

MINUTES OF SPECIAL CONVOCATION

Thursday, 24th June, 1993
9:00 a.m.

PRESENT:

Acting Treasurer (Roger Yachetti), Bastedo, Bellamy, Bragagnolo, Brennan, Campbell, Cullity, Elliott, Feinstein, Finkelstein, Graham, Hill, Kiteley, Lamek, Lamont, Lax, McKinnon, Manes, Murray, S. O'Connor, Palmer, Richardson, Sealy, Somerville, Thom, Topp and Weaver.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Re: GEORGE FLAK, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Graham withdrew.

Ms. Christina Budweth appeared for the Society and Mr. Walter Fox appeared for the solicitor. The solicitor was not present.

Counsel for the solicitor requested an adjournment because of a prior commitment in court. In addition he said he needed more time to consult with his client as there was a withdrawal of one of the Benchers from the case before the Reasons for Decision had been finalized.

Mr. Bastedo raised the issue of the timeliness of the notice for an adjournment.

Counsel, the reporter and the public withdrew.

It was moved by Mr. McKinnon, seconded by Ms. Lax that the request for the adjournment be granted to the next Discipline Convocation and that the solicitor's undertaking not to practice continue.

Carried

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

Counsel retired.

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Re: ROBERT CHARLES WATT, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mr. Lamek and Mr. Cullity withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Douglas Crane appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 17th May, 1993, together with an Affidavit of Service sworn 11th June, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on June 24th, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
Paul S. A. Lamek, Q.C.
David W. Scott, Q.C.

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

Gavin MacKenzie
for the Society

ROBERT CHARLES WATT
of the City
of Toronto
a barrister and solicitor

Douglas Crane
for the solicitor

Heard: June 22 and 23, 1992
October 29 and 30, 1992
February 18 and 19, 1993
May 11, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 18, 1992, Complaint D46/92 was issued against Robert Charles Watt alleging that he was guilty of professional misconduct.

The matter was heard in public on June 22 and 23, 1992, October 29 and 30, 1992, February 18 and 19, 1993 and May 11, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Paul S.A. Lamek, Q.C. and David W. Scott, Q.C. Mr. Watt attended the hearing and was represented by Douglas Crane. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D46/92

2. a) Between August and December, 1988, he misappropriated \$513,447.25 more or less, which belonged to the beneficiaries of the estate of Jessie Elizabeth Brown.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

The Committee is firmly of the view the Solicitor without colour of right deliberately misappropriated the sum of \$513,447.25 from the estate of his client (and family friend before her death), Jessie Elizabeth Brown, and is guilty of professional misconduct.

THE SOLICITOR:

The solicitor, Robert Charles Watt, is 47 years old. He has lived most of his life in the City of Toronto. He was educated at Victoria College and the University of Toronto Law School. He was called to the Bar in 1973. He has been married for 16 years to Barbara Jill Watt and they have three children. Until September 1991, when Mr. Watt voluntarily undertook to suspend his practice, he was a partner in the firm of Hetherington, Fallis, Park, Watt & Carriere of Toronto.

COMPLAINT:

The complaint, which is sworn the 18th of March 1992, alleges that between August and December 1988 the Solicitor misappropriated \$494,893.27 more or less which belonged to the beneficiaries of the Estate of Jessie Elizabeth Brown. At the opening of the hearing, counsel for the Law Society tendered an amended complaint by which the amount said to have been misappropriated was increased from \$494,893.27 to \$513,447.25. The increase in the amount of \$18,523.98 is represented by an income tax payment made to Revenue Canada on his own account and said to have been paid out of misappropriated trust funds.

ADMISSION:

The hearing proceeded on June 23, October 29 and 30, 1992 and February 18 and 19, 1993. Mr. MacKenzie, on behalf of the Law Society, elaborated on the details of the complaint in his opening. He presented and had marked as Exhibit 2 a Book of Documents consisting of some 51 tabs. These documents are said to represent the history of the events giving rise to the complaint. Insofar as admissions by the Solicitor are concerned, the following exchange occurred at the hearing subsequent to Counsel's opening on behalf of the Law Society.

Mr. MacKenzie, on behalf of the Law Society, observed, in part, as follows:

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"Mr. Crane has taken instructions from his client and has informed me that he takes no issue with the Society's position as outlined yesterday in my opening, save for any inference that I may have been asking the committee to draw concerning the solicitor's intent. In other words, the defense here is that the solicitor had no guilty intent. To elaborate on what the admission is by Mr. Crane's client, Mr. Watt accepts the flow of funds as depicted on the flow chart under tab 51, as outlined to the committee during opening, as reflected by the documents there. Mr. Watt accepts that the sum of \$494,893.27 which should have been distributed by him to the beneficiaries of the estate of Jessie Brown was instead credited to files number 3452 and 2218 in the names of Watt/Watson and Verna Watt respectively.

Further, Mr. Watt accepts that file number 3452 was a personal file of his (Mr. Crane interjected at this point and noted that it was a "trust account" ledger)

... and that he is the Watt in whose name the file was opened and he also accepts that substantial amounts of money in excess of \$200,000 were paid out of the funds held to the credit of those two trust ledgers in his name and his mother's name for his personal benefit.

Finally, Mr. Watt accepts that the sum of \$18,553.98 was paid out of the estate of Jessie Brown for income taxes which were due by him to the government, that they were credited to his personal account with Revenue Canada. Again, it's his position that that payment was made without any guilty intent on his part".

In response to Mr. MacKenzie's statement, counsel for the Solicitor, J. Douglas Crane, Q.C., observed as follows:

"Mr. Chairman, with respect to outlining my defense, I'd prefer to do that, not in the presence of all of the witnesses that I'm going to be cross-examining in a moment, obviously. I'd also like to outline it in more detail once I meet with Mr. Armstrong, but to shorten the proceedings, we are prepared to make those admissions."

Attached to these reasons and marked as Schedule "A" is a transcript of the evidence tendered before the Committee in its completed form of which the above exchange is a part.

COMPETING THEORIES:

On the above admissions, therefore, it is clear that trust monies, the property of the Estate of the late Jessie Elizabeth Brown, were diverted to the use of Mr. Watt or his family by way of the trust accounts above referred to. The competing theories as to how this occurred (and with respect to which the issue of intent arises) are these. The Law Society's position is that while the Estate of the late Jessie Elizabeth Brown in fact consisted of securities and cash to a value in excess of \$1 million, the Solicitor, in his capacity as solicitor for the Estate, distributed only approximately one half of the estate assets to the beneficiaries and deliberately diverted the balance to his own use.

The Solicitor, while admitting that the monies were derived in the manner described by Mr. MacKenzie in his opening, asserts that he was unaware that the Estate of Jessie Elizabeth Brown exceeded approximately \$450,000 in value and that the monies representing the balance of the Estate, which in truth was worth in total over \$1 million, were held in an investment account as a part of a general trust arrangement by his law firm. He asserts that he was unaware that they were so held and that the monies which derived from the trust accounts in question were monies which he believed he was entitled to have, representing as

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they did, according to his evidence, fees for which no bills had been rendered but which he had earned. These fees were said to have been earned in the closing of dormant files accumulated by a senior member of the firm. In short, it is his position that while the trust monies were being held in trust in the name of a client or clients, he was unaware of this fact and believed that he was entitled to an equivalent amount and thus that he did not have the intent to defraud the Estate of the late Jessie Elizabeth Brown or indeed any other client of the firm.

THE AGREED FACTS:

The facts outlined in opening and in respect of which, subject to the question of intent, there is general agreement may be summarized as follows.

In August 1991, the Law Society commenced an investigation of events which had occurred at the firm of Hetherington, Fallis, Park, Watt & Carriere (hereinafter referred to as "Hetherington, Fallis"). While his name was still associated with the firm, George Fallis had in fact retired from active practice in 1988. His extensive practice forms an important component in the resolution of the issues in this case. At the time of the investigation, Mr. Watt was a partner in the firm and enjoyed a broad practice consisting of real estate, family law, estates, civil litigation and some corporate work. He was an extremely busy man, not only in his practice but by reason of numerous extracurricular activities both church and community. Following upon the investigation, the Solicitor left the firm and, commencing in December 1991, he was hired by Ian Outerbridge, Q.C., who had purchased his practice. He was engaged on the basis that he would have no signing authority and no access to trust funds. For all practical purposes, he has functioned as a paralegal or trainee since that time.

The late Jessie Elizabeth Brown was an old family friend of the Watt family. The Solicitor's father, John Robert Watt, is a United Church Minister. In 1958, Jessie Brown and the Watt family became acquainted. Indeed, in the final analysis, the friendship became close enough that the Reverend Watt was named as the Executor in the late Mrs. Brown's Estate. The children, including the Solicitor, treated the deceased during her lifetime as a member of the family. In fact he knew her as Aunt Jessie. Jessie Brown had two brothers, Walter and Herbert Bremner and one sister, Mary Bremner. Mrs. Brown had no children. The only child of the family was her brother Walter's daughter Angela.

In 1982 it became apparent that Jessie Elizabeth Brown was incapable of managing her own affairs. She had reached an advanced age and the onset of senility. As a result, on the 9th of March 1982, the Solicitor made application (Tab 3) under the Mental Incompetency Act seeking an Order appointing himself and the National Trust Company as a Committee on behalf of Mrs. Brown. An appropriate Order was made in March 1982 (and confirmed in June 1982) appointing the Solicitor and the National Trust as Committee.

Six years later, on the 21st of May 1988, Mrs. Brown died. The Solicitor undertook to act on behalf of the Estate. As a result of the death of her brother Walter Bremner, Mrs. Brown had some years earlier altered her will (Tab 1) in her own hand to replace Walter Bremner with the Reverend John Robert Watt as Executor. As a result of intervening passings, the beneficiaries were Mary Bremner, her sister, and Walter's daughter, her niece, Angela Clancy.

It should be noted that it was agreed by the parties that the Reverend John Robert Watt was free of any responsibility or culpability in these matters. He received no documents and relied entirely on the advice and direction of his son, the Solicitor. Further, it is similarly clear that the Watts Sr. were unaware that Mrs. Watt's trust account was being credited with monies, the property of others. It escaped their notice because they were being used largely to balance monies withdrawn from the account by the Solicitor.

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There was an Application for Probate in the Estate of the late Mrs. Brown and, as appears from the document (Tab 10), the value of the Estate was given as \$354,986.75. This was a significant understatement of the actual value. Indeed, as noted earlier, the Estate had a value in excess of \$1 million. Letters Probate (Tab 14) were issued on June 21, 1988.

The Estate consisted of jewellery to the approximate value of \$15,000, cash and securities. The jewellery and cash were properly distributed amongst the beneficiaries as directed in the will. To a significant extent, the securities were not. In the manner outlined hereunder, their worth was in practical terms diverted to the benefit of the Solicitor. Tab 43 is the Hetherington, Fallis trust account statement for the Estate of Jessie Elizabeth Brown. An analysis of this account will show that, based on monies received by the firm, the sum of approximately \$460,000 was credited to the Estate and available for distribution after deduction of Executor's fees and fees to Revenue Canada. By an examination of the payments made, it can be seen that each of the beneficiaries received a total of \$231,000 in money or monies worth as follows:

August 11/88	Angela Clancy	\$150,000.00
August 19/88	Mary Bremner	\$150,000.00
August 23/88	Angela Clancy	\$50,000.00
August 23/88	Mary Bremner	\$50,000.00
Sept. 21/88	Angela Clancy	\$16,999.00
(final distribution - \$31,324.00 less the value of the jewellery)		
October 4/88	Mary Bremner	\$31,324.00
(final distribution)		
TOTAL distributed to each beneficiary: \$231,000.00		

Not shown on the trust ledger were substantial assets received from National Trust in the form of securities. These securities were deposited directly to certain investment accounts in the firm of Thomson Kernaghan, stockbrokers (hereinafter referred to as "TK") in the custody of Gilbert Kerrigan. Mr. Kerrigan had, for many years, maintained investment accounts for the firm of Hetherington, Fallis in the TK offices "downstairs" in the same building.

Returning to the distribution of the Estate, on October 4, 1988 the Solicitor wrote a letter (Tab 35) to Margaret Munroe, Mary Bremner's companion, forwarding her the sum of \$31,324 on behalf of Mary Bremner and noting that "this now completes the Estate". A similar letter was sent to Angela Clancy. Indeed, it is clear from all of the evidence that the distribution and administration of the Estate was completed, insofar as the beneficiaries might have been aware from information received from the Solicitor, and for all practical purposes by early October 1988.

As indicated above, the Estate of the late Jessie Elizabeth Brown consisted, in significant part, of securities. For the most part, these were delivered to TK and then sold. The proceeds of some of those sales were remitted to the firm of Hetherington, Fallis and deposited in its mixed trust account in the name of the Estate of Jessie Elizabeth Brown. The following entries appear in the Hetherington, Fallis trust ledger (Tab 43):

August 22, 1988	\$100,000.00
September 21, 1988	65,779.00
September 29, 1988	10,593.13
December 1, 1988	1,054.41
TOTAL:	\$177,426.54

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Accordingly, from National Trust (the Co-Committee of Jessie Elizabeth Brown during her lifetime) and TK on these transactions, a total of \$441,014.82 was delivered to the Hetherington, Fallis firm and credited to the Estate in the firm's trust account. In addition, the sum of \$60,000, realized from the sale of Ontario Hydro Bonds, was delivered by the CIBC on August 17, 1988 (Tab 43). Thus the "Estate", in practical terms, if one relied on the entries in the trust ledger at Hetherington, Fallis, consisted of assets having a value slightly in excess of \$500,000.

The trust ledger also shows disbursements made on the Estate's behalf as follows:

Sept. 1, 1988	Executor's fees	\$15,000.00
Sept. 17, 1988	Executor's fees	10,701.66
Sept. 1, 1988	Income tax payment	18,553.98
Apr. 21, 1988	Income tax payment	23,695.49

It is the position of the Law Society that the income tax payments, while consisting of monies paid to Revenue Canada, were deliberately directed by the Solicitor to Revenue Canada to be credited to his own personal account liability (see Tab 41). Indeed, as the document at Tab 50 shows, on August 30, 1988 the sum of \$18,553.98 was credited to the Solicitor's account with Revenue Canada.

As above indicated, it is the position of the Law Society that there were substantial assets in the Estate which did not find their way into the trust account in the name of the Estate of the late Jessie Elizabeth Brown maintained by the firm of Hetherington, Fallis but instead were deposited directly into the hands of TK, credited to an account in the name of the Estate and then distributed to the Solicitor or his nominees later. The firm of Allen, Miles, Fox & Johnston, Accountants, prepared an analysis (Tab 15) of these monies on behalf of the law firm. Column 1 in this document under the heading "Total Capital Receipts" shows the assets, as reported by National Trust, in the amount of \$1,019,521.23. Of this sum, that portion reported "to client" is shown as \$473,324.11. Column 3 shows original assets received of \$1,016,742.09. Column 5 shows the amount actually reported to the "client" as \$514,032.52. The same document shows as the bottom line an actual sum available for distribution of \$985,383 and an actual sum distributed to the "client" of \$446,419.

As admitted by the Solicitor, the net effect of these numbers is that the sum of \$462,093.27 was misappropriated by the Solicitor and paid into his own trust account in the firm, being Trust Account No.3452. The sum of \$32,800 was misappropriated by the Solicitor and paid into the account of Verna Watt (the Solicitor's mother). The total sum taken was \$494,893.27. To this must be added the taxes which the Solicitor caused to be paid to Revenue Canada on his own behalf in the amount of \$18,553.98. The result is the sum of money found in the amended complaint: \$513,447.25. Apart from the Revenue Canada payment, the monies were taken in the form of four cheques:

1.	September 14, 1988 (Tab 30)	\$191,491.93
2.	October 11, 1988 (Tab 36)	188,531.35
3.	undated	32,800.00
4.	undated	82,069.99

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Items 1 and 2 were two cheques drawn on the account of TK payable to the law firm, the dates of which fall on either side of the letter to Margaret Munroe (Tab 35) which is dated October 4, 1988 and advises her that the work of the estate is now complete. Both cheques have a typed reference line which reads, in the case of Tab 1, "Re: Estate of Jessie Brown" and in the case of Tab 2, "balance re Estate of Jessie Brown". The reference line has been crossed off on both cheques. Both cheques were deposited to the credit of the Solicitor's personal trust account, no.452. The Solicitor was unable to say who had crossed off the reference line, but conceded that it was unlikely that it would be TK because the reference line was in fact a correct descriptor of the account in question.

Items 3 and 4 are the proceeds from the sale of bonds. The bonds were in bearer form and were received by the Solicitor from National Trust. They were not deposited in the firm trust account in the name of the Estate; nor were they delivered to the TK estate account. They were simply deposited into an account in the name of the Reverend John Robert Watt and from there transferred to the Solicitor's own account (Account No.452, \$82,069.99) and his mother's account (Account No.2218, \$32,800).

Tab 51 (and Tab 51A which is the same document amended to add relevant tab numbers) is a chart showing the flow of monies. The Solicitor agreed to the accuracy of this document subject to his reservation with respect to intent. The net effect of the document is that the Solicitor, either for his own use (\$462,093.27) or for the use of his mother and father (\$32,800.00), received a total of \$494,893.27. To this must be added the payment made on his behalf to Revenue Canada in the amount of \$18,553.98. The result is the amount with which the Solicitor agrees and which is incorporated in the amended complaint amount: \$513,447.25.

THE SOLICITOR'S ANSWER:

Having conceded that the sum of \$513,447.25, being monies held in trust in the Estate of Jessie Elizabeth Brown, were taken by him for his own use, the Solicitor responded to the allegation of professional misconduct as follows:

- (a) He testified that he had absolutely no idea that the funds held in trust in the Estate of Jessie Elizabeth Brown substantially exceeded the monies which he distributed to the beneficiaries. He said that he believed that the value of the Estate as set out in the Application for Probate (Tab 10), namely \$354,986.75, was an accurate statement of the total value of the assets in the Estate. He further said that he had no idea that assets totalling in excess of \$1 million were received by the firm and that a substantial percentage of such assets were delivered by the firm to TK.
- (b) He testified that the money above described which he received from TK and deposited in the trust account in his name, and that of his mother, was money which he believed he was entitled to have representing, as it did, fees which he had generated during the course of the winding up of the practice of his former partner George Fallis.

A. THE SOLICITOR'S KNOWLEDGE OF THE TRUE EXTENT OF THE ESTATE

Extensive evidence was given by the Solicitor as to the manner in which he and his partners practiced law. "Helter skelter" would be an apt descriptor. He testified, as did two of his former secretaries, that he was an extremely busy person, both professionally and within the community. He was constantly behind in his work, for example in reporting to clients and clearing up outstanding files. His document and record keeping, particularly in terms of file management, was disorganized and unreliable.

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He outlined what he described as the "banking" practice of the Hetherington, Fallis firm. Over the years many clients of the firm, and particularly clients of George Fallis, agreed to leave money on deposit with the firm to be held in trust or to be invested in mortgages. According to the Solicitor, these monies were almost invariably deposited in the stockbroking offices of TK who, pursuant to pre-arrangement, invested them in stocks, bonds or other securities, recorded the interest gained and remitted it to the law firm. The firm would then cause it to be distributed, pro rata, amongst the relevant clients. As with the law firm, TK maintained both mixed trust accounts in respect of such investments and individually identified accounts. Indeed the assets in the Estate of Jessie Brown were held at TK in a named account and not a mixed trust account. In a typical transaction the firm would come into possession of the money of clients, it would be deposited at TK, invested and re-invested by TK. From time to time, the interest generated would be paid by TK to the law firm. It would then credit the interest on a pro rata basis to the accounts of those clients whose money was being so held.

The Solicitor testified that upon the death of Mrs. Brown, National Trust delivered a "bundle" of securities to his office. As was the practice he immediately took them "downstairs" to TK and placed them on Mr. Kerrigan's desk. He stated that he had no idea what the total value of the securities was or indeed what the bundle represented in terms of specific securities. He thought, so he said, that the Estate of Jessie Brown was a modest one.

He testified that the first time that he saw the National Trust Account (Tab 12) was during the Law Society investigation. This account demonstrates that the assets under administration in the Committee'ship exceeded \$1 million in value. This fact would be apparent to anyone who looked at the document. It shows an "opening balance" at June 3, 1988 of \$365,653.32. This sum is quite close to the sum indicated as the value in the application for Letters Probate. The Solicitor testified that he had nothing to do with preparing the Letters Probate and thus that he had no knowledge of the true value of the Estate. The extension of this was his testimony that he had no knowledge of the extent or value of assets being held on the Estate's behalf by TK and that when he closed out the Estate at the end of September he believed that he had distributed all the assets to the beneficiaries. The first branch of his defence, therefore, is that he could not be said to have knowingly deprived the Estate of the money set out in the complaint when he was unaware that the Estate enjoyed the benefit of such monies in the first place.

Obvious questions arise, of course, as to the likelihood that a solicitor charged with the responsibility of assisting the executor (in this case his father) in the administration of the Estate would not, in the ordinary course, do any assessment of the true value of the Estate, particularly when all of the assets were transmitted through his office. Further, in this case, since the assets were administered by a Committee of which he was one for a period in excess of six years, it seems equally unlikely, in spite of his statement that the day to day management of the assets was assumed by National Trust, that he would continue to be completely unaware of the extent or value of the assets under administration.

The Solicitor testified that when the securities were delivered by National Trust to Hetherington, Fallis he simply took them down to TK and put them on Mr. Kerrigan's desk without looking at them. It seems highly unlikely that a solicitor applying minimal attention to the affairs of his client would behave in this manner. However, this solicitor asserts that his habits were abnormal, that he was disorganized, overworked and generally out of touch with the detailed affairs of his clients.

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On the subject of knowledge of the relevant facts, the Solicitor is confronted with the evidence relating to the events of July 14, 1988. The Law Society called as its first witness Vanessa Vetter. Ms. Vetter was Mr. Watt's secretary for six years and occupied this position in the month of July 1988. She was asked to examine a number of documents. The first, Exhibit 2 (Tab 16), is a letter dated July 14, 1988 from National Trust confirming the delivery of four Government of Canada Bonds totalling \$115,000 in value. The letter appears to be signed, acknowledging its receipt, by Robert Watt. Ms. Vetter identified the signature on this letter as that of Mr. Watt.

Ms. Vetter was shown an extract from Mr. Watt's diary (Exhibit 4). The diary entries are for the 14th and 15th of July 1988. She testified that she believed Mr. Watt was in the office on those two days. On the 14th of July there is an entry in handwriting of an appointment at 11:00 with "Ed Chu". On the same day there is also an indication in hand of an appointment at 4:30 p.m. "Kontogiannis - sign". Ms. Vetter was also shown Exhibit 5, a Guaranty Trust direction. She identifies the document as having been signed by Mr. Watt on the 14th of July 1988. The document appears to be signed by one Kontogiannis. She was also shown Exhibit 6, which is a statutory declaration apparently sworn, inter alia, by one Letia Kontogiannis. Ms. Vetter testified that the signature in the jurat is that of Robert Watt. It was signed on the 14th of July 1988. She was also shown Exhibit 7, a handwritten note dated July 14, 1988 taken from a file. She testified that this was Mr. Watt's handwriting. Finally, in this connection she was shown Exhibit 8, a number of cheques dated July 14 and 15, 1988. She testified that they are all signed by Mr. Watt.

The following additional documents were also shown to Ms. Vetter. Exhibit 2 (Tab 26) is headed "New Files Opened Register". The last entry dated September 14, 1988 reads "Watt/Watson Real Estate" and bears Client No.W0120 and File No.3452. Ms. Vetter testified that the entry in question is in the handwriting of Mr. Watt although the client number was written by the bookkeeper. She indicated that she was not instructed to open a file folder in respect of File No.3452 and she was never given any documents to be placed in any file bearing this number. Additionally the two cheques (Tabs 30 and 36) for \$191,491.93 and \$188,531.35 bear the handwritten notation "No.3452". Ms. Vetter testified that the handwriting is that of Mr. Watt.

Finally, Ms. Vetter testified that in respect of the Jessie Brown Estate she opened the file, put the documents in it, did the application for Letters Probate, picked up the jewellery and typed all the correspondence with the beneficiaries. From her evidence it would appear that in practical terms Mr. Watt's office administered the Estate.

In cross-examination Ms. Vetter confirmed the relative disorganization of Mr. Watt's practice. Further, she conceded that she does not specifically recall the events of July 14, 1988 and was not able to say whether or not Mr. Watt was personally in the office on that date. She confirmed that the signatures on the various documents were Mr. Watt's and indicated that she herself would "never sign Mr. Watt's name". She testified further that Mr. Watt was careful in matters relating to money and that he showed no confusion as to where money should go when it came into the office.

All of this evidence is important because it contradicts the position asserted by Mr. Watt, in particular that he was unaware of the existence of any securities other than those "taken down" to TK.

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In his response to this evidence, the Solicitor denies that he was in the office on the 14th of July 1988, asserts that he did not receive the bonds represented in the acknowledgement in Exhibit 2 (Tab 16) and indeed that the signature on such document is not his. He says that on the night of the 13th of July he returned to his summer cottage at Bondi, Ontario, to look after the children while his wife came to Toronto to supervise the installation of a kitchen in his residence. He explains the various documents identified by Ms. Vetter as being a simple matter of misdating of documents.

His wife, Jill Watt, also testified. She produced a copy of her own diary (Exhibit 14) which covers July 14, 1988 and the days preceding and following it. She indicated that she was at the cottage at Bondi on the 11, 12, 13 and that the visitors identified by the names in the diary, Rob, etc. were present at Bondi as visitors. She testified that she travelled to Toronto on the evening of the 13th of July, delivered the car to her husband and stayed in Toronto in order to supervise the installation of the kitchen in their residence. On this version of the facts, therefore, Mr. Watt would not have been in his office on the 14th of July and would not have had occasion to receive the bonds and sign the receipt as testified to by Ms. Vetter.

We have come to the conclusion that Mrs. Watt is in error in her recollection. The evidence of Ms. Vetter is to be preferred for the following reasons. In the first place, while it would not be unusual to find a misdated document, it seems most unlikely that several documents signed independently of each other on the same day would all be misdated. Further, while Mr. Watt testified that his diary (Exhibit 4) shows that he was not in the office because there is straight line through the page, there are also appointments shown for July 14, including the "Kontogiannis" appointment at 4:30 p.m. accompanied by the word "sign". Exhibits 5 and 6 show, if they are taken at face value, that indeed the Kontogiannis were in the office on the 14th and that they signed the document as apparently was intended to occur on that occasion.

The most obvious inconsistency in the account of the Solicitor, however, resides in his denial, and that of his wife, that Tab 16, the acknowledgement of receipt of the bonds from National Trust, is signed by him. In the first place, the signature on the document is remarkably similar to the signatures acknowledged to be those of Mr. Watt on Exhibits 5, 6 and 8. Indeed, the signatures are so close that it is obvious that if the signature on Tab 16 is not that of Mr. Watt, whoever placed it there was attempting to forge his signature. The only person that he could identify as having the opportunity to sign his name is his secretary, Vanessa Vetter. He does not suggest that she would attempt to forge his signature. Indeed, if one examines Tab 18, Vanessa Vetter (then Smith) has signed the document "Robert Watt per: Vanessa Smith" and the signature of Robert Watt is not the least bit similar to that found on Tab 16.

The above account of the facts records the evidence up to the point that Mr. Watt had completed his examination in-chief. The matter was then adjourned and continued for two final days on the 18th and 19th of February 1993. As appears from the evidence that was tendered in cross-examination upon the resumption of the hearing, counsel for the Law Society was at work on this matter over the adjournment. In the first place, further documents surfaced from the National Trust, the most important of which is a further letter dated July 14, 1988 (Exhibit 38). Like the letter of July 14, Tab 16, the letter of July 14, Exhibit 38, is written by the National Trust addressed to Hetherington, Fallis and confirms the delivery of additional securities to a total value of \$350,000. This document, like Tab 16, is apparently signed by Robert Watt. During the course of his cross-examination, Mr. Watt denied that he had seen the letter before or that the signature on it was his.

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In reply, counsel for the Law Society tendered the evidence of one Gregory John Boyd, an employee of the Centre of Forensic Sciences at the Ministry of the Solicitor General and an acknowledged expert in handwriting identification and analysis. As appears from his report (Exhibit 56), he examined known and acknowledged samples of the Solicitor's handwriting and compared them with the handwriting on Tab 16 (the one page July 14, 1988 letter), Exhibit 38 (the two page July 14, 1988 letter which was produced for the first time in the cross-examination of the Solicitor) and, inter alia, Exhibit 4, the diary entries for July 14 to July 17 which include the references to appointments on July 14. It was the opinion of Mr. Boyd that the same person who signed the so-called "known" documents (acknowledged by the Solicitor to have been his signature) also signed Tab 16 and Exhibit 38. The opinion of Mr. Boyd is confirmatory of the obvious when one looks at the signatures in question.

Further, and by way of reply, counsel for the Law Society tendered the evidence of Edward Chu, an employee of Northern Telecom in Scarborough, Ontario. He was the Edward Chu who was a client of the Solicitor and whose name appears in Exhibit 4, beside the 11:00 appointment. He testified that Mr. Watt was acting as his solicitor in a real estate transaction at the time. Mr. Chu produced a Northern Telecom attendance record for the last half of 1988, including the month of July, and this record shows, as confirmed by his viva voce testimony, that he was out of the office on Thursday morning, July 14. He gave evidence that at the time he was visiting Mr. Watt to sign certain documents. His testimony was to the effect that he was certain that he actually met Mr. Watt at the office on the morning of July 14 and spoke to him with respect to his affairs.

We are therefore satisfied that the signatures on Tab 16 and on Exhibit 38 are the signatures of Mr. Watt placed there by him, that he was in the office on the 14th of July when the bonds in question were delivered, that he received them from the official of National Trust, and thus that he was aware of the existence of assets of value in the Estate of the late Jessie Elizabeth Brown beyond those set out in the Application for Letters Probate (Tab 10) and distributed to the beneficiaries in the process of closing out the Estate by Mr. Watt. The bonds accompanying these letters totalled \$465,000 in value, a sum not easily overlooked. It follows from this conclusion that we are satisfied that Mr. Watt was aware of the existence of substantial assets in the Estate of the late Jessie Elizabeth Brown and that he deliberately withheld the distribution of these assets from the beneficiaries intending, as he ultimately did, to convert them to his own use through the mechanism of the TK account. While the question of professional misconduct can be resolved based on this finding alone, we prefer to deal with the second, and related basis, upon which the Solicitor denies the allegations in issue.

B. THE FALLIS PRACTICE

As indicated earlier, the Solicitor denied knowledge of the extent of the Estate of the late Jessie Elizabeth Brown but confirmed that he received the monies forming the subject matter of the complaint, trust monies being held on behalf of the Hetherington, Fallis firm by TK. There can be no doubt that these were trust monies and, even if they had not been segregated as the property of the Estate of the late Jessie Elizabeth Brown, they were certainly the property of clients of the Hetherington, Fallis firm. On what basis does the Solicitor say he was entitled to requisition in excess of \$500,000 for his own personal use from these trust resources. His explanation lies in the practice carried on by George Fallis.

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Mr. Fallis practiced with the firm for many years. In 1982 he was a senior member of the Bar. He had an extensive practice which, as it turned out, had fallen into serious disarray. As a result of complaints from clients, the Law Society conducted an investigation into Mr. Fallis' practice and in 1982 discussed the management of the situation with the partners in the firm including Mr. Watt. The problem in simple terms was that there was approximately \$1.2 million sitting in the TK trust accounts for which there had been no accounting to clients. Virtually all of this money represented monies being held in trust for Fallis' clients. Balances, in many cases, had been in these accounts for many years without steps being taken to close them out and deliver the proceeds to the clients. While there was no detailed evidence given as to the nature of the monies, or the files which gave rise to their generation, there were obviously large trust balances being held in the firm's "bank" at TK for which there had been no accounting to clients.

As a result of discussions, the partners in the firm agreed with the Law Society that they would "clean up" these balances by closing out the files and returning the monies to the clients after deducting appropriate legal fees. According to Mr. Watt it was agreed that he, Carriere and Park would do a third of this work each. The Law Society gave them five years to complete the work. Park, as it turned out, did no work on the task and Carriere a nominal amount only. Thus, as he testified, it fell to Mr. Watt to do the job. He faced difficulties because Mr. Fallis was reluctant to disengage from his practice and proved to be a pest, interfering in the closing out process, retrieving files from Mr. Watt and putting them in his office, etc. Nonetheless, Mr. Watt went forward with the work, so he testified, as best he could. The arrangement in the firm was that any fees which were generated on the close-out of these trust balances and the delivery of the monies to the clients would be shared 50/50 as between Fallis and Watt.

The Solicitor testified that over the years between 1982 and 1988, he did substantial work on cleaning up these files. This resulted in a notional accrual of fees to which he was entitled. He said that, notwithstanding, Mr. Fallis got the full benefit of these fees. He permitted Mr. Fallis to take the benefit of 100% rather than splitting 50/50 because Mr. Fallis needed the credit from these fees to discharge his share of the overhead in the firm and he, the Solicitor, did not "need" to generate any fees for himself at the particular time. On the basis of this scenario, the Solicitor's position is that by 1988, when the Estate of Jessie Elizabeth Brown was being administered, the trust monies remaining in TK arising out of Mr. Fallis' practice were encumbered, in effect, by a lien for fees in his favour. He quantified this entitlement as being approximately \$800,000.

The evidence with respect to this issue is most unsatisfactory. It is largely unsupported by any financial records of practical use. The Solicitor, as part of his case, made an effort to reconstruct a series of events which is unsupported by any objective evidence. Indeed, at the end of the day what Mr. Watt is suggesting is that when he requisitioned in excess of \$500,000 from TK he was simply withdrawing fees to which he was entitled. He asserts that the only thing he failed to do was prepare a "dummy" account which would then be "thrown away" when the monies had been withdrawn. In other words, no effort would need to have been made to provide the client with an account before or concurrently with withdrawals of the "fees".

Further, no evidence was given about any of the 800 or so matters said to be represented by these trust balances nor how it was determined what portion thereof might reasonably be extracted by way of fees. Aside from the fact that it is obvious that it would be most improper, and professional misconduct of the clearest kind, to simply withdraw monies from trust accounts said to be on account of fees without rendering any account to the client, the evidence fails to establish that anything like the amount of money realized by Mr. Watt from the TK accounts was a legitimate expression of fees then due and owing.

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A forensic accountant testified on the Solicitor's behalf. Bruce Armstrong is a partner in Armstrong and Davidson, a forensic and investigative accounting firm in Toronto. He has extensive experience and is entirely qualified to conduct the kind of investigation which he was called upon to do on the Solicitor's behalf. Mr. Armstrong's report, which is dated October 28, 1992, was filed as Exhibit 31. There is a schedule attached summarizing the report entitled "Financial Statement Review Selective Analysis of Fallis and Watt Efforts May 31st, 1983 to 1990 Inclusive". The document purports to show that over the period in question, 1983 to 1990, the Solicitor was entitled to claim approximately \$600,000 in legal fees arising out of the work which he did in assisting in closing out the Fallis trust balances in accordance with the directives of the Law Society. The figure of \$600,000 is generated by a calculation which depends almost entirely on estimates provided by the Solicitor. It starts from the premise that in the period in question (1983 to 1990) Fallis was doing almost no new legal work and thus that the only fees which he could have generated were those associated with closing out his files. This premise has no independent evidentiary support in the record. In short, the Solicitor is saying that if Fallis generated income over the period it could only have been derived from the closing out process. Since the Solicitor was doing the closing out work and did not claim fees for the closing out process and Fallis did; and since there was to be a 50/50 split of fees, the Solicitor can be notionally credited with his 50% of all of these fees. On this basis it is said that the Solicitor was owed \$600,000. Apart altogether from the shortcomings of this form of estimating, there are absolutely no financial records, statements of account or other evidence of any of the assumptions made in the calculations. There is no documentary evidence of the files, the amounts held in trust, the proportion of fees or the work undertaken in either generating the fees in the first place or closing out the files in the second.

An illustration of the complete absence of evidence in support of these notions can be found in Exhibit 31, Mr. Armstrong's report. On page 4, the following appears:

"Watt prepared a list of about 60 of these accounts in which he was entitled to fees as of May 31st, 1987 corresponding with the balances remaining in the accounts. This listing totalled almost \$800,000 and approximated the imbalance between the benefits received by Fallis and foregone by himself".

Curiously neither Watt nor Armstrong produced the list in evidence. No evidence was given as to how the list was prepared, who the clients were and, most important, no evidence was tendered with respect to the justification for fees. One might be forgiven for asking the question rhetorically, what fees? Was it legal fees associated with the cost of closing out the files or fees association with work earlier performed by Mr. Fallis? Indeed, if one were to look at the numbers and accept the Solicitor's assertions, it would appear, as is developed hereunder, that what the Solicitor must be talking about is the actual money in the trust account rather than that portion of it representing fees.

Further, the evidence seems to be quite clear that little or no closing out work was in fact done in the period 1983 to January 1988. Rather, the cleanup appears to have taken place thereafter. Even if some work was done, it is inconceivable that it would have been sufficient to generate \$600,000 in accrued fee entitlement as is suggested by the evidence of Mr. Armstrong. As the witness conceded during the course of his evidence, the "vast majority" of the files of Fallis were cleaned up in 1989 and 1990 (subsequent to the misappropriation events in question). Most of the Fallis files (more properly described, not as files, but as trust balances) said to have been in existence in 1982 still had balances outstanding and thus would be regarded as not "cleaned up" in May 1988. The quantum of the balances confirms this. As of the 31st of May 1982, there were between 800 and 850 balances totalling \$1,011,000. As of the 31st of May 1988, the majority of the 850 files still had balances and there was a total of

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\$1,094,000 held in trust. As of the 31st of May 1990, there were only 44 balances and the amount remaining in trust was \$189,000. This seems to make it crystal clear that most of the work in closing out Mr. Fallis' clients' accounts did not take place prior to 1988 as suggested by Mr. Watt. Thus he could not have generated an accrual of fees to the extent of \$600,000 as suggested. Mr. Watt protests that over the period there would have been substantial interest generated in these accounts and thus the fact that essentially the same amounts of money were in trust from beginning to end would not be probative of the absence of closing out activity. This is unfortunately quite inconsistent with the evidence of Mr. Armstrong who insisted that (at the end of the period 1988) the vast majority of the original 850 files still had trust balances.

Accordingly, the Committee is satisfied that even if one considered the accrual of fees in the trust account to be an adequate basis for a wholesale transfer of these monies to the Solicitor, there were no such fees accrued at the relevant time. Thus there was no foundation, however misguided the Solicitor's attitude towards "dummy" billing might be, for requisitioning in excess of \$500,000 of trust funds from TK.

There is further evidence which is corroborative of this conclusion. Pierre Laflair, a chartered accountant and partner in the firm of Allen, Miles, the accounting firm who performed the audit in the Hetherington, Fallis firm, testified before the Committee. In August 1991, he attended a meeting at the Hetherington, Fallis firm to deal with "problems" in the trust account, indeed the specific problems which formed the subject matter of the present complaint. The Solicitor was present. The meeting lasted about one hour. A number of files were mentioned as problems but Mr. Watt did not identify the Brown Estate as one of them. Mr. Laflair testified that the Solicitor was distraught and predicted that his career would be ruined.

On the 30th of August 1991, Mr. Laflair looked at the so-called Trust Account File 3452 for the first time. Monies had been disbursed through this file for real estate transactions in which the Solicitor was involved personally. A great deal of money went through this account with respect to renovations to Mr. Watt's home. Indeed Mr. Watt testified that he had spent \$327,000 in improvements to his home over the years in question. Mr. Laflair noted that there was no physical "file" relating to these events. He stated that the Solicitor, upon being confronted with these accounts, said "Why would you want to look at that, it's my personal file?".

There were meetings which followed on the 9th and 29th of October 1991. On the 29th, in the presence of counsel, the Solicitor, by way of explanation, indicated that the assets which he had withdrawn from TK were his personal assets. He was asked for evidence that he maintained \$200,000 or \$300,000 of assets at TK. Evidence was never forthcoming.

Mr. Laflair also testified that he tried to get hold of the file for the Estate of Jessie Elizabeth Brown. The Solicitor told him that it was a family file that he had taken home and questioned why he would want to see it. Mr. Laflair asked for it several times and, finally, at the late October meeting, he undertook to get the file after Mr. Crane urged him to cooperate. The Solicitor at no time produced any documents with respect to the Jessie Elizabeth Brown Estate. Those in the record in this proceeding were found at the firm's offices.

Suffice to say that the behaviour of the Solicitor in these exchanges was entirely inconsistent with the position which he advanced at the hearing. He at no time advised his partners or Mr. Laflair that he had taken the monies under colour of right, specifically on the basis that they represented fees to which he was entitled. The statements which he made to Mr. Laflair are inconsistent with the innocent intent which he has communicated to the Committee.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Robert Charles Watt be disbarred.

REASONS FOR RECOMMENDATION

The Law Society submits that the Solicitor should be disbarred. The Society suggests that from the cases, particularly Milrod, Cooper and Fraser, it is clear that the issues which the Committee should consider in determining whether the Solicitor should be disbarred, or should be permitted to resign, involve:

- (a) restitution (or the probability of it);
- (b) remorse;
- (c) any issue of mental illness casually related to the misappropriation;
- (d) overwhelming financial pressure.

No evidence was led with respect to the issue of remorse, and it is fair to say that the Solicitor did not express in the course of his testimony any remorse for the losses suffered by the beneficiaries of the Estate.

The psychological and psychiatric evidence make it abundantly clear that while the Solicitor's lifestyle was dictated by devotion to his practice, to his profession, to the community, as well as an overwhelming workload, apparently at no time before or during the misappropriation did he suffer from any identifiable psychiatric illness.

There was no evidence of overwhelming financial pressure upon the Solicitor before or at the time of the misappropriation, and the evidence as to the disposal of the proceeds of the misappropriation demonstrates that substantial sums of money were paid for personal expenses, gifts and house renovations.

We were reminded that particularly in cases of misappropriation, the penalty that needs to be imposed must reflect the obligation of the Society to maintain public trust and confidence in the profession and the protection of the reputation of the profession.

Mr. Crane, on behalf of the Solicitor, urges the Committee to permit the Solicitor to resign. He pointed out that the Solicitor has not practised since 1991. He argued that the finding of professional misconduct is an extremely severe penalty in itself to the Solicitor and to his family. He adverts to the character evidence, which demonstrates an impeccable reputation enjoyed by the Solicitor before this event. He goes further to indicate that the evidence will support that the misappropriation was a single, isolated transgression out of character for the Solicitor and in these circumstances the penalty should be permission to resign.

We are satisfied that the Solicitor deliberately withheld information and documents for the purpose of misleading the Law Society. An expensive and intensive investigation by the Law Society was necessary to dig up evidence by way of documents from other sources in order to make the case against the Solicitor. Further, the Society was required to call witnesses to defeat the spurious defence raised by the Solicitor.

24th June, 1993

Based on the evidence before us, it is clear that the Solicitor enjoyed an excellent reputation in the community, in his church, among his clients, and among the members of his profession. No evidence was led by the Society of any discipline history. The Solicitor was heavily involved in community and church affairs. The extent of his involvement is highlighted by his services as a Director of the Canadian Cancer Society, as President of the Ontario Lung Association, as a Director of The Empire Club, and his obvious involvement in other charitable organizations.

He worked hard for his profession, teaching in Bar Admission, working at and for Legal Aid, and writing extensively, including co-editing with Donald Lamont, Lamont (Second Edition) Real Estate Conveyancing for Ontario Lawyers.

He was clearly very active in church affairs, not only at the level of his Humber Valley United Church, but at the Presbytery level.

The evidence would indicate he has been happily married with children. Nothing in his background, apart from the problems of his practice and the firm with which he practised, can explain this single serious departure from what appears to be an exemplary private and professional life.

We accept the evidence that the Solicitor was overwhelmed much of the time by his practice, church, community and charity work. He had developed (probably deservedly) a substantial practice; he was overgenerous of his time for his profession, his church, and the many organizations to which he was attracted, and which undoubtedly sought him.

It is clear from the evidence (although no evidence was tendered from the partners of his firm), that the practice was badly organized, that it lacked those systems necessary to the proper practice of law, and that its accounting methods were somewhat short of normal or even average. It is possible that these problems made it easier for the Solicitor to undertake the misappropriation, but in no way can these practice problems either explain or excuse the Solicitor's actions.

There is no doubt that this is a tragic case.

In the final analysis, the Committee paying deference to its public obligations, and entirely mindful of the tragedy of the case, cannot find circumstances that would permit the Committee to recommend anything other than that the Solicitor be disbarred.

Robert Charles Watt was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 17th day of May, 1993

Kenneth E. Howie, Q.C.,
Chair

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

Carried

The Recommendation as to Penalty was that the solicitor be disbarred.

24th June, 1993

Mr. Watt addressed Convocation.

Mr. MacKenzie urged Convocation to adopt the Recommendation.

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

It was moved by Mr. McKinnon, seconded by Mr. Campbell that the Recommendation as to Penalty that is, that the solicitor be disbarred, be adopted.

Carried

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

Counsel retired.

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Re: HERSCHEL WILFRED LEBO, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mrs. Weaver and Mrs. Graham withdrew.

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

Convocation had before it the Report of the Discipline Committee dated 27th May, 1993, together with an Affidavit of Service sworn 11th June, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 31st May, 1993 (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

Mary P. Weaver, Q.C., Chair
Fatima Mohideen
Mrs. Netty Graham

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

HERSCHEL WILFRED LEBO
of the City
of Toronto
a barrister and solicitor

Gavin MacKenzie
for the Society

Brian Greenspan
for the solicitor

Heard: April 27, 1993

24th June, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 27, 1993, Complaint D25/93 was issued against Herschel Wilfred Lebo alleging that he was guilty of professional misconduct.

The matter was heard in public on April 27, 1993 before this Committee composed of Mary P. Weaver, Q.C., Chair, Fatima Mohideen and Mrs. Netty Graham. Mr. Lebo attended the hearing and was represented by Brian Greenspan. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D25/93

2. a) Between 1990 and 1992, inclusive, he misappropriated the sum of \$211,079.36, more or less, from clients.

Evidence

The entirety of the evidence with respect to the allegations of professional misconduct were contained in an Agreed Statement of Facts which is set out below:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1.

The Solicitor admits service of Complaint D25/93 and is prepared to proceed with a hearing of this matter on April 27, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D25/93 with his counsel, Brian Greenspan, and admits particular 2(a) contained therein. The Solicitor also admits that particular 2(a) detailed in the complaint together with the facts as hereinafter set out constitute professional misconduct.

24th June, 1993

IV. BACKGROUND FACTS

4. The Solicitor was called to the bar in 1967. He practised as a sole practitioner from 1985 until late 1992. Prior to 1985, he practised with one partner. His practice at all material times consisted primarily of real estate work. In October 1992, he undertook not to practise pending the completion of this disciplinary proceeding.

V. FACTS RELEVANT TO COMPLAINT D25/93

5. The investigation that culminated in this complaint was initiated as a result of a complaint received by the Society in September 1992 from clients of the Solicitor. The clients alleged that the Solicitor had misappropriated \$75,000 that he had invested in a mortgage on their behalf. The clients said that after the mortgage came due they instructed the Solicitor to return the invested funds to them, but the Solicitor did not do so. The clients then communicated directly with the mortgagor, who reported that she had paid off the mortgage by returning the funds to the Solicitor. When the clients spoke to the Solicitor, he said that he did not have the money and would need time to pay the clients.

6. The Society's auditor met with the Solicitor and his counsel, Brian Greenspan, on October 13, 1992. At that meeting, the Solicitor acknowledged that between 1990 and 1992 he had misappropriated trust funds from the following clients in the following amounts:

Sophie Shubinsky	-	\$ 15,738.53
Arnold John Andrews	-	51,250.00
Karen Louise Steeves	-	78,236.33
Estate of Ethel Bernice Pearce	-	<u>65,854.58</u>
TOTAL		<u>\$211,079.36</u>

7. The auditor's review of the Solicitor's files and other records, and her interviews with the clients, have confirmed the accuracy of the Solicitor's acknowledgment.

8. The Solicitor has been unable to make restitution.

VI. PRIOR DISCIPLINE RECORD

9. The Solicitor was reprimanded in Convocation in 1985 for failing to have sufficient funds on deposit in his firm's mixed trust account to meet trust liabilities to clients, and failing to maintain the books and records required by the regulation under the Law Society Act.

DATED at Toronto this 27th day of April, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Herschel Wilfred Lebo be disbarred.

REASONS FOR RECOMMENDATION

Mr. Lebo misappropriated trust funds from his clients on four separate occasions between 1990 and 1992 totalling \$211,079.36.

Counsel for the Law Society asked the Committee to recommend that the Solicitor be disbarred. Counsel for the Solicitor submitted that permission to resign would be an appropriate penalty. Counsel for the Solicitor made submissions as to the following matters in mitigation of the penalty:

1. The Solicitor had cooperated fully with the Law Society in its investigation into the complaint and in negotiating an Agreed Statement of Facts. His conduct in this regard had been that of a model solicitor.
2. At the beginning of the investigation, the Solicitor gave his undertaking not to practice and he has not done so.
3. The Solicitor has shown remorse and accepts that he must leave the profession.
4. The Solicitor was under extremely heavy financial pressures at the time that the misappropriation took place.
5. There are criminal proceedings pending and he may be subject to further punishment.

Counsel for the Solicitor submitted that the fact that he was unable to make restitution should not be held against him in the consideration of the appropriate penalty. It is sometimes the case that a Solicitor has family, friends, or other means of making restitution, but the lack of such means should not be an element in considering the gravamen of the offence nor should the penalty be more severe than would otherwise be the case.

The Committee noted that the Solicitor was reprimanded in Convocation in 1985 for conduct which involved his failure to maintain sufficient funds on deposit to meet all their trust liabilities to their clients. In cases of misappropriation, the penalty is disbarment unless restitution has been made and there are very strong and compelling mitigating circumstances which permit a lesser penalty. Discounting the fact that the Solicitor is unable to make restitution, we are unable to agree with the submission that he should be permitted to resign and we adopt the reasons set out in the report of the Committee hearing the case of Ronald Paul Milrod.

"The Society cannot countenance theft and fraud by its members and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities: experience shows that the penalty attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career."

24th June, 1993

Herschel Wilfred Lebo was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 17th day of March, 1967.

ALL OF WHICH is respectfully submitted

DATED this 27th day of May, 1993.

Mary P. Weaver, Q.C.,
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Mr. Somerville that the Recommendation as to Penalty that is, that the solicitor be disbarred, be adopted.

There were no submissions and the Recommendation as to Penalty was adopted.

The solicitor was disbarred.

Counsel retired.

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Re: PETER SIMONS, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mrs. Weaver and Mrs. Graham withdrew.

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

The matter was withdrawn to allow for proper service of the Report.

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Re: THOMAS HOLYOAKE BOX, Markham

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Christina Budweth appeared for the Society and Mr. Box appeared on his own behalf.

Convocation was advised by the solicitor that he had not received his material and was requesting an adjournment to the next Special Convocation.

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

24th June, 1993

It was moved by Mr. Somerville, seconded by Mr. Lamek that the solicitor be granted an adjournment to the next Special Convocation.

Carried

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

Counsel and the solicitor retired.

.....

Re: PETER MICHAEL HOLLYOAKE, Burlington

The Secretary placed the matter before Convocation.

The reporter was sworn.

Messrs. Topp and Thom and Mrs. Graham withdrew.

Mr. Neil Perrier appeared for the Society. The solicitor was not present nor did counsel appear on his behalf.

Mr. Perrier advised Convocation that the solicitor was requesting an adjournment due to medical reasons.

The matter was stood down to see if Mr. Perrier could contact the solicitor.

It was moved by Mr. Somerville, seconded by Mr. Finkelstein that the adjournment be granted until the next Discipline Convocation peremptory to the solicitor.

Carried

Counsel retired.

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Re: DAVID JEAN ROYER, Cornwall

The Secretary placed the matter before Convocation.

The Reporter was sworn.

Mr. Brennan, Mrs. Elliott and Mrs. Graham withdrew.

Mr. Neil Perrier appeared for the Society. The solicitor was not present nor was counsel present on his behalf.

Convocation had before it the Report of the Discipline Committee dated 22nd April, 1993, together with an Affidavit of Service sworn 25th May, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 10th May, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 24th June, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

24th June, 1993

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair
Susan Elliott
Netty Graham

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

Neil Perrier
for the Society

DAVID JEAN ROYER
of the City
of Cornwall
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 18, 1993
March 12, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 22, 1992, Complaint D112/92 was issued against David Jean Royer alleging that he was guilty of professional misconduct.

The matter was heard in public on February 18, 1993 and March 12, 1993, before this Committee composed of Lloyd Brennan, Q.C., Chair, Susan Elliott and Netty Graham. Mr. Royer attended the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D112/92

2. (a) On or about February 1, 1989, he borrowed the sum of \$13,000 from a client providing only his promissory note as security. He did not advise the client to obtain independent legal representation or advice. The loan became due on February 1, 1992, but the balance owing has not been repaid.
- (b) He misled the Law Society and swore false or inaccurate statutory declarations on December 4, 1989, December 21, 1990 and February 21, 1992, all of which failed to detail the circumstances of his having borrowed money directly from a client.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D112/92 and is prepared to proceed with a hearing of this matter on October 7, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D112/92 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar in 1979. He practises as a sole practitioner in Cornwall, Ontario.

Particular 2(a)

5. On or about February 1, 1989, the Solicitor borrowed \$13,000 from a client, Marcelle Brisebois. The only consideration for the loan was a promissory note which provided for payment of interest at 12.5% per annum, calculated semi-annually. The note required the Solicitor to make monthly payments of \$175 due on the first day of each month beginning March 1, 1989 to and including February 1, 1992. The payment represented mainly interest. The balance of the loan became due and owing on February 1, 1992. A copy of the note is attached as Exhibit 1 to this agreed statement of facts.

6. At the date of the loan advance, Mrs. Brisebois was 59 years of age. She is an unsophisticated woman who, at the date of the loan to the Solicitor, had been involved in only one lending transaction, that being a vendor take back mortgage given on the sale of her home. It was the proceeds of this loan that were lent to the Solicitor.

7. Mrs. Brisebois was not advised by the Solicitor to obtain independent legal representation or advice in regard to the transaction. She would have done so if this had been suggested to her by the Solicitor.

8. The Solicitor paid Mrs. Brisebois all payments due under the note except for the instalment due on February 1, 1992. The January 1 payment was not made until January 27, 1992. The balance owing after the January 1, 1992 payment was \$11,204.45, with interest continuing to accrue under the terms of the note. Demand has been made for payment of the balance owing. The Solicitor has yet to repay the outstanding funds. An action for recovery has not yet been commenced.

24th June, 1993

Particular 2(b)

9. The Solicitor failed to reveal the borrowing from Mrs. Brisebois on his Form 2's for the year ended June 30, 1989, sworn December 4, 1989; for the year ended June 30, 1990, sworn December 21, 1990; and for the year ended June 30, 1991, sworn February 21, 1992. Copies of three Form 2's are attached, collectively, as Exhibit 2 to this agreed statement of facts.

10. The Solicitor's December 4, 1989 Form 2 declaration does indicate an indebtedness "as guarantor and partner as reported to the Law Society auditor in May, 1989". This reference is not in regard to the loan from Ms. Brisebois.

11. The Society corresponded with the Solicitor about this borrowing by letter dated January 31, 1990, attached as Exhibit 3 to this agreed statement of facts.

12. As a result of the misconduct discussed below the Society corresponded with the Solicitor on March 11, 1992 requesting that he amend his Form 2 for the year ended June 30, 1991, a copy of that letter is attached as Exhibit 4 to this agreed statement of facts. To date the Solicitor has failed to do so.

13. The Solicitor admits he was aware of his requirement to disclose borrowings from clients and that he intentionally failed to disclose the borrowing at the time of the execution of the forms.

V. PRIOR DISCIPLINE

14. The Solicitor was found guilty of professional misconduct on January 28, 1992 for borrowing from clients; conflict of interest in respect of the borrowing from clients and falsely filing Forms 2/3 in relation to the borrowing. A copy of the complaint is attached as Exhibit 5 to this agreed statement of facts.

DATED at Toronto this 5th day of October, 1992."

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Jean Royer be suspended for a period of one year, that he pay the costs of the Law Society's investigation in the amount of \$1,000.00. Prior to his return to practice, the Solicitor must file all forms required by the Law Society, and his books and records should be audited for a period of three years.

REASONS FOR RECOMMENDATION

The Solicitor admitted that he was guilty of professional misconduct in respect of each count. He testified, and he made submissions on his own behalf on the question of penalty.

He began his testimony by telling the Committee that he was unaware of Rule 7 when he borrowed from his client, Madame Brisebois in February of 1989. Every Solicitor has an obligation to be aware of the Rules. He testified that he was "painfully aware" of Rule 7 when he was disciplined in January of 1992 for borrowing from other clients. At the time of that hearing, and the investigation which preceded it, he concealed from the Law Society the fact that he had borrowed from Madame Brisebois. A month later, in February, he filed his Form 2 Annual Report without disclosing the Brisebois loan.

24th June, 1993

In answer to the questions of counsel and Committee members he acknowledged that he was conscious of the Brisebois loan at the time of the 1992 discipline hearing. He said that he did not disclose it because he hoped he would be able to pay it off.

Mr. Royer asserted that the proceeds of the Brisebois loan (like the proceeds of the loans for which he was disciplined in January of 1992) were used by him to help finance the operation of a dry cleaning business, which ultimately failed, occasioning substantial loss to him. He told the panel that his personal finances were untroubled at the time of the Brisebois loan. His practice was busy. He was "very solvent" personally. But upon cross-examination he admitted that he had given his personal guarantee to support the dry cleaning business, and it is apparent from his testimony that in February of 1989, the time of the Brisebois loan, he was having to use his own and other borrowed money to support the failing dry cleaning business. A solicitor is of course free to risk his personal wealth in a business venture, but he is not free to borrow from clients for any purpose. To borrow to fund a risky business venture, when he has provided his personal guarantee, not only breached the terms of Rule 7, but dishonestly placed Madame Brisebois' funds at greater risk than she could know.

The Solicitor stated that he believed the Law Society already knew of the Brisebois loan at the time he filed his Form 2 Report, dated February 21, 1992. The dates of three letters filed as Exhibit 7 establish otherwise. It is apparent that payment was demanded by Madame Brisebois' solicitor on January 7th; Mr. Royer replied on February 3rd, to the effect that he could not pay the balance owing; and on February 24th Madame Brisebois' solicitor wrote to repeat the demand, and to inform Mr. Royer that the matter would be reported to the Law Society. Mr. Royer attested before us that the written warning that the matter would be reported to the Law Society was preceded by a verbal warning in a conversation with Madame Brisebois' lawyer, which took place before the false statutory declaration was filed. We note that the false statutory declaration referred to in particular b) was dated February 21st. Having appeared before Discipline Committee January 28, 1992, for borrowing from clients in breach of Rule 7, he ought indeed to have been "painfully aware" of the Rule and ought to have disclosed the Brisebois loan, rather than to persevere in concealing the fact of that loan.

Our recommendation of one year's suspension is at the low end of the range suggested by the Society's counsel. There were several mitigating factors.

This Solicitor practices in a small town, where his professional and financial problems have been the subject of extensive press coverage. The Committee had before it several articles from the local newspaper, published before the hearing and during the period between the commencement and conclusion of the hearing, which detailed at length the allegations against the Solicitor and some of the problems in his personal life.

The Solicitor is virtually bankrupt. He suffered heavy financial loss as a result of the business failure. His income from his practice suffered a steep decline as a result of the reduction in motor vehicle accident litigation.

He has been under administrative suspension since November 1992.

These circumstances will render it very difficult for this Solicitor to re-establish a practice or earn a livelihood within his community. Our recommendation of one-year's suspension is made with those factors in mind.

We declined to make an order requiring the repayment of Madame Brisebois before the Solicitor can be re-instated, because we concluded that to do so might grant a preference to her over other creditors of the Solicitor, who is at risk of bankruptcy.

24th June, 1993

Although this is not an instance of misappropriation of trust funds, we are of the opinion that there was dishonesty on the Solicitor's part in failing to disclose the risky nature of the use to which he put the borrowed funds. Consequently, it is a matter which might be considered for compensation by the Lawyers' Fund for Client Compensation.

Prior to his return to practice the Solicitor must file all forms required by the Law Society, and his books should be audited for a period of three years. He has consented to an order that he pay \$1,000 on account of the costs of the Law Society's investigation, and the Committee considers this appropriate.

David Jean Royer was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 9th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of April, 1993.

Lloyd Brennan, Q.C.,
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. Topp, seconded by Mr. Lamek that the Recommendation as to Penalty be amended on page 7 by adding the words "by the Law Society" in paragraph 6 after the word "audited" so the sentence would then read:

"Prior to his return to practice the Solicitor must file all forms required by the Law Society, and his books should be audited by the Law Society for a period of three years."

Counsel, the reporter and the public withdrew.

It was moved by Mr. McKinnon, seconded by Mr. Finkelstein that the Recommendation as to Penalty as amended, that is, that the solicitor be suspended for 1 year together with the conditions set out in the Recommendation as to Penalty, be adopted.

Carried

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

Counsel retired.

.....

Re: TIMOTHY DAVID SALOMAA, Mississauga

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mrs. Graham and Mr. Topp withdrew.

24th June, 1993

Ms. Christina Budweth appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 1st June, 1993, together with an Affidavit of Service sworn 11th June, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 2nd June, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 24th June, 1993 (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

Carole Curtis, Chair
Paul Copeland
Mrs. Netty Graham

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

Christina Budweth
for the Society

TIMOTHY DAVID SALOMAA
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 2, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 21, 1992, Complaint D156/92 was issued against Timothy David Salomaa alleging that he was guilty of professional misconduct.

The matter was heard in public on February 2, 1993, before this Committee composed of Carole Curtis, Chair, Paul Copeland and Mrs. Netty Graham. Mr. Salomaa attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D156/92

2. (a) He failed to diligently and conscientiously serve his client, Huronia Trust, in a transaction in which he was retained to register a first charge on title of a property known as Block 54, Plan M-89 in the Village of Tara when he advanced the mortgage funds and registered the mortgage without first discharging prior encumbrances on the property; and
- (b) In the circumstances described in particular (a), he issued a false report dated November 10, 1989 to his client, Huronia Trust, respecting the property and in so doing, he violated his obligations pursuant to Rules 1 and 2 of the Rules of Professional Conduct.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D156/92 and is prepared to proceed with a hearing of this matter on February 2, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D156/92 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar on April 8, 1976. Since 1983, the Solicitor has been a sole practitioner whose practice has an emphasis on real estate law.
5. Stephano Caserta was a client of the Solicitor's during the period 1987 to 1989. During this time Mr. Caserta was engaged in the business of real estate investment.
6. Among other transactions, the Solicitor incorporated a numbered company, 813286 Ontario Limited, for Caserta on January 10, 1989. The Solicitor was 813286's original incorporating shareholder and director. On the day of incorporation, the Solicitor's share was transferred to a Mike Gentile who became 813286's sole shareholder and director. Stephano Caserta continued to be its operating mind.
7. On February 8, 1989, Grand-Route Holdings of Upper Canada Limited, as vendor, entered into an agreement of purchase and sale with 813286, as purchaser, to effect the sale of a block of land having the legal description Block 54, Plan M 89 in the Village of Tara.

24th June, 1993

8. The transaction was scheduled to close on February 28, 1989. The agreement called for a purchase price of \$140,000. The agreement required the vendor to discharge all existing encumbrances.

9. The agreement was amended February 5, 1989 to allow for a vendor take back second mortgage of \$70,000.

10. Solicitor Michael Lear acted for Grand-Route on the sale. The Solicitor acted for 813286. Both solicitor's have offices in the Mississauga area.

11. Grand-Route had purchased the property, as part of a larger parcel, from Thomas and Ida Middleton in January, 1989 for \$100,000 which included a vendor take back mortgage of \$90,000.

12. Stephano Caserta arranged for first mortgage financing from Huronia Trust in the amount of \$70,000 at 15.25% for the 813286 purchase. Mike Gentile guaranteed the mortgage.

13. The Solicitor was to act for both 813286 and Huronia Trust on the financing. In a preliminary report to Huronia dated February 28, 1989, the Solicitor stated that he had conducted a preliminary search of title and that he was satisfied that upon registration of the Huronia Trust mortgage that it would be a first mortgage "with no prior liens or executions". A copy of the Solicitor's preliminary report to Huronia Trust is attached as Exhibit 1 to this agreed statement of facts.

14. The transaction did not in fact close until March 10, 1989. The net mortgage proceeds from Huronia Trust in the amount of \$69,980 were not advanced to the Solicitor until March 8, 1989.

15. It was agreed between the Solicitor and Mr. Lear that the transaction would close in escrow in Mississauga on Friday, March 10, 1989. It was further agreed that the documents would then be sent by courier to the Solicitor for the Middletons, George Loucks, for registration in Walkerton on Monday, March 13, 1989. Mr. Loucks was to register: a) transfer, b) first mortgage in favour of Huronia Trust for \$70,000, c) second mortgage in favour of Grand-Route for \$70,000. This was sent up to the other conveyancer in error. A copy of the Solicitor's letter of instruction to Mr. Loucks is attached as Exhibit 2 to this agreed statement of facts.

16. Out of the sale proceeds, Grand-Route was to payoff \$18,000 of the \$90,000 mortgage to the Middletons. A partial discharge was then to be registered by Mr. Loucks on that parcel of property being purchased by 813286. A cheque representing the vendor's share of the Huronia funds was released directly to a representative of the vendor by the Solicitor on the afternoon of Monday, March 13, 1989.

17. When Mr. Loucks attended at the Registry Office on March 14, 1989, he found an execution in the amount of \$117,605.71 against Grand Route registered on March 13, 1989. Mr. Loucks returned to his office without registering the documents. Mr. Loucks did cash the \$18,000 cheque and registered a partial discharge of the Middleton mortgage.

18. On March 29, 1989, Mr. Loucks telephoned the Solicitor to take instructions from him.

24th June, 1993

19. By letter dated April 6, 1989, Mr. Loucks reported to the Solicitor that the registry office would not accept the Huronia Trust mortgage because of a technical photocopying problem. In addition, he reported that there were two liens registered against the property totalling \$45,379 as at March 17, 1989. He reported that the transfer and the mortgages were not registered. A copy of Mr. Loucks' April 6, 1989 letter is attached as Exhibit 3 to this agreed statement of facts.

20. On May 8, 1989 the transfer and mortgages were registered on the property by another conveyancer engaged by the Solicitor. The mortgages were and remain subject to the execution and liens registered against the property.

21. The Solicitor provided a solicitor's certificate of title and final report to Huronia Trust dated November 10, 1989. A copy of the report is attached as Exhibit 4 to this agreed statement of facts.

22. In the report the Solicitor certified that Huronia Trust had a valid first mortgage which was false as at the time of the report an execution existed against the vendor and there were two liens on the property.

23. 813286 defaulted on the mortgage. Huronia Trust brought an action against the Solicitor and Mr. Loucks. The litigation is ongoing.

V. PRIOR DISCIPLINE

24. The Solicitor was found guilty of professional misconduct on December 17, 1991 for failing to reply to the Society. The Solicitor was reprimanded in committee on that occasion.

DATED at Toronto this 2nd day of February, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended from the practice of law for one month. The Committee also recommends that the Solicitor be required to pay costs in the amount of \$4,500.00 to the Society. We recommend that the Solicitor be given six months, from the date of the completion of his suspension, to pay these costs.

REASONS FOR RECOMMENDATION

The Solicitor and counsel for the Society were in agreement that costs in the amount of \$4,500.00 should be paid by the Solicitor. We were advised that the audit cost in this case was approximately \$4,100.00 and that Ms. Budweth had spent 15 hours on the file. It was agreed between the parties that the costs for the audit should be reduced to \$3,000.00, and Ms. Budweth's time should be calculated at \$100.00 per hour.

24th June, 1993

On the issue of penalty, the Committee heard oral evidence from Mr. Loucks, and from the Solicitor. This appeared to us to be an exercise by the Solicitor in persuading us that Mr. Loucks was more at fault for registering the mortgage when prior encumbrances had not been discharged. While there were differences in the evidence of Mr. Loucks and the Solicitor on certain issues, the Committee did not find it necessary on the issue of penalty to make credibility findings on the evidence. It is clear that the certificate of title and final report to Huronia Trust, sent six months after the mortgage was registered, was blatantly false. We agree with Ms. Budweth that a suspension is required in this case, but we have chosen the lower end of the one to three month range that she suggested.

The Solicitor has been in practice for 16 years, and practices mainly in the real estate field. He has been married for six years and has two children. His practice is his only source of income. We believe even a month suspension will impact greatly on this sole practitioner. We note as well that this is the Solicitor's second discipline matter.

Timothy David Salomaa was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 8th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 1st day of June, 1993.

Paul D. Copeland
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Brennan, seconded by Mr. Lamek that the Recommendation as to Penalty that is, that the solicitor be suspended for 1 month with costs, be adopted.

The solicitor asked that the date of the suspension be effective June 26th, 1993.

There were no further submissions and the Recommendation as to Penalty was adopted.

Counsel and the solicitor retired.

.....

Re: PING KWAN TAM, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Mrs. Sealy withdrew.

Mr. Stephen Foster appeared for the Society.

The matter was stood down to allow Mr. Tam to appear.

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24th June, 1993

Re: DONALD GEORGE MARTIN, Toronto

The matter was stood down.

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Re: GABRIELE MONIKA HAUSER, Toronto

The Secretary placed the matter before Convocation.

The reporter was sworn.

Messrs. Bastedo and Thom and Mrs. Graham withdrew.

Ms. Christina Budweth appeared for the Society and Mr. Hauser appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 22nd April, 1993, together with an Affidavit of Service sworn 25th May, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 11th May, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 24th June, 1993 (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 G. Bastedo, Chair
Stuart Thom, Q.C.
Mrs. Netty Graham

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

Christina Budweth
for the Society

GABRIELE MONIKA HAUSER
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 2, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 12, 1992, Complaint D175/92 was issued against Gabriele Monika Hauser alleging that she was guilty of professional misconduct.

The matter was heard in public on March 2, 1993, before this Committee composed of Thomas G. Bastedo, Chair, Stuart Thom, Q.C. and Mrs. Netty Graham. Ms. Hauser attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D175/92

2. a) She failed to provide a reply to the Law Society regarding a complaint by Paul Vian despite letters dated April 9, 1992, July 16, 1992 and August 21, 1992, and telephone messages left on August 12, 1992 and August 18, 1992.
- b) She failed to provide a reply to the Law Society regarding a complaint by Ram P. Singh despite letters dated April 7, 1992, June 16, 1992 and September 3, 1992 and telephone requests on August 10, 1992 and August 12, 1992.
- c) She failed to provide a reply to the Law Society regarding a complaint by Adel S.W. Girgis despite letters dated July 27, 1992 and September 8, 1992 and telephone requests on August 2, 1992, August 21, 1992 and August 31, 1992.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D175/92 and is prepared to proceed with a hearing of this matter on March 2 and 3, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D175/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1986. She practices as a sole practitioner, with an associate.

Particular 2b) Failure to Reply to the Law Society regarding a complaint by Paul Vian

24th June, 1993

5. By letter received on December 13, 1991, Paul Vian advised the Law Society that he had retained the Solicitor to represent him regarding a landlord and tenant matter. Mr. Vian stated that the Solicitor had failed to contact him in over six months regarding his matter. A copy of Mr. Vian's letter dated December 13, 1992 is attached as Exhibit "A" to this Agreed Statement of Facts.

6. By letter dated January 8, 1992, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide her comments within two weeks. No reply was received.

7. A Law Society staff employee spoke to the Solicitor by telephone on January 13, 1992 regarding Mr. Vian's complaint. The Solicitor was advised that a reply to the same was required by February 14, 1992. No reply was received.

8. A Law Society staff employee left telephone messages for the Solicitor at her office on February 19, 1992 and February 21, 1992 requesting that she return the call. The calls were not returned.

9. By registered mail, dated February 26, 1992, the Law Society reminded the Solicitor of her obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

10. By letter dated February 17, 1992, the Solicitor advised Mr. Vian of her attempts to contact him since the summer and fall of 1991.

11. By letter dated February 17, 1992, the Solicitor advised the Law Society that Mr. Vian had requested she assist him with respect to a landlord and tenant matter as he had not paid his rent, could not pay his rent and wished a rental abatement as he could not tolerate noise of any sort due to severe emotional and mental problems. The Solicitor advised that, at trial, the court found against Mr. Vian and the tenancy was terminated. As Mr. Vian had located alternative and better housing at a reduced rate, the Solicitor did not intend to charge legal aid for her time spent reviewing the matter for appeal. The Solicitor further advised that Mr. Vian had moved and did not notify her office. The Solicitor advised the Law Society that she did not wish a copy of this letter to be forwarded to Mr. Vian.

12. By letter, received on March 20, 1992, Mr. Vian advised the Law Society that he had provided the Solicitor with his new address and telephone number. Mr. Vian further advised that the Solicitor had prejudiced his position by failing to file his appeal within the limitation period to be paid into court; she had failed to pay into court \$1,360.00 on his behalf which resulted in his eviction; and that she has not accounted to him for the \$1,360.00 he paid to her.

13. By letter dated April 9, 1992, the Law Society forwarded to the Solicitor a copy of Mr. Vian's letter received on March 20, 1992. The Solicitor was requested to provide her response to the allegations raised by Mr. Vian within two weeks of the date of this letter. No reply was received. A copy of the Law Society's April 9, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts.

14. By letter dated July 16, 1992, the Law Society forwarded to the Solicitor a copy of its April 9, 1992 letter. The Solicitor was requested to reply within seven days. No reply was received. A copy of the Law Society's July 16, 1992 letter is attached as Exhibit "C" to this Agreed Statement of Facts.

24th June, 1993

15. A Law Society staff employee left a telephone message for the Solicitor at her office on August 12, 1992 requesting she return the call. The Solicitor returned the telephone call on August 13, 1992, leaving a message for the Complaints Officer investigation the file, that she was returning her call.

16. A Law Society staff employee left a telephone message for the Solicitor at her office on August 18, 1992 requesting she return the call. The call was not returned; however the matter was mentioned to the Society staff member in a telephone conversation on August 21, 1992 as set out in paragraph 29.

17. By registered mail dated August 21, 1992, the Law Society forwarded to the Solicitor a copy of its April 9, 1992 letter. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received. A copy of the Law Society's August 21, 1992 is attached as Exhibit "D" to this Agreed Statement of Facts.

18. The Solicitor provided a reply to the Society on March 1, 1993. The Society has not yet had an opportunity to review the reply.

Particular 2b) Failure to Reply to the Law Society regarding a complaint by Ram P. Singh

19. By letter dated December 19, 1991, Ram P. Singh advised the Law Society of the Solicitor's failure to return his communications regarding the status of his matter. Mr. Singh stated that he had retained the Solicitor to obtain an annulment of his marriage.

20. By letter dated January 14, 1992, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to reply within two weeks. No reply was received.

21. A Law Society staff employee left telephone messages for the Solicitor at her office on February 19, 1992 and February 21, 1992 requesting that she return the calls. The calls were not returned.

22. By registered mail, dated February 26, 1992, the Law Society reminded the Solicitor of her obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

23. By letter dated February 27, 1992, the Solicitor advised the Law Society that Mr. Singh's matter was originally scheduled to be heard in June, 1991; however, the court refused to deal with the matter on the return date for reasons of evidence and that it did not wish to deal with the matter on a peremptory basis. The matter was adjourned to no fixed date. The Solicitor stated that Mr. Singh now resided in Nova Scotia and he had not contacted her despite her letter to him. She also stated that Mr. Singh's son had contacted the Solicitor however, she stated that she had no authority to discuss the matter with him. A copy of the Solicitor's February 27, 1992 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

24. By letter dated March 25, 1992, Mr. Singh advised the Law Society that he had met with the Solicitor at the end of July, 1991. The Solicitor had advised him that the case had gone well, however, the court wanted a medical report prior to signing the annulment. The next day, Mr. Singh delivered to the Solicitor a medical report. The Solicitor advised that the matter would be completed in less than three weeks. As Mr. Singh was unable to contact the Solicitor until the end of September, he requested she return his documentation to him and advised her that he was moving to Nova Scotia. Mr. Singh stated that the Solicitor had advised him to attend at her office the next day and she would deliver the file.

24th June, 1993

Mr. Singh attended at the Solicitor's office the next day, however, the file was not available. The Solicitor's secretary advised Mr. Singh that the file would be couriered the next day. Since September of 1991, Mr. Singh has not been contacted by the Solicitor nor has he received his file, despite several calls to the Solicitor's office. A copy of Mr. Singh's March 25, 1992 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

25. By letter dated March 30, 1992, Mr. Singh advised the Solicitor that he was terminating his retainer with her. The Solicitor was requested to forward his file.

26. By letter dated April 7, 1992, the Law Society forwarded to the Solicitor a copy of Mr. Singh's letter dated March 25, 1992. The Solicitor was requested to comment on Mr. Singh's concerns regarding the delay in obtaining the annulment and why Mr. Singh had not been provided with his file. The Solicitor was requested to reply within two weeks. No reply was received. A copy of the Law Society's April 7, 1992 letter is attached as Exhibit "G" to this Agreed Statement of Facts.

27. By letter dated June 16, 1992, the Law Society forwarded to the Solicitor a copy of its April 7, 1992 letter. The Solicitor was requested to respond to the same as well as, to provide Mr. Singh with her statement of account. The Solicitor was requested to reply forthwith. No reply was received. A copy of the Law Society's June 16, 1992 letter is attached as Exhibit "H" to this Agreed Statement of Facts.

28. A Law Society staff employee left a telephone message for the Solicitor at her office on August 10, 1992 requesting she return the call. The Solicitor returned the call on August 11, 1992 leaving a message that she would call again the next day after 10:00 am. Law Society staff employee left a telephone message for the Solicitor at her office on August 12, 1992 requesting she return the call.

29. A Law Society staff employee spoke with the Solicitor by telephone on August 21, 1992. The Solicitor requested that the Society forwarded to her by facsimile transmission, a copy of the Law Society's previous correspondence. The same were sent, by facsimile transmission on August 21, 1992. The Solicitor further advised the Law Society by telephone on August 21, 1992 that Mr. Singh's wife had died in Fiji sometime in December, 1991, and that Mr. Singh wanted to proceed with his request for the annulment without disclosing to the court the fact that his wife had died. The Solicitor further advised that Mr. Singh's brother-in-law had picked up the file. The Solicitor was requested to reply, in writing, to the Law Society's correspondence dated June 16, 1992, by August 31, 1992. No reply was received. A copy of the Law Society's facsimile transmission cover sheet, dated August 21, 1992, is attached as Exhibit "I" to this Agreed Statement of Facts.

30. By registered mail dated September 3, 1992, the Law Society forwarded to the Solicitor a copy of its April 7, 1992 letter. The Solicitor was reminded of her obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received. A copy of the Law Society's letter dated September 3, 1992, is attached as Exhibit "J" to this Agreed Statement of Facts.

31. The Solicitor replied to the Society on March 1, 1993. The Society has not yet had an opportunity to review the reply.

Particular 2c) Failure to reply to the Law Society regarding a complaint by Dr. Adel S. Girgis

24th June, 1993

32. By letter dated June 29, 1992, Dr. Adel S. Girgis advised the Law Society that he had retained the Solicitor to assist him with the sponsorship of his wife from Egypt in February, 1991. Dr. Girgis stated that the Solicitor had misled him as to the status of the matter. Dr. Girgis requested the Law Society assist him in determining the status of his matter, as well as, his request that the Solicitor provide him with a copy of the sponsorship application.

33. By letter dated July 27, 1992, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to be advised of the status of Dr. Girgis' matter and to forward documentation supporting her statements. The Solicitor was requested to reply within two weeks. No reply was received. A copy of the Law Society's July 27, 1992 letter, complete with enclosure, is attached as Exhibit "K" to this Agreed Statement of Facts.

34. A Law Society staff employee spoke with the Solicitor by telephone on August 21, 1992. The Solicitor requested the Law Society forward by facsimile transmission a copy of its July 27, 1992 letter and that she would respond to the same shortly. The same was sent by facsimile transmission that day. A copy of the Law Society's facsimile transmission cover sheet, dated August 21, 1992 is attached as Exhibit "L" to this Agreed Statement of Facts.

35. A Law Society staff employee spoke with the Solicitor by telephone on August 31, 1992. The Solicitor advised that she was attempting to send her response by facsimile transmission however, the same would not transmit. The Solicitor advised that she would mail her response that day. No reply was received.

36. By registered mail, dated September 8, 1992, the Law Society forwarded to the Solicitor a copy of its July 27, 1992 letter. The Solicitor was reminded of her obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received. A copy of the Law Society's letter dated September 8, 1992 is attached as Exhibit "M" to this Agreed Statement of Facts.

37. The Solicitor provided a reply to the Society on March 1, 1993. The Society has not yet had an opportunity to review the reply.

V. DISCIPLINE HISTORY

38. The Solicitor was found guilty of professional misconduct and received a reprimand in committee on March 19, 1991 for her failure to report to a client and her failure to reply to the Law Society.

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

RECOMMENDATION AS TO PENALTY

It is the Committee's unanimous view that this matter be dealt with in Convocation by reprimand. In addition, the costs will be paid by the Solicitor in the amount of \$1,250.00. And last, the Solicitor shall attend at the Practice Advisory programme.

REASONS FOR RECOMMENDATION

The Solicitor failed to reply to the complaints put forward by three clients despite repeated requests by the Law Society. This is the second occasion on which the Solicitor has come before the Law Society and on the last occasion which occurred on March 19, 1991, the complaints before the Law Society were of an analogous nature.

The Solicitor stated that the three clients which are the subject of this complaint were difficult clients and because of that difficulty, she expressed annoyance and agitation at dealing with them. While that may be so, nevertheless, we view these matters to be of importance and the Society cannot govern its members or serve the public unless the complaints of the public are promptly dealt with in an orderly fashion, and for those reasons, it is our view that there is no valid excuse for not responding to the requests of the Law Society to receive what may very well be a very valid explanation to be put forward by the Solicitor.

Gabriele Monika Hauser was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 10th day of April, 1986.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of April, 1993.

Thomas G. Bastedo,
Chair

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

There were no submissions and the Report was adopted.

Mr. McKinnon asked that the Recommendation as to Penalty be amended to read "the Solicitor shall attend the Practice Review Program of the Professional Standards Department".

It was moved by Mr. Bragagnolo, seconded by Mr. Topp that the Recommendation as to Penalty as amended that is, that the solicitor be reprimanded in Convocation with costs and condition, be adopted.

Carried

The solicitor was reprimanded.

Counsel and the solicitor retired.

.....

Convocation adjourned for a brief recess and resumed at 10:15 a.m.

.....

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RESUMPTION OF THE DONALD GEORGE MARTIN MATTER

The Secretary placed the matter before Convocation.

The reporter was sworn.

Messrs. Finkelstein and Thom and Mrs. Sealy withdrew.

Mr. Stephen Foster appeared for the Society and Mr. M. Royce appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 3rd May, 1993, together with an Affidavit of Service sworn 25th May, 1993 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 11th May, 1993 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 23rd June, 1993, (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

Neil Finkelstein, Chair
Stuart Thom, Q.C.
Hope Sealy

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

Stephen Foster
for the Society

DONALD GEORGE MARTIN
of the City
of Toronto
a barrister and solicitor

M. E. Royce
for the solicitor

Heard: February 16, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 18, 1992, Complaint D190/92 was issued against Donald George Martin, alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced with Complaint D190a/92 issued on January 5, 1993.

The matter was heard in public on February 16, 1992, before this Committee composed of Neil Finkelstein, Chair, Stuart Thom, Q.C. and Hope Sealy. Mr. Martin attended the hearing and was represented by M.E. Royce. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D190a/92

2. a) He failed to serve his clients, Mr. Erich G. Richter and Mrs. Martha K. Richter, in a conscientious, diligent and efficient manner in respect of their claim for damages against the Board of Trade of Metropolitan Toronto Country Club and, in particular, he failed to advise them that their action had been dismissed and failed to take steps to protect their interests following the dismissal.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D190a/92 and is prepared to proceed with a hearing of this matter on February 16, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

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

IV. FACTS

4. On June 6, 1984 Mrs. Martha K. Richter was injured when a golf ball, from the adjacent Board of Trade of Metropolitan Toronto Country Club golf course, struck the double paned window of her home smashing the outside pane. At the time, Mrs. Richter was standing on a chair in the window hanging curtains. The sound of the breaking glass frightened her and she either jumped or fell off the chair, landing on her buttocks, sustaining injuries.

5. Following the accident, Mrs. Richter went out to her backyard and picked up a golf ball from the vicinity of the window. Two men got out of a golf cart and indicated to her that the ball belonged to them.

6. Mrs. Richter experienced pain in her low back, neck and shoulders following the accident. On June 7, 1984 she saw Dr. Korentager. His report indicates that it was evident on the day after the accident that she sustained a myofascial strain to the low part of her back and was in a lot of discomfort. She was prescribed rest, heat and a muscle relaxant.

7. Mrs. Richter and her husband, Erich G. Richter, contacted a lawyer, Mr. Segal, who had previously handled a real estate matter for them. Mr. Segal referred them to the Solicitor.

24th June, 1993

8. On June 22, 1984 Mr. and Mrs. Richter met with the Solicitor at his Richmond Street office in Toronto. They discussed the circumstances surrounding the accident. The Solicitor told Mr. and Mrs. Richter that he would take care of the matter for them and that he would be getting back in touch with them.

9. At this initial meeting, the Solicitor did not provide Mr. and Mrs. Richter with his opinion on the merits and probable results of their case. In subsequent discussions, the Solicitor advised Mr. and Mrs. Richter that it was worth taking the action through examinations for discovery, after which a decision could be made as to whether to proceed to trial.

10. The Solicitor did not provide Mr. and Mrs. Richter with an estimate of the fees and disbursements involved in their case. Mr. and Mrs. Richter did not request any information about fees and disbursements.

11. By letter dated June 25, 1984 the Solicitor confirmed his meeting with Mr. and Mrs. Richter. A copy of the Solicitor's letter of June 25, 1984 is produced at Tab 1 of the Book of Documents in this matter.

12. By letter dated June 25, 1984 the Solicitor notified the Board of Trade of the claim for damages by Mr. and Mrs. Richter. A copy of the Solicitor's June 25, 1984 letter is produced at Tab 2 of the Book of Documents in this matter.

13. By letter dated September 7, 1984 W. A. King & Co. Ltd., liability insurers for the Board of Trade, advised the Solicitor that they had concluded their investigation and found no evidence of liability on the part of the Board of Trade. A copy of the W.A. King & Co. Ltd.'s September 7, 1984 letter is produced at Tab 3 of the Book of Documents in this matter.

14. By letter dated February 6, 1985 Mr. Richter confirmed his telephone conversation with the Solicitor respecting special damages occasioned by the accident. A copy of Mr. Richter's February 6, 1985 letter is produced at Tab 4 of the Book of Documents.

15. The Solicitor commenced an action on behalf of Mr. and Mrs. Richter against the Board of Trade of Metropolitan Toronto by way of a Statement of Claim dated April 12, 1985. A copy of the Statement of Claim is produced at Tab 5 of the Book of Documents in this matter.

16. The Solicitor never provided Mr. Richter or Mrs. Richter with a copy of the Statement of Claim.

17. The Statement of Claim refers in Paragraph 6 to the negligence of a golfer "the identity of whom is unknown at the time of this pleading".

18. By letter dated May 28, 1985 the lawyer acting for the Board of Trade, Mr. David Cheifetz of Messrs. Lawson, McGrenere, Wesley, Jarvis & Rose, provided the Solicitor with their Statement of Defense dated May 25, 1985. The covering letter makes reference to the golfer involved in the accident, Mr. Patterson, and provides his home and work telephone numbers. A copy of the May 28, 1985 letter and Statement of Defense dated May 25, 1985 are produced at Tab 6 of the Book of Documents in this matter.

19. Mr. Cheifetz states that he was of the opinion that the action would not succeed and, while he had not had any settlement discussions at all with his principals, would have been prepared to recommend that they pay no more than \$1,000 by way of a "nuisance settlement".

20. By letter dated September 9, 1985 the Solicitor advised Mr. and Mrs. Richter that examinations for discovery were scheduled for September 25, 1985 and requested that they contact his office to confirm the arrangements. A copy of the Solicitor's September 9, 1985 letter is produced at Tab 7 of the Book of Documents in this matter.

21. The examination or discovery of Mr. and Mrs. Richter took place on September 25, 1985. The examination of Mrs. Richter was adjourned prior to completion.

22. On September 25, 1985 there was also held the examination for discovery of Dalton Berg, a representative of the Board of Trade.

23. Some weeks after these examinations for discovery, Mr. Richter attended at the Solicitor's office requesting an update on the status of the case. Mr. Richter asked the Solicitor how Mrs. Richter had done at the examination for discovery. The Solicitor replied that she had done "very well". The Solicitor said that there might be some kind of settlement offer arising from the discoveries. If not, Mr. Richter agreed that the Solicitor should go to trial.

24. By letter dated October 18, 1985 the Defendant's lawyer, Mr. Cheifetz, asked the Solicitor for certain information arising from the discoveries and referred to the address of the golfer, Mr. Patterson. A copy of Mr. Cheifetz's October 18, 1985 letter is produced at Tab 8 of the Book of Documents in this matter.

25. By letter dated October 29, 1985 the Solicitor responded to Mr. Cheifetz. He indicated that he wished to proceed expeditiously with the addition of Mr. Patterson as a defendant. A copy of the Solicitor's letter dated October 29, 1985 is produced at Tab 9 of the Book of Documents in this matter.

26. By letter dated November 7, 1985 the Solicitor submitted an interim account for disbursements to Mr. and Mrs. Richter. A copy of the Solicitor's November 7, 1985 letter and attached account are produced at Tab 10 of the Book of Documents in this matter.

27. By letter dated November 25, 1985 Mr. Cheifetz provided the Solicitor with the address of the golfer, Mr. Patterson. A copy of Mr. Cheifetz's November 25, 1985 letter is produced at Tab 11 of the Book of Documents in this matter.

28. By letter dated January 17, 1986 the Solicitor advised Mr. Cheifetz that he was in the process of preparing a motion to add the golfer, Mr. Patterson, as a party defendant. A copy of the Solicitor's January 17, 1986 letter is produced at Tab 12 of the Book of Documents in this matter.

29. By letter dated March 27, 1986 Mr. Cheifetz requested the Solicitor to add Mr. Patterson as a defendant as soon as possible in order to get on with the action. A copy of Mr. Cheifetz's March 27, 1986 letter is produced at Tab 13 of the Book of Documents in this matter.

30. By letter dated May 2, 1986 the Solicitor requested from Mr. and Mrs. Richter the amount of \$250.00 for disbursements and advised that arrangements were being made for the continued examination of Mrs. Richter. A copy of the Solicitor's May 2, 1986 letter is produced at Tab 14 of the Book of Documents in this matter.

31. By letter dated May 2, 1986 the Solicitor requested Mr. Cheifetz to sign a Consent to an Order adding the golfer, Mr. Patterson, as a defendant and respecting the issuance of a fresh statement of claim in the Supreme Court of Ontario with a prayer for an injunction. A copy of the Solicitor's May 2, 1986 letter is produced at Tab 15 of the Book of Documents in this matter.

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32. By letter dated May 26, 1986 the Solicitor advised Mr. and Mrs. Richter that their examinations for discovery would be continued on September 15, 1986 and requested that they arrive at the Solicitor's office at 9:00 a.m. A copy of the Solicitor's May 26, 1986 letter is produced at Tab 16 of the Book of Documents in this letter.

33. By letter dated June 10, 1986 Mr. Cheifetz indicated that he was willing to consent to the addition of Mr. Patterson as a defendant but not to the rest of the Solicitor's requests and that, in any case, it would be necessary to move for the addition of Mr. Patterson as a defendant. A copy of Mr. Cheifetz's June 10, 1986 letter is produced as Tab 17 of the Book of Documents in this matter.

34. The Solicitor did not take any further steps to add Mr. Patterson as a defendant in the action.

35. By letter dated August 21, 1986 the Solicitor reminded Mr. and Mrs. Richter of the continuation of their examinations for discovery on September 15, 1986. A copy of the Solicitor's August 21, 1986 letter is produced at Tab 18 of the Book of Documents.

36. The examinations for discovery were subsequently rescheduled for 2:00 p.m. on September 15, 1986 and took place on that date. The Solicitor did not prepare Mrs. Richter for her continued examination for discovery.

37. During Mrs. Richter's examination for discovery, Mr. Cheifetz asked Mrs. Richter questions concerning the details of her sex life with her husband. Both Mr. and Mrs. Richter became very upset at these questions as they had not been advised by the Solicitor that these matters would be discussed even though they were referred to in the medical reports supporting the claim.

38. A Notice of Status Hearing was delivered by the District Court dated June 20, 1986, and made returnable October 6, 1986.

39. The status hearing was held on October 6, 1986 and Judge Rapson endorsed the record with his order that the action be placed on the trial list before December 1, 1986. A copy of Judge Rapson's endorsement is produced at Tab 19 of the Book of Documents in this matter.

40. A memo dated October 7, 1986 to the Solicitor from Ian A. Mair, a student in the Solicitor's office, indicates that Mr. Mair attended at the status hearing and that Judge Rapson ordered that the matter be placed on the trial list before December 2, 1986. A copy of the October 7, 1986 memo is produced as Tab 20 of the Book of Documents in this matter.

41. The Solicitor filed Plaintiff's Notice of Readiness for Trial and served this on Mr. Cheifetz on November 28, 1986.

42. The Solicitor did not file the Notice of Listing for Trial before December 2, 1986 as ordered by Judge Rapson.

43. The action was dismissed with the costs by order of the Deputy Local Registrar on December 2, 1986 as endorsed on the record of the action. A copy of the December 2, 1986 endorsement dismissing the action is produced at Tab 19 of the Book of Documents.

44. By letter dated March 24, 1987 Mr. Cheifetz advised the Solicitor that the action had been dismissed with costs. Mr. Cheifetz indicated that he was prepared to let the determination stand and would recommend that his client not seek costs but also indicated that he would likely consent to have the order set aside. A copy of Mr. Cheifetz's March 24, 1987 letter is produced at Tab 21 of the Book of Documents in this matter.

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45. By memo from the Solicitor's secretary Mildred Cullen to Joe Marando of the Solicitor's staff, directions were given to follow up on Mr. Cheifetz's letter concerning the dismissal by attending at the courthouse and finding out what had occurred and what to do to restore the action to the list. Handwritten notes on the memo state:

"Go back before Judge Rapson on a notice of motion for an order to set aside the endorsement and time extend for put action list. Call Bill Sheehan 965-7392."

A copy of the undated memo is produced at Tab 22 of the Book of Documents in this matter.

46. No further steps were taken by the Solicitor to set aside the order dismissing the action.

47. In late March, 1987 Mr. Richter telephoned the Solicitor for an update on the case. The Solicitor told Mr. Richter that he had "missed the trial date" but that this could be "fixed".

48. On April 22, 1987 Mrs. Richter telephoned the Solicitor to advise him that she had seen Dr. Peter Welsh from the Orthopaedic Hospital. By letter dated April 22, 1987 the Solicitor wrote to Dr. Welsh asking for his report. A copy of the Solicitor's April 22, 1986 letter is produced at Tab 23 of the Book of Documents in this matter.

49. By letter dated July 16, 1987 Mr. Cheifetz informed the Solicitor that given the long delay, he would now be opposing any order to set the dismissal aside. A copy of Mr. Cheifetz's July 16, 1987 letter is produced at Tab 24 of the Book of Documents in this matter.

50. By letter dated August 3, 1987 the Solicitor requested Mrs. Richter to sign a direction respecting further medical reports. A copy of the Solicitor's August 31, 1987 letter and the signed direction is produced at Tab 25 of the Book of Documents in this matter.

51. By letter dated September 8, 1987 the Solicitor requested Dr. Kofman to provide his report. A copy of the Solicitor's September 8, 1987 letter is produced at Tab 26 of the Book of Documents in this matter.

52. During 1987 Mr. and Mrs. Richter made various telephone calls to the Solicitor's office but were never able to speak directly to him and he never returned their messages.

53. On November 10, 1988 Mr. and Mrs. Richter attended at the Solicitor's office for an update on their case. Mr. and Mrs. Richter indicated that they would like to see more action on their case. The Solicitor said that he could consult with a colleague for a second opinion on their case and get back to them.

54. On December 28, 1988 Mr. and Mrs. Richter attended at the Solicitor's office requesting an update on their case. The Solicitor had not obtained the second opinion. However, the Solicitor now told Mr. and Mrs. Richter that he did not think the case was worth proceeding with because it lacked merit. The Solicitor also suggested to Mr. and Mrs. Richter that they consider selling their home. Mr. Richter replied that the matter should be dealt with properly and successfully concluded and that he wished the Solicitor to take the necessary action. The Solicitor suggested Mr. and Mrs. Richter consult another lawyer.

24th June, 1993

55. Around this time, Mr. and Mrs. Richter consulted another lawyer, Ms. Catharine M. Buie, concerning their action with Mr. Martin. Ms. Buie was acting for Mr. and Mrs. Richter on another matter. Ms. Buie's impression was that Mr. and Mrs. Richter did not know the status of their file with Mr. Martin and had no idea when it would come to trial. Ms. Buie had no idea that the action had been dismissed at a status hearing. Ms. Buie provided Mr. Richter with a list of questions to be put to Mr. Martin regarding the status of their file.

56. By letter dated February 2, 1989 Mrs. Richter requested that the Solicitor respond to a series of specific questions about the status of their case, namely:

1. Have you been able to prove who is liable?
2. Will this case go to trial?
3. Have there been any offers to settle?
4. What is the amount of general damages?
5. What is the cost of going to trial?
6. How many days will the trial take?
7. Do you require additional medical reports?

A copy of Mrs. Richter's February 2, 1989 letter is produced at Tab 27 of the Book of Documents in this matter.

57. By letter dated February 7, 1989 the Solicitor's office responded to Mrs. Richter that he was out of the city. A copy of the February 7, 1989 letter from the Solicitor's office is produced at Tab 28 of the Book of Documents in this matter.

58. Around this time, Mr. and Mrs. Richter made various phone calls to the Solicitor. His secretary would ask them to wait for a moment and then return saying that the Solicitor was "not in the office" or "is away". The calls were not returned by the Solicitor.

59. On May 22, 1989 Mr. Richter telephoned the Solicitor's office around noon. He was asked to wait for a moment and he then overheard the Solicitor's secretary say to Mr. Martin what should we "tell Mr. Richter this time?" She then told Mr. Richter that the Solicitor had left.

60. By letter dated August 24, 1989 Mr. and Mrs. Richter requested an update on the status of their case. A copy of the August 24, 1989 letter from Mr. and Mrs. Richter is produced at Tab 29 of the Book of Documents in this matter.

61. On October 20, 1989 Mr. Richter attended at the Solicitor's office. The Solicitor indicated to Mr. Richter that if he had been negligent, his insurance would cover him.

62. On February 7, 1990 Mrs. Richter attended at the Solicitor's office and requested that he release her file to Ms. Buie. The Solicitor agreed and said that he would make the file available.

63. By letter dated February 12, 1990 Ms. Buie wrote to the Solicitor enclosing a signed direction regarding the transfer of the file. A copy of Ms. Buie's February 12, 1990 letter is produced at Tab 30 of the Book of Documents in this matter.

64. By letter dated March 1, 1990 the Solicitor's office replied to Ms. Buie that the Solicitor was on vacation and that her letter would be brought to his attention upon his return. A copy of the March 1, 1990 letter from the Solicitor's office is produced at Tab 31 of the Book of Documents in this matter.

65. The Solicitor did not transfer the file to Ms. Buie.

66. By letter dated October 29, 1990 Mr. Richter referred to the fact that the Solicitor had not been returning his telephone calls and reminded the Solicitor of his promise to transfer the file to Ms. Buie. A copy of Mr. Richter's October 29, 1990 letter to the Solicitor is produced at Tab 32 of the Book of Documents in this matter.

67. By letter dated January 15, 1991 Mr. and Mrs. Richter complained to the Law Society respecting their attempts to communicate with the Solicitor and requesting assistance in obtaining their file. A copy of Mr. and Mrs. Richter's January 15, 1991 letter is produced at Tab 33 of the Book of Documents in this matter.

68. On February 1, 1991 the Law Society wrote to the Solicitor enclosing a copy of Mr. and Mrs. Richter's letter of complaint and requesting the Solicitor's comments. A copy of the Law Society's February 1, 1991 letter is produced at Tab 34 of the Book of Documents in this matter.

69. On April 3, 1991 the Solicitor provided the Law Society with a response to the complaint by Mr. and Mrs. Richter. A copy of the Solicitor's April 3, 1991 letter is produced at Tab 35 of the Book of Documents in this matter.

70. By letter dated April 10, 1991 the Law Society provided Mr. and Mrs. Richter with a copy of the Solicitor's response and also informed them that the matter had been forwarded to the Law Society's Errors and Omissions department. A copy of the Law Society's April 10, 1991 letter is produced at Tab 36 of the Book of Documents.

71. Prior to the Law Society's complaints officer forwarding this matter to the Errors and Omissions Department, the Solicitor had not advised his insurers of the potential claim against him in this matter.

72. By letter dated April 10, 1991 the Law Society requested the Solicitor to comment on why Ms. Buie had been unable to obtain Mr. and Mrs. Richter's file from him. A copy of the Law Society's April 10, 1991 letter is produced at Tab 37 of the Book of Documents.

73. By letter dated May 3, 1991 Mr. and Mrs. Richter responded to the Solicitor's reply to their complaint. A copy of Mr. and Mrs. Richter's May 3, 1991 letter is produced at Tab 38 of the Book of Documents.

74. On May 22, 1991 the Solicitor met with Ms. Catherine Whiten, insurance adjuster, respecting his Errors and Omissions coverage in this matter. The Solicitor handed over the file of Mr. and Mrs. Richter to Ms. Whiten.

75. When Ms. Whiten asked the Solicitor why he had not reported the matter to Errors and Omissions in March, 1987 when he first became aware of the problem, the Solicitor replied that he hoped the Richters would accept his advice that this action was futile and there was no hope of fixing liability on the golf course.

76. By letter dated May 30, 1991 the Law Society requested the Solicitor to respond to its April 10, 1991 letter and provided him with a copy of Mr. and Mrs. Richter's May 3, 1991 letter. A copy of the Law Society's May 30, 1991 letter is produced at Tab 39 of the Book of Documents.

77. In May, 1991 Mr. and Mrs. Richter again met with Ms. Buie concerning their file with Mr. Martin. When Ms. Buie reviewed the correspondence from the Law Society in this matter, she learned for the first time that Mr. and Mrs. Richter's claim had been dismissed.

24th June, 1993

78. By letter dated June 6, 1991 Ms. Buie forwarded to the Solicitor another direction to release the file. A copy of Ms. Buie's June 6, 1991 letter is produced at Tab 40 of the Book of Documents.

79. By letter dated July 4, 1991 Ms. Buie again requested that the Solicitor forward the file or contact her office. A copy of Ms. Buie's July 4, 1991 letter is produced at Tab 41 of the Book of Documents in this matter.

80. By letter dated August 28, 1991 Ms. Buie again wrote the Solicitor requesting the file. A copy of Ms. Buie's August 28, 1991 letter is produced at Tab 42 of the Book of Documents.

81. On September 3, 1991 Ms. Buie spoke with the Solicitor by telephone and he advised her that the file had been removed from his office a couple of months earlier by the insurance adjuster.

82. By letter dated December 19, 1991 the Solicitor advised the Law Society that the file was in the hands of the insurance adjusters.

83. The Solicitor has never provided the Law Society with an explanation of why he did not respond to Mr. and Mrs. Richter's and Ms. Buie's initial requests in February 1990 to transfer the file to Ms. Buie.

84. Because of the Solicitor's misconduct, Mr. and Mrs. Richter maintain that they have completely lost confidence in the legal profession.

85. Mr. and Mrs. Richter maintain that they trusted the Solicitor to ensure that they were properly compensated for the accident which had caused them considerable suffering and hardship. They also maintain that Mrs. Richter has suffered severe pain in her back, neck, shoulders, hips and thigh as well as loss of movement, and that she has experienced nervous depression which has interfered with her personal life.

86. The Solicitor's misconduct in this matter has exacerbated all of these problems and prejudiced Mr. and Mrs. Richter's rights to compensation. Mr. and Mrs. Richter describe their experience with the Solicitor as "nerve-wracking" for the two of them.

87. Mr. Richter maintains that he has been particularly inconvenienced in that he has lost numerous days from work in order to deal with the Solicitor's misconduct in this matter.

V. DISCIPLINE HISTORY

88. The Solicitor has no previous discipline record.

VI. COSTS

89. The Society and the Solicitor agree that the Solicitor will pay the Society's costs in the amount of \$1,500 in this matter.

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

RECOMMENDATION AS TO PENALTY

The Committee accepts the submissions of counsel for both the Solicitor and the Law Society and recommends that the Solicitor be reprimanded in Convocation. As well, with the agreement of the parties, the Committee recommends that the Solicitor pay the Law Society's costs in the amount of \$1,500.00.

REASONS FOR RECOMMENDATION

The Solicitor has been in practice for many years and gave evidence that the events which gave rise to the complaint here are an isolated case and do not represent the way that he carries on his practice of law. The Committee accepts his evidence in that regard.

In his evidence, the Solicitor admitted that his way of handling the case which gave rise to the complaint was improper but that he had a mental block. He could not even bring himself to look at the file. He never charged the client a fee, although that is due as much to the fact that it is his practice in such cases not to charge a fee until the conclusion of the file as it is to a conscious decision that he was not doing a proper job. The Solicitor clearly feels remorse and embarrassment, and is of the view that this incident will have an adverse impact on his referral work.

The Committee is of the view that the quality of the work exhibited here, or more precisely the lack thereof, calls for more than a minimum penalty of reprimand in Committee. The quality of services was far less than is to be expected, the Solicitor was extremely slow to transfer the file to another counsel when asked to do so, and his behaviour has upset his former clients considerably. For these reasons, the Committee recommends that the Solicitor be reprimanded in Convocation and be ordered to pay the costs of the Law Society in the amount of \$1,500.00.

Donald George Martin was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 10th day of April, 1964.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of May, 1993

Neil Finkelstein,
Chair

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

There were no submissions and the Report was adopted.

The Recommendation as to Penalty was that the solicitor be reprimanded in Convocation and pay costs.

There were no submissions by either counsel.

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

It was moved by Ms. Kiteley, seconded by Ms. Elliott that the solicitor be required to give an undertaking to apologize to the client.

It was moved by Ms. Weaver, seconded by Mr. Murray that the solicitor be suspended for 1 month along with the other conditions.

It was moved by Mr. Bragagnolo, seconded by Mr. Topp that the Recommendation as to Penalty be adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of the motions for an increased penalty.

24th June, 1993

Mr. Royce made submissions indicating that an apology would be given but argued against the 1 month suspension.

Society's counsel supported the Committee's recommendation.

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

Ms. Kiteley withdrew her motion.

The motion to suspend for 1 month was lost.

The Recommendation as to Penalty was adopted.

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

The solicitor was reprimanded.

Counsel retired.

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RESUMPTION OF THE PING KWAN TAM MATTER

Mr. Tam was present on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 26th May, 1993, together with an Affidavit of Service sworn 11th June, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th May, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 23rd June, 1993 (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

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

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

Stephen Foster
for the Society

PING KWAN TAM
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 16, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 13, 1992, Complaint D185/92 was issued against Ping Kwan Tam alleging that he was guilty of professional misconduct.

The matter was heard in public on March 16, 1993 before this Committee composed of Laura L. Legge, Q.C., Chair, Patricia J. Peters, Q.C. and Hope Sealy. Mr. Tam attended at the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

Complaint D185/92

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

2. a) He failed to reply to the Society regarding discrepancies contained in his filings for the fiscal year ended April 30, 1991, despite letters dated January 20, 1992, March 20, 1992, April 21, 1992 and May 19, 1992.
- b) He failed to keep proper books and records in accordance with Section 15 of Regulation 573 of the Law Society Act.
- c) He failed to comply with his undertaking to the Society dated February 19, 1991 by failing to submit by the 25th day of the following month, monthly trust bank reconciliations for the months ending February 28, 1991, April 30, 1991, May 31, 1991, June 30, 1991, July 31, 1991, August 31, 1991, September 30, 1991, October 31, 1991, November 30, 1991, December 31, 1991, January 31, 1992, February 29, 1992 and March 31, 1992.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D185/92 and is prepared to proceed with a hearing of this matter on March 16 and 17, 1992.

II. IN PUBLIC/IN CAMERA

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

24th June, 1993

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D185/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 5, 1979. He practices as a sole practitioner.

Particular 2a)

5. By letter dated January 20, 1992 the Law Society advised the Solicitor that it had reviewed his filing for the fiscal period ended April 30, 1991. The Law Society requested the Solicitor:

- Complete the report with his signature and return it to the Society as page three of the accountant's report had not been signed.
- Have his accountant forwarded a copy of his listing of trust obligations as required in item 6 on page 3 of the report.
- Have his accountant forward a copy of the reconciliation of the trust bank account required in item 6 on page 3 of the report including cheque numbers and amounts of outstanding cheques and the amounts, dates recorded and dates credited by the bank of any outstanding deposits.
- Have his accountant forwarded a copy of the bank statement as required in item 6 on page 3 of the report.
- Ensure that in the future all bank statements of his practice's bank account are kept in his office, properly in sequence, as required by subsection 1(J) of section 15 of the Regulation.
- Ensure that cashed cheques for all the bank accounts of his practice as kept available in his office as required by subsection 1(j) of section 15 of the Regulation.

A copy of the Law Society's January 20th letter is attached as Exhibit "A" to this Agreed Statement of Facts. No reply was received.

6. By letter dated March 20, 1992, the Law Society forwarded to the Solicitor a copy of its January 20th letter. The Solicitor was requested to give this matter his early attention. A copy of the Law Society's March 20th letter is attached as Exhibit "B" to this Agreed Statement of Facts. No reply was received.

7. By letter dated April 21, 1992, the Law Society requested the Solicitor reply to its previous correspondence as soon as possible so that this matter could be resolved without involving the Discipline Committee. A copy of the Law Society's April 21st letter is attached as Exhibit "C" to this Agreed Statement of Facts. No reply was received.

24th June, 1993

8. By letter dated May 19, 1992, the Law Society forwarded to the Solicitor a copy of its January 20, 1992, March 20, 1992, April 21, 1992 letters. The Solicitor was advised that should a reply not be received within fifteen days, the matter would be referred to the Discipline Committee. A copy of the Law Society's May 19th letter is attached as Exhibit "D" to this Agreed Statement of Facts. No reply was received.

9. The Solicitor has not requested an extension to reply nor has he provided the Law Society with an explanation for his failure to reply.

Particular 2c)

10. The Solicitor provided the Law Society with a written undertaking, dated February 19, 1991 as follows:

To submit monthly trust bank reconciliations for my trust account to the Law Society for two years starting with the reconciliation for the month of February, 1991. I will file each monthly reconciliation with the Society no later than the 25th day of the following month.

A copy of the Solicitor's undertaking, dated February 19th is attached as Exhibit "E" to this Agreed Statement of Facts.

11. Following is a chart detailing receipt of the Solicitor's trust reconciliations from February, 1991 to January, 1993:

Month Ended	Due Date	Received	Time Lapse
February 28/91	March 25/91	April 10/91	16 days
March 31/91	April 25/91	April 10/91	nil
April 30/91	May 25/91	July 5/91	41 days
May 31/91	June 25/91	July 5/91	10 days
June 30/91	July 25/91	July 30/91	5 days
July 31/91	August 25/91	September 6/91	12 days
August 31/91	September 25/91	October 27/91	32 days
September 30/91	October 25/91	October 27/91	2 days
October 31/91	November 25/91	November 29/91	4 days
November 30/91	December 25/91	February 7/92	44 days
December 31/91	January 25/92	February 7/92	13 days
January 31/92	February 25/92	April 7/92	42 days
February 29/92	March 25/92	April 7/92	13 days
March 31/92	April 25/92	April 27/92	2 days
April 30/92	May 25/92	May 25/92	nil
May 31/92	June 25/92	June 24/92	nil
June 30/92	July 25/92	July 24/92	nil
July 31/92	August 25/92	August 25/92	nil
August 31/92	September 25/92	September 29/92	3 days
September 30/92	October 25/92	October 26/92	1 day
October 31/92	November 25/92	November 26/92	1 day
November 31/92	December 25/92	December 30/92	5 days
December 31/92	January 25/93	January 25/92	nil
January 31/93	February 25/93	February 26/93	1 day

12. By letter dated March 25, 1992, the Law Society requested the Solicitor:

- Explain the difference of \$220.74 between his trust bank reconciliation and his client trust listing for the month ended December 31, 1991;
- Personally review his completed trust bank reconciliation to satisfy himself that his bookkeeping function was operating properly as his trust bank reconciliations for the months ended July 31, 1991 to December 31, 1991 showed a .98 cent item that was permitted to exist for a period in excess of one month.

24th June, 1993

- Forward copies of his bank statements for the months ended July 31, 1991 to December 31, 1991 inclusive.
- Provide his comments as to why overdrawn trust ledger accounts were permitted to remain uncorrected over a period in excess of one month.
- Indicate within one month of the date of this letter, why bank service charges were included in the client trust listing.
- Remit his trust comparison for January 31, 1992.

A copy of the Law Society's letter dated January 20th is attached as Exhibit "F" to this Agreed Statement of Facts.

13. By facsimile transmission on April 26, 1992, the Solicitor satisfactorily responded to the Law Society's correspondence dated March 25, 1992. A copy of the Solicitor's April 26th facsimile transmission is attached as Exhibit "G" to this Agreed Statement of Facts.

14. By letter dated June 23, 1992, the Law Society advised the Solicitor that it had reviewed his trust comparisons submitted for April 30, 1992. The Law Society forwarded to the Solicitor a list of fifty-five inactive trust ledger accounts which balances had remained unchanged over long periods. The Solicitor was requested to prepare a listing of trust ledger account balances including a column showing the date of last entry in each account either by paying the balances held to or on behalf of the client or bill and transfer to the general account funds he was entitled to. The Solicitor was requested to provide the Law Society with a copy of the next regular monthly trial balance of the clients' trust ledger showing the balances remaining after his review. The Solicitor provided the Law Society with a copy of his next regular monthly trial balance on July 24, 1992. A copy of the Law Society's March 20th letter is attached as Exhibit "H" to this Agreed Statement of Facts.

15. By letter dated October 19, 1992, the Law Society advised the Solicitor that it had reviewed his monthly trust comparison for the period ended May 31, 1992. The Solicitor was requested to explain the shortage of \$2,618.57 between his trust bank reconciliation and client trust listing. A copy of the Law Society's October 19th letter is attached as Exhibit "I" to this Agreed Statement of Facts. No reply was received.

16. By letter dated January 13, 1993, the Law Society requested the Solicitor respond to its letter dated October 19, 1992. The Solicitor was advised that the Society had review his trust comparison's to November 30, 1992. The Law Society requested the Solicitor:

- Provide a written explanation for the shortage of \$827.00 between the September 30th trust bank reconciliation and client trust list.
- As the Solicitor reported the sum of \$43,036.69 for September 30, 1992 in his trust listing, and the Society found that it totalled \$43,863.69, the Solicitor was requested to explain the discrepancy.
- Determine the cause for the reappearance of the same incorrect reconciling item for August, September and October, 1992, and have the same corrected forthwith. The Solicitor was requested to report to the Society within one month from the date of this letter of the results of his review.

24th June, 1993

- Determine why his monthly bank reconciliations contained outstanding, stale-dated trust cheques as reconciling items.
- Continue to review inactive balances in his trust account as no effort had been made to clear them out.

A copy of the Law Society's January 13th letter is attached as Exhibit "J" to this Agreed Statement of Facts. The Solicitor corrected the matter of the stale-dated trust cheques in his reconciliation on February 26, 1993, however, he did not answer the Society's other requests.

Particular 2b)

17. The Solicitor has failed to keep proper books and records in accordance with Section 15 of Regulation 573 of the Law Society Act as evidenced by paragraphs 5, 12 and 13 of this Agreed Statement of Facts.

V. DISCIPLINE HISTORY

18. The Solicitor was found guilty of professional misconduct regarding his failure to file for the fiscal years ended April 30, 1987 and April 30, 1988. The Solicitor was reprimanded in committee on May 30, 1989.

19. The Solicitor was found guilty of professional misconduct regarding his failure to file for the fiscal year ended April 30, 1989. The Solicitor was reprimanded in committee on February 19, 1991.

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

RECOMMENDATION AS TO PENALTY

The Committee found the Solicitor guilty of professional misconduct. It is recommended that the Solicitor be reprimanded in Convocation on the basis that he participate in the Practice Review Programme and take care of all outstanding matters prior to May Convocation. In default of the above, the Committee recommends he be suspended for a period of one month definite and thereafter until all outstanding matters are dealt with.

REASONS FOR RECOMMENDATION

There was no evidence of dishonesty on the part of the Solicitor. He appears to have some difficulty in understanding and implementing efficient office procedures. The Committee felt that this Solicitor could be helped by our Practice Review Program.

24th June, 1993

Ping Kwan Tam was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 5th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 26th day of May, 1993

Laura L. Legge, Q.C.,
Chair

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

There were no submissions and the Report was adopted.

The Recommendation as to Penalty was that the solicitor be reprimanded on the basis that he participate in the Practice Review Programme or be suspended for 1 month.

There were no submissions by the solicitor.

Mr. Foster advised Convocation that matters had been cleared up pertaining to the solicitor's books and records and that only minor matters were outstanding. The solicitor also had not contacted the Professional Standards Department.

It was moved by Mr. Bastedo, seconded by Mr. Finkelstein that the matter be adjourned to the Special Convocation in September to advise in writing that he had completed all outstanding discrepancies and was participating in the Practice Review Programme.

Carried

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

Counsel and the solicitor retired.

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Re: BRIAN ALLEN SHERMAN, Richmond Hill

The Secretary placed the matter before Convocation.

The reporter was sworn.

Ms. Lax and Mr. Topp withdrew.

Mr. Neil Perrier appeared for the Society and Mr. Sherman appeared on his own behalf.

Mr. Perrier indicated that Schedules A and B were missing from the Report but were before Convocation.

24th June, 1993

Convocation had before it the Report of the Discipline Committee dated 5th March, 1993, together with an Affidavit of Service sworn 25th May, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th May, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 23rd June, 1993 (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

Brendan O'Brien, Q.C., Chair
Earl J. Levy, Q.C.
John L. Lax

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

Neil Perrier
for the Society

BRIAN ALLEN SHERMAN
of the Town
of Richmond Hill
a barrister and solicitor

Not Represented
for the solicitor

Heard: October 28, 1992
March 5, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 23, 1991, Complaint D171/91 was issued against Brian Allen Sherman alleging that he was guilty of professional misconduct and on July 6, 1992 a further complaint D129/92 was issued alleging additional professional misconduct.

The matters were heard in public on October 28, 1992 and March 5, 1993, before this Committee composed of Brendan O'Brien, Q.C., Chair, Earl J. Levy, Q.C. and Joan L. Lax. The Solicitor was in attendance and not represented by counsel. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D171/91

2. a) He failed to provide a reply to the Law Society regarding a complaint by David Jebb, despite letters dated May 30, 1991 and July 18 1991 and telephone requests on June 19, 1991 and July 10, 1991.
- b) He did not answer with reasonable promptness communications regarding the release of a file from David Jebb, a fellow solicitor, which required a reply.
- c) He failed to provide a reply to the Law Society regarding a complaint by Gerald A. Swaye, despite letters dated June 7, 1991 and July 18, 1991 and telephone requests on June 25, 1991 and July 10, 1991.
- d) He did not answer with reasonable promptness communications regarding the release of a file from Gerald A. Swaye, a fellow solicitor, which required a reply.
- e) He failed to provide a reply to the Law Society regarding a complaint by Robert J. Dumont despite letters dated July 22, 1991 and September 18, 1991 and telephone requests on August 12, 1991, August 16, 1991, September 6, 1991 and September 13, 1991.
- f) He failed to provide a reply to the Law Society regarding a complaint by Mr. Kanaan J. M. Aljibouri, despite letters dated July 17, 1991 and September 23, 1991 and telephone requests on September 3, 1991, September 6, 1991 and September 10, 1991.
- g) He failed to honour a written undertaking given to the Law Society on March 30, 1988 in which he undertook to respond promptly to all Law Society correspondence as required, and in the case of written correspondence within three weeks in any event, with respect to complaints filed by Robert J. Dumont and Kanaan J. M. Aljibouri.

Complaint D129/92

2. a) The Solicitor failed to serve his clients, Laura D'Alberto, Domenic Aidoo, Albert Wireko, Kell Peterson and Enoch Bempong in a conscientious, diligent and efficient manner by failing to ensure that their interests were protected by the issuance of originating process prior to the expiry of the applicable limitation periods;
- b) The Solicitor engaged in the practice of law while under suspension for non-payment of his Errors and Omissions Insurance levy in the period between November 29, 1991 and February 12, 1992;
- c) In the period between February, 1984 and February, 1992 the Solicitor engaged in a course of conduct evidencing consistent and repeated failures to honour his financial obligations to the Society (Rule 13, Commentary 6);
- d) The Solicitor breached his Undertaking to the Society dated January 14, 1991 and the Order of Convocation dated June 20, 1991, requiring his co-operation with the Professional Standards Program.

"AGREED STATEMENT OF FACTS - D171/91

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D171/91 and is prepared to proceed with a hearing of this matter on June 2, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D171/91 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the bar on March 29, 1977 and has been suspended since November 29, 1991 from the practice of law with respect to non-payment of his Errors and Omissions levy.

Particular 2b) - David Jebb

5. In or about the month of August, 1988, Mr. Mak retained the Solicitor to represent him with respect to a claim for damages resulting from a motor vehicle accident which occurred on August 12, 1988.

6. By letter dated March 5, 1991, David Jebb, a fellow solicitor, advised the Solicitor that Mr. Chi Wai Mak had retained the law firm of Anand, Braganca, Levy & Jebb, to represent him with respect to the claim. Mr. Jebb provided the Solicitor with a duly executed direction for release of the files. He further undertook to protect the Solicitors "reasonable" account from proceeds of settlement or judgment.

7. By letter dated March 22, 1991, David Jebb advised the Solicitor that he had not received a response to his correspondence dated March 5, 1991 regarding release of Mr. Mak's file. The Solicitor was requested to look into this matter immediately.

8. By letter dated April 12, 1991, Mr. Jebb advised the Solicitor, that should he not receive Mr. Mak's file within two weeks of the date of this letter, the matter would be reported to the Law Society.

9. Mr. Jebb did not receive the file until November 12, 1991 when it was forwarded to him by the Law Society's insurer.

Particular 2a) - David Jebb

10. By letter dated May 13, 1991, Mr. Jebb advised the Law Society of the aforementioned. He further expressed his concern in that the Mr. Mak had not been advised by the Solicitor that a law suit had been commenced and the two year limitation period may have already passed.

11. By letter dated May 30, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

12. A Law Society staff employee spoke with the Solicitor by telephone on June 19, 1991. The Solicitor advised the he would respond shortly.

13. A Law Society staff employee left a telephone message for the Solicitor, at his office, on July 10, 1991. The call was not returned.

14. By registered mail, dated July 18, 1991, the Law Society reminded the Solicitor of his obligation to reply to the Law Society pursuant to Rule 13, Commentary 3. The Solicitor was advised, should he not provide the Law Society with his written response within seven days, the matter would be referred to the Discipline Committee. No reply was received.

15. As set out in paragraph 9, Mr. Jebb obtained the file in November of 1991.

Particular 2d) - Gerald A. Swaye

16. During the month of May, 1987, James and Charlotte Amoako retained the Solicitor to represent them with respect to a claim for damages as a result of a motor vehicle accident which occurred during the month of July, 1987.

17. By letter dated January 23, 1990, Gerald A. Swaye, a fellow solicitor, advised the Solicitor that James and Charlotte Amoako had retained him to represent them on the claim. Mr. Swaye provided the Solicitor with a duly executed Direction for release of the files. No reply was received.

18. By letter dated March 13, 1990, Mr. Swaye forwarded to the Solicitor a further copy of his correspondence dated January 23, 1990. The Solicitor was requested to forward the files at his earliest convenience.

19. By letter dated July 17, 1990, Mr. Swaye confirmed a telephone conversation between himself and the Solicitor's secretary, in which Mr. Swaye was advised that the solicitor was not prepared to release the file as there was an outstanding account with respect to the matter. Mr. Swaye undertook to pay the Solicitor's disbursements and to protect his account out of a settlement or judgment, if any, subject to the clients right to taxation. The Solicitor was requested to reply as soon as possible. No reply was received.

20. By letter dated October 30, 1990, Mr. Swaye advised the Solicitor that he had not received any sort of response in order to make any satisfactory arrangements in transferring the files. The Solicitor was requested to contact him at his earliest convenience. No reply was received.

21. By letter dated March 15, 1991, Mr. Swaye requested the Solicitor contact him within the next week or two. Mr. Swaye advised the Solicitor that as his clients' interests may be prejudiced, he may need to involve the Law Society. No reply was received.

22. By letter dated May 16, 1991, Mr. Swaye advised the Law Society of the aforementioned. The Solicitor further advised that he and his office made telephone calls to the Solicitor's office on January 22, 1990, February 28, 1991, May 15, 1991, and May 16, 1991. On each occasion, the Solicitor's office indicated that there was no difficulty with transferring the file. Despite the above, Mr. Swaye has not received a written response to any of his correspondence.

23. Subsequent to Mr. Swaye filing the letter of complaint with the Law Society, his staff left a telephone message at the Solicitor's office on October 17, 1991. On January 27, 1992, Mr. Swaye's staff left a further message for the Solicitor. No reply was received.

24th June, 1993

Particular 2c) - Gerald A Swaye

24. By letter dated June 7, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

25. A Law Society staff employee spoke to the Solicitor by telephone on June 25, 1991. The Solicitor advised that he would release the file and reply to the Law Society right away. No reply was received.

26. A Law Society staff employee left a telephone message for the Solicitor at his office on July 10, 1991. The call was not returned.

27. By registered mail, dated July 18, 1991, the Law Society reminded the Solicitor of his obligation to reply to the Law Society, pursuant to Rule 13, Commentary 3. The Solicitor was advised, should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

28. Mr. Swaye obtained the file in April of 1992.

Particular 2e) - Robert J. Dumont

29. During or about the middle of August, 1988, Zenobia Mahava retained the Solicitor to represent her with respect a claim for damages resulting from a motor vehicle accident which occurred on July 8, 1988.

30. By letter dated June 6, 1991, Robert J. Dumont, a fellow solicitor, advised the Solicitor that Zenobia Mahava had retained himself, to represent her with respect to the claim. Mr. Dumont provided the Solicitor with a copy of his retainer duly executed by Ms. Mahava. The Solicitor was requested to forward his account by facsimile transmission. Upon receipt of the account, Mr. Dumont would provide the Solicitor with a duly executed direction for the transfer of the file.

31. By letters dated June 11, 1991 and June 19, 1991, Mr. Dumont requested the Solicitor reply to his correspondence dated June 6, 1991.

32. By letter dated July 8, 1991, Mr. Dumont advised the Law Society of the aforementioned.

33. By letter dated July 22, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

34. A Law Society staff employee left a telephone message for the Solicitor at his office on August 12, 1991. The call was not returned.

35. A Law Society staff employee spoke with the Solicitor's secretary on August 16, 1991. She advised that she would have the Solicitor complete a letter of response on Monday and forward the same by facsimile transmission. No reply was received.

36. A Law Society staff employee spoke with the Solicitor's secretary on September 6, 1991. She advised that she would speak to the Solicitor on Monday.

37. A Law Society employee left a telephone message for the Solicitor at his office on September 18, 1991. The call was not returned.

38. By registered mail, dated September 18, 1991, the Law Society reminded the Solicitor of his obligation to reply to Law Society correspondence pursuant to Rule 13, Commentary 3. The Solicitor was advised, should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

39. The matter has been settled between Mr. Dumont's client and the Solicitor.

Particular 2f) - Kanaan Aljibouri

40. By letter dated June 26, 1991, Mr. Aljibouri advised the Law Society that upon the Solicitor assuming carriage of his file, no further work was carried out yet he was requested, and did pay, further funds to have the matter progress.

41. By letter dated July 17, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

42. A Law Society staff employee left telephone messages for the Solicitor at his office on September 3, 1991 and September 6, 1991. The calls were not returned.

43. A Law Society staff employee spoke with the Solicitor by telephone on September 10, 1991. the Solicitor advised that he would respond by September 17, 1991. No reply was received.

44. By registered mail, dated September 23, 1991, the Law Society reminded the Solicitor of his obligation pursuant to Rule 13, Commentary 3. The Solicitor was advised, should he not reply to the Law Society within seven days, the matter would be referred to the Discipline Committee. No reply was received

Particular 2g) - Breach of Undertaking

45. The Law Society received from the Solicitor a written undertaking, dated March 30, 1988 in which the Solicitor undertook:

- 1) to respond promptly to all Law Society correspondence as required, and in the case of written correspondence within three weeks in any event

A copy of the Solicitor's March 30th Undertaking is marked as Exhibit "A" and attached to this agreed statement of facts.

46. The Solicitor failed to reply to correspondence from the Law Society dated July 22, 1991 and September 18, 1991 with respect to a complaint by a fellow solicitor, Robert J. Dumont.

47. The Solicitor failed to reply to correspondence from the Law Society dated July 17, 1991 and September 23, 1991 with respect to a complaint by a client, Kanaan J. M. Aljibouri.

48. The Solicitor breached his undertaking to the Law Society dated March 30, 1988.

V. DISCIPLINE HISTORY

49. The Solicitor received a reprimand in committee on May 1, 1990 with respect to his failure to reply promptly to the Law Society.

50. The Solicitor received a reprimand in convocation, with a fine of \$3,000.00, on June 20, 1991, with respect to his failure to reply to the Law Society and practising while under suspension.

DATED at Toronto this 2nd day of June, 1992."

"AGREED STATEMENT OF FACTS - D129/92

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D129/92 and is prepared to proceed with a hearing of this matter on October 27, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed this Agreed Statement of Facts and admits the facts contained herein.

IV. FACTS

4. The Solicitor is a sole practitioner in Richmond Hill and practises mainly in the area of litigation.

Particular 2(a) - Failing to Serve Clients

5. In November and December, 1991, the Errors & Omissions Department ("E & O") opened 16 claim files in respect of the Solicitor. In February and March, 1992, E & O opened a further five claim files.

6. Howard Maker, an audit counsel with the Law Society, reviewed the E & O files and found that virtually all claim files were plaintiff personal injury actions. In approximately half of the files, the Solicitor issued a Statement of Claim but failed to serve it on the defendant within the six month limitation period. In the other cases, the Solicitor did not even issue a Statement of Claim and the limitation period passed with no action by the Solicitor. Since November, 1991, E & O has opened almost 40 files under the Solicitor's name. Almost all of these files relate to the Solicitor's alleged "failure to serve" clients. E & O is presently attempting to determine the extent of the damage with respect to these files. The Society reviewed six files with the Solicitor in which no Statement of Claim was issued and the limitation period had passed. Details of four of these six files follow.

i) Laura D'Alberto

7. On August 3, 1988, Ms. D'Alberto's vehicle was struck by another car. There was no dispute that the driver of the other vehicle was liable. The Solicitor obtained medical reports setting out the details of the client's injuries and met with the client in May, 1989 and June, 1989 and October, 1990. In the interim he settled the property damage claim.

8. By the October, 1990 meeting, the limitation period had already expired on August 2, 1990. No Statement of Claim was issued and there is no evidence that the client was advised of the missed limitation period.

9. The Solicitor stated to Mr. Maker that he could provide "no earthly reason" why no steps were taken on the file between October, 1989 and August, 1990 when the limitation period expired. He indicated that he felt his client had a good claim. E & O eventually settled the client's claim by a payment of \$5,000.

ii) Domenic R. Aidoo and Albert Wireko

10. The Solicitor was retained to represent the above occupants of a vehicle which was involved in a motor vehicle accident on August 27, 1988. The Solicitor was retained at the latest, by March 16, 1989.

11. The insurance adjuster wrote the Solicitor on six separate occasions attempting to obtain medical information or a Statement of Claim. A copy of the six letters dated May 17, 1989 through July 4, 1990, from the insurance company to the Solicitor are attached as Appendix "A". The Solicitor did not reply to any of the adjuster's letters.

12. The limitation period expired on August 26, 1990, and no claim had been issued. The Solicitor is unable to explain why there was no activity between November, 1989 and August, 1990.

iii) Kell Peterson

13. The above client was involved in a motor vehicle accident on September 21, 1988 while sitting in a parked car. The Solicitor was retained to represent him sometime in 1988. The Solicitor initially made contact with the insurer but did not take any subsequent steps.

14. The limitation period expired on September 20, 1990. The Solicitor subsequently met with the client on September 3, 1991, but there is no indication that the Solicitor advised the client of the expiry of the limitation period. The Solicitor states that he is embarrassed about this matter as the client was a personal friend. The Solicitor stated that there was no issue of liability regarding the claim and that he can offer no explanation as to why a Statement of Claim was not issued.

15. Also contained in the file were letters dated May 4, 1989 and February 27, 1990 from Allstate to the Solicitor requesting information respecting the client's claim (Appendix "B").

iv) Enoch Bempong

16. The above client was involved in a motor vehicle accident on June 26, 1989. Between July 28, 1989 and December 18, 1990 the insurance adjuster corresponded with the Solicitor on 18 separate occasions. The Solicitor did not respond to the correspondence in a timely manner. No Statement of Claim had ever been issued, and the limitation period to issue a Statement of Claim expired on June 26, 1991.

Particular 2(b) - Practising While Under Suspension

17. Appendix "C" is a list detailing the history of the administrative suspensions imposed upon the Solicitor from February, 1984 to date, on account of the Solicitor's failure to pay his Errors & Omissions Insurance levy or his annual fees in a timely fashion. The Solicitor has been suspended on 19 separate occasions since 1984. He was suspended on three separate occasions in each of 1986, 1987, 1988 and 1989. The Solicitor admits that he engaged in the practice of law throughout each and every period listed in Appendix "C" including the period from November 29, 1991 to February 12, 1992.

Particular 2(c) - Failing to Honour Financial Obligations

18. On March 26, 1992, representatives of the Law Society, Anita McCann and Howard Maker, attended at the Solicitor's office to discuss the history of administrative suspensions imposed upon him from February, 1984 to date on account of his failure to pay the E & O insurance levy or annual fees in a timely fashion. As stated above, the Solicitor had been suspended on 19 separate occasions since February, 1984, and was suspended on three separate occasions in each of 1986, 1987, 1988 and 1989.

19. The representatives of the Law Society asked the Solicitor if he could provide an explanation for the inordinate number of administrative suspensions imposed upon him. The Solicitor denied that the suspensions in any way related to any financial difficulty. He claimed that as a general rule, it is his policy to pay the amounts owing on the last possible date. He stated that he was simply late in paying on some occasions and accordingly, was suspended. In support of his position, he points out that approximately the first 12 suspensions were all relatively short.

20. However, in a number of instances the Solicitor was not suspended until 5 or 6 months after the last day for payment of his E & O levy. For example, on November 29, 1991, the Solicitor was suspended for non-payment of his E & O levy which would have been due and payable as at June 30, 1991.

21. The Solicitor concedes that the subsequent suspensions are longer in duration. Between February, 1989 and April, 1990, he was suspended for 16 months. He was also suspended for approximately five months between May and October, 1990.

Particular 2(d) - Breach of Undertakings

22. On March 30, 1988, in consideration of the Society withdrawing a discipline Complaint against the Solicitor, the Solicitor undertook in writing to respond promptly to all Law Society correspondence as required, and in the case of written correspondence within three weeks in any event (Appendix "D").

23. On January 14, 1991 as a result of a subsequent discipline matter, counsel for the Society, Ronald Cohen, and the Solicitor executed an Agreed Statement of Facts that contained a paragraph in which the Solicitor, inter alia, agreed "...to co-operate with the Professional Standards Practice Review Program, and implement the recommendations of such review". By Order of Convocation dated June 20, 1991, the said Undertaking was incorporated (Appendix "E").

24. The Solicitor initially co-operated with Professional Standards and on September 3, 1991 a copy of the Professional Standards Report was sent to the Solicitor. The Solicitor was asked to review the Report and reply within 14 days by providing comments on the Report and particularly on the Reviewer's recommendations. The Society sent further correspondence to the Solicitor on October 2 and 30, 1991 (Appendices "F" and "G"). The October 30th correspondence reminded the Solicitor of his Undertaking to co-operate and requested his reply within seven days of receipt of the correspondence.

25. On February 24, 1992 (Appendix "H"), the Society wrote the Solicitor advising him that as a result of his failure to co-operate, the Professional Standards Committee recommended the closure of its file and its referral to the discipline process.

26. The Law Society's file does not reflect a record of a response from the Solicitor and the Professional Standards Committee subsequently closed his file.

24th June, 1993

27. His association with his former law firm was in the process of terminating and he was in a very difficult period from a psychological standpoint.

28. The Society and the Solicitor will be calling further evidence on the issue of the Solicitor's communications with Professional Standards.

Prior Discipline

March 30, 1988

29. Complaint was withdrawn as a result of the Solicitor providing an Undertaking (Appendix "D") to reply to communications from the Law Society.

May 1, 1990

30. The Solicitor was reprimanded in Committee for failing to reply promptly to Law Society correspondence. A copy of the Agreed Statement of Facts is attached as Appendix "I".

June 20, 1991

31. The Solicitor was reprimanded in Convocation and fined the sum of \$3,000 payable within 21 days for his failure to reply to the Law Society and for practising while under suspension. A copy of the Report and Decision of the Discipline Committee is attached as Appendix "J".

DATED at Toronto this 23rd day of October, 1992."

Appendices A - J are not copied into the report.

In addition, oral evidence was given by Joanne Poworoznyk, co-ordinator of the Professional Standards Practice Review Program, and Howard S. Maker, employed as counsel-audit and investigation for the Law Society confirming and supplementing the facts set forth in the Agreed Statements mentioned above. This concluded the evidence for the Society.

The Solicitor then tendered in evidence as Exhibit 5 a report dated June 2, 1992 from Psychologist, Dr. David Clair, of the Sunnybrook Health Science Centre. A copy of this report is attached as Appendix "A" and in addition, Dr. Clair gave oral evidence. From this report and evidence it became apparent that the Solicitor has had serious psychological problems, both with respect to his family relations and with respect to his practice. Dr. Clair summed up this difficulty by explaining that the Solicitor would recognize a duty to behave in a certain way and would then fail to discharge that duty, and worse still, ignore the consequences of the breach and this irresponsible conduct would be repeated time and again as is evident from the Agreed Statements of Fact. Stress has been a factor in bringing about immobilization and future stress may bring about further immobilization.

The Solicitor gave evidence acknowledging his problems and that he was not functioning at 100% capacity.

At the conclusion of the evidence on October 28th, 1992, there was no doubt that the various complaints had been established and that the only question was as to the disposition of the matter. Counsel for the Society stated that he had originally thought disbarment was the answer but then thought that perhaps an indefinite suspension would be appropriate until the Solicitor could satisfy a Committee under Section 35 that he was fit to continue practice.

24th June, 1993

The Committee then decided to adjourn the matter for 30 days during which the Solicitor was requested to put before the Committee in writing particulars of a plan for supervision of his practice and such other undertakings as he would be prepared to provide in line with the suggestions made by counsel for the Society. The Committee at the same time informed the Solicitor that regardless of the presentation to the Committee a plan of supervision and undertakings, the Committee would recommend to Convocation in any event a three month suspension because of his engaging in the practice of law while under suspension as alleged in paragraph (b) of Complaint D129/92. The Solicitor was further advised by way of guidance that a proper plan of supervision could best be provided if he worked in close association or partnership with a lawyer or lawyers who practice in the same area and that he work out details of such a plan with counsel for the Society before the plan would be submitted to the Committee. The final words of advice were that if he needed an extension of the 30 day period, he should make application to Mr. Perrier who would consult with the Committee.

The Committee heard nothing further about the matter until the matter was brought on again for hearing in 1993, but from evidence given at the hearing on March 5, 1993 it appears that immediately after the hearing on October 28th, the Solicitor did discuss with Mr. Perrier the question of supervision and the giving of undertakings which resulted in a letter from Mr. Perrier to the Solicitor dated November 2, 1992 which letter is as follows:

Dear Mr. Sherman:

Re: Complaints D171/91 and D129/92

Pursuant to the disposition of the Discipline Committee on October 28, 1992 regarding the above Complaints, I enclose a draft Undertaking for your review and comment. Could you please contact this writer upon receipt of the same.

As you were informed by the Committee, you must make arrangements for a solicitor to supervise your practice. I shall be pleased to provide any assistance you may require in attempting to locate an appropriate person to supervise your practice. I have requested that the Staff Trustee's office contact you with respect to the possibility of a suspension to make arrangements for your practice.

If you have any questions with respect to the above or enclosed, please do not hesitate to contact me.

Yours truly,

Neil J. Perrier
Discipline Counsel

To this letter was attached a draft undertaking, with a blank space for the identity of the person who was to provide supervision. There was no response to this letter or subsequent follow up letters until just before the March hearing and aside from the fact that the Solicitor had apparently spoken to three other lawyers, no progress had been made in arranging for supervision, nor had he availed himself of the assistance offered in Mr. Perrier's letter on November 2nd, in locating a person to supervise his practice.

The only excuse offered for not replying to the letter of November 2nd was that because he had no solicitor whose name he could give to be inserted in the undertaking, he didn't think that he was in a position to make answer, but ignoring the fact that an offer of assistance had not been taken advantage of.

24th June, 1993

Not only were letters from Mr. Perrier not answered, but in addition, Mr. Chris Lloyd, an adjuster for the Law Society Errors & Omissions Insurance Department, had had similar difficulty with respect to replies, letters having gone unanswered with respect to Risi dated November 20 and December 31, 1992 with respect to Cipressi, a letter dated December 28, 1992 and with respect to Lim, letters dated November 5 and December 28, 1992. These letters were in addition to a number of previously unanswered letters prior to the October 28th hearing.

In addition to his own evidence, the Solicitor produced a report dated February 3, 1993 from Dr. Clair, a copy of which is attached hereto as Appendix "B" from which it appears that they have continued meeting every two weeks. The Solicitor has satisfied Dr. Clair that he had been able to look after certain files which he mentioned and further, that he was working hard at addressing his personal and professional difficulties, and "he is committed to being attentive to behaviours that have resulted in him not meeting his obligations".

In addition to the report from Dr. Clair, the Solicitor produced a report from another solicitor, John Cannings, who has represented the Society with respect to errors and omissions claims. This letter is dated March 4, 1993 and is as follows:

TO WHOM IT MAY CONCERN

I act for the insurers of Mr. Sherman with regard to three potential claims. I have acted on one other claim which was successfully repaired.

In the process of my dealings with Sherman relative to these claims, I found that three out of the four claims were caused by psychological difficulties Mr. Sherman was having when a number of different influences converged on him at the same time. [An excessive work load, lack of support staff, and family difficulties.]

The fourth of these claims has probably no foundation in law.

Throughout my dealings with Mr. Sherman, I found him to be most cooperative in attending for appointments on short notice and in giving me a clear and detailed account of the events leading up to the potential claim.

From my review of the files themselves, it would appear that Mr. Sherman has always conducted his practice with a high degree of skill and competence.

Where it not for the difficulties that he had of a psychological nature, I doubt that he would have had any E & O claims made against him.

At no time in all of my investigation of the four E & O claims that I am responsible for, have I discovered any dishonesty or deliberate unethical conduct on the part of Mr. Sherman. I believe that, insofar as he was able, he served his clients' interests as best he could.

From my understanding of the psychological difficulties he was facing, the alleged errors were caused not by any voluntary act on his part but, rather, and involuntary "blocking-out" of his subjective perception of his duties to his client.

Once he became aware of the difficulties he was having, I understand that he attended therapy for his difficulties and that this has yielded most positive results.

24th June, 1993

Should you require anything further, please do not hesitate to contact me at your convenience.

Yours very truly,

JOHN CANNINGS

It is hard to reconcile some of the things said by Mr. Cannings with evidence of failure to reply to letters from Mr. Perrier and Mr. Lloyd but the Solicitor (Sherman) was confident that his ability to keep abreast of his work was greatly improved and that he was beginning to cope effectively.

For what it may be worth, the Solicitor appeared to the Committee to be in a better frame of mind that he had been on October 28, 1992, but he was quite unable to answer the obvious questions respecting his failure to respond to letters and those who wanted to help him.

RECOMMENDATION AS TO PENALTY

The Committee recommends to Convocation a suspension of six months with the further proviso that the Solicitor will not be permitted to return to practice unless and until he has met the following conditions:

1. He must continue during suspension a structured psychotherapy program until such time as he can satisfy the Society that such treatment is no longer necessary;
2. That upon seeking to return to practice, he shall provide a written opinion from his psychotherapist that he is, in the opinion of the psychotherapist, in a condition to resume the practice of law in a responsible manner and this report must be in form acceptable to the Society;
3. He must put before the Society a program of supervision or partnership or employment that will be acceptable to the Society.
4. He must continue to co-operate with the Errors & Omissions officials and counsel during his suspension and must respond in a prompt manner to all communications regarding any and all pending claims and proof that he has done so will have to be provided before he will be permitted to return to practice.

REASONS FOR RECOMMENDATION AS TO PENALTY

It was with reluctance that the Committee did not accept the recommendation of counsel for the Society that the penalty should be disbarment. The reason for not doing so was that there was some evidence that if the Solicitor would take advantage in a positive way of the opportunity provided to him, he might be able to mend his ways and return to practice. On the other hand, his record since the hearing of October 28th, caused the Committee grave concern and it was difficult to reach a conclusion as to how the public interest could be effectively protected. Balancing these factors, the Committee recommended the above penalty.

It was pointed out to the Solicitor in the oral disposition of the matter that this may be his last opportunity to continue as a lawyer.

24th June, 1993

Brian Allen Sherman was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 5th day of March, 1993

Brendan O'Brien, Q.C.,
Chair

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

There were no submissions and the Report was adopted.

The Recommendation as to Penalty was that the solicitor be suspended for 6 months with conditions.

There were submissions by the solicitor as to the length of the recommended suspension. The solicitor felt that he should be given a 3 month suspension rather than 6 months to commence August 1st, 1993 in light of the progress made as a result of psychiatric counselling and evidenced in the reports of the treating psychiatrist before Convocation. He had no argument with the conditions which would be imposed after his suspension.

Mr. Perrier made submissions in support of the Committee's recommendation.

There were questions taken from the Bench.

Counsel, solicitor, the reporter and the public withdrew.

It was moved by Mr. Bastedo, seconded by Mr. Brennan that Convocation adopt the Committee's Recommendation as to Penalty.

Carried

It was moved by Mr. Bragagnolo, seconded by Mr. McKinnon that the period of suspension be 4 months with conditions.

Not Put

It was moved by Mr. Finkelstein, seconded by Mr. Lamont that the period of suspension be 3 months with conditions.

Not Put

An amendment was accepted by all movers and seconders that the words "including involvement with the Practice Review Program" be added to number 3 of the conditions which would then read:

"He must put before the Society a program of supervision including involvement with the Practice Review Program and partnership or employment that will be acceptable to the Society."

Convocation agreed that the August 1st, 1993 would be the effective date of suspension.

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

24th June, 1993

Counsel and solicitor retired.

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It was moved by Mr. Bragagnolo, seconded by Mr. Brennan that Mr. Yachetti
be Chair at the Regular Convocation on June 25th, 1993.

Carried

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CONVOCATION ROSE AT 11:40 A.M.

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Confirmed in Convocation this day of , 1993.

Treasurer