

21st April, 1994

MINUTES OF SPECIAL CONVOCATION

Thursday, 21st April, 1994
9:15 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Brennan, Feinstein, Finkelstein, Howie, Lax, Lerner, McKinnon, Manes, Moliner, S. O'Connor, Sealy, Somerville, Strosberg, Thom and Weaver.

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IN PUBLIC

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The reporter was sworn.

DISCIPLINE COMMITTEE

Re: HARVEY SAMUEL MARGEL, North York

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Feinstein withdrew for this matter.

Mr. Gavin MacKenzie appeared for the Society and Mr. Brian Greenspan appeared for the solicitor. The solicitor was not present.

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

Counsel retired.

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Re: RAYMOND VINCENT DONOHUE, Sarnia

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Thom and Ms. Moliner withdrew for this matter.

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

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

Counsel retired.

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Re: JOHN ALLEN ZINSZER, Kitchener

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Howie withdrew for this matter.

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

Mr. Perrier explained that Mr. Madorin, counsel for the solicitor had a prior commitment and was unable to attend.

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

Counsel retired.

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Re: DAVID WARGA, North York

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Feinstein withdrew for this matter.

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

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Abraham Feinstein, Q.C., Chair

J. James Wardlaw, Q.C.

Netty Graham

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

Gavin MacKenzie
for the Society

DAVID WARGA
of the City
of North York
a barrister and solicitor

Brian Greenspan
for the solicitor

Heard: December 6, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 16, 1993, Complaint D104/93 was issued against David Warga alleging that he was guilty of professional misconduct.

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

DECISION

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

Complaint D104/93

40 Paulart Drive, Etobicoke

- (a) On or about September 25, 1989, he falsely reported to his clients, Ben, Esther, Steven and Francine Ross, that a mortgage that they had purchased was a valid second mortgage that ranked behind only a first mortgage in an unspecified amount, when in fact the mortgage was a third mortgage that ranked behind a \$184,000 first mortgage and a \$50,000 second mortgage, in circumstances in which his non-disclosure of the amount of the first mortgage and of the existence and amount of the second mortgage resulted in the clients' realizing no recovery (except for legal fees in enforcing their security) upon the sale of the property under power of sale on May 27, 1991 for \$235,000;
- (b) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct;
 - (i) Beaver Bend Investments Limited sale of \$50,000 third mortgage to Murray Ehrlick Insurance Agencies Limited, November 30, 1988; and
 - (ii) Murray Ehrlick Insurance Agencies Limited sale of \$50,000 second mortgage to Ben, Esther, Steven and Francine Ross, June 24, 1989.

680 Tennent Court, London

- (c) He failed to serve his client, Gus Lazarakis, in a conscientious, diligent and efficient manner in representing him in relation to a \$35,000 loan to Barry Benson to be secured by a second mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, May 26, 1989, the mortgage was in fact a sixth mortgage;
- (d) In the transaction referred to in particular (c), he failed to report to his client, Gus Lazarakis; and
- (e) In the transaction referred to in paragraphs (c) and (d), he acted for more than one party without making the disclosure to or obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct.

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451 The West Mall, Etobicoke

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

66 Mooregate Crescent, Kitchener

- (g) On or about October 25, 1988, he falsely reported to his client, Werger Holdings Inc., that it had purchased a valid second mortgage in the principal amount of \$500,000 and that the only prior encumbrance on title was a \$5,300,000 first mortgage, when in fact the mortgage was a fourth mortgage ranking also behind a \$1,300,000 second mortgage and a \$300,000 third mortgage.
- (h) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:
 - (i) Werger Holdings Inc. \$500,000 second mortgage loan to First Western Ontario Property Inc. in trust, September 30, 1988;
 - (ii) Werger Holdings Inc. postponement of \$500,000 second mortgage to new first mortgage to Canada Trustco Mortgage, March 14, 1989;
 - (iii) Werger Holdings Inc. \$750,000 second mortgage loan to First Western Ontario Properties Inc. in trust, September 28, 1989.

564 Durham Crescent, Woodstock

- (i) On the following transaction involving mortgage security on the property, he acted for more than one party and acted for a party in which his partner, Harvey Margel, had a personal financial interest, without making the disclosure to and obtaining the consent of his client as required by commentary 5 of rule 5 of the rules of professional conduct:
 - (i) Ganwood Inc. \$160,000 second mortgage loan to First Western Property Inc. in trust, November 17, 1989.

85 Willow Road, Guelph

- (j) He failed to serve his client, Sharon Noss, in a conscientious, diligent and efficient manner in representing her in relation to a \$125,000 loan to First Western Ontario Properties Inc. to be secured by a second mortgage registered against title to 85 Willow Road, Guelph, in that the mortgage was in fact a third mortgage, in circumstances in which the client lost her entire investment when the property was sold under power of sale;
- (k) On the following transaction involving mortgage security on the property, he acted for more than one party without making the disclosure and obtaining the consent of his client as required by commentary 5 to rule 5 of the rules of professional conduct:
 - (i) Sharon Noss \$125,000 second mortgage loan to First Western Ontario Properties Inc., June 5, 1990.

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Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

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

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

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

IV. BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 Paulart Drive, Etobicoke

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

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

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

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

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

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

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

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

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

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

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

2. Get execution certificate;

3. Please register the enclosed mortgage."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

680 Tennent Court, London

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

186 John Street, Ingersoll

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

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

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

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

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

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

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

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

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

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

451 The West Mall, Etobicoke

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

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

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

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

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

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66 Mooregate Crescent, Kitchener

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

564 Durham Crescent, Woodstock

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

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

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

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

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

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

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

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

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

85 Willow Road, Guelph

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Warga be suspended for a period of three months.

REASONS FOR RECOMMENDATION

The Solicitor failed to serve his clients in a conscientious, diligent and effective manner.

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He falsely reported priority of mortgages, failed to report particulars of prior mortgages, failed to report to a client and failed to secure a second mortgage. The Solicitor acted for more than one party without making disclosure to and obtaining the consent of his clients as required by Commentary 5 to Rule 5 of the Rules of Professional Conduct.

The Solicitor suffered from health problems, declared bankruptcy, lost his home, lost over \$1,800,000.00 and his wife has returned to work. There were numerous letters of support from clients who lost money. His role was minor compared to his partner's and the Committee accepts the recommendation of the Counsel for the Society of a three month suspension.

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

ALL OF WHICH is respectfully submitted

DATED this 18th day of March, 1994

Abraham Feinstein, Q.C.
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Lerner, seconded by Ms. Sealy that the Recommendation as to Penalty, that is, that the solicitor be suspended for a period of 3 months, be adopted.

There were brief submissions by both counsel in support of the recommended penalty. Mr. Greenspan noted an amendment in the Reasons on page 30, at the beginning of the third paragraph that the words "suffered from health problems", be deleted.

The Recommendation as to Penalty as amended was adopted.

Convocation accepted Mr. Greenspan's request that the commencement of the suspension be June 11, 1994.

Counsel and the solicitor retired.

.....

ROSS HAINSWORTH, Edmonton

Mr. Strosberg placed the matter before Convocation but did not participate.

The Treasurer advised that Mr. Strosberg would only be present to offer guidance on questions respecting discipline procedures. There was no objection by the solicitor.

Mr. Thom withdrew for this matter.

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

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Convocation had before it the Report of the Discipline Committee dated 5th August, 1993, together with an Affidavit of Service sworn 15th September, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 19th August, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th November, 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

Paul D. Copeland, Chair
J. James Wardlaw, Q.C.
Stuart Thom, Q.C.

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

Gavin MacKenzie and Christina Budweth
for the Society

ROSS HAINSWORTH
of the City of
of Edmonton
a barrister and solicitor

Not Represented
for the solicitor

Heard: July 6, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 27, 1992, Complaint D76/92 was issued against Ross Hainsworth alleging that he was guilty of professional misconduct.

The matter was heard in public on July 6, 1993, before this Committee composed of Paul D. Copeland, Chair, James Wardlaw and Stuart Thom. The Solicitor did not attend the hearing and was unrepresented. Gavin MacKenzie and Christina Budweth appeared on behalf of the Law Society.

DECISION

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

1. Between February 3 and 5, 1991, inclusive, the Solicitor attempted to induce David Clost, a witness at the General Court Marshall of Corporal Gravline, to give false evidence in that proceeding;
2. Between February 3 and 5, 1991, inclusive, the Solicitor offered to accept a financial reward from David Clost for providing Mr. Clost with assistance in connection with a claim which Mr. Clost might be able to assert against the Government of Canada.

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Request for Adjournment and for an Order
Directing a Stay of Proceedings

As noted above, the Solicitor did not attend the discipline proceedings. Through counsel for the Society he provided us with a letter and a bound booklet entitled "Submission of Ross Hainsworth to the panel of the Discipline Committee of the Law Society of Upper Canada convened on July 6 and 7, 1993 to hear Complaint D76/92". The letter and the submission were dated the 30th of June, 1993 and were apparently sent to the Law Society by courier. They arrived at the Law Society on the 5th day of July, 1993.

Mr. MacKenzie indicated to us that he had been contacted on July 5, 1993 by Mr. Hainsworth at 6:30 p.m., and Mr. Hainsworth indicated he wanted an adjournment of the discipline proceedings.

The adjournment request was opposed by Mr. MacKenzie.

Mr. MacKenzie provided us with the following information.

Mr. Hainsworth was a defence counsel on a court martial proceeding and that role gave rise to the allegations of professional misconduct in this case. Mr. Hainsworth had joined the Judge Advocate General (JAG) in 1987 and was called to the Bar in 1980. The incident giving rise to these discipline proceedings occurred in 1991. Mr. Hainsworth was dismissed from the Canadian Forces in January of 1992. Mr. Hainsworth was court martialled on two charges. As a result of plea negotiations, Mr. Hainsworth pleaded guilty to a charge of fraud on the government. Mr. MacKenzie advised us that Mr. Hainsworth appealed that decision based on the Supreme Court of Canada decision in *R. v. Generaux* 70 CCC (3d) (3d) that s.11(d) of the *Charter* had been violated by the court martial proceedings. Mr. Hainsworth was successful on the appeal. A second prosecution was commenced, but Mr. Hainsworth successfully argued that a procedural error had been made and that charge did not proceed. Mr. MacKenzie advised us that at the present time he was uncertain whether a third attempt would be made to proceed with a court martial against Mr. Hainsworth.

The endorsements on the Complaint against Mr. Hainsworth are as follows:

1. May 13, 1992: adjourned on consent to set a date;
2. May 19, 1992: adjourned on consent to set a date;
3. June 2, 1992: adjourned on consent to proceed on October 27 and 28;
4. October 27, 1992: adjourned on consent to February 16 and 17, 1993 in order that court martial re-trial can take place. Letter from solicitor filed indicating consent to adjournment and fact that he is not practicing law;
5. February 16, 1993: adjourned to April 13, 1993 to be spoken to. Law Society to advise Mr. Hainsworth by fax;
6. April 13, 1993: adjourned on consent to May 12, 1993 to set date;
7. May 12, 1993: adjourned to proceed peremptorily on July 6 and 7, 1993 for trial for reasons given orally.

Mr. MacKenzie advised us that the Law Society had initially agreed to adjourn the discipline proceedings until after the court martial proceedings had been completed but eventually the Law Society indicated a desire to proceed with the matter even though the court martial proceedings had not been completed.

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On May 12, 1993 Mr. Hainsworth had requested an adjournment *sine die*. This request was refused by a Committee chaired by Mr. Ruby. Subsequent to the decision of May 12, 1993, Mr. Hainsworth raised an objection to Mr. Ruby's involvement on May 12, because Mr. Hainsworth had at one time in these proceedings consulted with Mr. Ruby's partner, Melvin Green. Mr. MacKenzie advised us that an option was given to Mr. Hainsworth regarding a possible re-application for an adjournment. Mr. Hainsworth initially had indicated to Mr. MacKenzie on the telephone that he wouldn't be asking for an adjournment today and that he intended to rely on Mr. Ruby's involvement on May 12, 1993 as a defect in the proceedings.

Mr. Hainsworth's request for a stay of these proceedings was based on the fact that the letter to him advising him of the hearing scheduled for July 6 and 7, 1993 did not specify the place of the hearing.

After retiring for a period to consider the matter, the Committee refused the request for an adjournment and for a stay of proceedings and gave the following reasons orally:

We regard ourselves as a fresh panel as requested by Mr. Hainsworth in Appendix F to his submission. We do not regard it as necessary to determine whether the decision to refuse the adjournment made by the panel chaired by Mr. Ruby on May 12, 1993 was improper because of Mr. Ruby's participation as outlined by Mr. Hainsworth in Appendix E to his request for an adjournment. In our view the public interest requires that this matter proceed. It is unclear whether court martial proceedings against Mr. Hainsworth will proceed. We do not regard the Law Society as being obliged to refrain from proceeding with disciplinary matters until criminal or quasi-criminal proceedings have been completed.

On the issue of the request for a stay by reason of non-compliance with s.33(1)(b) of the *Law Society Act* concerning notification of the place of hearing, we note that the original notice served on Mr. Hainsworth's then solicitor Mr. Trudell on May 13, 1992 specified the place of the hearing as Convocation Room, in the east wing of Osgoode Hall, 130 Queen Street West, in the City of Toronto. This hearing is a continuation from that notice. Mr. Hainsworth has been aware of the place of these hearings and up until now has never raised any objection. To now argue that the letter of May 28, 1993, Appendix D, and the transcript of the Committee decision dated May 12, 1993, Appendix C, fails to disclose a place of hearing appears to us to be a specious attempt by Mr. Hainsworth to avoid having this case dealt with on its merits. We note that Mr. Hainsworth is not present at this hearing in the Discipline Room of the Society and is not present at Convocation Room upstairs. The matter will proceed in the absence of Mr. Hainsworth. It should be noted that the Committee has reviewed all of the materials supplied by Mr. Hainsworth including his letter of June 30, 1993, his submissions dated June 30, 1993 with appendices, his memorandum dated January 25, 1993 as well as the Law Society document book and Mr. MacKenzie's submissions.

Evidence

The following exhibits were filed:

- Exhibit 1: Mr. Hainsworth's letter of June 30, 1993 and submissions
- Exhibit 2: Mr. Hainsworth's memorandum dated January 25, 1993
- Exhibit 3: Law Society document book
- Exhibit 4: Original Complaint

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Two witnesses were called to testify. An order was made excluding witnesses and the second witness Mr. Longworth was cautioned not to discuss the evidence heard in his absence.

David Clost is a 30 year old bus line dispatcher who lives in Peterborough. Prior to his work for the bus line he had been in the Canadian Forces. On the night of April 21, 1990 Mr. Clost was seriously injured in an incident at the Junior Ranks' Mess at the Canadian Forces Base Toronto. After an argument in the Mess Mr. Clost had left in company with a duty custodian. After a few minutes he returned to the Mess. As he was again leaving with the duty custodian, he heard some screaming and was then hit from behind with something. He continued walking out of the Mess and then noticed blood on his shirt. He did not know who had struck him. Mr. Clost was transported to the Sunnybrook Hospital where he was found to have a cut to his exterior jugular vein, several little muscles in his shoulder and his neck had been severed and several nerves. His right ear was sliced in half and he had a cut down towards the back of his head. A Corp. John Gravline was charged in the incident and Mr. Hainsworth was defence counsel for Corp. Gravline at a general court martial which was scheduled to be held on February 4, 1991.

On February 3, 1991 Mr. Clost met Mr. Hainsworth at the Triumph Sheraton Hotel and at Mr. Hainsworth's request he met with Mr. Hainsworth in Mr. Hainsworth's hotel room for 45 minutes starting at 10 p.m.

The relevant portions of Mr. Clost's testimony were as follows:

- A. When I went into his room, we talked about the case that was coming up the next day. He went into detail about his theory of how this accident had happened, how his client was innocent and had nothing, other than the actual verbal argument that we had, to do with my injuries. He went on to tell me his theory of how things had happened and how he had found out certain information that led up to the accident happening and at the end of that, he produced a document for me.
- Q. Let's go back if we could. What was the theory that he was advancing to as to what had occurred when you had hurt yourself?
- A. His theory was that, as I was walking, I tripped over the small metal strip between the parquet floor and the carpeting and landed on a glass that happened to be at my feet, slicing my neck open and that was basically what his theory was; that I had been drunk and was staggering.
- Q. Did you respond to what he said about how the accident had occurred?
- A. I told him there is no way that could possibly happen.
- Q. Did you elaborate on that at all?
- A. I did tell him that I knew that I had been hit from behind because I remember being pushed forward by the duty custodian towards the door and then all I remembered was after that, was, after that, was like a bright flash from being hit and then I carried on walking out the door. So I knew I was still on my feet.

Mr. Clost testified that Mr. Hainsworth had produced a handwritten document and asked Mr. Clost to sign it. Mr. Clost testified about the document as follows:

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- A. It was written on 8 1/2 x 11 foolscap. It said, 'I, David Clost, do now remember the events leading up to and after the scuffle that caused my accident.' It went on to say that, 'I now remember having tripped on the parquet floor, landing on the glass that broke that caused the neck injury.' Then it would be signed and dated by myself.

Mr. Clost went on to testify as follows:

- A. We had - part of the discussion that took place after the document was handed to me was that in my return for signing this, what I would get would be several pieces of information that would help my lawyer set up a law suit against the government. I could make anywhere between \$40,000.00, \$60,000.00, \$80,000.00 or \$100,000.00.

Q. I'm sorry. Is this something Mr. Hainsworth said to you?

- A. This is what Mr. Hainsworth said to me. It started \$40,000.00, \$60,000.00, \$80,000.00 then \$100,000.00. From the proceeds of what I got, I would be responsible to pay off the \$3,000.00 legal fee to John Legge who was the civilian lawyer for Gravline and for Mr. Hainsworth's trouble for uncovering all this information and the amount of time that he had spent on this case I would have to pay him 1 or 2% of the proceeds that I would get.

Mr. Clost left Mr. Hainsworth's room after indicating to Mr. Hainsworth that Mr. Clost wished to speak to his lawyer Michael Longworth.

On February 4, 1991 the court martial commenced. Mr. Clost did not testify on the first day and as a result of an approach made by Mr. Hainsworth to Michael Longworth, arrangements were made for Mr. Clost, Mr. Longworth and Mr. Hainsworth to have dinner together.

Prior to the dinner Mr. Clost and Mr. Longworth spoke to the prosecuting lawyers.

Concerning the dinner meeting, Mr. Clost testified as follows:

- A. At the beginning of the conversation we had just finished ordering our meal, he came right out with this contract from the night before; only now, all the numbers had increased. I was looking at anywhere from \$100,000.00 to \$200,000.00 now for the settlement with the evidence that he would give Michael. I would still pay the \$3,000.00 to John Legge for Gravline's fees and the percentage that Mr. Hainsworth would now get was up to 10%.

After that, a lot of the discussion that Michael and Ross Hainsworth had was basically what happened during the court today - the Askov decision that they had been talking about, and then, he carried on with some of the information that he could disclose to Michael that would help my case if I would decide to sue the government.

- Q. Was there any discussion about what would be expected of you in giving your evidence before the court martial?

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- A. He tried looking for the contract again that he had from the night before. He went through his briefcase. He had an old principal styled one. He spent about five minutes going through that trying to find it. He never did find it, but kept talking about it and explained to Michael what would be required of me was to sign this and then I would have to change my statement and say that I now recall what had happened and basically go along with his theory that this is what happened. He would give me the information in return.

Shortly thereafter, Mr. Longworth and Mr. Clost left the dinner.

Mr. Clost testified as follows concerning a conversation with Mr. Hainsworth on February 5:

- A. I seen him about 5 after 1 in the afternoon. I was in the prosecution witness room and he came up and wanted to talk to me and led me into the men's washroom. We got into the men's washroom and he checked underneath the door of the stalls to make sure there was nobody in there and mentioned to me then that if we are going to do it, we are going to have to do it today as far as signing the contract. And I told him, I was going to be the next witness up and he said, 'no, you won't be up today. You won't be up until tomorrow.' He invited me back to his room and that's where we would have signed it, that would have been that evening.

The conversation was interrupted by a major who walked into the washroom. Mr. Clost shortly thereafter was called to give evidence in the case against Mr. Gravline. He testified that he had been hit from behind as he was leaving the room.

Mr. Clost was subpoenaed as a witness for Mr. Hainsworth's court martial but he was not required to testify because of the guilty plea.

John Michael Longworth is a solicitor practicing in Peterborough who was called to the Bar in 1982. He had been retained by Mr. Clost in regard to a contemplated action arising out of the incident at the Canadian Forces Base on April 21, 1990. Mr. Longworth attended the first day of the Gravline court martial. At the request of Mr. Hainsworth, Mr. Longworth and his client agreed to have dinner with Mr. Hainsworth on the evening of February 4. Prior to the dinner meeting Mr. Longworth and Mr. Clost met with the prosecuting officers.

At the restaurant after five or ten minutes of chit chat, a discussion occurred. Mr. Longworth's testimony of the discussion was as follows:

- A. Well, Captain Hainsworth launched quite directly and openly into a proposal which he put to Mr. Clost and myself, and the proposal had several components to it.
- Q. Would you outline for the Committee its various components, what the proposal was?
- A. All right. The first component was that Mr. Clost was being asked by Captain Hainsworth to sign a handwritten statement containing a different version of the events which transpired the preceding April than what Mr. Clost's expected evidence at the court martial was to be.
- Q. How did Mr. Hainsworth characterize this statement?
- A. I'm not sure I understand.

21st April, 1994

Q. You said a statement that was different than Mr. Clost's expected evidence. How did Mr. Hainsworth justify this statement and what was his explanation for it?

A. He really didn't give an explanation. He just asked if - this was part of his proposal, that he expected Mr. Clost to sign this statement and then several other components of the proposal would fall into place. Shall I indicate what I recall of the statement?

Q. Please.

A. The handwritten statement that Mr. Clost was going to be asked to sign was basically a statement by him that he had attended at the officers' mess that evening, the area that he was in was very dimly lighted, he had gotten into a scuffle with someone whom he couldn't identify or name and he had tripped over a portion of the floor that separated a carpet from a parkay portion of the floor. And while falling, he had struck his neck on a glass lying in the area and thereby sustained his wound. That was the gist of the statement that he was being asked to sign.

Q. Was there any concern raised by either Mr. Clost or yourself regarding the way in which this different evidence would be viewed by the prosecution?

A. I don't recall that we raised it before he did; that is, Captain Hainsworth. My recollection is that he volunteered that this was likely going to cause some problem obviously with the prosecution officers. That they might wish to cross-examine David as a hostile witness, but that it shouldn't be a problem for him because it was common for witnesses to lose their memory and then suddenly regain it in circumstances such as those.

Q. Now, to be clear, Mr. Clost was to sign this statement and he was to give evidence consistent with the statement?

A. Yes.

Q. Now, in return for signing the statement, what would Mr. Clost receive and what, if anything, would Mr. Hainsworth receive?

A. Well, I kind of think of it in stages, so if I can go through it, the second component to the proposal was that Captain Hainsworth would take the handwritten statement back from Mr. Clost and I think the words he used were, "keep it in his hip pocket". He explained that it would afford Corporal Gravline protection in the future and I took that to mean that both the possibility of Mr. Clost would give the original version of it, of his evidence in the court martial, or the subsequent perhaps police charges brought against Corporal Gravline. So, he would hold the statement as evidence.

The second or next component of the proposal was that Captain Hainsworth said that he had several valuable pieces of information which he was prepared to share with us that would allow us, Mr. Clost and myself, to bring action against the Crown for liability resulting in injuries that Mr. Clost sustained.

Q. So, did he give you any examples of the evidence that he could provide?

- A. He gave some quite direct hints. He indicated for instance, that the police had found a broken glass in this area of the floor that the subsequent statement that he wanted Mr. Clost to sign referred to. He was quite critical of the duty custodian that evening, a Corporal Patterson. He indicated he had been derelict in his duty and in fact had lied to the police, hints like that as to what sort of information he was prepared to give us.

He said he knew the way the department worked. If we were to sue later, he would be quite prepared to assist us with who to examine for discovery and what questions to ask, that sort of thing.

- Q. Was there another component to this proposal?

- A. Yes. The final component that I can recall was that Captain Hainsworth, in return for his contribution by affording this information to us, was to receive ten percent of whatever compensation Mr. Clost received by reason of his civil action against the Crown. That is, ten percent of compensation of any sort received, whether it was general damages, special damages, income loss or whatever.

- Q. What, if any, idea did Mr. Hainsworth have for the remainder of the proceeds from any such contemplated litigation?

- A. Well, he made a remark or a suggestion that offended me. He said something to the effect that, "once the legal expenses are paid and once I received my ten percent, you and Mr. Clost can split the rest", as if I was somehow going to become a party to receiving half of these proceeds.

... two questions and answers from the transcript omitted here.

- Q. Where any arrangements made for the signing of the document.

- A. Yes. We then discussed how and when the statement was to be signed. There was also another document that he said that he wanted Mr. Clost to sign and that was an agreement whereby Captain Hainsworth would convey this information to Mr. Clost or myself and in consideration of that, Captain Hainsworth would receive ten percent of the proceeds of the litigation. I remember he wanted the agreement to specify that the information that he was giving us or was proposing to give us, was information that he had gathered outside of the scope of his duties as defending officer. He seemed somehow to emphasize that as a rationale for being able to give us this information or make the deal.

So, the two documents he wanted signed, Mr. Clost I recall, suggested that he obtain copies of them and fax them to my office the next morning, that is Tuesday morning, and Captain Hainsworth declined to that and suggested instead that he would get the statements, have Mr. Clost with him and Captain Hainsworth would read the statements to me over the phone the next morning, call my office in Peterborough while Mr. Clost was standing beside him reviewing what he was reading. Then, if I approved the statement and the agreement, then they could be signed.

- Q. Did either you or Mr. Clost commit yourselves in any way as to whether or not the statement would actually - either of the statements would actually be signed?

21st April, 1994

A. No.

Shortly thereafter Mr. Clost and Mr. Longworth left the meeting. Mr. Longworth dictated into his portable recorder his recollection of the discussion at dinner.

At approximately 10 p.m. Mr. Clost and Mr. Longworth sought out and met with the prosecuting authorities in the Gravline case.

In his submissions Mr. MacKenzie made reference to Rule 10, Commentary 2(d) and (e) and Commentary 14. The Committee had no reason to doubt the veracity of the testimony given by the witnesses and we found Mr. Hainsworth guilty of the two counts of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the solicitor be disbarred.

REASONS FOR RECOMMENDATION

Mr. MacKenzie, prior to making submissions expressed his wonder whether there was some explanation for Mr. Hainsworth's behaviour. Mr. MacKenzie referred us to the *Dubinsky* case and the *Rovet* case.

Mr. MacKenzie suggested that the conduct in this case was comparable to the seriousness of the conduct in the *Rovet* case and proposed two alternative penalties:

1. disbarment;
2. a lengthy suspension and that the solicitor not be permitted to resume practice until he persuades a committee that he is a fit and proper person to practice law in Ontario.

Mr. Dubinsky was found guilty of professional misconduct for recklessly advising a Provincial Court Judge as to background details respecting, and his authority to appear on behalf of an accused person, his client Susan Valley, which information Mr. Dubinsky knew to be incorrect. Mr. Dubinsky had advised the court he had a written authorization to enter a guilty plea on behalf of a client when he did not have such an authorization. Mr. Dubinsky made submissions on sentence that were incorrect and were invented by Mr. Dubinsky. The Discipline Committee recommended that Mr. Dubinsky be reprimanded in Convocation. Convocation suspended Mr. Dubinsky for a period of one month.

Mr. Rovet was found guilty of professional misconduct on three particulars:

1. he knowingly made false representations to the Canada Labour Relations Board about facts material to the case;
2. he assisted his client to prepare false documents in support of his false representations;
3. he charged personal expenses as fees without the knowledge or consent of his partners or clients (approximately \$35,000.00).

21st April, 1994

The Committee in the *Rovet* case on November 13, 1991 recommended that Mr. *Rovet* be suspended for six months and that the suspension be back dated to June 1, 1991.

At Convocation Mr. *Rovet* was suspended for one year. The suspension was to run from the date of Convocation. The majority reasons of Convocation were written by Mr. Murray. Mr. Strosberg and Mr. Epstein dissented from that decision. They felt the six month suspension was adequate and in any event that the suspension should be retroactive to the date Mr. *Rovet* had ceased practicing.

Ms. Lax wrote a dissenting opinion in the *Rovet* case. She would have disbarred Mr. *Rovet* or at a minimum suspended him for somewhere between three and five years. We regard her opinion with approval.

Convocation during its deliberations in the *Donaldson* case expressed the view that the *Rovet* case was wrongly decided. We agree with that view of the *Rovet* decision. The penalty was not sufficiently severe.

The actions of Mr. Hainsworth in this case are totally contrary to the behaviour one would expect and require of a solicitor. Suborning or counselling perjury and offering an indirect financial benefit to a witness for his false evidence are most serious offences.

Our courts require that the evidence presented before them be truthful. Very serious penalties are imposed for perjury even in minor matters. Perjury is bad enough for lay people. Lawyers with their skill and knowledge know what evidence will be important. They better than anyone else will know what false evidence will assist in a case. If lawyers think that it is permissible to fabricate evidence or to have witnesses lie, our system of justice will break down.

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.

Frankfurter J in *Re Sawyer*, 360 U.S. 622, 668 (1959)

In our view the behaviour of Mr. Hainsworth is more serious than misappropriation of funds by a lawyer.

The public must be assured by our decision that we totally disapprove of and reject this type of behaviour. General deterrence is an important aspect of the penalty in this case. Generally speaking disbarment is required in these types of cases. In the absence of any mitigating factors concerning the actions of Mr. Hainsworth, i.e. stress, psychiatric problems, substance addictions, coupled with character evidence, or a proven background of professional excellence and contribution, Mr. Hainsworth should be disbarred.

Ross Hainsworth was called to the Bar and admitted as a solicitor to the Supreme Court of Ontario on the 10th day of April, 1980.

ALL OF WHICH is respectfully submitted

DATED this 5th day of August, 1993

Paul D. Copeland
Chair

21st April, 1994

The following documents were before Convocation: Record Book of The Law Society of Upper Canada, Supplementary Record Book of Further Evidence and Facta and Books of Authorities.

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

Counsel for the Society and the solicitor suggested that the solicitor make his submissions first.

Mr. Hainsworth sought two items of relief in his submissions, that Convocation reject the Report of the Committee and that Convocation exercise its discretion under section 41 of the Law Society Act to pay costs for unwarranted proceedings.

The solicitor asked that subparagraph 9(o) of his Factum found on page 10 of the Facta and Book of Authorities, be deleted.

Mr. Hainsworth submitted that he did not receive the Notice of Hearing as required by section 33(1) (b) of the Law Society Act and further submitted that the hearing conducted on July 6, 1993 was not a fair hearing. He submitted that the Committee was biased and made reference to the following comments "...specious attempt by Mr. Hainsworth to avoid having this case dealt with on its merits" on page 4 and "Committee had no reason to doubt the veracity of the testimony given by the witnesses...." on page 14 of the Report, as examples.

The solicitor concluded that he would make submissions on costs, if appropriate following the disposition of the Report and Recommendation as to Penalty.

Counsel for the Society made submissions with a review of the facts surrounding the service of the Complaint and reviewed in detail the extensive correspondence between the Law Society and the solicitor regarding various adjournments.

Reference was made by Mr. Brown to the Emerson discipline case and that the solicitor's conduct in this case cured any defect that there might be in notice and service.

There were questions from the Bench.

Mr. Hainsworth made submissions in reply and admitted he did not object to the Notice and Service until he filed his material dated June 30, 1993. He maintained he was entitled to reply on the provisions of section 33.

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

The Report was voted on and adopted.

Reasons are to be prepared by Mr. Finkelstein and circulated to the members of Convocation.

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

Convocation took a brief recess at 11:15 a.m. and resumed at 11:30 a.m.

ROSS HAINSWORTH (cont'd)

Mr. Manes entered Convocation but did not participate.

21st April, 1994

It was moved by Mr. Lerner, seconded by Ms. Sealy that the Recommendation as to Penalty, that is, that the solicitor be disbarred, be adopted.

Counsel for the Society made submissions in support of the recommended penalty.

The solicitor sought leave to provide oral testimony or an opportunity to put his evidence in affidavit form.

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

It was moved by Mr. Strosberg, seconded by Mr. Finkelstein that the solicitor be granted an adjournment on the terms that the affidavit material be filed within 15 days going to matters of mitigation as outlined in the penultimate paragraph of the Committee's Report and that cross-examination be completed within 15 days thereafter and that the matter be set to proceed at the Special Convocation in June.

Carried

The solicitor would be advised that the Undertaking not to Practice would remain in effect and he would be urged to retain counsel.

Convocation was seised of this matter.

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

Counsel and solicitor retired.

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IN CAMERA

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CONVOCATION ADJOURNED FOR LUNCHEON AT 12:35 P.M.

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21st April, 1994

CONVOCATION RECONVENED AT 1:45 P.M.

PRESENT:

The Treasurer, Arnup, Cullity, Feinstein, Finkelstein, Howie, Kiteley, Lamont, Lax, McKinnon, Manes, Moliner, S. O'Connor, Palmer, Somerville, Strosberg, Thom and Weaver.

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IN PUBLIC

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Re: MICHAEL JAMES TAYLOR, Toronto

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Thom withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 24th January, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th March, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Rino C. Bragagnolo, Q.C., Chair
Stuart Thom, Q.C.
Earl Levy, Q.C.

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

Neil Perrier
for the Society

MICHAEL JAMES TAYLOR
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: June 9, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 16, 1992, Complaint D186/92 was issued and on March 10, 1993, Complaint D66/93 was issued against Michael James Taylor alleging that he was guilty of professional misconduct.

The matter was heard in public on June 9, 1993 before this Committee composed of Rino C. Bragagnolo, Q.C., Chair, Stuart Thom, Q.C. and Earl Levy, Q.C. Mr. Taylor 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 D186/92

2. (a) He failed to provide a reply to the Law Society regarding a complaint by James B. Klotz, despite letters dated July 8, 1992 and September 10, 1992.

Complaint D66/93

2. (a) He has breached an Order of Convocation by continuing to practise while under suspension since March 6, 1992;
(b) He has failed to co-operate with a Law Society representative in her attempt to audit his books and records pursuant to Section 18 of Regulation 573 of the Law Society Act, despite an attendance at his office on August 26, 1992 and subsequent telephone calls and letters.

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 D186/92 and is prepared to proceed with a hearing of this matter on March 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 D186/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitutes professional misconduct.

21st April, 1994

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1986. He has been suspended from the practice of law since March 6, 1992 as a result of non-payment of his annual fee.

Particular 2b) Practising while under Suspension

5. By registered mail, dated March 2, 1992 (Tab 1, Document Book), the Law Society advised the Solicitor that his rights and privileges as a member had been suspended by Convocation effective March 6, 1992.

6. Mr. Klotz, a solicitor, acted on behalf of Kim Harold Wei and Leslie Ann Wei regarding the sale of their property municipally known as 4361 Idlewild Crescent, Mississauga, against which property, a certain writ of seizure and sale was registered. The Solicitor acted on behalf of John Paul McKeown and Barbara McKeown, the purchasers of the said property.

7. By facsimile transmission on May 29, 1992 (Tab 3, Document Book), Mr. Klotz advised the Solicitor that he had been informed by the Law Society of the Solicitor's suspension from the practice of law. In order to facilitate the closing, Mr. Klotz advised the Solicitor that he required an undertaking from any other real estate solicitor in good standing to hold the funds pending receipt of the discharge of the said writ of seizure and sale by Mr. Klotz.

8. By facsimile transmission on May 29, 1992 (Tab 4, Document Book), Mr. Klotz advised the Solicitor that they were extending the closing until June 1, 1992 as the Solicitor had failed to attend at his office as agreed for a pre-closing.

9. By facsimile transmission on June 1, 1992 (Tab 5, Document Book), the Solicitor advised Mr. Klotz that he was a member in good standing with the Law Society and by that letter, gave Mr. Klotz his undertaking to provide him with proof of the same forthwith. The Solicitor further advised Mr. Klotz that he was prepared to close the transaction that day.

10. By facsimile transmission on June 2, 1992 (Tab 6, Document Book), Mr. Klotz provided the Solicitor of a synopsis of events regarding this transactions since May 29, 1992. The transaction closed on June 2, 1992 as the Solicitor had provided a series of personal cheques to facilitate the closing. Mr. Klotz advised the Solicitor that the Bank had advised that, as of 3:00 p.m. on June 2, 1993, the Bank held insufficient funds in the Solicitor's personal bank account to honour the Solicitor's cheques. Notwithstanding this advice, Mr. Klotz deposited these cheques which were duly cleared.

11. By facsimile transmission on June 8, 1992 (Tab 7, Document Book), the Solicitor provided Mr. Klotz with his undertaking regarding his office procedures to ensure that the events mentioned in Mr. Klotz's letter of June 2nd did not happen again. The Solicitor provided Mr. Klotz with his synopsis of the events leading up to the closing. The Solicitor also requested Mr. Klotz provided him with copies of the discharge, application to Amend the register, signed acknowledgement, client's social insurance number and Mr. Klotz's account.

12. By letter dated June 9, 1992 (Tab 8, Document Book), Mr. Klotz advised the Law Society of his concerns regarding the Solicitor's conduct regarding this transaction.

21st April, 1994

Particular 2a) Failure to reply to the Law Society

13. By letter dated June 15, 1992 (Tab 9, Document Book), Mr. Klotz advised the Law Society of the Solicitor's having practised while under suspension and the difficulties which respect to the closing of property municipally known as 5461 Idlewild Crescent, Mississauga.

14. A Law Society staff employee left a telephone message for the Solicitor as his office on June 25, 1992. The Solicitor returned the call that same day, leaving a message at the Law Society for the staff employee.

15. A Law Society staff employee left a telephone message for the Solicitor at his office on June 29, 1992 requesting he return the call. The call was not returned.

16. By letter dated July 8, 1992 (Tab 10, Document Book), the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to Mr. Klotz's allegation that he practised while under suspension; his false assurances to Mr. Klotz that he was a member in good standing and why he continued to practice law knowing that he was suspended.

17. A Law Society staff employee left a telephone message for the Solicitor at his office on September 9, 1992, requesting he return the call. The call was not returned.

18. By letter dated September 10, 1992 (Tab 11, Document Book), sent by registered mail and ordinary mail on October 6, 1992, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

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

V. DISCIPLINE HISTORY

20. The Solicitor has no previous discipline record.

DATED at Toronto this 9th day of June, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Michael James Taylor be suspended for a period of 2 months to commence on the date the administrative suspension is terminated upon payment of all arrears and the Solicitor satisfies the Law Society that his books and records are in order. Your Committee further recommends that the Solicitor consult a psychiatrist and submit a report to satisfy the Law Society that he is fit to practice law, upon completion of the suspension period.

REASONS FOR RECOMMENDATION

The Solicitor was called to the Bar on April 10, 1986. He has been suspended from the practice of law since March 6, 1992 as a result of non-payment of his annual fees.

21st April, 1994

The Solicitor acted on behalf of John Paul McKeown and Barbara McKeown, the purchasers of the property known municipally as 4361 Idlewild Crescent, Mississauga. Mr. Klotz acted on behalf of the vendors of the said property. The Solicitor closed the said transaction on June 2, 1992, having misrepresented to Mr. Klotz that he was a member in good standing with the Law Society and would provide him with proof of the same forthwith, when he knew that his rights and privileges had been suspended by Convocation on the 6th day of March, 1992, for non-payment of his 1991-1992 annual fees, having been advised by the Law Society by facsimile transmission and regular mail on June 2, 1992. Up until June 30, 1991, the Solicitor had been employed by the firm of DelZotto, Zorzi, specializing in the field of condominium real estate. His wife left him in April of 1991. Before leaving the DelZotto, Zorzi law firm, he notified the Law Society he would be leaving the employ of DelZotto, Zorzi on June 30, 1991 and, thereafter, he would be travelling through Europe and would not be gainfully employed. He advised the Law Society that they would be notified when he resumed the practice of law and, at that time, the Solicitor would seek instructions with regard to payment of the annual fees.

The evidence does not indicate that he was suffering from any particular physical or mental disorder, although the Solicitor indicated that he was under considerable stress due to the breakup of his marriage and the subsequent divorce proceedings. As well, his mother, who was 72 years of age, was hospitalized for a five-month period in 1992 and early 1993.

With reference to the allegation of practising while under suspension, it would appear from the evidence, that he had engaged in only one real estate transaction during his period of suspension.

Your Committee is satisfied that the appropriate penalty is a suspension for two months to commence on the date the administrative suspension is terminated upon payment of all arrears and the Solicitor satisfies the Law Society that his books and records are in order. Your Committee further recommends that the Solicitor consult a psychiatrist and submit a report to satisfy the Law Society that he is fit to practice law, upon completion of the suspension period.

Michael James Taylor 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 24th day of January, 1994

Rino C. Bragagnolo, Q.C.
Chair

It was moved by Mr. Howie, seconded by Mr. Somerville that the Report be adopted.

Mr. Perrier asked that an amendment be made on page 3 of the Report, to delete the last word "provided" and replace it with the word "provide".

There were no submissions and the Report as amended was adopted.

21st April, 1994

It was moved by Mr. Somerville, seconded by Mr. Howie that the Recommendation as to Penalty, be adopted, that is, that the solicitor be suspended for a period of 2 months or until he completes his books and records to the satisfaction of the Law Society, whichever comes later, such suspension to commence at the termination of the solicitor's administrative suspension.

Counsel for the Society made submissions in support of the recommended penalty.

The solicitor made submissions explaining the difficulties he would have with the terms of the Recommendation.

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

It was moved by Mr. Howie, seconded by Mr. Feinstein that the solicitor commence a 2 month discipline suspension immediately and the administrative suspension to follow thereafter.

Carried

The Recommendation as to Penalty was not put.

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

Counsel and solicitor retired.

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Re: BRYON DEAN BOUGHNER, Windsor

Mr. Strosberg placed the matter before Convocation but did not participate.

Ms. Weaver withdrew for this matter.

Mr. Neil Perrier appeared for the Society and Mr. David Humphrey appeared for the solicitor who was present.

Convocation had before it the original Report of the Discipline Committee dated 9th March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th March, 1994 (marked Exhibit 1(a) - original Report to be sealed). The version of the Report which deleted the names of the victims was filed as Exhibit 1(b). The Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 was marked Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report (Exhibit 1(b)) 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

Patricia J. Peters, Q.C.

Michael G. Hickey, Q.C.

21st April, 1994

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

Neil Perrier
for the Society

BRYON DEAN BOUGHNER
of the City
of Windsor
a barrister and solicitor

David Humphrey
for the solicitor

Heard: January 12, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 25, 1993, Complaint D221/93 was issued against Byron Dean Boughner alleging that he was guilty of professional misconduct and/or conduct unbecoming.

The matter was heard in camera on January 12, 1994 before this Committee composed of Mary P. Weaver, Q.C., Chair, Patricia J. Peters, Q.C. and Michael G. Hickey, Q.C. Mr. Boughner attended the hearing and was represented by David Humphrey. Neil Perrier appeared on behalf of the Law Society.

DECISION

The complaint against the Solicitor is on four separate particulars corresponding to the criminal counts for which the Solicitor was convicted and sentenced in June of 1993. The Solicitor admits the particulars in the Agreed Statement of Facts and admits that the particulars constitute professional misconduct and/or conduct unbecoming a barrister and solicitor. The Committee was asked to determine whether or not on the basis of the admissions the Solicitor was guilty of professional misconduct or conduct unbecoming a barrister and solicitor, or both. It is the decision of the Committee that the Solicitor is guilty of conduct unbecoming a barrister and solicitor.

Complaint D221/93

- 2.a) He, between July 15 and August 15, 1992, at the City of Windsor in the said region, being in a position of trust or authority towards "A", a young person, did for a sexual purpose touch the body of "A" with a part of his body, to wit: his mouth, contrary to section 153(1)(a) of the Criminal Code;
- b) He, between July 15 and August 15, 1992, at the City of Windsor in the Southwest Region, being in a position of trust or authority towards "A", a young person, did for a sexual purpose touch the body of "A" with a part of his body, to wit: his hand, contrary to section 153(1)(a) of the Criminal Code;
- c) He, on or about August 13, 1992, at the City of Windsor in the said region, did unlawfully have in his possession a narcotic, to wit: Cannabis Marihuana contrary to section 3(1) of the Narcotic Control Act;

- d) He, between June 26 and August 15, 1992, at the City of Windsor in the Southwest Region, did unlawfully traffic in a narcotic, to wit: Cannabis Marihuana, contrary to section 4(1) of the Narcotic Control Act.

Evidence

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

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D221/93 and is prepared to proceed with a hearing of this matter on January 12, 1994.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard *in camera* pursuant to Section 33(4) of the Law Society Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D221/93 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct and/or conduct unbecoming a barrister and solicitor.

IV. FACTS

4. The Solicitor is 36 years of age and was called to the bar on April 15, 1987.
5. On June 2, 1993, a certificate of conviction (Document Book, Tab 1) was issued and entered against the Solicitor on the following counts:

Count 1 - Being in a position of trust or authority towards one "A", a young person, did for a sexual purpose touch the body of "A" with a part of his body to wit: his mouth, contrary to Section 153(1)(a) of the Criminal Code.

Count 2 - Being in a position of trust or authority towards one "A", a young person, did for a sexual purpose touch the body of "A" with a part of his body to wit: his hand, contrary to Section 153(1)(a) of the Criminal Code.

Count 3 - Unlawful possession of a narcotic to wit: Cannabis Marihuana contrary to Section 3(1) of the Narcotic Criminal Act.

Count 4 - Unlawfully traffic in a narcotic to wit: Cannabis Marihuana contrary to Section 4(1) of the Narcotic Control Act.

6. On July 8, 1993, the Solicitor received the following sentences:

Count 1 - Term of imprisonment for six months.

Count 2 - Term of imprisonment for six months running concurrent to count 1.

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Count 3 - A \$250.00 fine with 60 days to pay or in default 10 days consecutive to counts 1 and 2.

Count 4 - A \$2,000.00 fine with 60 days to pay. In default of payment 80 days consecutive to counts 1, 2 and 3.

A two year period of probation was also ordered.

7. The Solicitor was released from prison on parole on September 17, 1993 and is presently looking for employment.

8. In April of 1992, "A" (17 years of age) and "B" (15 years of age) encountered certain difficulties with the law. As a result, their mother, "C", retained the legal services of the Solicitor to defend both her sons on a charge of possession of tools with intent to break and enter.

9. In June of 1992, the Solicitor approached "C" indicating he needed some work done around his house and offered to pay her two boys to help him.

10. The boys started working for the Solicitor after the school year was completed. Their first work day was a Saturday in June 1992. They did some general maintenance work for which they each received payment of \$50.00. They returned the following Saturday and cleaned the yard and patio areas and received \$20.00 each.

11. On their third visit to the Solicitor's home, the Solicitor produced a quantity of marihuana and as a result, he shared the narcotic with "A" and "B". On another occasion during June 1992, the Solicitor accompanied these two boys to Point Pelee Park where they all consumed marihuana cigarettes on the way to the Park and at certain times during the day. While on the beach, the Solicitor swam in the nude while the two boys swam in their bathing suits.

12. On another occasion, the Solicitor took the two boys to the "go cart" track in Leamington. Once again they all consumed a quantity of marihuana.

13. The following weekend after visiting the "go cart" track, the two boys were visiting the Solicitor at his home when the Solicitor produced a white flight bag which contained pornographic videos. Pornographic videos were shown to the boys on this, and other, occasions. On two occasions the videos depicted homosexual acts.

14. On Saturday, July 25, 1992, "C" inquired of the Solicitor if "A" and "B" might spend the night at his home. The Solicitor agreed to have the boys spend the night at his home.

15. During the day of July 25, 1992, the two boys performed some yard work around the Solicitor's house, smoked some marihuana provided by the Solicitor and had a barbecue.

16. The Solicitor's mother was at the house during the evening and after she went to bed, the Solicitor, "A" and "B" smoked more marihuana and watched some pornographic movies provided by the Solicitor.

17. An excerpt from the transcript of "A"'s examination in chief at the preliminary hearing on the Solicitor's criminal charges further particularizing the events of July 25, 1992 is attached as Exhibit 1 to this agreed statement of facts.

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18. An excerpt is from the cross-examination of "A" at the preliminary hearing further particularizing the events of July 25, 1992 is attached as Exhibit 2 to this agreed statement of facts.

19. "A" testified that he had never previously engaged in a homosexual activity.

20. On August 1, 1992, the Solicitor picked up "A" as they had plans to travel to Detroit for the purpose of picking up some office furniture. They went to the Solicitor's house in order to change clothes. They went upstairs to the Solicitor's bedroom where they smoked two marihuana cigarettes and watched a pornographic movie. "A" became sick and entered the bathroom. He felt the Solicitor may make a pass at him so he tightened the draw strings of his shorts. When "A" returned to the Solicitor's bedroom, the Solicitor started making passes at him. The Solicitor eventually persuaded "A" to pull down his shorts. The Solicitor produced a gel called "Wet" and proceeded to lubricate "A"'s penis with this gel. Afterwards, the Solicitor masturbated "A" to the point of ejaculation.

21. After a complaint was filed with the police, a search warrant was executed at the Solicitor's home where a quantity of marihuana was located in his bedroom. Other items seized were pornographic films, a white flight bag, a jar of "Wet" lubricant, a red and blue mat, homosexual literature, marihuana pipe, magazines of young persons in sexual situations.

22. The boys visited the Solicitor 20-30 times over a period of a few months. The Solicitor smoked marijuana with the boys on numerous occasions, as well as supplying the boys with small quantities of marijuana on a few occasions.

23. The testimony of "A" and "B" are set out in further detail in the transcripts of evidence given at the preliminary hearing before the Honourable Judge M. Marshman on the 25th day of January, 1993 (Document Book, Tab 2).

24. On June 2, 1993 the Solicitor was found guilty on all four counts after a trial by jury.

25. On July 8, 1993, the Honourable Mr. Justice Donnelly imposed the following sentences (Document Book, Tab 1):

Sentence count one, six months imprisonment in reformatory; count two, six months imprisonment concurrent; count three, \$250 fine, in default ten days consecutive to counts one and two; count four, \$2,000 fine, on default, 80 days consecutive to counts one, two and three; two years probation following discharge from prison on the following terms: one, keep peace and be of good behaviour; two, report as required; three, continue appropriate treatment programs; victim fine surcharge 15 percent of \$2,250, 60 days for payment of fines and surcharge.

26. The following has been extracted from Mr. Justice Donnelly's Reasons for Sentence (Document Book, Tab 3):

"In this crime, breach of trust is not an aggravating factor. It is an element of the offence."

"The original association of trust and authority between the offender and the victim was founded on the lawyer/client relationship and to a much lesser extent on the employer/employee relationship. It was further entrenched by "C"'s reliance on the support and guidance potential to be provided by the lawyer."

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Clearly, there was evidence upon which the jury could properly find the position of trust or authority existed at the relevant time. The victim must have recognized the lawyer was not functioning as a lawyer while these visits were in progress. From his prior experimentation, the victim had a full awareness of the illegality attendant on the use of marihuana. He could not have perceived himself as being nurtured, protected or guided. Although the lawyer/client relationship existed, it was very much in the background by reason of the long adjournment and the absence of any current preparation for trial. That position of trust or authority was not exploited to achieve the sexual goal."

27. With respect to the Solicitor's conviction as to trafficking in a narcotic. This appears to relate to small quantities of marihuana which the Solicitor gave to "A" on two or three occasions to take home which were later consumed by "A" and his friends.

28. The Solicitor has no prior discipline record.

DATED at Toronto this 12th day of January, 1994."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Byron Dean Boughner be granted permission to resign.

REASONS FOR RECOMMENDATION

The Solicitor was retained by the mother of two juveniles, "A" (17) and "B" (15), to defend them on a charge of possession of tools with intent to break and enter. The Solicitor did not know the boys prior to this retainer. Two months after he was retained, the Solicitor hired his clients to perform general maintenance work at his home and thereafter the relationship developed from that of Solicitor and client to employer and employee and then to friend and companion. Throughout the whole period of the relationship, the Solicitor was in a position of trust and authority over the boys. In this relationship he exerted influence and by his example put a stamp of approval on the conduct that subsequently led to criminal convictions. The Solicitor betrayed the trust and used his position to sexually exploit "A" and supply "B" with marihuana. There are four elements to be considered in recommending an appropriate penalty:

1. The degree of culpability inherent in the conduct.
2. The maintenance of the integrity of the profession in the eyes of the public.
3. General deterrence.
4. The particular circumstances specific to this Solicitor including the devastating consequences he has already suffered by reasons of his conviction and sentence.

With respect to the first three elements, the Committee agreed that the penalty must be severe and must send a message to potential offenders and to the public that the Society will not tolerate this conduct. In considering the particular consequences of the conduct of the Solicitor, the Committee considered and adopted part of the reasons of Mr. Justice Donnelly in passing sentence on the accused. In his reasons, Mr. Justice Donnelly assumed that the Solicitor would no longer be practising law and he states:

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"What is the real penalty and hence the real deterrent A life spent in the wasteland of deprivation of the enjoyment and satisfaction derived from the practice of one's profession, its financial rewards and opportunity for comfort and long-term security Recognizing there has been no Law Society ruling, still, such devastation of the offender's personal and professional life must be factored into the sentencing equation."

It was submitted by counsel for the Solicitor that up until these events, the Solicitor had led an exemplary life. He is 34 years of age and had through his own work and efforts paid for his own education. First he completed a three-year course at St. Clair College followed by a fourth year at a college in Michigan. Subsequently while earning his living as a taxi driver, he put himself through law school and through the bar admission course. For several years during a severe illness of his father and since his father's death, the Solicitor took responsibility for caring for his mother and for looking after her home in which he continues to reside. The Solicitor is genuinely contrite and has shown remorse for his conduct. At the sentencing hearing, Mr. Justice Donnelly asked the Solicitor if he had anything to say. The Solicitor's response is evidence of his contrition as is the letter of apology written to the boys' mother and stepfather after he was sentenced. The Solicitor comes from a religious family who would have severely condemned homosexual conduct. The Solicitor now acknowledges that he is a homosexual and experienced two minor incidents of a homosexual nature in his teens. Since that time, he has been in a state of denial. His suppressed sexual drives have caused him an emotional turmoil.

The victims of the offense were 15 and 17 years of age. The conduct of the Solicitor in supplying the younger juvenile with marihuana and by sexually exploiting the elder is particularly culpable having originated with the victims' lawyer. In addition to the evidence in the Agreed Statement of Facts, in order to determine the degree of culpability of the offenses the Committee considered the transcript of the evidence given at the preliminary hearing and Mr. Justice Donnelly's reasons for sentence as follows:

"It must be less culpable for the offender to act thusly with a person 17 years of age and have demonstrated experience, wilfulness and independence rather than with a more less-worldly young person who has just attained the age of 14 years.

The victim although within the definition of young person was not entirely defenceless in either an emotional, physical or captive sense. He demonstrated an ability to disassociate himself from disciplines that did not please him at school, at work and at home."

The Committee was referred to a report prepared by L.A. Grannemann, MSW, CSW, a family counsellor retained by the Solicitor. There was no evidence before the Committee that the Solicitor was a paedophile and the Committee did not place any weight on the statement in Mr. Grannemann's report that the Solicitor is not a paedophile.

The gravity of the offenses committed by the Solicitor is such that the conduct might well have called for a penalty of disbarment. The Solicitor cooperated throughout these proceedings and the criminal proceedings and has demonstrated that he is thoroughly ashamed of his conduct and is truly contrite. We are satisfied that the Solicitor is capable of rehabilitation and we are of the view that this is not a case for the imposition of a penalty of disbarment. We therefore recommend that the solicitor be given permission to resign.

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Byron Dean Boughner was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 15th day of April, 1987.

ALL OF WHICH is respectfully submitted

DATED this 9th day of March, 1994

Mary P. Weaver, Q.C.
Chair

It was moved by Mr. Howie, seconded by Ms. Lax that the Report be adopted.

There were no submissions and the Report was adopted.

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

Mr. Perrier made submissions in support of the recommended penalty.

Counsel for the solicitor made submissions for a lesser penalty of a lengthy suspension.

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

It was moved by Ms. Kiteley, seconded by Mr. Somerville that the solicitor be disbarred.

Not Put

It was moved by Mr. Manes, seconded by Ms. Palmer that the solicitor be suspended for a period of 2 years.

Lost

The Recommendation as to Penalty was adopted.

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

Counsel and solicitor retired.

.....

Re: GEORGE CLEGG, Orillia

Mr. Strosberg placed the matter before Convocation but did not participate.

Messrs. Thom and Arnup withdrew for this matter.

Mr. Stephen Foster appeared for the Society and Mr. Patrick Wymes appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 9th February, 1994, together with an Affidavit of Service sworn 2nd March, 1994 by Louis Katholos, that he had effected service on the solicitor by registered mail on 14th February, 1994 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

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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.
Netty Graham

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

S. Foster
for the Society

GEORGE CLEGG
of the City
of Orillia
a barrister and solicitor

P. Wymes
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 July 21, 1992, Complaint D109/92 was issued against George Clegg alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced with Complaint D109a/92 issued on March 2, 1993.

The matter proceeded in public on March 2, 1993 before this Committee composed Thomas G. Bastedo, Chair, Stuart Thom, Q.C. and Mrs. Netty Graham. Mr. Clegg attended the hearing and was represented by Patrick Wymes. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

2. a) He breached the provisions of Rule 2(b), with respect to 15 clients, by failing to make a prompt and complete report when he had completed work for the clients or, where a final report could not be made, by failing to make an interim report where one might reasonably be expected;
- b) He breached the provisions of Rule 2(b) of the Rules of Professional Conduct, which provisions require that a lawyer should serve the client in a conscientious, diligent and efficient manner, and should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation. He failed to meet the requirements of this branch of the Rule with respect to the following particular clients:

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- 1) John McCuaig and Christine McCuaig;
- 2) Anthony Wooton and Josephine Wooton/
Thomas Hart and Carolee Morais;
- 3) Lila Rose LeBarron;
- 4) Estate of George Kent;
- 5) Estate of Minnie Olive Wray.

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 D109a/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. SECTION 9(2) OF THE ONTARIO EVIDENCE ACT

3. The Solicitor acknowledges that he may be compelled, pursuant to section 33(6) of the Law Society Act, R.S.O. 1990, c.L.8 as amended, to attend and give evidence herein. The Solicitor states that he would have objected to answer any and all questions or give any and all evidence herein and, without restricting the generality of the foregoing, would have objected to answer any and all questions or give any and all evidence herein regarding the Kent Estate and LeBarron matters, and would have sought the protection of, inter alia, section 9(2) of the Ontario Evidence Act, c. E.23 as amended and/or section 5(2) of the Canada Evidence Act, R.S.C. 1985 c. C-15 as amended. The Solicitor agrees to submit the following answers and/or evidence and/or submissions in reliance upon section 9(2) of the Ontario Evidence Act and/or section 5(2) of the Canada Evidence Act and with the understanding that the answers and/or evidence and/or submissions given herein are wholly and completely sheltered pursuant to the provisions aforesaid.

IV. ADMISSIONS

4. The Solicitor has reviewed Complaint D109a/92 and admits the particulars contained in paragraphs 2(a) and 2(b) therein. The Solicitor admits that these particulars in the Complaint together with the facts as hereinafter set out constitute professional misconduct.

V. FACTS

Failure to Send Reporting Letters

5. On or about February 28, 1990 Mr. Doug Weber, Auditor for the Law Society, conducted an examination of the books and records of the Solicitor.

6. This examination disclosed that the Solicitor held trust monies for about 175 clients. About 83 of the clients' trust balances had remained unchanged for at least one year. 29 of these were for amounts in excess of \$500.00.

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7. Mr. Weber reviewed the client files for 15 of the 29 inactive trust balances in excess of \$500.00. He found that although the matters had been closed for at least one year, the Solicitor had failed to deliver reporting letters to the clients. In some of the files, the Solicitor had reported in writing to his mortgagee clients but not to his mortgagor clients.

8. Mr. Weber prepared a handwritten schedule of the 15 files reviewed. A copy of the schedule is produced at Tab 1 of the Society's Book of Documents.

9. On or about February 28, 1990 Mr. Weber asked the Solicitor if he had prepared reporting letters on the other 14 files which he had not reviewed for which there were inactive trust balances of at least \$500.00. The Solicitor told Mr. Weber that he probably had not sent reporting letters to these clients.

10. Mr. Weber asked the Solicitor why he had not sent reporting letters to his clients. The Solicitor told Mr. Weber the following:

About 1987 he had an increase in real estate transactions to handle. He has had a very difficult time in finding and retaining qualified support staff. Since 1987 he has had about eight support staff come and go for various reasons. Either the person was not doing a satisfactory job or they left because of the pressure of their work load. During this time both his employed solicitor, Michael Drury, and himself each had his own secretary, plus he employed a full-time receptionist who also performed secretarial functions. His attempts to increase the staff from the above have been unsuccessful. He believes that he is in arrears on sending some of the reporting letters since about the fall of 1987.

11. In mitigation of penalty, the Solicitor maintains that:

- a) Reporting letters have now been sent on fourteen of the fifteen files. There is a continuing litigation matter on the outstanding file.
- b) In fourteen of the fifteen matters, the inactive trust balances were monies owing to the Solicitor in respect of unbilled fees and disbursements.
- c) The Solicitor had previously provided interim oral reports to the clients in question and none of them has complained about his handling of the files.

John McCuaig and Christine McCuaig (Dickenson)

12. In 1986 the Solicitor acted for John McCuaig and Christine McCuaig on their sale of a property at R.R. #1, Brechin. The Solicitor had previously acted for Mr. and Mrs. McCuaig on their purchase of this property.

13. Mr. and Mrs. McCuaig were involved in a matrimonial dispute and the Brechin property was their matrimonial home. They had each retained their own counsel in regard to the matrimonial matter.

14. Prior to the closing of the sale transaction, a Court Order dated July 10, 1986 by Mr. Justice Labrosse was delivered to the Solicitor with a covering letter from Mr. McCuaig's solicitor on the matrimonial matter. This order provided that the net proceeds of the sale were to be held by the Solicitor in an interest bearing trust bank account until disposition was agreed upon or until further orders of the court. A copy of the Order of Mr. Justice Labrosse is produced at Tab 2 of the Society's Book of Documents.

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15. The Solicitor handled the closing of the sale of the matrimonial home. The Solicitor's mixed trust ledger discloses that he deposited the balance due on closing of \$51,594.45 into his mixed trust account. He paid from the mixed trust account the balance of real estate closing due, a mortgage, and other costs connected with the closing. As at August 8, 1986 the Solicitor held \$14,183.65 in his mixed trust account on behalf of Mr. and Mrs. McCuaig. A copy of the Solicitor's mixed trust account client ledger is produced at Tab 3 of the Society's Book of Documents.

16. The McCuaig trust account ledger discloses that the Solicitor did not invest the net proceeds of the disposition of the matrimonial home in an interest bearing trust account as required by the Order of Mr. Justice Labrosse.

17. By letter dated January 29, 1987 Mr. McCuaig's solicitor requested from the Solicitor a reporting letter on the sale of the Brechin property, a trust accounting including up-to-date interest accruals in connection with the maintenance by the Solicitor of the interest-bearing trust account ordered by Mr. Justice Labrosse. The Solicitor did not reply to this letter. A copy of the January 29, 1987 letter is produced at Tab 4 of the Society's Book of Documents.

18. On September 8, 1987 Mr. McCuaig's solicitor, Mr. Downs, had a telephone conversation with the Solicitor. The Solicitor advised Mr. Downs that he had not invested the net proceeds of the Brechin property in an interest bearing trust account.

19. By letter dated September 25, 1987 Mr. Downs again requested the information from the Solicitor. A copy of Mr. Downs' letter of September 25, 1987 is produced at Tab 5 of the Society's Book of Documents.

20. By letter dated October 9, 1987 Mr. Downs provided the Solicitor with a written direction from Mr. McCuaig to pay \$1,954.57 to Canada Trust in respect of an outstanding loan. Mr. Downs again requested the Solicitor to respond to his requests for information respecting the sale of the Brechin property. A copy of Mr. Downs' October 9, 1987 letter is produced at Tab 6 of the Society's Book of Documents.

21. By letter dated November 12, 1987 Mr. Downs enclosed a copy of his letter of September 25, 1987 and advised the Solicitor that further delays in responding might be prejudicial to the settlement of the matrimonial proceedings between the McCuaigs. A copy of Mr. Downs' November 12, 1987 letter is produced at Tab 7 of the Society's Book of Documents.

22. By letter dated December 23, 1987 Mr. Downs made an additional request for this information. Mr. Downs advised the Solicitor that "the McCuaigs will be very interested in hearing about your position regarding any outstanding fees given that interest in the neighbourhood of \$1,250.00 has not been realized that should have been realized". A copy of Mr. Downs' December 23rd, 1987 letter is produced at Tab 8 of the Society's Book of Documents.

23. On or about December 25, 1987 Mr. Downs sent a further letter to the Solicitor enclosing copies of the earlier correspondence and again requesting the information in question. A copy of Mr. Downs' December 25th, 1987 letter, is produced at Tab 8 of the Society's Book of Documents.

24. On or about December 29, 1988 the Solicitor transferred to his general account the amounts of \$184.17 respecting fees on the McCuaig's original purchase from Black of the Brechin property and \$850.58 respecting fees on the sale to Duffy and Lewis of the Brechin property.

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25. By letter dated January 3, 1989 the Solicitor reported to Mr. and Mrs. McCuaig respecting the Brechin property. The Solicitor made no reference to the requirement that he keep the net proceeds deposited in an interest bearing account as required by the order of Mr. Justice Labrosse. A copy of the Solicitor's January 3rd, 1989 letter is produced at Tab 9 of the Society's Book of Documents.

26. On April 11, 1989 Commissioner D.R. Timms released his recommendations with respect to the matrimonial dispute between the McCuaigs. A copy of Mr. Timms Reasons for Judgement released April 11, 1989 are produced at Tab 10 of the Society's Book of Documents.

27. On April 18, 1989 Mr. Justice Potts issued a judgement respecting the division of the McCuaig's assets under the Family Law Act, 1986. The judgement refers in paragraph 4 to the distribution of "the net proceeds from the sale of the jointly owned cottage (the same ordered held in trust by George Clegg, solicitor, in an interest bearing trust account until disposition is agreed upon by the parties or until further order of this court pursuant to order of the Honourable Mr. Justice Labrosse made July 10, 1986)". A copy of Mr. Justice Potts' judgement is produced at Tab 11 of the Society's Book of Documents.

28. By letter dated May 1, 1989 Mr. Downs requested the amount of \$3,546.70 from the Solicitor in respect of the accrued interest on the amounts to have been invested in an interest-bearing trust account pursuant to the Order of Mr. Justice Labrosse. A copy of Mr. Downs's May 1, 1989 letter is produced at Tab 12 of the Society's Book of Documents.

29. By letter dated July 3, 1989 the Solicitor responded to Mr. Downs by reminding him that " a Court Order is not, without a representation order, binding on anyone but the parties to the action or proceeding. I know of no rule which requires me to deposit monies in an interest-bearing account without the express direction of the client. In this case there were two clients who were jointly entitled to the funds in my trust account, and I received no direction from one of them...I therefor deny any further claim by Mr. McCuaig". A copy of the Solicitor's July 3, 1989 letter is produced at Tab 13 of the Society's Book of Documents.

30. The Solicitor had not previously advised Mr. and Mrs. McCuaig of his view that he was not bound by the order of Mr. Justice Labrosse.

31. Moreover, by letter dated October 23, 1989 the Solicitor provided a response to the Law Society respecting his conduct in this matter. At page 2 of his letter the Solicitor states:

I was under the impression at that time from discussions I had with Mr. John McCuaig and the parties' respective solicitors that settlement between them was imminent. In view of this, and since opening a special interest-bearing client account involves considerable extra bookkeeping and a separate report from the accountant, with a bank confirmation for each account (which banks naturally charge for) I put off opening a specific account. Since nothing further was heard from the solicitors for either party until the end of last year, I overlooked that the funds were still in my general trust account. As a matter of fact, my bill for the sale was not rendered until December 29, 1988.

A copy of the Solicitor's October 23, 1989 letter to the Law Society is produced at Tab 14 of the Society's Book of Documents.

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32. In mitigation of penalty, the Solicitor maintains that:

- a) He was caught in the middle of a bitter divorce case.
- b) He was not originally consulted with respect to the motion, nor served with a copy of same nor given an opportunity to attend on the motion before Justice Labrosse.

Anthony Wootton and Josephine Wootton / Thomas Hart and Carolee Morais

33. In the summer of 1987, Josephine Wootton contacted the Solicitor with respect to a cottage in Tay Township which she and her husband wished to sell to Carolee Morais and Thomas Hart. Mr. and Mrs. Wootton advised the Solicitor that the terms of the sale to Ms Morais and Mr. Hart had been agreed upon.

34. Mr. and Mrs. Wootton advised the Solicitor that there was a problem with title to the property and that the township had stopped sending tax bills because they did not recognize the Wootton's ownership interest in the lands. The township's position was based on a 1984 court decision holding that titles transferred under "checkerboarding" schemes were not valid.

35. The township nevertheless recognized that many people, such as Mr. and Mrs. Wootton, had purchased properties in good faith from vendors using checkerboarding, and not in order to try and avoid the law. The township had passed "forgiveness by-laws" which permitted people such as Mr. and Mrs. Wootton to apply for severances.

36. On or about August 13, 1987 Carolee Morais contacted the Solicitor to inquire about the legal description of the property and advising that she and Thomas Hart intended to purchase from Anthony Wootton and Josephine Wootton.

37. Mr. and Mrs. Wootton had advised Ms Morais and Mr Hart that the Solicitor was working on securing a good and marketable title to the property for the Woottons who only had a possessory title at the time.

38. Ms Morais and Mr. Hart requested that the Solicitor act for them on the purchase transaction. The Solicitor also acted for Mr. and Mrs. Wootton respecting the sale of the property and the clearing of the title to their property.

39. The Solicitor obtained written acknowledgement from both clients that he acted for both parties and waiving their rights to independent legal representation.

40. The Solicitor advised Ms Morais that the title situation would not be a problem and that it was simply a matter of paperwork. He advised that the transaction could be closed on September 4, 1987.

41. The Solicitor provided Ms Morais with the details of the legal description of the property and she prepared an Offer to Purchase / Agreement of Purchase and Sale. This was executed by herself and Mr. Hart on August 14, 1987 and by Mr. and Mrs. Wootton on August 18, 1987. A copy of the Offer to Purchase / Agreement of Purchase and Sale is produced at Tab 15 of the Society's Book of Documents.

42. The Offer to Purchase / Agreement of Purchase and sale was conditional on the purchasers obtaining first mortgage financing by August 28, 1987 with a provision that the vendors would provide a second mortgage if necessary.

43. Ms Morais and Mr. Hart obtained approval for a first mortgage in the amount of 60% of the value of the property from the Mortgage Factory but the the Solicitor advised Ms Morais that he was concerned that the Mortgage Factory brokerage fee was too high.

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44. Mr. Hart and Mr. Wootton arrived at a new agreement that Mr. Hart and Ms Morais would provide a \$10,000.00 down payment and that Mr. and Mrs. Wootton would take a first mortgage on the complete balance of sale.

45. Ms Morais contacted the Solicitor and explained the agreement which had been reached with the Woottons. She requested that he extend the closing date by one week in order to allow the purchasers to come up with the \$10,000.00 down payment. The Solicitor made no mention of the need to amend the Offer to Purchase / Agreement of Purchase and Sale or execute a new Agreement of Purchase and Sale.

46. On September 11, 1987 Ms Morais and Mr. Hart attended at the Solicitor's office for the closing of their purchase. The Solicitor advised them that his search of title had revealed a more serious problem than he had anticipated. However, he stated that it was a problem that could be rectified in about 30 to 90 days. The Solicitor telephoned Mr. and Mrs. Wootton in the presence of Ms Morais and Mr. Hart and suggested that they close in escrow.

47. On September 11, 1987 Ms Morais and Mr. Hart executed a Charge / Mortgage in the amount of \$36,000.00. A copy of the Charge / Mortgage is produced at Tab 16 of the Society's Book of Documents.

48. On September 11, 1987 Ms Morais and Mr. Hart provided the Solicitor with the downpayment of \$10,000.00 and the amount of \$680.00 on account of his fees in the matter. The Solicitor deposited these monies to his mixed trust account.

49. Ms Morais and Mr. Hart took possession of the property and began making payments of \$390.00 on the 12th of each month commencing October 12, 1987 pursuant to the terms of the Charge / Mortgage.

50. In November, 1987 Ms Morais telephoned the Solicitor on various occasions seeking information on the status of her purchase. Ms Morais has telephone bills reflecting these long distance calls. The Solicitor did not respond to these telephone calls.

51. By letter dated December 11, 1987 Ms Morais requested the Solicitor to report on the status of her purchase. The Solicitor did not respond to this letter. A copy of Ms Morais' December 11, 1987 letter is produced at Tab 17 of the Society's Book of Documents.

52. By letter dated January 22, 1988 Ms Morais requested the Solicitor to report on the status of the matter. The Solicitor did not respond to this letter. A copy of Ms Morais' January 22, 1988 letter is produced at Tab 18 of the Society's Book of Documents.

53. Ms Morais continued to telephone the Solicitor seeking information on her purchase but she was unable to elicit any response from the Solicitor.

54. In April, 1988 the Solicitor returned one of Ms Morais' telephone calls. He advised her that the survey had been completed on the property and invited her and Mr. Hart to attend at his office. Upon attending at the Solicitor's office, Ms Morais and Mr. Hart discovered that the survey had been completed in September, 1987. The Solicitor did not provide them with any further information on the status of the title to the property.

55. In May, 1988 and June, 1988 Ms Morais and Mr. Hart defaulted on their mortgage payments to Mr. and Mrs. Wootton.

56. Ms Morais then decided to retain another solicitor, Mr. Graham Webb, to obtain independent legal advice in the matter.

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57. Ms Morais paid to Mr. Webb in trust the sum of \$800.00 representing funds to bring the May and June payments on the mortgage up to date provided that her rights under the agreement of purchase and sale could be protected.

58. By letter dated July 7, 1988 Mr. Webb wrote the Solicitor requesting an update on the progress of the matter. The Solicitor did not respond to this letter. A copy of Mr. Webb's July 7, 1988 letter is produced at Tab 19 of the Society's Book of Documents.

59. By letter dated September 15, 1988 Mr. Webb again wrote the Solicitor requesting an update on the matter. The Solicitor did not respond to this letter. A copy of Mr. Webb's letter of September 15, 1988 is produced at Tab 20 of the Society's Book of Documents.

60. By letter dated September 19, 1988 Mr. and Mrs. Wootton advised the Solicitor that due to the unprofessional way that he had been handling the matter, they were dismissing him as their solicitor. They requested that he transfer the file to another Solicitor. A copy of Mr. and Mrs. Wootton's September 19, 1988 letter is produced at Tab 21 of the Society's Book of Documents.

61. By letter dated September 27, 1988 Mr. Webb wrote the Solicitor again requesting an update on the matter. The Solicitor did not respond to this letter. A copy of Mr. Webb's September 27th, 1988 letter is produced at Tab 22 of the Society's Book of Documents.

62. By letter dated September 30, 1988 Mr. Webb advised the Solicitor that he had completed a search of title which disclosed a deficiency. He requested that the Solicitor advise him of whether he had formed an opinion as to whether a good possessory title was possible and, failing that, if any steps had been taken to obtain a conveyance with Committee of Adjustment consent. The Solicitor did not respond to this letter. A copy of Mr. Webb's September 30th, 1988 letter is produced at Tab 23 of the Society's Book of Documents.

63. By letter dated October 3, 1988 Mr. and Mrs. Wootton complained to the Law Society in respect of Mr. Clegg's handling of this matter. A copy of Mr. and Mrs. Wootton's October 3rd, 1988 letter is produced at Tab 24 of the Society's Book of Documents.

64. By letter dated October 6, 1988 Mr. Webb made Mr. and Mrs. Wootton an offer to settle the matter through the Solicitor. A copy of Mr. Webb's October 6, 1992 letter is produced at Tab 25 of the Society's Book of Documents.

65. By letter dated October 26, 1988 Ms Morais filed a complaint with the Law Society with respect to the Solicitor's handling of the matter. A copy of Ms Morais' October 6, 1988 letter (without its exhibits) is produced at Tab 26 of the Society's Book of Documents.

66. By letter dated January 8, 1989 the Solicitor provided the Law Society with a response to the complaint by Mr. and Mrs. Wootton in this matter. A copy of the Solicitor's January 8th, 1989 letter is produced at Tab 27 of the Society's Book of Documents.

67. By letter dated January 18, 1989 Mr. William P. Taws, the solicitor then acting on behalf of Mr. and Mrs. Wootton, advised the Law Society that the Solicitor had still not turned over Mr. and Mrs. Wootton's file. A copy of Mr. Taw's January 18, 1989 letter to the Law Society is produced at Tab 28 of the Society's Book of Documents.

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68. By letter dated February 2, 1989 the Law Society advised the Solicitor of the complaint from Ms Morais in this matter. The letter also suggested that as the matter might lead to a claim against the solicitor in negligence, the Solicitor report this matter to the Director of Insurance of the Law Society. A copy of the Law Society's February 2, 1989 letter is produced at Tab 29 of the Society's Book of Documents.

69. By letter dated February 7, 1989 the Law Society requested the Solicitor to address the Wootton's request to turn over their file to their new solicitor. A copy of the Society's February 7th, 1989 letter is produced at Tab 30 of the Society's Book of Documents.

70. On February 14, 1989 the Solicitor delivered the contents of Mr. and Mrs. Wootton's file to Mr. Taws.

71. Mr. Taws took the necessary steps to apply under the township's forgiveness by-law and Mr. and Mrs. Wootton obtained a proper title to the property.

72. In late February, 1993 Mr. and Mrs. Wootton resold their property for the amount of \$50,000.

73. By letter dated April 7, 1989 the Solicitor responded to Ms Morais' complaint to the Law Society. In his letter the Solicitor states:

I truly regret my mishandling of this matter and can only say in mitigation that the demands of my practice last year were greater than I was able to handle. I found it impossible to obtain competent support staff, since everyone practicing in this area was experiencing the same pressures from the overheated real estate market...

A copy of the Solicitor's April 7, 1989 letter is produced at Tab 31 of the Society's Book of Documents.

74. The Solicitor's client trust account ledger discloses that on June 17, 1989 the Solicitor transferred the \$10,680.00 he was holding in his mixed trust account to an interest bearing trust account. A copy of the Solicitor's client trust account ledger is produced at Tab 32 of the Society's Book of Documents.

75. By letter dated December 6, 1989 the Solicitor advised that he had not reported this matter to Errors and Omissions because he considered the property to be worth more than when it was sold to Hart and Morais and that, as such, there would be no loss to the Woottons. He stated that he would be willing to purchase the property from them for the original price plus the interest which the purchase money would have earned. A copy of the Solicitor's December 6, 1989 letter is produced at Tab 33 of the Society's Book of Documents.

76. In mitigation of penalty, the Solicitor maintains that:

- a) He was initially of the opinion that this title problem was solvable, notwithstanding its complicated nature, by bringing an application for committee of adjustment consent. He then decided that the most effective solution was to move, pursuant to a township by-law, for a declaration that the Wootton's possessory title be validated. Before any work in this regard could be completed, the problems between the parties arose.
- b) The Solicitor has not yet charged Mr. and Mrs. Wootton any fees in respect of these matters. He still holds \$13,846.41, representing the initial deposit and \$658.00 in fees paid by Morais to the Solicitor, on deposit in an interest bearing trust account until final resolution of the dispute between the parties.

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Lila Rose LeBarron

77. In 1986 the Solicitor acted for the mortgagees in a financing transaction involving Lila Rose LeBarron, the mortgagor, in respect of mortgage financing on her property at R.R. #4, Orillia ("property").

78. There was an execution registered against the property in respect of a judgment obtained in May, 1980 by Citicorp Realty Ltd. ("Citicorp") in the amount of \$14,876.13 against Mr. and Mrs. LeBarron. A copy of the Writ of Execution is produced at Tab 34 of the Society's Book of Documents.

79. In 1986 the Solicitor experienced some difficulties obtaining detailed information from Citicorp respecting a payout amount on the execution.

80. In or about March, 1988 the Solicitor was retained to provide independent legal advice to Mr. Wainman, Mrs. LeBarron's father, in respect of two mortgage transactions on the property. Mrs. LeBarron was refinancing the property, in part to pay indebtedness to several creditors. The Solicitor was subsequently retained to also act for Mrs. LeBarron on the transaction.

81. The mortgages were in the amount of \$100,000.00 from Gideon Mortgage Services Inc. and in the amount of \$10,000.00 from Eptown Investment Corporation.

82. Mr. Edwin Myers was the solicitor acting for both mortgagees in respect of these transactions.

83. By letter dated March 11, 1988 Mr. Myers submitted certain requisitions concerning the mortgage transaction. A copy of Mr. Myers March 11th, 1988 letter is produced at Tab 35 of the Society's Book of Documents.

84. Prior to closing, Mr. Myers also advised the Solicitor that his search of executions had disclosed the Citycorp execution against Mr. and Mrs. LeBarron.

85. Upon closing, the Solicitor gave his undertaking to Mr. Myers to hold back the amount of \$20,000.00 to discharge a construction lien and the Citicorp execution.

86. The net mortgage proceeds were delivered to the Solicitor on March 15, 1988 and March 16, 1988. The net proceeds on the Gideon mortgage were \$27,040.54 after discharge by Mr. Myers of a previous mortgage. The net proceeds on the Eptown mortgage were \$9,068.00. These amounts were deposited in the solicitor's mixed trust account as appears from the Solicitor's client account ledger in this matter. A copy of the Solicitor's client account ledger is produced at Exhibit 36 of the Society's Book of Documents.

87. Mrs. LeBarron provided the Solicitor with a handwritten note and list of the creditors to be paid. A copy of Mrs. LeBarron's undated note is produced at Tab 37 of the Society's Book of Documents.

88. Page 1 of Mrs. LeBarron's note states that she is providing the payout figures and that she has "contacted all places for these except Legal Aid, Atlas Block, and of course Beaver Lumber & Citybank". Page 2 lists "Citybank" and a question mark for the payout figure.

89. By letter dated April 12, 1988 the Solicitor wrote to Citicorp's solicitor, Mr. Ken James, requesting the amount required to have the execution lifted. A copy of the Solicitor's April 12th, 1988 letter is produced at Tab 38 of the Society's Book of Documents.

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90. By letter dated April 27, 1988 Mr. James advised the Solicitor that the payout amount was \$10,172.05. A copy of Mr. James' April 27, 1988 letter is produced at Tab 39 of the Society's Book of Documents.

91. As of April 27, 1988 the Solicitor held \$28,196.55 in his trust account in respect of this matter.

92. During April and May 1988 the Solicitor paid three creditors from the money held in trust but made no payment respecting the Citicorp execution.

93. By letter dated June 28, 1988 Mr. LeBarron requested an update on the status of Beaver Lumber and City Bank. Mr. LeBarron states:

We were wondering how much longer we have to wait for City Bank to provide the necessary figures. We first asked for them in 1986.

A copy of Mr. LeBarron's June 28, 1988 letter is produced at Tab 40 of the Society's Book of Documents.

94. During the remainder of 1988 the Solicitor made three payments to Mrs. LeBarron totalling \$4,250.00 and paid arrears on the Gideon mortgage of \$1,250.00.

95. In February, 1989 Mr. and Mrs. LeBarron retained Mr. A.E. Owen to act for them on applying for new financing.

96. By letter dated February 22, 1989 Mr. Myers reminded the Solicitor that he had undertaken to pay off several debts respecting the property. A copy of Mr. Myers' February 22, 1989 letter is produced at Tab 41 of the Society's Book of Documents.

97. In April, 1989 the Solicitor paid another \$3,500.00 on the Gideon mortgage.

98. By letter dated June 7, 1989 Mr. Myers again requested the Solicitor to resolve the matter of the outstanding execution. Mr. Myers' letter refers to the fact that the Solicitor had advised Mr. Myers that the execution creditor had lost its file. A copy of Mr. Myers' June 7, 1989 letter is produced at Tab 42 of the Society's Book of Documents.

99. By letter dated August 4, 1989 Mr. Myers' complained to the Law Society respecting the solicitor's handling of this matter. A copy of Mr. Myers' August 4, 1989 letter is produced at Tab 43 of the Society's Book of Documents.

100. By letter dated August 30, 1989 Mr. Myers wrote the Solicitor enclosing a copy of a letter from the solicitor for Citicorp indicating that the payout had reached the sum of \$13,719.76 as of August 31, 1989. Copies of Mr. Myers' August 30, 1989 letter and Mr. James' August 24th, 1989 letter are produced at Tab 44 of the Society's Book of Documents.

101. The Solicitor's delay in paying out the Citicorp execution had resulted in the payout amount increasing from \$10,172.05 on April 27, 1988 to \$13,719.76 on August 31, 1989.

102. As at August 30, 1989 the Solicitor held \$10,295.63 in his trust account for Mrs. LeBarron. He paid \$9,000.00 to Mr. Myers and subsequently transferred the balance of \$1,295.63 to his general account for payment of his legal fees on this matter.

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103. By letter dated December 6, 1989 the Solicitor responded to the Law Society regarding Mr. Myers' complaint as well as some other matters. A copy of the relevant extract of the Solicitor's December 6, 1989 letter is produced at Tab 45 of the Society's Book of Documents.

104. By letter dated February 20, 1990 Mr. Myers advised the Law Society that he had been forced to use \$4,800.00 of his own funds to ensure the closing of new financing on the LeBarron property. This money was replaced at the end of January, 1990. A copy of Mr. Myers' February 20, 1990 letter is produced at Tab 46 of the Society's Book of Documents.

105. In mitigation of penalty, the Solicitor maintains that:

- a) In addition to acting for the LeBarrons on the mortgage refinancing, he acted for them in negotiating the removal and in removing a Construction Lien registered against title. He was required to bring a motion in this regard and successfully removed the lien at a lower amount than on the certificate of lien.
- b) He advanced the monies to the LeBarrons on three occasions (totalling \$4,250.00) after being advised by his clients that Mr. LeBarron was unemployed and that the LeBarrons were desperate for money. If he had not agreed to advance these monies, he would have had sufficient funds in his trust account to satisfy the Citycorp. execution.

Estate of George Kent

106. George Kent signed a power of attorney dated August 31, 1978 in favour of Gordon Redvers Whiston. A copy of the Power of Attorney is produced at Tab 47 of the Society's Book of Documents in this matter.

107. Between 1978 and 1986 Mr. Whiston assisted Mr. Kent in the handling of his financial affairs.

108. Mr. Kent signed a will dated February 9, 1979. The will named Mr. Whiston as sole executor. A copy of the will is produced at Tab 48 of the Society's Book of Documents.

109. The will made a number of specific bequests and provided for the residue to be held in trust for Mr. Kent's wife. Upon her death, the residue was left to Mr. Kent's granddaughter, Leda Piche.

110. Mr. Kent signed a codicil to his will dated November 29, 1982. The codicil provided for a \$20,000.00 trust for Mr. Kent's great-granddaughter, Shanna Piche. A copy of the codicil is produced at Tab 49 of the Society's Book of Documents.

111. Mr. Kent died on February 12, 1986.

112. Letters probate of the will were obtained on March 10, 1986. A copy of the Letters Probate is produced at Tab 50 of the Society's Book of Documents.

113. Following Mr. Kent's death, Leda Piche requested that Mr. Whiston account to her, or demonstrate that he had accounted to the deceased, for the handling of his financial affairs during the period of the power of attorney.

114. By letter dated May 6, 1986 Leda Piche's accountants, Millard, Deslauriers & Shoemaker requested the Solicitor, who had acted for Mr. Kent and Mr. Whiston during that time period, to provide certain financial documentation. A copy of the letter is produced at Tab 51 of the Society's Book of Documents.

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115. By letter dated September 19, 1986 Leda Piche's solicitor, H.M. MacKenzie, requested the Solicitor to provide certain financial information respecting the power of attorney as well as the estate. A copy of the letter is produced at Tab 52 of the Society's Book of Documents.

116. Ms Piche then commenced, through her solicitors, an application by way of Notice of Application dated June 26, 1987. The application sought, inter alia, orders requiring Whiston to pass his accounts as attorney and executor and requiring the distribution of the assets of the estate. A copy of the Notice of Application is produced at Tab 53 of the Society's Book of Documents.

117. The first return date of the application was July 28, 1987. The Solicitor's employee, Mr. Michael Drury, represented the respondent Whiston at the motion.

118. Following negotiations at the courthouse, an agreement was reached between Mr. Drury and Mr. MacKenzie and the motion was adjourned sine die. Mr. Drury was required to seek instructions from Mr. Clegg in regard to executing the agreement. A copy of the agreement respecting adjournment is produced at Tab 54 of the Society's Book of Documents.

119. The agreement provided that Mr. Whiston would answer certain questions and produce certain documents. The agreement was confirmed by letter dated August 5, 1987 from Mr. Mackenzie to Mr. Clegg. A copy of the August 5th, 1987 letter is produced at Tab 55 of the Society's Book of Documents.

120. The application was returned to court on December 24, 1987. An affidavit from Leda Piche sworn November 30, 1987 referred to numerous inadequacies in the responses from Mr. Whiston. A copy of an extract from Leda Piche's affidavit is produced at Tab 56 of the Society's Book of Documents.

121. The matter was heard by Judge Clare who ordered:

- 1) Mr. Whiston to pass his accounts as attorney and as executor by February 29, 1988;
- 2) Mr. Whiston to apply for a Clearance Certificate for the estate within 15 days;
- 3) Mr. Whiston to file trust tax returns for Shanna Piche; and
- 4) costs of the motion to be paid half by Whiston and half by the firm of Clegg & Drury.

A copy of the order is produced at Tab 57 of the Society's Book of Documents.

122. Judge Clare stated the following in his endorsement:

On hearing Mr. Drury for Whiston and Mr. MacKenzie for the Applicant and it appearing that Agreement between counsel as set out in MacKenzie letter of 5 august 1987 (see Tab 4 of Application record) have not been carried out in full and delay has been caused mainly by firm of Clegg and Drury order to go as follows:...

A copy of the endorsement and a typed transcription thereof is produced at Tab 58 of the Society's Book of Documents.

123. Following Judge Clare's order, there was a series of letters back and forth between Messrs. Clegg & Drury and Mr. MacKenzie. Some of the material which was to be produced was provided, and some was not.

124. By letter dated January 28, 1988 the Solicitor's firm confirmed to Mr. MacKenzie that an appointment to pass accounts had been taken out for March 3, 1988. A copy of the January 28th, 1988 letter is produced at Tab 59 of the Society's Book of Documents.

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125. On March 1, 1988 Mr. MacKenzie contacted the court Registrar who advised that the necessary documents for appointment to pass accounts had not been filed by Clegg & Drury. The Solicitor's firm advised Mr. MacKenzie that they had cancelled the appointment because they had decided to seek leave to appeal Judge Clare's order.

126. The Solicitor's firm made a motion for leave to appeal Judge Clare's order of December 24, 1987. On March 14, 1988 Mr. Justice Galligan refused leave except on the question of costs, as follows:

1. This Court Orders that the Motion be dismissed with respect to paragraph 1,2, and 3 of the Order of Judge Clare dated the 24th day of December, 1987.
2. And This Court Orders that the time for appealing paragraph 4 of the Order of Judge Clare date the 24th day of December, 1987 be extended to March 24, 1988.
3. And This Court Orders costs of the Motion to the Respondent in any event of the cause.

A copy of an unsigned version of the order of Judge Galligan is produced at Tab 60 of the Society's Book of Documents.

127. By letters dated March 28, 1988 and April 12, 1988 Mr. MacKenzie requested that the Solicitor's firm schedule an appointment to pass accounts in accordance with the order of Judge Clare. Copies of the letters of March 28, 1988 and April 12, 1988 are produced at Tab 61 and Tab 62 of the Society's Book of Documents.

128. By letter dated April 13, 1988 the Solicitor stated that he would "forthwith" be making the arrangements in regard to arranging the appointment for the passing of accounts. A copy of the April 13, 1988 letter is produced at Tab 63 of the Society's Book of Documents.

129. The parties subsequently agreed to an appointment for the passing of accounts on June 16, 1988.

130. On June 13, 1988 Mr. MacKenzie had not been served with the documents respecting the appointment and he telephoned the Registrar. The Registrar advised him that the appointment had been cancelled by Messrs. Clegg & Drury. By letter dated June 13, 1988 Mr. MacKenzie advised Messrs. Clegg & Drury that he did not consent to the adjournment of the appointment. A copy of the June 13, 1988 letter is produced at Tab 64 of the Society's Book of Documents.

131. By letter dated June 16, 1988 the Solicitor responded to Mr. MacKenzie's letter respecting the appointment on June 16, 1988. The Solicitor indicated that the appointment was cancelled partly because the Local Registrar had made another appointment for a contested matter without consultation with Messrs. Clegg & Drury. The Solicitor suggested another date of July 19, 1988.

132. On June 16, 1988 Mr. MacKenzie spoke with the Local Registrar who denied that the court had scheduled another appointment which necessitated the cancellation of the Whiston appointment. Clegg & Drury had simply failed to file any material.

133. Mr MacKenzie brought a motion returnable on July 5, 1988, seeking an order:

- a) removing Whiston as executor and replacing him with Ms. Piche;
- b) directing Whiston to respond to questions put to him and attend an examination for discovery;
- c) finding Whiston in contempt of court;
- d) ordering a distribution of assets; and
- e) costs.

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134. On July 5, 1988 the matter again came before Judge Clare. Judge Clare ordered, inter alia, the following:

- 1) Whiston to pass his accounts as attorney on August 2, 1988 and with copies served on Piche by July 25, 1988;
- 2) Whiston to answer the questions raised by Piche's accountants;
- 3) Whiston to forward trust income tax returns for Shanna Piche;
- 4) Costs of the motion payable by the law firm of Messrs. Clegg & Drury.

A copy of Judge Clare's July 5, 1988 Order is produced at Tab 65 of the Society's Book of Documents.

135. On August 2, 1988 Gordon Whiston passed his accounts as executor which disclosed the sum of \$6,690.21 remaining in his hands from which the Solicitor's, Official Guardian's and Registrar's costs, totalling \$1,765.00 were to be taken.

136. On December 13, 1988 the appeal of Judge Clare's December 24, 1987 order respecting costs was heard in Divisional Court. The appeal was dismissed, with costs of the appeal payable half by Messrs. Clegg & Drury and half by Gordon Whiston. A copy of the December 13th, 1988 Order of the Divisional Court is produced at Tab 66 of the Society's Book of Documents.

137. The Factum of the Appellant filed by Messrs. Clegg & Drury reveals the following:

34. The appellant respectfully requests that paragraph 4 of the Order of the Honourable Judge Clare, Local Judge, dated December 24, 1987, whereby costs of the original Application and the Notice of Return application of the Respondent in appeal were awarded one-half against the Appellant and one-half as against the law firm of Messrs. Clegg & Drury, be set aside.
35. The Appellant respectfully requests that, in the alternative, paragraph 4 of the Order of The Honourable Judge Clare, Local Judge, dated December 24, 1987, whereby costs were awarded as against the law firm of Messrs. Clegg & Drury, be set aside.

A copy of an extract from the Factum of the Appellant is produced at Tab 67 of the Society's Book of Documents.

138. During the hearing of the Appeal, comments were made from the Bench of the Divisional Court which were critical of Messrs. Clegg & Drury for acting in a conflict of interest situation and for their failure to comply with previous court orders, for their delay in handling the estate matter in general and for the quality of their work in respect thereof.

139. The motion which had been adjourned on July 5, 1988 was brought back on by Mr. MacKenzie on April 26, 1989. It was heard by Judge Dilks who ordered, on consent, inter alia, as follows:

- a) Whiston to resign as executor following a final passing of accounts, which is to take place within 30 days;
- b) Leda Piche to be appointed as executrix of the estate thereafter;
- c) Whiston to cash the G.I.C. being held by the trust company for Shanna Piche's trust forthwith, and to pay the funds to the accountant of the Supreme Court of Ontario;
- d) Clegg & Drury and Whiston to send Piche's accountant all documents in their possession regarding the Kent estate;
- e) Piche's accountants thereafter to obtain the Clearance Certificate for the estate;

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- f) Whiston to answer proper questions regarding the management of Kent's financial affairs from January 1, 1979 to February 13, 1986; and
- g) costs payable by Whiston.

A copy of the April 26, 1989 Order of Judge Dilks is produced at Tab 68 of the Society's Book of Documents.

140. Mr. MacKenzie heard nothing from Messrs. Clegg & Drury after the April 26, 1989 Order and brought the motion back on September 12, 1990 for the following reasons:

- a) As of that date, no appointment had been taken out for Whiston to pass accounts as executor for the period following August, 1988. Whiston could not resign as executor until this was done, and accordingly, Ms Piche could not be appointed executrix.
- b) With respect to Shanna Piche's trust monies, the principal sum was paid to the accountant on October 25, 1989, six months after Judge Dilk's order. The interest thereon was not paid into court until June 12, 1990, some fourteen months after the date of the consent order.
- c) No further documents had been delivered to Ms Piche's accountants and therefore the latter were not able to apply for a Clearance Certificate.
- d) The costs of the motion had not yet been paid.

141. Prior to the return of the motion, Mr. MacKenzie spoke to the Solicitor. He suggested that the Solicitor bring to the courthouse on the day of the motion every document whatever in his possession regarding the estate.

142. On September 12, 1990, the Solicitor attended at court and brought with him a package of documents, including bank books, bank statements, cheques and income tax returns. Mr. MacKenzie prepared a handwritten list of these documents. A copy of Mr. MacKenzie's list is produced at Tab 69 of the Society's Book of Documents.

143. On September 12, 1990 the motion was heard by Judge Fedak and he ordered that Whiston resign as executor immediately following the passing of his accounts, such passing of accounts to take place within 45 days of the date of the Order. He ordered costs to be payable by Whiston. A copy of Judge Fedak's order of September 12, 1990 is produced at Tab 70 of the Society's Book of Documents.

144. On October 31, 1990 Whiston passed his accounts to that date which were approved by Judge Taliano.

145. On January 31, 1991 Ms. Piche obtained a Certificate of Assessment of Costs in the amount of \$7,393.10 in respect of the Orders of Judge Clare on July 5, 1988 and the Divisional court on December 1, 1988. A copy of the Certificate of Assessment of Costs is produced at Tab 71 of the Society's Book of Documents.

146. By letter dated March 27, 1991 the Solicitor paid part of these costs but deducted certain amounts including "Executor's Costs of Passing Accounts" of \$650.00 and "MacKenzie's Costs" of \$350.00. A copy of the Solicitor's March 27th, 1991 letter is produced at Tab 72 of the Society's Book of Documents.

147. By letter dated April 1, 1991 Mr. MacKenzie advised the Solicitor that he did not agree with the deductions. A copy of Mr. MacKenzie's April 1, 1991 letter is produced at Tab 73 of the Society's Book of Documents.

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148. Mr. MacKenzie states that his costs of \$350.00 have never been paid and the executor's costs have not been awarded.

149. A Clearance Certificate has still not been obtained. According to Ms Piche's accountant, he is unable to obtain a Clearance Certificate because the documents provided by Clegg & Drury are insufficient to permit him to do so.

150. In a letter dated July 17, 1991 Mr. F.R. Herlihey indicated that some of the steps necessary for the issuance of a certificate had not been taken. A copy of the July 17, 1991 letter from F.R. Herlihey is produced at Tab 74 of the Society's Book of Documents.

151. In mitigation of penalty, the Solicitor maintains that:

- a) Within two and a half months of the passing of the late George Kent, approximately 80% of the assets of which he was aware had been distributed to the named beneficiaries by or through the Solicitor's office.
- b) He has attempted to have his account assessed in this matter but Ms Piche's counsel has objected to the final assessment taking place on the basis that she has commenced an action in negligence against the Solicitor. The assessment is now scheduled to be heard before Justice Taliano in April, 1993.

Estate of Minnie Wray

152. Minnie Wray lived with her daughter, Vera Lockhart.

153. Vera Lockhart predeceased her mother on March 4, 1973.

154. Following her daughter's death, Minnie Wray asserted that she had lent her daughter \$5,000.00 by way of an investment in a \$12,800.00 mortgage registered solely in her daughter's name. The Solicitor acted on Minnie Wray's behalf in a claim against her daughter's estate respecting the investment.

155. The claim was disputed by the Lockhart estate which was represented by Richard Stephenson.

156. Minnie Wray died on March 13, 1974. The Solicitor acts for the estate. The sole executrix of the estate is Orma Thompson.

157. By letter dated March 14, 1980 Mr. Stephenson offered to settle the claim by the Wray estate against the Lockhart estate for the amount of \$6,000.00. A copy of Mr. Stephenson's March 14th, 1980 letter is produced at Tab 75 of the Society's Book of Documents.

158. By letter dated March 17, 1980 the Solicitor replied to Mr. Stephenson that he would consult his client after her return from Texas. A copy of the Solicitor's March 17, 1980 letter is produced at Tab 76 of the Society's Book of Documents.

159. Orma Thompson has no recollection of an offer of \$6,000.00 to settle the dispute.

160. The Solicitor advised Mr. Doug Weber of the Law Society that he had advised Orma Thompson of the offer, that she had initially rejected the offer, that he had advised her that it was not a bad offer, that she had changed her mind about it and that when the Lockhart estate was told that she would accept the offer, the estate changed its mind.

21st April, 1994

161. Marion Williamson was apparently entitled to one-half of the residue of the Wray estate. Mrs. Williamson died on or about November 10, 1988.

162. Susan Heather is a beneficiary of the Williamson estate. She is represented by Mr. Bruce Savage. Ms Heather desired to obtain information about any assets in the Wray estate to which her mother had apparently been entitled.

163. By letter dated December 7, 1988 Mr Savage wrote the Solicitor requesting details of the Wray estate. A copy of Mr. Savage's letter is produced at Tab 77 of the Society's Book of Documents.

164. Mr. Savage did not receive a reply to his letter and he wrote further letters to the Solicitor dated January 31, 1989 and May 24, 1989. Copies of these letters are produced at Tab 78 of the Society's Book of Documents.

165. Mr. Savage did not receive any replies to these letters and he complained to the Law Society respecting the Solicitor's conduct in this matter.

166. By letter dated December 6, 1989 the Solicitor replied to this complaint. A copy of the Solicitor's December 6th, 1989 letter is produced at Tab 45 of the Society's Book of Documents.

167. By letter dated February 16, 1990 Mr. Savage advised the Solicitor that he had still not obtained the documentation requested in his December 7, 1988 letter. A copy of Mr. Savage's letter of February 16, 1990 is produced at Tab 80 of the Book of Documents.

168. By letter dated April 6, 1990 Mr. Savage again wrote the Law Society indicating his client's concerns that there were additional assets not accounted for by the Solicitor. A copy of Mr. Savage's April 6, 1990 letter is produced at Tab 81 of the Society's Book of Documents.

169. To date the estate has not been finalized by the Solicitor.

- In mitigation of penalty, the solicitor maintains that:
- a) This was a complicated matter involving both aspects of civil litigation and estate administration, which was further complicated by the lengthy passage of time herein.

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

RECOMMENDATION AS TO PENALTY

The Committee accepts the joint submission that the Solicitor be suspended for a period of one month, effective 30 days from the decision of Convocation and that he pay the Society's costs in the amount of \$4,000.

REASONS FOR RECOMMENDATION

The Solicitor readily admits that he has not served certain clients in a conscientious, diligent and efficient manner, and that his quality of service is less than ought to have been expected of him. The details and circumstances of Mr. Clegg's relationship with the named clients as set out in paragraph 2(b) of the complaint are set out in detail in the Agreed Statement of Facts. Mr. Clegg, who was 68 years of age at the date of the hearing, gave evidence before this Committee at some length. It is clear to the members of the Committee that in the years 1988, 1989 and 1990, he was simply overwhelmed with the demands of his practice. During these years, Mr. Clegg carried approximately five hundred active files in each year. In 1988, he opened 387 files, in 1989 he opened 391 files, and in 1990 he opened another 279 files. Added to the stress of the enormous number of active files that he was carrying, was the difficulty that he had in obtaining proper legal assistance in his office caused primarily for the local demands for competent legal personnel fuelled by the active real estate markets in the late 1980's. The serious illness of Mr. Clegg's wife in 1988, who was afflicted with cancer, added serious and obvious stress to his legal practice.

The Committee accepts the joint submission with some misgivings. The Committee will go to significant lengths to accommodate the joint submissions on penalty, but states frankly that were it not for the factors which are set out, the recommendation of a one month's suspension coupled with the direction that the Solicitor pay the Society's costs in the amount of \$4,000.00 within thirty days of the date of the hearing of this matter, would not be accepted. First, the Committee is mindful of the significant service that George Clegg has rendered to the community of Orillia. He is the past president of the Orillia Law Association, he is a former member of the Orillia Police Commission, he has served on the executive of the Simcoe County Law Association, and he has served his country in the armed forces with distinction. Second, quite frankly, Mr. Clegg is at the end of his career and in the process of wrapping up his practice. He does not intend to carry on his practice in the future and the Committee notes the Solicitor's counsel's observation that a longer penalty would in effect amount to a disbarment. Third, the circumstances in the late 1980's of the difficulties that Mr. Clegg had in coping with his practice, coupled with the illness of his wife to whom he has been married nearly fifty years, can be viewed in large part as an aberration from the normal standard of practice which he had carried on for many years.

The Committee is of the view that these factors are reasons for mitigating the concerns which the Committee has with respect to joint submission on penalty. In the result, the recommendation as to penalty as set out above is accepted.

George Clegg was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 12th day of April, 1962.

ALL OF WHICH is respectfully submitted

DATED this 9th day of February, 1994

Thomas G. Bastedo,
Chair

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

21st April, 1994

There were no submissions and the Report was adopted.

It was moved by Ms. Palmer, seconded by Mr. Feinstein that the Recommendation as to Penalty, that is, that the solicitor be suspended for a period of 1 month effective 30 days from the decision of Convocation and pay the Society's costs of \$4,000, be adopted.

Mr. Foster made submissions in support of the recommended penalty.

Mr. Wymes asked Convocation's permission to go in camera to make certain submissions.

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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The public was recalled.

Mr. Wymes made further submissions in support of the 1 month suspension with costs being reduced to \$2,000.

Mr. Foster did not oppose the issue on costs.

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

It was moved by Mr. Finkelstein, seconded by Ms. Weaver that the solicitor pay the costs of \$2,000.

Withdrawn

It was moved by Ms. Palmer, that the solicitor be afforded time to pay the original costs of \$4,000.

Not Put

The Recommendation as to Penalty was adopted.

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

Mr. Wymes asked that the solicitor be allowed to commence his suspension on June 4, 1994.

The request was granted.

Counsel and solicitor retired.

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21st April, 1994

Re: NORMAN GERALD MATUSIAK, Etobicoke

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Thom withdrew for this matter.

Mr. Neil Perrier 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 March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 21st March, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

E. Susan Elliott, Chair
Shirley O'Connor
Stuart Thom, Q.C.

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

Neil Perrier
for the Society

NORMAN GERALD MATUSIAK
of the City of
of Etobicoke
a barrister and solicitor

J. Douglas Crane
for the solicitor

Heard: February 1, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 1, 1993, Complaint D41/93 was issued against Norman Gerald Matusiak alleging that he was guilty of professional misconduct.

The matter was heard in public before this committee composed of E. Susan Elliott, Chair, Shirley O'Connor and Stuart Thom, Q.C. The Solicitor was in attendance at the hearing and was represented by J. Douglas Crane, Q.C. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D41/93

2. a) He failed to respond to Law Society correspondence dated January 17, 1992, February 6, 1992 March 20, 1992 and January 5, 1993.
- b) he breached his undertaking to the Law Society dated dated December 20, 1991 to correct deficiencies in his books and records and to review certain complaint matters and report back to the Law Society.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

I. The solicitor admits service of Complaint D41/93 and is prepared to proceed with a hearing of this matter on July 27, 1993.

11. 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.

111. ADMISSIONS

3. The Solicitor has reviewed Complaint D41/93 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.

1V. FACTS

4. The Solicitor was called to the Bar on April 10, 1964. He practices as a sole practitioner.

5. On April 11, 1991 a Law Society examiner made an unannounced visit to the Solicitor's home/office at 55 Downpatrick Crescent to review his books and records. The examiner was advised by the Solicitor's wife that the Solicitor could be located at 710 Annette Avenue.

6. On April 11, 1991, the examiner made an unannounced visit to 710 Annette Avenue. The Solicitor was unavailable to meet with her.

7. On April 17, 1991, the examiner made an unannounced visit to 710 Annette Avenue. The Solicitor was unavailable to meet with her.

21st April, 1994

8. On April 18, 1991, the examiner spoke with the Solicitor. They agreed that they would meet on April 23, 1991 at 55 Downpatrick Crescent to review the Solicitor's books and records.

9. On April 23, 1991, the examiner attended at the Solicitor's home/office. The examiner discovered that the Solicitor was not making monthly trust comparisons, his trust records were in arrears by approximately six months, incorrect trust differences existed and he was maintaining inadequate fee records. The examiner left a note to this effect and requested that he correct the deficiencies in his books and records. The Solicitor did not reply to the examiner's note.

10. During the month of May, 1991, the examiner attempted to contact the Solicitor on an almost daily basis. When the telephone was answered, the examiner would leave a message requesting the Solicitor return her calls. The calls were not returned.

11. By letter dated June 4, 1991, the examiner requested the Solicitor contact her to arrange a date for the completion of her examination of his books and records. The examiner requested the Solicitor contact her within one week of the date of this letter in order that an examination could be arranged for no later than June 30, 1991. A copy of the examiner's June 4, 1991 is attached as Exhibit "A" to this Agreed Statement of Facts. No reply was received.

12. By registered mail dated June 18, 1991, the examiner forwarded to the solicitor a copy of her June 4, 1991 letter. The Solicitor was advised that should he fail to contact her to arrange an examination by June 30, 1991, the matter would be referred to the Discipline Committee. A copy of the examiner's June 18, 1991 letter is attached as Exhibit "B" to this Agreed Statement of Facts. Shortly after receiving the Society's June 18th letter, the Solicitor contacted the examiner by telephone to request an extension. The examiner agreed to extend the deadline for the production of books and records for examination by one week. The solicitor did not produce his books and records by the deadline.

13. The Solicitor advised the examiner by telephone on July 24, 1991, that his accountant, Leslie Gerendasi, would be contacting her shortly.

14. On July 26 1991, the examiner hand delivered to the Solicitor's home/office a letter in which she reminded the Solicitor of his responsibility to satisfy the Society's requests regarding examination of his books and records. The Solicitor was advised that should he fail to contact the examiner to make arrangements for the examination by July 31, 1991, the matter would be referred to the Discipline Committee. A copy of the examiner's July 26, 1991 letter is attached as Exhibit "C" to this Agreed Statement of Facts.

15. On July 29, 1991, the Solicitor's accountant called the examiner. It was agreed that the Solicitor's accountant and the examiner would meet on July 31, 1991.

16. On July 31, 1991, the examiner attended at the Solicitor's accountant's office. The Solicitor's books and records were inadequate.

21st April, 1994

17. By letter dated August 22, 1991, the examiner advised the Solicitor that on July 31, 1991 his books and records were insufficient. The examiner listed in her letter the items which she required the Solicitor produce in order that she could complete her examination. The Solicitor was requested to deliver the items listed to the Society by September 10, 1991. The Solicitor was further advised that the books and records he delivered covered the period from September, 1989 to date. The Solicitor was advised that should he be unable to deliver the formal books and records, that he deliver all source document. A copy of the examiner's August 22, 1991 letter is attached as Exhibit "D" to this Agreed Statement of Facts. The Solicitor did not reply.

18. By registered mail dated September 19, 1991, the examiner forwarded to the Solicitor a copy of her August 22, 1991 letter. The Solicitor was advised that should he fail to deliver his books and records by 10:00 am on October 18, 1991, the matter would be referred to the Discipline Committee. A copy of the examiner's September 19, 1991 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

19. On October 22, 1991, the Solicitor's accountant contacted the examiner by telephone. A meeting was arranged for October 30, 1991.

20. On October 30, 1991, the examiner attended at the Solicitor's accountant's office. The examiner discovered during her examination of the Solicitor's books and records that his trust reconciliation items remained uncorrected. All his other books and records had been brought up-to-date.

21. On December 10, 1991, the examiner attempted to contact the Solicitor, by telephone, to arrange a meeting to discuss the findings of her examination completed on October 30, 1991. The Solicitor's wife requested the examiner call again at 2:00 p.m. that day as the Solicitor was unavailable. The examiner called again at 2:00 p.m., however, the telephone was not answered.

22. The examiner spoke with the Solicitor by telephone on December 11, 1991. A meeting was arranged for December 20, 1991.

23. On December 20, 1991, the Solicitor attended at the Law Society to meet with the examiner. The audit questionnaire was completed and the examiner reviewed her findings with the Solicitor. The Solicitor provided the Law Society with a written undertaking which stated he would:

... ensure that the deficiencies are corrected forthwith in order to comply with the Regulation. I/We agreed to ensure that these deficiencies are corrected forthwith and will comply with the Law Society's Regulation 573 (sections 14 and 15) respecting books and records, henceforth. In addition I/We agree to abide by the Law Society's Rules of Professional Conduct.

A copy of the Solicitor's undertaking is attached as Exhibit "F" to this Agreed Statement of Facts.

24. By letter dated January 17, 1992, the examiner requested the Solicitor provide the following:

- evidence to show that \$539.50 was paid to Laura Jevtik for her services in producing a transcript with regard to D.C.O., File No. 283213/87, Marino et al v Realty 2001 Development Company;
- evidence to show that \$54.00 was paid to the Sheriff's office with regard to its statement of account #024067, dated January 1, 1991.

21st April, 1994

- a copy of the client's trust ledger account pertaining to the purchase & sale of 620 Wilson Avenue showing all receipts and disbursements relating to the transaction; copies of accounts, deposit slips and cashed cheques as they relate to the transaction; and any other information or comments you feel are relevant; and evidence to show the vendor has been paid the amount owing to him.

A copy of the examiner's January 17, 1992 letter is attached as Exhibit "G" to this Agreed Statement of Facts. The Solicitor was requested to reply within two weeks.

25. By letter dated February 6, 1992, the examiner forwarded to the Solicitor a copy of her January 17, 1992 letter. The Solicitor was requested to reply forthwith. A copy of the examiner's February 6, 1992 letter is attached as Exhibit "H" of this Agreed Statement of Facts.

26. By registered mail dated March 20, 1992, the examiner forwarded to the Solicitor a copy of her January 17 and February 6, 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 examiner's March 20, 1992 letter is attached as Exhibit "I" to this Agreed Statement of Facts. No reply was received.

27. Conditional authorization was granted against the Solicitor on October 4, 1992.

28. A Law Society staff employee left a telephone message for the Solicitor at his office on October 15, 1992 requesting he return the call.

29. On October 16, 1992, the Solicitor's accountant contacted the Law Society by telephone. The Society advised the accountant that the outstanding matters with the Society stemmed from an audit but that without the Solicitor's approval, the same would not be discussed with his accountant. The Society requested the accountant have the Solicitor contact them.

30. On October 19, 1992, the Solicitor attended at the Law Society and provided a copy of a letter from the Society's Complaints Department advising that the Jevtik matter was closed. The Solicitor advised that he would provide evidence regarding other matters as requested in its January 17, 1992 letter by the next day. The Solicitor did not attend at the Society the following day.

31. A Law Society staff employee spoke with the Solicitor's wife by telephone on October 21, 1992. Mrs. Matusiak advised the Society that the Solicitor was in court and that she understood he would attend at the Society later that day. The Society left a telephone message for the Solicitor with his wife, requesting he return the call and that should he not attend at the Society, the staff employee would call again between 4:00 and 5:00 p.m.

32. On October 21, 1992, the Solicitor attended at the Society and provided a copy of his bank statement showing a certified cheque issued on February 5, 1992 in the amount of \$555.21. The Solicitor advised that he did not have a copy of the certified cheque. The Solicitor further advised that he had paid the Sheriff's office by cash. The Solicitor indicated that the Sheriff's office was conducting a search to determine payment of the account. The Solicitor was advised that proof of payment to the sheriff's office was required by October 30, 1992. The Solicitor did not provide proof of payment, however, a review of the Complaints Department file showed that the Sheriff's account had been satisfied on March 18, 1991. A copy of the documents provided by the Solicitor are attached as Exhibit "K" to this Agreed Statement of Facts.

21st April, 1994

33. By registered mail dated January 5, 1993, the Law Society forwarded to the Solicitor copies of its June 4, 1991, June 18, 1991, July 26, 1991, August 22, 1991, September 19, 1991, January 17, 1992, February 6, 1992 and March 20, 1992 letter as well as, a copy of his undertaking dated December 20, 1991. The Solicitor was advised that the Society was satisfied that the Jevtik and Sheriff office accounts had been satisfied. The Solicitor was advised that should he fail to respond to item (c) of its January 17, 1992 letter and comply with his December 20, 1991 undertaking, by January 13, 1993, a formal complaint would be issued against him. A copy of the Law Society's January 5, 1993 letter is attached as Exhibit "L" to this Agreed Statement of Facts. No reply was received.

34. Complaint D41/93 was issued against the Solicitor on February 1, 1993.

V. DISCIPLINE HISTORY

35. On November 13, 1990, the Solicitor was reprimanded in Committee for failing to file his Forms 2/3 for the fiscal years ending January 31, 1990.

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

RECOMMENDATION AS TO PENALTY

The Committee recommends that Norman Gerald Matusiak be reprimanded in Convocation and that he pay the sum of \$750.00 toward the costs of the Law Society.

REASONS FOR RECOMMENDATION

1. The Solicitor is a former Crown attorney, aged 59, who since 1988 has been trying to adjust to and enter into private practise. He has found the transition from his former position, which he held for 24 years, to his current practise, to be difficult. He has realized in the process that he is not a good bookkeeper and that he requires the services of an accountant.

2. However, the Solicitor has provided no adequate excuse for his complete failure to respond to the Society in this situation. He failed to take advantage of the fact that the charge against him was brought forward as a conditional authorization which would have allowed him to provide the required information without having a formal complaint issued against him. He admitted that there was no impediment to his bringing the information to the Society but that he had just "let it slide" knowing it would cost him some money, to pay his accountant. He seems not to have realized from his previous discipline matter, which was also recent in time, that the Society takes the matter of books and records very seriously and it expects members to do so as well.

3. The Solicitor indicated he was sincerely sorry and, he appeared genuinely emotionally upset concerning the proceedings. Unfortunately his remorse did not facilitate his answers to the Society and the final outstanding matter was attended to only hours before the hearing.

4. While the Committee considered the Solicitor's request for a reprimand in Committee, it was determined that the complete failure to respond in a timely fashion coupled with his breach of an undertaking to the Society and his prior discipline record required a more serious penalty. The previous messages the Society delivered, including trying to give the Solicitor every opportunity to comply in this case, went unheeded.

21st April, 1994

5. The Solicitor had some personal problems and extraordinary expenses but there was no reason for his failure to comply with the Society's requirements. If not for the Solicitor's strong public service record and his apparent contrition the Committee might well have recommended a more serious penalty, at least in the area of costs. Given the circumstances, including his poor finances, the Committee recommends the Solicitor be reprimanded in Convocation and pay \$750.00 toward the Society's costs, being the amount sought by the Society.

Norman Gerald Matusiak 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 17th day of March, 1994

E. Susan Elliott,
Chair

It was moved by Mr. Manes, seconded by Mr. McKinnon that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. McKinnon that the Recommendation as to Penalty, that is, that the solicitor be reprimanded and pay costs of \$750, be adopted.

Both counsel made submissions in support of the recommended penalty. Mr. Crane requested that the solicitor be given 30 days to pay the costs of \$750.

The Recommendation as to Penalty was adopted.

The solicitor was reprimanded.

Counsel and solicitor retired.

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Re: ROGER EDGAR BELLEFEUILLE, Alexandria

Mr. Strosberg placed the matter before Convocation but did not participate.

Ms. O'Connor and Messrs. Thom and Feinstein withdrew for this matter.

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

The solicitor requested an adjournment to the May Convocation in order to complete his filings and made submissions respecting the adjournment.

Counsel for the Society opposed the request for an adjournment.

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

21st April, 1994

It was moved by Mr. Manes, seconded by Ms. Lax that the request for an adjournment be denied.

Carried

Counsel, the solicitor, the reporter and the public were recalled and advised that the matter would proceed.

Convocation had before it the Report of the Discipline Committee dated 17th March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 21st March, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

E. Susan Elliott, Chair
Shirley O'Connor
Stuart Thom, Q.C.

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

Stephen Foster
for the Society

ROGER EDGAR BELLEFEUILLE
of the Town
of Alexandria
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 1, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 21, 1993, Complaint D254/93 was issued against Roger Bellefeuille alleging that he was guilty of professional misconduct.

The matter was heard in public on February 1, 1994 before this Committee composed of E. Susan Elliott, Chair, Shirley O'Connor and Stuart Thom, Q.C. The Solicitor was in attendance at the hearing and represented himself. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D254/93

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

Evidence

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

"AGREED STATEMENT OF FACTS

1. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D254/93 and is prepared to proceed with a hearing of this matter on February 1 and 2, 1994.

11. 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.

111. ADMISSIONS

3. The Solicitor has reviewed Complaint D254/93 and admits the particular contained therein. The solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 19, 1978. He was suspended by an Order of Convocation on September 23, 1993 for a period of three months.
5. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 31, 1992, as required by S.16(2) of Regulation 708 under The Law Society Act.
6. A Notice of Default in Annual Filing, dated August 8, 1992 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.
7. By registered letter dated September 11, 1992, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on the filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Society's September 11, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

21st April, 1994

8. The late filing fee began to accrue on October 9, 1992.

9. The Solicitor advised the Law Society by telephone on November 24, 1992 that he had not practised as a sole practitioner since July 1, 1991. He was now general counsel for a real estate syndicate.

10. By letter dated December 1, 1992, the Solicitor confirmed with the Society his telephone conversation of November 24th. The Solicitor requested the Society credit his 1991 membership fees to the amount owed for the current year. A copy of the Solicitor's December 1, 1992 letter is attached as Exhibit "C" to this Agreed Statement of Facts.

11. By registered letter dated January 19, 1993, the Law Society advised the Solicitor that his name would go before Convocation on February 26, 1993 for suspension of his rights and privileges would his late filing fee remain unpaid as of 5:00 p.m. on February 25, 1993. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's January 19, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

12. By letter dated February 25, 1993, the Solicitor advised the Law Society that he had been advised that his Forms for the 1992 year end would be available in the French Language. As the Solicitor had not, to date, received the Forms in the French language, he advised that he was not willing to pay the late filing fee of \$1,500. The Solicitor requested the Society contact him. A copy of the Solicitor's February 25, 1993 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

13. By letter dated March 1, 1993, the Law Society advised the Solicitor that his rights and privileges as a member had been suspended by Convocation on February 26, 1993 as a result of his failure to pay his late filing fee. A copy of the Society's March 1, 1993 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

14. By letter dated March 10, 1993, the Law Society advised the Solicitor that Forms 2 and 3 would be available in the French language to members who indicated the preference for French language documents. The Society forwarded to the Solicitor a copy of his 1990-91 Fees Notice in which he did not complete the appropriate section to obtain his documents in the French language. The solicitor was advised to contact the Society's Manager of Records to be advised of the society's procedure to amend his records. A copy of the Society's March 10, 1993 letter is attached as Exhibit "G" to this Agreed Statement of Facts. As of this date, the Solicitor has not contacted the Society's Manager of Records to request that documentation from the Society by in the French language.

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

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

V. DISCIPLINE HISTORY

13. On June 8, 1980 the Solicitor was reprimanded in Committee and order to pay \$565 in costs in connection with a Complaint that he made a false affidavit of legal age and signed the jurat of that document.

21st April, 1994

15. On May 18, 1993, the Solicitor was found guilty of professional misconduct regarding a Complaint that he failed to produce all books and records for an audit examination, he failed to maintain proper books and records, he practised law while under suspension and he borrowed funds from two clients. On September 23, 1993, Convocation ordered that the Solicitor be suspended from the practice of law for three months and that he pay the Society costs's of \$1,000 within thirty days following Convocation.

DATED at Toronto this 1st day of February, 1994."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Roger Edgar Bellefeuille be reprimanded in Convocation and pay costs in the amount of \$500.00 if the required filings have been made, failing which the Solicitor is to be suspended for a period of 30 days definite and indefinitely thereafter until filings are done.

REASONS FOR RECOMMENDATION

1. At the time of hearing this matter, the Solicitor still had not filed his Form 2 or Form 3 for the period ending January 31st, 1992, as required by s.16(2) of Regulation 700 under *The Law Society Act*. Apart from being professional misconduct in and of itself this was also a breach of his written undertaking to the Society dated May 18, 1993, entered as Exhibit 3, in which he undertook to bring his books and records up to date by July 31, 1993.
2. The Society sought a penalty of a reprimand in Convocation plus payment of costs of \$500.00 or, a suspension of 30 days definite and indefinitely thereafter until the filings were made, plus costs of \$500.00.
3. The Solicitor sought a reprimand in Committee and agreed to the costs of \$500.00.
4. The only explanation the Solicitor initially could offer as to why the filings still had not been made was that he was "very tied-up" since March of 1993 and that he had no excuse for the delay. The Agreed Statement of Facts made reference to the Solicitor's request for forms in the French language but it appears this was not related to the Solicitor's delay in filing the forms and he did not allege at the hearing that there was any connection. The Committee also noted the Solicitor spoke fluent English and appears to have had no prior problems making his annual filings for the fourteen years preceding 1992. However, the fact that the Solicitor, having requested forms in the French language, was told to re-state his request to the Records Department certainly struck the Committee as unduly bureaucratic on the part of the Society.
5. The Solicitor eventually explained that he had not practised privately since July of 1991 and had had no open files since March of 1991. At that time he became involved in a real estate syndication project and began to act as general counsel for it. Things did not go well and in August 1992 the bank repossessed the Solicitor's house. In November he sent his wife and children to Montreal to live. In 1993 the bank sold his house, without the Solicitor's

21st April, 1994

knowledge but he managed to intervene at the last minute, have the sale cancelled and have the real estate syndicate purchase the property. He then became involved in another discipline matter with the Society and also decided to retrieve his family from Montreal as there had been a gun incident at his daughter's school. The Solicitor was also involved in two serious motor vehicle accidents - one in May 1992, the other in January 1993 - and experienced the loss of two members of his family in 1992.

6. The Solicitor advised the Committee he expected to return to private practise in September 1994. Given the filings had still not been made, this gave rise to some concern on the part of the Committee that the Solicitor fully appreciate the necessity of complying with the requirements regarding his books and records.

7. Given his prior discipline history, his failure to comply with the undertaking given in March 1993 and his failure to file the forms as of the date of hearing the Committee felt a reprimand in Committee would not be adequate, even making allowances for the professional and personal problems which had plagued the Solicitor in parts of 1992 and 1993. Accordingly, it is recommended that the Solicitor be reprimanded in Convocation and pay costs in the amount of \$500.00 if the required filings have been made, failing which the Solicitor is to be suspended for a period of 30 days definite and indefinitely thereafter until filings are done.

Roger Edgar Bellefeuille was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 19th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 27th day of March, 1994

E. Susan Elliott,
Chair

It was moved by Mr. Manes, seconded by Mr. Lamont that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Weaver, seconded by Mr. Finkelstein that the Recommendation as to Penalty, that is, that the solicitor be suspended for a period of 30 days definite and indefinitely thereafter until his filings were done and pay the costs of \$500, be adopted.

Mr. Foster made submissions in support of the recommended penalty.

There were no submissions by the solicitor.

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

The Recommendation as to Penalty was adopted.

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

Counsel and solicitor retired.

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21st April, 1994

Re: GABRIELE MONIKA HAUSER, Toronto

Mr. Strosberg placed the matter before Convocation but did not participate.

Mr. Lamont and Ms. O'Connor withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 15th December, 1993, together with an Affidavit of Service sworn 2nd March, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st February, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the DISCIPLINE COMMITTEE is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert C. Topp, Chair
Donald H. L. Lamont, Q.C.
Shirley O'Connor

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: September 28, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 6, 1993, Complaint D97/93 was issued against Gabriele Monika Hauser alleging that she was guilty of professional misconduct.

The matter was heard in public on September 28, 1993, before this Committee composed of Robert C. Topp, Chair, Donald H.L. Lamont, Q.C. and Shirley O'Connor. Ms. Hauser attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D97/93

2. a) She failed to reply to the Law Society regarding a complaint by David P. Yerzy despite letters dated November 13, 1992 and February 22, 1993, and telephone calls on January 15, 1993, February 8, 1993 and February 9, 1993.

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 D97/93 and is prepared to proceed with a hearing of this matter on September 28, 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 this Agreed Statement of Facts and admits the particulars contained therein constitute professional misconduct.

IV. FACTS

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

5. By letter dated October 30, 1992, David P. Yerzy filed a complaint with the Law Society on behalf of his client Mr. Abdi Warsame Mohamud. Mr. Yerzy attached a letter from Mr. Mohamud to the Law Society dated October 26, 1992 by which he authorized Mr. Yerzy to file the complaint. Mr. Mohamud alleged that he retained the Solicitor for an appeal from a negative decision in his refugee case. Mr. Yerzy alleged that the Solicitor mishandled Mr. Mohamud's appeal and failed to respond to Mr. Mohamud's inquiries about the status of his appeal. Mr. Yerzy states that it was only after numerous requests that the Solicitor released Mr. Mohamud's file. Mr. Yerzy alleged that the Solicitor's file did not contain the documents referred to by Mr. Mohamud's counsel at his immigration hearing. A copy of Mr. Yerzy's letter dated October 30, 1992 is attached as Exhibit "A" to this Agreed Statement of Facts.

6. By letter dated November 13, 1992, the Law Society forwarded to the Solicitor a copy of Mr. Yerzy's letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. A copy of the Law Society's November 13, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts. No reply was received.

21st April, 1994

7. A Law Society staff employee spoke with the Solicitor on January 15, 1993, and requested her response to the Society's letter of November 13, 1992. No reply was received.

8. A Law Society staff employee spoke with the Solicitor February 9, 1993, wherein the Solicitor advised that she would attempt to provide her response to the Society by February 10, 1993. No reply was received.

9. By registered mail dated February 22, 1993, the Law Society forwarded to the Solicitor a copy of its November 13, 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. A copy of the Law Society's February 22, 1993 letter is attached as Exhibit "C" to this Agreed Statement of Facts. No reply was received.

V. DISCIPLINE HISTORY

10. On March 2, 1993, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society. The Solicitor was reprimanded in Convocation for this misconduct. In addition, Convocation ordered that she enrol in the Practice Review Program of the Professional Standards and pay the Society's costs of \$1,250

11. On March 19, 1991, the Solicitor was reprimanded in Committee for failure to reply to the Society.

DATED at Toronto this 27th day of 09, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gabriele Monika Hauser be suspended for a period of sixty days.

REASONS FOR RECOMMENDATION

The Law Society Counsel and the Solicitor jointly recommended a penalty involving a reprimand in Convocation and costs. The Committee finds that such a penalty fails to reflect both the gravity of the offence and the discipline record of the Solicitor.

The Solicitor was found guilty of professional misconduct for failure to reply to the Law Society on March 2nd, 1993 and was reprimanded in Convocation for that misconduct. Convocation also ordered that she enrol in the Practice Review Program of the Professional Standards Department and pay the Society's costs of \$1,250.00. In addition, the Solicitor was reprimanded in Committee on March 19th, 1991 for failure to reply to the Society.

During the course of the hearing, it became crystal clear to the members of the Committee that the Solicitor simply could not grasp the nature of the misconduct nor did she appear willing to come to grips with the issue of the necessity to respond to the reasonable request for information from the Law Society.

21st April, 1994

During the hearing, the Solicitor produced a letter addressed to the Law Society which was dated March 16th, 1993 but which had been delivered to the Law Society on September 27th, 1993. No explanation was given for the fact that although the letter was dated March 16th, 1993, it was not delivered to the Law Society until some six and one half months had passed. In fact the letter may have been in answer to the original complaint, although your Committee specifically declines to find that the letter from Ms. Hauser would have been a sufficient response at least it was some response, had it only been sent in a timely fashion.

Your Committee is seriously concerned with the issue of governability and with the serious lack of judgement shown by the Solicitor in her continuous failure to respond to the Law Society in a timely fashion.

The Committee is therefore unable to accept the joint recommendation of a reprimand and costs.

It is the view of the Committee that it is necessary to bring home to this Solicitor and to other solicitors of like mind, that failure to respond to the requests of the Law Society which form a pattern shall be dealt with in an appropriate fashion. The patent necessity of solicitors responding to the Society is fundamental to the self governing status of our profession and the failure of solicitors to respond simply strikes at the heart of our discipline function.

As to costs, your Committee has viewed this request in light of its ultimate determination and has recommended that this is not an appropriate case for costs against the Solicitor. Rather the penalty that is recommended excludes costs on the basis that when last before Convocation on March 2nd, 1993, the Solicitor was both reprimanded and ordered to pay the costs in the sum of \$1,250.00. The effect of that reprimand and the award of costs were in your Committee's view simply non-existent.

Your Committee therefore recommends that the Solicitor be suspended for a period of 60 days.

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 15th day of December, 1993

Robert C. Topp,
Chair

Mr. McKinnon withdrew for this matter.

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Ms. Palmer that the Recommendation as to Penalty, that is, that the solicitor be suspended for a period of 60 days, be adopted.

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

21st April, 1994

The solicitor made submissions of mitigating circumstances.

The solicitor requested that if the Recommendation was adopted that the suspension commence May 1, 1994.

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

It was moved by Mr. Manes, seconded by Ms. Lax that the solicitor be suspended for a period of 30 days commencing May 1, 1994.

Carried

The motion for adoption of the Recommendation as to Penalty was lost.

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

Counsel and solicitor retired.

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Re: ANTHONY ROGER BUTLER, Ottawa

Mr. Strosberg placed the matter before Convocation but did not participate.

Ms. Lax and Mr. Thom withdrew for this matter.

Ms. Janet Brooks appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 21st February, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 7th March, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21 April, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Joan Lax, Chair
Stuart Thom, Q.C.
Netty Graham

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

Janet Brooks
for the Society

ANTHONY MORRIS BUTLER
of the City
of Ottawa
a barrister and solicitor

Not Represented
for the solicitor

Heard: January 18, 1994

21st April, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 21, 1993, Complaint D255/93 was issued against Anthony Morris Butler alleging that he was guilty of professional misconduct.

The matter was heard in public on January 18, 1994 before this Committee composed of Joan Lax, Chair, Stuart Thom and Netty Graham. The Solicitor was in attendance at the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D255/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending September 30, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening section 16(2) of the Regulation made pursuant to the Law Society Act.

Evidence

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

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D255/93 and is prepared to proceed with a hearing of this matter on January 18 and 19, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D255/93 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He practices as a sole practitioner.

21st April, 1994

5. The Solicitor's fiscal year end is September 30th. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending September 30, 1992, as required by S.16(2) of Regulation 573 under The Law Society Act.

6. A Notice of Default in Annual Filing, dated April 5, 1993 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail dated May 8, 1993, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Society's Second Notice is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

8. The late filing fee began to accrue on May 24, 1993.

9. By registered mail dated October 2, 1993, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing. The Solicitor was advised that his name would go before Convocation on October 29, 1993 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on October 28, 1993. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's Third Notice is attached as Exhibit "C" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

10. The Solicitor paid the late filing fee of \$1,500.00 on October 29, 1993.

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

12. To date, the Solicitor has not filed the required forms.

V. DISCIPLINE HISTORY

13. The Solicitor does not have a discipline history.

VI. JOINT SUBMISSION AS TO PENALTY

14. The Solicitor and the Society make the following joint submission as to penalty:

- a. If the Solicitor files his Forms 2 and 3 for the fiscal year ended September 30, 1992, prior to the date that this matter is heard by Convocation, it is submitted that the Solicitor should be reprimanded in Convocation; and

21st April, 1994

- b. If the Solicitor fails to file his Forms 2 and 3 for fiscal year ended September 30, 1992, by the date this matter is heard by Convocation, it is submitted that the rights and privileges of the Solicitor should be suspended for a period of one month from the date that the matter is heard by Convocation, and provided that he has not by the end of that period filed his Forms 2 and 3 for the fiscal year ended September 30, 1992, that the suspension continue until he has done so.

VII. COSTS

15. The Solicitor and the Society agree that the Solicitor pay the costs of the Society in the amount of \$500.00 within thirty days of January 18, 1994.

DATED at Toronto this 17th day of January, 1994."

RECOMMENDATION AS TO PENALTY

The Committee accepted the joint submission on penalty which is as follows:

- a. If the Solicitor files his Forms 2 and 3 for the fiscal year ended September 30, 1992, prior to the date that this matter is heard by Convocation, the Solicitor should be reprimanded in Convocation; and
- b. If the Solicitor fails to file his Forms 2 and 3 for fiscal year ended September 30, 1992, by the date this matter is heard by Convocation, the rights and privileges of the Solicitor should be suspended for a period of one month from the date that the matter is heard by Convocation, and provided that he has not by the end of that period filed his Forms 2 and 3 for fiscal year ended September 30, 1992, the suspension continue until he has done so.
- c. The Solicitor pay costs of the Society in the amount of \$500.00 by February 18, 1994.

REASONS FOR RECOMMENDATION

Notwithstanding repeated requests to the Solicitor and demands that he make his annual filing for the year 1992, the Solicitor has failed to do so. The particulars of these requests are all as set out in the Agreed Statement of Facts which was filed at the hearing as Exhibit 2.

The Solicitor admits the particulars of the misconduct in the Agreed Statement of Fact and accordingly there was a finding of professional misconduct.

The Committee has accepted the joint submission as to penalty and recommends that Convocation adopt this as the appropriate penalty in this case.

21st April, 1994

Anthony Morris Butler was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 21st day of February, 1994

Joan Lax,
Chair

It was moved by Mr. Somerville, seconded by Mr. Feinstein that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Manes, seconded by Mr. McKinnon that the Recommendation as to Penalty, that is, that the solicitor be reprimanded and pay costs of \$500, be adopted.

Ms. Brooks made submissions in support of the recommended penalty and advised that the solicitor had already paid the costs.

The solicitor made no submissions.

The Recommendation as to Penalty was adopted.

The solicitor was reprimanded.

Counsel and solicitor retired.

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Confirmed in Convocation this day of , 1994.

Treasurer