MINUTES OF SPECIAL CONVOCATION

Thursday, 27th September, 1990
9:30 a.m.

PRESENT:

The Treasurer, (James M. Spence, Q.C.), Callwood, Campbell, Carey, Carter, Epstein, Graham, Hall, Kiteley, Lamek, Lerner, Levy, McKinnon, Noble, Peters, Thoman, Topp, Wardlaw, and Thom.

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"PUBLIC"

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DISCIPLINE COMMITTEE

Re: RICHARD SIU-DICK WONG, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Robert Conway appeared for the Society and Mr. J. Falconer appeared for Mr. Wong.

There was a request on consent for an adjournment to the next Discipline Convocation which was granted.

Counsel retired.

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Re: DAVID CARSON BIRD, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society and the solicitor who was present was represented by Mr. M. J. Sandler.

Convocation had before it the Report of the Discipline Committee dated 19th September, 1990, together with the Affidavit of Service sworn 26th September, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 21st September, 1990 (marked Exhibit 1) together with Acknowledgment, Declaration and Consent signed by the solicitor 27th September, 1990 (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

Thomas J.P. Carey, Chair
Stuart Thom
Jeffery S. Lyons

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

DAVID CARSON BIRD
of the City
of Toronto
a barrister and solicitor

Gavin MacKenzie
for the Society

Steven Skurka
for the Solicitor

Heard: September 14, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 5, 1990, Complaint D148/90 was issued against David Carson Bird alleging that he was guilty of professional misconduct.

The matter was heard in public on September 14, 1990, before this Committee composed of Thomas J.P. Carey, Chairman, Stuart Thom and Jeffery S. Lyons. Mr. Bird appeared and was represented by Steven Skurka. Gavin MacKenzie appeared as counsel for the Law Society.

DECISION

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

Complaint D148/90

2(a) The Solicitor misappropriated the sum of $2,476,574.16, more or less, between 1984 and 1990, inclusive.

Evidence

The entirety of the evidence before the Committee on the issue of professional misconduct was in the form of the following Statement:

"STATEMENT

Statement of David Carson Bird, age 35, married, resident at 144 Regent Street, Richmond Hill, Ont., L4C 9P1, telephone 416 737-8568.

I am a member of the Law Society of Upper Canada. I was admitted to the Bar April 10, 1980.

Most recently I have practised law at 260 East Beaver Creek Road, Suite 301, Richmond Hill, Ontario, L4B 3M3, telephone 416 882-2442. My practice sublet office space from Ogilvie & Kang Corp., Commercial Real Estate Brokers.

I state the following in connection with a series of financial transactions commonly termed "lapping".

I have been involved in a series of these transactions over the past 5 years and at this time have about 25 of these such transactions outstanding. I have voluntarily come forward with my lawyer to make full disclosure to the Law Society of Upper Canada, to place myself under immediate co-signing restraints and to be disbarred. I voluntarily make this statement.

In 1981, I incorporated Canplex Corporation ("Canplex"). Throughout, I have held a 50% interest in this corporation, which has engaged in joint ventures with other real estate investors in about a dozen properties in the Greater Metropolitan Toronto Region over the past 9 years. I was a director of the corporation and sole active shareholder in all financial dealings.

About 5 years ago, because of a retroactive realty tax assessment, one of these properties, (1520-1524 Bathurst Street, Toronto, being two apartment buildings, each containing 24 rental units) incurred an immediate realty tax arrear of approximately $80,000.00.

To cover the realty tax arrear and the newly-increased (by about $4,000/month) realty tax expense, I started stealing client funds from my mixed trust account. Monies would be improperly transferred from my mixed trust account to Canplex. I never sought contribution from any of the joint venturers at any time notwithstanding there was provision for such on a pro rata basis in each joint venture agreement.

The thefts and lapping remained relatively small until August, 1987. At that time, Canplex purchased 100 Pembroke Street, Toronto, an 11 story apartment building with 97 rental units. Canplex (as always) was the managing joint venturer (with a 25% interest) and silent joint venturers held the remaining 75% interest.

When 100 Pembroke Street, Toronto was purchased, almost all of the rental units were occupied. However, I soon discovered that many of the tenants were engaged in criminal activity (drug dealing, prostitution and vandalism) and were unable or unwilling to pay rent. I was successful in removing these tenants and attracting more appropriate tenants, but at an enormous cost for repairs and renovations (several hundreds of thousands of dollars). At best, the occupancy rate has been only about 70-75% because I did not want the building to again deteriorate.

When 100 Pembroke Street, Toronto was purchased, the new first mortgage then arranged was in the principal amount of $2,650,000, and provided for a floating interest rate of 2% over prime. Over the 2 years subsequent to August, 1987, the prime rate increased from 9 1/4% to 14 3/4%, creating a serious cash flow shortage. In those years, Canplex was indebted in various properties up to about $10,000,000. Floating rate mortgages and re-financing at higher interest rates of fixed rate mortgages caused the annual interest expense to increase from $1,000,000 to about $1,500,000. The apartment buildings were all highly leveraged, as mortgages were increased whenever possible to partially reduce the cash flow shortage. In addition, large mortgage brokerage and CMHC insurance fees (totalling hundreds of thousands of dollars) had to be paid on most re-financings.

Over these years, more and more monies were stolen from the mixed trust account, both to reduce the cash flow shortage of Canplex and to cover ("lap") previous thefts.

Rental increases throughout these years were provincially controlled, and limited to between 4.6% and 5.2% annually. Rent review applications for larger rental increases were not helpful because decisions took 2-3 years to be rendered.

In these years, Canplex and the silent joint venturers sold 181-183 Gerrard Street East, 96 Isabella Street, and 85 Shuter Street, (all in Toronto) to reduce the cash flow shortage.

In the Fall of 1989, Canplex received an offer to purchase 100 Pembroke Street, Toronto. After several extensions of the closing date (ultimately to June 15, 1990), the purchaser finally refused to close. In time it became clear to me that matters were regressing significantly. I became depressed and ultimately contacted a lawyer, Steven Skurka, who arranged for a meeting with an Assistant Crown Attorney, Mr. Jim Atkinson, and officers from the Metropolitan Toronto Police Fraud Squad. The Law Society of Upper Canada was contacted by Mr. Atkinson.

Attached as appendices to this statement are details of two thefts. The examples pertain to the following client matters:

Appendix "A" Rent Recovery Service v. West Mall Holdings
File #0/013

Appendix "B" Teresa Andaloro
Mortgage of 3321-3323 Lakeshore Blvd. West
File #0/046

and

Samsung Electronics Canada Inc.
Purchase of Lots 4 & 5, Plan 43M-964
City of Mississauga
File #9/065

Also attached as Appendix "C" is a list of outstanding thefts from specific clients. The amount of each theft noted is essentially accurate. At the present time I lack sufficient assets to make full restitution to all of the individuals from whom I have misappropriated funds.

The amount of outstanding thefts is approximately $2,500,000. Some calculations for interest owing have been made, but interest would not be paid to the client on monies that should have been held in the mixed trust account.

I, David C. Bird, acknowledge the above to be true and I have furnished the explanations necessary to compile the above in response to questions put to me by David McKillop and Bryon Dale of the Law Society of Upper Canada.

Dated at Toronto, in the Municipality of Metropolitan Toronto, this 30th day of August, 1990."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the said David Carson Bird be disbarred.

REASONS FOR RECOMMENDATION

The facts in this case were not in dispute. The Solicitor's misappropriation of over $2.4 million of client's trust money between 1984 and 1990 came to the attention of the Police and the Law Society through the Solicitor's voluntary revelations. Both parties submit that disbarment is appropriate and of course there could be no other appropriate penalty. Accordingly, it is recommended that the Solicitor be disbarred.

David Carson Bird was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 10th day of April, 1980.

ALL OF WHICH is respectfully submitted

DATED this 19th day of September, 1990

"Tom Carey"
Thomas J.P. Carey
Chair

It was moved by Mr. Lamek, seconded by Mr. Lerner that the Report of the Discipline Committee be adopted.

There were no representations by counsel.

The Report was adopted.

It was moved by Mr. Lamek, seconded by Mr. Lerner that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred be adopted.

There were no representations by either counsel as to the Recommendation as to Penalty.

The solicitor, counsel, the reporter and the public withdrew.

The Recommendation as to Penalty was adopted and the solicitor and counsel were recalled and informed of the decision.

The solicitor and counsel retired.

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Re: THOMAS TEDD SAHAIDAK, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Robert Conway appeared for the Society, no one appeared for the solicitor nor was the solicitor present.

Mr. Conway indicated to Convocation that he had spoken to the solicitor's counsel and had been informed that neither counsel nor the solicitor would attend.

Convocation had before it the Report and Decision of the Discipline Committee dated 25th July, 1990, together with the Affidavit of Service sworn 17th August, 1990 by Neesa Chittenden that she had effected service on the solicitor by registered mail on 16th August, 1990 (marked Exhibit 1). 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
Laura L. Legge, Q.C.
Denise Bellamy

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

THOMAS TEDD SAHAIDAK
of the City
of Toronto
a barrister and solicitor

J. Robert Conway
for the Society

John I. Laskin
for the solicitor

Heard: May 1, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 24, 1990, Complaint D67/90 was issued against Thomas Tedd Sahaidak, alleging that he was guilty of professional misconduct.

The matter was heard in public on May 1, 1990 before this Committee composed of Roger D. Yachetti, Q.C., as Chairman, Denise Bellamy and Laura L. Legge, Q.C. Mr. Sahaidak was not in attendance but was represented by his counsel, John I. Laskin. J. Robert Conway appeared as counsel for the Law Society.

DECISION

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

(Paragraph 2; Complaint D67/90

(a) In or about the month of March 1981, he assisted his borrowing clients, William C. Player and Player's corporate interests ("the borrowers"), to dishonestly deprive his lending client, Seaway Trust Company, of mortgage loan monies amounting to $775,000.00, more or less, in connection with five properties at Scott and Weber Streets, in the City of Kitchener, by structuring the transactions to disguise the true identity of the borrowers, and to make it appear that the borrowers had paid $1,500,000.00 for the properties, when in fact, they had acquired them for $550,000.00.

Evidence

The entirety of the evidence before the Committee on the issue of professional misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D67/90 and is prepared to proceed with a hearing of this matter on May 1, 1990.

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 D67/90 with his Counsel, John I. Laskin, and admits the particular contained therein.

IV. FACTS

4. The subject matter of this Complaint was the subject of criminal proceedings against the Solicitor which were completed in January 1990. On January 10, 1990, Mr. Justice Doherty of the Supreme Court of Ontario found the Solicitor guilty of defrauding Seaway Trust of sum in excess of $1,000.00 in connection with the transaction referred to in the complaint.

5. For that and other convictions, the Solicitor was sentenced on January 30, 1990 to three years' imprisonment.

6. Prior to being sentenced, the Solicitor informed the Court through his Counsel that he would consent to being disbarred.

7. By reason of having been convicted of fraud in excess of $1,000.00 in connection with the transaction which is the subject of Complaint D67/90 and by reason of his Counsel having informed the Court that he would consent to disbarment, the Solicitor has instructed his Counsel to inform the Discipline Committee that he consents to his disbarment.

DATED at Toronto this 1st day of May, 1990"

RECOMMENDATION AS TO PENALTY

This Committee recommends that the said Thomas Tedd Sahaidak be disbarred.

REASONS FOR RECOMMENDATION

In light of the most serious admissions contained in the Agreed Statement of Fact, the agreement of the Solicitor that his conduct constituted professional misconduct, and the Solicitor's consent to an Order of Disbarment, we have no hesitation in recommending to Convocation that Thomas Tedd Sahaidak be disbarred.

Thomas Tedd Sahaidak was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 25th day of June, 1959.

ALL OF WHICH is respectfully submitted

DATED this 25th day of July, 1990

"Roger Yachetti"
Roger D. Yachetti, Q.C.
Chair

It was moved by Mr. Lamek, seconded by Mr. Lerner that the Report of the Discipline Committee be adopted.

Carried

It was moved by Mr. Lamek, seconded by Mr. Lerner that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred be adopted.

Carried

Counsel retired.

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Re: ROBERT EARL STAFFORD, St. Thomas

Mr. Lerner did not participate in the debate nor vote on the matter.

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society and the solicitor was represented by Mr. P. Stern. The solicitor was present.

Convocation had before it the Report and Decision of the Discipline Committee dated 19th June, 1990 together with the Affidavit of Service sworn 17th August, 1990 by Neesa Chittenden that she had effected service on the solicitor by registered mail on 16th August, 1990 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor 27th September, 1990 (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
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"IN PUBLIC"

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Re: ALBERT JOHN BICKERTON, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report and Decision of the Discipline Committee dated 2nd August, 1990 together with the Affidavit of Service sworn 17th August, 1990 by Neesa Chittenden that she had effected service on the solicitor by registered mail on 16th August, 1990 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor 27th September, 1990 (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

D. Jane Harvey, Chair
Gordon H.T. Farquharson
Stuart Thom

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

ALBERT JOHN BICKERTON
of the City
of Toronto
a barrister and solicitor

Reginald Watson
for the Society

Not represented
for the solicitor

Heard: June 5, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 15, 1990, Complaint D33/90 was issued against Albert John Bickerton alleging that he was guilty of professional misconduct.

The matter was heard in public on June 5, 1990 before this Committee composed of D. Jane Harvey, Chair, Gordon H.T. Farquharson and Stuart Thom.

Mr. Bickerton attended the hearing and was not represented. Reginald Watson appeared on behalf of the Society.

DECISION

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

Para. 2: (Complaint D33/90)

(a) He failed to comply with an order of the Discipline Committee dated April 28, 1989 requiring him to pay costs to the Society in the amount of $2,000.00, despite written requests dated September 21, November 2 and November 21, 1989.

(b) He failed to provide a reply to the Society regarding a complaint by Mr. Francisco Perez, despite letters dated September 8th and December 6, 1989 and a telephone message on January 29, 1990.

(c) He failed to reply to communications from the Law Society regarding a complaint made by Jennifer Wren, Assistant Crown Attorney.

Evidence

The entirety of the evidence before the Committee on the issue of professional misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of the Complaint D33/90 and is prepared to proceed with a hearing of this matter on June 5, 1990.

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

The Solicitor has reviewed Complaint D33/90 and admits the particulars contained therein.

IV. BACKGROUND

4. The Solicitor was called to the Bar in 1978. He is a sole practitioner. His practice is primarily criminal.

V. FACTS

Francisco Perez

5. The Complainant, Francisco Perez, wrote to the Society on August 21, 1989 complaining about the Solicitor's failure to, inter alia, maintain contact with him, co-operate with his new counsel in the transfer of his file and account to him for fees and disbursements. The Society wrote to Mr. Bickerton on September 8, 1989 requesting a reply within two weeks. The Solicitor did not reply.

6. On November 21, 1989, a telephone call was placed to the Solicitor's office to inquire to why a reply had not been received. On November 22, 1989, the Solicitor advised that a reply would be mailed by November 27, 1989. The Solicitor did not reply. On December 6, 1989, the Society wrote to the Solicitor by registered mail. In that letter, the Solicitor was advised that the matter would be referred to the Discipline Committee for further instructions if he did not reply within seven days of the date of the letter. A further telephone message was left for the Solicitor on January 10, 1990. The following day, the Solicitor explained that he had been on vacation but thought that a reply had been sent. He intended to try and locate the reply and would contact the Society. When the Solicitor failed to contact the Society, a further message was left for him on January 29, 1990. The Solicitor did not reply. Complaint D33/90 was issued on March 15, 1990.

Jennifer Wren

7. The Complainant, Jennifer Wren, in her capacity as an Assistant Crown Attorney in Brampton, complained to the Society in June of 1989 with respect to the Solicitor's failure to communicate with her regarding an undertaking to make restitution on behalf of a client, Lynda Paxton. Ms. Paxton pled guilty to charges of theft over $1,000. The matter was set for March 16, 1989 for sentencing at which time the Solicitor advised the court that he had a money order in his file and undertook to forward it at once. As of June, 1989, restitution had not been made. Ms. Wren made calls to the Solicitor in May, 1989, many of which were not returned. The Solicitor subsequently advised Ms. Wren that the cheque had been sent in March, 1989.

8. In the fall of 1989, the Solicitor advised the Society that he had found a copy of the money order in his file. He agreed to provide a copy of the money order so that it could be traced through the bank. He further agreed to provide the Society with a current telephone number for his client. The Society sent a letter to the Solicitor on November 15, 1989 confirming the above and requesting further documentation. No reply was received from the Solicitor. The Solicitor did not reply to a telephone call made by the Society. By registered letter dated January 18, 1990, the Society advised the Solicitor that unless the documents were received within two weeks, a Section 42 Order would be sought which would freeze the Solicitor's accounts. Complaint D33/90 was issued on March 15, 1990.

Past Discipline

9. A previous Complaint was issued against the Solicitor on November 28, 1988. On April 28, 1989, the Solicitor was reprimanded in Committee. At that time, the Committee also ordered that the Solicitor pay costs to the Society in the amount of $2,000.00. The Solicitor indicated at that time that he was willing and able to make the payment.

10. On September 21, 1989, the Society wrote to the Solicitor's counsel requesting that payment of the costs be made. A further letter was sent to the Solicitor's counsel on November 2, 1989 requesting an indication from the Solicitor within two weeks as to whether he intended to pay the costs, failing which instructions would be sought as to the appropriate course of action. No reply was received from the Solicitor. On November 21, 1989, a further letter was sent by the Society to the Solicitor's counsel indicating that the matter was going to be referred to the Discipline Committee for instructions on proceeding. The Solicitor's counsel, Brian Greenspan, assured that he had passed these communications on to his client. Complaint D33/90 was issued on March 15, 1990.

VI. EVENTS SUBSEQUENT TO ISSUANCE OF COMPLAINT

11. After receiving Complaint D33/90, the Solicitor provided the Society a written reply, dated March 26, 1990, with respect to the Francisco Perez complaint.

12. After receiving Complaint D33/90, the Solicitor provided to the Society a written reply, dated March 26, 1990, with respect to the Jennifer Wren complaint.

13. After receiving Complaint D33/90, the Solicitor attended upon the Society's offices to discuss the matters outlined in the Complaint. The Solicitor provided a cheque to the Society in the amount of $1,500.00 in partial payment of the outstanding costs.

DATED at Toronto, this 5th day of June, 1990"

RECOMMENDATION AS TO PENALTY

The Committee recommends that the said Albert John Bickerton be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

The Solicitor was reprimanded in Committee in April, 1989 for failure to account to a client on proceeds of a sale of property and failure to co-operate with the audit investigation.

The Solicitor is now before us again, on an admitted complaint of failure to comply with an order of the Discipline Committee, dated April 28, 1989, failure to provide a reply to the Society regarding a complaint by Mr. Francisco Perez and failure to reply to communications from the Law Society regarding a complaint made by Jennifer Wren, Assistant Crown Attorney.

The recommendation of reprimand in Convocation has been made to impress upon the Solicitor the need to fulfill his obligations without requiring the Society to expend considerable time, energy and expense to require him to do so.

Albert John Bickerton was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 13th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of August, 1990

"Jane Harvey"
D. Jane Harvey, Chair

It was moved by Mr. Lamek, seconded by Mr. Topp that the Report of the Discipline Committee be adopted.

Carried

It was moved by Mr. Lamek, seconded by Mr. Topp that the Recommendation as to Penalty contained in the Report that is that the solicitor be reprimanded in Convocation be adopted.

There were no representations by either counsel as to the Recommendation as to Penalty and the solicitor, counsel and the reporter withdrew.

It was moved by Mr. Wardlaw, seconded by Mr. Lerner that the solicitor be suspended for a period of 1 month.

The solicitor and counsel were recalled and informed of the motion for an increased penalty. The solicitor requested and was granted an adjournment to consult counsel.

The matter was adjourned to the next Discipline Convocation.

The solicitor and counsel withdrew.

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Re: OREST WASYL HRYNKIW, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report and Decision of the Discipline Committee dated 2nd August, 1990 together with the Affidavit of Service sworn 17th August, 1990 by Neesa Chittenden that she had effected service on the solicitor by registered mail on 16th August, 1990 (marked Exhibit 1) together with Acknowledgment, Declaration and Consent signed by the solicitor 27th September, 1990 (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

Robert J. Carter
Jeffrey S. Lyons
Ms. June Callwood

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

OREST WASYL HRYNKIW
of the City
of Toronto
a barrister and solicitor

Shaun Devlin
for the Society

Brian Greenspan
for the solicitor

Heard: June 14, 1989
October 13, 1989
April 5, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 18, 1989, Complaint D29/89 was issued against Orest Wasyl Hrynkiw, alleging that he was guilty of professional misconduct.

The matter was heard IN CAMERA on June 14, 1989, October 13, 1989 and April 5, 1990 before this Committee composed of Robert J. Carter, Q.C., Chair, Ms. June Callwood and Jeffery S. Lyons, Q.C. Mr. Hrynkiw was in attendance and was represented by Brian Greenspan. Shaun Devlin appeared as counsel for the Law Society.

DECISION

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

Complaint D29/89

2(a) In or about September and October, 1986, he borrowed the sum of $20,000, more or less, from his clients, Barry Smith and S.B. Smith Holdings Inc., which borrowing was prohibited by Rule 7 of the Rules of Professional Conduct.

Evidence

The entirety of the evidence before the Committee on the issue of professional misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D29/89 and agrees with a hearing of this matter before the Discipline Committee on June 14th, 1989.

II. IN PUBLIC/IN CAMERA

The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

IV. BACKGROUND

3. The Solicitor was called to the Bar in 1968. While he maintains an office in association with a law firm, he is not taking on any new files and is in the process of winding down his private practice.

V. FACTS

4. The Solicitor was a partner in the firm of Bastedo, Cooper and Shostack from April 1984 until October 1985.

5. Mr. Smith was a childhood friend of the Solicitor. He retained the Solicitor in 1985 or early 1986. Mr. Smith and the Solicitor had not seen each other for a number of years prior to that time but, upon meeting again, Mr. Smith decided to take his legal work to the Solicitor.

6. After the Solicitor left Bastedo, Cooper, he represented Mr. Smith in his personal capacity and on behalf of City Farms, a company controlled by the Solicitor in a legal dispute that Mr. Smith had with National Grocers Co. Ltd. The Solicitor commenced acting on that matter in February, 1986. On May 15th, 1986, he sent Mr. Smith an account in the amount of $3,000 for work done in connection with negotiations regarding the matter. The account was paid on May 16th, 1986, by Mr. Smith in his personal capacity.

7. The Solicitor continued to work on the National Grocers matter for Mr. Smith although other counsel was also retained to deal with litigation aspects of the file. The Solicitor submitted a further bill to Mr. Smith dated March 27th, 1987 in the amount of $2,745.00 which was paid by Mr. Smith in his personal capacity on April 1st, 1987. As of September, 1986, Mr. Smith had some money on hand from the sale of his business. The Solicitor was aware of this through his representation of Mr. Smith and through their personal relationship. In the course of social visits, the Solicitor asked Mr. Smith if he could borrow $20,000 for a few months. The Solicitor advised Mr. Smith that no security was available and that the Solicitor had a "deal going through" in December, 1986, from which he could repay Mr. Smith.

8. Mr. Smith gave the Solicitor a $5,000 cheque drawn on his personal account on September 18th, 1986 and another $5,000 cheque drawn on his personal account on September 21st, 1986.

9. On October 30th, 1986, the Solicitor received a $10,000 cheque from S.B. Smith Holdings Ltd. provided by Mr. Smith.

10. The Solicitor provided Mr. Smith with a handwritten demand Promissory Note dated September 18th, 1986 for the sum of $10,000. He provided a further handwritten Demand Promissory Note in the amount of $10,000 to Mr. Smith on October 30th, 1986. No security was provided for the loan. Each of the Promissory Notes provided for interest calculated at a rate of 10% per annum. Copies of the Promissory Notes are provided to the Committee.

11. By December 1986, Mr. Smith had spoken to the Solicitor several times about repayment. The Solicitor told Mr. Smith that he had some business problems and asked if he could wait for the money until September 1987. Mr. Smith agreed to that arrangement. Mr. Smith was aware of the Solicitor's ongoing financial difficulties.

12. On October 1st, 1987, the Solicitor met with Mr. Smith advising that he was unable to pay. The Solicitor proposed payment on an installment plan. Mr. Smith agreed to payment on those terms. The Solicitor provided a handwritten Installment Note dated October 1st, 1987 in which he agreed that he was indebted to Mr. Smith for the sum of $22,500.00 with interest at a rate of 13% per annum payable quarterly in accordance with an attached schedule. A copy of the Installment Note and attached schedule are provided to the Committee.

13. The Solicitor provided monthly post-dated cheques in the principal amount of $500 plus decreasing monthly interest with the installment schedule. The cheques were payable starting November 1st, 1987, until and including May 1st, 1988. The June 1st, 1988 cheque was returned as being without sufficient funds and there have been no funds to satisfy the remaining cheques.

14. After speaking to the Solicitor about repayment, Mr. Smith complained to the Law Society by letter dated September 2nd, 1988.

15. At present the balance of the loan remains outstanding. The only payments that have been made towards principal and interest were the payments made between November 1st, 1987, and May 1st, 1988 in the total amount of $3,500 plus the amount for interest as provided in the schedule.

DATED at Toronto this 14th day of June, 1989"

RECOMMENDATION AS TO PENALTY

The Committee recommends that the said Orest Wasyl Hrynkiw be suspended for a period of two months definite and that the suspension continue until the debt to his clients is paid in full with interest.

However, if the debt plus interest is paid in full prior to the matter being heard by Convocation, the Committee recommends that in lieu of the above penalty the Solicitor be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

The loan to the Solicitor was made in September and October 1986, "for a few months" on the basis that the Solicitor had a "deal going through" in December of 1986, from which the loan would be repaid.

We were not given information as to the nature of this "deal" or evidence of its existence.

In December, 1986, when the client Mr. Smith requested repayment, the Solicitor advised that he had business problems and asked Mr. Smith to wait until September 1987, for repayment. The Solicitor must have had some question in his mind about his ability to repay the loan in December 1986, when the loan was made in September and October 1986.

The original demand notes provided for interest at the rate of 10%. Repayment was extended from December 1986 to September 1987. On October 1st, 1987, a new installment note was prepared acknowledging a debt of $22,500.00, increasing the interest to 13% and schedule of payments proposed of $500.00 per month plus interest. 7 cheques - November 1st, 1987 to May 1st, 1988 were honoured. Cheque dated June 1st, 1988 was returned N.S.F. No further payments were made.

After a finding of professional misconduct on June 14th, 1989, the matter was adjourned for a penalty hearing to October 14th, 1989.

On October 14th, 1989, the Solicitor requested a further one month adjournment to repay the loan or provide sufficient security on either a house or a cottage that he had interest in.

The matter came on again on April 5th, 1990, for a penalty hearing. No additional information was placed before the Committee. The loan had not been repaid and no security had been provided. The only steps taken by the Solicitor to repay the loan or provide security was a vague conversation with a friend who is said to have advised that because of matrimonial problems, no security could be provided. We had serious doubts about the sincerity of the efforts of the Solicitor to do what he said he wanted to do when he obtained the October 13th, 1989 adjournment.

It is for these reasons we make the recommendation as to the above penalty.

Orest Wasyl Hrynkiw was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 22nd day of March, 1968.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of August, 1990

"Robert Carter"
Robert J. Carter, Q.C., Chair

The Report was amended to indicate that the original hearing before the Committee was in public and not in camera.

It was moved by Mr. Lamek, seconded by Mr. Topp that the Report of the Discipline Committee be adopted.

Carried

The Report was further amended at page 2, paragraph 6 in the second line by deleting "by the solicitor" and inserting the words "by Mr. Smith".

It was moved by Mr. Lamek, seconded by Mr. Topp that the Recommendation as to Penalty contained in the Report that is that the solicitor be suspended for a period of 2 months and thereafter until the debt together with interest had been repaid to the client be adopted.

There were no submissions by the solicitor.

Mr. MacKenzie made representations in support of the Recommendation.

The solicitor, counsel and the reporter withdrew.

The Recommendation as to Penalty contained in the Report was adopted.

The solicitor and counsel were recalled and informed of the decision.

The solicitor and counsel retired.

.....

Re: TIMOTHY JOHN LUTES, Orillia

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. B. Cohen appeared for the Society. Mr. Lutes was not present nor was he represented by counsel.

Mr. Cohen outlined the efforts made by the Society to serve Mr. Lutes and requested permission from Convocation to proceed on the basis that the Society had complied with the statutory requirements contained in the Law Society Act and Regulations.

It was moved by Mr. McKinnon, seconded by Mr. Carter that the matter be adjourned to the next Discipline Convocation peremptory to the solicitor and that efforts be made to serve the solicitor personally.

Carried

Counsel retired.

.....

Re: CECIL GARLAND STEWART MCKEOWN, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

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

Convocation had before it the Report and Decision of the Discipline Committee dated 7th September, 1990, together with the Affidavit of Service sworn 26th September, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 14th September, 1990 (marked Exhibit 1) together with Acknowledgment, Declaration and Consent signed by the solicitor 27th September, 1990 (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

Clayton C. Ruby, Chair
Gordon H.T. Farquharson
Michael G. Hickey

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

CECIL GARLAND STEWART MCKEOWN
of the City
of Toronto
a barrister and solicitor

Reginald Watson
for the Society

Brian Greenspan
for the solicitor

Heard: June 13, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 15, 1990, Complaint D45/90 was issued against Cecil Garland Stewart McKeown, alleging that he was guilty of professional misconduct.

The matter was heard in public on June 13, 1990 before this committee composed of Clayton C. Ruby, Chairman, G.H.T. Farquharson and Michael G. Hickey.

Mr. McKeown attended the hearing and was represented by Brian Greenspan. Reginald Watson appeared on behalf of the Law Society.

DECISION

The Complaint

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

(Para 2: Complaint D45/90)

(a) While acting as counsel in a criminal matter in the District Court of Ontario, he appeared in court in an intoxicated condition in or about April, 1989. Thereafter, he appeared in court for trial in an intoxicated condition on or about September 18, 21 and 25, 1989 and failed to attend in court on or about September 19, 1989, with the result that a mistrial was declared at his request regarding his client.

(b) While acting as counsel in a criminal matter in the District Court of Ontario, he failed to attend on or about July 13 and 14, 1989 during a preliminary hearing. Thereafter, he attended in court for trial in an intoxicated condition on December 6 and 7, 1989, with the result that a mistrial was declared.

(c) While acting as counsel in a criminal matter in the District Court of Ontario, he failed to attend in court on December 8, 1989, with the result that the sentencing of his client could not proceed.

(d) He failed to co-operate with the Law Society in an investigation regarding his professional conduct by:

i) Failing to attend at the offices of the Law Society on December 8, 1989 after having been requested and agreeing to do so, and

ii) Failing to respond to the specific concerns addressed in correspondence from the Law Society dated December 8 and December 18, 1989.

DECISION

Adjournment Request

This matter was first before a Discipline Committee on April 11, 1990. At this time an undertaking not to practise law until the conclusion of the discipline proceedings involving Complaint D45/90 was submitted by the Solicitor. Neither the Solicitor nor counsel for the Solicitor was present at this time. The matter was adjourned on consent to June 13, 1990 when the Solicitor and his counsel appeared before the Discipline Committee. It is not suggested that the Solicitor was suffering under any disability, or confusion, or that he did not understand that the case would proceed on this date. Mr. Greenspan appeared for the Solicitor for the first time, on the day of trial, and asked for an adjournment. This application was opposed by counsel for the Law Society of Upper Canada.

Mr. Greenspan wished for time, having been retained only some days earlier, to meet with Marc Somerville, the Vice-Chairman of Discipline who had authorized this complaint, and to convince him to "withdraw" it and to permit the Solicitor to resign from the Law Society of Upper Canada. Such a written request for permission to resign had been made by the Solicitor after the charge was laid.

It is far from clear that such instructions to "withdraw a charge could or should be given once the matter has reached the trial stage in the sense that it is before a panel properly constituted and ready to commence the trial and witnesses are in attendance and prepared to testify. In any event, such a request to "withdraw" a complaint would have to be approved by the panel that is ready to commence the trial of the case. We are of the view that the allegations in this case were far too serious to permit such a withdrawal in the circumstances outlined by Mr. Greenspan -- circumstances which contained nothing more than an appeal to practicality and for clemency.

We did not consider that the requested adjournment was for a proper purpose in all of the circumstances, and we ruled accordingly:

"MR. RUBY: Let me state our indebtedness to both counsel for the quality of the argument and the assistance which we have had in determining this preliminary issue.

With regard to the question of an adjournment for the purpose of allowing Mr. Greenspan to make representations to Mr. Somerville concerning the issuance of the complaint, we have considered that carefully and we don't think it's an appropriate reason for an adjournment; at least in the circumstances of this case where it is quite clear that the facts which gave rise to the complaint would have been within the knowledge of the Solicitor, if they are true, in the period leading up to the application for an adjournment and because of the previous history of the Solicitor that we've been told about.

There also has been some time to deal with that issue. There was a conversation with Mr. Somerville and investigation uncovered that in fact at the time of the authorization, Mr. Somerville was not aware of the letter seeking to resign; but that has not been pursued.

In all of those circumstances, we are not inclined to grant an adjournment for that reason.

With respect to the fact that Counsel for the Solicitor has been very recently retained, we're much more sympathetic. We are prepared to proceed to-day to hear the case for the Law Society and then to allow whatever time period you reasonably require for preparation of any defense case or additional evidence. So, that is the course that we will take. We will hear from the prosecution and at the close of your case, we will adjourn being a seized committee to deal with the balance of the case at a future date that seems convenient. That will enable Mr. Greenspan to marshall what evidence he needs to present to us. And, we are aware that throughout this proceeding, there will be at least one issue which we've been alerted to, which is the question of whether or not we should be recommending that the Solicitor be permitted to resign and we want to hear from both of you on that issue."

"MR. RUBY: Thank you. We've considered this renewed request for adjournment. In addition to the factors raised and commented on earlier, we are aware that the Solicitor took a relatively long time to decide to hire Mr. Greenspan. He was served with the complaint on March 19th, 1989 and sent a letter to H. Reginald Watson of the Law Society selecting the date of June 13, 1990.

The Solicitor must have known when he selected this date that it would be a date to proceed and that counsel would be required to be available, if he chose to have counsel. This adjournment request therefore comes at the very last minute. We note that Mr. Greenspan had material by way of disclosure all week-end and we particularly note that it is now 3:20 in the afternoon and he has had some additional time to prepare to-day while waiting for the case to be called.

There is no suggestion of any particular surprise or disadvantage arising from going on to-day and we want to make it clear that it is open to Mr. Greenspan to raise any particular surprise or disadvantage if one arises as the evidence is heard and we would be very sympathetic to any such requests.

The defense will be adjourned in any event to a future day when there would be adequate time to prepare for it to be called; and if any witness called, as it turns out, is required to return for further cross-examination, application can be made for that and once again, we would be sympathetic to that request.

The allegation by the Crown is not a complicated or difficult one, although we can see very clearly that the defense to this case may involve medical or other consideration which might be complex and difficult.

In all those circumstances, we will not grant the adjournment and wish the case to proceed."

"MR. GREENSPAN: Mr. Chairman, in the light of the ruling of the committee, Mr. McKeown and I have consulted with respect to that eventuality, with great respect to the committee, it is not Mr. McKeown's intention to participate in the further hearing of the matter, nor my intention to participate in the further hearing of the matter and we would simply withdraw from the hearing at this point."

The hearing proceeded in their absence.

The Wong Case

The Solicitor was retained by Wing Wong after he was charged, along with a number of others, with the offenses of bribery, conspiracy, gambling, and breach of trust. The Wong case was complex, lengthy and serious.

Though there were originally other accused persons, through many of these events there were four accused -- Wing Wong (the Solicitor's client), Wilson Wong (for whom Brian Jones acted), Bill Mar (for whom Frank Gabriel acted), and David To (for whom Jeffry House acted). The Crown Attorney conducting the prosecution was Robert Ash.

The matter was to proceed to trial in April, 1989. For reasons unconnected with the Solicitor's conduct, the trial did not proceed. Nevertheless the Solicitor attended in April on at least two occasions while his ability to function was impaired by either drugs or alcohol. Crown counsel, Mr. Ash, warned him to desist but on one day he did not appear at all. On one occasion, his impairment was so obvious that the other defence counsel instructed him to go home. Mr. Frank Gabriel's evidence was that the Solicitor's impairment was marked by an unsteady gait and a speech disturbance. (Mr. Gabriel smelled no alcohol but noted that he was suffering from allergies that day and had a reduced sense of smell.) Mr. Jeffrey House noted that the Solicitor's late appearance in court (noon or 12:30 p.m.) caused the case to lose what priority it might have had in relation to other cases. Mr. McKeown was "in no condition to do a trial." Among other things, Mr. House noted a slow reaction time, slurred speech, and that the Solicitor was somewhat unsteady on his feet. At the same time Mr. McKeown was immaculately dressed, and had no odour of alcohol.

In Mr. House's opinion Mr. McKeown was not intellectually able to understand the issues or to communicate with his client, with other counsel, or with the Court.

In addition to this "false start" in April, there had also been one previous mistrial. All counsel were concerned that the matter proceed as expeditiously as possible. (The trial was ultimately to last nine and one half weeks). The trial was rescheduled for September, 1989.

Shortly after the trial started on September 18, 1989, the Solicitor appeared in such an intoxicated state that defence counsel sent him home. A police officer, Mr. Kenneth Yates, described the Solicitor as having his eyes glazed and his speech slurred. He came to the conclusion that the Solicitor was impaired. The Solicitor was observed by one of the investigating officers staggering onto the escalator after the morning recess on September 18, 1989. Mr. Yates indicated that he was concerned about the Solicitor's safety in executing that maneuver. The Solicitor did not return to court that day.

On September 19, 1989 the Solicitor once again failed to attend court. That failure to attend resulted in the loss of a court day as everyone at the trial tried, but was unable, to find Mr. McKeown. He had, however, been observed the evening before while walking home. Staff Sergeant Harry D'Arcy was of the opinion that he was so intoxicated then that he could hardly stand.

On September 20, 1989 the Solicitor appeared in court and was able to proceed.

On September 21, 1989 the Solicitor again appeared in court in a severely intoxicated state. He did not look well and he was unsteady on his feet. According to Superintendent Julian Fantino he looked ill and incapacitated by alcohol or drugs. Superintendent Fantino smelled alcohol at one point and thought he was incoherent. He said he "didn't

seem to be there". Officer Yates thought he was intoxicated by alcohol or drugs or both. He was observed to have been unable to interact with other people, and it appeared that the jury was aware of this state. Superintendent Fantino, who was seated in a position to be able to observe, saw jurors focus their attention on Mr. McKeown and his condition.

A meeting was held during the lunch recess with all counsel and the officer in charge of the investigation. The Solicitor was advised by Crown counsel Robert Ash that the conduct exhibited to date would no longer be tolerated ("something had to give") and he agreed to have junior counsel to assist him by the following Monday, September 25, 1989, although he indicated that he saw no need for this as he was, in his own view, capable of proceeding. It should be noted that Mr. Gabriel asked Mr. McKeown whether he was having problems with alcohol, and Mr. McKeown consistently denied any drinking.

During that afternoon's testimony an undercover video was being shown to the Court. Mr. McKeown was sitting motionless in his chair, pale, like a statue, for a long time. Other counsel noted that the jury was looking at him a great deal. At one point Mr. McKeown interrupted the showing of the video with a suggestion to the court that indicated that he was barely aware of what was occurring in the trial. Superintendent Fantino said he was mumbling and couldn't be understood. He thought the Solicitor was "obviously impaired".

At one point the Solicitor rose for no apparent reason. Mr. Gabriel took hold of him and sat him down physically. Mr. Yates saw him sitting with his left eye closed and his right eye open just before the video was shown. During that afternoon Mr. McKeown asked Mr. House "What is this trial all about?"

At another point he got up and lurched forward to answer a question asked by Her Honour Judge German. Unfortunately, the question had been asked some 10 minutes earlier.

Some jurors were observed to be in "absolute shock" at his comments during the video. Mr. House observed Mr. Gabriel on a couple of occasions "tug down on Mr. McKeown to prevent him from making inappropriate motions." During the video the lights were out and there was no reason for Mr. McKeown to speak. Yet he rose in the subdued light and said:

> "After the 40 minutes of tape are finished, you can decide which way we are going to go."

At this time he was standing slouched over, his hands and arms extended towards the rear. Mr. Gabriel indicated that Mr. McKeown didn't seem to understand what was happening. At one point Mr. McKeown said "I think we should leave now" and actually got up. Police Officer Yates was able to smell alcohol from 6 feet away.

After court closed for the day, in the hallway, Superintendent Fantino spoke to Mr. McKeown and smelled alcohol on his breath.

The trial resumed on September 25, 1989. The Solicitor again appeared in an intoxicated state, although not a state as bad as the week before. He failed to arrange for junior counsel to assist him as he had promised. A meeting was held among counsel and it was decided that the Solicitor would request permission to withdraw from the case on account of his "ill health". This request was granted by the trial Judge after some discussion about finding alternative counsel to carry on with the trial, and after the Solicitor waived his client's right to argue delay under the Charter. Unfortunately, this waiver was effected without even consulting the client. Mr. House noted that the client, in fact, seemed unhappy while these representations were being made and was shaking his head from side to side and speaking in Chinese throughout this episode.

A mistrial was declared regarding the Solicitor's client and a new trial date was set.

"THE COURT: Mr. Wing Wong, do you think it's possible that you can find a lawyer by tomorrow morning that would be ready to start the trial tomorrow morning?

ACCUSED: I will try my best to find a lawyer. Uhm, this whole method -- is happening rather abruptly and it is not my fault. My -- my counsel has been drinking and he cannot represent me. I'll try to look for a new lawyer to represent me."

Exhibit 2, Transcript of Proceedings, p.17, 11.23-32

The Givens Case

Reginald Givens was charged with aggravated assault, robbery, forcible confinement, choking and possession under $1,000.00. The charges were serious. He was in custody pending his trial. The Solicitor did not appear on July 6, 1989 when the preliminary inquiry was (by agreement) to be either waived or traversed from College Park to Old City Hall to joint up with the case of a co-accused. The case was next spoken to on July 13, 1989 at Old City Hall to set a date but the Solicitor again did not appear.

Mr. Givens had retained the Solicitor for both the preliminary inquiry and the trial. The Solicitor missed two days of the preliminary inquiry. The trial itself commenced December 5, 1989. The Solicitor was there. On December 6, 1989, when the Solicitor arrived in Court, Crown Counsel John Scutt noticed he smelled of alcohol. The Solicitor commenced his cross-examination of the complainant. After the morning recess he appeared to be impaired. His speech was slurred, his sentences trailed off without ending, his eyes were glazed, he supported himself on the table or podium at all times when he was standing, and he appeared to be unaware of what was happening around him. He cross-examined witnesses about what they had done over their lunch period -- but the questions were asked before lunch and taken place. Sgt. David Guyea smelled alcohol and noticed a "peculiar manner" of walking. He too observed that Mr. McKeown had to use a table to support himself when he stood up and during the evidence he seemed to be staring out "into nowhere".

His Honour Judge Whealy interrupted the cross-examination and sent the jury out of the court.

"THE COURT: I wonder if the jury would excuse us. Would the jury retire to the jury room."

"THE REGISTRAR: Members of the Jury, you may now retire until called.

-- Jury exits courtroom at 12:10 p.m.

"THE REGISTRAR: The jury has retired."

"THE COURT: I sent the jury out, Mr. McKeown, because it appears to be to me that you are under the influence of something. You are slurring your words, you are leaving words out -----"

"MR. MCKEOWN: I'm not in the slightest."

"THE COURT: That appears obvious to me."

"MR. MCKEOWN: Absolutely not."

"THE COURT: I'm sorry to have to tell you, but I think we can no longer carry on this morning. The jurors, themselves, have been looking at you with the strangest look on their faces. You've been doing this all morning."

"MR. MCKEOWN: I am appalled."

Exhibit 3, Transcript of Proceedings, p.51, l.11 to p.52, l.6

His Honour Judge Whealy then called counsel into his chambers. The Solicitor admitted having consumed alcohol prior to Court. His Honour indicated he would adjourn till the following morning, but that if there were further signs of impairment he would declare a mistrial.

"THE COURT: I did not enjoy making the allegations this morning at ten after twelve.

I am quite satisfied having talked to my staff that my suspicions were not without foundation. Unless you can assure me that you are perfectly capable and sober of carrying on this afternoon, I propose to call a mistrial and send a transcript to the Law Society."

"MR. MCKEOWN: I am totally prepared to say to you that, certainly, I was prepared to proceed with trial this afternoon.

I have had just looming prior to this trial, and for five, twelve, my first cancer operation. So I had -- certainly did take a drink, but I didn't think it rendered me incompetent to present a trial. If that is the case, then I think that I should have my client have other counsel."

"THE COURT: I agree with you."

"MR. MCKEOWN: I would like your compassion."

"THE COURT: No one likes to be told what you have just told us. No one can offer more sympathy than I offer you right now and I hope that the operation was a success and that you will have many long years ahead of you."

The difficulty that I have -- and it is one that I can't shed -- is that I have to assure your client of a fair trial. He has chosen a jury of his peers. They were reacting to you this morning. I could see it on their faces. Whatever the substance is that seems to be affecting you, it obviously is making you less alert and less able to assert your client's rights than I would wish and I think that the administration of justice demands. Now if you think --"

"MR. MCKEOWN: I fully --"

"THE COURT: Let me finish."

"MR. MCKEOWN: If that's the fact, then I am stunned that I did that."

"THE COURT: There were some people closer to you than I was that noticed odour of alcohol of some kind."

Exhibit 3, Transcript of Proceedings, p.52, 1.20 to p.54, 1.13

The following morning Crown Counsel applied for a mistrial on the ground that the jury had noticed the Solicitor's conduct and on the additional ground that the accused had experienced hearing difficulties during trial. The application for mistrial was granted. His Honour indicated that one of the reasons was the Solicitor's obvious impairment the day before. A new trial was ordered, but the accused remained in custody during the delay caused in part by the Solicitor from December 5, 1989 until January 10, 1990. This time was required in order for him to obtain new counsel.

Keith Regher of the Society's Investigation Department was present in court. He had also been there the day before and he had smelled a strong smell of alcohol in the room although he was standing some six feet from Mr. McKeown. After the proceedings were finished he requested that the Solicitor attend at the offices of the Society to discuss the matter. The Solicitor refused but agreed to attend the following day.

The Solicitor failed to attend the following day. He did not call to cancel or reschedule the appointment.

The Bardzley Case

The Solicitor acted for Johan Bardzley whose sentencing by His Honour Judge Wren was scheduled for December 8, 1989 at the Courthouse on 361 University Avenue. The Solicitor was seen in the robing room of that building that morning by a fellow solicitor, Mr. John Collins, who engaged him in casual conversation. Mr. McKeown indicated he was disappointed that His Honour Judge Wren was instead sitting in another building. The Registrar of the Court had, he said, suggested that he come back at 2:30 p.m. when His Honour Judge Wren could deal with the sentencing matter. Mr. Collins concluded from what he saw or heard that Mr. McKeown was "not in the pink". The Solicitor did not attend the sentencing on the afternoon of December 8, 1989. That afternoon, after his own court matter was finished, Mr. Collins saw His Honour Judge Wren in a courtroom. Mr. McKeown was not there but the client, Mr. Bardzley, was there. Mr. Bardzley seemed disappointed because this was the second day when he had attended in Court to be sentenced. The sentencing had been put over to December 8, 1989 at the request of Mr. Bardzley so that he could put his affairs in order prior to his expected incarceration on December 8, 1989. Mr. Bardzley reluctantly decided to put his sentencing over to another date so that he could get other counsel. Mr. McKeown later called Mr. Collins and thanked him for assisting him in his absence by speaking to the matter before His Honour Judge Wren and asked him to act for Mr. Bardzley. Mr. Collins did so. Mr. Collins noted that Mr. McKeown seemed lethargic though he was again immaculately dressed and was well able to articulate an account of events to Mr. Collins.

The sentencing was adjourned to January 15, 1990 at which time it proceeded with Mr. Bardzley represented by other counsel.

The Failure to Cooperate

On December 8, 1989, a letter was delivered to the Solicitor's office requesting certain information and asking the Solicitor to set up an appointment to attend at the Society on December 11, 1989. The Society had no knowledge about any upcoming court appearances. The Solicitor was asked to provide confirmation that his client's affairs were being attended to in a satisfactory manner.

The Solicitor replied by letter dated December 11, 1989 in which he indicated that he was entering the hospital that day for surgery, that he had no appearances until January 1990, and that he would provide the information requested in a few days.

By letter dated December 18, 1989 he was requested to provide confirmation of the contents of his letter of December 11, 1989.

There was no further contact from the Solicitor between December 11, 1989 and the date the Complaint was sworn.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Cecil Garland Stewart McKeown be given permission to resign, and if the Solicitor does not resign that he be disbarred.

REASONS FOR RECOMMENDATION

It is clearly professional misconduct to appear in Court in a condition so intoxicated as to render a barrister/solicitor unable to responsibly represent his client's interest, and equally unacceptable for him to fail to appear by reason of intoxication. Standards of fidelity and service to clients and to the Court are breached by a lawyer who acts in such a way, and professional misconduct results.

The Committee finds the complaint established respecting Mr. McKeown's conduct on the Wong and Givens trials, and the complaint respecting failure to cooperate with the Law Society established. The Committee, by a majority finds the particular regarding the sentencing of Mr. Bardzley established. The solicitors who testified, both Crown and Defence counsel, gave evidence marked by compassion and fairness, and took care to be cautious in their observations and conclusions. There can be no doubt that Mr. McKeown's conduct in Court on both of these occasions was the result of marked intoxication and that he failed in his duty to the Society, to the Court and to the public. It is moreover clear from the pattern of behaviour in the Wong matter, that he is quite unable to bring his substance abuse under effective control.

The Committee did not rely on the evidence of Staff Sgt. Harry D'Arcy because his observations were made from a car, at some distance, and there were no observation of any symptoms unique to impairment by any alcohol or drug. Moreover, the time of observation was relatively short, some 45 seconds or so.

In each of the Wong and Givens cases, the evidence of more than one witness directed to the same observations strengthens the conclusion that we draw and negates any possibility of an innocent explanation.

The Solicitor's failure to cooperate is abundantly established by the letters to and from the Solicitor and his unexplained failure or refusal to reply.

The majority's view is that the particular respecting his conduct of the Bardzley sentencing matter is also established beyond a reasonable doubt and that it discloses impairment that amounts to professional misconduct. Mr. Collins testified in a fair and impartial manner, and there is no reason to doubt his observations. The Chairman, dissenting, takes the view that the conduct of Mr. McKeown as described by Mr. Collins could well have been caused by an error in judgment not amounting to proof of professional misconduct, and having a doubt on this issue, he would acquit respecting this particular.

REASONS FOR SENTENCE

The Committee approaches the sentencing problem with an overwhelming sense that we are acting now at least a decade too late. It is a decade during which the Solicitor's substance abuse problems have proved a humiliation to the profession, an embarrassment to the public, and a tragedy for individual clients whom he has represented.

It will be seen in the case of this Solicitor's substance abuse, the policy of the Law Society of Upper Canada has been to extend leniency as part of the sentencing process. It has been argued that this sort of approach is misguided and that leniency should be extended before harm to the public has occurred, but not afterward:

> "Lastly, for a variety of reasons, the states should abandon the availability of alcoholism as a mitigating factor in lawyer discipline cases. One of the principal purposes of lawyer discipline is protection of the public. This protection has not been accomplished. An other stated purposes to deter other attorneys from the same behaviour. Singularly, this prophylactic objective has not been achieved ... if alcoholism were unavailable to respondent lawyers as a mitigating factor, more impaired lawyers might be persuaded to begin treatment before an infraction (and resulting harm to clients) occurs ... attention should be focused on getting help for the impaired lawyer before he or she has violated the public trust."
>
> Michael A. Bloom and Carol Lynn Wallinger, Lawyers and Alcoholism: It is time for a new approach?
> Temple Law Review, Vol. 61, No. 4 (1988)

In 1979 the Solicitor was found guilty of contempt before the Supreme Court of Ontario for appearing in Court in an intoxicated condition. A trial was unable to proceed on several occasions on which he simply did not appear. He pleaded guilty to the charge of contempt of Court and was fined some $4,000.00 and placed on probation.

In 1980 he was found guilty of contempt of Court for failing to appear for a criminal jury trial and for failing to attend when ordered to appear to show cause why he should not be cited for contempt. Both instances were caused by the ingestion of drugs or alcohol.

In March 1982 he had been discovered by the police in an intoxicated condition sitting on the exterior steps of a building in a public place in Hamilton wearing his barrister's gown.

In July 1982 he attended at Provincial Court (Criminal Division) in Scarborough in a state of such intoxication that he was unable to appear as counsel in a criminal case scheduled for trial. The trial could not proceed as a result.

In May and June 1982 he failed to appear in Provincial Court (Criminal Division) in Toronto on four separate occasions.

These instances were placed before a Law Society Committee who found:

> "The Committee has concluded that the Solicitor is not sufficiently serious about the need to overcome his personal problems. The most convincing evidence is to be found in the fact that in the 21-month interval between the first day of the hearing and the second (and last) day there were six more cases at a time when it could be said he was "on probation" so far as the Society was concerned. This is an intolerable situation. It persuades the Committee that the Solicitor should not be permitted to continue to practise law because there is simply no assurance that there will not be recurrences of cases of non-attendance in court

were he permitted to continue to practise. Should the Solicitor indicate that he is prepared to resign his membership, the Committee recommends to Convocation that it permit him to resign. The Committee puts forward this alternative recommendation in view of the Solicitor's history as a good counsel when not under the influence of alcohol or drugs and because of personal problems."

Conclusion of Committee, p.389

Convocation did not follow the recommendation of the Committee. Instead it suspended the Solicitor from practice for 18 months and directed that a Committee be convened pursuant to Section 35 of the Law Society Act. After one year, the Solicitor applied to the Committee and later to Convocation to have the period of suspension reduced by six months and for permission to practice once again. This application was granted.

In 1984, the Solicitor agreed to act for Peter Demeter in a complex and difficult trial. The trial was to commence on April 15, 1985 and he had not prepared for the trial. Due to his consumption of alcohol, a mistrial was declared.

In December 1986 he was retained to represent Ruth Jackson on charges of aggravated assault and robbery and he appeared on an adjournment application. At that time he was under the influence of alcohol, and indeed carrying a bottle of alcohol in his briefcase.

These matters were placed before a Discipline Committee, and it recommended to Convocation that the Solicitor be suspended for a period of one month and pay a fine to the Society in the amount of $2,000.00. Convocation accepted that recommendation.

Today, counsel for the Law Society of Upper Canada submits that Mr. McKeown be given permission to resign, if he will, and if not, that he be disbarred. We think that this is the appropriate course to recommend to Convocation.

The Solicitor suffers from an illness, a serious disease. If any blame attaches for permitting him to practice that blame rests with Convocation. There is no sense of punishment attached to this disposition. It would do no good to him or to others like him. But the public and the judicial system must be protected from those like Mr. McKeown.

And this must be the end of the line. He is a menace. And he must never be permitted to practice again.

We think it important to comment on one aspect of the evidence that we heard. There seems to be a suggestion by some lawyers that when they are faced with a situation where counsel is intoxicated and unable to fulfil his many obligations, their role is to see that counsel not act in a way that disrupts the proceedings and causes a mistrial. If this can be achieved, they assist the lawyer to carry on with his brief. This view focuses on the public appearance of justice, and the perception of the public of a drunken lawyer in Court. It is a misconception. If a lawyer is in fact unable to properly carry out his brief in Court, even if he shows no overt symptoms or causes no public embarrassment, the proceedings should be immediately stopped by any counsel who has reason to believe another counsel to be in that condition. The proper course is to draw such matter to the attention of the trial judge immediately, so he can stop the trial either temporarily or permanently or declare a mistrial. A lawyer must be able to meaningfully fulfil his role in the adversary process at all times. A lawyer who gives the appearance of sobriety, or who conceals his intoxication from the Court and the public, but who is in fact unable to act as counsel, fails his client, and the system of justice, as surely as one who acts in such a way as to disrupt the Court proceedings and draw attention to himself.

The Solicitor is a sole practitioner in Toronto. Cecil Garland Stewart McKeown was called to the Bar on the 25th day of June, 1959 and is 67 years old.

ALL OF WHICH is respectfully submitted

DATED this 7th day of September, 1990

"Clayton Ruby"
Clayton C. Ruby, Chair

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

There were submissions by both counsel.

Mr. Greenspan asked Convocation not to accept the Report and to permit Mr. McKeown to tender his resignation.

Mr. MacKenzie made submissions in support of the adoption of the Report by Convocation.

Following the submissions of both counsel Mr. Lerner withdrew his seconding of the motion regarding the adoption of the Report. Ms. Kiteley then seconded the motion.

The solicitor, counsel and the reporter withdrew.

It was moved by Mr. Noble, seconded by Mr. Topp that the Report be tabled and not adopted and that the solicitor be permitted to resign as set out in his letter of February 14th, 1990 subject to review by the Finance Committee.

Not Put

It was moved by Mr. McKinnon but failed for want of a seconder that the findings and reasons in the Report of the Discipline Committee in the matter of Stewart McKeown not be adopted and that the Complaint set out at pages 1 and 2 of the Report be adopted as constituting an Agreed Statement of Facts and that Convocation having found professional misconduct permit the solicitor to resign in light of the solicitor's long career at the Bar.

It was moved by Mr. Epstein, seconded by Ms. Peters and later withdrawn that the Report be quashed and that the solicitor's resignation be accepted.

It was moved by Mr. Carter, seconded by Ms. Peters that the Report of the Discipline Committee be rejected and that Mr. McKeown's resignation as set out in his letter of February 14th, 1990 be accepted subject to the usual procedures set out for resignation from the Law Society.

Carried

The solicitor and counsel were recalled and informed of the decision.

The solicitor and counsel retired.

.....

Re: FRANK SETH COOK, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

Mr. Robert Conway appeared for the Society. The solicitor was not present nor was he represented.

Convocation had before it the Report and Decision of the Discipline Committee dated September, 1990, together with the Affidavit of Service sworn 25th September, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 14th September, 1990 (marked Exhibit 1). 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

Gordon H.T. Farquharson, Chair
Denise E. Bellamy
Colin L. Campbell

In the matter of The Law Society Act and in the matter	J. Robert Conway for the Society
FRANK SETH COOK of the City of Toronto a barrister and solicitor	Not Represented for the solicitor Heard: July 17, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 16, 1990, Complaint D46/90 was issued against Frank Seth Cook alleging that he was guilty of professional misconduct.

The matter was heard in public on July 17, 1990 before this Committee composed of Gordon H.T. Farquharson, Chairman, Denise E. Bellamy and Colin L. Campbell. Mr. Cook was in attendance and was not represented. J. Robert Conway appeared as counsel for the Law Society.

DECISION

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

Complaint D46/90

1. During the period May to June, 1989, he improperly deposited client trust funds into his own personal bank account in order to avoid co-signing controls over his trust account which had been implemented by the Law Society.

2. By depositing client trust funds to his personal bank account, he knowingly breached an Undertaking to the Society dated April 18, 1989 in which he had undertaken to deposit all trust monies coming into his possession into the trust account for his law practice.

3. On or about June 30,, 1989, he made a false statement to a representative of the Law Society regarding his deposit of client trust funds into his own personal bank account.

4. He has failed to maintain current books and records for his practice as required by Regulation 573 made under the Law Society Act during the period March 31, 1987 to June 30, 1989.

5. He failed to reply to the Law Society regarding complaints made by B. McNeil on behalf of the Solicitor's client, Scotia Bank and from his fellow solicitor, Dennis Apostolides.

6. He failed to complete outstanding client matters and to report fully to all clients following his withdrawal from active practice on or about June 30, 1989.

7. He breached an Undertaking to the Law Society given October 10, 1989 to:

a) Bring the books and records of his practice up to date on or before November 15, 1989.

b) To prepare and file with the Law Society Form 2/3 annual returns for his fiscal years ending March 31, 1988 and March 31, 1989.

c) To co-operate fully with the Staff Trustee and with the Auditors of the Law Society.

Evidence

The entirety of evidence before the Committee on the issue of professional misconduct was in the form of the following Agreed Statement of Fact:

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D46/90 and is prepared to proceed with a hearing of this matter on July 17, 1990.

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 D46/90 and admits the particulars contained herein.

IV. BACKGROUND FACTS

4. the Solicitor was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on March 23, 1973. Since March, 1980 the Solicitor has acted as a sole practitioner with a general practice.

5. The Solicitor was before the Discipline Committee on June 2, 1987. The Solicitor was found guilty of professional misconduct respecting his investments of client trust funds. In some of these investments the Solicitor failed to obtain any security for the trust funds he invested. A copy of Complaint D49/87 is at Tab 1 of the Document Brief. A copy of the Agreed Statement of Facts supporting Complaint D49/87 is at Tab 2 of the Document Brief. The Solicitor was Reprimanded in Committee and ordered to pay $1,000 in costs.

V. FACTS - COMPLAINT D46/90

6. The Society attended at the Solicitor's office on April 18, 1989 to conduct a spot examination of his practice of law. At that time the Society determined that the Solicitor had not maintained the books and records for his practice of law since March of 1987. As a result, the Solicitor was unable to provide the Society with evidence that he had sufficient funds on deposit in his trust account to meet his trust liabilities. Co-signing controls were implemented on April 18, 1989 and as a result the Solicitor undertook to the Society in writing that in future all trust money coming into his possession or control would be deposited into the trust account subject to co-signing controls. The Solicitor also instructed his bank in writing that all trust cheques would have to be co-signed by the Solicitor and a Law Society audit employee.

7. Unknown to the Society the Solicitor took steps to circumvent the Society's co-signing controls by using his personal account to receive and disburse trust funds. This came to the attention of the Society on June 30, 1989 when Mr. Raymond Banks, the manager of the bank where the Solicitor maintained his accounts, telephoned the Society. The Solicitor had sent a clerk to the bank to deposit trust cheques payable to the Solicitor into the Solicitor's personal account. The words "in trust" on the cheque had been scratched out and initialled by the Solicitor. Mr. Banks had refused to deposit the three cheques which totalled over $400,000. Mr. Banks also informed the Society that several large transactions were processed through the Solicitor's account during the last several weeks and there was a current balance of approximately $140,000 in the Solicitor's personal account.

8. Also on June 30, 1989 but shortly after Mr. Banks had spoken with the Society the Solicitor contacted Mr. Stephany of the Society's audit department requesting that trust cheques be co-signed. The Solicitor attended upon Mr. Stephany who noted that the three cheques reported by Mr. Banks had been deposited to the Solicitor's trust account. In response to a question from Mr. Stephany, the Solicitor falsely explained that his law clerk had become confused about the bank deposit and had inadvertently attempted to deposit the trust monies to the Solicitor's personal account. This was false as the Solicitor himself had scratched out the words "in trust", initialled the deletion and instructed his law clerk to deposit the trust funds to personal account as he had done on numerous occasions in the recent past.

9. As a result of the concerns respecting the Solicitor's handling of trust funds, the Society assigned an auditor to investigate. On July 4, 1989 the auditor attempted to contact the Solicitor but was advised by his secretary that he would be on holiday until August 1, 1989. On the same day the auditor wrote to the Solicitor requesting the production of the Solicitor's books, an explanation as to who was tending to the client files during the Solicitor's month long vacation and requesting that the Solicitor contact the auditor upon his return.

10. On August 2, 1989 the auditor attempted to contact the Solicitor by telephone but received no answer. The auditor wrote the Solicitor on August 2, 1989 advising that she would attend at his office on August 11, 1989 to examine the books and records. This letter was delivered by courier to the Solicitor on August 4, 1989. On August 10, 1989 the Solicitor's secretary advised the Society's auditor that the Solicitor had left town and would not be available on August 11, 1989. The appointment was rescheduled for August 14, 1989.

11. On August 14, 1989 the Society's auditor and Staff Trustee attended at the Solicitor's office and was advised that the Solicitor had been involved in a car accident and would not be available for the meeting. The auditor wrote to the Solicitor on August 14, 1989 requesting that the Solicitor attend at the audit department on August 17, 1989.

12. The Solicitor attended on August 17, 1989 and stated that he was winding down his practice. Upon being questioned by the Society's staff he admitted that he had lied to Mr. Stephany about his attempt to deposit trust funds to his personal account. He admitted that he had used his personal account for trust transactions to avoid the co-signing restriction. He stated that using the personal account was easier as his prime concern was to get the deals closed. He indicated that he had lied to Mr. Stephany on June 30, 1989 to keep him happy and to obtain the co-signatures required on the trust cheques to close the deals. He also admitted that he had been avoiding the Society's auditor.

13. The Solicitor stated that he had first used his personal account for trust transactions in May, 1989. Since that date he had processed approximately ten transactions through his personal account.

14. The Solicitor also acknowledged his obligation to update his books and records. He stated that he had done nothing in regard to the books and records since the co-signing controls had been placed on his trust account on April 18, 1989.

15. The Solicitor agreed to sign an Undertaking to the Society whereby he would wind up his practice and accept no new legal work. The Solicitor did not execute the Undertaking until October 10, 1989. A copy of the Undertaking is at Tab 3 of the Document Brief. The Solicitor produced some client files and partial banking records and agreed to provide the Society with a breakdown of client activity in his personal account and the related client files. In addition, the Solicitor has not provided the Society with books and records.

16. The limited documentation provided by the Solicitor indicated that during the period May 18 to July 31, 1989 trust funds totalling $457,135.15 were deposited to his personal account. Disbursements during this period totalled $433,885.40 of which approximately $421,756.56 were client related and approximately $12,128.84 were personal payments. On August 4, 1989 the Solicitor's personal account had a balance of $20,733.50 which the Society believes to be client funds as no evidence could be found of personal funds being injected into the account by the Solicitor. When the Solicitor started using the personal account for trust transactions, there was a debit balance of $2,516.25.

17. After analyzing the personal account the Society wrote to the Solicitor requesting verification of the client funds identified as being deposited to his personal account. This verification was necessary due to the lack of books provided by the Solicitor as well as the incomplete nature of his client files. The Solicitor has not provided the information requested by the Society.

18. The Solicitor breached his Undertaking to the Society dated October 10, 1989 by:

1. Failing to bring the books and records of his practice up to date on or before November 15, 1989 pursuant to paragraph x(i) of his Undertaking;
2. Failing to prepare and file with the Law Society Form 2/3 annual returns for his fiscal years ending March 31, 1988 and March 31, 1989 pursuant to paragraph x(ii) of his Undertaking;
3. Failing to co-operate fully with the Staff Trustee and the Society pursuant to paragraph iv of his Undertaking.

19. The Society also received complaints from his former client, the Scotia Bank and a fellow solicitor, Dennis Apostolides. The Society wrote to the Solicitor requesting his reply. Despite repeated communications, the Solicitor has failed to reply to the Society's request for his comments on these outstanding complaint matters.

20. During the meeting of August 17, 1989 the Solicitor informed the Society that he had voluntarily withdrawn from the practice of law on June 30, 1989. However, on June 30, 1989 the Solicitor had not dealt with all of the outstanding matters remaining from his practice of law including reporting to clients on completed matters, transferring files and properly maintaining his books and records. Since that time, the Solicitor has still not resolved these outstanding matters. Despite the Solicitor reducing his Undertaking to writing on October 10, 1989 he has still not co-operated with the Staff Trustee and the auditor in that he has failed to provide the requested information.

DATED at Toronto this 26th day of June, 1990"

RECOMMENDATION AS TO PENALTY

The Committee recommends that Frank Seth Cook be disbarred.

REASONS FOR RECOMMENDATION

On the matter of penalty the Solicitor has admitted as truthful the statements of counsel for the Society which include, among other matters, the breach of an Undertaking given to the Society in respect of a previous finding of professional misconduct with respect to obligations regarding his trust account. The previous Undertaking, which is part of Exhibit 3, is appended hereto.

In particular we are advised that the Solicitor has not voluntarily wound up his practice under the direction and supervision of the Staff Trustee, has not co-operated fully with the Staff Trustee and auditors of the Law Society, has not maintained the books and records for his practice on a daily basis, has not brought the books and records of his practice up to date, and has not prepared and filed the appropriate Form 2 and Form 3 returns as provided.

We were advised that there still remains outstanding some $4,000 to $5,000 in a trust account that needs to be disbursed for which the Society requires the lawyer's co-operation. In addition, Mr. Cook has conceded that his cover-up of his failings amount to lying on his behalf which amounts to dishonesty. Mr. Cook has submitted that his problem is simply that he is unsuited to be a Solicitor and that he was never happy in the profession, did not have the ability to carry out the business duties of the practice and wishes to be allowed to resign without the disgrace of disbarment.

The Solicitor is 44 years old, having been called in 1973. He practiced with the firm of Tilley, Carson until 1980 at which time he commenced practice on his own. He indicated that his decision not to continue practice was made independently of these proceedings, and that he wants to do something different and "seems to have frozen" in his ability to deal with the business aspects of the practice. He concedes dishonesty, but maintains that he is not crooked.

Since the commencement of thee proceedings, and indeed pending this hearing, the Solicitor has not taken steps to wind up his practice, and the Society has no knowledge of whether his books and records can be brought into an appropriate state much less whether they will be.

The Solicitor has not taken on a new matter since November of 1989 and while he has paid annual dues in October of 1989 he was suspended in May of this year for failure to pay his insurance bill.

The Solicitor is prepared to allow the Society access to all books and records, but does not trust himself to make a recommendation as to how these matters can be completed.

The Solicitor believes that he "froze" at a point in time and became psychologically incapacitated. Counsel for the Society urges that the conduct establishes willful and wanton intent despite his admitted incapacity.

While the Committee was prepared to accept the Solicitor's statement that his activity was not motivated for personal gain, nevertheless, the attitude of the Solicitor which militates against the orderly winding-up of his practice and ensuring that the obligations to his clients are met, militates against this.

In addition, his deceit in dealing with the Society is not compatible with the public interest accorded a resignation.

For the above reasons the Committee recommends that the Solicitor be disbarred.

Frank Seth Cook was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on March 23, 1973.

ALL OF WHICH is respectfully submitted

DATED this day of September, 1990

"Colin Campbell"
Colin L. Campbell

Mr. Campbell did not take part in the discussion.

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

Carried

It was moved by Mr. Lamek, seconded by Mr. Lerner that the Recommendation as to Penalty contained in the Report that is that the solicitor be disbarred be adopted.

Carried

Counsel retired.

.....

CONVOCATION ADJOURNED at 12:50 P.M.

.....

CONVOCATION RECONVENED AT 2:30 P.M.

.....

PRESENT:

The Treasurer (James M. Spence, Q.C.), Callwood, Campbell, Carey, Epstein, Graham, Hall, Kiteley, Lamek, McKinnon, Noble, Peters, Thom, Topp and Wardlaw.

.....

Re: WILLIAM GEOFFREY MILNE, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

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

Convocation had before it the Report of the Discipline Committee dated 8th March, 1989, together with the Affidavit of Service sworn 14th April, 1989 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th April, 1989 (marked Exhibit 1) together with Acknowledgment, Declaration and Consent signed by the solicitor 27th September, 1990 (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

A.M. Rock, Chair
M.P. Weaver
D.H.L. Lamont

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

WILLIAM GEOFFREY MILNE
of the City
of Toronto
a barrister and solicitor

S. Devlin
for the Society

B. Bellmore
for the solicitor

Heard: November 15, 1988

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

DECISION AND REASONS FOR DECISION

William Geoffrey Milne of the City of Toronto was the subject of Discipline Complaint No. D39/86 sworn the 8th day of May, 1986 and charging that he was guilty of conduct unbecoming a barrister and solicitor. A single particular of that allegation was provided in the Complaint as follows:

(a) on or about April 30, 1986, he was found guilty and convicted in the Supreme Court of Ontario before a judge and jury of the crime of manslaughter contrary to Section 219 of the Criminal Code of Canada.

At the hearing before us, counsel for Mr. Milne did not contest the allegation, so that the only matter in issue was the appropriate penalty. In the circumstances, the Committee finds that the complaint has been established. In dealing with the issue of penalty, the Committee first finds it necessary to set forth in some detail the facts of this case.

William Geoffrey Milne is now forty years of age. He studied law at Queen's University, having graduated from that law school in 1977. He articled in Brampton, Ontario and was called to the Bar in the Spring of 1979.

Mr. Milne had completed his undergraduate studies at the University of Toronto, which he attended between 1968 and 1972. It was during that period that he became involved with the unlawful use of drugs. In his testimony before us, he admitted that during the late 1960s and early 1970s, he "tried a bit of everything and experimented with drugs to determine their effects". In addition to the drugs, Mr. Milne also engaged in the heavy use of alcohol during that period.

Mr. Milne denied any involvement with drugs during years in law school, although he did testify that he drank alcohol during that period to the point at which it "became a problem for [him]".

After his call to the Bar, Mr. Milne moved to North Bay, where he remained until 1980. Although he opened a law office, the vast majority of his time was devoted to winding-up the estate of his late father who had died in 1978. His father had left behind a dairy farm that was very substantially in debt. By obtaining a licence for the extraction of gravel from the farm and then selling the gravel, Mr. Milne was able to generate sufficient income to repay the debts owed by his father's estate.

Mr. Milne moved to Toronto in late 1980 and began living with Ingrid Peters, whom he had met when they were both in the Bar Admission Course. Ms. Peters practised in the field of banking and insolvency law at a large Toronto law firm between 1980 and 1987.

During the first two years of their cohabitation, Mr. Milne devoted most of his time to music. He organized a musical group and recorded an album. During that time, he also began using drugs again, taking amphetamines to increase his energy when working for long periods on his music. He also experimented with a drug he called "China White", which is apparently a derivative of a pharmaceutical used as a a heart stimulant. Mr. Milne described China White as an addictive drug that he tried "a few times" in 1980 and then again during the summer of 1982.

By the end of 1982, Mr. Milne had become discouraged with his musical career and disbanded the group he had assembled.

In 1983, Mr. Milne and Ms. Peters purchased a three-acre farm in Caledon East, which they renovated and moved into. While keeping music as a hobby, he spent his time renovating the house and working from time to time for a newspaper in North Bay. Mr. Milne testified that during the period 1983-84 he was drinking alcohol to excess, including during the day-time.

Ms. Peters gave birth to their son John in 1982. A second son, William, was born in mid-1987.

During the period leading up to the crime, Mr. Milne's use of alcohol and drugs was a source of conflict between him and Ms. Peters. She voiced objection to his habits and lifestyle, but was not able to persuade him to change.

The crime of which Mr. Milne was convicted was committed in May, 1984. The victim was a former member of Mr. Milne's band, one Leo Trottier. Having made plans to return to the music business by recording another album, Mr. Milne invited Mr. Trottier to his Caledon farm for the purpose of "drying him out" since Mr. Milne knew that he was a heavy drug user. Instead, Mr. Trottier's visit to the farm resulted in the two of them using drugs and alcohol. Mr. Milne used China White in the week before the slaying.

Mr. Milne described in his testimony the circumstances of the crime. He testified that Mr. Trottier was acting in a bizarre fashion on the day in question, and that Mr. Trottier threatened Mr. Milne's mother when she visited the farm. Mr. Trottier was apparently holding a knife at her throat and Mr. Milne was convinced that if he did not act, his mother would be seriously harmed if not killed. Mr. Milne retrieved a shotgun and killed Mr. Trottier with it. Afterwards, he removed the clothes from the dead body and attempted, unsuccessfully, to destroy the clothes by burning them.

Mr. Milne was charged with second degree murder. From the time of his arrest in May, 1984 until October of that year, he was an in-patient at the Clarke Institute. He was then released on bail and lived with his wife and son until his conviction in May, 1986. When an appeal and cross-appeal from the conviction and sentence were abandoned in the spring of 1988, Mr. Milne began serving his sentence of two years less a day and he is now on parole.

Mr. Milne described the treatment that he received commencing in 1984. During the months that he was an in-patient at the Clarke Institute, he was seen by two psychiatrists and remained under their treatment after his discharge in October, 1984.

Mr. Milne's treating psychiatrist, Dr. M.H. Ben-Aron, reported to the Provincial Court by letter dated July 3, 1984 on the question of Mr. Milne's fitness to stand trial. Dr. Ben-Aron had no difficulty in concluding that Mr. Milne was fit, and that he was not mentally ill. Blood tests, EEG and CT scan procedures all proved normal. However, Dr. Ben-Aron had the following to say:

> "Clinically, from a psychiatric perspective, William suffers from long-standing alcohol and drug abuse. He also has a number of emotional and personality problems. In the past these have resulted in his experiencing episodes of depression, feelings of guilt, disrupted interpersonal relationship, especially of a courtship nature, and a tendency to non-conformist and at time even rebellious attitudes and conducts."

Dr. Ben-Aron diagnosed alcohol and substance abuse, although he felt that Mr. Milne's personality problems were not of such an intensity or pervasiveness that they justified being given a formal and separate diagnosis.

Dr. Ben-Aron strongly recommended that Mr. Milne remain totally abstemious, and refrain from the use of any alcohol or other non-prescribed mind-altering substances. He also recommended that Mr. Milne become involved in psychiatrist treatment.

During the years prior to his trial in 1986, and in addition to psychiatric treatment and counselling that he was receiving, Mr. Milne underwent cognitive therapy from a psychologist in an attempt to change some of his old patterns of thinking that had led to occasional depression and maladaptive behaviour. he also worked at Frontier College, training illiterates. In addition, Mr. Milne built his own house in North Bay and worked at a dairy. He also donated some of his time to PEN International, writing a brief on its behalf in opposition to proposed federal legislation aimed at banning pornography.

At the invitation of counsel, the Committee read and considered the reasons delivered by the trial judge in sentencing Mr. Milne following his conviction for manslaughter. In the course of those reasons, the Honourable Mr. Justice Bowlby considered the psychiatric evidence and a favourable presentence report which included the following opinion:

> "...it is highly unlikely that [Mr. Milne) will commit any further antisocial acts in the future".

His Lordship also referred to the character witnesses called on behalf of Mr. Milne at the trial, all of whom described Mr. Milne as a person of integrity and who has a general reputation for non-violence.

His Lordship expressed the conclusion that there was little possibility that Mr. Milne would ever be a threat to society again.

In sentencing Mr. Milne to a term of imprisonment for two-years less one day, His Lordship said the following:

"After weighing the appropriate circumstances surrounding the commission of the offence, the gravity of the crime, the lack of a previous record for the offender and the continued support of his family, his general reputation of honesty and peacefulness and his successful treatment at the Clarke Institute, it is my view that William Milne is most definitely a person who can and will be reclaimed as a useful member of society. Again, my opinion in this regard must be balanced by the crime of which he has been found guilty."

The Committee was also provided with more recent medical reports written by Dr. Ben-Aron. By letter dated May 23, 1986, Mr. Milne's psychiatrist said the following:

> "The main psychiatric problem for which he was being treated was a severe mood disorder, characterized in him by fluctuating mood states and emotional lability. Predominantly however, he experienced serious bouts of depression. The main treatment thrust for these specific difficulties included medication (Tricyclic anti-depressants) as well as individual and group psychotherapy. We also were aware of Mr. Milne's problem with alcohol and substance abuse and through the individual and group psychotherapy treatment approaches, attempted to help him deal with these difficulties as well.
>
> "It has been our experience with Bill that he has always been highly motivated for treatment and cooperated with out treatment recommendations and has over the tenure of his involvement with us made good progress. Were he available to do so we would recommend his continued treatment involvement with us. We are prepared to continue treating him as soon as he is available."

Mr. Milne has been on parole since October 31, 1988. he is employed at present by a company that carries on the business of renovating houses. he is continuing with his psychiatric treatment, participating in group therapy twice a month. He is also seeing a psychiatrist individually once each month. Each Friday night Mr. Milne attends at the Donwood Institute for a group meeting similar to Alcoholics Anonymous. At present, he reports no difficulty with alcohol or drugs.

Mr. Milne's children are now six years old and eighteen months old, respectively. Mr. Milne and Ms. Peters are undergoing a "trial separation", although he stays overnight with her sometimes and they have seen each other on a regular basis since his parole began on October 31st. Mr. Milne remains very close to his children.

Mr. Milne has not practised law at all since his arrest in 1984, having voluntarily undertaken to the Law Society at that time not to do so. During his testimony at the hearing, Mr. Milne told the Committee that his aspiration is to engage in criminal defence work should he be permitted to continue to practice.

The Committee also heard the evidence of Ms. Peters. She testified that in her view, the tragic events of 1984 and the subsequent trial and incarceration were sufficient to "jolt" Mr. Milne and require him to reassess his lifestyle and values. She testified that Mr. Milne is now on the straight and narrow and is a better person for the experience.

In his submissions on behalf of Mr. Milne, Mr. Bellmore urged us to suspend Mr. Milne until the completion of his criminal sentence on March 1, 1990. Taken together with the period during which Mr. Milne voluntarily undertook not to practice, Mr. Bellmore observed that that would result, in effect, in a six year suspension from the practice of law. Mr. Bellmore also suggested that we require Mr. Milne to enroll in not fewer than ten continuing legal education programmes to be agreed upon by counsel for the Law Society and Mr. Milne in order to refresh his knowledge of the law. He urged us not to require Mr. Milne to leave the profession and relied particularly upon the evidence that Mr. Milne has now been rehabilitated from his abuse of alcohol and drugs. Having regard to Mr. Milne's continued attendance upon psychiatrists, Mr. Bellmore argued that the solicitor's commitment in good faith to his own recovery has been demonstrated.

Mr. Bellmore also relied upon the many favourable passages both in the reasons rendered by the learned trial judge in passing sentence upon Mr. Milne and the pre-sentence report that was prepared for that occasion. The attention of the Committee was drawn to the character evidence that was before Mr. Justice Bowlby as well as letters tendered at the hearing before us attesting to Mr. Milne's gentle nature, his refinement and his essential goodness.

Finally, Mr. Bellmore referred to the medical reports that were before the Committee, and particularly to the recent letters from the psychiatrists who have been treating Mr. Milne and which speak of his recovery.

For his part, Mr. Devlin urged us to recommend that Mr. Milne leave the profession, either by way of disbarment or permission to resign. He referred to the subjective and objective elements that must be considered in determining whether Mr. Milne is fit to continue in the practice of law and stressed the moral turpitude involved in both Mr. Milne's lifestyle until 1984 and in the criminal offence itself.

The Committee has carefully considered all of the evidence and the submissions of counsel. In particular, we have reviewed in detail the documentary evidence that was filed, and particularly the medical reports, the pre-sentence report and the reasons rendered by the learned trial judge in sentencing Mr. Milne.

We have come to the conclusion that the appropriate disposition in this case is to recommend to Convocation that Mr. Milne be permitted to resign from the Law Society. Should he decline to do so, he should be disbarred.

In arriving at that conclusion, we are quite prepared to accept that the crime of manslaughter for which Mr. Milne was convicted was an isolated incident and that he is not likely to engage again in violent or even criminal misconduct. However, the fact remains that the manslaughter was merely one event in a lifestyle in which Mr. Milne engaged for an extended period and which included significant drug and alcohol abuse. It is also clear that Mr.Milne suffered from significant emotional difficulties which have now been diagnosed and are under continuing treatment.

The Committee was not satisfied, however, with the extent and quality of evidence concerning Mr. Milne's present condition. The only medical evidence before us in that regard was the letter of November 9, 1988 signed by Dr. Ben-Aron and by Dr. Pollock, the psychologist at the Clarke Institute involved with Mr. Milne's case. The doctors wrote:

> "In our opinion Mr. Milne has worked hard on his psychological and emotional difficulties over the past four years and has made good progress in dealing with many of the issues that originally resulted in the problems he experienced in the Spring of 1984."

The doctors also commented upon Mr. Milne's responsible attitude in attending treatment sessions regularly since 1984. They described him as "a highly motivated individual in dealing with his difficulties." They expressed the following view:

> "...In our opinion [he] has succeeded in understanding his problems, their causes and effects and, as well, developed emotionally and psychologically good coping mechanisms to deal with his past problems".

The doctors concluded as follows:

> "We of course cannot speak to the issue of his continuing to practice law. We are able to repeat that he has conducted himself in his association with us in a responsible, trustworthy and mature fashion. he has not demonstrated to us that he is suffering from any current psychological problems that would compromise his thinking, judgment, self-controls or abilities to relate in a responsible and appropriate manner with those around him.
>
> "Specifically with respect to Mr. Milne's past history of mind-altering substance and drug abuse it is our understanding that he has not used any mind-altering substances, drug agents, etc., other than medications prescribed for him."

Having regard to the seriousness of Mr. Milne's past difficulties and misconduct, the Committee has decided that it requires more evidence than was presented in order safely to conclude that Mr. Milne is now a fit person to rejoin the profession as an active member. More particularly, the Committee feels that the following questions remain unanswered:

(1) Would Mr. Milne be able to withstand the stresses and pressures of a law practice without experiencing significant emotional difficulties? and

(2) Would such pressures and stresses result in his returning to a pattern of drug or alcohol abuse?

The Committee has also been mindful of the fact that Mr. Milne has never really practised law. Following his call to the Bar in 1979, he devoted only a small proportion of his time to the law office that he opened in North Bay. Between 1980 and 1982, his time was spent primarily on his musical career. Thereafter,he devoted his attention to the renovation of his farmhouse and journalism until the point in 1984 when he voluntarily undertook to the Law Society not to practice. While not itself dispositive on the issue of penalty, the Committee feels that this fact must be taken into account along with all the other circumstances in this case in deciding whether Mr. Milne should remain in the profession.

Fundamentally, however, the Committee has come to its conclusion because of the very substantial evidence that as of 1984, Mr. Milne was not a fit person to practice law. He associated with undesirable persons he had developed a drug dependency and he had allowed his life to deteriorate to the point at which he was charged and subsequently convicted of a most serious offence. Had this hearing been conduct in 1984, we have little doubt that Mr. Milne would have been disbarred.

The question then becomes whether there is sufficient evidence of recovery and rehabilitation in the intervening years to justify a decision by the Law Society to permit Mr. Milne to remain in the profession. We are not satisfied that there is such evidence before us. We have carefully considered all of the favourable character evidence at trial and in his hearing. With respect to the evidence at trial, we remind ourselves that those statements, and indeed the favourable statements made by the learned trial judge, were expressed in the context of determining an appropriate criminal penalty as opposed to an appropriate professional sanction. Indeed, to the extent to which he considered the matter at all, the learned trial judge expressed the view in the course of the reasons for sentence that:

> "...On the balance of probabilities he will be disbarred and lose his right to practice law. The loss of this right, of course, does not preclude his reinstatement if at a later date the governing body of the Law Society of Upper Canada considers such reinstatement conducive to the maintaining of the integrity and good name of the legal profession."

While the letters tendered at the hearing before us concerning Mr. Milne's good character were impressive indeed, most of them were very general in scope and failed to address important issues of character and fitness t practice that must be paramount in our consideration.

Finally, the Committee has considered the Society's duty to the public to ensure that members of the profession adhere to standards of conduct that justify the trust and confidence placed in them by the men and women of Ontario. In all the circumstances of this case, we feel that that duty requires that Mr. Milne leave the profession.

We have therefore come to the conclusion that we must recommend to Convocation that Mr. Milne be permitted to resign. We have decided upon that disposition rather than a recommendation for disbarment in order to reflect our recognition of the efforts Mr. Milne has made to date to rehabilitate himself and in order to enhance Mr. Milne's prospects should he eventually decide to make an application for re-admission based upon complete and cogent evidence of fitness to practise.

ALL OF WHICH is respectfully submitted

DATED this 8th day of March, 1989

"Allan Rock"
Chair

There were no submissions on the Report and it was moved by Mr. Lamek, seconded by Mr. Topp that the Report be adopted.

Carried

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

There were submissions by both counsel on the issue of penalty.

Mr. Bellmore indicated that he thought that a 2 year suspension was appropriate in all the circumstances in support of the psychiatric report contained in the decision. He filed as Exhibit 3 the curriculum vitae of Dr. Ben-Aron.

Mr. MacKenzie made submissions in support of the Recommendation as to Penalty contained in the Report.

Mr. Bellmore made a brief reply to the submissions made by Mr. MacKenzie.

The solicitor, counsel and the reporter withdrew.

It was moved by Mr. Epstein, seconded by Ms. Peters and later withdrawn that the matter be remitted to the Committee in order that Mr. Bellmore could call evidence to address the concerns raised by the Committee regarding Mr. Milne's future fitness to practise law.

It was moved by Mr. Topp, seconded by Ms. Peters that the solicitor be suspended pending his successful completion of the next Bar Admission Course including the articling period.

Carried

It was moved by Mr. McKinnon, seconded by Ms. Kiteley that the solicitor be suspended until he successfully completes the 1991-92 Bar Admission Course including articling.

Withdrawn

It was moved by Mr. Carey but failed for want of a seconder that the penalty be no further suspension in light of the six and a half years of non-practice coupled with an Undertaking by the solicitor to the Law Society to comply with whatever requirements were imposed to indicate that he was now capable of practising law.

The solicitor and counsel were recalled and informed of the decision.

The solicitor and counsel retired.

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CONVOCATION ADJOURNED AT 3:35 P.M.

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Confirmed in Convocation this 26th day of October, 1990.

Treasurer