

24th April, 1997

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 24th April, 1997
9:00 a.m.

PRESENT:

The Treasurer (E. Susan Elliott), Arnup, Backhouse, Banack, Bobesich, Carey, Crowe, DelZotto, MacKenzie, Marrocco, Murray, Ortved, Puccini, Sachs, Sealy, Stomp, Swaye, Thom, Wilson and Wright.

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IN PUBLIC

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The reporter was sworn.

DISCIPLINE COMMITTEE

Ms. Lesley Cameron, Senior Counsel - Discipline introduced Mr. John Rook, Q.C. who acted as Duty Counsel.

Re: Martin King Ian RUMACK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Carey, DelZotto and MacKenzie withdrew for this matter.

Ms. Janet Brooks appeared on behalf of the Law Society and Mr. Brian Greenspan appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 13th November, 1996, together with an Affidavit of Service sworn 20th November, 1997 by Louis Katholos that he had effected service on the solicitor by registered mail on 15th November, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 24th April, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas J. P. Carey, Chair
Nora Angeles
Elvio L. DelZotto, Q.C.

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

Janet Brooks
for the Society

24th April, 1997

MARTIN KING IAN RUMACK
of the City
of Toronto
a barrister and solicitor

Brian Greenspan
for the solicitor

Heard: June 24, July 10 and
July 23, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 18, 1994 Complaint D293/94 was issued against Martin King Ian Rumack alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced with Complaint D293a/94 issued on April 11, 1996.

The matter was heard in public on June 24, July 10 and July 23, 1996 before this Committee composed of Thomas J.P. Carey, Chair, Nora Angeles and Elvio L. Delzotto, Q.C. The Solicitor attended the hearing and was represented by Brian Greenspan. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D293a/94

- 2.a) He acted in a conflict of interest by acting for the borrower(s) and lenders, in a number of real estate transactions regarding properties described municipally as:
- i) 1512 Upper Gage Avenue, Hamilton
 - ii) 113 Woodbridge Avenue, Woodbridge
 - iii) 360 Guelph St, Halton Hills
 - iv) 111 - 117 Berkeley Street, Toronto

He placed himself in a situation of further conflict by acting in the role of a broker in respect of the transactions regarding the aforementioned properties (i) through (iv). He also placed himself in a conflict by acting in the role of broker in respect of the following transaction in which he also acted for the lenders:

- i) 951 - 971 Gladstone Avenue, Ottawa
- ii) 945 - 949 Wellington St. , Ottawa
- iii) 844 Division Street, Cobourg

- c) He breached the provisions of Rule 23(2)(b) of the Rules of Professional Conduct in regard to the Division Street, Berkeley Street, and Wellington Street properties.
- d) during term of various of the mortgages the Solicitor failed to reveal relevant information about the status of the mortgages, including the fact that he was personally making mortgage payments and the fact that various power of sale proceedings had been instituted, to his lender clients in regard to the Gladstone Avenue, Woodbridge Avenue, and Guelph Street properties;

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- e) in the circumstances of part d) above, he further violated the provisions of Rule 5 of the Rules of Professional Conduct by continuing to be involved in the transactions regarding Woodbridge Avenue, Gladstone Avenue and Guelph Street, when the mortgage payments he received began to be returned NSF and power of sale proceedings were commenced.

Finding on disputed particulars:

In terms of the allegations contained in particular 2(b) of the complaint, the Committee is not convinced that the Solicitor preferred the interests of his borrower clients and, to some extent, his own interests, to those of his other clients.

With respect to particular 2(c), we find that although the securities on these properties may have been more than mortgages, that the properties involved all did have syndicated mortgages involved and, for that reason, Rule 23(2) (b) was breached.

With respect to particular 2(f), we do not find that the facts here support a finding that the solicitor executed postponements of a second mortgage without authorization.

EVIDENCE

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

"STATEMENT OF UNDISPUTED FACTS"

I. JURISDICTION AND SERVICE

- 1. The Solicitor admits service of Complaint D293a/94 and is prepared to proceed with a hearing of this matter.

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 D293a/94, as amended, and this Statement of Undisputed Facts (hereinafter "Statement of Facts") with his counsel, Brian H. Greenspan. The Solicitor admits the following for the purpose of this discipline proceeding:

- 2(a) He admits particular 2(a) and further admits this particular supported by the facts herein constitutes professional misconduct.
- 2(c) He admits that he breached the provisions of Rule 23(2)(b) of the *Rules of Professional Conduct* in respect of the Berkeley Street property and further that this particular supported by the facts herein constitutes professional misconduct.
- 2(d) He admits particular 2(d) and further that this particular supported by the facts herein constitutes professional misconduct.
- 2(e) He admits particular 2(e) and further that this particular supported by the facts herein constitutes professional misconduct.

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The parties will make submissions as to whether the other particulars of misconduct are established and constitute professional misconduct .

4. For the purpose of this discipline proceeding, where this statement of facts specifies that the Solicitor admits or agrees to certain facts, the Solicitor so admits or agrees as the case may be. With respect to all other facts herein, the Solicitor does not dispute those facts and shall tender no evidence in this proceeding to contradict those facts. The Solicitor acknowledges that, in these circumstances, the Discipline Committee and Convocation shall receive those undisputed facts as evidence in this matter in determining the issues of professional misconduct and penalty.

IV. FACTS

Background

5. The Solicitor is 50 years of age. He was called to the Bar on March 23, 1973 and practises as a sole practitioner in Toronto. He does not have a discipline history.

6. The herein Complaint relates to seven properties located throughout Ontario. The financial analysis of the investments in these properties indicates the following losses to investors:

Property	Loss on Original Investment *	Additional Arrears Paid for and Lost by Investors
951-971 Gladstone Avenue, Ottawa	\$800,000.00	\$53,000.00
1512 Upper Gage Avenue, Hamilton	150,000.00	
945-949 Wellington Street, Ottawa	600,000.00	
113 Woodbridge Avenue, Woodbridge	850,000.00	
844 Division Street, Cobourg	600,000.00	
360 Guelph Street, Halton Hills	260,000.00	
111-117 Berkeley Street, Toronto	940,000.00	
<u>Total</u>	<u>\$4,200,000.00</u>	<u>\$53,000.00</u>

* Loss on Original Investment: These losses represent the entire amount of the investment.

7. A number of the clients whose investment is set out above have made claims against the Law Society's Lawyers' Professional Indemnity Company. Of clients' claims totalling \$2.47 million, a total of \$890,000 remain outstanding.

8. At times previous to and relevant to the matters which form the basis of this Complaint, the Solicitor acted in the dual capacity of solicitor and mortgage broker. The Solicitor was registered as a mortgage broker in 1987. In regard to most of the properties for which the Solicitor acted in the capacity of a mortgage broker, the financing of the properties was for the purpose of development or re-development. It would be the Solicitor's evidence, which the Society accepts, that the Solicitor has been performing services as a mortgage broker for many years and that the mortgages had performed well. As a result, many of the investors detailed below had previously invested in successful mortgages through the Solicitor.

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9. The Solicitor followed a general format in arranging investor clients' involvement in syndicated investments as is set out below.

10. The Solicitor would generally speak to the investors over the telephone and, in conversations of 5 to 10 minutes, provided them with general information regarding the proposed investment including the total value of the syndication in which they were investing and the amount of the investment he was seeking from them as well as the term, interest rate, priority of mortgage, the value of the security, and type of property. The Solicitor would then forward to the investors for review and execution a document entitled "Investment Authority for Mortgages or Other Charges on Real Property Held In Trust". The document reflected information regarding the potential investment which included:

- the name and address of the borrower;
- the legal description and municipal address of the property;
- the principal amount of the mortgage and the amount to be advanced;
- the mortgage ranking and details of any prior mortgages;
- the investor's participation in the mortgage and, if applicable, the equity participation;
- the term and interest rate of the loan;
- the payment schedule;
- details of legal and brokerage fees payable to Rumack on the transaction;
- an estimated value of the security;
- provisions regarding immediate payment;
- that the mortgage is being held in the name of Martin Rumack, In Trust, and details of the collection fee;
- the Solicitor's interest in the mortgage, if any; and
- the name(s) of the guarantor(s).

11. Once the client had made the decision to invest in a particular property, the Solicitor executed a Declaration of Trust on behalf of the investor, the Declaration was usually in the following form:

MARTIN RUMACK hereby declares that a second mortgage is registered in the name of MARTIN RUMACK, IN TRUST, on the property known as (municipal address).

The 100% interest in the said second mortgage is held by MARTIN RUMACK, IN TRUST, as nominee and trustee of (INVESTOR), as to a (investors' percentage) interest, of the said 100% interest.

...

(INVESTOR) constitutes and appoints MARTIN RUMACK her true and lawful attorney for herself and in her name, place and stead and for her sole use and benefit to sell, convey, transfer, mortgage, hypothecate and borrow money in connection with the said (investor's percentage) interest of the 100% ownership of the aforesaid second mortgage on the hereinbefore described lands and premises which are held by MARTIN RUMACK, IN TRUST, for the said (INVESTOR).

IN WITNESS WHEREOF MARTIN RUMACK has hereunto set his hand and seal at the City of Toronto, in the Municipality of Metropolitan Toronto, this (DATE)

(signed by MARTIN RUMACK)

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12. Following the closing of each transaction, the Solicitor prepared a reporting letter addressed to Martin Rumack, In Trust. A copy of the reporting letter was sent to each investor in the transaction and confirmed that the mortgage was registered as well as its terms. A copy of the Declaration of Trust as well as some portions of the appraisals for the property were generally sent to the investors with the reporting letters, as well as registered mortgages and financing statements. In several instances some of the documents expressly referred to had not been enclosed. Monthly mortgage payments were made to each investor by the Solicitor from monies received by him from the borrowers or occasionally by the Solicitor in anticipation of payment from the borrowers.

13. In general, the Solicitor received fees in regard to these transactions as set out below:

FEE TYPE	DESCRIPTION
1. Non-refundable processing fee (which was only paid if investment did not close)	As the name suggested, this fee was payable by the borrower to the Solicitor whether or not the transaction closed. If the deal closed, as in all of the transactions herein, this fee was applied against the arranging/brokerage fee. This fee was disclosed to the borrower in the letter of commitment. This fee was not disclosed to the investor.
2. Arranging or Brokerage Fee	This fee was payable by the borrower only if the deal closed. This fee was expressed to the borrower in the letter of commitment and to the investor in the Investment Authority.
3. Legal Fees	The fees quoted in the commitment letter and Investment Authority were legal fees not including disbursements paid by the borrower.

In the seven properties which are the subject of this Complaint, the Solicitor received legal and arranging fees as is set out in a chart attached as Exhibit 1 to this statement of facts of \$204,062, being \$150,376 in legal and arranging fees related to the mortgage/investment transactions and \$53,686 relating to the purchase of the Woodbridge property. The Solicitor personally invested \$238,000 in three properties, all of which he lost, namely, \$100,000 in the Wellington Street mortgage; \$75,000 in the Division Street mortgage; and \$63,000 in the Berkeley Street mortgage.

951-971 Gladstone Avenue, Ottawa - Mortgage Amount - \$800,000.00

14. The property known municipally as 951-971 Gladstone Avenue, Ottawa ("Gladstone") is a commercial/industrial property and self serve gas bar.

15. On January 2, 1987, Erawan House (International) Limited transferred Gladstone to Sadana Corporation Ltd. The consideration noted on the transfer was \$1,850,000. Erawan took back a first mortgage in the amount of \$1,550,000. Royal Trust held a second mortgage of \$300,000. The directors of Sadana were three members of the Chavali family. The Solicitor did not act on the purchase.

16. On April 26, 1989, D.G. Armstrong & Associates, an Ottawa appraiser, prepared an appraisal respecting the property for the Chavalis. The appraisal valued the property at \$3,000,000. The appraisal stated, *inter alia*, that the buildings were in "good condition" and all available space was rented. A copy of the appraisal is attached as Exhibit 2 to this statement of facts.

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17. On May 29, 1989, the Solicitor provided Sadana with a letter of commitment with respect to a loan in the amount of \$800,000. The letter of commitment included the following terms:

- a. The borrower was Sadana Corporation Ltd. and the loan was to be guaranteed by Vahini Holdings Ltd. and personally guaranteed by Rajagopal Chavali and Krishna Chavali. (The directors of Vahini Holdings Ltd. were Reddy Rajagopal Chavali, Reddy Krishnaveni Chavali and Reddy Vendata Subbaram Chavali);
- b. the mortgage was to be a second mortgage on Gladstone. The interest rate was 18% per annum;
- c. Repayment was to be interest only monthly. Twelve post-dated cheques were to be submitted at the commencement of the loan;
- d. a General Assignment of Rents and Leases was to be obtained;
- e. the legal fees were in the amount of 1% (i.e. \$8,000) plus disbursements. In addition, an arranging fee of 3% (i.e. \$24,000) was payable to the Solicitor. If the deal did not close, a non-refundable processing fee in the amount of \$10,000, was payable by the borrower. [Ultimately, this was not payable since the transaction closed].
- f. With respect to taxes, the commitment provided that the lender was directed to discharge at its sole option, out of the proceeds of the advance under the loan, all liens, utilities and taxes. The commitment also provided that "all taxes due and payable and all special assessments outstanding, relating to the property to be mortgaged shall be paid in full by the Borrower prior to the advance being made pursuant to this mortgage".

A copy of the letter of commitment is attached as Exhibit 3 to this statement of facts. The Chavalis' provided a certified rent roll in which they stated they were collecting rents of \$23,240.00 monthly. The Solicitor did not make any inquiries regarding when the leases were coming due and if he did he did not convey this information to the potential investors. The Solicitor would testify that he understood that at the time of the commitment, there were negligible commercial vacancies in Ottawa. In fact, some of the leases came due during the term of the mortgage and were not renewed.

18. By letter dated June 5, 1989, the Solicitor provided each investor with an Investment Authority, a sample of which is attached as Exhibit 4 to this statement of facts. A list of the investors and their monetary share of the syndicated mortgage is attached as Exhibit 5 to this statement of facts.

19. Because the property was in Ottawa, the Solicitor retained the law firm of Goldberg, Shinder, Gardiner, Kronick to act in respect of the mortgage.

20. Prior to the advance of mortgage funds, inquiries of the municipality and utilities revealed that the following amounts were in arrears or were outstanding:

- Taxes (arrears as at June 21/89)	\$37,521.68
- Taxes (due June 30/89 & August 31/89)	21,162.00
- Gas (approx. One year)	21,922.56
- Water	<u>3,318.59</u>
	<u>\$83,924.83</u>

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21. On June 15, 1989, Wildwood Capital Inc. (one of the mortgage brokers in this transaction) delivered a letter to the Chavalis advising them that a number of items were not disclosed to Wildwood in the initial discussions respecting the mortgage arrangements. A copy of the letter is attached as Exhibit 6 to this statement of facts. The letter stated that the Solicitor had instructed Wildwood to require the following:

- a. the taxes were to be paid to the end of 1989;
- b. the borrower would deposit an amount equal to one year of interest into an interest bearing account in order that Chavali would not have to make monthly payments on the mortgage.

22. The Solicitor did not advise the prospective investors of the arrears or the balance of taxes outstanding set out in paragraph 20 prior to the advance and has advised the Law Society that his reason for doing so was that he did not feel that such information was relevant. The Solicitor now acknowledges that the existence of such arrears or balances outstanding would be or might reasonably have been seen to be relevant to some or all of the potential investors.

23. On June 16, 1989, the Solicitor executed a Declaration of Trust on behalf of each investor.

24. On June 21, 1989, the Solicitor delivered a letter to the solicitors for Sadana confirming the transfer of the sum of \$695,000 to his Ottawa agents. The Solicitor also confirmed that the mortgage proceeds were to be used to pay the arrears and balance of taxes outstanding on the property. A letter of the same date with same information was delivered to the Solicitor's Ottawa agent in order to close the transaction. Copies of the letters are attached as Exhibit 7 to this statement of facts.

25. The arrears on the property were paid from the mortgage advance which was reduced accordingly. The Solicitor held back three months of mortgage payments and paid the balance to the mortgagors. In total, \$99,262.43 of the mortgage proceeds was used to clear up tax, gas and water arrears, the balance outstanding in taxes as well as insurance on the property.

26. The mortgage as well as the general assignment of rents were registered on June 22, 1989.

27. The first mortgage cheque dated July 16, 1989 was returned marked "insufficient funds". The Solicitor replaced the cheque on July 24, 1989 from the three months interest held in trust but did not advise the investors that the first payment had been returned.

28. By letter dated July 25, 1989, Wildwood delivered a letter to Sadana regarding the NSF payment. A copy of the letter is attached as Exhibit 8 to this statement of facts.

29. On August 4, 1989, Erawan issued a Statement of Claim against Sadana, Royal Trust and Rumack, In Trust, claiming foreclosure and possession. The Solicitor was served. The investors were not advised by the Solicitor.

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30. On August 9, 1989, the Solicitor issued a Notice of Sale Under Mortgage claiming the amount due for the July 16, 1989 payment. The Solicitor did not advise the investors that he had issued this Notice of Sale, although on the same day the Solicitor delivered a reporting letter to all of the investors, a copy of a sample of which is attached as Exhibit 9 to this statement of facts. The Solicitor did not enclose a copy of the appraisal in the report nor did he advise the investors that the very first mortgage payment had been returned NSF. The first indication the investors had from the Solicitor that there were any problems with this mortgage came at the time of the renewal, as described below, when by letter dated June 13, 1990 the Solicitor did report problems with the loan "from time to time".

31. The August 16, 1989 mortgage payment was returned NSF and the Solicitor replaced it on August 22, 1989 from the 3 month hold back. The Solicitor did not advise the investors of this fact.

32. The Solicitor personally made payments on the first mortgage for the months of September, October and November, 1989. He did not advise the investors of this fact. The Solicitor was eventually reimbursed by Sadana for all of the payments made.

33. On August 21, 1989, the Solicitor requested an updated appraisal from D.J. Armstrong & Associates. In a letter dated August 23, 1989, a copy of which is attached as Exhibit 10 to this statement of facts, the Solicitor confirmed a telephone conversation with Mr. Reddy Chavali in which the two discussed the issue of the NSF cheques and the consequences that would flow as a result thereof.

34. A course of correspondence followed between the Solicitor and Burke-Robertson, counsel for Sadana. Copies of these letters are attached collectively as Exhibit 11 to this statement of facts. In essence, Burke-Robertson complained about the Solicitor's withholding of three months interest from the mortgage proceeds. In the Solicitor's reply of September 6, 1989 he stated that Sadana was well aware of the requirement to withhold due to the substantial arrears at the outset of the transaction, and the fact that the transaction could only have proceeded on the basis of withholding of interest payments.

35. On September 5, 1989, the Solicitor entered into a property management agreement with Erawan which required the collection of rents and their deposit into a trust account. The Solicitor did not advise the investors he had taken control of the property in this manner. The Solicitor's explanation is that he believed that the collection responsibilities were his and that the investors would not be interested in knowing about such matters; although he had no communication either orally or in writing with them with respect to the delegation of such issues.

36. On September 7, 1989, the Solicitor delivered a Notice of Sale Under Mortgage for the August 16 payment. The Solicitor did not advise the investors of this fact. Again, the Solicitor's explanation is that he believed that the investors had delegated such collection issues to him; although he had no communication either orally or in writing with them with respect to the delegation of such issues.

37. On September 7, 1989, D.J. Armstrong & Associates, the firm which had prepared the appraisal referred to in paragraph 16 herein, delivered a further appraisal with respect to the property, a copy of which is attached as Exhibit 12 to this statement of facts. The appraisal noted the property to be only in "average condition" and the premises 75 percent rented. The appraisal arrived at the same value of \$3,000,000.

38. As a result of the pending power of sale proceedings, for which a second appraisal was prudent, the Solicitor contacted Higgs Peppiatt Cameron Cyr & Wilson Ltd., another Ottawa appraiser, who on October 4, 1989, delivered an appraisal to the Solicitor, at his request, valuing the property at \$1,500,000. This appraisal, Exhibit 13 to this statement of facts, found the buildings to be in fair to poor condition. The Solicitor did not advise the investors of the appraisal at this or any other time. By letter dated November 1, 1989, the Solicitor wrote to D.J. Armstrong & Associates requesting an explanation for the variance in the appraisals. D.J. Armstrong & Associates reported by letter dated November 9, 1989. Copies of the correspondence are attached at Exhibit 14 of this statement of facts.

39. Due to the discrepancies in the two appraisals, the Solicitor sought a third. On October 30, 1989, Pigeon-Roy delivered an appraisal to Erawan House, valuing the property at \$1,750,000. The Solicitor did not advise the investors of this appraisal.

40. On October 10, 1989, the Solicitor delivered a further Notice of Sale Under the Mortgage for the entire outstanding amount. The Solicitor did not advise the investors of this. A copy of the Notice is attached as Exhibit 15 to this statement of facts.

41. By the end of November 1989, Sadana brought the mortgage current and the Solicitor advised Burke-Robertson that the Solicitor's clients would not be renewing the mortgage upon maturity.

42. The Solicitor continued to have problems with the collection of a number of subsequent mortgage payments.

43. By letter dated March 23, 1990, a copy of which is attached as Exhibit 16 to this statement of facts, the Solicitor confirmed the state of the mortgage and further confirmed that even if the mortgage was brought into good standing it would not be renewed at its maturity on June 16, 1990.

44. By letter dated May 23, 1990, National Capital Management delivered a letter to the Chavalis advising that it would not continue to perform its obligations under the management agreement. A copy of this letter, which is attached as Exhibit 17 to this statement of facts, was provided to the Solicitor at or about this date. The Solicitor did not advise the investors of this development.

45. On June 13, 1990 the Solicitor delivered a letter to the investors advising of the maturity of the mortgage. The Solicitor did reveal that he had problems "from time to time" with the mortgagor and he did not recommend renewal. The Solicitor did not provide the particulars of any of the numerous problems that he had encountered including the fact that he had personally made several of the mortgage payments and the fact that two lower appraisals had been obtained which appraised the property at approximately one half of what it was initially appraised to be worth. The Solicitor advised the insurance policy on the property was expiring and recommended that the investors forward a cheque for their proportionate share. A copy of the letter is attached as Exhibit 18 to this statement of facts.

46. By a further letter dated June 29, 1990 the Solicitor advised the investors that the May 16 payment had been returned NSF and stated that the investors might have to cover the first mortgage payments to keep it in good standing.

47. The Solicitor did not advise the investors to seek independent legal advice with respect to their rights regarding the property and the courses of action open to them.

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48. On July 6, 1990, the Solicitor advised the investors that he had issued a Statement of Claim for payment. On August 13, 1990, the Solicitor advised the investors that he had seized the August 1, 1990 rents. The Solicitor also advised of arrears with respect to gas, hydro, water and taxes. The Solicitor requested funds from the investors to pay these arrears. A copy of the Solicitor's August 13, 1990 letter is attached as Exhibit 19 to this statement of facts. In response to this request by the Solicitor, investors provided him with approximately \$53,000.

49. In October, 1990, a conditional offer of purchase was received from the municipality for \$2,100,000. The offer apparently failed because a portion of the property had previously been used as a gas bar and as a result there were environmental concerns. A copy of the offer is attached as Exhibit 20.

50. By letter dated November 8, 1991, the Solicitor delivered a letter to D.G. Armstrong & Associates advising that the appraisals they had prepared were excessive. The Solicitor opined that Armstrong was negligent in preparing the appraisal and that he intended to look for damages. The Solicitor did not advise the investors of his concerns about the appraisal. A copy of the Solicitor's November 8, 1991 letter is attached as Exhibit 21 to this statement of facts. The Solicitor would testify that an action was commenced on behalf of the investors against D.J. Armstrong at his expense and that the action is at the pleading stage. He also obtained judgments against the borrower and guarantor against which there has been no recovery.

Stella Stern

51. Three of the 22 clients of the Solicitor who invested in the Gladstone project were Stella Stern who invested \$20,000, Lily Lash who invested \$15,000, and Ruth Kelman who invested \$50,000. As well, the Solicitor's father-in-law invested \$40,000, mother-in-law invested \$15,000, parents invested \$50,000, and two cousins invested a total of \$80,000. In regard to Mrs. Stern, the Solicitor acknowledges that she relied on the Solicitor regarding his recommendations for investments in these properties as well as the opinion of her brother, Willi Karpel, a businessman, who invested \$50,000 in this property on the advice of the Solicitor. Mrs. Stern's evidence would be that on each occasion when she and the Solicitor discussed the type of risks posed by her various investments, he assured her that it was "safe". Mrs. Stern would also testify that if the Solicitor had advised her of the utilities and tax arrears on the property at the time of the advance she would have been concerned about investing in such property.

Mrs. Kelman

52. Mrs. Kelman became acquainted with the Solicitor through his father who was her family's accountant and had known him since childhood as the Rumack family were members of the synagogue where her husband was the rabbi. At the outset of their relationship, she expressed her desire to invest in safe investments. On a number of occasions, in order to establish the risk associated with the loan, Mrs. Kelman asked the Solicitor "would you put your family into it?".

53. Mrs. Kelman would have been concerned had the Solicitor revealed that he was withholding a portion of the mortgage proceeds which, to her, indicated concern about the borrower's financial viability, the arrears of taxes and utilities and balance of taxes outstanding and the fact that the Solicitor was also earning substantial fees from the borrowers. She also would have been interested to know the purchase price of the property. Mrs. Kelman would have declined to participate in this loan investment had this information been provided to her. Had she been advised of the problems with the investment as they arose, she would not have invested further monies in other investments with the Solicitor, knowing that her monies in the Gladstone property were at risk.

Other investors

53a. Lily Lash, Willi Karpel and Helene Hucaluk were also investors in the Gladstone property. They too would testify that they would have declined to participate in the investment had they been advised of the tax arrears and that they would have expected to have been advised of problems with the investment as they arose.

945-949 Wellington Street, Ottawa - Investment Amount \$600,000.00

54. On March 31, 1989, the first parcel, namely, 945 Wellington Street, was conveyed from 729173 Ontario Inc. to Wellington Business Centre Inc. (Wellington) for \$165,000. The Solicitor did not act on the purchase.

55. On April 7, 1989, a commitment letter from Vanguard Trust was delivered to Wellington advising that Vanguard Trust, as lender, had approved Wellington's application for a loan in an amount not exceeding \$1,100,000. The loan was to be used to construct an 8,200 square foot rentable area. The term was one year from the date of the first advance. A land advance in the amount of \$200,000 was permitted with the sum of \$900,000 being allocated as a construction loan. The mortgage was registered on April 21, 1989 and guaranteed by the principals of Wellington, Glenn Lucas and Gary Simpson. A copy of the commitment letter is attached as Exhibit 22.

56. On April 17, 1989, Wellington Business Centre took title to the second parcel, 949 Wellington Street. The purchase price was \$200,000. The Solicitor did not act on the purchase.

57. On November 1, 1989, a letter of intent was delivered from the Solicitor to Wellington. The Solicitor confirmed the commitment for a \$600,000 investment subject to the following terms:

- a. interest at the rate of 9%;
- b. 75% equity ownership;
- c. upon the garage area being enclosed, the first mortgagee would advance a further \$400,000, of which there would be approximately \$290,000 available to pay down the monies advanced by Rumack's investors;
- d. the corporation agreed to re-purchase the equity interest after three years according to a rather complicated formula; and
- e. the advance was to be secured by a second mortgage in the amount of \$600,000 for a term of three years. Rumack confirmed that the mortgage would be postponed to advances in favour of Vanguard Trust in the amount of \$1,100,000.

A copy of the letter of intent is attached as Exhibit 23 to this statement of facts.

58. On November 7, 1989, the Solicitor provided Wellington with a letter of commitment, a copy of which is attached as Exhibit 24 to this statement of facts.

59. On November 8, 1989, a co-tenancy agreement was executed on behalf of the investors. A copy of the co-tenancy agreement is attached as Exhibit 25 to this statement of facts. The co-tenancy agreement specifically stipulated that the Solicitor was acting for all parties in relation to the co-tenancy agreement.

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60. On November 10, 1989, the second mortgage in the amount of \$600,000 in favour of Martin Rumack, In Trust was registered on both properties to secure the investment.

61. By letter dated November 20, 1989, a copy of which is attached as Exhibit 26 to this statement of facts, the Solicitor provided each investor with a copy of the Investment Authority to be executed and returned to him. Paragraph 3 of the Investment Authority, a sample of which is attached as Exhibit 27 to this statement of facts, indicated that \$150,000 of the \$600,000 loan had been advanced on November 10, 1989, a further \$150,000 was to be advanced upon the completion and execution of all documents, including Co-Tenancy Agreement and production of building permit, and the balance of \$300,000 was to be disbursed on the December 15, 1989. The Investment Authority was forwarded following the advance of funds by each investor and subsequent to the registration of the mortgage. A copy of the list of investors is attached as Exhibit 28 to this statement of facts. The Investment Authority stated the estimated value of the security is \$1.95 million based on a letter of opinion by John C. Garland dated November 21, 1989. The Solicitor did not provide the investors with a copy of the letter of opinion at that time. A copy of the opinion of J. C. Garland was included with his reporting letter of December 15, 1989.

62. No appraisal report was ever prepared on the property expressly for the Solicitor. He would testify that he relied upon the opinion of the real estate broker set out herein and his information that an appraisal had been prepared for the Vanguard Trust first mortgage. The Solicitor would testify that he never reviewed the appraisal and did not know what value the appraisal had placed on the project but assumed that the \$1.1 million first mortgage from Vanguard Trust represented no more than 70% of that appraisal. He would further testify that it is his recollection that he requested a copy of the appraisal but that one was not provided. The Solicitor did not advise the investors that he was relying on this assumption as support for the value of the property.

63. The Solicitor did not advise the investors that the letter of opinion valued the property at \$1.95 million based on the market value upon completion, nor that the purchase price of the property six months prior was \$365,000, although he would testify that he did not believe that it was relevant because the financing was with respect to a project to be constructed.

64. The Solicitor arranged and recommended the \$600,000 investment in the Wellington Street property to the investors and was also participating as an investor by investing \$100,000 in the same mortgage.

65. On November 28, 1989, the Solicitor executed a Declaration of Trust on behalf of each investor, an example of which is attached as Exhibit 29 to this statement of facts. It is the Solicitor's explanation that a combination of the Declaration of Trust and the co-tenancy agreement permitted him to make postponements of the mortgage without consulting any of the investors in the project. He did not explain to or advise the investors that this was his position. One of the investors, Mr. DiRenzo did not receive a Declaration of Trust despite the reference thereto in his reporting letter. The Solicitor failed to advise Mr. DiRenzo of his position regarding the powers conferred by the Declaration of Trust or the co-tenancy agreement.

66. By letter dated December 15, 1989, a copy of which is attached as Exhibit 30 to this statement of facts, the Solicitor wrote to all of the investors confirming their respective interest in the second mortgage.

67. On January 29, 1991, a third mortgage in favour of Di Mar Construction Limited in the amount of \$227,000 was registered on both properties. The mortgage was also guaranteed by Lucas and Simpson. The Solicitor did not advise the investors of this mortgage. The Solicitor would testify that this mortgage was to finance expansion of the project and unanticipated expenses.

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68. By letter dated April 10, 1991, Lang, Michener, Honeywell, Wotherspoon confirmed to the Solicitor that Central Guaranty Trust would be registering a new first mortgage in the amount of \$1.4 million on the properties. A copy of the letter is attached as Exhibit 31 to this statement of facts. The letter confirmed the Solicitor's agreement to postpone the second mortgage and the postponement agreement was enclosed for his execution. The Solicitor did not obtain the consent of the co-investors in respect of the postponement agreement.

69. On May 13, 1991, the \$1.4 million dollar mortgage in favour of Central Guaranty Trust was registered on the property and the mortgage in favour of Martin Rumack, In Trust was postponed. The Di Mar Construction Ltd. mortgage was also postponed to the Central Guaranty mortgage.

70. On July 10, 1991, a fourth mortgage in the amount of \$150,000 was registered on the property. On the same day, the mortgage in favour of Di Mar Construction Ltd. was postponed to this \$150,000 mortgage. On September 13, 1991 the mortgage in favour of Martin Rumack, In Trust was postponed in favour of the \$150,000 mortgage. Again, the Solicitor did not obtain the consent of the co-investors to this postponement. Ultimately, the investors' mortgage was third in priority, behind mortgages totalling an additional \$450,000.

71. On September 13, 1991, a fifth mortgage in favour of Martin Rumack, In Trust, was registered on the property in the amount of \$25,000. The Solicitor would testify that this was a direct advance from the Solicitor personally. The Solicitor would testify that the purpose of the loan was to assist in obtaining a building permit. The Solicitor did not advise the investors of the fifth mortgage and its purpose.

72. Subsequent to the completion of construction, the Wellington Business Centre had trouble leasing space and was unable to pay outstanding trade debts and service the mortgages, which went into default.

73. The Solicitor received a 15 percent equity in the project as legal fees and as an arranging fee as set out in the Investment Authority. Under the agreement with Wellington, the investors were to receive a 75 percent beneficial interest, so in fact would be dividing a 60 percent interest when the Solicitor's interest for legal and arranging fees is deducted. Each investor, one of whom was the Solicitor in the amount of \$50,000, was to receive 5 percent equity in return for a \$50,000 investment which translates to an arranging fee equivalent to \$150,000 was paid to the Solicitor.

Nick DiRenzo

74. The Solicitor's client, Nick DiRenzo, the Vice-President, Finance, of Colonia Life Insurance and a Chartered Accountant, was one of the investors in the Wellington Street property. As with his investment in the Guelph Street, Halton Hills property, Mr. DiRenzo borrowed the money for this investment as he did not have the ready cash. Mr. DiRenzo wanted a safe investment as he was "playing the interest rate spread game". Mr. DiRenzo did not receive a copy of the appraisal nor did he receive a copy of the Declaration of Trust referred to in the reporting letter. Mr. DiRenzo was never advised of the subsequent financing transactions which are described above and would not have agreed to the two postponements of his mortgage to that of Central Guaranty or Di Mar. For Mr. DiRenzo, the purchase price of the property would have been a significant factor for him in deciding whether to invest but he was not advised by the Solicitor. Mr. DiRenzo did not understand that the equity interest which the Solicitor was to receive as fees served to reduce the equity which the investors were to share. Mr. DiRenzo would testify that he understood that the equity interest was a bonus to the mortgage.

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75. When it became apparent that the mortgagors would no longer be able to make payments on the property, the Solicitor approached him to inject funds into the project but Mr. DiRenzo declined to do so. As difficulties with the transaction were encountered, the Solicitor did not advise Mr. DiRenzo to obtain independent legal advice.

Eduardo Unikel

76. Eduardo Unikel was a business person who had resided next door to the Solicitor. He was also an investor in the Wellington properties. He would testify that the Solicitor presented the equity participation in the investment as an addition to the mortgage. The Solicitor did not discuss the postponement of mortgages with him and he would not have consented to the postponements. The Solicitor sent pictures of the stages of development of the properties to him.

77. On several occasions, after problems arose regarding the mortgages, he made requests of the Solicitor to get him out of the investment; if the Solicitor made attempts, he did not advise him. Mr. Unikel asked the Solicitor to suggest to the owners of the properties in which there was equity participation, that they settle the debt by repaying the principal amount only and forget the equity. The Solicitor would testify that he made efforts in response to Mr. Unikel's requests although Mr. Unikel would state that he was not advised of any efforts. Mr. Unikel asked the Solicitor to call a meeting of the investors of the Wellington and Cobourg properties when mortgage payments were late. By the time the Solicitor arranged the meeting, the mortgages were in default.

78. At no time during the investment did the Solicitor advise the lenders to obtain independent legal advice.

113 Woodbridge Avenue, Woodbridge - Investment Amount - \$850,000.00

79. On September 15, 1988, Charles Goldsmith, In Trust, as purchaser, entered into an agreement to purchase all outstanding shares of 474856 Ontario Limited and 474857 Ontario Limited from the Pavicics as vendor for an aggregate price of \$1.425 million dollars. The principal asset of both corporations was the Woodbridge Hotel. The Solicitor structured the purchase as a share purchase so that each of the principal vendors could take advantage of the \$500,000 capital gains exemption. The agreement required a deposit of \$100,000.

80. Shortly after the agreement had been reached, Goldsmith retained the Solicitor to act on his behalf with respect to the share purchase. The Solicitor had known Goldsmith since 1974 and had acted for him in numerous transactions. Based on the strength of their relationship over the years, the Solicitor personally agreed to lend the \$100,000 deposit called for by the agreement.

81. Goldsmith approached the Solicitor regarding the possibility of obtaining secondary financing in the amount of \$850,000 to allow him to close the transaction, complete minor renovations, commence rezoning and complete the design and planning requirements prior to the construction of the proposed condominium complex.

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82. Goldsmith had obtained a market assessment study of the property completed by N. Barry Lyon which concluded, *inter alia*, that the site offered an excellent market potential for residential condominium development. The report also confirmed that: "the front of the Woodbridge Hotel is circa pre-1860, deeming it historically significant to the area. While the building is not officially designated, it is listed on the inventory of historical buildings. As such, any redevelopment of the building in whole, or in part, would be subject to a review of Heritage Vaughan". A copy of the Lyon report, dated January, 1989, is attached as Exhibit 32 to this statement of facts. However, according to Mr. Lyons, the formal version report was not printed until January 31, 1989, after the closing on January 25, 1989 and a copy was not provided to the Solicitor until several months later further to the Solicitor's request.

83. By letter dated January 9, 1989, Lebow Appraisal Services Ltd. confirmed the Solicitor's instructions to provide an appraisal of the property, a copy of the letter of confirmation is attached as Exhibit 33 to this statement of facts. The Solicitor agrees that the letter of confirmation accurately sets out the instructions which he provided to its author Barry Lebow.

84. By letter dated January 13, 1989, a copy of which is attached as Exhibit 34 to this statement of facts, the Solicitor provided Goldsmith with a letter of commitment for a loan in the amount of \$850,000. The commitment included the following details:

- a. the borrowers were 474856 Ontario Limited and 474857 Ontario Limited and the loan was to be guaranteed by Goldsmith and The Woodbridge Hotel Ltd.;
- b. the interest rate was 18% per annum, calculated and payable monthly for a term of one year;
- c. the legal fees were \$8,500 plus disbursements. In addition, a placement fee of \$25,500 was required;
- d. the lender was to receive a general assignment of all rents to be received by the lessor from the lessees of the mortgaged premises during the term of the mortgage; and
- e. prior to the disbursement of the funds, the lender was to receive an up-to-date appraisal for the property by Lebow Appraisal Services Ltd. indicating a current value for mortgage purposes not less than \$2,250,000.

85. By letters dated January 19, 1989, the Solicitor provided each investor with an Investment Authority to be executed and returned to him. A copy of the standard letter dated January 19, 1989, a copy of a standard Investment Authority as well as statement showing the source and use of funds are attached collectively as Exhibit 35 to this statement of facts. The Investment Authority included the following details:

- a. the principal amount of the charge which was to be fully advanced is \$850,000 subject to a first mortgage in the amount of \$925,000 in favour of Nikola Pavicic and Michael Sekulic;
- b. that the estimated value of the security is \$2,250,000 established by an appraisal report by Lebow Appraisal Services dated January 24, 1989
- c. that the mortgage is being held in the name of Martin Rumack, in trust; and

- d. that the Solicitor was investing \$100,000 personally as a participant in the charge.

86. The Investment Authority did not set out the following information:

- a. that the Solicitor had loaned the deposit of \$100,000 to Goldsmith and that the Solicitor would be receiving a fee of \$15,000 in respect of that loan and repayment of the loan from the mortgage proceeds;
- b. that he was acting for the purchaser/borrower of the property as well as the guarantor;
- c. that he would be receiving legal fees in connection with the purchase of the property and that they would be obtained from the mortgage proceeds;
- d. the purchaser was not contributing any monies towards the purchase; and
- e. the purchase price of the shares was \$1,425,000.

87. The Solicitor did not advise the investors of the facts set out in paragraph 86, items a, c, d or e.

88. The Solicitor would testify that he believes that he would have told investors that he also acted for the borrowers and guarantors but accepts and would not dispute the investors' evidence that he did not advise them either orally or in writing of the conflict. The Solicitor admits that he did not advise the investors of the consequences of the conflict. The Solicitor also admits that at no time did he advise the investors to seek independent legal advice.

89. The Solicitor did not invest \$100,000 in the Woodbridge property as was set out in the Investment Authority. He would testify that his proposed investment was given to another investor after the Investment Authority was sent to the other investors. The Solicitor did not advise the investors prior to commitment of their fund that he was not personally investing in the property as set out in the Investment Authority.

90. On January 22, 1989, Lebow Appraisal Services provided the Solicitor with an appraisal stating the market value of the property as vacant land as at January 17, 1989 was \$2.24 million dollars. The land was not vacant.

91. The share purchase agreement closed on January 25, 1989 and the second mortgage was registered on that date.

92. Under cover of letter dated January 25, 1989 the Solicitor forwarded a trust cheque in the amount of \$100,000 payable to C.A. Goldsmith & Associates. A second cheque in the amount of \$150,000 payable to the Woodbridge Hotel Ltd. was also forwarded. A copy of the Solicitor's January 25, 1989 letter is attached as Exhibit 36 to this statement of facts. At this point in time, the purchaser/borrower had not spent any money on the purchase of the property but had received \$250,000 of the mortgage proceeds. The Solicitor would testify that Mr. Goldsmith told him that he had incurred costs of approximately \$50,000 to \$60,000 in relation to the market assessment study and preliminary drawings. The Solicitor was repaid the money he advanced as the deposit from the investors' mortgage advance.

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93. By letter dated March 3, 1989, the Solicitor delivered a copy of his reporting letter to the investors. The Solicitor did not inform the investors that he had decided not to invest the \$100,000 as indicated in the Investment Authority, nor did the Solicitor provide any of the information set out in paragraph 86 above. A copy of the Solicitor's March 3, 1989 reporting letter is attached as Exhibit 37 to this statement of facts.

94. Goldsmith had negotiated a lease with a prospective tenant to operate the bar area of the Woodbridge Hotel but this lease did not materialize. The Solicitor would testify that he became aware of this fact one month after closing and did not advise the investors as, in his view, it was not a condition of the loan.

95. As a result of the circumstances set out in the paragraph above, Goldsmith approached the Solicitor for a loan in August or September of 1989. On September 15, 1989, Goldsmith executed a demand note in favour of the Solicitor in the amount of \$150,000 at a rate of 2.5 percent above prime. The Solicitor would testify that funds were to be advanced as required by Goldsmith, that he established a line of credit to meet these advances which were in part to make payments to the investors for September 1989 through January 1990, at Goldsmith's direction at which time the mortgage was renewed and continuing to the last payment made on May 25, 1990. The Solicitor never advised the investors that the payments were being made from this source either at the time it was made or the time the mortgage was being renewed.

96. Towards the end of 1989, Goldsmith advised the Solicitor that he was negotiating the sale of the property and requested the Solicitor approach the investors to renew the second mortgage for a further six months.

97. At this point in time, the Solicitor had prepared a Notice of Sale Under the Second Mortgage dated January 11, 1990.

98. By letters dated January 25, 1990 to all investors, the Solicitor confirmed the renewal of the mortgage for a further period of six months at the same rate and upon the same terms initially agreed upon. The Solicitor's file included letters from most of the investors acknowledging and agreeing to the terms of the letter with the exception of Goldhart Investments who had initially invested \$100,000. The Solicitor approached other investors to make up the shortfall. A copy of the Solicitor's January 25, 1990 letter is attached as Exhibit 38 to this statement of facts.

99. At the time of the renewal, the Solicitor did not advise the investors that:

- a. the taxes were in arrears of approximately \$11,000; his explanation being that although this information was in his office, he had not become aware of it;
- b. Goldsmith had been unable to meet the investors' mortgage payments since September 1989, due to what the Solicitor would testify was described to him by Goldsmith as cash flow problems. Goldsmith had in fact obtained a loan from the Solicitor in order to meet those interest payments on the second mortgage and other payments.; and
- c. the Solicitor prepared a Notice of Sale Under the Second Mortgage which he delivered to Mr. Goldsmith but did not serve on other parties.

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100. By letter dated June 20, 1990, the Solicitor wrote to the various investors advising of a default in the payments under the mortgage. The Solicitor listed the property for sale on July 9, 1990 and signed as "mortgagee under power of sale". On July 23, 1990, the first mortgagee issued a Notice of Sale Under Mortgage.

101. The Solicitor received fees relating to the purchase of the Woodbridge property, including the related corporate purchase and the financing as follows:

- \$34,498.04 for legal fees and disbursements, disbursements being \$1,083.91; and

- \$15,000.00 as a fee for the Solicitor's \$100,000 deposit loan.

He also received:

- \$4,187.50 representing the interest expense which he incurred as a result of providing the \$100,000 deposit loan.

The Solicitor received fees relating to the financing of the second mortgage of the Woodbridge property, as set out in the Investment Authority as follows:

- \$8,500.00 for legal fees; and
- \$25,500.00 as a brokerage fee.

102. Mr. Joseph Gatt is representative of the Solicitor's clients who invested in this project. The Solicitor told him that the Woodbridge property was a profitably run hotel. The Solicitor did not advise that he was acting for the borrower on this transaction. The Solicitor did not provide him with a copy of the appraisal of the property until he delivered the reporting letter. The Solicitor did not advise him of the purchase price. The Solicitor did not advise him that he had put up the money for the \$100,000 deposit nor did he advise him that he was not participating in the transaction. Mr. Gatt would testify that if the above information would have been relevant and important to him and if he had been advised of these facts, he would not have invested in this property.

103. Although Mr. Gatt had some successful dealings with the Solicitor, he would also testify that during the course of his business relationship with the Solicitor, he turned down between five and seven potential investments because he did not like the terms or some circumstance surrounding the mortgage or did not have funds.

104. Eduardo Unikel was also an investor in the property. The Solicitor did not advise him of the Solicitor's decision not to invest, the purchase price, or that the taxes were in arrears. Mr. Unikel was provided with only an excerpt of the appraisal after closing. He would have objected to the renewal if apprised of the arrears in taxes and the borrower's difficulties in meeting mortgage payments.

360 Guelph Street, Halton Hills - Mortgage Amount - \$260,000.00

105. On March 11, 1988, Millview Commercial Developments Ltd. purchased a vacant piece of land at 360 Guelph Street, Halton Hills, for the sum of \$210,000. The Solicitor acted for Millview on this purchase. On April 13, 1988, Millview changed its name to Canterra Commercial Developments Ltd. The principals of the company were Patrick LaBrier, Peter Winterstein and David Williams. The Solicitor had acted for Canterra on some mortgage transactions, including the Berkeley Street property. The Solicitor would testify that he believed, based on presentations he had seen, that Canterra held over 20 properties across the province and had significant net worth.

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106. On February 28, 1989, Stephen P. Saxe Ltd. provided an appraisal which projected the value "upon completion of a proposed commercial development". The appraisal also valued the property at March 1, 1989 on an "as is" basis, as vacant land, at \$514,000. According to the appraisal, there was a portable building on the property. A copy of the appraisal is attached as Exhibit 39 to this statement of facts.

107. In September 1989, Aaron Mendelson Enterprises Ltd., as purchaser, and Canterra, as vendor, entered into an agreement of purchase and sale which set the purchase price for the property at 1.25 million dollars. While the agreement stated that the property was vacant at the time, it provided that prior to closing the vendor would construct a Boston Pizza Restaurant. This agreement was not executed by Canterra. A copy of the agreement is attached as Exhibit 40 to this statement of facts. The Solicitor was provided with a copy of the agreement at or about the date of its execution by Aaron Mendelson Enterprises Ltd.

108. On September 8, 1989, the Solicitor provided Canterra with a letter of commitment regarding a second mortgage loan on the property in the amount of \$260,000 at 18.5 percent per annum. The letter of commitment included the following details:

- a. postponement of the second mortgage in favour of a first mortgage for interim construction financing not to exceed the sum of \$800,000;
- b. this would be a second mortgage, subject to a first mortgage of not more than \$350,000;
- c. legal fees payable to the Solicitor in the amount of \$2,600 plus disbursements and an arranging fee of \$7,000 payable to the Solicitor; and
- d. the sum of \$50,000 was to be advanced September 18, 1989, and the sum of \$210,000 would be forwarded once an Agreement of Purchase and Sale was firm and binding.

The Solicitor understood the new first mortgage of \$800,000 would pay out the existing \$350,000 first mortgage. A copy of the letter of commitment is attached as Exhibit 41 to this statement of facts.

109. By letters dated September 14, 1989, the Solicitor provided each investor with an Investment Authority to be executed and returned to him. A copy of the standard letter of September 14, 1989 and the Investment Authority are attached collectively as Exhibit 42 to this statement of facts. A list of investors and their monetary share of the mortgage is attached as Exhibit 43 to this statement of facts.

110. The Investment Authority included the following details regarding the transaction:

- a. "the estimated value of the security (land only) is \$514,000.00 established by an appraisal prepared by Stephen P. Saxe Ltd. and the estimated value of the security (with building) was \$1,200,000.00 based on a sale";
- b. "principal amount of the charge is \$260,000.00 and the principal amount of the loan to be advanced is \$50,000.00 on the 18th day of September, 1989 and the balance of \$210,000.00 to be advanced once the Agreement of Purchase and Sale becomes firm and binding";
- c. "...the chargors shall provide the chargee with a series of twelve (12) post-dated cheques at the commencement of the mortgage"; and

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d. the mortgage was being held in the name of Martin Rumack, In Trust.

111. The Solicitor did not advise the investors that this property was purchased 18 months prior for the sum of \$210,000. He did not advise the investors that with a first mortgage of a minimum of \$350,000 and based on appraisal of \$514,000 dated six months earlier, that \$96,000 of their \$260,000 second mortgage advance would be unsecured for the period of time between the date that the agreement of purchase and sale was binding until the closing of the agreement. Although the investors may have determined from a careful review of the Investment Authority when the advances were to be made, this analysis was not pointed out by the Solicitor nor was the Investment Authority provided to all of the investors prior to the commitment of funds.

112. The Solicitor also did not advise that he was holding back interest only mortgage payments for the period of one year in the sum of \$48,100, with interest earned payable to Canterra.

113. The Solicitor would testify that he believes that he would have told the investors that he also acted for the borrowers and guarantors but accepts and would not dispute the investors' evidence that he did not advise them either orally or in writing of the conflict. The Solicitor admits that he did not advise the investors of the consequences of the conflict. The Solicitor also admits that at no time did he advise the investors to seek independent legal advice.

114. On September 18, 1989, the Solicitor forwarded a trust cheque to Canterra in the amount of \$29,028.99 representing \$50,000 to be advanced under the mortgage commitment. The sum of \$20,971.01 was deducted from the advance and applied to 14th Avenue Street, another Canterra property. The investors were not advised their mortgage funds were being used to pay off debts on another property.

115. On September 18, 1989, a second mortgage in favour of Martin Rumack, In Trust was registered on the property. On the same day, the Solicitor executed a Declaration of Trust on behalf of each investor. As with all Declarations of Trust on all the properties, the investors did not execute this document.

116. On October 27, 1989, the Solicitor delivered a reporting letter regarding the transaction to each of the investors. A copy of the reporting letter is attached as Exhibit 44 to this statement of facts. On or about the same date the Solicitor delivered a report to Canterra confirming the terms of the mortgage.

117. On January 17, 1990, the Solicitor delivered a letter to Canterra enclosing a cheque in the sum of \$158,444.83 representing the final advance on the mortgage. On January 18, 1990, Canterra delivered a letter to the Solicitor stating that the Georgetown site had been sold to a European syndicate as described in an Agency Contract. A copy of the letters are attached as Exhibit 45 to this statement of facts. A copy of the Agency Contract is attached as Exhibit 46 to this statement of facts. The Solicitor would testify that he was advised by David E. Williams, Vice-President of Finance and a principal shareholder of Canterra that the property had been sold. This was later denied by Mr. Williams as outlined in paragraph 119 and the correspondence referred to therein between the Solicitor and Mr. Williams. The Solicitor did not take any steps to confirm that there was a firm and binding agreement of purchase and sale before releasing the funds.

118. By letter dated July 31, 1990, the Solicitor informed the investors that he had been advised by Canterra that they are unable to honour its mortgage commitments. A copy of such letter is attached as Exhibit 47 to this statement of facts.

119. In August 1990, the Solicitor exchanged correspondence with Canterra with respect to the "sale" of the property. Attached as Exhibit 48 to this statement of facts is the Solicitor's letter of August 1, 1990 and Canterra's letters of August 2 and August 3, 1990. The Solicitor did not then advise the investors that funds had been advanced although a binding agreement of purchase and sale did not exist and that they should seek independent legal advice.

120. By letter dated August 31, 1990, the first mortgagee served Notice under Power of Sale on the Solicitor. At that time, the first mortgagee was owed \$356,423.49. In October 1990, the property was appraised at \$400,000.

121. Ruth Kelman, Helene Huculak and Nick DiRenzo were among the investors in this mortgage. The Solicitor he accepts and would not dispute their evidence that they understood from their telephone discussion with the Solicitor that at the time of the investment, the property was not merely land. Mrs. Kelman, Ms. Huculak and Mr. DiRenzo would testify that had this fact alone been brought to their attention, they would not have invested.

1512 Upper Gage Avenue, Hamilton - Mortgage Amount - \$150,000.00

122. On February 15, 1988, 1512 Upper Gage Avenue was conveyed from 594244 Ontario Inc. to 665573 Ontario Limited for \$375,000. The Solicitor acted for the purchaser, a company in which Aaron Neufeld and Ruben Benchitrit were the only directors. The first mortgage in the amount of \$116,000 was assumed and a vendor take-back second mortgage of \$210,000 due in August, 1988 was guaranteed by Ruben Benchitrit and Aaron Neufeld.

123. In the summer of 1988, the first and second mortgages were further renewed. In October, 1988, a new first mortgage in the amount of \$325,000 was arranged to pay off the existing first and second mortgages. This mortgage was guaranteed by the directors of 665573 Ontario Limited, Ruben Benchitrit and Aaron Neufeld.

124. In December 1989, the Solicitor arranged a second mortgage in the amount of \$150,000. Susan Fenwick was the only investor in this mortgage.

125. On December 6, 1989, the Solicitor requested a mortgage statement from the new first mortgagee. A copy of the Solicitor's letter is attached as Exhibit 49 to this statement of facts. In response, the Solicitor received, on December 12, 1989, an information statement from the new first mortgagee stating that the principal owing under its mortgage as at December 1, 1989 was \$324,449.32, that the mortgage was in arrears in the amount of \$13,149.50 and that monthly payments on the mortgage were \$3,757. A copy of the information statement from the first mortgagee is attached as Exhibit 50 to this statement of facts.

126. On December 11, 1989, Susan Fenwick, the only investor, executed an Investment Authority. All communications with respect to the investment were between the Solicitor and Allan Fenwick, the spouse of Susan Fenwick. Ms. Fenwick was the only investor on the property. The Investment Authority is attached as Exhibit 51 to this statement of facts. It includes the following statements:

- a. the borrower was 665573 Ontario Limited and Aaron Neufeld and Ruben Benchitrit were guarantors;
- b. the principal amount of the mortgage which was to be fully advanced was \$150,000 and was subject to a first mortgage in favour of Shoppers Mortgage and Loan Corporation in the amount of \$325,000;
- c. the legal fees were \$1,900. In addition, an arranging fee of \$3,000 was required;

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- d. the estimated value of the security was \$635,000 based on current market value;
- e. the mortgage would be held in the name of Martin Rumack, In Trust;
- f. interest was to be paid in the amount of prime plus 5½ %, calculated and payable monthly; and
- g. Susan Fenwick would receive a bonus of \$1,500.

127. The Investment Authority did not include the following information:

- a. the Solicitor was acting for the borrower and the guarantors;
- b. the status of the property, namely, that the mortgagor purchased the property with a view to developing a strip mall and the property consisted of land with a residential property which yielded a minor income;
- c. the purchase price 22 months previous, in February, 1988 was \$375,000;
- d. the value of the property stated in the Investment Authority was an estimated value only and was not supported by an appraisal; although the Solicitor would testify that he was told by an employee of Shoppers Mortgage and loan that it had obtained an appraisal in the amount of \$635,000 so support its mortgage of \$325,000 in October 1988. However, the Solicitor did not obtain a copy of the appraisal.
- e. the mortgage advance was to be used to pay, in part, the Solicitor's fees and discharge a second collateral mortgage; and

128. The Solicitor did not advise the Fenwicks of the facts in paragraph 127, items (b) through (e). The Solicitor would testify that he believes that he would have told of the Fenwicks that he also acted for the borrowers and guarantors but accepts and would not dispute their evidence that he did not advise them either orally or in writing of the conflict. The Solicitor admits that he did not advise the investors of the consequences of the conflict. The Solicitor also admits that at no time did he advise the investors to seek independent legal advice.

129. On December 14, 1989, Susan Fenwick forwarded \$150,000 to the Solicitor and on the same day a mortgage was registered in that amount in favour of Martin Rumack, In Trust.

130. Prior to advancing the Fenwick's funds, the Solicitor determined that the first mortgage was in arrears by three months and municipal taxes were a full year in arrears. He did not advise the Fenwicks of these facts or seek their instructions.

131. The Solicitor paid outstanding taxes and mortgage payments from the mortgage proceeds. Attached as Exhibit 52 collectively to this statement of facts, are the Solicitor's letters dated December 14, 1989 to Shoppers Mortgage and Loan Corporation and the Tax Department of the City of Hamilton. The Solicitor also paid the amount required to discharge a CIBC second collateral mortgage from the mortgage proceeds. Attached as Exhibit 53 to this statement of facts is a Solicitor's letter to the CIBC.

132. A copy of the mortgage in favour of Martin Rumack, In Trust, is attached as Exhibit 54 to this statement of facts.

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133. On December 14, 1989, a cheque was issued to Susan Fenwick for \$1,500 representing her bonus. Attached as Exhibit 55 to this statement of facts is the Solicitor's letter to Ms. Fenwick.

134. On January 25, 1990, the Solicitor delivered a copy of his reporting letter to the Fenwicks. A copy of the letter is attached as Exhibit 56 to this statement of facts. For the first time, the Solicitor advised the Fenwicks that the first mortgage and taxes had been in arrears and that they had been brought into good standing. There were no complaints by the Fenwicks at that time with respect to the payment of the arrears.

135. A copy of the Statement of Source and Use of funds with respect to the Upper Gage property is attached as Exhibit 57 to this statement of facts.

136. In May, 1990, the first mortgage went into arrears. The first mortgagee had obtained an appraisal from Patricia Bud Appraisals Inc. in the amount of \$650,000. The appraisal was based on the ability of the property to be converted to a commercial development or strip mall, although no attempt had been made to have the property so converted. In July, 1990, Lebow Appraisal Services Ltd. (at the request of the first mortgagee, Shoppers Loan) valued the property at \$270,000 since redevelopment was not possible unless further property was purchased from the municipality, a step which was not taken. The Solicitor did not apprise the Fenwicks of this appraisal.

137. In May, June and July, 1990, the Solicitor made payments on the second mortgage by transferring funds from another file, 9 Berryman Street, Toronto, another property owned by basically the same parties as the Upper Gage property. The Solicitor would testify that he made these payments on the direction of the principals of 665573 Ontario Limited. The Solicitor did not inform the Fenwicks that he was making the mortgage payments in this way.

138. On July 27, 1990, the Solicitor sent a letter to Susan Fenwick stating that the mortgage payment cheque for July 12, 1990 was returned from the bank marked "non-sufficient funds".

139. The Solicitor and the first mortgagee issued notice of sale on the Upper Gage property. The principals of 665573 Ontario Limited filed for bankruptcy on March 20, 1991.

140. Allan Fenwick would testify that he relied on the Solicitor as his legal counsel on the Upper Gage Avenue and other investments and expected to be kept informed of all relevant information. He would testify that he specifically informed the Solicitor that he did not want to be involved in any transactions that had payments in arrears. He told the Solicitor that he wished to be kept informed about the borrowers and guarantors, the security and any problems in respect of his investments.

844 Division Street, Cobourg - Mortgage Amount - \$600,000.00

141. On March 3, 1989, SPI Syndicated Property Investments Limited ("SPI"), In Trust, purchased the property from 428497 Ontario Limited for \$450,000. The Solicitor did not act on the transaction.

142. On June 8, 1989, a mortgage commitment letter was delivered from the Mutual Trust Company to SPI with respect to the first mortgage on the property in the amount of \$2,300,000 for the development of a plaza. A copy of the commitment letter is attached as Exhibit 58 to this statement of facts. The commitment letter included the following details:

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- a. once all security documentation is in place, Mutual will make a first advance in the amount of \$350,000 to facilitate the land acquisition of the lands;
- b. advances beyond \$350,000 shall be against work in place and supported by satisfactory inspection certificates in the amounts of not less than \$100,000; and
- c. no financing subsequent to any of the facilities shall be permitted without the written consent of Mutual.

143. On July 12, 1989, Mutual obtained an appraisal from Baayen & Associates Limited. The appraisal for \$500,000 was on the basis that the land was vacant and zoned industrial/commercial. In order to complete the project, the required zoning was "District Commercial", which was not the zoning of the land. Attached as Exhibit 59 to this statement of facts is the appraisal with references to zoning at page 16 thereof.

144. By letter dated November 16, 1989, site plan approval was given for the plaza, and although rezoning to permit a wider variety of commercial uses than its existing highway/commercial designation had not yet taken place, the Assistant Planner advised that upon such time as minor details were finalized, the Town Solicitor would prepare the necessary Development Agreement. It was noted that the details were not severe and did not pose any problems with respect to the approval of the project.

145. In January, 1990, SPI approached the Solicitor seeking \$600,000 in financing. The Solicitor was told that the owner was in the process of working out a development agreement with the municipality to permit a strip mall plaza.

146. On January 25, 1990, Gary Simpson, one of the directors of the owner, delivered a letter to the Solicitor stating that Simpson did not expect any problems with respect to rezoning and anticipated beginning construction once at least 50% of the plaza was pre-leased and rental income would be at least \$170,000 per annum. A copy of the letter is attached as Exhibit 60 to this statement of facts.

147. On February 16, 1990, the Solicitor delivered a commitment letter to SPI, which is attached as Exhibit 61 to this statement of facts. The letter includes the following details:

- a. Martin K.I. Rumack, In Trust, as lender, approved the application for a loan of \$600,000;
- b. the borrower was SPI Syndicated Property Investments Limited, In Trust, and the loan was to be guaranteed by the principals of the corporation, Glenn Lucas and Gary Simpson;
- c. interest was as 10% per annum, calculated and payable monthly, for a 2 year term;
- d. repayment was to be interest only on a monthly basis;
- e. investors were to receive a 75% interest in the equity of the property;
- f. legal fees and arranging fees were 15% of the equity which was a portion of the 75% interest given to investors; and
- g. the lender's security was a second mortgage and a co-tenancy agreement.

148. On February 27, 1990, the Solicitor delivered a letter to all investors enclosing the Investment Authority to be executed and returned to him. Attached as Exhibit 62 to this statement of facts is a copy of the Investment Authority. It included the following details, in addition to those set out in the commitment letter:

- a. the principal of the mortgage which is to be fully advanced is \$600,000 subject to a first mortgage in favour of The Mutual Trust Company in the amount of \$2,300,000 of which only \$350,000 had been advanced to date;
- b. the estimated value of the security is \$700,000 for land only; and
- c. the Solicitor is investing \$75,000 as a participant in the mortgage.

149. The Investment Authority did not include the following information:

- a. the Solicitor was acting for the mortgagors and guarantors in respect of the co-tenancy agreement as well as the investors, although this was specified in the co-tenancy agreement, which was provided to them with the reporting letter;
- b. the investors monies were to be used as a construction loan; although, this was specified in the co-tenancy agreement;
- c. while the Investment Authority did state that only \$350,000 of the \$2,300,000 first mortgage had been advanced, there was no mention of the fact that nothing had been built on the property as of the date of the Investment Authority;
- d. there was no appraisal to support the estimated value of the security as \$700,000 for land only;
- e. the basis for the \$700,000 estimated value of the security;
- f. the land had been appraised at \$500,000 in July, 1989, however the Solicitor would testify that he was advised by the general partners of the borrower that there had been preparation of rezoning plans;
- g. the first mortgagee, Mutual, had not been advised of the beneficial change in ownership.

150. The Solicitor did not advise the investors of the facts in paragraph 149, items (a) through (g).

151. A schedule showing the participation of the investors is attached as Exhibit 63 to this statement of facts.

152. The Solicitor arranged and recommended the \$600,000 investment in the Division Street property to the investors and was also participating as an investor by investing \$75,000 in the same mortgage.

153. On February 28, 1990, the day after the Investment Authorities were sent to the investors, the Solicitor requested an appraisal from Property Evaluators based on a rezoning of the property to permit the erection of a single storey strip plaza complex. A copy of the letter is attached as Exhibit 64 to this statement of facts.

154. On March 1, 1990, the mortgage in the amount of \$600,000 in favour of Martin Rumack, In Trust, was registered. A copy of the registered mortgage is attached as Exhibit 65 to this statement of facts. On the same date, the \$600,000 secured by the mortgage was fully advanced.

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155. On March 1, 1990, the Solicitor executed a Declaration of Trust on behalf of each investor. A copy of the Declaration is attached as Exhibit 66 to this statement of facts. On March 1, 1990, the Solicitor also executed the co-tenancy agreement with the borrowers and guarantors. A copy of the Agreement is attached as Exhibit 67 to this statement of facts. Clause 11.01 states that if construction has not commenced by December 31, 1990, the vendors/borrowers agree to purchase the investors' interest in the sum of \$660,000 plus accrued interest. The agreement further provided that these monies are to be paid on or before March 1, 1991. The Solicitor did not separately point out to the investors that clause 11.01 existed although the co-tenancy agreement was provided to the investors with the Solicitor's reporting letter which included clause 11.01 at page 13.

156. On March 12, 1990, Property Evaluators completed their appraisal for the Solicitor. The appraisal indicated the value of the property as of March 6, 1990, as \$785,000. The valuation was based on all ground work being completed such that construction could commence immediately. A copy of the appraisal is attached as Exhibit 68 to this statement of facts. The Solicitor did not deliver a copy of the appraisal to the investors until he delivered the relevant portion of the appraisal with the reporting letter.

157. On October 15, 1990, the Solicitor delivered his reporting letter with respect to the closing of the transaction. A copy of the reporting letter is attached as Exhibit 69 to this statement of facts. No new information was contained in the report. The Solicitor did not advise the investors of the purchase price of the property; his explanation is that it was not relevant. The Solicitor told the Society's auditor that he did not advise the investors that the development project had not commenced until he did so at an investors meeting in January, 1992.

158. The investors in this mortgage included Allan Fenwick and Eduardo Unikel. Although they received a copy of the co-tenancy agreement, they would testify that they did not know that Clause 11.01 existed or that they were in a position to exercise it. The property was zoned industrial/commercial. The investors were not advised that there was a delay in obtaining a district /commercial zoning which would enhance the property by permitting a wider variety of tenants.

159. The second mortgage went into default in November 1991.

111-117 Berkeley Street, Toronto - Investment Amount - \$940,000.00

160. On August 2, 1988, Canterra Commercial Developments Ltd. agreed to purchase the property from Agincourt Products Limited. The purchase price was \$1,750,000 and the deposit required was \$100,000. The Solicitor acted for Canterra. The deposit was made by a group of the Solicitor's clients so that there was no equity by Canterra in the property. The transaction closed on September 16, 1988.

161. On August 29, 1988, the Solicitor delivered a letter to Canterra confirming that he had arranged an equity loan in the amount of \$600,000. A copy of the letter is attached as Exhibit 70 to this statement of facts. In the letter, the Solicitor confirms the following:

- a. the investors would receive 11% per annum;
- b. investors would receive a 42% equity share of the project, with profits estimated at \$1,800,000;
- c. collateral security would be a collateral mortgage on "one or two" of the other Canterra projects to be discussed;
- d. the Solicitor's arranging fee was 6% equity interest; and

- e. the Solicitor would prepare a co-tenancy agreement.

162. By letters dated September 9, 1988, the Solicitor provided investors with an Investment Authority to be executed. A copy of the Investment Authority is attached as Exhibit 71. The Investment Authority included the following details:

- a. Canterra Commercial Developments Ltd. was the borrower;
- b. the principal amount of the mortgage which was to be fully advanced was \$600,000 subject to a first mortgage in the amount of \$1,250,000 in favour of Income Trust Company;
- c. the estimated value of the security was \$1,750,000 as established by an Agreement of Purchase and Sale dated August 2, 1988;
- d. the mortgage was being held in the name of Martin Rumack, In Trust, and interest was to paid in the amount of 11% per annum; and
- e. the Solicitor was investing \$75,000 in the mortgage and held a 5.25% equity interest.

163. The Investment Authority did not disclose and the Solicitor did not advise the investors of the following:

- a. an "Acquisition Fund" of the Solicitor's clients had put up the \$100,000 deposit required under the Agreement of Purchase and Sale; and
- b. the purchasers not only paid nothing to purchase the property but received \$51,400 on closing, being the excess over the price of the first and second mortgages.

164. The Solicitor would testify that he believes that he would have told the investors that he also acted for the borrowers and guarantors but accepts and would not dispute the investors' evidence that he did not advise them either orally or in writing of the conflict. The Solicitor admits that he did not advise the investors of the consequences of the conflict. The Solicitor also admits that at no time did he advise the investors to seek independent legal advice.

165. The Solicitor arranged and recommended the \$600,000 investment in the Berkeley Street property to the investors, where he was also participating as an investor by investing \$50,000.

166. On September 16, 1988, the property was transferred to Canberra and the first and second mortgages were registered. Attached collectively as Exhibit 72 of this statement of facts are copies of the mortgages. On the same date, the Solicitor executed a Declaration of Trust on behalf of each investor. A summary of the investors is attached as Exhibit 73.

167. On September 30, 1988, a collateral mortgage in the amount of \$600,000 was registered on the River Drive, Halton Hills, property. A copy of the mortgage is attached as Exhibit 74 to this statement of facts.

168. On November 30, 1988, the Solicitor delivered a reporting letter with respect to the completion of the second mortgage transaction, confirmed the details set out in the Investment Authorities and also advised as to the registration of the collateral security. The Solicitor also advised that the property was an historical site. Attached as Exhibit 75 to this statement of facts is the report.

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169. On December 5, 1988, the Solicitor delivered a report to Canterra with respect to the purchase of the property setting out the terms of the first and second mortgages. A copy of the Solicitor's letter is attached as Exhibit 76 to this statement of facts. In his letter, the Solicitor confirms the registration of the collateral security.

170. From the mortgage proceeds, the Solicitor paid \$100,000 to himself, In Trust, in order to repay his other clients, the Acquisition Fund, for monies provided for the deposit.

171. On July 7, 1989, Nutt-Well Associates Limited prepared an appraisal of the property valuing it at \$2,900,000 as of June 30, 1989.

172. On October 18, 1989, Canterra delivered a memorandum to the Solicitor with respect to the investors' investment. Canterra referred to the investment as the "48% investor mortgage", being the investor's 42% equity interest plus the Solicitor's 6% brokerage fee paid as equity interest. Canterra proposed to pay out the investors of the \$600,000 investment. The terms included the following:

- a. Canterra would raise a \$1,600,000 mortgage on the property;
- b. the Solicitor would arrange a new second mortgage in the sum of \$720,000, representing \$600,000 in principal and \$120,000 bonus;
- c. investors would return their 48% ownership in Canterra;
- d. the collateral mortgage would be released; and
- e. there was an existing appraisal on the property at \$2,900,000.

173. On November 3, 1989, Canterra received commitment for a new first mortgage loan of \$1,550,000, with interest at 13.25% for two years.

174. On November 6, 1989, the Solicitor delivered a commitment letter to Canterra approving a new second mortgage in the amount of \$940,000. A copy of the Solicitor's letter is attached as Exhibit 77 to this statement of facts. The letter provided:

- a. the borrower was Canterra and the loan was to be guaranteed by its principals;
- b. the interest rate was 18% per annum;
- c. the mortgage would be a second mortgage;
- d. repayment was to be interest only on a monthly basis;
- e. legal fees to the Solicitor were \$6,500 including disbursements. In addition, an arranging fee of \$33,500 was payable to the Solicitor; and
- f. an up-to-date appraisal was required appraising the property at least \$2,900,000 and the lender was to receive a General Assignment of Rents.

There was no equity interest to investors in this loan.

175. By letters dated November 8 and November 13, 1989, the Solicitor provided investors with an Investment Authority to be executed. A copy of the Investment Authority is attached as Exhibit 78 to this statement of facts. The Investment Authority included the following information:

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- a. the principal of the mortgage which was to be fully advanced was \$940,000 subject to a first mortgage in the amount of \$1,550,000 with interest at 13.5%;
 - b. the estimated value of the security was \$2,900,000 established by an appraisal dated July 7, 1989;
 - c. the mortgage was being held in the name of Martin Rumack, In Trust;
 - d. interest was payable at 18% per annum;
 - e. the Solicitor was investing \$63,000.
176. The Investment Authority did not include the following facts:
- a. the Solicitor was acting for the borrower and guarantors;
 - b. there was no hold-back for construction; and
 - c. this was a refinancing, the borrower having earlier obtained a \$600,000 second mortgage with certain terms which included equity interest.
177. Prior to the commitment of the investors' funds the Solicitor determined but did not advise the investors that taxes were outstanding in the amount of \$10,598.26 being, substantially, the 1989 taxes.
178. The Solicitor would testify that he believes that he would have told the investors that he also acted for the borrowers and guarantors but accepts and would not dispute the investors' evidence that he did not advise them either orally or in writing of the conflict. The Solicitor admits that he did not advise the investors of the consequences of the conflict. The Solicitor also admits that at no time did he advise the investors to seek independent legal advice.
179. The Solicitor did not to otherwise advise the investors of the facts in paragraph 176, items (b) and (c).
180. On November 15, 1989, the second mortgage in the amount of \$940,000 was registered as well as an Assignment of Rents.
181. Also, on November 15, 1989, a handwritten document entitled "Berkeley Pay out as at November 15, 1989" was prepared by the Solicitor or his office. A copy of the document is attached as Exhibit 79 to this statement of facts. This document dealt with the \$600,000 mortgage which was to be replaced. It showed that the Solicitor received the sum of \$20,000 for legal and brokerage fees as well as the bonus of \$10,833.33 which he was to receive on his \$50,000 investment as one of the investors.
182. As well, on November 15, 1989, the Solicitor delivered a letter to the investors advising that the original second mortgage of \$600,000 had been discharged and enclosed a cheque. A copy of the Solicitor's letter is attached as Exhibit 80 to this statement of facts. Those investors who were reinvesting in the new \$940,000 mortgage received a cheque representing their bonus only and principal was placed in the new mortgage investment or the difference between the original investment in the \$600,000 mortgage and the new mortgage.

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183. At the relevant time, Rule 23 (2)(b) of the *Rules of Professional Conduct* prohibited solicitors from arranging or recommending the investment of a client as an investor in a syndicated mortgage where the solicitor was also an investor. The Solicitor breached the Rule by arranging and recommending the \$940,000 investment in the Berkeley Street property to the investors, where he was participating as an investor by investing \$63,000 in the same mortgage. The Solicitor would not have complied with the 1990 amendment to the Rule as he did not ensure that the investors obtained independent legal advice prior to making the investment. The investors could not be considered "knowledgeable" within the terms of the amendment, since they were not aware of relevant facts regarding the investment as set out in paragraph 176 or 177 herein.

184. On December 7, 1989, the new first mortgage in the amount of \$1,550,000 was registered.

185. On January 4, 1990, the Solicitor delivered a reporting letter to Rumack, In Trust, with respect to the completion of the second mortgage transaction on November 15, 1989. A copy of the Solicitor's letter is attached as Exhibit 81 to this statement of facts. The reporting letter stated that outstanding taxes had been paid. The Solicitor did not advise that the mortgage advance had been used to pay those taxes.

186. In August, 1990, the first and second mortgages went into default.

187. In April and May 1991, the Berkeley Street properties were sold under power of sale by the first mortgagee. The first mortgagee suffered a deficiency of \$273,470.76 on the properties; the second mortgagees lost their entire investment.

188. Eduardo Unikel was an investor in both the \$600,000 and the \$940,000 investments. He would testify that on the Solicitor's suggestion that there were problems with the \$600,000 investment, he accepted the borrower's offer to buy out the second mortgage. Mr. Unikel would testify that he was then approached by the Solicitor with respect to an investment in the \$940,000 mortgage, however, he was not advised by the Solicitor that he was investing in the very same property; although the address was mentioned on the Investment Authority, Mr. Unikel did not appreciate that he was investing in the same property; had he appreciated this fact, he would never have invested in the property. He would further testify that the Solicitor did not advise him of those facts listed in paragraphs 176 and 185 herein. With knowledge of those facts he would have chosen not to invest in either mortgage, and having lost confidence in the Solicitor would have declined to continue to invest with the Solicitor in the Wellington property in November 1989, the Woodbridge property in January 1989 or the Division Street mortgage in February 1990.

189. Mr. Gatt was an investor in the \$940,000 mortgage, he would testify that he was not informed of those facts listed in paragraphs 185 and 186. With knowledge of those facts, he would have chosen not to invest in the mortgage.

189a. Willi Karpel and Stella Stern were also investors in the \$940,000 mortgage. They would testify that they too were not informed of the facts listed in paragraphs 185 and 186 and, with knowledge of these facts, would have chosen not to invest in the property.

Acquisition Fund

190. The Acquisition Fund, which provided the initial deposit on the purchase and which is referred to in paragraph 160 above, had been set up specifically for Canterra by the Solicitor and was funded by a group of his client investors: Delstay Limited (\$235,000), Marlene Firsten (\$75,000), Willi Karpel (\$40,000), Gerda Kosiner (\$30,000), Stella Stern (\$20,000), Helen Michaels (\$25,000), Dianne Fallis (\$20,000), Erna Toufar (\$25,000) and A.S.G. Investments (\$30,000). The Acquisition Fund operated as a line of credit or source of funds to be used as deposits in Canterra's acquisitions. Interest was paid to the investors on the available funds even when monies were not drawn by Canterra. Canterra received the offset interest earned on the funds when they were not used. The line of credit started at \$500,000 and was subsequently reduced to \$300,000 and finally repaid in full. The Solicitor set up a numbered company whose purpose was to put in conditional offers with deposits. If Canterra wished to firm up the offer and waive conditions, they required the Solicitor's permission. Permission would be granted once Canterra had the funds available to repay the deposit to the Acquisition Fund. Payment was obtained through mortgage proceeds also raised by the Solicitor from other client investors. While the offers were conditional, the deposits could be refunded. The Solicitor has explained that the purpose of the deposits was to obtain options on properties, that is, to take them off the market for a period of time. Conditions were only waived when financing could be found to repay the deposits.

191. The Solicitor received a minimum \$40,000 for arranging the original \$500,000 loan from the investors to Canterra. The Solicitor also received a \$500.00 per month servicing fee from Canberra.

VI. EFFECT ON INVESTORS

177. Investor clients invested with the Solicitor in more than one property and often in four or five of the seven properties herein. These investors, Mr. Gatt, Mrs. Lash, Mrs. Stern, Mrs. Kelman and her children, Mr. Unikel, Mr. Fenwick, Mr. Karpel, Mr. DiRenzo and Ms. Huculak, would not have continued to invest with the Solicitor in further properties, if the Solicitor had advised them of the problems with the investments as the problems arose. For example, Mrs. Kelman would not have invested in the Guelph Street property in September 1989, if she had been advised that the July and August 1989 mortgage payments on the Gladstone property had been returned N.S.F. Had she known that her funds in the Gladstone property may be at risk, she would have left the funds which she later invested in the Guelph Street property with her Bank. Similarly, if Mr. Unikel was advised that there were problems with the Woodbridge investment in September 1989 when the Solicitor provided the borrower with a loan in order to pay arrears on the investors' mortgage, Mr. Unikel would not have committed funds to the Wellington, Berkeley and Division Street properties.

193. These investors placed reliance on the Solicitor in investing their savings. For Mrs. Stern who is 84 and widowed, Mr. Karpel who is 75, Mr. Gatt, Ms. Huculak, Mrs. Lash and Mrs. Toufar (now deceased), this represented hard earned savings for retirement. For Mrs. Kelman, the funds invested in her name and in the name of her children, Maury and Jay, represented savings by the Kelman family for some 30 years.

194. For the families of Mr. DiRenzo and Mr. Unikel, the loss has placed them in a position where they continue to service loans to repay debts they have incurred and are limited in their ability to save for their retirement, and for their children.

195. The loss of funds and the resulting legal actions have resulted in emotional hardship for each of the investors and their families, particularly those investors in retirement.

196. For each investor, the Solicitor's continued failure to disclose relevant information to him or her over the course of the various investments has undermined that investor's confidence in lawyers.

VI. DISCIPLINE HISTORY

197. The Solicitor does not have a discipline record.

DATED at Toronto, this 24th day of June, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Martin King Ian Rumack be suspended for a period of thirty days and that upon his reinstatement, he be subject to the following conditions:

1. that he be prohibited from acting for both vendor and purchaser in a real estate transaction;
2. that he be prohibited from acting on both sides of a real estate transaction except where the mortgagee is an institutional mortgagee;
3. that he enrol and co-operate with the Practice Review Program of the Law Society;
4. that he be required to offer his services to the Law Society in lecturing on the perils and dangers of acting in a conflict of interest and the related matters that have caused him to be before the Law Society, and that he prepare a paper for the use of the Law Society, LPIC or a similar type of body on the same subject;
5. that he pay the Law Society costs in the amount of \$20,000 payable in yearly instalments of \$2,500 commencing six months after his return to practice.

REASONS FOR RECOMMENDATION

In determining the appropriate penalty in this matter, the Committee has looked at a number of factors. First of all, the misconduct that we found is misconduct involving acting in conflict of interest and over a period of time, between one and a half to two years.

It occurred during the period of time when the clients were making investments that turned out not to be sound, and the period of time when the investments were taking place turned out to be a very volatile one in the real estate market and significant amounts of money were lost.

We note that this misconduct took place in the period of time that ended approximately six years ago. Apparently there was no misconduct committed by the Solicitor before that, and apparently none since. We also note that the legal work that relates to the real estate transactions was done properly and that there was no misrepresentation as to the status of the mortgages. There was no financial gain to the Solicitor who had together with his investors, including members of his family, lost a substantial amount of money.

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We have an extensive brief of character letters that are impressive in telling the story of a Solicitor well respected in the legal community and in the wider community, letters that speak of his compassion. The letters are from family, employees, and lawyers who have worked with him, as well as investors who lost money, all speaking of his decency, warmth, and sensitivity, and many speaking of his legal skills.

The Committee have read these letters and are impressed. The letters are from a wide variety of people, but include many well-known figures in the legal community, and in the general community as well. These people are of good character themselves, and have put their reputations on the line.

We have taken into account the nature of the misconduct and consider it serious. We must not allow the Rules to be breached. We must give a message to the legal community that not only should the Rules be followed, but all solicitors must be aware of the Rules and should be reading the Rules.

There is evidence here that in one of the counts in the complaint the Solicitor was simply not aware of the Rule, Rule 23(2)(b), and is now aware of it.

The Committee is cognizant of the financial penalty that the Solicitor would face were he subject to a lengthy suspension. We are aware of his present financial circumstances. We have been told that he is in debt a significant amount of money, over a million dollars. We find it significant and a positive reflection on his character that he has chosen to try to repay his debts as opposed to other routes that might be available to him. We feel that that is a course of conduct which should be encouraged. The activities of the Solicitor that gave rise to his misconduct arose not from lack of competence in the practice of real-estate law, but in his efforts as a mortgage broker, and it was in that capacity that he was in a conflict with his obligations as a lawyer.

A penalty in terms of a lengthy suspension, that would effectively put Mr. Rumack out of the legal business, would not be in the public interest, would not achieve that repayment of debt, nor his ability to pay penalties that would be assessed in this matter.

For these reasons we make the recommendations as set out above.

Martin King Ian Rumack was called to the Bar on the 23rd day of March, 1973,

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 13th day of November, 1996

Thomas J. P. Carey, Chair

There were no submissions. The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 30 days, pay the Society's costs in the amount of \$20,000 payable in yearly installments commencing 6 months after the solicitor's return to practice and upon his reinstatement be subject to the conditions set out in the report.

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Mr. Greenspan made submissions in support of the recommended penalty and requested that the suspension commence in November 1997 or in the alternative August 1997 in order that the solicitor could deal with the obligations of his practice.

Ms. Brooks made submissions in support of the recommended penalty but opposed the requested commencement date of the suspension.

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

It was moved by Ms. Sealy, seconded by Ms. Sachs that the recommended penalty be adopted with the amendment that the commencement date of the suspension be June 6th, 1997.

Carried

It was moved by Mr. Swaye, seconded by Ms. Puccini that the recommended penalty be adopted and the commencement date of the suspension be August 1st, 1997.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 30 days commencing June 6th, 1997, pay costs in the amount of \$20,000 and be subject to the conditions set out in the Report upon the solicitor's return to practice.

Re: Antol TASSY - Cambridge

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Wilson, DelZotto and Banack withdrew for this matter.

Ms. Brooks appeared for the Society and Mr. Rook, Duty Counsel appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 29th January, 1997 together with an Affidavit of Service sworn 14th February, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 5th February, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 24th April, 1997 (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

Elvio L. DelZotto, Chair
W. Michael Adams
Mary A. Eberts

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

Janet Brooks
for the Society

24th April, 1997

ANTAL TASSY
of the City
of Cambridge
a barrister and solicitor

David St. C. Bond
for the solicitor

Heard: January 28, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 27, 1996 Complaint D94/96 was issued and on September 19, 1996 Complaint D231/96 was issued against Antal Tassy alleging that he was guilty of conduct unbecoming a barrister and solicitor. Complaint D94/96 was withdrawn and replaced with Complaint D94a/96 issued on December 10, 1996.

The matter was heard in public on January 28, 1997 before this Committee composed of Elvio L. DelZotto, Q.C., Chair, W. Michael Adams and Mary A. Eberts. The Solicitor attended the hearing and was represented by David St. C. Bond. Janet Brooks appeared on behalf of the Law Society.

DECISION

The following particulars of conduct unbecoming a barrister and solicitor were found to have been established:

Complaint 94a/96

2. a) That he, on or about the 29th day of July, 1994, in the Ontario Court, Provincial Division, Municipality of Metropolitan Toronto, was found guilty in respect of a charge of assault; and
- b) That he, on or about the 19th day of April, 1995, in the Ontario Court, Provincial Division, Regional Municipality of Waterloo, before His Honour Judge Elliott Allen, was convicted of a charge of assault.

Complaint D231/96

2. A) On May 21, 1996, he was convicted of the offence that he on or about the 28th day of April, 1996, at the City of Cambridge in the Central South Region did in committing an assault on Joyce Crawford carry a weapon, to wit; a wooden walking stick, contrary to Section 267(1)(a) of the Criminal Code of Canada.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D94a/96 and Complaint D231/96 and is prepared to proceed with a hearing of this matter on December 10 and 11, 1996.

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 D94a/96, Complaint D231/96 and this agreed statement of facts with his counsel, David St.C. Bond, and admits the particulars contained therein. The Solicitor also admits that the particulars of Complaint D94a/96 and Complaint D231/96, supported by the facts set out herein, constitute conduct unbecoming a barrister and solicitor.

IV. FACTS

4. The Solicitor was called to the Bar on February 7, 1992. He practises as a sole practitioner in Cambridge, Ontario.

Complaint D94a/96

Particular 2(a) Finding of guilt on or about July 28, 1994 in respect of assault

5. On July 28, 1994, the Solicitor was found guilty in respect of a charge of common assault contrary to section 266 of the Criminal Code of Canada. The charge was in relation to an incident occurring on June 30, 1994 in which the Solicitor assaulted Grant Bedford with a metal walking cane. The Solicitor was charged with assault causing bodily harm. He entered a guilty plea before His Honour Judge C.H. Paris, at Ontario Court (Provincial Division) at Toronto to the lesser and included offence of common assault. He received a conditional discharge with probation for six months, requiring the Solicitor to keep the peace and be of good behaviour. Attached at Tab 1 of the Document Book is a copy of the certified copy of the Information.

6. Attached at Tab 2 of the Document Book is a transcript of the proceedings on July 28, 1994 before His Honour Judge C.H. Paris. The facts as read in by the Crown were as follows:

"On Thursday, June 30, 1994 at approximately 3:45 p.m., the accused, Antal Tassy was walking east from Bay Street and Dundas Street West in Toronto. The victim was crossing Bay Street at Dundas Street West on his bicycle and he was suddenly hit in the back by a walking stick which the accused was carrying, and this caused the victim to lose his balance slightly on his bicycle. The attack was not provoked in any way. The victim heard the accused saying, "Get out of the way!" before he was hit.

"The victim attracted the attention of uniformed officers who were on routine patrol, and Mr. Tassy was apprehended at the location just east of where the assault took place and he was arrested. He provided some resistance and during the arrest was un-cooperative. Those are the facts."

[Document Book, Tab 2, Transcript: page 3, lines 1-19].

7. The Solicitor was asked whether the facts as read in by the Crown were accurate. He had the following comments:

"Not exactly, Your Honour, because in the first he was riding a bicycle on the sidewalk less than a half metre in front of me. That is to say, it was not necessarily not provoked, and I cooperated with the police to the extent that I think it's required to cooperate with the police. That's the only problem I have with the facts as read."

[Document Book, Tab 2, Transcript: page 3, lines 21-27.]

Complaint D94a/96

Particular 2(b) Conviction of assault on or about April 19, 1995

8. On April 19, 1995, the Solicitor was convicted of assault on Michelle Parsons contrary to Section 266 of the Criminal Code of Canada. He entered a plea of not guilty before His Honour Judge Elliott at Ontario Court (Provincial Division), Cambridge and was convicted following a trial on April 19, 1995. On June 20, 1995, the Solicitor received a suspended sentence and two years probation with a requirement that he take such psychiatric counselling as directed by the probation officer and that there be no contact directly or indirectly with either of the complainants (Michelle Parsons and Mark Parsons). Attached as Tab 3 of the Document Book is a copy of the Certificate of Conviction.

9. Attached at Tab 4 of the Document Book is a copy of the transcript of the trial before His Honour Judge Elliott on April 19, 1995. At the trial the Solicitor represented himself. The Crown called four witnesses: the investigating officer, Michelle Parsons, the building manager at the Solicitor's office building and Mark Parsons. The Solicitor cross-examined the Crown's witnesses.

10. Michelle Parsons, age 20 years, identified the Solicitor as the person who assaulted her. With respect to the incident, she testified, *inter alia*:

"...we were just going for a normal bike ride like we usually does and when we were coming across the bridge, we made the turn right to come down the street here and there was so much traffic that we just pulled off to the side a little bit and like still sitting on our bikes but we were walking a little ways down and I noticed the officer right here, he was sitting on the corner already doing an accident. There was an accident or something so we noticed him and we kept on riding and when we come down, like we were slowing down and this gentleman right here come up...

... Mr. Tassy I presume his name is. He was walking towards us. People like - we weren't like blocking any kind of traffic whatsoever. People were walking by. Actually two people side by side walked right beside us. We were in single file on our bikes and he just come after Mark with his briefcase for no reasons and shoved him right onto the ground and then he come after me and pushed me to the side into the wall and like he didn't even turn around to see if we were all right. He just kept walking.

[Document Book, Tab 4, Transcript: page 11, lines 19-32; page 12, lines 1-3]

11. Michelle Parsons was asked about injuries and testified in chief as follows:

"Q. Were you afraid?

- A. Why not? It was the first time ever I was assaulted in my life like that.
Q. Did you have any injuries?
A. No just fairly really scared.
Q. What about Mark?
A. It's - it scared him a lot. He won't go nowhere with me no more."

[Document Book, Tab 4, Transcript: page 12, lines 24 - 30]

On cross-examination she was also asked about injuries and testified as follows:

- "Q. Did you feel hurt?
A. Yeah.
Q. Was - your pride was wounded or..
A. It wasn't my pride. You scared me half to death. Nothing ever happened like that to me before in my life so what do you want me to do? Just like walk on by and pretend it never happened. I don't think so.

[Document Book, Tab 4, Transcript: page 20, lines 22 - 26]

12. Mark Parsons, age 11, identified the Solicitor as the person who assaulted him. With respect to the incident, he testified, *inter alia*:

".. Well me and my cousin were going for a bike ride ...We moved over to the side and we let some people go by and then some people went by and we went on and he came up and he approached me first and he took the briefcase in both hands and he shoved me off my bike."

[Document Book, Tab 4, Transcript: page 24, lines 23 - 27]

13. The Solicitor did not give evidence. In submissions, he raised issues of identification and justification. In particular, in relation to justification, the Solicitor submitted that:

"... the complainants in this case were contributorily at fault or whatever one would wish to say. They were in a space where they did not belong. Demonstrated that they had no knowledge of not belonging there. Perhaps the method chosen to admonish them to that purpose was an inelegant method..."

[Document Book, Tab 4, page 32, lines 30-32; page 33, lines 1-5]

14. In Reasons for Judgment, the Court found that identification was made out. On the issue of justification, His Honour stated, *inter alia*:

"As to the issue of justification, the notion that an adult can and I appreciate that the complainant in this case is 20 but in the circumstances of this case, she has to be regarded as a kid on a bike. The idea that a pedestrian can walk up to and assault children on bicycles because they might brush up against them and get his clothes dirty or because they come within the definition of a vehicle in the Highway Traffic Act or some nonsense like that is just that, nonsense. There's no reasonable apprehension of an assault here. There's no reasonable apprehension of danger and the method of dealing with the situation is not a reasonable method of dealing with it in any event. This man was angry at cyclists in general and he took it out on a couple of kids on a random basis. There will be a conviction..."

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[Document Book, Tab 4, page 35, lines 21-32; page 36, lines 1-5]

15. A pre-sentence report was ordered and the matter was adjourned to June 20, 1995 for sentencing.

16. Attached at Tab 5 of the Document Book is a copy of the pre-sentence report prepared by Bruce Hare, Probation and Parole Officer. It provides the Solicitor's background and states, *inter alia*:

"The offender reports no problems or concerns regarding his emotional health.

....

"Julie Glass of Corporate Health Consultants was contacted for this report with the offender's signed consent. She reports that the offender attended one session with her on May 10, 1995 for about 1.25 hours. He attended upon the advice of a colleague and through Employees Assistance Programme of the Law Association.

"Ms. Glass indicates that the offender did not hesitate to discuss the assault with her. Furthermore, the offender discussed two previous assaults. One at the age of 17 years when he "shot" another boy in the face with a BB gun after being shot in the groin. The other involved assaulting a man on the Toronto Transit who refused to extinguish his cigarette at the offender's request. She adds that in these cases, the current offence, the offender does not accept responsibility for his actions and sees the victims as the problem. With respect to the current offence, the offender apparently did not intend to hurt the cyclists.

"During the assessment with Ms. Glass, the offender was not able to identify treatment goals and stated he does not feel he has anger management problems. No further counselling appointment was made. Ms. Glass does not feel that a referral for anger management would be beneficial in this case because of the offender's failure to assume responsibility for his actions. She feels that a referral for psychiatric assessment and/or treatment would be "time better spent". Never-the-less, should the offender decide to return to her agency for counselling, he will be accommodated."

17. The Assessment provided in the pre-sentence report is as follows:

"Before the Court for sentencing is the 44-year-old Antal Tassy. His childhood saw the basic necessities provided, but intra-familial relationships were distant. The offender appears deeply disappointed in his father. He spoke little of his mother. No abuse issues in the family were noted.

"The offender does not abuse substances and is in good physical health.

"He is well educated and holds a Masters Degree. His employment record shows many short-term positions which appear to have been unrewarding for him. He is having considerable difficulty establishing a private practise in law. His financial situation is poor and a source of considerable stress for the offender. He appears to have difficulty managing his finances and bookkeeping.

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"Sources describe the offender as being highly regimented, and disciplined individual. He apparently has a low tolerance for people who do not see the world a he does. He is quick to anger when he feels he is witnessing "irrational" behaviour. He attended one session with a counselling agency but did not identify a need for counselling, did not identify treatment goals, and failed to accept responsibility for his actions. He sees the victims of his assaults as the problem. The counsellor does not feel that anger management counselling would be beneficial for the offender. She recommends psychiatric assessment and/or treatment.

"Should the Court be considering a period of Community Supervision, the offender would be amenable. The writer recommends the following conditions:

- "1) attend for psychiatric (*sic*) or psychological assessment and /or treatment as directed by the probation officer
- 2) attend for other counselling as arranged by the probation officer. (Here the writer has in mind Debit/Credit Counselling.)"

18. The sentencing proceedings took place before His Honour Judge Allen on June 20, 1995. A copy of the transcript is attached at Tab 6 of the Document Book. The Solicitor appeared on his own behalf and submitted, *inter alia*:

"In mitigation, it was established that there were no injuries. It was established that there were no injuries. It was admitted in evidence by the first complainant that the actual assault consisted of a fending off. That was admitted. That's in the record. I submit that constitutes a mutuality. When you fend off, you're fending off something - something else. The two complainants - apart from what your Lordship (*sic*) thinks about the Highway Traffic Act or local delegated legislation in his city, the two complainants were committing a discourteous and dangerous act, and therefore attracted on themselves an admonishment at the very least. One complainant - they were characterized in this court as being kids on bikes. A 20 year old woman is generally not considered a kid.."

[Document Book, Tab 6, Transcript: page 4, lines 12-28]

19. After hearing the submissions of the Solicitor, Judge Elliot commented on the Solicitor's lack of remorse and expression of defiance. The matter was stood down on the list while the Solicitor was held in custody from approximately 10:30 a.m. until 2:00 p.m. [Document Book, Tab 6, Transcript: page 7].

20. His Honour Judge Elliot suspended sentence and ordered two years probation on terms noted in paragraph 8 above. In reasons for sentence, His Honour stated *inter alia*:

On this case, Mr. Tassy was found guilty after a trial of two counts of assault involving two young people on bicycles who he perceived to be acting inappropriately, riding their bicycles on the sidewalk, and he assaulted both of them, not in any way that resulted in bodily harm, but in a way that was totally inappropriate and uncalled for in the circumstances.

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He attempted in the course of the trial to justify his conduct on the basis that they might have run into somebody else, and therefore he was entitled to take the action he did, and in my view, he clearly was not. It's apparent, from the information I've received, that shortly after this incident, before he was charged with this incident, a similar incident occurred in Toronto which was dealt with promptly and resulted in a conditional discharge and a term of probation.

...Mr. Tassy, according to the Pre-Sentence Report prides himself on discipline and believes that other people should behave in a more disciplined fashion. It's apparent to me that Mr. Tassy deludes himself that he is a disciplined person because he has no control over his own anger, and so if he places some value on self-discipline, he should come to terms with the fact that he has none.

He also prides himself on his education, particularly the fact that he is a member of the Bar, and has a legal education, but it is apparent that he has, when it comes down to a personal situation, no understanding of the law either. The law does not allow for preemptive physical assaults against people who are being nuisances or violating by-laws or whatever the cause may be, and anyone who attempts to twist the law around to justify their own behaviour in that regard, clearly doesn't have the proper understanding of the law either..

... What aggravates this case is that Mr. Tassy is quite unrepentant.

... You cannot assault members of the public because you don't like the way they are behaving, and if you think you can, you will find yourself before the courts again...

[Document Book, Tab 6, Transcript: pages 7 - 13]

21. The conviction was brought to the attention of the Law Society by letter dated July 17, 1995 from Michael Code, the then Assistant Deputy Attorney General, Criminal Law Division. Mr. Code notified the Law Society that there had been a number of minor successful prosecutions against the Solicitor. Attached at Tab 7 of the Document Book is Mr. Code's letter. Mr. Code enclosed a letter dated June 28, 1995 from Lois Aicken, Assistant Crown Attorney to James A. Treleaven, Regional Director of Crown Attorneys. A copy of Ms. Aicken's letter is attached at Tab 8 of the Document Book. Mr. Code also enclosed a letter dated July 4, 1995 which he received from Mr. Treleaven. A copy of Mr. Treleaven's letter is attached at Tab 9 of the Document Book.

22. The Law Society forwarded a copy of the correspondence from Mr. Code to the Solicitor for his comments. By letter dated November 5, 1995, the Solicitor provided his response to the Law Society. A copy of the Solicitor's letter is attached at Tab 10 of the Document Book. The Solicitor stated, *inter alia*:

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"I concede that I feel no remorse toward the persons who appeared for the Crown. I did not cause injury or property damage. I intended no injury or property damage. I intended to admonish individuals who clearly did not understand the lawful use of pedestrian pavements. I have no specific recollection of the relevant events and only was able to infer certain suppositions by analyzing correspondence or other records of the same date. It is a fact that about the beginning of summer in 1994 a large number of irresponsible individuals were operating bicycles on pedestrian pavements in this vicinity. I happen not to drive and to walk virtually all short distances. I consider a distance of less than five kilometres to be short. I used to race bicycles but have actually not ridden once since riding two bicycles (two separate occasions) from my Law School to Cambridge in 1990.

"On a number of such occasions I have been struck by cyclists driving on sidewalks, my clothes have been dirtied, a cyclist once came very close to running over my dog -- the ultimate innocent bystander; cyclists in my recent experience have proceeded along walkways at speed and turned corners virtually in my face and then cursed me because of having to slow or brake. I find this behaviour hard to appreciate. The Highway Traffic Act and bylaws of most communities (including this) are explicit in prohibiting the driving of vehicles on walkways, yet the practice persists and the police appear not to concern themselves."

23. In his letter of November 5, 1995, the Solicitor commented on two other incidents which had been referred to in the pre-sentence report (Tab 5 of the Document Book). With respect to the incident involving the B.B. gun, the Solicitor stated:

"The event alluded to involving the B.B. gun occurred about 1964 (when I was 13 years of age) and hence some 31 years ago. In general the facts there presented are correct."

The Solicitor commented on an incident in which he requested another rider on a T.T.C. subway car to extinguish a cigarette. At page 1, he described the event as follows:

"The matter led to a consensual fistfight at which I indeed initiated the event because it was clear to me that the individual was about to initiate an assault. (I have read just enough theoretical material about warfare to appreciate that the armoured vehicle that shoots first has a 63% chance of defeating an opposing armoured vehicle: I apply this knowledge to the infantry as well.)"

24. By letter dated September 21, 1995, the Law Society requested further particulars regarding the incident on the T.T.C. A copy of the Law Society's letter is at Tab 11 of the Document Book.

25. By letter dated January 3, 1996, the Solicitor provided further details regarding the incident on the T.T.C. A copy of the Solicitor's letter is at Tab 12 of the Document Book.

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Complaint D231/96

Particular 2(a) Conviction of assault with a weapon on or about June 5, 1996

26. On May 21, 1996, the Solicitor was convicted of assault with a weapon contrary to Section 267(1)(a) of the Criminal Code of Canada. The Solicitor entered a guilty plea on May 21, 1996. On June 5, 1996, he received a suspended sentence with two years probation. The Court ordered that the Solicitor be prohibited pursuant to Section 100 of the Criminal Code from possessing firearms or other weapons for a period of ten years. A copy of the Certificate of Conviction is at Tab 13 of the Document Book. A copy of the Order pursuant to section 100 of the Code is at Tab 14 of the Document Book.

27. A copy of the Probation Order dated June 5, 1996 is at Tab 15 of the Document Book. The terms of probation are as follows:

- a. keep the peace and be of good behaviour;
- b. report forthwith, in person, to a probation officer as directed and, thereafter, be under the supervision of a probation officer or a person authorized by a probation officer to assist in the supervision of the accused, and report at such times and places as that person may require;
- c. perform 200 hours of community service under the supervision of a probation officer or designate;
- d. abstain from owing, possessing or carrying any offensive weapon/ammunition/explosive substance or weapon as defined in the Criminal Code;
- e. not change place of residence without first giving notification to the probation officer or designate;
- f. attend for assessment/treatment/and/or counselling as may be required upon such schedule as may be arranged by your probation officer particularly with respect to concerns re alcohol abuse, psychological counselling and psychiatric counselling and such other area as may be identified by your probation officer and provide such proof as may be required by your probation officer or your attendance at and participation in any programme recommended and any treatment recommended.

28. The Crown's Synopsis and Will-Say statements are at Tab 16 of the Document Book. The transcript of the Solicitor's guilty plea on May 21, 1996 is at Tab 17 of the Document Book. The facts read in by the Crown and admitted by the Solicitor were as follows:

"On April 28th, 1996, at approximately 12:49 in the afternoon, Joyce Crawford, was riding her bicycle on the sidewalk northbound adjacent to Hespeler Road in Cambridge approaching Pine Bush Road. She observed a man, later identified as Mr. Tassy. He was dressed in dressed in army fatigues. He was running in her direction and was carrying a black object, which in fact, was a black wooden walking stick with a sling on it or slung over his shoulder and he ran towards her. She attempted to swerve out of his way. He continued to proceed towards her and struck her on her left bicep causing her to fall off her bicycle and onto the ground. He hesitated and said something. She's not sure what he said but she believes: "I'm sorry". He then continued on his way. She called out to for him to stop. He did not. She called to her husband who was approaching but quite a distance away, however he did not hear her. He approached Ron Crawford, her husband, and ran so close to him that their shoulders brushed. There was also a witness who was in her vehicle on Hespeler Road. She stopped to offer assistance. Mrs. Crawford said she was fine. She thought in fact that the object was a rifle at first, but it wasn't. It was a stick. She reported -

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the witness reported to the police, who were parked at the Knob Hill Farm Store on Hespeler Road in the parking lot. They searched the area and found Mr. Tassy running southbound on Hespeler Road still in army fatigues holding a black walking stick. When questioned he said: "I told her I was sorry." He was subsequently arrested and charged with assault. Ms. Crawford suffered a deep tissue bruise to her left bicep with an imprint of the walking stick in the bruise. She also suffered numerous scrapes and bruises to her left leg and arms after the fall off the bicycle. She said she was okay and those were the extent - that was the extent of her injuries. Mrs. Crawford was about... 55 years old. She was wearing a helmet at the time"

[Document Book, Tab 17, Transcript: page 2, lines 5-31; page 3, lines 1-11]

At the sentencing proceedings on June 5, 1996, further submissions were made on the facts by counsel for the Solicitor and Crown counsel. A copy of the transcript of those proceedings is at Tab 21 of the Document Book. Submission by counsel for the Solicitor are at pages 2, 3 and 5 of the transcript. Submissions by Crown counsel are at pages 4, 5 and 6 of the transcript.

29. After being arrested on April 28, 1996, the Solicitor was taken by police to the London Psychiatric Hospital for preliminary assessment which recommended that the Solicitor undergo further mood disorder testing. On May 21, 1996, His Honour Judge Culver made an order pursuant to section 672.119(e) of the *Criminal Code* which remanded the Solicitor into custody for 14 days at the London Psychiatric Hospital for the purpose of further psychiatric assessment. In total, the Solicitor was in custody for 35 days either at the Waterloo Detention Centre or at a hospital.

30. An assessment interview was conducted on August 9, 1995 by Dr. Griffith Moran, consultant psychologist. Attached at Tab 18 of the Document Book is a copy of Dr. Morgan's report. The Solicitor has some disputes some of the statements in the report which, according the Solicitor was based on one appointment.

31. A psychiatric assessment of the Solicitor was carried out at London Psychiatric Hospital from May 22, 1996 to June 4, 1996. By letter dated June 4, 1996, Dr. Wadden, Psychiatrist, Admissions Services, at London Psychiatric Hospital provided his assessment. Dr. Wadden's report is based on the Solicitor undergoing testing and being in the London Psychiatric Hospital on two periods of time. A copy of Dr. Wadden's report is attached at Tab 19 of the Document Book. The clinical impressions provided by Dr. Wadden are that:

- "1. Mr. Tassy suffers a dysthymic disorder, a form of mood disorder, characterized by a low grade chronic depression. Mr. Tassy has tended to cope with this depressive illness by working 7 days a week and filling his off hours with as much structured physical activity as possible. This also appears to be a method for Mr. Tassy to cope with the irritability associated with the dysthymic disorder and also work related stress.

2. Personality disorder of mixed type. Mr. Tassy's longitudinal history is consistent with a personality disorder or mixed type, in that he demonstrates recurrent difficulties in initiating and maintaining relationships, impulsivity and conflict resolution. Mr. Tassy shows a mixture of schizoid obsessional, antisocial and narcissistic traits. The schizoid traits refer to his lack of interest in human contact and his tendency to prefer social isolation. The obsessionalism is evident in his efforts to control as much of his environment as possible and not to deviate from a task, even if some unforeseen events should arise in the case of the recent offense. The antisocial traits are evident in Mr. Tassy's history of impulsivity and aggressive behaviour towards others.
3. Dangerousness: there is a risk of a similar offense occurring in the future. The best predictor of this is the prior history of repeated assaultive behaviour. Outside of the incident described with the pellet gun as a child, Mr. Tassy has never used a firearm in an irresponsible fashion and clearly states that he would never use a firearm irresponsibly or intend harm to himself or anyone else."

Dr. Wadden's clinical recommendations were:

- "1. It is recommended that Mr. Tassy begin a trial of an antidepressant for treatment of dysthymic disorder. He has agreed to this and has started an antidepressant, Paxil (Paroxetine).
2. We recommend that Mr. Tassy be involved in individual psychotherapy with a view to facilitating peaceful, effective conflict resolution, managing impulsivity, coping with depressive symptoms and resolving significant personal losses.
3. The patient should abstain from alcohol completely as its disinhibiting effects may increase the risk of violent behaviour."

Dr. Wadden's report concluded:

"The treatment of the dysthymic disorder and successful engagement in individual psychotherapy will be helpful in decreasing the risk of future assaultive behaviour. However, the most critical factor in the reduction of this risk will be Mr. Tassy's level of motivation. Mr. Tassy admits that he has a serious problem in managing encounters with bicyclists. He expresses strong motivation to change and also a willingness to collaborate with health professionals in reducing this risk...."

32. On June 5, 1996, the sentencing took place before His Honour Judge Culver. The Court received the letter from Dr. Wadden and the Victim Impact statement of Mrs. Crawford. A copy of the Victim Impact Statement is at Tab 20 of the Document Book. Mrs. Crawford stated that her injuries were not serious, that she realized that the Solicitor had a mental illness and was pleased that he was receiving treatment. She also expressed her concern that "his next victim could be seriously injured."

33. A copy of the transcript of the sentencing is at Tab 21 of the Document Book. Statements in the medical report and by defence counsel raised issues of intent; however, the Court was satisfied that the plea should stand and proceeded with sentencing.

34. On June 20, 1996, the Solicitor, through counsel, advised the Law Society that he had been convicted of an offence of a nature similar to that of his previous conviction.

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35. The conviction was also brought to the attention of the Law Society by letter from Assistant Deputy Attorney General, Graham Reynolds dated July 10, 1996. A copy of the letter is at Tab 22 of the Document Book. Mr. Reynold's enclosed copies of a memorandum from James A. Treleaven, Regional Directors, Crown Attorneys, dated June 26, 1996 (Tab 23 of the Document Book), a letter from Lois Aicken, Assistant Crown Attorney to Mr. Treleaven, dated June 12, 1996 (Tab 24 of the Document Book), and the pre-sentence report filed before His Honour Judge Allen in respect of the earlier conviction (Tab 5 of the Document Book).

IV. DISCIPLINE HISTORY

36. The Solicitor does not have a discipline history.

DATED at Toronto, Ontario, this 11th day of December, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Antal Tassy be suspended for a period of 30 days and to continue thereafter until he produces an opinion, satisfactory to the Secretary of the Law Society from a psychiatrist acceptable to the Secretary of the Law Society, stating that the Solicitor is fit to practise law and able to serve clients; that he presents no danger to clients, and that he is able to exercise self-governance so that members of the public are not hurt.

REASONS FOR RECOMMENDATION

The Solicitor was charged and convicted of assault on three occasions during 1995 and 1996. Each incident involved individuals who were on bicycles.

The judge in the second case recommended that the Solicitor seek psychiatric assistance which he did not do.

When arrested the third time the police took him to London Psychiatric Hospital for a preliminary assessment which recommended that he undergo further mood disorder testing. As a result, His Honour Judge Culver ordered the Solicitor into custody for 14 days at the London Hospital for further psychiatric assessment. In total he was in custody for 35 days.

Dr. Wadden, Psychiatrist, in his report concludes that the Solicitor suffers "a dysthymic disorder, a form of mood disorder, characterized by a low grade chronic depression" and further that his personality disorder is "consistent with a personality disorder or mixed type, in that he demonstrates recurrent difficulties in initiating and maintaining relationships, impulsivity and conflict resolution. Mr. Tassy shows a mixture of schizoid obsessional, antisocial and narcissistic traits." Dr. Wadden states, "there is a risk of a similar offense occurring in the future."

Dr. Wadden recommends a trial of antidepressants, individual psychotherapy and abstinence from the use of alcohol. He states that such treatment would be "helpful in decreasing the risk of future assaultive behaviour."

The Order at trial, among other things, required the Solicitor to undergo such treatment.

24th April, 1997

The Solicitor states that he visited Dr. Ketab, a psychiatrist, and that he did not want to see him after the third visit because of a personality clash. The Solicitor also stated that his medication subscription had run out before his last visit on November 4, 1996 and he had not asked for a new one. He then said his family doctor, Doctor Piper was endeavouring to find a psychiatrist for him but had not done so as of the date of this hearing.

Clearly the Solicitor has not complied with the Court Order and therefore is at risk of committing a similar offence.

The Committee would have imposed a more severe penalty if it had not been for the obvious mental illness that the Solicitor has. He has already spent 35 days in custody; he has lost his military pay because of this problem and lost income from his referral service.

The Committee believes that if the Solicitor obtains the required psychiatric assessment indicating he is able to practise law, and Convocation agrees, the suspension should be reduced to a reprimand in Convocation.

Antal Tassy was called to the Bar on February 7th, 1992.

ALL OF WHICH is respectfully submitted

DATED this 29th day of January, 1997

Elvio L. DelZotto, Q.C.,
Chair

Counsel took questions from the Bench.

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

It was moved by Mr. MacKenzie, seconded by Mr. Bobesich that the Report not be adopted.

Counsel, the solicitor, the reporter and the public were recalled and heard further submissions from counsel.

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

The MacKenzie/Bobesich motion was voted on and lost.

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

Carried

Counsel, the solicitor, the reporter and the public were recalled and advised that the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 30 days and to continue thereafter until the solicitor produces an opinion satisfactory to the Secretary from a psychiatrist acceptable to the Secretary stating the solicitor is fit to practise.

Ms. Brooks advised that a psychiatric report had been received and made submissions in support of the 30 day suspension.

24th April, 1997

Mr. Rook made submissions in support of a reduced penalty of a reprimand in Convocation because the solicitor had produced a psychiatric report.

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

It was moved by Mr. Swaye, seconded by Mr. Bobesich that the solicitor be reprimanded in Convocation.

Carried

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

The Treasurer administered the reprimand.

Convocation took a brief recess at 11:00 a.m. and resumed at 11:15 a.m.

Re: David Eric HOWLETT - Niagara Falls

The Secretary placed the matter before Convocation.

Messrs. MacKenzie, Thom and Wright and Ms. Stomp withdrew for this matter.

Ms. Lesley Cameron appeared on behalf of the Society and Mr. Rook appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 11th October, 1996, together with an Affidavit of Service sworn 23rd October, 1996 by Ron Hoppie that he had effected service on the solicitor at the Glengate Street address by registered mail on 16th October, 1996 (marked Exhibit 1), together with the Report and Affidavit of Service sworn 23rd October, 1996 by Ron Hoppie that he had effected service on the solicitor at the 3643 Portage Road address by registered mail on 16th October, 1996 (marked Exhibit 2), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 24th April, 1997 (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert B. Aaron, Chair
W. Michael Adams
Shirley O'Connor

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

Lesley Cameron
for the Society

DAVID ERIC HOWLETT
of the City
of Niagara Falls
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 14 & 15, 1995
March 27 & May 28, 1996

24th April, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

D196/93; D360/93

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

IN THE MATTER OF DAVID ERIC HOWLETT

REPORT

On August 23, 1993, complaint D196/93 was issued against David Eric Howlett. On January 7, 1994, complaint D360/93 was issued against him. Both complaints allege professional misconduct.

These complaints were heard in public on December 14, 1995, December 15, 1995, March 27, 1996 and May 28, 1996 before this Committee composed of Robert B. Aaron (chair), W. Michael Adams and Ms. Shirley O'Connor.

Mr. Howlett attended and represented himself. Ms. Lesley Cameron appeared on behalf of the Law Society.

This matter had been heard by a Discipline Committee on a previous occasion. On November 23, 1995, Convocation determined that the matter would be sent back to committee for a new hearing. The reasons of the previous Committee and the reasons of Convocation were not before this panel.

DECISION

David Eric Howlett was charged with the following particulars of professional misconduct:

Complaint D 196/93

- (a) he practised law while his rights and privileges as a member of the Society were suspended from November 2, 1992 to April 27, 1993.
- (b) he breached an order of Convocation dated November 23, 1989 whereby he was suspended and ordered not to practise as a sole practitioner for two years upon being reinstated.

Complaint D 360/93

- (a) he failed to file with the Society within six months of the termination of his fiscal year ending November 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 Regulation 708 made pursuant to the Law Society Act.

24th April, 1997

D 196/93 Particular (a) Practising under Suspension

On behalf of the Society, Lorraine Campbell, an examiner in the Law Society's Audit Department, introduced sample notices of default for the Errors and Omissions Insurance Levy which were sent to the Member, and a copy of the registered letter sent to the Member on November 3, 1992 notifying him that his rights and privileges were suspended from that date (Tab 3, Document Book). This letter was returned to the Society unclaimed. Notice of the suspension was published in the Ontario Reports, November 27, 1992.

Several months later, on April 26, 1993, Ms. Campbell attended the Member's office in Niagara Falls to conduct an audit of his practice. The Member indicated to her that he had received notice that the E&O levy was due but did not receive the letters indicating that he was under suspension for non-payment. He claimed that he had paid the outstanding levy in October, 1992. During the audit of his books and records, no entry was shown in his general disbursements journal showing the \$2,800 payment to the Law Society.

The practice audit revealed to Ms. Campbell that the Member was practising while under administrative suspension, namely during the period November 2, 1992 to April 27, 1993. The Member admitted to Ms. Campbell practising during this period, and we find as a fact that he did so practise while his right to do so was under suspension.

Two issues with respect to this particular are as follows:

1. Did the Member pay his fees as he says he did on October 23, 1992? If he did, he should not have been suspended.
2. Did the Member receive the notice or see his name on the list of suspended members in the Ontario Reports?

Mr. Howlett's own evidence as to how and when he paid was vague, difficult to understand and inconsistent. For example,

491. Q. (by Ms. Cameron) ... What I'm asking you is whether it was a bank draft or a money order, was it something that your mother would have purchased or signed, or was the situation that she gave you the cash and you purchased it or signed---

A: - um -- I think she would have gotten it.

492. Q. All right, and can you tell us?

A. --- if she would have given me the cash, I would have, you know, I might have probably done it myself.

497. Q. Can you tell us why a payment by your mother or by you, not from your practice account, would be entered into your cash disbursement journal?

A. Because it was not a disbursement written out of the general account. It was not written out on the trust account or on the general, so it was from another source.

498. Q. Well ---

24th April, 1997

A. --- like, what that is useful for, is like if I pay something out of pocket and it doesn't show up as a cheque anywhere. It's what it says it is --- it's a cash --

531. Q. Mr. Howlett, what efforts did you make in April of '93 to obtain a copy of the bank draft or money order, after it became apparent to you that the Law Society did not receive or did not consider payment to have been made?

A. I looked at my records at home and a few things that were in the office, to see if I could locate them. I looked at my parents' place.

532. Q. Did you approach...well, first of all, let me ask you this, did you consider which bank may have issued a bank draft?

A. You see, the problem was I was dealing with a lot of different banks.

533. Q. So, I take it from your answer, that you didn't approach any bank to try to obtain a copy?

A. Well, I talked to the people at my bank.

534. Q. Which Bank was that?

A. The Royal

535. Q. Who did you talk to?

A. I don't recall.

536. Q. Which branch was it of the Royal Bank?

A. The one on Huggins Street.....well, it's Portage and Huggins.

537. Q. Is it still there?

A. Yes

538. Q. You can't recall who you talked to?

A. No.

539. Do you recall when you went there?

A. Specifically, no.

540. Q. Generally?

A. Around, you know, around the time that this was going on. I mean, that was a significant amount of money to me.

541. Q. Do you recall, not the name, but the position of the person you spoke to?

A. One of the tellers that I dealt with.

542. Q. And what did she tell you?

A. I asked her how do you obtain a draft, you know, if it doesn't turn up.

543. Q. And what did she tell you?

A. She basically went through how, you know, they look for it and how it turns up.

544. Q. She explained that to you?

A. Um-hum.

545. Q. Did you ask her to look for it?

A. Sure

546. Q. And what happened?

A. I didn't hear anymore.

547. Q. Did you follow up?

A. Well, my assumption was that it wasn't at that bank and I looked elsewhere.

548. Q. Did you follow up?

A. With who?

549. Q. With the teller that you asked to trace....

A. ...no

550. Q. Did you approach any other bank?

A. I talked to my mother about it.

551. Q. Did you approach any other bank?

A. I didn't approach any other bank, no.

552. Q. I take it from your conversation with the teller at your own bank...that at that point, you were under the impression that it was a bank draft from your own bank?

A. Well, I had to pursue every avenue, yeah.

553. Q. Did you ask her [the teller at your bank] if you could get a copy of the bank statement showing the money coming out of your account?

A. Well, I got the bank statements and I didn't see it coming out of the account. I knew ---

554. Q. --- that it actually wasn't paid from your account?

A. No, but if I had the money in cash or in another form --- do you know what I mean?

555. Q. No.

A. Well, if you buy a bank draft or you can buy a money order, if you have the funds on hand and that sort of thing.

556. Q. Are you saying you used cash and it didn't come out of your account, is that what you're saying?

24th April, 1997

A. No, I'm saying that was something I had to determine and I determined it and I know I didn't get it in cash.

This type of exchange is repeated over and over again, both in the hearing before this panel, and in those portions of the hearing before the prior panel (Mr. Samuel Lerner, QC, Carole Curtis, and Nora Richardson) which were read into evidence on the same points.

The Member's evidence on the alleged payment of his levy was vague, inconsistent, speculative, and implausible. His explanation is a very weak and ultimately unproven effort for someone who says he genuinely believes he was deprived of \$2,800 and wrongly suspended from practice for 6 months. Had the Member really paid the \$2,800 and wrongly been suspended and wrongly faced this particular misconduct complaint, we would expect the Member to have been at his bank and the Society on a daily basis to complain and "raise the roof" until payment could be proven.

No witness was presented who could have testified that payment was delivered to the Society. Ultimately the only "evidence" there was that payment was made was the cash disbursement journal, and the evidence of the Member's bookkeeper that she generated the journal from records or other documents in March 1993. A witness for the Member, Mr. James Mace, gave some evidence about seeing the payment in October 1991 rather than 1992, but his evidence was of no assistance in determining whether payment was made in October 1992.

We find that there was no confirming evidence of payment at all. If there had been documentary support for the entry in the cash journal in March 1993, that evidence would certainly have been available for the Society's auditor in April 1993. In fact, the Society's auditor was not shown the cash disbursement journal at that time, and did not see it until this hearing.

Mr. Howlett testified that the day after Lorraine Campbell attended his office on April 26, 1993, someone attended at the Society and dropped off a replacement cheque. This behaviour is inconsistent with someone who claims that he had already paid the levy.

Ms. Campbell testified for the Society that when she attended at the Member's office for her audit, he told her that he did receive the notice of non-payment, but not the letter of suspension.

Ms. Campbell testified that the notices of non-payment and the letter of suspension went to the same address, and that the notices sent by regular mail were not returned, although the registered letter with the suspension notice did come back unclaimed.

We reject Mr. Howlett's lengthy and rambling argument that he is the victim of an injustice, that the Society is wrong, that the Society in the circumstances was under an obligation to advise him of the default, and that legitimate confusion is an excuse for failing to file.

The Member was aware of the consequences of non-payment. We find that the Member did not pay the levy in October 1992, that he was validly suspended from November 2, 1992 to April 27, 1993 and that he knowingly practised law during this period while his right to do so was suspended. We find that the Member is guilty of professional misconduct in this particular.

24th April, 1997

D 196/93 Particular (b) Breaching an Order of Convocation:

With respect to particular (b) of complaint D196/93, Convocation ordered on November 23, 1989, that the rights and privileges of Mr. Howlett be suspended for a period of one month commencing December 15, 1989 and thereafter indefinitely until his books and records are in order and the outstanding Form 2/3s are filed. The Order also provided: *"Upon being reinstated, the Solicitor will not be permitted to practise as a sole practitioner for a period of two years."*

Considerable evidence was tendered as to what this Order meant, what the Society staff thought it meant at the relevant times and what the Member thought it meant at the relevant times.

Mr. Howlett's books and records were brought up to date according to the Society in February 1991, (Document book, tab 5, letter of Gavin MacKenzie) so the prohibition as to being a sole practitioner would not expire until February 1993. After considerable testimony and submissions, Mr. Howlett, on the fourth day of the hearing, admitted particular (b) of Complaint D 196/93 in that he breached the order of Convocation dated November 23, 1989 by which he was suspended and ordered not to practise as a sole practitioner for two years upon being reinstated. As a result we find that he is guilty of professional misconduct in this particular.

Complaint D 360/93 Failed to File for Year-end November 30, 1992

A notice of default for failure to file the annual return was sent to the Member February 4, 1993 and returned marked "moved." During the practice audit on April 26, 1993, the Member advised the Society of his new address, and a followup letter from the Audit & Investigation department regarding the default in annual filings was mailed to his new address on October 25, 1993.

In his evidence, the Member admitted that he did not file for the relevant year-end, but testified that he never had a November 30 fiscal year-end.

Considerable time was spent documenting the Member's various changes of address, how and when the Society found out about them and whether or not he received the letters. The legislation does not obligate the Society to notify a Member of his or her obligation to file. The Member has still not filed and whether or not he received the Society's notice is not the issue.

The Member had previously been found guilty of professional misconduct in failing to file his annual returns (among other matters), so that his obligation to make his annual filings should not have escaped his notice.

The Member did not make his annual filings for the November 30 1992 year-end. He was under a clear duty to make the filings and did not. We find that he is guilty of professional misconduct with respect to this particular.

PENALTY

RECOMMENDATION

David Eric Howlett was called to the Bar on September 23, 1983. The Committee recommends that David Eric Howlett be disbarred.

REASONS

The Member is not unfamiliar with the Discipline Process. In November, 1989, he was suspended for one month and thereafter until his books and filings were up to date. This is the order of Convocation referred to in complaint D 196/93(b). This complaint established misconduct relating to books and records, failure to file, failure to serve clients, and breach of undertaking to a fellow Member of the Society.

At the time of the hearing before this Committee, a further complaint (D234/94) was outstanding against the Member. This complaint related to failing to comply with an undertaking to a Member, failure to respond to letters from a Member, and failure to reply to the Society.

In the view of this Committee, David Eric Howlett is ungovernable. This is the second time a discipline panel has found that he practised under suspension. His breach of an order of Convocation suggests a disregard for the authority of the Law Society. There was no evidence of mitigating circumstances. We reject the Member's argument that it was an "honest mistake." His explanations defy logic and credibility. The order of Convocation which he breached was based on a joint submission. It is simply not plausible that the Member did not understand Convocation's order in the circumstances.

In assessing penalty, the case of Leon Stanley Wickham, an order of Convocation dated September 22, 1994, was referred to us as a relevant precedent. The complaints against him alleged several instances of failure to reply to the Society, failure to serve clients, failure to file, and failure to produce books and records. The majority of the Committee recommended a three month suspension and costs. One member recommended disbarment based on ungovernability. Convocation agreed with the dissent and disbarred the Member.

The case of Natalie Bronstein, an order of Convocation dated January 27, 1994, was also relevant. The complaint was that the Member breached an undertaking to the Society by failing to release custody and control of client files, failed to cooperate with the staff Trustee in winding up her practice, and practised law after a specific date set out in the undertaking.

The panel (Paul Copeland, chair, Donald H.L. Lamont, Q.C., and S. Casey Hill), in recommending disbarment, stated:

"The professional misconduct described in Complaint D77/93 is serious. Deliberate breaches of an undertaking to the Law Society, involving a lack of cooperation with the professional governing body and the unauthorized practice of law, cannot be tolerated if the Law Society is to regulate its members in the public interest. While disbarment may seem an extreme sanction for this misconduct in isolation, the context of the Solicitor's entire disciplinary history warrants such a penalty."

"Reprimands and suspensions have failed to get Ms. Bronstein's attention. The signal theme of the Solicitor's career has regrettably been a contemptuous disregard for those rules considered essential by the profession to protect clients and other members of the public. Ms. Bronstein has proven herself to be ungovernable."

24th April, 1997

We adopt this statement as applicable to the case before us and we reject the Member's submissions that the penalty is excessive. In the public interest, we have no alternative.

ALL OF WHICH is respectfully submitted

Dated 11th of October, 1996

Robert Aaron, Chair

An amendment was made to the Report as follows:

- 3rd line from the bottom of page 9, the word "an" was changed to "and" so that the sentence would then read:

"...his books and records are in order and the outstanding Form 2/3s are filed".

Mr. Rook made submissions that the Report be rejected and referred back for another hearing before another committee. He submitted that the Committee had made a manifest error because it had failed to fulfill its obligations to the solicitor who was unrepresented throughout the proceedings.

There were questions from the Bench.

Ms. Cameron made submissions in reply.

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:45 P.M.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Angeles, Arnup, Backhouse, Bobesich, Carey, Chahbar, Crowe, DelZotto, Marrocco, Ortved, Puccini, Sachs, Sealy, Stomp, Swaye, Thom, Wilson and Wright.

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IN PUBLIC

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RESUMPTION OF THE DAVID ERIC HOWLETT MATTER

Counsel for the Society continued with her submissions.

There were further questions from the Bench.

There was a reply by Mr. Rook.

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

24th April, 1997

It was moved by Mr. Carey, seconded by Mr. Bobesich that the finding on Complaint D196/93 Particular 2.(a) - practising under Suspension, be vacated.

It was moved by Mr. Wilson, seconded by Mr. Ortved that the Report in so far as it dealt with Particular 2.(a) be accepted.

Not Put

Convocation took a brief recess at 3:40 p.m. and resumed at 3:55 p.m.

Counsel, the solicitor, the reporter and the public were recalled and were advised by counsel that they had no further submissions as to the Notice of Disagreement.

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

The Carey/Bobesich motion was voted on and lost.

It was moved by Mr. Wilson, seconded by Mr. Ortved that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be disbarred.

Mr. Rook made submissions in support of a lesser penalty of a maximum of 6 months suspension.

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

There was a reply by Mr. Rook.

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

It was moved by Ms. Sealy, seconded by Ms. Sachs that the solicitor be suspended for a period of 6 months to be served concurrently with the administrative suspension and if the solicitor resumes practising that he complete the Practice Review program.

Carried

It was moved by Mr. Swaye, seconded by Mr. Bobesich that the solicitor be suspended for a period of 3 months concurrent with the administrative suspension and to complete the Practice Review program upon resuming his practice.

Not Put

It was moved by Ms. Puccini, seconded by Mr. Crowe that the solicitor be suspended for a period of 1 month concurrent with the administrative suspension and complete the Practice Review program upon resuming practice.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months to be served concurrently with the administrative suspension and complete the Practice Review program if he resumes the practise of law.

24th April, 1997

Re: David Roy SNIDER - Whitby

The Secretary placed the matter before Convocation.

Ms. Jane Ratchford appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

The Report of the Discipline Committee dated October 8th, 1996 together with the Affidavit of Service was filed as Exhibit 1.

Ms. Ratchford set out the recent history of communications with the solicitor and opposed his request for an adjournment.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Carey, seconded by Mr. Marrocco that the Report be referred back to the Committee to deliver supplementary reasons in support of their findings.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the Report be referred back to the Committee to deliver supplementary reasons in support of their findings.

Re: Alexandre Patterson DUFRESNE - Korea

The Secretary placed the matter before Convocation.

Ms. Angeles and Ms. Backhouse withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 26th February, 1997 together with an Affidavit of Service sworn 5th March, 1997 by Ron Hopple that he had effected service on the solicitor by registered mail on 26th February, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 20th March, 1997 (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

Nancy L. Backhouse, Chair
Nora Angeles
Thomas E. Cole

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

Glenn Stuart
for the Society

ALEXANDRE PATTERSON DUFRESNE
of the Republic
of Korea
a barrister and solicitor

Not Represented
for the solicitor

Heard: January 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 29, 1996 Complaint D106/96 was issued against Alexandre Patterson Dufresne alleging that he was guilty of professional misconduct.

The matter was heard in public on January 16, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Nora Angeles and Thomas E. Cole. The Solicitor did not attend the hearing, nor was he represented. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D106/96

2. a) The Solicitor deliberately misled clients with respect to the status of trust funds, by:
 - (i) deliberately misleading his client, Max Saltsman Community Co-operative Inc., as to the status of its trust account balance; and
 - (ii) deliberately misleading the auditors of his client Max Saltsman Community Co-operative Inc., with respect to the status of the said trust account balance.
- b) The Solicitor borrowed money from clients who were neither lending nor similar institutions, nor related persons, by:
 - (i) borrowing money from his client, Anita Heron, who was neither a lending institution nor a related person as defined by the Income Tax Act;
 - (ii) borrowing money from his client, Maria Dykman, who was neither a lending institution nor a related person as defined by the Income Tax Act;
 - (iii) borrowing money from his client, Tac Venh Vong, who was neither a lending institution nor a related person as defined by the Income Tax Act;
- c) The Solicitor misappropriated client funds by:
 - (i) misappropriating trust funds of his client, Curt Bennett, in the amount of \$2,458.59;
 - (ii) misappropriating trust funds of his client, Max Saltsman Community Co-operative Inc., in the amount of \$13,982.53;
 - (iii) misappropriating general trust funds in the amount of \$6,002.40, and by
 - (iv) (a) misappropriating client funds with respect to Bill Smith, Dennis Rossi and Carol Mitchell, which funds were under the Solicitor's control for or on account of fees;

24th April, 1997

- (b) in the alternative, the Solicitor drew his fees from client funds of Bill Smith, Dennis Ross and Carol Mitchell, otherwise than as permitted by Regulation 708 made under the Law Society Act.

Service

This matter was scheduled to proceed on December 10 and 11, 1996 but did not get reached. Notice of that date had been served by registered mail at the last known address of the Solicitor in Korea, acknowledgment for which was signed for by the Solicitor. The Solicitor did not attend on December 10 and 11, 1996. Notice that the matter was rescheduled for January 16, 1997 was sent by registered mail to the aforesaid address. We are satisfied that the Solicitor is aware of these proceedings, has had proper service and that the matter should proceed in his absence.

Evidence

Particular 2(c) (i)

Curt Bennett testified that he hired the Solicitor in approximately 1987 to provide legal advice for developing a board game called Music Mania. He provided \$10,000 in seed money which was held by the Solicitor at the CIBC. When there was a balance of \$2,458.59 in the account, Mr. Bennett asked the Solicitor to close his file and refund him the balance. The Solicitor made excuses as to why he could not do so to the effect that he was concerned about a lawsuit against the client and accordingly had to retain the funds. At Tab 2 of Exhibit 8, the passbook for the account shows that on October 16, 1989, \$2,458.59 was withdrawn from the account, leaving it with a zero balance. Mr. Bennett never received the return of his monies. The Solicitor had previously rendered an account for \$1,000.00 which had been paid from the account. The Solicitor never suggested to Mr. Bennett that the Solicitor was entitled to the balance remaining in the account on account of fees or disbursements.

The Law Society's investigator, Matthew Spence, testified that the Solicitor admitted withdrawing \$2,458.59 from the trust account for Curt Bennett and retaining the money for his own purposes.

Particular 2(b)(i)

Anita Heron testified that she retained the Solicitor in 1990 with respect to insurance proceeds she was entitled to upon the death of her fiancée. The Solicitor had previously handled a house purchase on her behalf. Ms. Heron was on mother's allowance in 1990. She used some of the insurance proceeds she received to invest in a GIC for her children's education. The Solicitor suggested that she take the funds out of the GIC so that he could invest the same for her and thereby obtain higher interest. Ms. Heron provided a total of \$35,000.00 to the Solicitor and received two promissory notes from him, one dated June 28, 1990, for \$20,000.00 and the second for \$15,000.00. The Solicitor did not want Ms. Heron to get independent legal advice although she did consult another lawyer about the validity of the promissory notes. For some time, the Solicitor paid interest on the notes. Then Ms. Heron asked for the return of her money. In 1992 and 1993, a total of \$15,000 in principal was repaid. In approximately 1992, the Solicitor stopped paying interest to Ms. Heron. She has never received back from him the principal sum of \$20,000.

Ms. Heron is neither in the business of lending, nor related to the Solicitor.

24th April, 1997

Particular 2(a)(i) and (ii) and 2(c)(iii)

In 1990, the Solicitor was retained by the Max Saltsman Community Co-operative Inc. In March 1992, the Co-operative passed a resolution that the GST refund that it had received in the amount of \$599,157.81 be paid to the Solicitor's law firm, Dufresne & Dufresne to be held in an interest-bearing trust account pending direction as to its disbursement. The Solicitor was instructed and did disburse funds to pay various construction and architect accounts. He prepared a Statement of Account (Tab 12 of Exhibit 8) which was accurate as at June 21, 1992. It showed a balance being held in trust for the Co-operative in the amount of \$61,633.49. The Solicitor was authorized to make two further payments from the trust fund to Reid's Heritage Homes Ltd. in the amount of \$30,470.55 and to Snider Reichard March Architects in the amount of \$26,113.04. This would have left a balance of \$5,049.90 plus any interest earned which the Solicitor was instructed to forward directly to the Co-operative. A further Statement of Income and Outgoing was prepared by the Solicitor and provided to the Co-operative. It showed \$30,470.55 being paid to Reid's Heritage Homes Ltd. but only \$20,000 rather than the \$26,113.04 being paid to Snider Reichard March Architects, the latter amount being what the Solicitor had been directed to do. The Statement showed the sum of \$14,000 having been transferred to the Bank of Nova Scotia. In fact by the time the Solicitor paid \$20,000 to Snider Reichard there was an insufficient amount in the account to pay the full balance owed to Snider Reichard. This was because the Solicitor had made a number of unauthorized withdrawals totalling \$13,982.53 from the account. By letter dated August 31, 1993, the Solicitor wrote to the Co-operative's auditors, BDO Dunwoody Ward Mallette, deliberately misleading them to believe that trust monies were being held in a guaranteed investment certificate for the Co-operative. Russell Weir, Chartered Accountant, and the partner at BDO Dunwoody in charge of the audit of the Co-operative swore an Affidavit dated January 14, 1997, which establishes that the Solicitor misled Mr. Weir to believe that he had placed the amount of \$14,000 in a guaranteed investment certificate with the Bank of Nova Scotia.

Susan Carlyle, Complaints Staff Lawyer for the Law Society, identified a letter sent to her by the Solicitor at Tab 42 of Exhibit 8 wherein the Solicitor admitted withdrawing \$13,982.53 from the Royal Trust Co-operative trust account which were "defalcations from the trust account made by me (Alec Dufresne) without knowledge of my partner, Paul A. Dufresne".

Matthew Spence, an Investigator for the Law Society testified that he was assigned to investigate the Solicitor in the course of which he interviewed him and reviewed the books and records of Dufresne & Dufresne. He testified that the passbook photocopied at Tab 6 of Exhibit 8, was provided to him by the secretary/bookkeeper of Dufresne & Dufresne and was confirmed by the Solicitor to be the passbook for the Co-operative's trust account. The Solicitor admitted that he withdrew \$6,420.00 on November 13, 1992, which he deposited into the firm's general account because the firm was short of cash. He admitted to Mr. Spence that by representing the \$6,420.00 as an invoice, his father would not question it. He further admitted to Mr. Spence that he withdrew \$5,500.00 on February 15, 1993, and confirmed that his signature appeared on the withdrawal slip at Tab 13 of Exhibit 8. The Solicitor acknowledged that on April 27, 1993, he withdrew the balance in the Co-operative's trust account of \$1,642.99 and closed the account. The aforesaid amount was deposited into his law firm's general account. The Solicitor acknowledged that his initials appear on the banking documentation which effected this at Tab 17 of Exhibit 8. The Solicitor admitted to Mr. Spence that he had retained all of the monies improperly taken from the account for his personal use.

Particular 2(b)(ii)

Maria Dykman testified that when her husband was diagnosed with a terminal illness, they sold their business. They retained the Solicitor to draw up the contract of sale and handle the mortgage back to themselves. Mrs. Dykman received \$35,000 which she planned to put into a guaranteed investment certificate. The Solicitor telephoned her at her place of employment two days after she received the money and asked her what her intentions were with respect to the funds. He suggested to Mrs. Dykman that he could invest the funds for her for equivalent security to a first mortgage. The Solicitor typed up three promissory notes, each for \$10,000.00. He asked to receive the funds in cash with which request Mrs. Dykman complied because he seemed very honest and sincere and she trusted him. There were no discussions with respect to the limitations on a solicitor borrowing from his client. The Solicitor did not advise Mrs. Dykman to get independent representation. She received interest payments on the monies until September 1993. The payments stopped thereafter. When she contacted the Solicitor, he advised that he had been in the hospital and was terminally ill. He said he would be able to make up the payments in December 1993. In December 1993 she telephoned him several times. She was ultimately advised by the Solicitor's father that he had been fired from the firm in October 1993. She received no further interest payments or payments on account of the principal from the Solicitor.

Particular 2(b)(iii)

Mr. Spence testified that the Solicitor admitted that he had been short of funds and had approached his client, Tac Venh Vong, to lend him money. Five thousand dollars was lent by the client and placed by the Solicitor in the law firm's trust account. The Solicitor acknowledged that he then wrote a cheque on the trust account for \$4,000.00 to Karen Scott, a personal friend, and a cheque for \$1,000.00 to himself.

Particular 2(c)(iii)

Mr. Spence testified that copies of cheques written on the firm's trust account by the Solicitor (Tabs 25-30 of Exhibit 8) did not appear in the records of the law firm and totalled \$6,002.40 of funds misappropriated by the Solicitor from the firm's trust account. The Solicitor acknowledged his signature and, where the cheques were made out to him, acknowledged that he received the funds in cash. Some of the cheques have a reference of "Charles" or "Elliott" which the Solicitor explained was a pseudonym for himself so he would remember what funds he had to repay. The cheque at Tab 27 of Exhibit 8 is for \$3,000 to the Director of the Family Support Plan which was paid out of the firm's trust account on account of the Solicitor's personal obligation for arrears of child support. The Solicitor's explanation to Mr. Spence for the cheque at Tab 29 of Exhibit 8 to J-4 Self Storage was that it was to pay for the storage costs for his personal property.

Particular 2(c)(iv)(a) and (b)

Mr. Spence testified that he questioned the Solicitor about the receipt at Tab 31 of Exhibit 8. The Solicitor advised that he had issued a receipt to his client Bill Smith, for preparation of a co-habitation agreement which retainer was not reflected in the books and records of the law firm. Tab 33 of Exhibit 8 was a receipt from the Solicitor to Dennis Rossi for \$450.00 for obtaining a divorce which also was not reflected in the books and records of the law firm. The Solicitor admitted he had retained these funds for his own purposes. The Affidavit of the bookkeeper of Dufresne & Dufresne, Maria Puim-De Oliveira, sworn January 14, 1997, confirmed that Carol Mitchell was a client represented by the Solicitor. Ms. Mitchell advised Ms. Puim-De Oliveira that she had provided the Solicitor with the sum of \$550.00 in cash on account of services rendered which sum was not reflected in any of the firm's books and records. On the basis of Ms. Mitchell's information, she was credited with that sum in payment of her account.

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The Affidavits of Paul Dufresne, father of the Solicitor and former law partner sworn January 14, 1997, and of Ms. Puim-De Oliveira, Bookkeeper, explain how the Solicitor's defalcations came to light. Ms. Puim-De Oliveira discovered a blank trust cheque lying face down on the Solicitor's desk on October 22, 1993, which was out of order from the trust cheques currently being used. She then ascertained that some trust cheques were missing from the trust cheque book. Ms. Puim-De Oliveira and Mr. Dufresne, Senior, then made further investigations and determined that the Solicitor had written a number of trust cheques for his own benefit without any authority, being trust cheques numbered 2693, 2695, 2696, 2697, 2699 and 2700. Two counter cheques had been issued by the Solicitor against the trust account which did not relate to any client trust accounts. The Solicitor admitted to Mr. Dufresne, Senior, that he had misappropriated funds from the firm's mixed trust account. He also admitted that he had previously misappropriated other amounts which had been paid by clients either to the credit of the firm's accounts or as retainers. Mr. Dufresne, Senior, then reported his son to the Law Society which led to this Complaint being brought against him.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Alexander Patterson Dufresne be disbarred.

REASONS FOR RECOMMENDATION

All of the particulars set out in the Complaint have been established.

The Solicitor's licence to practise law allowed him to hold himself out to the public as someone worthy of their trust and respect. He used this licence to prey upon unsophisticated clients and to lie to and steal from them. He stole \$20,000 from a client who was on mother's allowance. He stole \$30,000 from another client whose husband was terminally ill. He stole \$13,982.53 from a Co-operative he represented. The evidence is overwhelming that the Solicitor should be disbarred and never allowed to practise law again. The Committee recommends that the Solicitor be disbarred.

Alexandre Patterson Dufresne was called to the Bar on March 29th, 1977.

ALL OF WHICH is respectfully submitted

DATED this 26th day of February, 1997

Nancy Backhouse, Chair

There were no submissions. The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be disbarred.

It was moved by Ms. Sealy, seconded by Mr. Carey that the recommended penalty be adopted with an amendment that the words "and never allowed to practise law again" be deleted from the Reasons for Recommendation.

Carried

24th April, 1997

Re: William Leo RILEY - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Marrocco and Wright and Ms. Angeles withdrew for this matter.

Ms. Georgette Gagnon appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 28th January, 1997 together with an Affidavit of Service sworn 14th February, 1997 by Ron Hoppie that he had effected service by registered mail on 5th February, 1997 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Abraham Feinstein, Q.C., Chair
Nora Angeles
Bradley H. Wright

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

Georgette Gagnon
for the Society

WILLIAM LEO RILEY
of the City
of Ottawa
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 1, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 13, 1995 Complaint D433/94 was issued; on February 13, 1996 Complaint D49/96 was issued; and, on July 30, 1996 Complaint D215/ 96 was issued, against William Leo Riley alleging that he was guilty of professional misconduct.

These matters were heard in public on November 1, 1996, in Ottawa, before this Committee composed of Abraham Feinstein, Q.C., Chair, Nora Angeles and Bradley H. Wright. The Solicitor was not present, nor was he represented. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D433/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1994, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*;
- b) he failed to co-operate with the Law Society's representative's attempts to conduct an audit pursuant to Section 18 of Regulation 708, by failing to produce his books and records as set out in Section 15 of the Regulation;
- c) he failed to reply to the Law Society regarding a complaint by Larrie W. Thomson in spite of letters to him dated June 21, 1993, September 2, 1993 and December 20, 1993 and telephone conversations on August 10, 1993 and November 10, 1993 and telephone messages left on August 25, 1993 and October 26, 1993;
- d) he failed to reply to another solicitor, Drew F. Shouldice, on behalf of Kristi Hyllekve, in spite letters dated January 5, 1994 and March 7, 1994;
- e) he failed to account to his former client, Kristi Hyllekve, for monies entrusted to him by her;
- f) he failed to reply to the Law Society regarding a complaint by Drew F. Shouldice in spite of letters dated April 26, 1994 and September 21, 1994 and telephone requests on July 7, 1994 and July 20, 1994; and
- g) he failed to reply to the Law Society regarding a complaint by Reid McPhail in spite of letters dated July 15, 1994 and October 18, 1994 and telephone requests on August 19, 1994 and September 7, 1994.

Complaint D49/96

2. a) He failed to account for all monies paid to him by his client, Andre Lalonde, in his matrimonial matter;
- b) he failed to respond to letters from A. Sean Jones, another solicitor, dated May 11, 1994 and June 8, 1994; and
- c) he failed to respond to the Society's communications regarding a complaint by Andre Lalonde despite a letter dated October 18, 1994 and telephone requests on November 30, 1994 and December 5, 1994.

Complaint D215/96

2. a) He failed to reply to another solicitor, Andrea Comacho, in spite of letters dated February 20, March 20 and May 18, 1995;
- b) he failed to account to his client, Susan Fostey (Deneault), for the amount of \$3,000.00 paid to him in trust;

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- c) he failed to transfer client files, specifically files belonging to Holly Roberts and Susan Fostey, in spite of requests from other solicitors that he transfer these files;
- d) he failed to reply to the Law Society regarding a complaint by Andrea Comacho in spite of letters dated July 7 and September 6, 1995 and April 18, 1996 and telephone messages left on August 23 and August 30, 1995 and March 28, 1996; and
- e) he failed to reply to the Law Society regarding a complaint by Holly Roberts in spite of letters dated December 4, 1995 and April 19, 1996 and a telephone message left on March 28, 1996.

EVIDENCE

Part of the evidence before the Committee consisted of the following agreed statements of facts:

Re: Complaint D433/94

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D433/94 and is prepared to proceed with a hearing of this matter on November 1, 1996.

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 D433/94 and this agreed statement of facts and admits the particulars and facts contained therein. The Solicitor further admits that the said particulars and facts constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He practised as a sole practitioner until he was suspended on May 9, 1994 as a result of his failure to pay his errors and omissions levy. The Solicitor last filed his Form 2/3 for the fiscal period ending January 1, 1992

Particular 2(b) Failure to co-operate with a Law Society's representative's attempts to conduct an audit by failing to produce his books and records

5. A Law Society examiner attended at the Solicitor's home on December 9, 1994 (Document Book, Tab 1). The door was not answered. The examiner left her card at the Solicitor's door.

6. The Solicitor contacted the examiner by telephone on December 9, 1994 (Document Book, Tab 1). The Solicitor advised the examiner of his medical difficulties and that his trust records were in arrears. The Solicitor advised that due to poor health, he was unable to withstand the stress of dealing with the Law Society. The examiner volunteered to act as a liaison between the Solicitor and the various departments of the Law Society. It was agreed that the Solicitor would attend at the Law Society's office on December 14, 1994.

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7. The Solicitor attended at the Law Society's offices on December 14, 1994 (Document Book, Tab 2). The Solicitor advised that he left the law firm he was working for in June of 1993 and had been practising sporadically since then. The Solicitor indicated that he had not practised since March of 1994. The examiner and the Solicitor discussed his files and outstanding issues between the Solicitor and the various departments of the Law Society.

8. The Law Society examiner left telephone messages for the Solicitor at his office on January 9, 1995 and January 10, 1995 requesting he return the calls (Document Book, Tab 1). The Solicitor did not return the examiner's calls.

9. The Law Society examiner attended at the Solicitor's home, unannounced, on January 19, 1995 (Document Book, Tab 1). The examiner asked the Solicitor to produce his file for a client by the surname of "Watt". The Solicitor advised that he would deliver the "Watt" file to the Law Society's office by 8:30 a.m. on January 20, 1995. The Solicitor did not deliver the file.

10. The Law Society's examiner attended at the Solicitor's home on January 19, 1995 and January 25, 1995 (Document Book, Tab 1). The door was not answered.

11. By registered mail dated February 15, 1995 (Document Book, Tab 3), the Law Society's examiner confirmed the statement that his books and records would be available for examination on or before March 6, 1995 and that she would attend at his home on March 6, 1995 at 9:30 am. to review the documents. The examiner indicated that she would also obtain the "Watt" file at that time. The Solicitor was advised that should he fail to produce his books and records and the "Watt" file by March 6, 1995, the matter would be referred to the Discipline Committee. The Law Society's February 15, 1995 letter was returned by the post office marked "unclaimed", although the letter had been sent to the Solicitor's home address where he had met with the examiner on earlier occasions.

12. The Law Society examiner attended at the Solicitor's home on March 6, 1995 (Document Book, Tab 1). The door was not answered.

13. The discipline hearing regarding Complaint D433/94 was scheduled to proceed on November 15, 1995. The proceeding was adjourned at the request of the Solicitor to allow him to obtain medical evidence and legal advice. The discipline proceeding was then scheduled for March 1, 1996.

14. In January 1996, a new audit was instructed by the Audit Department as a result of the Solicitor's failure to reply to the Law Society regarding a new complaint received June 23, 1995.

15. The discipline proceeding scheduled for March 1, 1996 was also adjourned at the request of the Solicitor. On April 30, 1996, the Law Society's examiner received a letter of introduction from the Director of the Department of Audit & Investigation to conduct another audit of the Solicitor's practice.

16. On August 19, 1996, the Law Society's examiner attended at the Solicitor's home and enquired whether retainers received from clients Watt and Deneault had been deposited to trust. The Solicitor indicated that it was not his practice to ask for retainers and that he wished to deal with all outstanding matters at the Law Society in preparation for the hearing scheduled for November 1, 1996. The Solicitor refused to look for files and books and records while the Law Society examiner was at his home.

17. On August 23, 1996, the Law Society's examiner attended at the Solicitor's home and received client files, Watt and Deneault. The Solicitor did not produce banking records.

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18. On August 26, 1996, the Law Society's examiner reviewed the aforementioned client files and found no evidence of any amounts received as retainers, no fee billings were found in the Watt file and the Deneault file had one billing dated May 12, 1994. No reports to clients were in the files. The only material in the files was documentation provided to the Solicitor by the clients.

19. On September 5, 1996, the Law Society's examiner sent a letter to the Solicitor by fax and regular mail setting out the problems with the books and records as evidenced from her inventory of files and receipt of information to date. Attached at Tab 1(a) of the Document Book is a copy of the Law Society examiner's letter to the Solicitor dated September 5, 1996. The Solicitor did not respond to the Law Society's letters or the problems with the Solicitor's books and records as set out in the letters.

20. On October 1, 1996, the Law Society's examiner telephoned the Solicitor and left a message on his voice mail. No response was received. On October 1, 1996, the Law Society examiner sent a letter by registered mail which was accepted on October 3, 1996. Attached at Tab 1(b) of the Document Book is a copy of the voice mail message of the Law Society examiner and letter to the Solicitor dated October 1, 1996.

21. On October 24, 1996 the Law Society's examiner left a message on the Solicitor's voice mail and asked him to call her as soon as possible.

22. On October 24, 1996, the Law Society's examiner attended at the Solicitor's home and he advised her that he was not well enough to discuss matters. The Solicitor would not discuss his attendance at the discipline hearing scheduled for November 1, 1996. Attached at Tab 1(c) of the Document Book is a copy of the Law Society examiner's telephone transaction and memo to file regarding her attendance at the Solicitor's home on October 24, 1996.

23. On October 25, 1996, the Law Society's examiner left a message on the Solicitor's voice mail to telephone her. The Solicitor did not respond. On the same day the Law Society's examiner attended at the Solicitor's home. Attached at Tab 1(d) of the Document Book is a copy of the Law Society examiner's memo to file respecting her attendance at the Solicitor's home on October 25, 1996.

24. On October 28, 1996, the Law Society's examiner telephoned the Solicitor. The Solicitor indicated that he could not talk and had to get his house in order. He was advised by the examiner to have ask person stay with him or attend at the hospital. Attached at Tab 1(e) of the Document Book is a copy of the Law Society examiner's memo to file respecting her telephone conversation with the Solicitor on October 28, 1996.

25. To date, the Solicitor has not produced his books and records or co-operated with the Law Society's representative in her attempts to conduct an audit.

Particular 2(c) Failure to reply to the Law Society regarding a complaint by Larrie W. Thomson

26. By letter dated June 11, 1993 (Document Book, Tab 4), Larrie W. Thomson advised the Law Society that his estranged spouse retained the Solicitor to obtain their final divorce. Mr. Thomson advised that five months earlier he returned a withdrawal of the existing Answer and Counterpetition to the Solicitor. Mr. Thomson advised that he had not heard from the Solicitor.

27. By letter dated June 21, 1993 (Document Book, Tab 5), the Law Society sent to the Solicitor a copy of Mr. Thomson's June 11, 1993 letter. The Solicitor was advised about the Law Society's policy and procedure when investigating a "third-party complaint". The Solicitor was asked to provide his response to Mr. Thomson's June 11, 1993 within two weeks. No reply was received.

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28. A Law Society staff employee spoke with the Solicitor by telephone on August 10, 1993 (Document Book, Tab 6). The Solicitor advised that he had recently separated from his wife and had just returned from holidays. The Solicitor advised that he would provide a written response within two days. No response was received.

29. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on August 25, 1993 requesting that he return the call (Document Book, Tab 6). The Solicitor did not return the Law Society's call.

30. By registered mail dated September 2, 1993 (Document Book, Tab 7), the Law Society forwarded to the Solicitor a copy of its June 21, 1993 letter. The Solicitor was reminded of his obligation to respond to communications from the Law Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. The Law Society's September 2, 1993 letter was signed for and delivered on September 9, 1993. No response was received.

31. A Law Society staff employee left telephone messages for the Solicitor on his answering machine on October 26, 1993 and November 10, 1993 requesting he return the calls (Document Book, Tab 8).

32. The Solicitor returned the Law Society's calls on November 10, 1993 (Document Book, Tab 8). The Solicitor advised that he was being treated for depression, was in the midst of a divorce and was moving out of his office. The Solicitor advised that he would provide a written response by November 15, 1993. No response was received.

33. By registered mail dated December 20, 1993 (Document Book, Tab 9), the Law Society forwarded the Solicitor a copy of its June 21, 1993 letter. The Solicitor was reminded of his obligation to reply to communications from the Law Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. The Law Society's December 20, 1993 letter was signed for and delivered on December 23, 1993. No reply was received.

34. To date, the Solicitor has not provided the Law Society with a reply to the complaint of Larrie Thomson.

Particular 2(d) Failure to reply to another solicitor, Drew F. Shouldice, on behalf of Kristi Hyllekve

Particular 2(e) Failure to account to his former client, Kristi Hyllekve, for monies entrusted to him by her

35. Kristi Hyllekve was represented by the Solicitor with regard to her matrimonial proceedings. She provided the Solicitor with a \$500.00 retainer. On October 15, 1993, the law firm of Mount, Clark, Yemensky, Daigle & Lemay, pursuant to Mrs. Hyllekve's instructions, sent the Solicitor the sum of \$2,700.00 from the proceeds of sale of the former matrimonial home. Ms. Hyllekve understood that the amount of \$2,700.00 was to cover all fees and disbursements in connection with her divorce proceedings, including pursuing the divorce to its final conclusion (Document Book, Tabs 10 and 11).

36. Ms. Hyllekve retained the law firm of Forbes, Singer, Smith and Shouldice, in November, 1993 as the Solicitor did not respond to her communications regarding the status of her matter and for an accounting of the funds received. She had also retained the firm for an outstanding problem respecting to a lien filed with the Director of Legal Aid in Brockville as the Solicitor, at one time, had been retained under a legal aid certificate (Document Book, Tab 11).

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37. The firm of Forbes, Singer, Smith and Shouldice spoke with the Solicitor in December of 1993 requesting that he advise of the status of the matter and provide Ms. Hyllekve with an accounting (Document Book, Tab 11). No response was received from the Solicitor.

38. By letter dated January 5, 1994 (Document Book, Tab 12), Drew F. Shouldice, a barrister and solicitor with Forbes, Singer, Smith, Shouldice advised the Solicitor that the necessary documentation had been provided to the area director of Legal Aid and that he anticipated that the execution, filed in Brockville, would be lifted shortly. As Mrs. Hyllekve had indicated that sufficient funds had been withheld from her settlement to cover the fees and disbursements involved in processing her divorce petition, Mr. Shouldice asked the Solicitor to advise of the status of the matter. No reply was received from the Solicitor.

39. During the month of February, 1994, the firm of Forbes, Singer, Smith, Shouldice attempted to reach the Solicitor by telephone, without success (Document Book, Tab 11).

40. By letter dated March 7, 1994 (Document Book, Tab 13), Mr. Shouldice advised the Solicitor that Mrs. Hyllekve had delivered to him copies of her documentation whereby she authorized payment to the Solicitor in the amount of \$2,700.00. Mr. Shouldice demanded the Solicitor provide a complete accounting of those funds, return of Mrs. Hyllekve's marriage certificate and advise of the status of the divorce petition. The Solicitor was advised that should he fail to respond to the request within seven days, the matter would be referred to the Law Society. No reply was received from the Solicitor.

41. By letter dated April 13, 1994 (Document Book, Tab 11), Mr. Shouldice advised the Law Society of the Solicitor's failure to respond to his communications.

42. A representative of the firm of Forbes, Singer, Smith, Shouldice spoke with the Solicitor by telephone on July 17, 1994 (Document Book, Tab 11). The Solicitor advised that he could call back later that evening or the morning of July 20, 1994. No return call was received from the Solicitor.

43. To date, the Solicitor has not provided a reply to Mr. Shouldice. The Solicitor has failed to provide a final account to his former client Kristi Hyllekve for the amount of \$2,700.00

44. By letters dated August 17, 1996 and September 4, 1996 the Solicitor responded to Heather Werry of the Lawyers' Fund for Client Compensation in response to the claim of Ms. Hyllekve to the fund. Attached at Tab 11(a) to the Document Book are copies of the Solicitor's letters dated August 17, 1996 and September 4, 1996.

Particular 2(f) Failure to reply to the Law Society regarding a complaint by Drew F. Shouldice

45. By letter dated April 26, 1994 (Document Book, Tab 14), the Law Society sent the Solicitor a copy of Mr. Shouldice's April 16, 1994 letter. The Solicitor was asked to provide his written comments and the following information:

- his response to whether Ms. Hyllekve paid him to complete the divorce action;
- to advise of what proceedings, if any, were taken with regard to the completion of the divorce;
- should this matter not be completed, to advise as to whether he transferred the funds from his trust account to his general account;

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- to advise whether an account had been rendered for work completed, including finalizing the divorce; and
- provide copies of any relevant memos, letters, notes to file, and accounts.

The Solicitor was asked to provide his written comments within two weeks. No reply was received from the Solicitor.

46. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on July 7, 1994 asking him to return the call (Document Book, Tab 15).

47. The Solicitor returned the Law Society's call on July 14, 1994. He left a message that he would complete his response that weekend, prior to going on vacation the following week (Document Book, Tab 16). No reply was received.

48. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on July 20, 1994, requesting he call back on his return from his vacation (Document Book, Tab 15). The call was not returned by the Solicitor.

49. By registered mail dated September 21, 1994, the Law Society forwarded to the Solicitor a copy of its April 26, 1994 (Document Book, Tab 17). The Solicitor was reminded of his obligation to respond promptly to communications from the Law Society. The Solicitor was advised that should he fail to provide a written response within seven days from the date of the letter, the matter would be referred to the Discipline Committee. The Law Society's September 21, 1994 letter was signed for and delivered on September 26, 1994. No reply was received from the Solicitor.

50. To date, the Solicitor has not responded to the Law Society regarding the complaint of Drew Shouldice.
Particular 2(g) Failure to reply to the Law Society regarding a complaint by Reid McPhail

51. By letter dated July 6, 1994 (Document Book, Tab 18), Reid McPhail, advised the Law Society that he had retained the Solicitor to represent him on an application by his son's mother to move their child out of Canada to the United States. Mr. McPhail stated that the Solicitor failed to return his telephone calls and did not attend at scheduled meetings. Mr. McPhail advised that the hearing was held without his knowledge. Two weeks after the hearing, Mr. McPhail advised that he met with the Solicitor who did not advise him that the hearing had been held. Mr. McPhail advised that his son has subsequently left Canada.

52. By letter dated July 15, 1994 (Document Book, Tab 19), the Law Society sent the Solicitor a copy of Mr. McPhail's July 6, 1994 letter. The Solicitor was asked to provide his comments within two weeks. No reply was received from the Solicitor.

53. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on August 19, 1994 requesting that he return the call (Document Book, Tab 20).

54. The Solicitor returned the Law Society's call on August 22, 1994. The Solicitor advised that he would provide his written response by August 25, 1994 (Document Book, Tab 20). No reply was received from the Solicitor.

55. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on September 7, 1994 requesting he return the call (Document Book, Tab 20). The call was not returned by the Solicitor.

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56. By registered mail dated October 18, 1994 (Document Book, Tab 21), the Law Society reminded the Solicitor of his obligation to respond promptly to communications from the Law Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. The Law Society's October 18, 1994 letter was returned by the post office marked "unclaimed" although the letter had been sent to the Solicitor's last known address as indicated on the Law Society's records.

57. By way of explanation the Solicitor's states that the professional misconduct admitted and described in the Complaint and this agreed statement of facts was not willful, intentional or dishonest. The misconduct occurred as a result of a severe mental depression suffered by the Solicitor in or about 1994.

58. To date, the Solicitor has not provided the Law Society with a written response to Mr. McPhail's July 6, 1994 letter of complaint.

V. DISCIPLINE HISTORY

59. The Solicitor provided the Law Society with a written Undertaking, dated December 5, 1994 (Document Book, Tab 22) not to engage in the practice of law until he satisfied the Law Society that the following particulars had been met:

- bring all required filings with the Law Society of Upper Canada up to date;
- reply to the Law Society in a meaningful and comprehensive manner regarding the complaint of Mr. D. D. Mundy;
- upon seeking return to the practise of law, to provide a written report from a psychiatrist in a form acceptable to Senior Counsel - Discipline or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law.

To date, the Solicitor has not brought his filings up to date, replied to the Law Society regarding the complaint of D. D. Mundy and has not sought to return to the practise of law.

VI. PENALTY

60. The Law Society and the Solicitor jointly submit that the Solicitor be suspended indefinitely. Upon seeking return to the practice of law the Solicitor will provide a written report from a psychiatrist in a form acceptable to the Secretary/Treasurer or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law and the Solicitor will bring all required filings with the Law Society of Upper Canada up to date.

DATED at Ottawa this 1st day of November, 1996."

Re: Complaint D49/96

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D49/96 and is prepared to proceed with a hearing of this matter on November 1, 1996.

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 D49/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He practised as a sole practitioner until he was suspended on May 9, 1994 as a result of his failure to pay his errors and omissions levy. The Solicitor last filed his Form 2/3 for the fiscal period ending January 1, 1992.

Particular 2a) He failed to account for all monies paid to him by his client, Andre Lalonde, in his matrimonial matter.

5. The Solicitor was retained in September 1990 by Andre Lalonde with respect to a matrimonial matter. Mr. Lalonde paid the Solicitor a total sum of \$7,432.00. A copy of the cheques are contained at Tab 1 of the Document Book. The Solicitor rendered accounts to Mr. Lalonde in the sum of \$6,475.77. In spite of numerous attempts by Mr. Lalonde to obtain a final account from the Solicitor, the Solicitor has not produced a final account. A copy of the Solicitor's statements of account are contained at Tab 2 of the Document Book.

6. To date, the Solicitor has not provided Mr. Lalonde with a final account and the amount of \$856.23 that has not been accounted for by the Solicitor.

7. Mr. Lalonde asked another solicitor, A. Sean Jones, to assist him in obtaining a final account from the Solicitor.

Particular 2b) He failed to respond to letters from A. Sean Jones, another solicitor, dated May 11, 1994 and June 8, 1994.

8. By letter dated May 11, 1994 (Tab 3, Document Book), Mr. Jones wrote to the Solicitor asking the Solicitor to provide him with a copy of his trust statement for monies regarding Mr. Lalonde and that a final account be sent to Mr. Lalonde. The Solicitor did not respond.

9. By letter dated June 8, 1994 (Tab 4, Document Book), Mr. Jones again wrote to the Solicitor asking for a copy of his account and trust statement by June 17, 1994. The Solicitor did not respond.

10. To date, the Solicitor has not responded to A. Sean Jones.

Particular 2c) He failed to respond to the Society's communications regarding a complaint by Andre Lalonde despite a letter dated October 18, 1994 and telephone requests on November 30, 1994 and December 5, 1994.

11. By letter dated October 5, 1994 (Tab 5, Document Book), Mr. Lalonde made a complaint to the Law Society regarding the Solicitor's failure to render a final account.

12. By letter dated October 18, 1994 (Tab 6, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Lalonde's letter dated October 5, 1994 and requested his comments within two weeks. The Law Society's letter was delivered to the Solicitor's last known address as shown by the records of the Society. No reply was received.

13. On November 30, 1994, a Law Society staff employee left a message for the Solicitor regarding his response. The Solicitor did not return the call. A copy of the transcribed and handwritten notes are contained at Tab 7 of the Document Book.

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14. On December 5, 1994, a Law Society staff employee called the Solicitor and left a message for him to return the call. The Solicitor returned the call that day and advised that he would respond by December 9, 1994. A copy of the transcribed and handwritten notes are contained at Tab 18 of the Document Book.

15. To date, the Solicitor has not responded to the Law Society regarding a complaint by Andre Lalonde.

16. By way of explanation the Solicitor's states that the professional misconduct admitted and described in the Complaint and this agreed statement of facts was not willful, intentional or dishonest. The misconduct occurred as a result of a severe mental depression suffered by the Solicitor in or about 1994.

V. PRIOR DISCIPLINE

17. The Solicitor provided the Law Society with an Undertaking, dated December 5, 1994 not to engage in the practice of law until he satisfied the Law Society that the following conditions had been met:

- bring all required filings with the Law Society of Upper Canada up to date;
- reply to the Law Society in a meaningful and comprehensive manner regarding the complaint of Mr. D.D. Mundy;
- upon seeking return to the practise of law, to provide a written report from a psychiatrist in a form acceptable to Senior Counsel - Discipline or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law.

To date, the Solicitor has not brought his filings up to date, has not replied to the Law Society regarding the complaint of D.D. Mundy and has not sought to return to the practise of law.

VI. PENALTY

18. The Law Society and the Solicitor jointly submit that the Solicitor be suspended indefinitely. Upon seeking return to the practice of law the Solicitor will provide a written report from a psychiatrist in a form acceptable to the Secretary/Treasurer or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law and the Solicitor will bring all required filings with the Law Society of Upper Canada up to date.

DATED at Ottawa, this 1st day of November, 1996."

Re: Complaint D215/96

"AGREED STATEMENT OF FACT

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D215/96 and is prepared to proceed with a hearing of this matter on November 1, 1996.

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.

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III. ADMISSIONS

3. The Solicitor has reviewed Complaint D215/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He has been suspended for non-payment of his Errors and Omissions levy since May 9, 1994. The Solicitor last filed his Form 2/3 for the fiscal period ending January 1, 1992.

Particular 2a) He failed to reply to another solicitor, Andrea Camacho, in spite of letters dated February 20, March 20 and May 18, 1995.

Particular 2b) He failed to account to his client, Susan Fostey (Deneault), for the amount of \$3,000.00 paid to him in trust.

Particular 2c) He failed to transfer Susan Fostey's file in spite of requests from another solicitor that he transfer the file.

5. The Solicitor was retained by Susan Deneault, now Fostey, with respect to her matrimonial matter. The Solicitor rendered two interim accounts dated March 22, 1994 and May 12, 1994 respectively (Tabs 1 & 3, Document Book). Ms. Fostey provided cheques to the Solicitor in full satisfaction of each account (Tabs 2 & 4, Document Book). On June 20, 1994, Ms. Fostey provided the Solicitor with a further retainer in the amount of \$1,000.00. A copy of the cheque is contained at Tab 5 of the Document Book. On September 1, 1994, Kenneth P. McCloskey, solicitor for Mr. Deneault, forwarded a cheque in the amount of \$2,000.00 to the Solicitor in trust representing Ms. Fostey's share of the proceeds of the sale of the matrimonial home (Tab 6, Document Book).

6. By letter dated October 31, 1994 (Tab 7, Document Book), Ms Fostey confirmed her meeting with the Solicitor on September 26, 1994 and their discussion about the case. Ms. Fostey advised the Solicitor that she had called him and left messages for him on his answering machine but did not receive a return call. Ms. Fostey asked the Solicitor to contact her by November 7, 1994, failing which she would seek other representation.

7. Ms. Fostey spoke with the Solicitor on November 10, 1994 at which time he indicated that he would call her that evening with an update. The Solicitor did not call. By letter dated December 6, 1994 (Tab 8, Document Book), Ms. Fostey wrote to the Solicitor asking him to respond to her correspondence and to provide her with an explanation as to why he did not proceed as agreed. The Solicitor did not respond to Ms. Fostey's letter.

8. Ms. Fostey subsequently retained Andrea R. Camacho to represent her. By letter dated February 20, 1995, Ms. Camacho wrote to the Solicitor advising that she had been retained by Ms. Fostey and enclosed a Direction authorizing the release of her file (Tab 9, Document Book). Ms. Camacho also asked that the Solicitor prepare his final account and return the balance of the \$3,000.00 retainer held in trust. The Solicitor did not respond.

9. By letter dated March 20, 1995 (Tab 10, Document Book), Ms. Camacho again wrote to the Solicitor asking him to return the balance of the trust funds and the contents of Ms. Fostey's file. The Solicitor did not respond.

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10. By registered mail dated May 18, 1995 (Tab 11, Document Book), Ms. Camacho reminded the Solicitor of her previous letters to him dated February 20 and March 20, 1995 asking for the return of the balance of the trust funds and for the release of Ms. Fostey's file. The Solicitor was advised that if he did not respond within five days, the matter would be referred to the Law Society. Ms. Camacho's letter was returned "unclaimed" although the letter was sent to the Solicitor's last known address.

11. By letter dated June 21, 1995 (Tab 12, Document Book), Ms. Camacho made a complaint to the Law Society regarding the Solicitor's failure to produce a final account and to deliver Ms. Fostey's file to her.

Particular 2d) He failed to reply to the Law Society regarding a complaint by Andrea Camacho.

12. By letter dated July 7, 1995 (Tab 13, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Ms. Camacho's letter dated June 21, 1995 and requested his comments within two weeks. The Solicitor did not respond.

13. On August 23 and 30, 1995, the Law Society called the Solicitor and left messages for him on his answering machine. The Solicitor did not return the calls. A copy of the notes of the telephone messages are contained at Tab 14 of the Document Book.

14. By registered mail dated September 6, 1995 (Tab 15, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on September 11, 1995. The Solicitor did not respond to the Law Society.

15. On March 28, 1996, the Law Society called the Solicitor and left a message on his voice mailbox asking him to return the call. The Solicitor did not return the call. A copy of the notes of the telephone message is contained at Tab 16 of the Document Book.

16. By registered mail dated April 18, 1996 (Tab 17, Document Book), the Solicitor was again reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on April 22, 1996. The Solicitor did not respond.

17. To date, the Solicitor has not responded to the Law Society regarding a complaint by Andrea Camacho and has not delivered a final account or the client's file to her.

Particular 2c) He failed to transfer Holly Roberts' file in spite of requests from another solicitor that he transfer the file.

18. The Solicitor was retained by Holly Roberts in or about May 1993 in connection with her matrimonial matter. Ms. Roberts provided the Solicitor with all relevant documentation at the time of his retainer. Ms. Roberts spoke with the Solicitor in February 1994 but since that time she had been unable to reach him. By letter dated May 12, 1994, Ms. Roberts wrote to the Solicitor asking him to arrange a meeting to discuss the matter. A copy of Ms. Roberts' letter is contained at Tab 18 of the Document Book. The Solicitor did not contact Ms. Roberts.

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19. On or about June 1, 1994, Ms. Roberts retained Dianne George to represent her in this matter. By letters dated July 4 and August 18, 1994 (Tab 19, Document Book), Ms. George contacted the Solicitor advising that she had been retained by Ms. Roberts and requested the release of the file. The Solicitor did not respond to Ms. George's communications.

20. By letters dated September 18 and November 16, 1995 (Tabs 20 & 21, Document Book), Ms. Roberts made a complaint about the Solicitor regarding the foregoing.

Particular 2e) He failed to reply to the Law Society regarding a complaint by Holly Roberts.

21. By letter dated December 4, 1995 (Tab 22, Document Book), the Law Society wrote to the Solicitor enclosing Ms. Roberts' letters dated September 18 and November 16, 1995 and requested his comments within two weeks. The Solicitor did not respond.

22. On January 3, 1996, the Law Society called Directory Assistance and obtained a number for the Solicitor. The Law Society called and left a message on the answering machine for the Solicitor although unsure whether the number belonged to the Solicitor. A copy of the notes of the telephone message is contained at Tab 23 of the Document Book.

23. By registered mail dated January 31, 1996 (Tab 24, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was returned marked "moved".

24. On March 28, 1996, the Law Society called the Solicitor and left a message on his voice mailbox asking him to return the call. The Solicitor did not return the call. A copy of the notes of the telephone message is contained at Tab 16 of the Document Book.

25. By registered mail dated April 18, 1996 (Tab 17, Document Book), the Solicitor was again reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on April 22, 1996. The Solicitor did not respond.

26. To date, the Solicitor has not responded to the Law Society regarding a complaint by Holly Roberts and has not delivered the file to her.

27. By way of explanation the Solicitor's states that the professional misconduct admitted and described in the Complaint and this agreed statement of facts was not willful, intentional or dishonest. The misconduct occurred as a result of a severe mental depression suffered by the Solicitor in or about 1994.

V. PRIOR DISCIPLINE

28. The Solicitor provided the Law Society with a written Undertaking, dated December 5, 1994 not to engage in the practice of law until he satisfied the Law Society that the following conditions had been met:

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- bring all required filings with the Law Society of Upper Canada up to date;
- reply to the Law Society in a meaningful and comprehensive manner regarding the complaint of Mr. D.D. Mundy;
- upon seeking return to the practise of law, to provide a written report from a psychiatrist in a form acceptable to Senior Counsel - Discipline or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law.

To date, the Solicitor has not brought his filings up to date, has not replied to the Law Society regarding the complaint of D.D. Mundy and has not sought to return to the practise of law.

VI. PENALTY

29. The Law Society and the Solicitor jointly submit that the Solicitor be suspended indefinitely. Upon seeking return to the practice of law the Solicitor will provide a written report from a psychiatrist in a form acceptable to the Secretary/Treasurer or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, that he is fit to resume the practise of law and the Solicitor will bring all required filings with the Law Society of Upper Canada up to date.

DATED at Ottawa, this 1st day of November , 1996."

RECOMMENDATION AS TO PENALTY

The Committee accepts the joint submission as to penalty and recommends that the Member be suspended indefinitely. Upon seeking return to the practice of law, the Member shall provide a written report from a psychiatrist, in a form acceptable to the Secretary or a Committee approved by Convocation pursuant to section 35 of the Law Society Act, stating that he is fit to resume the practice of law and the Member shall have made all his required filings with the Law Society of Upper Canada up to date.

REASONS FOR RECOMMENDATION

The Member did not appear before the Committee. Counsel for the Society advised that the Member was content that the Committee proceed in his absence. The Member admits the particulars contained in the Agreed Statement of Facts and further admits that the particulars constitute professional misconduct. The Committee did hear from the Member by telephone conference call during which he consented to the Committee hearing evidence from his doctor and also to the Committee proceeding in his absence. The Committee made a finding of professional misconduct with respect to each particular. These are serious complaints. The Member has not provided an accounting to Mr. Lalonde for the sum of \$856.23, to Ms. Hyllekve for the sum of \$2,700.00 or to Ms. Fostey (Deneault) for the sum of \$3,000.00. The Member has failed to reply to clients, other solicitors and to the Law Society. The Member has created a hardship for his vulnerable Family Law clients during their difficult times. To date, the Member

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has not produced his books and records or co-operated with the Law Society's representative in her attempts to conduct an audit. The Member has provided the Law Society with an undertaking not to practise law until all required Law Society filings are up to date and he has received an acceptable report from a psychiatrist. The Committee notes that the Member has not practised for 2½ years. However, the Committee agrees that the Member's conduct was mitigated by a mental problem of a recurring depression. Dr. Kalin, his family physician for over twenty years, advised the Committee that the Member had a biological depression that runs in the family for which the Member has received medication and psychiatric help. Dr. Kalin advised that this depression had affected the Member's ability to concentrate, keep up professional standards and generally carry on a law practice. The Committee accepted Dr. Kalin's evidence. Before his illness, the Member carried on a good Family Law practice and contributed to the Family Law bar in Ottawa. The Committee balanced the misconduct with the mitigating circumstances. The Committee considered the effect of the Member's conduct on his clients and the Member's explanation that his conduct was not wilful but was a result of his mental depression. In all the circumstances, the Committee agreed that this was not a case for disbarment nor did the Committee feel that they should ask for the Member's resignation. Weighing all the facts, the Committee accepted the joint submission as to penalty as being reasonable and appropriate in the circumstances.

William Leo Riley was called to the Bar on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 28th day of January, 1997

Abraham Feinstein, Q.C, Chair

The following amendment was made to the Report:

- page 7 of the Report, paragraph 24., 3rd line - sentence should read: "He was advised by the examiner to have a person stay with him or attend at the hospital".

Prior to Convocation the solicitor had advised Ms. Gagnon that he would not be attending.

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

The recommended penalty of the Discipline Committee was that the solicitor be suspended indefinitely and if the solicitor seeks to return to the practice of law, he shall provide a written report from a psychiatrist in a form acceptable to the Secretary or a Section 35 Committee stating that he is fit to practise and that all of the filing requirements are up to date.

Counsel for the Society indicated that the recommended penalty be amended to provide for a definite suspension of 3 months followed by the indefinite suspension on the terms in the recommended penalty. She indicated that the amendment for a suspension for a time definite was required by the Act. She further indicated that the matter had been canvassed with the solicitor and he consented to the amendment.

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It was moved by Mr. Crowe, seconded by Mr. Wilson that the solicitor be suspended for a period of 3 months definite and indefinitely thereafter until the solicitor provides a written report from a psychiatrist in a form acceptable to the Secretary of the Law Society or a section 35 committee stating that he is fit to resume the practice of law and that the required filings are made.

Carried

Re: Sadrudin JAFFER - Scarborough

The Secretary placed the matter before Convocation.

Mr. Marrocco and Wilson and Ms. Angeles withdrew for this matter.

Ms. Ratchford appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 18th March, 1997, together with an Affidavit of Service sworn 26th March, 1997 by Ron Hoppie that he had effected service by registered mail on 21st March, 1997 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gary L. Gottlieb, Q.C., Chair
Robert B. Aaron
Nora Angeles

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

Jane Ratchford
for the Society

SADRUDIN JAFFER
of the City
of Scarborough
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 4, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 16, 1996 Complaint D245/96 was issued; and, on November 27, 1996 Complaint D313/96 was issued against Sadrudin Jaffer alleging that he was guilty of professional misconduct.

The matter was heard in public on February 4, 1997 before this Committee composed of Gary L. Gottlieb, Q.C., Chair, Robert B. Aaron and Nora Angeles. The Solicitor did not attend the hearing nor was he represented. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D245/96

2. a) He failed to reply to the Law Society's letters dated November 3, 1995, January 10, 1995 and a voice-mail message left for the Solicitor on February 13, 1996, concerning the submission of his trust bank statements to the Society;
- b) He failed to reply to the Law Society regarding a complaint by John E. Sands despite letters dated March 19, 1996 and April 18, 1996 and telephone messages left on April 12, 1996 and April 15, 1996;
- c) He failed to attend a judgment debtor examination which resulted in an Order issuing on January 24, 1996 finding him in contempt of court and that he be committed to jail for ten days;
- d) He failed to reply to the Law Society regarding a complaint by A.H. Griesdorf despite a letter dated May 15, 1996; and
- e) He failed to comply in a meaningful way with his Undertaking given to the Law Society dated June 8, 1994 that he enter into the Practice Review Programme.

Complaint D313/96

2. a) He failed to reply to the Law Society regarding a complaint by Vicente M. Curammeng despite a letter dated June 14, 1996;
- b) He failed to reply to the Law Society regarding complaints by Firoz Salehmohamed despite a letter dated May 15, 1996, and a telephone message left on July 10, 1996;
- c) He failed to reply to the Law Society regarding deficiencies in his filings for the fiscal period ended June 30, 1994, despite letters dated January 25, 1996, May 13, 1996 and June 25, 1996;
- d) He failed to reply to the Law Society regarding a complaint by Nizar Lakha despite a letter dated May 30, 1996;
- e) He failed to account to his client Nizar Lakha for \$1,000.00 paid to him as a retainer;
- f) He failed to provide a discharge of a mortgage pertaining to a property municipally known as 10 Sunny Glenway, #504, North York, despite numerous requests that he do so; and
- g) He failed to fulfil a financial obligation to Firoz Salehmohamed in the amount of \$606.74 pursuant to an account for services rendered dated September 27, 1994.

Service

The Committee was satisfied that the Solicitor had been properly served in accordance with section 33 (13) of the *Law Society Act* and that the matter should proceed in his absence.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Sadrudin Jaffer be disbarred.

REASONS FOR RECOMMENDATION

The Committee made a finding of professional misconduct on the basis of the matters itemized in Complaints D245/96 and D313/96.

With regard to particular 2(e) in Complaint D245/96 being that the Solicitor failed to comply in a meaningful way with his undertaking given to the Law Society dated June 8, 1994, that he enter into the Practice Review programme, it is the opinion of the Committee that the transcript of the June 8, 1994 discipline hearing involving the Solicitor is clear and we are satisfied that the Solicitor intended to, and indeed did enter into an undertaking with the Society to enter into the Practice Review programme and the Committee is satisfied that he did not comply in a meaningful way with that undertaking.

The Committee heard *viva voce* evidence given by Catherine Riches, a law clerk and Complaints Officer for the Law Society; as well as *viva voce* evidence from Hershel Gross, a Staff Lawyer with the Professional Standards department of the Law Society. In addition we had before us affidavit evidence in accordance with section 33 (9) of the *Law Society Act*; an affidavit of Margot Devlin, the Manager of the Examiner Programs and Forms Services of the Law Society; the affidavit of Tina Perryman, a Forms Reviewer/ Examiner, employed in the Forms Services department of the Law Society, as well as an affidavit of Firoz Salehmohamed, a Barrister and Solicitor practising in Ontario. We also had before us an affidavit of Nizar Lakha, a client of the Solicitor, as well as an excerpt of a previous hearing pertaining to the Solicitor dated June 8, 1994. That excerpt pertained to the Solicitor's undertaking to enter into the Practice Review Programme.

The individual grounds of misconduct were all serious, some more serious than others, but in any event the Solicitor was not present to provide an explanation. All of the matters have the cumulative effect of indicating that the Solicitor is ungovernable. He has failed to reply to Law Society letters and phone messages concerning the submission of his trust bank statements. He failed to reply to the Law Society with regard to a complaint by a person to whom he owes money and which person proceeded to get a judgment against him. The Solicitor then failed to attend at a Judgment Debtor examination which resulted in his being found in contempt of court and an Order that he be committed to jail for ten days.

The Solicitor failed to reply to the Law Society regarding a complaint by another lawyer to whom two invalid cheques had been given by the Solicitor.

The Solicitor was to enter into the Practice Review Programme, but the evidence of the staff lawyer from the Practice Review department was that Mr. Jaffer failed to comply in any meaningful way with the recommendations made by that staff lawyer.

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The evidence also showed that he failed to reply to the Law Society regarding a complaint by a client who retained him in a matrimonial matter but then the Solicitor failed to do the work. He failed to reply to the Law Society regarding complaints by a fellow solicitor. He failed to provide a mortgage discharge to that solicitor, although the solicitor had paid off the mortgage and was entitled to the discharge, and furthermore, he failed to honour an account on another matter to that same lawyer.

The evidence indicated he failed to reply to the Law Society regarding deficiencies, and filings for his fiscal period ended June 30, 1994. But, even more important, the evidence indicated that he failed to reply to the Law Society regarding a complaint by another client who paid him a retainer of \$1,000 and to whom the Solicitor failed to account.

What was really heart-rending was a letter sent by that client, a Mr. Nizar Lakha, the letter being dated August 12, 1995, in which the client said to the Solicitor:

"I gave these files to you with trust and faith that you would resolve these matters as quickly as possible, but regret to say that in almost two and a half years, nothing has been done to resolve these matters. Awaiting your kind and early reply with some good news".

The evidence indicates that the client was left high and dry by this Solicitor.

It can therefore be seen that we have here a case of a Solicitor who has totally failed in his duties and responsibilities to; his clients, his fellow solicitors, and to the Law Society to which he belongs.

This Committee feels that we would be derelict in our duties if we recommended anything in this case other than disbarment for this particular solicitor. There is a time and a place for leniency and a time and a place for mercy, but the evidence indicates that this Solicitor has been reprimanded in committee on three separate occasions in the past, and in addition was given a three month suspension, which suspension has not yet been effected as the Solicitor is under an administrative suspension.

Our duty to the public and to the profession has led us to recommend that this Solicitor be disbarred.

Sadrudin Jaffer was called to the Bar on April 8, 1976.

ALL OF WHICH is respectfully submitted

DATED this 18th day of March, 1997

Gary L. Gottlieb, Q.C.

Ms. Ratchford advised that the solicitor had been served in accordance with the Act.

The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be disbarred.

24th April, 1997

It was moved by Mr. Wright, seconded by Mr. DelZotto that the solicitor be
disbarred.

Carried

CONVOCATION ROSE AT 4:25 P.M.

Confirmed in Convocation this **23** day of **May**, 1997


Treasurer