by W.H. Peter Madorin. Neil Perrier appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D69/91

2. a)(i) he preferred the interests of the vendors over those of the purchasers by failing to ensure that existing encumbrances were discharged.
- (ii) he deliberately failed to advise the purchasers that the existing mortgage on title which was to be discharged, remained on title after closing.
- (iii) he falsely reported to his client, the Bank of Nova Scotia, that it held a valid first mortgage on the property when he knew that the mortgage to the Bank of Nova Scotia was second in priority.
- (iv) he failed to report promptly to his clients, the purchasers, after the transaction closed.
- (v) he failed to report promptly to his client the Bank of Nova Scotia after the transaction closed.
- (vi) he failed to protect the interests of Mrs. Broughton, one of the vendors, by failing to ensure that the mortgage against the property which she was selling was discharged, thereby leaving her potentially liable to the Bank of Nova Scotia.

Complaint D16/92

2. a) In September, 1989, he misapplied trust funds in a real estate transaction deposited by his purchaser/clients, Mr. Kevin Bryan and Ms. Beverly Gosse, and a mortgagee/client, the Bank of Nova Scotia, in the sum of \$73,014.98 when he transferred the said funds to his vendor/client instead of discharging two prior registered mortgages on title to the property.

The evidence before the Committee was in the form of an Agreed Statement of Fact and evidence from the Solicitor and William Dunell, the Manager of the Bank of Nova Scotia in Listowel. The statement of facts forms Schedule "A" to these reasons.

Based on the Agreed Statement of Facts and the evidence your Committee makes the following findings of fact.

1. The Solicitor acted for the vendor, purchaser and mortgagee with respect to the sale and purchase of a cottage property near Parry Sound.
2. The cottage property was subject to two mortgages at the time of the sale. This was a fact known to the Solicitor who had acted in placing them.
3. The sale occurred at the time of a hot real estate market.

Thursday, 26th May, 1994

4. The Solicitor was experiencing strain as a result of business pressures and family difficulties. Because of the hot real estate market his office was overburdened with work. The family problems arose out of joint custody of his children from a failed first marriage.
5. The Solicitor delegated most of his real estate practice to a senior real estate secretary.
6. On closing, \$73,014.98 was transferred to the account of the vendor client rather than being used to discharge the two mortgages on the vendor's property.
7. Your Committee finds that this action was due to the solicitor's failure to properly supervise his staff, and failure to ensure, prior to closing, the terms upon which discharges would be available.
8. On discovering the error, the Solicitor put pressure on his client to provide him with the money necessary to discharge the two mortgages. The client did so, but not until ten months later for the first mortgage and thirteen months later for the second.
9. The purchase and sale was completed on September 1, 1989. Reports were not sent to the purchaser and the mortgagee until July 23 and July 24, 1990, over ten months later.
10. The reports did not make reference to the fact the first and second mortgages had not been discharged although the Solicitor was directly aware of that fact by this time.

The Solicitor has a good reputation in his community as an honest, responsible, and capable lawyer. He admitted responsibility for the error from the beginning, and has taken steps to prevent its reoccurrence by employing a Solicitor to supervise the real estate end of his practice.

With respect to finding 10, the Solicitor's evidence, which the Committee accepts, was that his real estate secretary prepared the reports and he did not properly review them before he signed them and caused them to be sent out. It is hard to believe that this would have happened if the Solicitor had been acting for the vendor alone. His mind would have been forced to the need to discharge the two mortgages. It was not. Responsibility was delegated to his staff and the error occurred.

Part of the problem may also lie in the failure to provide sufficient staff to do the work and overburdening staff. His secretary was not able to prepare the reports for over ten months. It is possible that if there had been sufficient staff at the time the error would not have occurred.

The fact that the rate of interest charged on the loan was a criminal rate of interest is admitted. (See Agreed Statement of Facts, para 24 - 30 inclusive). The Solicitor's explanation, which the Committee accepts, was that he never turned his mind to the rate of return, and that there was no criminal intent to break the law.

FINDING OF PROFESSIONAL MISCONDUCT

The complaints, on their face, indicate a conspiracy between the Solicitor and his vendor client. The facts do not warrant that interpretation.

The complaint of professional misconduct has, however, been made out. That misconduct was the Solicitor's abdication of his responsibility in the management of his real estate practice by turning it over to a senior secretary and failure to properly supervise her activities.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended for a period of one month and pay the Society's costs of investigation and prosecution of \$2,000.00.

REASONS FOR RECOMMENDATION

Counsel for the Society argued that the Solicitor should be suspended for three months. The Solicitor misapplied \$73,014.98 to the credit of the vendor client. It was the Solicitor's good fortune that the money was replaced. It could have resulted in a loss. Loris Chapman was suspended for a year for his abdication of practice in turning his real estate practice over to a law clerk and sending reports that were not accurate. Mario Cornelius Sommer was suspended for a year for misapplying funds by delivering them to a vendor client instead of holding them in trust for pending real estate closings.

Counsel for the Solicitor urged a reprimand in committee. His client has no prior discipline history. The event occurred at a time of business and personal stress. There was no personal profit. No one suffered any loss. He cooperated with the Society. He has rectified the problem. He has a good community record as evidenced by letters of recommendation.

The Committee was impressed with both arguments. It agrees that the Solicitor is an honest, capable, hard working lawyer. The cases cited by the Society are not the same in that additional complaints were involved.

The Committee cannot, however, and does not, condone the practice of turning over to a senior real estate secretary the real estate practice of a firm. It is activity such as this that has contributed to the tremendous losses incurred by the errors and omissions insurance department of the Society. It is because of the many positive qualities of the Solicitor that the recommended penalty is not more severe.

John Allen Zinszer was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 20th day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 15th day of June, 1994.

Kenneth E. Howie, Q.C.
Chair

Thursday, 26th May, 1994

It was moved by Mr. Lerner, seconded by Mr. Brennan that the Report be adopted.

Not Put

Mr. Perrier asked that the Report be amended by deleting the word "deliberately" in paragraph 2.(a)(ii) on page 1 of the Report and substitute the word "incorrectly" with the word "falsely" in paragraph 2.(a)(iii).

Counsel for the solicitor consented to the amendments.

It was moved by Ms. Palmer, seconded by Ms. Curtis that the matter be referred back to the Committee for consideration of the amendments proposed by counsel.

Lost

It was moved by Mr. Somerville, seconded by Mr. Bastedo that the Report be amended as proposed by counsel.

Not Put

It was moved by Mr. Carter, seconded by Mr. Bragagnolo that the first sentence under the heading, Decision, be changed to read: "The following particulars of professional misconduct were found to have been established and the professional misconduct is set out at page 4 of the Report".

Mr. McKinnon moved to amend Mr. Carter's motion by changing the sentence to read: "The following particulars of professional misconduct were inter alia alleged".

Mr. Carter accepted Mr. McKinnon's amendment and seconded Mr. McKinnon's motion so that the motion reads:

that the Report be amended by changing the first sentence under the heading Decision - "The following particulars of professional misconduct were inter alia alleged and the professional misconduct found to be established is set out at page 4 of the Report."

Mr. Madorin questioned whether the Report should be referred back to the Committee for clarification.

The McKinnon/Carter motion to amend the Report carried.

It was moved by Mr. Bragagnolo, seconded by Mr. Carter that the Report as amended be adopted.

Carried

It was moved by Mr. Somerville, seconded by Ms. Palmer that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for 1 month and pay the Society's costs of investigation and prosecution of \$2,000.

Both counsel made submissions and asked Convocation to grant the solicitor 60 days to pay the costs and that the suspension commence July 1st because the solicitor had a number of real estate closings.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Ms. Graham, seconded by Mr. Lamont that the solicitor be suspended for 3 months and pay the costs of \$2,000.

Counsel, the solicitor, the reporter and the public were recalled and advised of a motion for an increased penalty.

Convocation took a brief recess at 10:50 a.m. so that counsel could discuss the matter.

Convocation resumed at 11:00 a.m.

RESUMPTION OF ZINSZER MATTER

There were further submissions by Mr. Madorin for an adjournment to seek evidence regarding the issue of penalty.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Mr. Finkelstein, seconded by Ms. Palmer that the matter be adjourned.

Lost

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

Both counsel made further submissions in support of the recommended penalty.

There were questions from the Bench.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Ms. Curtis, seconded by Ms. Graham that the solicitor be suspended for 3 months.

Carried

It was moved by Ms. Curtis, seconded by Ms. Graham that the suspension commence on June 1, 1994.

Carried

It was moved by Mr. Finkelstein, seconded by Mr. Lerner that the solicitor be granted 60 days to pay the Society's costs.

Carried

The motion to adopt the recommended penalty was not put.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

Counsel and solicitor retired.

.....

Re: ROBERT EMERSON PRITCHARD, Sault Ste. Marie

The Secretary placed the matter before Convocation.

Messrs. Brennan and Hickey withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Ms. Budweth advised Convocation that the solicitor would not be attending Convocation and would not be contesting the recommended penalty. A letter from Mr. Pritchard was distributed to the Benchers and marked as Exhibit 1.

Thursday, 26th May, 1994

Convocation had before it the Report of the Discipline Committee dated 14th April, 1994, together with an Affidavit of Service sworn 17th May, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair
Patricia J. Peters, Q.C.
Michael G. Hickey, Q.C.

In the matter of
The Law Society Act
and in the matter of

Christina Budweth
for the Society

ROBERT EMERSON PRITCHARD
of the City
of Sault Ste. Marie
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 12, 1993 Complaint D205/93 was issued against Robert Emerson Pritchard and on November 16, 1993, Complaint D306/93 was issued against Robert Emerson Pritchard, both alleging that he was guilty of professional misconduct.

The matters were heard in public on February 9, 1994 before this Committee composed of Lloyd Brennan Q.C., Chair, Patricia J. Peters, Q.C. and Michael G. Hickey, Q.C. The Solicitor did not attend the hearing nor was he represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D205/93

2. a) He failed to provide a reply to the Society regarding a complaint by Michael Lomer despite letters dated February 26 and April 7, 1993 and telephone requests on December 14, 1992, January 4, 6, 8, 13, 20, 26, February 1, March 18, and 24, 1993.

- b) He failed to honour financial obligations to Michael Lomer and Charles Barhydt in connection with his practice of law.

Complaint D306/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The solicitor admits service of Complaints D205/93 and D306/93 and is prepared to proceed with a hearing of these matters on February 9, 1994.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D205/93 and D306/93 and admits the particulars contained therein. The Solicitor also admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 26, 1971. He practices in the City of Sault Ste Marie. The Solicitor has been suspended since November 1, 1993 for non-payment of the annual fee.

Complaint D205/93

Particular 2(a) Failure to reply to communications from the Law Society regarding a complaint by Michael Lomer;

Particular 2(b) Failure to honour financial obligations to Michael Lomer and Charles Barhydt.

5. In August 1991, Michael Lomer, L.L.B. and Charles N. Baryhdt, L.L.B. were retained by the Solicitor to represent his client, on an Application for Bail pending an Appeal of his case.

6. On September 4, 1991, Mr. Barhydt prepared and forwarded his account in the amount of \$614.11 (Exhibit 1) to the Solicitor for his services on the case.

7. On November 15, 1991, Mr. Lomer prepared and forwarded his account in the amount of \$1141.75 (Exhibit 2) to the Solicitor for his services on the case.

8. By letter dated October 16, 1992 (Exhibit 3), Mr. Lomer reminded the Solicitor that both his and Mr. Barhydt's accounts remained unpaid. Mr. Lomer requested that the Solicitor contact him regarding this matter by October 23, 1992. No reply was received.

9. By letter dated November 3, 1992 (Exhibit 4), Michael Lomer filed a complaint against the Solicitor with the Law Society over his failure to honour the above-mentioned accounts.

10. On December 14, 1992, Ms. Trisha Danyluk, a Complaints Officer for the Law Society, telephoned the Solicitor to discuss Mr. Lomer's complaint. The Solicitor requested an opportunity to review his file. The Solicitor advised that he had filed for personal bankruptcy and, therefore, he was not in a position to pay these accounts. The Solicitor recalled that these accounts were to be billed to Legal Aid. Ms. Danyluk requested that the Solicitor call her once he had reviewed his file.

11. On January 4, 1993, Ms. Danyluk telephoned the Solicitor to inquire about this matter. The Solicitor advised that he had not had the opportunity to review his file. Ms. Danyluk advised the Solicitor that she would follow up with the Solicitor on January 6, 1993.

12. On January 6, 1993, Ms. Danyluk telephoned the Solicitor and left a message for him to return the call. The call was not returned.

13. On January 8, 1993, Ms. Danyluk telephoned the Solicitor and left a message on his answering machine for him to return the call.

14. On January 11, 1993, the Solicitor left a message for Ms. Danyluk to return his call.

15. On January 13, 1993, Ms. Danyluk returned the Solicitor's telephone call and left a message for him to return the Society's call. The call was not returned.

16. On January 20, 1993, Ms. Danyluk telephoned the Solicitor and left a message on his answering machine for him to return the call. The call was not returned.

17. On January 26, 1993, Ms. Danyluk left a telephone message for the Solicitor. The call was not returned.

18. On February 1, 1993, Ms. Danyluk placed a telephone call to the Solicitor and left a message on his answering machine reminding him that it was the third telephone message left for him.

19. On February 4, 1993, the Solicitor telephoned Ms. Danyluk and advised that he received a cheque for Mr. Barhydt's account from Legal Aid, in the amount of \$614.11, as well as a cheque in the amount of \$1141.75 for Mr. Lomer's account. The Solicitor advised that he would forward payment to both Mr. Lomer and Mr. Barhydt.

20. By letter dated February 26, 1993 (Exhibit 5), the Law Society requested that the Solicitor confirm that he had forwarded his payment to Mr. Lomer and Mr. Barhydt. The Solicitor's response was requested within a period of two weeks. No reply was received.

21. On March 18, 1993, a Law Society staff employee left a message on the Solicitor's answering machine for him to return the call. The call was not returned.

Thursday, 26th May, 1994

22. On March 24, 1993, a Law Society employee telephoned the Solicitor inquiring about when his reply could be expected. The Solicitor advised that he had been away from his office due to an illness, and would prepare and forward his reply to the Society by March 29, 1993. No reply was received.

23. By registered mail dated April 7, 1993 (Exhibit 6), the Law Society forwarded to the Solicitor a copy of its February 26, 1993 letter. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

24. As of November 18, 1993, Mr. Lomer's and Mr. Barhydt's accounts remain unpaid.

Complaint D306/93

Particular 2(a) Failure to file for fiscal year ended December 31, 1992

25. The Solicitor's fiscal year end is December 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending December 31, 1992, as required by S.16(2) of Regulation 573 under The Law Society Act.

26. A Notice of Default in Annual Filing, dated July 7, 1993 (Exhibit 7) was forwarded to the Solicitor by the Law Society. No reply was received.

27. By registered letter dated August 13, 1993 (Exhibit 8), a Second Notice of Default in Annual Filing was forwarded to the Solicitor. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file.

28. The late filing fee began to accrue on August 27, 1993.

29. As a form 3 is a report of a public accountant respecting the compliance of the Solicitor's books and records with the regulations, the Society has no way of verifying that the Solicitor is maintaining books and records save for arranging for an audit examiner to attend at the Solicitor's practice thereby substantially increasing the costs of the audit branch.

30. To date, the Solicitor has not yet mailed the required forms.

V. DISCIPLINE HISTORY

31. On June 7, 1989, the Solicitor was found guilty of professional misconduct for failing to serve clients and for misleading a client. The Solicitor was suspended by Convocation for one month beginning July 1, 1989.

DATED at Toronto this 1st day of February, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Robert Emerson Pritchard be suspended for a period of 3 months, to commence upon termination of the administrative suspension now in effect, and thereafter to continue until all of his obligations of membership in the Society are fulfilled.

REASONS FOR RECOMMENDATION

The Solicitor was not present at the hearing. Counsel for the Society satisfied us that the Solicitor had actual notice that the matter was to proceed on this date, and further satisfied us that the Solicitor was content that it should so proceed although he was unable to attend and was not represented by counsel.

Exhibit 1 is the Solicitor's letter to counsel for the Society returning the signed Agreed Statement of Facts. The letter includes a "correction" to paragraph 19 of the Statement, which does not lessen the effect of the agreed facts nor vitiate the Solicitor's admission. Exhibit 1 also contains the Solicitor's assertion that he will not be present for the hearing on February 9, 1994, having no means of transportation to Toronto nor the funds to travel there.

Exhibit 5 is a letter to the Solicitor from the Society's counsel, dated February 2, 1994. It sets out clearly that she intended to recommend suspension for an unspecified definite period, followed by an indefinite suspension pending the Solicitor's fulfilment of all outstanding obligations. Although the duration of the definite period to be suggested was not specified, counsel's suggestion was for three months, which we find reasonable in the circumstances, and well within what the Solicitor would expect upon reading Exhibit 5.

The Solicitor engaged the services of two fellow members of the profession to conduct bail motions for a legally aided client. They billed him on the legal aid scale and he submitted their accounts and received payment from the Legal Aid Plan. More than two years after the bills were rendered, the two fellow solicitors remained unpaid. He failed to reply to the Society regarding their complaints, notwithstanding the Society's repeated efforts to reach him, detailed at page 1 of this report.

He has also failed to file Forms 2 and 3 as set out in Complaint D306/93.

We therefore recommend that the Solicitor be suspended for a period of three months, to commence upon termination of the administrative suspension now in effect, and thereafter to continue until all of his obligations of membership in the Society are fulfilled.

Robert Emerson Pritchard was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 26th day of March, 1971.

ALL OF WHICH is respectfully submitted

DATED this 14th day of April, 1994

Lloyd Brennan, Q.C.
Chair

It was moved by Ms. Palmer, seconded by Ms. Moliner that the Report be adopted.

Carried

It was moved by Mr. Bastedo, seconded by Ms. Moliner that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for 3 months to commence upon the termination of the administration suspension and to continue thereafter until all obligations of membership in the Society were fulfilled.

Ms. Budweth made submissions in support of the recommended penalty.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Ms. Curtis, seconded by Ms. Moliner that the solicitor be suspended for 6 months with the same conditions.

Withdrawn

It was moved by Ms. Curtis, seconded by Ms. Moliner that the solicitor pay the monies owing to the 2 solicitors with interest at rates set by the Courts of Justice Act.

Withdrawn

It was moved by Mr. Lerner and failed for want of a seconder that the solicitor be disbarred.

It was moved by Mr. Topp, seconded by Mr. Bragagnolo that the matter be adjourned to give notice to the solicitor of a motion for an increased penalty and make submissions regarding the characterization of behaviour as theft.

Not Put

The Recommendation as to Penalty was adopted.

Counsel, the reporter and the public were recalled and informed of Convocation's decision.

Counsel retired.

.....

Re: JOHN LOUIS ROSSI, Windsor

The Secretary placed the matter before Convocation.

Ms. Peters and Ms. Richardson withdrew for this matter.

Mr. Stephen Foster appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 22nd December, 1993, together with an Affidavit of Service sworn 2nd March, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th January, 1994 (marked Exhibit 1), together with the Report of the Discipline Committee dated 12th May, 1994, together with an Affidavit of Service sworn 19th May, 1994 by Ron Hoppie that he had effected service on the solicitor by registered mail on 13th May, 1994 (marked Exhibit 2), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th May, 1994 (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee (Exhibit 1) is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Laura L. Legge, Q.C., Chair
Patricia Peters, Q.C.
Hope Sealy

In the matter of
The Law Society Act
and in the matter of

Stephen Foster
for the Society

JOHN LOUIS ROSSI
of the City
of Windsor
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 31, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 11, 1992, Complaint D183/92 was issued against John Louis Rossi alleging that he was guilty of professional misconduct.

The matter was heard in public on August 31, 1993 before this Committee composed of Laura L. Legge, Q.C., Chair, Patricia J. Peters, Q.C. and Hope Sealy. Mr. Rossi attended the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D183/92

- 2.(a) He failed to comply with his undertaking to the Law Society, dated June 16, 1992, by failing to provide a full and complete written response to the matters set out under particulars 2(b)(c) and (d) of Complaint D23/92 by July 14, 1992.
- (b) He failed to comply with his undertaking to the Law Society, dated June 16, 1992 by failing to reply to a telephone request from the Law Society on September 2, 1992 within three business days and, by failing to reply to a letter from the Law Society dated September 14, 1992 within one week of receipt.

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D183/92 and is prepared to proceed with a hearing of this matter on March 16 and 17, 1993.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D183/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the Complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 14, 1978. He practices as an associate of the law firm Corrent & Macri.

5. A formal complaint, D23/92, was issued against the Solicitor on March 5, 1992. The professional misconduct alleged to have taken place was stated, in part, as follows:

- 2b) He failed to reply to the Law Society regarding a complaint by L. Jane Burbage, a fellow solicitor, despite letters dated September 25, 1991, November 5, 1991 and telephone messages left on October 29, 1991 and November 4, 1991.

- 2c) He failed to reply to the Law Society regarding a complaint by David L. Greenbank, despite letters dated October 28, 1991 and December 3, 1991 and telephone messages left on November 4, 1991 and November 20, 1991.
- 2d) He failed to reply to the Law Society regarding a complaint by Dr. Ron Langevin, despite letters dated November 5, 1991 and November 21, 1991 and telephone requests on January 10, 1992 and February 5, 1992.

A copy of Complaint D23/92 is attached as Exhibit "A" to this Agreed Statement of Facts.

6. Complaint D23/92 was heard on June 16, 1992, along with Complaint D37/92. The Solicitor admitted professional misconduct with respect to both Complaints D23/92 and D37/92. A copy of the executed Agreed Statement of Facts is attached as Exhibit "B" to this Agreed Statement of Facts.

7. On June 16, 1992, the Solicitor provided the Law Society with a written undertaking as follows:

- 1. To provide the Law Society with full and complete written responses to the Complaints set out under particulars 2(b), (c) and (d) of Complaint D23/92 within four weeks of the date set out herein below;
- 2. To reply promptly to all communications from the Law Society, from other lawyers and from clients; in the case of written communications, within one week of receipt of such communications, and, in the case of telephone communications, within three business days of receipt.

A copy of the Solicitor's undertaking, dated June 16, 1992, is attached as Exhibit "C" to this Agreed Statement of Facts.

8. On the basis of his undertaking to provide full and complete responses to the Complaints set out under particulars 2(b), (c) and (d) of Complaint D23/92, the Solicitor received a reprimand in committee on June 16, 1992.

9. A Law Society staff employee spoke to the Solicitor by telephone on September 2, 1992. The Solicitor advised that he would respond to particulars 2(b), (c) and (d) of Complaint D23/92 by facsimile transmission on or before September 9, 1992. No reply was received.

10. By registered mail, dated September 14, 1992, the Law Society forwarded to the Solicitor a copy of his undertaking dated June 16, 1992; a copy of the Agreed Statement of Facts dated June 16, 1992; a copy of the Law Society's correspondence dated September 25, 1991 and November 5, 1991 regarding the complaint by L. Jane Burbage; a copy of the Law Society's correspondence dated October 38, 1991 and December 3, 1991 regarding the complaint by Doig, Bailey, McLean, Greenbank & Murdock, law firm (David L. Greenbank); and a copy of the Law Society's correspondence dated November 21, 1991. The Solicitor was referred to his undertaking in which he undertook to respond to particulars 2(a), (b) and (c) of Complaint D23/92. The Solicitor was advised that should a full and complete written response not be received by September 25, 1992, the matter would be referred to the Discipline Committee. A copy of the Society's September 24 letter, complete with enclosures of the Society's previous correspondence, is attached as Exhibit "D" to this Agreed Statement of Facts. No reply was received.

Thursday, 26th May, 1994

11. The Solicitor did not requested an extension to reply nor has he provided the Law Society with an explanation for his failure to reply.
12. On November 11, 1992 Complaint D183/92 was issued.
13. By facsimile transmission received on March 15, 1993 at 14:11 p.m., the Solicitor provided the Law Society with a document entitled "Response to Undertaking". A copy of the Solicitor's Response to Undertaking is attached as Exhibit "E" to this Agreed Statement of Facts.

DATED at Toronto this 16th day of March, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that John Louis Rossi be suspended for one month and from month to month until his undertakings to the Law Society are fulfilled.

REASONS FOR RECOMMENDATION

The Committee heard no evidence of dishonesty on the part of the Solicitor. He demonstrates a serious reluctance to deal with necessary and urgent matters.

In view of his past history, the Committee believed that some measures must be taken to force the Solicitor to realize the seriousness of his inertia. Until he is prepared to deal with urgent matters, he should not practise law.

John Louis Rossi was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 14th of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of December, 1993

Laura L. Legge, Q.C.
Chair

The Report of the Discipline Committee (Exhibit 2) is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Mary P. Weaver, Q.C., Chair
Stuart Thom, Q.C.
Nora Richardson

In the matter of
The Law Society Act
and in the matter of

Stephen Foster
for the Society

JOHN LOUIS ROSSI
of the City
of Windsor
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 12, 1993, Complaint D290/93 was issued against John Louis Rossi alleging that he was guilty of professional misconduct.

The matter was heard in public on March 9, 1994 before this Committee composed of Mary P. Weaver, Q.C., Chair, Stuart Thom, Q.C. and Nora Richardson. The Solicitor attended the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D290/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending February 28, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

Evidence

Part of the evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D290/93 and is prepared to proceed with a hearing of this matter on March 9, 1994.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D290/93 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 14, 1978. He practices as an associate at the firm of Corrent and Macri.

5. The Solicitor's fiscal year end is February 28. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending February 28, 1992, as required by S.16(2) of Regulation 573 under The Law Society Act.

6. A Notice of Default in Annual Filing, dated September 10, 1992 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts. No response was received.

7. By registered letter dated October 9, 1992, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults of filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Society's October 9, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts.

8. As a Form 3 is a report of a public accountant respecting the compliance of the Solicitor's books and records with the regulations, the Society has no way of verifying that the Solicitor is maintaining books and records save for arranging for an audit examiner to attend at the Solicitor's practice thereby substantially increasing the costs of the audit branch.

9. To date, the Solicitor has not yet filed the required forms.

V. DISCIPLINE HISTORY

10. On March 6, 1991 the Solicitor was the subject of an Invitation to Attend regarding his failure to file his Forms 2 and 3 for his fiscal year ending February 28, 1991.

11. On June 16, 1992, the Solicitor was found guilty of professional misconduct for failing to reply to communications from the Law Society; failing to reply to communications from a fellow solicitor; and breaching his Undertaking to the Society's Discipline department dated March 5, 1991. The Solicitor was reprimanded in Committee and provided a further Undertaking dated June 16, 1992 to reply to the Law Society. A copy of the Solicitor's Undertaking is attached as Exhibit "C" to this Agreed Statement of Facts.

12. On November 11, 1992, Complaint D183/92 was issued against the Solicitor for failing to comply with his Undertaking of June 16, 1992. The Solicitor was found guilty of professional misconduct and the Discipline Committee recommended he be suspended for one month and indefinitely thereafter until he complies with the Undertaking. The matter is currently pending Convocation.

13. In the course of the hearing of Complaint D183/92 the Committee suggested that the solicitor take advantage of the Society's Practice Review Program.

14. Since the hearing of Complaint D183/92 the Solicitor has participated in the Practice Review Program as well as obtained assistance from the Society's LINK program. The Solicitor expects to provide Convocation with reports of his progress in these areas.

15. One of the reasons the Solicitor has not attended to the filings which are the subject matter of this Complaint is that he is having financial difficulties and still attempting to obtain the funds necessary to pay his accountant.

JOINT SUBMISSION AS TO PENALTY

16. The Solicitor and the Society jointly submit the following:

- a) This matter should be referred to Convocation to be dealt with at the same time as Complaint D183/92;
- b) If the Solicitor has filed his Forms 2 and 3 when this matter is heard by Convocation, this matter shall be dealt with by way of the penalty imposed in respect of Complaint D183/92 and no additional penalty shall be required;
- c) If the Solicitor has not filed his Forms 2 and 3 when this matter is heard by Convocation, the Solicitor should be suspended for one month, in addition to any suspension which may be imposed in respect of Complaint D183/92, and the Solicitor should be suspended indefinitely thereafter until his filings are made.

DATED at Toronto this 9th day of March, 1994."

The Solicitor appeared and gave evidence and made submissions. Submissions were also made by counsel for the Law Society. Upon consideration of the evidence, including the Agreed Statement of Facts and the submissions of counsel, the Committee agreed that the joint submission as to penalty is the proper penalty to be imposed.

RECOMMENDATION AS TO PENALTY

The Committee recommends that:

- a) This matter should be referred to Convocation to be dealt with at the same time as Complaint D183/92.
- b) If the Solicitor has filed his Forms 2 and 3 when this matter is heard by Convocation, this matter shall be dealt with by way of the penalty imposed in respect of Complaint D183/92 and no additional penalty shall be required.
- c) If the Solicitor has not filed his Forms 2 and 3 when this matter is heard by Convocation, the Solicitor should be suspended for one month, in addition to any suspension which may be imposed in respect of Complaint D183/92, and the Solicitor should be suspended indefinitely thereafter until his filings are made.

REASONS FOR RECOMMENDATION

The Solicitor's professional conduct does not have the degree of culpability that requires a heavy penalty provided that the Solicitor file his Form 2/3 without delay. This breach of the Rules, however, is of concern because until the filing is made, the Society cannot be satisfied that the Solicitor has dealt with his clients' funds in accordance with the Law Society Rules. The Committee reviewed the discipline history of the Solicitor and found that between March 1991 and the date of the hearing, the Solicitor had been before the Law Society on one invitation to attend and had been found guilty of professional misconduct and sentenced to penalties on two prior occasions. In addition, there is another complaint against this Solicitor which will proceed to Convocation. This history raises an issue as to the Solicitor's governability. The penalty must have sufficient impact on him to make him fully aware of his obligations to conform to all the Law Society Rules. The Committee was satisfied that the facts of each of the prior attendances and complaints are the result of his inability to deal properly with his financial obligations. There was no evidence of any dishonesty on the part of the Solicitor. In his evidence and submissions the Solicitor appeared to be genuinely determined to change his practice to avoid further breaches of the Law Society Rules. The Committee felt that he should be allowed one more chance to bring his practice into conformity with the Law Society's Rules of Professional Conduct. On balance, the Committee was satisfied that the recommended penalty is fair. Convocation dealing with both outstanding complaints against the Solicitor at the same time will be in a position to deal with the Solicitor's breaches of professional conduct in the most appropriate manner.

John Louis Rossi was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 14th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 12th day of May, 1994

Mary P. Weaver, Q.C.
Chair

It was moved by Mr. Somerville, seconded by Ms. Palmer that the Reports be adopted.

There were no submissions and the Reports were adopted.

Thursday, 26th May, 1994

Mr. Foster advised that the filings had not been completed.

It was moved by Mr. McKinnon, seconded by Ms. Palmer that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for 1 month and if the conditions were not met there would be a further suspension of 1 month to continue thereafter until the filings were completed.

Mr. Foster made submissions in support of the 2 month suspension.

The solicitor made submissions and sought a 1 month adjournment to complete his filings and present further evidence for a lesser penalty of a reprimand in Convocation.

It was moved by Mr. Topp, seconded by Mr. Bastedo that the matter be adjourned for 1 month to the June Special Convocation.

Carried

The solicitor waived the requirements for a quorum composed of those Benchers present in Convocation.

Counsel and solicitor retired.

.....

CONVOCATION ROSE AT 12:35 P.M.

.....

Confirmed in Convocation this day of , 1994.

Treasurer