

23rd June, 1994

MINUTES OF SPECIAL CONVOCATION

Thursday, 23rd June, 1994
10:15 a.m.

PRESENT:

Philip Epstein (in the Chair), Bragagnolo, Campbell, Copeland, Cullity, Curtis, Elliott, Epstein, Graham, Hickey, Lamont, Lerner, McKinnon, Murray, D. O'Connor, S. O'Connor, Palmer, Richardson, Scott, Sealy, Somerville, Thom, Topp, Wardlaw, Weaver and Yachetti.

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IN PUBLIC

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The reporter was sworn.

DISCIPLINE COMMITTEE

Re: WAYNE DOUGLAS BERTHIN, Midland

The Secretary placed the matter before Convocation.

Ms. Palmer and Ms. Graham did not participate.

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

Mr. Perrier advised that the solicitor was unable to attend Convocation due to an ongoing trial. An adjournment was requested on consent.

The adjournment was granted to the Special Convocation in September.

Counsel retired.

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Re: JOHN CALVIN BRACEWELL, Sarnia

The Secretary placed the matter before Convocation.

Messrs. Scott and Cullity and Ms. O'Connor did not participate.

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

Mr. Foster advised that there had been a death in the solicitor's family and an adjournment was requested on consent.

The adjournment was granted to the Special Convocation in September.

Counsel retired.

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Re: PATRICK PETER COONEY, Toronto

The Secretary placed the matter before Convocation.

Messrs. O'Connor and Scott and Ms. Curtis did not participate.

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

Ms. Budweth advised that the solicitor had filed a Notice of Disagreement and an adjournment was requested on consent in order to prepare documents for Convocation.

The adjournment was granted to the Special Convocation in September.

Counsel retired.

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Re: RAYMOND VINCENT DONOHUE, Sarnia

The Secretary placed the matter before Convocation.

Messrs. O'Connor, Scott, Campbell and Thom did not participate.

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

Mr. Foster advised that the solicitor required surgery for a recent injury and an adjournment was requested on consent.

The adjournment was granted to the Special Convocation in September peremptory to the solicitor and Convocation advised that if there were any further requests for an adjournment medical evidence would have to be provided.

Counsel retired.

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Re: JEFFREY MARK LEVY, Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott and Wardlaw and Ms. Graham did not participate.

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

The solicitor advised he required an adjournment to allow him time to put his accountant and counsel in funds. He further advised he was awaiting the clearance of a cheque which would enable him to make the payments.

Counsel for the Society opposed the adjournment because of the length of time the matter had been before Convocation and the solicitor's failure to take steps to resolve the outstanding matters.

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

It was moved by Mr. McKinnon seconded by Mr. Topp that the matter be adjourned to September peremptory to the solicitor.

Carried

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Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision that the matter be adjourned to the Special Convocation in September peremptory to the solicitor.

Counsel and solicitor retired.

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Re: DAVE ALLEN KLAIMAN, Thornhill

The Secretary placed the matter before Convocation.

Mr. Scott did not participate.

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

The solicitor made submissions regarding certain family difficulties, his treatment for alcoholism and depression and advised that his reports had not been completed. He further advised that another Complaint had been issued against him and would not be heard until September. The solicitor requested an adjournment and confirmed his continuing Undertaking not to practice law.

Counsel for the Society opposed the adjournment because there were no medical reports as to any treatment. In addition the Society was not satisfied with the state of the solicitor's client files.

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

It was moved by Mr. Topp, seconded by Mr. Bragagnolo that Convocation adjourn the matter to the November Convocation to deal with both Complaints, peremptory to the solicitor on the continuation of the solicitor's Undertaking not to practice law.

Carried

Counsel, the solicitor, the reporter and the public returned and were informed of Convocation's decision to adjourn the matter to November peremptory to the solicitor.

Counsel and solicitor retired.

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Re: KISHORE PREMJI TANNA, Etobicoke

The matter was stood down.

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Re: GIOVANNI FARACI, Toronto

The Secretary placed the matter before Convocation.

Ms. Curtis withdrew for this matter.

Ms. Christina Budweth appeared for the Society and Ms. Glendinning from Mr. John Rosen's office appeared on behalf of the solicitor. The solicitor was present.

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Convocation had before it the Report of the Discipline Committee dated 2nd May, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th May, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd June, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
Carole Curtis
Marie Moliner

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

Christina Budweth
for the Society

GIOVANNI FARACI
of the City
of Toronto
a barrister and solicitor

John Rosen
for the solicitor

Heard: November 30, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 2, 1992, Complaint D208/92 was issued against Giovanni Faraci alleging that he was guilty of professional misconduct.

The matter was heard in public on November 30, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Carole Curtis and Marie Moliner. Mr. Faraci attended the hearing and was represented by John Rosen. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D208/92

2. c) He failed to provide a reply to the Law Society regarding a request for copies of his trust comparisons despite letters dated February 3, 1992, March 5, 1992 and April 15, 1992.

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- d) He failed to comply with his undertaking to the Law Society dated January 28, 1992 by failing to provide a full and complete response within two weeks to letters from the law Society dated February 3, 1992, March 5, 1992 and April 15, 1992.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D208/92 and is prepared to proceed with a hearing of this matter on August 24 and 25, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D208/92.

IV. FACTS

4. The Solicitor was called to the Bar on March 23, 1973. He practices as a sole practitioner.

Particular 2(c) and (d)

5. On April 23 and May 23, 1991, a Society examiner attended at the Solicitor's office to conduct a spot audit. By letter dated June 5, 1991, the Law Society provided the Solicitor with a pamphlet setting out sections 13 to 18 of Regulation 573 of the Law Society Act. The Solicitor was reminded that the Society's representative had provided him with a copy of the audit report dated May 23, 1991. The Solicitor was requested to correct the following inadequacies:

- review and close two inactive trust ledger accounts whose balances had remained unchanged over long periods by paying the balances held to or on behalf of the clients. The Solicitor was requested to report the result of his review to the Society within one month.
- provide the Society with his comments as to why trust comparisons had not been regularly performed each month. The Solicitor was also requested to forward to the Society, within one month of the date of this letter, a copy of each monthly trust comparison from January 31, 1990 to May 31, 1991, inclusive, supported by copies of detailed listings of each client's balances in trust, detailed trust bank reconciliations and trust bank statements at each month-end.
- determine and report to the Society within one month from the date of this letter, the cause of the reappearance of reconciling items in his trust bank statement.

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- determine why monthly trust bank reconciliations contained outstanding stale-dated trust cheques as reconciling items. The Solicitor was requested to stop payment, reverse and reinstate the trust obligations in the clients' trust ledger for the clients involved.

The Solicitor was requested to acknowledge receipt of the Society's letter, in writing, and confirm with the Society that he had taken the necessary steps to correct the deficiencies. A copy of the audit report dated May 23, 1991 is attached as Exhibit "A" to this Agreed Statement of Facts. A copy of the Law Society's June 5, 1991 letter is attached as Exhibit "B" to this Agreed Statement of Facts. No reply was received.

6. By letter dated July 5, 1991, the Law Society forwarded to the Solicitor a copy of its June 5, 1991 letter. The Solicitor was requested to reply forthwith. A copy of the Law Society's July 5, 1991 letter is attached as Exhibit "C" to this Agreed Statement of Facts. No reply was received.

7. By registered letter, dated September 5, 1991, the Law Society forwarded to the Solicitor a copy of its June 5 and July 5, 1991 letters. The Solicitor was advised that should he fail to reply to the Society within fifteen days the matter would be referred to the Discipline Committee. A copy of the Law Society's September 5, 1991 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

8. A Law Society staff employee left a telephone message for the Solicitor at his office on November 5, 1991 requesting he return the call. The call was not returned.

9. A Law Society staff employee left a telephone message for the Solicitor at his office on November 6, 1991 advising that a reply was required within two weeks.

10. By letter dated November 25, 1991, the Solicitor advised the Society of the following:

- the two inactive trust accounts had been closed. The balances in those accounts were applied to pay a portion of his legal fee as no fee had previously been charged.
- a final report of the monthly trust comparisons would be provided by the end of the week.
- the uncorrected reconciled items in the trust bank statements resulted from bank charges which should not have been charged to the trust account. The Solicitor advised that he has instructed his bank not to debit his trust bank account but to debit his general account.
- the outstanding cheques/stale-dated cheques, had been replaced with cash payments.

A copy of the Solicitor's November 25, 1991 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

11. As a result of prior disciplinary proceedings, the Solicitor provided the following undertaking on January 28, 1992:

To provide full and complete responses, in future, to any written request from the Law Society within a time period of not more than two weeks from the date of the Law Society's written correspondence; to any oral communications from the Law Society within a time period of not more than seven days of the date of the communication.

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A copy of the Solicitor's January 28, 1992 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

12. By letter dated February 3, 1992, the Solicitor was requested to forward copies of his monthly trust comparisons for the period from January 13, 1990 to May 13, 1990 inclusive, supported by copies of detailed listings of each clients' balance in trust, detailed bank reconciliations and trust bank statements at each month end. A copy of the Law Society's February 3, 1992 letter is attached as Exhibit "G" to this Agreed Statement of Facts. No reply was received.

13. By letter dated March 5, 1992, the Society forwarded to the Solicitor a copy of its February 3, 1992 letter. The Solicitor was requested to reply forthwith. A copy of the Law Society's March 5, 1992 letter is attached as Exhibit "H" to this Agreed Statement of Facts. No reply was received.

14. By registered letter dated April 15, 1992, the Society forwarded to the Solicitor copies of its letters dated June 5, 1991, July 5, 1991, September 5, 1991, February 3, 1992 and March 5, 1992. The Solicitor was advised that should a reply not be received within fifteen days, the matter would be referred to the Discipline Committee. A copy of the Law Society's April 15, 1992 letter is attached as Exhibit "I" to this Agreed Statement of Facts. The Society's April 15, 1992 letter was returned by the post office marked "unclaimed".

15. The Solicitor did not request an extension time to reply nor did hprovide the Society with an explanation for his failure to reply; however, the Solicitor did, by letter dated September 28, 1992 advise the Society that he had not been in active practice during the period July 1, 1990 to September 30, 1992, a copy of the Solicitor's September 23rd letter is attached as Exhibit "J" to this agreed statement of facts.

16. Under cover of correspondence dated September 8, 1993, the Solicitor delivered the bound volume of trust reconciliations. A copy of the Solicitor's September 8, 1993 letter is attached as Exhibit "K" to this agreed statement of facts.

V. DISCIPLINE HISTORY

17. The Solicitor was found guilty of professional misconduct on April 25, 1984 for obtaining monies from various clients without ensuring that their interests were fully protected as they would have been had they had independent legal representation. The Solicitor was suspended for eight months commencing May 24, 1984. A copy of the complaint is attached as Exhibit "L" to this agreed statement of facts.

18. The Solicitor was found guilty of professional misconduct and reprimanded in committee on January 28, 1992 regarding his failure to file for the fiscal year ended February 28, 1989; failure to reply to the Law Society; and, failure to satisfy a financial obligation in relation to his practice of law.

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

RECOMMENDATION AS TO PENALTY

The Committee recommends the following penalty for Giovanni Faraci:

1. A reprimand in Convocation;
2. Payment of the costs of the Law Society in the amount of \$1,500.00;

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3. The Solicitor shall file trust reconciliations with the Law Society every three months for a period of two years.

REASONS FOR RECOMMENDATION

The Solicitor has had two previous episodes of discipline, the first of which was serious enough to warrant an 8-month suspension. The Committee was mindful of the usual consideration of escalating penalties when discipline episodes recur and increase.

The Solicitor had been called to the Bar in 1973 and had practised with no discipline incident until 1984. Then there was a further 8-year period without incident, until 1992. There was some evidence from the Solicitor of personal problems and life problems from 1989 through to 1991, including the death of his father in January 1991, severe depression, and thoughts of suicide. There was also evidence of financial problems for the Solicitor and difficulties meeting financial obligations, even to the extent of being evicted from his office premises. However, from August 1992 the Solicitor had found new office space, renewed his practice, and was paying his Law Society fees. It appeared that the Solicitor had successfully put his difficulties behind him and was moving forward appropriately.

This would normally result in a suspension particularly given the Solicitor's history. The Committee is recommending a reprimand, bearing in mind the need to continue the Solicitor's rehabilitation, and to encourage the Solicitor to get back on his feet and continue his practice. The Committee was influenced by a concern that a suspension would finish the Solicitor's so far successful return to practice.

Giovanni Faraci was called to the Bar and admitted as a solicitor on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of May, 1994

Kenneth E. Howie, Q.C.
Chair

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

There were no submissions and the Report was adopted.

Both counsel made submissions in support of the recommended penalty that the solicitor be reprimanded, pay the Society's costs of \$1,500 and file trust reconciliations every 3 months for a period of 2 years.

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

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

Carried

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

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The solicitor was reprimanded in Convocation.

Counsel and solicitor retired.

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RESUMPTION OF THE TANNA MATTER

The Secretary placed the matter before Convocation.

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

Mr. Stephen Foster appeared on behalf of the Society and Mr. Shaw appeared on behalf of the solicitor who was present.

It was moved by Mr. Somerville, seconded by Mr. Topp that the Report filed as Exhibit 1 be adopted.

There were no submissions and the Report was adopted.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C. Chair

Ross W. Murray, Q.C.

Mrs. Netty Graham

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

Stephen Foster
for the Society

KISHORE PREMJI TANNA
of the City
of Etobicoke
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 4, and September 9, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 20, 1993, Complaint D4/93 was issued against Kishore Premji Tanna alleging that he was guilty of professional misconduct.

The matter was heard in public on May 4, 1993 and September 9, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Ross W. Murray, Q.C. and Mrs. Netty Graham. Mr. Tanna attended the hearing and was unrepresented. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D4/93

- 2.(a) He failed to produce all of his books, records and accounts when requested to do so by the Law Society's Department of Audit and Investigation;
- (b) He failed to comply with a written Undertaking dated November 18, 1991 given to the Law Society to produce his books and records no later than January 6, 1992;
- (c) He failed to maintain proper books, records and accounts in connection with his practice;
- (d) He failed to correct inadequacies with respect to maintaining his books, records and accounts even though instructed to do so following examinations by the Law Society;
- (e) He failed to serve his client, Viswasvarrao Pilleseaty, in a conscientious, diligent and efficient manner and displayed unsatisfactory professional practice in connection with the purchase of a property located at 29 Kendal Avenue.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D4/93 and is prepared to proceed with a hearing of this matter on May 4 and 5, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D4/93 and admits the particulars contained therein. The Solicitor also admits that the particulars in the Complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1975.

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5. The Solicitor practices as a sole practitioner in Rexdale with a branch office for interviewing clients in Toronto. His practice is primarily in the area of real estate. In the past, the Solicitor also conducted his practice from a second office in Toronto.

Particulars a), b), c), d) - Books and Records

6. The Law Society has conducted six examinations of the Solicitor's books: July 21, 1980 (Document Book Tab 1), November 4, 1982 (Document Book Tab 2), July 12, 1985 (Document Book Tab 3), January 27, 1987 (Document Book Tab 4), November 24, 1987 (Document Book Tab 5) and August 17, 1989.

7. In respect of the last examination which began on August 17, 1989, the Law Society's examiner attended at the Solicitor's office on various occasions from August 17, 1989 to September 4, 1991. By letter dated September 18, 1991 the Law Society reviewed these visits, advised the Solicitor that he had not produced sufficient books and records for the completion of the examination, and requested the Solicitor to make arrangements for a further examination on October 18, 1991 (Document Book Tab 6).

8. By letter dated October 16, 1991 the Solicitor explained some of the problems he was having producing his books and records and requested a further extension of time (Document Book Tab 7).

9. By letter dated October 22, 1991 the Law Society granted a further extension to November 4, 1991 and advised the Solicitor that if he failed to produce the items requested the matter would be referred to the Discipline Committee (Document Book Tab 8).

10. By letter dated October 29, 1991 (Document Book Tab 9) the Solicitor further explained some of the problems he was having producing his books and records and stated:

You have cooperated so far and I am sure I would be able to complete within a very short period and after that I would not have problem since the bookkeeper and accountant are now familiar with the system.
Would you please bear with me for some time.

11. On November 18, 1991 the Law Society's examiner met with the Solicitor at his office and it was agreed she would return to complete her examination on January 6, 1992. This was confirmed by the Law Society by letter dated October 18, 1991 (Document Book Tab 10) (which the letter mistakenly refers to January 6, 1991).

12. On November 18, 1991 the Solicitor signed an Undertaking to the Law Society acknowledging the deficiencies in his books and records and undertaking to produce and make available for examination his complete books and records no later than January 6, 1992 (Document Book Tab 11).

13. By letter dated January 2, 1992 (Document Book Tab 12) the Solicitor advised that it had not been possible to prepare his books and records for examination so far as they were related to his closed account for the downtown office for the year 1990 from January, 1990 to July, 1990. The Solicitor attached a letter from his bookkeeper setting out some of the problems in producing the books and records.

14. The Law Society's examiner did not personally receive the Solicitor's letter of January 2, 1992 and, as such, attended at the Solicitor's office on January 6, 1992. The Solicitor was not able to produce his complete books and records and the Law Society's examiner refused to grant any further extensions (Document Book Tab 13).

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15. The Solicitor did not produced sufficient books and records to allow the examiner to complete an examination. In particular, he did not produce any current books and records relating to that part of his practice conducted from his former Toronto office. He did not produced a current general receipts journal and general disbursements journal respecting his Rexdale office (Document Book Tab 13).

16. With respect to the books and records which were produced for the 1989 examination, the following inadequacies were revealed: trust comparisons were in arrears; books and records generally were in arrears; transfer of fees from trust prior to billing; overdrawn clients' trust ledger accounts; uncorrected trust reconciling items; unexplained trust differences.

17. All of these inadequacies had arisen in one or more of the previous examinations of the Solicitor's books and records and the Solicitor had been instructed to correct them.

18. However, the records and books were brought up-to-date and annual filings were made with the exception of the records for 1990 at the downtown office as mentioned in the Solicitor's letter dated January 2, 1992.

19. The Solicitor contends that he has made every effort to produce books and records for examination but that he has encountered difficulties in being able to remedy the deficiencies in the books and records on time. His accountant who used to maintain his records and books for 14 years died while the Solicitor's accounts were in the process of transferring from a manual to a computerized system, known as "Nuvview". Subsequent accountants had taken time to peruse, grasp and complete the transfer to, the Nuvview system. As regard the incomplete outstanding records of closed downtown account of 1990, the same were lost and the Solicitor had ordered copies of the whole record from the bank which took eight months to provide and the bookkeeper found difficulties in the record as mentioned in his letter dated January 2, 1992.

Particular e) - Failure to Serve Pillerseaty

20. The 1989 examination of the Solicitor's books and records was initiated following receipt by the Law Society of a complaint respecting the Solicitor's handling of a real estate transaction involving Mr. Viswasvarrao Pillerseaty. The complaint alleged that the Solicitor had failed to turn over his file to Mr. Pillerseaty, failed to provide an accounting and acted while in conflict of interest on the transaction.

21. In November, 1987 the Solicitor acted for Mr. Pillerseaty on the sale of a property located at 29 Kendal Ave.

22. During the period of time in question Mr. Pillerseaty was employed as a para-legal with the Solicitor and also participated in a business investment with the Solicitor.

23. The Solicitor received the balance of the sale proceeds on closing but failed to pay these out to Mr. Pillerseaty within a reasonable period of time. Instead, the proceeds were released to Mr. Pillerseaty in instalments over a period of several months.

24. The Solicitor maintains that the proceeds had not been paid to Mr. Pillerseaty immediately because they were to be applied to Mr. Pillerseaty's purchase of a property located at 3559 Eglinton Avenue West in March 1988 and that the same were placed in an interest bearing account at the instructions of

Mr. Pillerseaty and interest thereon was accounted to Mr. Pillerseaty and were disbursed as per Mr. Pillerseaty's instructions and further that Mr. Pillerseaty's solicitor has been provided with the accounts. The Solicitor's files contained copies of statements of account dated November 23, 1987 (Document Book Tab 14) and March 29, 1988 (Document Book Tab 15) which included cash flow statements and support the Solicitor's explanation. However, the statements are incomplete.

25. The Solicitor did not report to Mr. Pillerseaty with respect to this transaction because of his mistaken belief that as he had acted gratuitously for Mr. Pillerseaty who was employed as a law clerk with him, that the transaction would not require reporting and further that all the files and records were available and accessible to Mr. Pillerseaty as he was working with his office.

26. The Solicitor did not report to Mr. Pillerseaty with respect to this transaction.

V. DISCIPLINE HISTORY

27. The Solicitor has no previous discipline record.

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

The Committee makes a finding of professional misconduct in respect of all of the particulars contained in paragraph 2 of the Complaint.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be reprimanded in Convocation, provided he has attended to all the outstanding particulars contained in paragraph 2 of the complaint to the satisfaction of the Law Society by the time of the first hearing date in Convocation.

In the event that the Solicitor has failed to attend to all of the matters contained in the complaint to the satisfaction of the Law Society, the Committee recommends that the Solicitor should be suspended for a period of one month. The suspension at the end of that time should continue thereafter, indefinitely, until all the outstanding matters have been attended to by the Solicitor, to the satisfaction of the Law Society.

The Committee recommends that the Solicitor should be called upon to pay costs in the amount of \$500.00.

REASONS FOR RECOMMENDATION

The matters which are the subject of complaint have been outstanding since 1992. The matter came before this Committee in May 1993 at which time the finding of professional misconduct was made and the Committee granted the Solicitor an adjournment to August of 1993 in order to attend to the matters which are the subject matter of the complaint.

The Solicitor at the hearing on September 9, 1993 sought a further adjournment indicating that he had been unable to attend to any of the matters which are the subject matter of the complaint. The Committee refused to grant the adjournment at that time and proceeded. It became clear at the hearing that the Solicitor had not attended to any of the matters contained in the complaint. His submissions were to the effect that he had been simply too busy with his practice and with practice reviews to be able to attend to the matters.

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The Committee is satisfied that the Solicitor has some problems with respect to lost documentation and has financial problems which have imposed some difficulty upon him in terms of purchasing the accounting assistance required to complete the problems associated with the inadequacies with respect to maintaining his books and accounts. The Committee has some sympathy for the Solicitor's problems financially, but felt that the Solicitor cannot use that as an excuse indefinitely to fail to fulfill the obligations of him by the Rules.

The Committee found it quite upsetting that the Solicitor has still not reported out to his client the real estate transaction referred to in paragraph (e) in the complaint, although the Solicitor conceded that it will only take him half an hour to do so.

The Committee has deliberately requested that the matter not be brought before Convocation until November in order to provide the Solicitor with one last opportunity to attend to the matters, in which case the Committee is of the view that suspension is not required, either for a fixed term or for an indefinite period.

Kishore Premji Tanna was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 12th day of October, 1993

Kenneth E. Howie, Q.C.
Chair

Counsel for the Society advised that the solicitor had not completed his books and records and supported the Committee's recommendation that the solicitor be suspended for a period of 1 month to continue thereafter until all outstanding matters were attended to and to pay the costs of \$500.

Counsel for the solicitor also supported the recommended penalty. He advised that the solicitor had been under a great deal of stress. Counsel requested that the suspension take effect on July 1st.

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

It was moved by Mr. McKinnon, seconded by Mr. Somerville that the solicitor be suspended for a period of 1 month commencing July 1st such suspension to continue thereafter until all outstanding matters were attended to.

Carried

An amendment to Mr. McKinnon's motion was accepted that the solicitor enter into the Professional Standards program.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for 1 month, pay costs and enter into the Professional Standards program.

Counsel and solicitor retired.

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23rd June, 1994

Re: BOTOND GABOR FEJES, Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott, O'Connor and Thom and Ms. Sealy withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 9th May, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th May, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 20th June, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

S. Casey Hill, Chair
Stuart Thom, Q.C.
Hope Sealy

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

Neil Perrier
for the Society

BOTOND GABOR FEJES
of the City
of Toronto
a barrister and solicitor

Roger Smith
for the solicitor

Heard: March 1, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 1, 1993, Complaint D49/93 was issued and on June 22, 1993, Complaint D179/93 was issued against Botond Gabor Fejes alleging that he was guilty of professional misconduct.

The matter was heard in public on March 1, 1994 before this Committee composed of S. Casey Hill, Chair, Stuart Thom, Q.C. and Hope Sealy. The Solicitor was in attendance at the hearing and was represented by Roger Smith. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D49/93

2. a) He practised while under suspension, thereby breaching an order given by Convocation on May 24, 1991, that he suspend his practice for failure to pay the Errors and Omissions levy;
- b) He failed to maintain sufficient trust funds in his trust bank account to meet client trust obligations;
- c) he failed to correct inadequacies disclosed in prior examinations which had been subsequently reported to him.

Complaint D179/93

2. a) He practised from November 2, 1992 to April 21, 1993 while under suspension, thereby breaching an order given by Convocation on November 2, 1992, that he suspend his practice for failure to pay his Errors and Omissions levy;
- b) He failed to file with the Society within six months of the termination of his fiscal year ending July 31, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D49/93 and is prepared to proceed with a hearing of this matter on March 1 and 2, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

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

IV. FACTS

1. Breach of Suspension Order by Convocation

23rd June, 1994

4. The Solicitor was suspended on May 24th 1991 for failure to comply with Errors and Omissions requirements. The suspension lasted approximately 14 months until July 28, 1992. The Solicitor was notified of the suspension by The Law Society of Upper Canada by letter dated May 27th 1991, a copy of which is attached as Appendix "A".

5. Since the Solicitor's call to the Bar in 1981, the Solicitor has been suspended on ten separate occasions for non-payment of Errors & Omissions levies and/or annual fees. The particulars of the suspensions are summarized as follows:

Date of Suspension	Reason For Suspension	Date of Reinstatement
November 2nd 1992	Non-payment of E&O	April 21st 1993
May 24th 1991	Non-payment of E&O	July 28th 1992
November 23rd 1990	Non-payment of E&O	April 11th 1991
November 24th 1989	Non-payment of E&O	January 17th 1990
May 27th 1988	Non-payment of E&O	June 24th 1988
February 26th 1988	Non-payment of the annual fees	March 16th 1988
November 27th 1987	Non-payment of E&O	December 18th 1987
February 27th 1987	Non-payment of the annual fees	April 9th 1987
November 28th 1986	Non-payment of E&O	December 5th 1986
May 25th 1984	Non-payment of E&O	June 4th 1984

Attached as Appendix "A" are copies of correspondence sent to the Solicitor advising him of each suspension.

6. The Solicitor paid his Errors and Omissions levy on July 16th 1992 and was reinstated on July 28th 1992.

7. However, the Solicitor admitted that he had been practising law for a period in excess of a year contrary to the Order by Convocation that he suspend his practice. The Solicitor admitted specifically to appearing in court in connection to ongoing matters and as an agent for other solicitors. He also admitted to having accepted new matters during the duration of the suspension.

8. Information gathered from client files confirmed that the Solicitor was practising during his suspension.

9. The Solicitor's July 1992 trust statement indicates his continued acceptance of trust funds through his period of suspension.

2. Failure to Maintain Sufficient Trust Funds in Trust Bank Account

10. The following schedule sets out the trust differences and shortages revealed by trust bank reconciliations and trust listings for each month from October 1991 to June 1992:

Month/Y r.*	Bank Errors and Other Adjustments	Description and/or Explanation	Overdrawn Client Trust Ledger Accounts	Total Deficiency
July 1992	46.80	uncorrected bank charges	1,615.07 (total)	1,937.98
	276.11	March 1989 deposit to general s/b trust		
June 1992	46.80	uncorrected bank charges	2,409.52	8,141.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
May 1992	46.80	uncorrected bank charges	2,117.52	7,849.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
April 1992	46.80	uncorrected bank charges	2,117.52	7,849.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
March 1992	46.80	uncorrected bank charges	1,832.52	7,564.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		

Month/Y r.*	Bank Errors and Other Adjustments	Description and/or Explanation	Overdrawn Client Trust Ledger Accounts	Total Deficiency
Feb. 1992	46.80	uncorrected bank charges	1,867.52	7,599.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
Jan. 1992	46.80	uncorrected bank charges	1,832.52	7,564.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
Dec. 1991	46.80	uncorrected bank charges	1,390.52	7,122.00
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
Nov. 1991	46.80	uncorrected bank charges	1,842.94	7,574.42
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		
Oct. 1991	46.80	uncorrected bank charges	2,690.64	8,422.12
	276.11	March 1989 deposit to general s/b trust		
	5,408.57	uncorrected bank errors		

23rd June, 1994

Month/Y r.*	Bank Errors and Other Adjustments	Description and/or Explanation	Overdrawn Client Trust Ledger Accounts	Total Deficiency
* - figures taken at end of month				
Note: uncorrected bank errors and bank charges were carried forward to June 1992 from 1989 or earlier.				

Note 1: On July 3rd 1992, the trust receipts journal did not show sufficient detail. The Law Society immediately brought this fact to the Solicitor's attention. The trust receipts journal does now show sufficient detail.

Note 2: On July 3rd 1992, the general receipts journal did not show sufficient detail. The Law Society immediately brought this fact to the Solicitor's attention. The general receipts journal does now show sufficient detail.

Note 3: The Solicitor was unable to produce trust comparisons for the Law Society's examination on July 3rd 1992, July 16th 1992 and August 12th 1992 or at any time prior to September 1st 1992. Trust comparisons from April 30th 1991 to September 30th 1991 were received by the Law Society on March 3rd 1992.

Note 4: On July 3rd 1992, the trust and general deposit slips did not always show sufficient detail. The Law Society immediately brought this fact to the Solicitor's attention. The trust and general deposit slips do now show sufficient detail.

Prior Discipline

11. The Solicitor was found guilty of professional misconduct on September 18th 1990 regarding his failure to file his Form 2/Form 3 for the fiscal year ended July 31st 1989. The member received a Reprimand in Committee.

DATED at Toronto this 1 day of March, 1994."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D179/93 and is prepared to proceed with a hearing of this matter on March 1 and 2, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

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

IV. FACTS

4. Particular 2(a)

On November 2, 1992, the Solicitor's rights and privileges were suspended by an Order of Convocation pursuant to Section 36 of the Law Society Act for failure to pay his Errors and Omissions insurance levy. A Notice of Suspension was served by registered letter dated November 3, 1992. (Appendix 'A').

5. An Audit was instructed to confirm that the member was maintaining books and records as required by Sections 14 and 15 of the Regulation and that the member had not been engaged in the practice of law while under suspension.

6. The auditor discovered the following evidence that the Solicitor had practised during the period November 2, 1992 through to April 21, 1993 while under suspension:

- a) copies of trust disbursement journals for the period November 2, 1992 to February 26, 1993 (Appendix 'B');
- b) copies of trust receipts journals for the period November 2, 1992 to February 26, 1993 (Appendix 'C');
- c) copies of trust account bank statements with the Royal Bank for the months November 1992, December 1992, January 1993 and February 1993 (Appendix 'D').

7. The Solicitor has a history of previous suspensions for non-payment of E&O Insurance Levies and Annual Fees dating back to 1984 as follows:

History of Previous Suspensions

Date of Suspension	Reason for Suspension	Date of Reinstatement
November 2nd 1992	Non-payment of E&O	April 12st 1993
May 24th 1991	Non-payment of E&O	July 18th 1992
November 23rd 1990	Non-payment of E&O	April 11th 1991
November 24th 1989	Non-payment of E&O	January 17th 1990
May 27th 1988	Non-payment of E&O	June 24th 1988
February 26th 1988	Non-payment of the annual fees	March 16th 1988
November 27th 1987	Non-payment of E&O	December 18th 1987
February 27th 1987	Non-payment of the annual fees	April 9th 1987
November 28th 1986	Non-payment of E&O	December 5th 1986
May 25, 1984	Non-payment of E&O	June 4th 1984

Particular 2(b)

8. The Solicitor's fiscal year end is July 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ended July 31, 1992 as required by Section 16 (2) of Regulation 708 pursuant to the Law Society Act.

23rd June, 1994

9. A first Notice of Default dated February 4, 1993 was delivered to the Solicitor (Appendix 'E').
10. A second Notice of Default was served by Registered Mail on the Solicitor on March 11, 1993 (Appendix 'F').
11. The within complaint was served on the Solicitor on June 24, 1993.
12. On August 9, 1993 the Solicitor submitted his annual filing for the fiscal year ended July 31, 1992.

Prior Discipline

13. The Solicitor was found guilty of professional misconduct on September 18th 1990 regarding his failure to file his Form 2/Form 3 for the fiscal year ended July 31st 1989. The member received a Reprimand in Committee.

DATED at Toronto this 1 day of March, 1994".

RECOMMENDATION AS TO PENALTY

The Committee recommends that Botond Gabor Fejes be suspended for a period of nine months.

REASONS FOR RECOMMENDATION

The Committee has considered the totality of the Solicitor's conduct, in arriving at a global disposition.

The Society submitted that a suspension of 6 to 9 months would constitute a fit penalty. The Solicitor submitted that the penalty ought to be a 3 month suspension followed by a further 3 month period of practice under strict controls together with an undertaking by the Solicitor agreeing to a more severe penalty should there be any repetition of professional misconduct. The Committee views the suggested undertaking, prospective or contingent on a future event, as unenforceable and inappropriate.

The conduct in question does not involve any allegation of dishonesty. Counsel for the Solicitor submitted that his client's misconduct was the product of an "untidy conspiracy of circumstances". The Solicitor is married with two young children. His practice has been characterized by intermittent administrative suspensions apparently occasioned by an unbroken plight of impecuniosity. The Solicitor was unable to afford a regular accountant. With knowledge of the relevant orders of suspension, the Solicitor nevertheless practiced law in order to secure income.

The total period of practice while under suspension was 17 to 18 months in duration. Without diminishing the seriousness of the entirety of the allegations, the act of practicing while under suspension is the gravest misconduct at issue. Accordingly, the Committee's Reasons focus on this aspect of the complaints.

A solicitor who practices while under suspension necessarily engages in a wilful breach or disobedience of an order or orders existing for the purposes of protecting the public. Such conduct may be especially serious, as in the instant case, where insurance levies are unpaid. This serves to put the public at risk and engenders public disrespect for the profession. The suspended solicitor, who practices in contravention of the professional obligation not to do so, is

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prepared to gamble that she/he will not be caught, and if discovered by the governing body, that the penalty incurred, will de facto amount to a lesser sanction than having foregone practice during the relevant period of suspension. In other words, the solicitor hopes to be "better off", or in effect rewarded, for having taken the risk even if ultimately sanctioned by Convocation. This mentality, on the part of a minority, but increasing, segment of the profession will not be tolerated and must be deterred.

Recently, Discipline Committees, with the approval of recommended penalties by Convocation, have adopted a principle referable to sanction for practicing while suspended that the subject solicitor should not be put in a better position by the disposition of the case than she/he would have been in had there been compliance with the obligation to desist from practice. This has generally resulted in the imposition of a period of suspension equal to the period during which the impugned practice occurred plus an additional one month: see for example, The Law Society of Upper Canada v. MacGregor, Committee Report January 5, 1993 - approved by Convocation April 22, 1993, The Law Society of Upper Canada v. Ellison, Committee Report July 27, 1993 - approved by Convocation January, 1994.

The Committee recognizes that the principle espoused by Convocation is sound in terms of the need to effect deterrence and to impose a proportional penalty. However, the principle should not become an inflexible, irreducible tariff. Otherwise, the imposition of penalty is reduced to slavery to a mathematical formula without consideration of individual circumstances or the principle of the totality of the penalty.

The imposition of an 18 or 19 months suspension would effectively foreclose the Solicitor's ability to re-enter the profession. Unlike the Ellison case, where the solicitor was engaged in a "marginal general practice" over and above the full time occupation of running a family business, this case involves an individual whose entire livelihood involves the practice of law. As a general rule, a period of suspension, especially in circumstances divorced from dishonest misconduct, ought not to become the functional equivalent of a resignation from practice or disbarment.

The Committee is satisfied that applicable principles will not be eroded, and indeed an appropriate balance effected between public and individual considerations, by the imposition of a 9 month suspension.

Botond Gabor Fejes was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 9th day of April, 1981.

ALL OF WHICH is respectfully submitted

DATED this 9th day of May, 1994

S. Casey Hill
Chair

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

There were no submissions and the Report was adopted.

Both counsel made submissions in support of the recommended penalty that the solicitor be suspended for a period of 9 months.

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

It was moved by Ms. Weaver, seconded by Mr. Hickey that the solicitor be suspended for 9 months.

Carried

It was moved by Mr. Bragagnolo but failed for want of a seconder that the solicitor be suspended for 6 months.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to suspend the solicitor for 9 months.

Convocation granted the solicitor's request to commence his suspension on June 30th at the close of business.

Counsel and solicitor retired.

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Re: CARL ERIC LOGAN, Hamilton

The Secretary placed the matter before Convocation.

Messrs. O'Connor, Scott and Thom and Ms. Weaver and Ms. Richardson withdrew for this matter.

Mr. Neil Perrier appeared for the Society. No one appeared for the solicitor. The solicitor was called 3 times outside of Convocation Room with no response.

Convocation had before it the Report of the Discipline Committee dated 12th May, 1994, together with an Affidavit of Service sworn 19th May, 1994 by Ron Hoppe that he had effected service on the solicitor by registered mail on 13th May, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

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

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

Neil Perrier
for the Society

CARL ERIC LOGAN
of the City
of Hamilton
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 19, 1993, Complaint D16/93 was issued, on June 22, 1993, Complaint D178/93 was issued, and on September 14, 1993, Complaint D226/93 was issued against Carl Eric Logan alleging that he was guilty of professional misconduct.

The matter was heard in public on March 9, 1994 before this Committee composed of Mary P. Weaver, Q.C., Chair, Stuart Thom, Q.C. and Nora Richardson. The Solicitor was not present nor was he represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D16/93

2. a) He has failed to provide a reply to the Society regarding a complaint by Hans De Groote, despite letters dated June 30 and August 10, 1992 and telephone requests on June 25, July 15 and July 21, 1992;
- b) He has failed to reply to the Society regarding a complaint by Paula M. McGirr, despite letters dated June 30 and August 10, 1992 and telephone requests on June 5, June 18, June 24, July 15 and July 21, 1992;
- c) He has failed to file his Forms 2 and 3 for his April 30, 1991 fiscal year end in accordance with regulation 16(2) of the Rules and Regulations to the Law Society Act. He has also ignored all Notices of Default and refused to pay any and all late filing penalties. The Solicitor, however, continued to practise law;
- d) He practised law during the period May 29, 1992 through August 31, 1992, fully aware that he was under suspension for failing to file his annual Forms 2 and 3 for the April 30, 1991 fiscal year end. In addition, the Solicitor did not pay his late filing fees which resulted in his suspension;
- e) He has failed to maintain and provide his current records including his trust bank account reconciliations. As a result, the integrity of his trust activities and bank account cannot be determined. The Solicitor therefore breached Sections 15(1)(h), subsections (i) and (ii) of Regulation 573 under the Law Society Act which requires that members prepare monthly listings of those clients and amounts for whom he is holding funds in trust, and a monthly trust bank reconciliation.

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Complaint D178/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending April 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.

Complaint D226/93

2. a) He misappropriated the approximate sum of \$59,000 owing to Royal Trust from his clients, Philip and Nancy Scime and/or Mr. and Mrs. Webb;
- b) He misappropriated the approximate sum of \$89,000 from his clients, Antonio Capolongo and/or Joseph Jordan and/or Scotiabank;
- c) He misappropriated the approximate sum of \$75,000 from his clients, Antonio Capolongo and/or Douglas Nash and/or National Bank;
- d) He misappropriated the approximate sum of \$2,500 from his mixed trust account;
- e) He misappropriated the approximate sum of \$18,000 from his client, Ian Wood and/or the Public Trustee;
- f) He misappropriated the approximate sum of \$20,000 from his client, Anne Chapman;
- g) He falsely reported the position of the new mortgages in all of the above transactions;
- h) He failed to maintained trust ledgers in breach of Section 15 of Regulation 573 of the Law Society Act;
- i) He paid money into and withdrew money from his mixed trust account to avoid Revenue Canada in breach of Section 14 of Regulation 573 of the Law Society Act; and
- j) He was practising while under suspension from May 29, 1992 to June, 1993.

Evidence

The Solicitor was not in attendance at the hearing. Service of the notice of the hearing was filed. The Solicitor had responded to a notice of an earlier hearing which had been sent to him on June 30th, 1993 by sending a letter on July 7th, 1993 in which the Solicitor purported to resign as a member of the Law Society. The letter also indicated that he would not be attending the hearing.

Each particular of the three complaints was established by viva voce evidence and by documents introduced by the witnesses as exhibits. Viva voce evidence was given by the following persons:

Audrey Cado - Paralegal - Discipline Department
William Campbell - Detective - Hamilton-Wentworth Police Force - fraud squad
Doug Kruger - investigation auditor of the Law Society

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Terry Penny - prior employee of Law Society - investigation auditor
Patricia Rogerson - Staff Trustee - Audit
Trisha Danyluk - Complaints Officer
Cathy Riches - Complaints Officer

The Committee viewed a video of an interview that took place on June 17, 1993 in the police station of the Hamilton-Wentworth police force. On that day the Solicitor entered the police station unaccompanied, and stated that he wished to make a statement. Detective Campbell proceeded with a video taped interview in which the Solicitor admitted the misappropriation in Complaint D226/93. The Committee was provided with copies of the transcripts of the interview. Counsel for the Law Society submitted that the video was for the purpose of identifying the Solicitor and corroborating the viva voce evidence of Detective William Campbell of the Hamilton-Wentworth police. Evidence of the misappropriation was also adduced by witnesses producing copies of the Solicitor's books and records. The Committee also heard evidence that the Solicitor was charged and convicted of criminal fraud based on the misappropriation and was sentenced to three months in prison.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Carl Eric Logan be disbarred.

REASONS FOR RECOMMENDATION

In all cases where a Solicitor is guilty of misappropriation, the penalty is disbarment unless there are extenuating circumstances, within a limited range of circumstances and of such a compelling nature that an appropriate penalty is found to be that the solicitor be given permission to resign. In this case, there are no extenuating circumstances. The Committee recommends that the Solicitor be disbarred.

Carl Eric Logan was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 13th day of April, 1962.

ALL OF WHICH is respectfully submitted

DATED this 12th day of May, 1994

Mary P. Weaver, Q.C.
Chair

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

There were no submissions and the Report was adopted.

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

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

Counsel retired.

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23rd June, 1994

Re: YAROSLAV MIKITCHOOK, Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom and Ms. Sealy withdrew from Convocation for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 9th May, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th May, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd June, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

S. Casey Hill, Chair
Stuart Thom, Q.C.
Hope Sealy

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

Neil Perrier
for the Society

YAROSLAV MIKITCHOOK
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 1, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 24, 1993, Complaint D273/93 was issued against Yaroslav Mikitchook alleging that he was guilty of professional misconduct.

The matter was heard in public on March 1, 1994, before this Committee composed of S. Casey Hill, Chair, Stuart Thom, Q.C., and Hope Sealy. The Solicitor attended the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D273/93

- 2.a) He failed to provide a reply to the Law Society regarding a complaint by Jamie-Lynn Nassr despite letters dated June 24, 1993 and July 29, 1993 and telephone requests on July 19, 1993, July 22, 1993 and July 27, 1993.
- b) He failed to comply with his undertaking to the Law Society dated May 1, 1990 by failing to promptly and fully answer all correspondence and telephone calls from the Society regarding a complaint by Jamie-Lynn Nassr.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D273/93 and is prepared to proceed with a hearing of this matter on March 1 and 2, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D273/93 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 20, 1975. He practices as a sole practitioner.

Particular 2(a)
Failure to reply to the Law Society

5. By letter dated June 2, 1993 (Tab 1, Document Book) to the Law Society, Jamie-Lynn Nassr alleged that the Solicitor, who acted on behalf of her husband in divorce proceedings, was delaying the matter.

6. By letter dated June 24, 1993 (Tab 2, Document Book), the Law Society forwarded to the Solicitor a copy of Ms. Nassr's June 2nd, letter. The Solicitor was advised of the Society's procedure when receiving a complaint from a "third-party". The Solicitor was requested to provide his comments to Ms. Nassr's June 2nd letter within two weeks. No reply was received.

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7. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on July 19, 1993 requesting he return the call. A copy of the Society's verbal transaction form is contained at Tab 3, of the Document Book. The call was not returned.

8. A Law Society staff employee spoke with the Solicitor by telephone on July 22, 1993. The Solicitor advised that a response would be provided by July 26, 1993. A copy of the Society's verbal transaction form is contained at Tab 3, of the Document Book. No reply was received.

9. A Law Society staff employee left a message for the Solicitor at his office on July 27, 1993 requesting he return the call. A copy of the Society's verbal transaction form is contained at Tab 3, of the Document Book. The call was not returned.

10. By registered mail dated July 29, 1993 (Tab 4, Document Book), the Law Society forwarded to the Solicitor a copy of its June 24th letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a response within seven days of the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

11. A formal complaint was conditionally authorized against the Solicitor on September 9, 1993.

12. A Law Society staff employee left a telephone message for the Solicitor at his office on September 13, 1993 requesting he return the call. A copy of the Society's verbal transaction form is contained at Tab 5, of the Document Book. The call was not returned.

13. By registered mail dated September 15, 1993 (Tab 6, Document Book), the Law Society forwarded to the Solicitor a copy of its June 24th and July 29th letters. The Solicitor was reminded of his obligation to provide a reply to the Society, as well as, the contents of his Undertaking to the Society, dated May 1, 1990. The Solicitor was advised that should he fail to provide a full and complete written reply to the Society by September 22, 1992, a formal complaint was to be issued against him. No reply was received.

14. Complaint D273/93 was issued against the Solicitor on September 24, 1993.

15. By letter dated October 1, 1993 (Tab 7, Document Book), the Solicitor advised that the delay in proceeding with the matter was due to his client's financial difficulties and his inability to deliver funds to the Solicitor. The Solicitor advised that his client had now provided the funds in order that the matter could proceed.

16. Complaint D273/93 was served upon the Solicitor on October 4, 1993.

17. By letter dated October 18, 1993 (Tab 8, Document Book), the Solicitor advised the Society of the progress of the proceedings in that the matter would be required to be set down for a trial.

18. By letters dated October 19, 1993 (Tab 9, Document Book) and November 2, 1993 (Tab 10, Document Book), the Law Society advised the Solicitor that it would be monitoring the progress of the divorce proceedings. The Solicitor was requested to advise the Society of any change in the status of the proceedings.

19. By letter dated December 28, 1993 (Tab 11, Document Book), the Solicitor provided the Law Society with an update as to the status of the proceedings.

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20. By letter dated January 20, 1994 (Tab 12, Document Book), the Law Society requested the Solicitor continue to keep it advised of the progress of the proceedings.

Particular 2(b)

Failure to comply with his undertaking to the Society

21. The Solicitor provided the Law Society with a written undertaking, dated May 1, 1990 (Tab 13, Document Book), as follows:

...to promptly and fully answer all correspondence and telephone calls from the Society regarding complaints against me.

22. The Solicitor failed to comply with his undertaking to the Law Society, dated May 1, 1990 by failing to promptly respond to telephone requests from the Law Society on July 19, 1993, July 22, 1993, July 27, 1993 and September 13, 1993 and letters dated June 24, 1993, July 29, 1993 and September 15, 1993.

V. DISCIPLINE HISTORY

23. The Solicitor was found guilty of professional misconduct on August 5, 1992 as a result of his failure to reply to the Law Society, failure to comply with his May 1, 1990 undertaking to the Society, failure to service a client and his having misled a client regarding a motion. The Solicitor was reprimanded in convocation on January 28, 1993 and order to pay the Society's costs of \$3000.

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

RECOMMENDATION AS TO PENALTY

The Committee accepts the joint submission that the Solicitor be reprimanded in Convocation, that he pay costs in the amount of \$500.00 before this matter reaches Convocation and that the Solicitor is to perform 40 hours of community service at the Toronto Food Bank, to the satisfaction of Senior Counsel Discipline, within 3 months of the Order of Convocation.

REASONS FOR RECOMMENDATION

At the time of the Committee hearing, the Solicitor had been responding in a full and timely fashion to the Society for a 3 to 4 month period. There was no allegation of dishonesty in the complaints before the Committee.

The complaints collectively represent an unacceptable derogation by the Solicitor from his responsibilities to the Society, the profession and the public.

Delay in response to a complaint fosters public disrespect for the profession. Breach of an undertaking as a general rule, indicates that prior disciplinary action has failed to get the Solicitor's attention.

Nevertheless, as a consequence of the joint submission, and because the Solicitor has entered upon a course of replying to the Society in a satisfactory fashion for some months immediately preceding the hearing, the joint submission constitutes a fit disposition in all of the circumstances.

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

ALL OF WHICH is respectfully submitted

DATED this 9th day of May, 1994

S. Casey Hill
Chair

It was moved by Mr. Bragagnolo, seconded by Mr. Copeland that the Report be adopted.

There were no submissions and the Report was adopted.

Counsel for the Society made submissions in support of the recommended penalty that the solicitor be reprimanded, pay the costs of \$500 and perform 40 hours of community service.

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

Carried

The solicitor was reprimanded.

Counsel and solicitor retired.

.....

Re: JOHN LOUIS ROSSI, Windsor

The Secretary advised that this matter was a continuation of the penalty phase which had been before Convocation in May.

Messrs. Scott and Thom, Ms. Sealy, Ms. Weaver and Ms. Richardson withdrew for this matter.

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

Counsel for the Society supported a 1 month suspension but was not opposed to a reprimand in Convocation. Mr. Foster advised that the solicitor had completed all outstanding matters and participated in the Link and Practice Review program.

The solicitor made submissions seeking a reprimand in Convocation rather than a 1 month suspension.

A letter dated May 24th, 1994 from Mr. Robert Daragon was filed as Exhibit 4 and a letter dated May 18th, 1994 from Mr. John Paul Corrent to Mr. Stephen Foster was filed as Exhibit 5.

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

It was moved by Ms. Palmer, seconded by Mr. Cullity that the solicitor be suspended for a period of 1 month.

Lost

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It was moved by Ms. Curtis, seconded by Mr. O'Connor that the solicitor be reprimanded in Convocation.

Carried

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

The solicitor was reprimanded.

Counsel and solicitor retired.

.....

Re: BRYAN THOMAS DAVIES, Whitby

The Secretary placed the matter before Convocation.

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

Mr. Neil Perrier appeared for the Society and Mr. Robert Seiler appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 14th April, 1994, together with an Affidavit of Service sworn 17th May, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th April, 1994 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd June, 1994 (marked Exhibit 2). The Joint Record Book was filed as Exhibit 3 and a Book of Authorities submitted on behalf of the Society was filed as Exhibit 4. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

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

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

Neil Perrier
for the Society

BRYAN THOMAS DAVIES
of the Town
of Whitby
a barrister and solicitor

Mr. B. Seiler
for the solicitor

Heard: January 18, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

REPORT

On September 14, 1993, Complaint D227/93 was issued against Bryan Thomas Davies, alleging that he was guilty of professional misconduct.

The matter was heard in public on January 18, 1994 before this Committee composed of Joan Lax, Chair, Stuart Thom, Q.C., and Netty Graham. The Solicitor was in attendance and was represented by Mr. B. Seiler. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D227/93

2. a) He misappropriated \$57,953.49 from his client, Ken Murray;
- b) He borrowed \$50,000 from his client, David Williamson, contrary to Rule of Professional Conduct 7; and
- c) He failed to serve his client, David Williamson, diligently and competently, contrary to Rules of Professional Conduct 2, 5, and 17.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D227/93 and is prepared to proceed with a hearing of this matter on January 18th and 19th, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

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

IV. BACKGROUND FACTS

4. The Solicitor is 35 years of age and was called to the Bar in 1984.
5. From March 1, 1987 to February 12, 1993, the Solicitor was a partner in the two partner firm of Fowler Davies (the "Law Firm") in Port Perry, Ontario.
6. On February 12, 1993 the Law Firm was dissolved as a result of the Solicitor's admission of the matters raised in the Agreed Statement of Facts.

Status of Books and Records

7. At the time of the Law Firm dissolution, Mr. Fowler performed a detailed review of the books and records of the firms. All questionable transactions, were reported by Mr. Fowler to the Law Society's Errors & Omissions Department.

23rd June, 1994

8. In light of the above, a detailed spot audit was not performed.
9. The shortage in the trust bank account, \$58,000, was replaced personally by Mr. Fowler on February 15, 1993. These monies were compensated through the Solicitor's capital account with the Law Firm.

FACTS

10. On February 12, 1993, at a meeting between then partners Michael Fowler and the Solicitor, he admitted to Mr. Fowler that he had misappropriated monies from one client to advance funds to another client.

11. On that same day, Mr. Fowler contacted the Audit and Investigation Department of the Law Society to inform them of misappropriation. The Solicitor also contacted them the same day.

12. On February 17, 1993, a meeting was held at the offices of the Audit and Investigation Department at the Law Society. In attendance at that meeting were representatives of the Audit and Investigation Department, Mr. Fowler and his counsel, and the Solicitor and his counsel. At that meeting the Solicitor admitted to the matters contained in this Agreed Statement of Fact.

A. MISAPPROPRIATION OF CLIENT (KEN MURRAY) FUNDS - \$57,953.49

13. The Solicitor represented Ken Murray in litigation arising from the sale of a house Mr. Murray owned. The sale price of the house was \$84,000. The sale was a complicated and protracted matter. It involved Mr. Murray obtaining a severance of the property in question. The purchasers moved into the property prior to the closing of the transaction and paid Mr. Murray rent until the transfer took place. In the time period between the purchasers moving into the house and the scheduled closing of the transaction (which was continually delayed because of Mr. Murray's inability or lack of desire to obtain the required severance), it appears that Mr. Murray had a change of mind and he did not wish to close the transaction.

14. Mr. Murray did his best to not close the transaction. He delayed in obtaining the severance. At one point he tried to force out the tenants/purchasers by turning off the water in the middle of winter. Mr. Murray also attempted to void the agreement by transferring title to the property to his daughter. The purchasers eventually had to sue Mr. Murray for specific performance on the sale contract.

15. The purchasers were successful in the action and the court ordered, in October 1991, that the transaction should be completed as it was initially agreed upon. In addition, Mr. Murray was to pay the purchaser's costs in the sum of \$12,550.16.

16. The transaction eventually closed on June 30, 1992. Net proceeds from the transaction in the sum of \$70,580.45 were received by the Law Firm on July 3, 1992.

17. Out of the proceeds from the sale, Mr. Murray was issued cheque #17283 in the sum of \$69,000 on July 8, 1992. However the cheque was never cashed by Mr. Murray.

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18. By September 1, 1992, the bookkeeper of the Law Firm brought it to the Solicitor's attention that Mr. Murray had not yet cashed the \$69,000 cheque. The Solicitor had a meeting with Mr. Murray on September 5, 1992 to enquire as to why the cheque had not yet been cashed. During the meeting, Mr. Murray made it known to the Solicitor that he was not satisfied with the outcome of the transaction and the litigation and he was under the impression that an appeal of the decision was in progress despite the Solicitor's belief that he had had oral instructions previously not to pursue the appeal.

19. In the course of the meeting, the Solicitor gave Mr. Murray the impression that the appeal was in process when, in fact, no such appeal proceedings had been initiated.

Payment of \$11,000 to Mr. Murray

20. It was agreed between Mr. Murray and the Solicitor that the \$69,000 cheque would be voided, \$11,000 of the money would be paid to Mr. Murray and the remaining \$58,000 would be deposited in trust for Mr. Murray at the Port Perry branch of the Laurentian Bank. Attached as Appendix "A" is a copy of an authorization signed by Mr. Murray on September 5, 1992 which directed the Solicitor to do just that.

21. It was from the \$58,000 trust fund belonging to Mr Murray that the misappropriation occurred. A chronology of the transactions are set out in the chart below.

Opening of New Bank Account

22. On September 5, 1992 a cheque in the sum of \$11,000 was issued and delivered to Mr. Murray. The Solicitor then opened a trust bank account at the Laurentian Bank - account number 0954282-01.

23. On September 5, 1992 cheque #18025, in the amount of \$58,000 and payable to B.T. Davies (in trust), was issued from the Law Firm trust account. This cheque was used on the same day to purchase a bank draft from the Royal Bank of Canada (draft #24811089-054). The bank draft was payable to B.T. Davies (in trust) and it was in the amount of \$58,000. The Solicitor depositeed the \$58,000 bank draft into the newly opened account at the Laurentian Bank on the same day.

Misappropriation of \$57,953.49

24. As noted earlier in the brief, the \$58,000 was to remain in the Laurentian Bank account until further instructions were recieved by the Solicitor from Mr. Murray.

25. However, the Solicitor made the following withdrawals (by cheques) from the trust account:

DATE	CHQ #	PAYEE	AMOUNT
Sep 5/92	1	James Washington	\$ 52,500.00
Sep 9/92	2	Lloyd Parish	5,000.00
Oct 3/92	001	Gravenhurst High School	135.00
Oct 26/92	003	Linda Simpson	<u>325.000</u>
TOTAL CHEQUE WITHDRAWALS			<u>\$ 57,960.00</u>

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26. These withdrawals were not authorized by the client Mr. Murray and the withdrawals were in no way related to Mr. Murray's matter. Accordingly, these cheque withdrawals were a misappropriation of funds by the Solicitor from his client Ken Murray.

27. The total amount of the misappropriation is calculated as follows:

Cheque withdrawals from account	\$ 57,960.00
Less interest earned on bank account	(16.77)
Add service charges on account	10.26
TOTAL MISAPPROPRIATION	<u>\$ 57,953.49</u>

Uses of the Misappropriated Funds

Re: Mr. Washington - \$52,500

28. The cheque to James Washington related to a wrongful dismissal suit in which the Solicitor was representing a client named James Washington. Mr. Washington was a teacher with 24 years seniority at Appleby College in Oakville, Ontario. In the fall of 1990 Mr. Washington's contract was not renewed, effectively terminating his employment at Appleby College at the end of the 90-91 school year. The Solicitor is an Appleby College alumni and a close friend of Mr. Washington.

29. Mr. Washington engaged the Solicitor to represent him in a wrongful dismissal action against his soon to be former employer. At the beginning of the action, both the Solicitor and Mr. Washington believed that Mr. Washington was entitled to a settlement in the \$75,000 to \$85,000 range. However, prior to the end of the school year Mr. Washington was able to secure employment with another school board for the start of the next school year. In addition, from a legal stand point, it became evident to the Solicitor that the *Labour Standards Act* would not prevail in Mr. Washington's situation and the chances for settlement in the range set out above would be remote.

30. The matter went to discoveries and soon thereafter, a settlement was agreed upon between the Solicitor and Appleby College's lawyer for \$35,000. Although this settlement was communicated to Mr. Washington, the Solicitor stated that he could not convince Mr. Washington that this was the best and, most likely, only offer he was going to receive.

31. Mr. Washington had been a mentor to him since high school and throughout this matter he was intimidated by Mr. Washington's pre-disposition towards a settlement in the higher range. This intimidation, combined with their close, personal friendship, precluded the Solicitor from providing straight forward legal advice to Mr. Washington.

32. The end result was that the Solicitor, subsequent to making the \$35,000 settlement, led Mr. Washington to believe that a settlement in the \$85,000 range had been agreed upon when, in fact, no such settlement had been reached.

33. Attached as Appendix "B" is a copy of the remittance advice from Appleby College related to the payment of the \$35,000 settlement (which netted out to \$27,500) and a copy of a letter from the Solicitor to Mr. Washington, dated June 12, 1992, which indicates that the \$27,500 payment was the first of three payments. The two remaining "fictitious" payments were to be made on August 1, 1992 (for \$27,500) and December 31, 1992 (for \$25,000).

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34. The Solicitor knew that these two future payments would not be obtained from Appleby College and that he would have to find the funds from personal resources to cover the payments. Further detail will be provided in the Agreed Statement of Facts that the Solicitor was involved in a land mapping venture with his father in Brazil from which they were expecting a \$2.6 million contract. Upon obtaining the contract, the Solicitor expected that he would have more than sufficient funds to make the payments to Mr. Washington.

35. In early September 1992 the Solicitor received a call from Mr. Washington asking if the payments could be advanced because Mr. Washington and his wife were purchasing a house and money was required "immediately". The Murray funds had just been received and the Solicitor, knowing the Mr. Murray was not in need of the funds and knowing that the Brazil money would be coming in shortly as well, used the \$52,500 of Mr. Murray's funds to pay Mr. Washington.

Re: Lloyd Parish - \$5,000

36. The Solicitor was a minority shareholder in a restaurant and bar in Oshawa called "Club Blitz" and/or "The Warehouse II". The restaurant was purchased in July 1991. It was managed by a person named Brian Dalton. The Solicitor and four or five co-investors each invested approximately \$5,000 in the restaurant. Brian Dalton invested \$60,000 in the restaurant. Brian Dalton was impecunious and his investment monies were loaned to him by his father, Donovan Dalton. Donovan Dalton took out a \$60,000 second mortgage on his house in order to loan the funds to his son.

37. The intent of the venture was that Brian Dalton would manage the business and the Solicitor and the minority shareholders would be silent investors.

38. Less than four months after the restaurant opened for business, it was determined that Brian Dalton, in the course of managing the business, was not reporting all of the revenue receipts of the venture. Brian Dalton was released from the business and Donovan Dalton took over Brian Dalton's financial interest. Despite his minority shareholding, the Solicitor then became very much involved with operation of the business.

39. New managers were engaged to run the restaurant. Within six months of their hiring, once again it was determined that these managers were making unauthorized withdrawals from the business. In August 1992, a new manager, Lloyd Parish, was engaged to run the business.

40. Throughout this time period, the restaurant was not financially successful. Rent payments were always behind and supplier payments were never made on a timely basis. The Solicitor estimates that over an 18 month period he personally injected \$40,000 into the business to keep it operating.

41. The Solicitor does not recall when and why he made a \$5,000 payment from the Murray trust funds to Lloyd Parish. He does not dispute that it is his signature on the cheque. He just does not recall why he made the payment, though he does suspect that it probably was required by the business to either make a rent payment or to pay a supplier.

Re: Gravenhurst High School - \$135

42. The Solicitor misappropriated the sum of \$135.00 from the Murray trust account by cheque dated October 3rd, 1993.

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43. The Solicitor does not recall writing the cheque in the sum of \$135 to Gravenhurst High School, though he does not dispute the fact that it is his signature on the cheque.

44. The Solicitor coaches a basketball team. The Solicitor believes the cheque was used for entry fees for a basketball tournament.

Re: Linda Simpson - \$325

45. The Solicitor misappropriated the sum of \$325.00 from the Murray trust account by cheque dated October 20, 1992.

46. The Solicitor does not recall writing this cheque, though he does not dispute the fact that it is his signature on the cheque.

C. BREACH OF RULE 7 - BORROWING FROM A CLIENT
(DAVID WILLIAMSON) - \$50,000.00

Background Facts Which Led to the Borrowing

47. The Solicitor's father, Bryan Davies Sr., is a land surveyor who operates a surveying company named Horton Wallace and the Solicitor in Whitby. Mr. Davies Sr. was in partnership with a Mr. Wallace for many years. Mr. Davies Sr. and the Solicitor become aware of a new computerized mapping device that, in lay man's terms, was set to revolutionize the surveying and mapping industry. Developed by Ohio State University, the mapping system used video cameras and computers installed in a van. When driving the van, sufficient data was collected to enable maps of the surrounding area to be made.

48. The Solicitor and Mr. Davies Sr. saw this technology as a cornerstone for the future of the mapping industry. The Solicitor and Mr. Davies Sr. formed a company, Davies Survtex Ltd., and this company purchased the rights to the technology for Ontario, New York State, South America, and Ireland.

49. Although not a shareholder, it was the intention of both Mr. Davies Sr. and the Solicitor that the Solicitor would become a 50% shareholder in Davies Survtex Ltd. The Solicitor was, however, the secretary of the company and a signatory on its bank accounts.

50. Around the same time, the Solicitor and Mr. Davies Sr. became very interested in conducting business in South America, particularly Brazil. They envisioned that the new mapping technology would be extremely useful in Brazil. They set out to establish contacts in Brazil in order to allow them to exploit the technology.

51. After the Solicitor and Mr. Davies Sr. made several trips to Brazil, Davies Survtex acquired a \$2.6 million contract to use their mapping device in a city in Brazil. This contract was a joint operation with a Brazilian contact.

52. It was expected that advances, totalling in the range of \$250,000, would be made on the contract prior to its commencement. The contract advances were to be used to purchase the van and all of the computerized mapping equipment from Ohio State University - the cost of which was in the \$170,000 U.S. range.

Client David Williamson

53. A client of the Solicitor over the years was David Williamson. The Solicitor represented Mr. Williamson in his separation, on two impaired driving matters and a CCC S.100 application. The divorce was, in the Solicitor's words, relatively simple. The division of assets was agreed upon by husband and wife with little difficulty.

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54. Over the last couple of years, according to the Solicitor, Mr. Williamson had approached the Solicitor about investment opportunities. The first time he was approached, the Solicitor referred Mr. Williamson to a mortgage broker. The Solicitor did not wish to provide investment advice to Mr. Williamson.

55. Eventually Mr. Williamson became aware of the Solicitor's involvement with Davies Survtex Ltd. and the company's opportunities in Brazil. The Solicitor indicates that in the fall of 1992 Mr. Williamson approached the Solicitor and told him he would like to invest in the Brazilian business if an opportunity arose.

Sale of the Williamson Matrimonial Home

56. On December 15, 1992, as a result of Mr. Williamson's divorce, the sale of the Williamson matrimonial home was completed. The Solicitor represented Mr. Williamson on the sale. From the sale proceeds Mr. Williamson received a payment of \$51,700.62. Attached as Appendix "C" is a copy of an authorization of funds signed by Mr. Williamson which indicates that \$58,079.24 was to be received by the Solicitor's firm on closing and after all legal bills were paid, a payment of \$51,700.62 was to be made to Mr. Williamson.

57. Included in Appendix "C" is a copy of cancelled cheque #18399 to David Williamson in the amount of \$51,700.62 and a copy of the trust ledger sub-account for the transaction which indicates the funds entering the Law Firm's trust bank account and the monies being disbursed as per the authorization.

58. Mr. Williamson deposited his cheque into his bank account on December 15, 1992. Attached as Appendix "D" is a copy of the January 4, 1993 bank statement of David Williamson's bank account at the Royal Bank which indicates the deposit being made.

Loan of \$50,000 From David Williamson to Davies Survtex Ltd.

59. At the time Mr. Williamson received his share of the proceeds of the sale of the matrimonial home, he also mentioned to the Solicitor that he was looking for an investment for the funds.

60. By December, 1992, Davies Survtex Ltd. was in need of funds to finance their endeavours. In fact, Davies Survtex Ltd. was in a financial crisis. An advance of funds from their Brazilian partner was not received as anticipated, Davies Survtex Ltd.'s operating line of credit at the C.I.B.C. was over \$70,000 and Davies Survtex Ltd. had committed to the C.I.B.C. that the line of credit would be reduced to \$45,000 by December 10, 1992.

61. Having no further source of funds to reduce the line of credit, the Solicitor, on behalf of Davies Survtex Ltd., borrowed \$50,000 from Mr. Williamson. There is no documentation to support the loan but it is believed by both parties that the loan was to be for six months (July 1993), there would be no monthly payments made on the loan but at the end of six months Mr. Williamson would receive the \$50,000 plus a \$10,000 bonus. Although the Solicitor believes that a promissory note was prepared for the loan, neither he nor Mr. Williamson's new lawyer are in possession of a note to evidence the loan.

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62. Mr. Williamson withdrew a \$50,000 cheque to Davies Survtex Ltd. from his bank account (Cheque #101, dated December 15, 1992) on December 15, 1992 - the same day that he received the proceeds from the house sale. The cheque was converted into a Royal Bank bank draft (#24811824-054), payable to Davies Survtex Ltd., in the amount of \$50,000. Attached as Appendix "E" is a copy of Cheque #101 and Royal Bank bank draft #24811824-054. In addition, the bank statement of Mr. Williamson's account, which is included in Appendix "D", indicates that the \$50,000 cleared Mr. Williamson's bank account on December 15, 1992.

63. It is clear that immediately prior to Mr. Williamson making the loan to Davies Survtex Ltd., the Solicitor was engaged as Mr. Williamson's lawyer. The Solicitor represented Mr. Williamson not only on his matrimonial problems, but also on two impaired driving charges and a criminal code application. According to Mr. Williamson's new lawyer, George Smith, Mr. Williamson had also been a voluntary patient at the Whitby Psychiatric Centre on a number of occasions in recent years. The Solicitor denies any knowledge of this.

D. BREACH OF RULES 2, 5 AND 17 - FAILURE TO SERVE
CLIENT COMPETENTLY

64. In addition, throughout the loan transaction, the Solicitor did not serve his client professionally in order to ensure that his best interests were protected. The Solicitor did not:

- 1) advise Mr. Williamson to seek independent legal representation in respect to the loan;
- 2) advise Mr. Williamson to seek independent financial advice on the financial merits of the loan; and
- 3) provide any security to Mr. Williamson for the loan, thus putting at risk \$50,000 of his client's money.

65. In general, the Solicitor's interests in the Davies Survtex Ltd. affairs jeopardized his professional independence and competence when dealing with David Williamson.

V. PRIOR DISCIPLINE

66. The Solicitor has no prior discipline record.

67. It should be noted that the Solicitor was extremely co-operative throughout the investigation. In addition to immediately admitting the difficulties, the Solicitor provided full disclosure of all information related to the matters at hand.

DATED at Toronto this 6th day of January, 1994."

RECOMMENDATION AS TO PENALTY OF MAJORITY

The majority recommend that Bryan Thomas Davies be requested to resign and that permission be granted for him to do so. Failing his resignation within ten days of the date of the Order, he should be deemed to be disbarred.

REASONS FOR RECOMMENDATION

REASONS OF MAJORITY - MR. THOM AND MRS. GRAHAM

It is a basic principle of discipline that unless there are compelling extenuating reasons for imposing a lesser penalty, members found guilty of misappropriating their clients' funds should be disbarred. It is in the interest of the profession and of the public that this principle should not be weakened. It was not challenged by counsel in the present case. The Committee is in agreement however that there can be situations where extenuating circumstances might modify the severity of the penalty. The Committee is in agreement that this is such a case and the issue then becomes what lesser penalty would be appropriate.

Counsel for the Society and the Solicitor presented a joint submission that the penalty should be a suspension for one year, which by taking into account a period of time in 1993 when the Solicitor did not practice would amount to a suspension of about six months from the date of the Order of Convocation. Conditions to accompany the recommended penalty were that on the expiry of the period of suspension the Solicitor could engage in practice only in the office of the Crown Attorney and could return to general practice only with the consent of the Society. Counsel for the Solicitor strongly urged acceptance of the joint submission taking the position, as reported in the dissenting opinion, that "...the appropriate test is to ask whether a reasonable and well-informed member of the public in possession of all the facts...would accept [disbarment] as reasonable and just in the circumstances."

The majority of the Committee did not accept this approach. Determination of an appropriate penalty for professional misconduct is a matter for the Society and not one that can be left to public opinion. The Society is the governing body of the legal profession, charged with the heavy responsibility of disciplining those of its members who misconduct themselves. Misappropriation of clients' funds is misconduct of a very serious nature. Members of the public whose funds are in the hands of lawyers count on the Society to protect them from loss through this kind of misbehaviour. Expulsion from the Society is indeed a Draconian measure but the obligation to the public and the profession of maintaining the integrity of the profession must take precedence over the considerations developed in the dissenting recommendation.

Counsel for the Solicitor filed with the Committee a volume of 73 letters from judges, officials and citizens at large who were unanimous in praising the Solicitor's character and high standing in the community. The recipients had each been provided with copy of the Society's counsel brief, (a document prepared by officials of the Society who had investigated the Solicitor's activities and was the basis on which the complaint had been laid). They were surprised and distressed by the nature of his misconduct. A number of them made reference to his psychiatric problem referred to below.

Counsel called two witnesses. One was a senior and highly regarded member of the bar in the area in which the Solicitor practised. He himself at an early stage in his career had suffered from the same disorder that had afflicted the Solicitor. His problem had been recognized however before it had seriously impacted on his practice. He had been put on a lithium regime and has had no subsequent difficulties. He had no personal knowledge of the Solicitor's

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situation but felt that if the disease was not treated in a timely fashion it might result in improper conduct. The other was a friend who had frequent contacts with the Solicitor during 1991 and 1992. He said that the Solicitor had become excessively concerned with his practice and business affairs, had become unreliable and would miss engagements. He was aware of the Solicitor's interest in the restaurant/bar project but did not think that the effort to keep it alive would justify taking trust money.

The evidence regarding the Solicitor's psychiatric problem was provided by letters from two doctors, one a family physician, Dr. Obedkoff and the other a psychiatrist, Dr Arfai. In December 1993 Dr. Obedkoff wrote to the Solicitor's counsel as follows:

"I am aware that Mr. Davies had symptoms of a bi-polar affective disorder as early as 1991. At that point I suspected he might be hypo-manic and suggested that he see Dr. Arfai for assessment. With a change in lifestyle, Brian's condition improved, but I feel that the stress of work along his many volunteer commitments in the Community precipitated another cycle of mania [in 1992]. It is my feeling that this certainly impaired his judgment and therefore his ability to deal appropriately with his work."

In November 1993 Dr. Arfai wrote to the Solicitor's counsel at length. He quoted from a Manual of Mental Disorders describing the condition of affective disorder of bi-polar type. During periods of mood disturbance there are symptoms such as inflated self-esteem, more talkative than usual, flights of ideas and increase in goal directed activity. He said that he had examined the Solicitor in January 1991 and reported to his family that his impression was that he had gone through a mild episode of manic depressive cycle but at that stage would not require regular psychiatric follow up.

He said he had examined the Solicitor again in February 1993 in the course of which he was told of the Solicitor's increasing problems. Among other matters he was told of the misappropriation of trust monies to pay another account. The facts as Dr. Arfai reported they were told to him, do not conform with the actual facts given in evidence at the hearing, but the significant feature of this conversation is that the Solicitor gave as his reason for not paying attention to the Rules of the Law Society that "it was the best thing to do for everybody". Dr Arfai wrote as follows:

"Mr. Davies now very clearly knows and appreciates that his acts which are the subject of the complaints by the Law Society were wrong, but at the time, his illness for the reasons I had already stated, had impaired his judgment to such an extent that he felt he was acting at the best interest of all concerned."

It will be noted that both doctors offered by way of explanation, or perhaps exculpation, of the Solicitor's wrongful behaviour that his illness had "impaired his judgement". It would have been most helpful for the Committee had the doctors been made available to be questioned as to the significance of this remark. The Committee concluded from the letters that the Solicitor at all relevant times was aware of what he was doing and was not suffering from mental delusions. Although he realized the impropriety of his actions he excused himself by his feeling that he was acting "in the best interests of all concerned" to quote Dr Arfai. In the circumstances this was a mental aberration, but what influence it had on his behaviour was not brought out.

In both instances there were reasons for doing what he did which do not indicate any mental disability. The Murray trust money was used to support a failing business in which the Solicitor had made a substantial investment. In so doing he was attempting to protect his personal financial interest along with those of his co-investors. The money was replaced by his partner applying funds

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from the Solicitor's capital account in the firm. The Williamson "loan" was used to fulfill a personal obligation to a friend. Although referred to as a "loan" in the Agreed Statement the client whose funds were used was not called to give evidence and there was no promissory note or written evidence of a loan. Sometimes referred to as an "improper borrowing", on the face of the evidence presented to the Committee it was a simple taking that could have been treated as misappropriation. The Committee was given to understand that Williamson was re-imbursed by the Solicitor's father.

Bryan Thomas Davies was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 9th day of April, 1984.

ALL OF WHICH is respectfully submitted

DATED this 19th day of April, 1994

Stuart Thom, Q.C.

(Mrs.) Netty Graham

RECOMMENDATION AS TO PENALTY - MINORITY

The minority recommends that Convocation accept the joint submission on penalty of a suspension of one year. The terms of the suspension are:

- (1) the Solicitor is to be credited with a period of five months and ten days during which time he voluntarily withdrew from practice, resulting in a suspension of six months and twenty days.
- (2) upon termination of the suspension, the Solicitor is to be permitted to practise law, but only as a Crown Attorney.
- (3) Should the Solicitor wish at any subsequent time to practise law otherwise than as a Crown Attorney, he must apply to Convocation for permission to do so.
- (4) the Solicitor will pay costs of \$2000.00 and
- (5) will provide a Direction to his attending physicians to disclose to the Law Society medical evidence of his continuing treatment and its impact on the Solicitor's professional responsibilities.

REASONS FOR RECOMMENDATION

REASONS OF MINORITY - MRS. LAX

I begin by acknowledging the very careful preparation and presentation of this difficult case by Mr. Perrier, counsel for the Society and Mr. Seiler, counsel for Mr. Davies. I have had the benefit of reviewing the Reasons prepared by Mr. Thom on behalf of himself and Ms. Graham. We differ on the question of the appropriate penalty.

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Mr. Davies is 34 years of age, married with two children and was called to the bar in 1984. Prior to attending university and law school, he was a scholarship student at Appleby College in Oakville, Ontario, graduating with the gold medal. There he met Mr. Washington who was his teacher, mentor and the housemaster in his residence. I will return to Mr. Washington later in these Reasons.

Following graduation from law school, Mr. Davies articulated with the law firm of Mr. Terence Kelly, Q.C. in Oshawa, Ontario and returned to the firm as an associate lawyer. Mr. Kelly was then and is now a remarkable contributor to a wide range of community service activities. He introduced Mr. Davies to a number of very worthwhile endeavours, including Big Brothers and the Durham Region YMCA and Mr. Davies served on these boards. Mr. Davies practised law with Mr. Kelly's firm for a little more than two years and then left to join Mr. Michael Fowler in a litigation partnership in Port Perry, Ontario. Between 1986 and 1990, Mr. Davies developed a busy litigation practice with a mix of civil and criminal matters. In Port Perry, he continued his involvement in community activities including coaching a highly competitive girls' basketball team, organizing a Rotary Youth Exchange program, and serving on the Board of Governors of Durham College.

About the middle of 1990, Mr. Davies noticed a change in his behaviour. His sleep patterns became erratic, he was working at his law practice 60 to 70 hours per week, and drinking too much. Towards the end of that year, he found that he was not attending to matters in his law practice and had made representations to clients which were in fact not true. In January, 1991, he and Mr. Fowler attended at the Law Society and together met with a staff lawyer in the Practice Advisory. At the time, it was thought that overwork was causing the problems and Mr. Davies agreed to restrict his workload. The concerns which brought Mr. Davies and Mr. Fowler to the Law Society were all satisfactorily resolved. At the same time as the Law Society was notified, Mr. Davies made an appointment to see his family physician who referred him to a psychiatrist in Whitby, Ontario. The psychiatrist, Dr. E. Arfai, saw Mr. Davies on January 22, 1991 and later forwarded a consultation report to Dr. Obedkoff who was Mr. Davies' family physician. A copy was also provided to Denise Ashby of the Law Society in March, 1991. Dr. Arfai wrote as follows:

"My impression is that Mr. Davies has gone through a mild episode of manic depressive cycle...I feel a more definite diagnoses(sic) would be established only if he experiences cycles of mood changes in the future....at this stage I do not feel he would require regular psychiatric follow up."

It is important to understand that Dr. Arfai's diagnosis was not made known to Mr. Davies at that time. He came away from the consultation believing that he was fit to practise law and that he need only attempt to reduce his workload and channel his stress more appropriately. It was not until February 12, 1993, some two years later that the full import of his illness was appreciated. By that time, the condition of bi-polar affective disorder was, unfortunately, well-established and the misappropriations and improper borrowing which are the subject of this complaint had occurred.

The Misappropriations and Improper Borrowing

Mr. Davies gave detailed evidence about the circumstances of each of the misappropriations of the "Murray funds" and the improper borrowing from his client, David Williamson. He did not seek to excuse his conduct which he clearly knew to be wrong. The evidence was compelling. I do not propose to review this evidence in detail as the facts giving rise to the misappropriations are clearly set out in the Agreed Statement of Facts. I would however highlight the following features of the evidence.

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In the case of Mr. Washington, for whom he acted without a fee, Mr. Davies was chagrined and frustrated that he was unable to persuade him that a settlement of \$35,000.00 was fair and appropriate in the circumstances. In recounting this evidence, it was apparent to me how distressing and painful it was to Mr. Davies to be unable to better assist his former teacher, mentor and friend who had well and faithfully served the students of Appleby College for 25 years. Although it was, to use Mr. Davies' words "patently wrong" to misappropriate the "Murray funds", the bulk of these funds were given to Mr. Washington by way of "settlement" of his wrongful dismissal claim.

Mr. Parrish was the successor manager of the Oshawa restaurant and bar in which Mr. Davies had a 5% interest. The payment of \$5,000.00 to Mr. Parrish was likely made to support the business. Mr. Davies had introduced several of his friends to this investment which ultimately turned out to be unsuccessful. Subsequent to the misappropriation of \$5,000.00, Mr. Davies personally advanced the sum of \$37,500.00 to this business although he knew that it was not a viable operation. Taking the evidence as a whole, (including the evidence of Mr. Ted Reczulski who was a friend and investor), I conclude that Mr. Davies' primary motivation for this misappropriation was not to advance his own personal interests, but to protect the investments of Mr. Reczulski and other friends.

The other small amounts to Linda Simpson and the Gravenhurst High School appear to have been advanced for entry fees for basketball tournaments in which the team Mr. Davies coached was participating.

Finally, the entirety of the Williamson loan in the amount of \$50,000.00 was refunded to this client together with interest and a 'bonus payment' of \$10,000.00

Following Mr. Davies' initial visit to Dr. Arfai in January, 1991, he attempted to channel his energies into a variety of activities. He carried on with his law practice, coaching, community activities and began to train for a running championship. However, his pace accelerated rather than diminished. The following year, he carried on this relentless pace, but began to experience periods of pronounced depression. Mr. Reczulski who saw Mr. Davies frequently during this year gave evidence corroborating erratic and unusual behaviour on the part of his friend. Toward the end of 1992, Mr. Davies was so profoundly depressed that he contemplated suicide. During this period of depression, he wrote a letter to his partner, Michael Fowler informing him that he had breached his trust and wanted to leave the practice of law. He did not give him the letter. On February 12, 1993, matters came to a head when Mr. Fowler confronted him with an unrelated matter and Mr. Davies confessed his wrongdoing to Fowler. That same day, their partnership was dissolved, the Law Society was informed and Mr. Davies again sought medical assistance.

In summary, the misappropriations and improper borrowing have these common features. First, and perhaps most significant, none of the wrongdoing was motivated by nor resulted in any benefit, financial or otherwise, to Mr. Davies. On the contrary, his wrongdoing has caused him significant financial loss. Second, there has been complete restitution. Third, all of the acts of wrongdoing were committed during a period when Mr. Davies was suffering from a recognized and debilitating psychiatric disorder for which he had sought professional help.

Medical Evidence

Within a week of the reporting of the misappropriations to the Law Society, a diagnosis of bi-polar affective disorder was made by Dr. Arfai and Mr. Davies was placed on a program of lithium therapy which he has faithfully continued. Mr. Davies' illness is described in the very thorough medical reports filed as exhibits at the hearing. It is characterized by many of the symptoms which Mr. Davies experienced, including alternating periods of mania and depression,

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decreased need for sleep, distractibility, and impaired judgment. In his medical report of November 29, 1993, Dr. Arfai writes:

"Mr. Davies, prior to 1993 did not appreciate the symptoms of his illness. He was told that he had a manic episode in 1990-1991, but this could not possibly have alerted him to the next episode. Mr. Davies now clearly knows and appreciates that his acts which are the subject of the complaints by the Law Society were wrong, but at the time, his illness for the reasons I had already stated, had impaired his judgment to such an extent that he felt he was acting at the best interest of all concerned."

The majority concludes that there was no mental disability or, if there was, there is no nexus between it and the Solicitor's conduct. They also feel that it would have been helpful for Mr. Davies' physicians to attend and give evidence on the relationship between his mental condition and his conduct. I disagree with the majority on both points. The psychiatric reports filed, clearly explain that bi-polar affective disorder is thought to be caused by chemical imbalances. This can result in impaired judgment and, in the opinion of the physicians, did so in Mr. Davies' case. When this evidence is taken with the other evidence which was before us, the picture which emerges is that of a responsible and extremely capable Solicitor who embarked on a course of conduct which was totally out of character. Lithium is a well-recognized treatment for Mr. Davies' condition. To adopt the reasoning of the majority is to give so little weight to the psychiatric evidence and the treatment program which was prescribed for Mr. Davies consequent upon a diagnosis of his illness, as to render it irrelevant. I found the medical evidence to be credible and persuasive and it would not have assisted me further to hear viva voce evidence from Mr. Davies' physicians.

Subsequent Professional Involvement

Following the events described, Mr. Davies remained in Port Perry and continued with his community activities. He did not practise law. His income derived from an Accident and Sickness Insurance policy. In August, 1993, he moved to Whitby where he obtained employment as a part-time Crown attorney. If the joint submission as to penalty is ultimately accepted by Convocation, he hopes, at the conclusion of the period of suspension to return to this kind of work. There is of course, no guarantee of employment.

Character Evidence

There are many cases which come before Convocation where character evidence is led on behalf of a Solicitor. Frequently, the evidence is persuasive. However, I am unaware of a case (and, it is difficult for me to imagine one) where the character evidence was as compelling as it was in this case. The evidence is compelling for the following reasons.

First, the sheer volume of the commendations was impressive. There were 75 letters in all attesting to the fine qualities of Mr. Davies. It should be borne in mind that Mr. Davies is not a practitioner of long-standing. He has been at the Bar less than ten years. In that brief time, he has made a favourable impression on a very great number of individuals both within and outside the legal profession.

Second, the character letters were obtained and put before the Committee in a very fair and open manner. Mr. Davies' counsel wrote to about 100 individuals inviting each to comment on "...[Mr. Davies'] good character, his abilities as a lawyer, his record of community service and the unique personality which makes Bryan an exceptional person who ought to be allowed to continue to practice." Enclosed with the letter was a copy of the Discipline Counsel's brief which in all material respects is identical to the Agreed Statement of Facts. Everyone who responded therefore had the opportunity to be fully informed of the

misconduct. Both the brief and the form of letter sent by Mr. Seiler to the 100 referees were before the Committee. As well, every letter which was received by Mr. Seiler was also before the Committee and the Committee therefore had all the letters which were received.

Third, the character letters encompass a very wide cross-section of the bench, bar and community. There were letters from virtually every judge in the Provincial Court (Criminal Division) in Durham Region as well as a large number from Justices of the General Division, including Regional Senior Justice Jean MacFarland. Fourteen members of the judiciary in all wrote in support of Mr. Davies as did forty-seven members of the bar, including seven Crown Attorneys. The balance of the letters came from clients (including Mr. Williamson), court staff, and members of the communities in which Mr. Davies has so tirelessly served.

Fourth, the content of the letters is overwhelmingly a testament to Mr. Davies' skill and candour as an advocate, fairness as an opponent, loyalty as a friend, dedication and integrity as a lawyer and vitality and commitment as a member of his community. Many of the letters were lengthy and revealed the care and concern which had motivated the authors. I will quote from only one. This letter came from Alan W. Bryant who is a Professor of Law at the University of Western Ontario. He came to know Bryan first as a student sharing an interest in both law and basketball. After law school, they maintained contact on an intermittent basis. Later, Professor Bryant had occasion to retain him as counsel in a quasi-criminal matter. Professor Bryant wrote:

" I have reflected upon the bizarre conduct disclosed in the brief, that is misappropriating money from one client in order to satisfy the demands of his other client and mentor, Mr. Washington. I can recall Bryan revering two of my former colleagues one of whom is a distinguished barrister and the other a leading jurist in Ontario. It was these people whom Bryan selected as his role models and almost idolized their intellectual abilities and integrity. Although I understand that he would wish to satisfy his mentor, I can only state that the described conduct is totally out of character.

Mr. Davies has now been diagnosed as a manic depressive and he is aware of this diagnosis and the need for treatment. Notwithstanding Mr. Davies' misconduct, I support his application to continue to practise law as I do not think that he would further contravene any professional rules of conduct. There would be few former students that I would be prepared to oppose disbarment for misappropriating funds but under the present circumstances, I sincerely believe that he will honourably practice law in the future." [underlining added]

Finally, the Committee heard from Mr. Terence Kelly, Q.C. who was Mr. Davies' first employer, Mr. Ted Reczulski, who is also a lawyer, and a friend of Mr. Davies since law school and, through Mr. Seiler, was informed of the evidence of John Scott, Senior Crown Attorney in Durham Region. Since August, 1993, Mr. Davies has worked as a Crown Attorney under Mr. Scott's supervision.

Mr. Kelly's evidence was helpful in understanding the behaviour of a manic depressive and the positive results which can be obtained from a program of lithium therapy. Mr. Kelly was candid in telling the Committee that he too suffers from this illness. I have already commented on the very great esteem in which Mr. Kelly is held as a member of the legal profession and his many and varied commitments to his community throughout a very distinguished career at the bar.

Mr. Reczulski's evidence was helpful in corroborating much of Mr. Davies evidence concerning his behaviour in 1992 as well as the evidence explaining the misappropriation of funds relating to the Oshawa bar and restaurant.

Although Mr. Scott was scheduled to testify, he was unable to do so due to his involvement in a murder trial. The substance of his evidence was that Mr. Davies has done a good job in Durham and is the subject of many favourable comments from those involved in the criminal justice system, including police officers, victims and defense counsel. But for Mr. Davies' pending discipline matter, Mr. Scott would have offered him a contractual position as a full-time Crown Attorney. If Mr. Davies is permitted to return to the practice of law, Mr. Scott would have no hesitation to employ him.

In summary, the character evidence establishes beyond any doubt that Bryan Davies has much more than a good character. He was an exemplary member of the profession. He was held in great esteem and affection by those with whom he came in contact, from the Senior Justice of his region to the operator of the Courthouse cafeteria.

The Penalty

Misappropriation is regarded by many members of our profession as the most serious misconduct in which a solicitor can engage. In assessing penalty, the protection of the public is paramount and both the objectives of general and specific deterrence must be met.

In determining whether the public's interest is well-served by the penalty, the appropriate test is to ask whether a reasonable and well-informed member of the public, in possession of all the facts, both aggravating and mitigating, would accept the result as reasonable and just in the circumstances. The principle of general deterrence is addressed if the penalty imposed is likely to deter a person in similar circumstances. On the question of specific deterrence, there is no question that Mr. Davies understands that his conduct was wrong and he is genuinely remorseful. Yet, these are difficult principles to apply in this case given the existence of the psychiatric condition which I conclude was the motivating factor in the misconduct.

It is well-settled that in cases of misappropriation, the Solicitor ought to be disbarred unless there are strong extenuating circumstances which point to another penalty. The following strong extenuating circumstances exist in this case and are well supported by the evidence to which I have referred:

1. The misappropriations were not motivated by avarice or greed nor did they result in any personal benefit to Mr. Davies.
2. Mr. Davies has made the fullest restitution at great personal cost. None of the clients are victims and none complain about their treatment. All have been re-paid.
3. Mr. Davies sought professional medical help at the first sign of his inability to cope with his professional responsibilities. Had he been diagnosed and treated at that time, it is likely that the misappropriations would never have occurred. Unfortunately, he was not treated and was therefore unaware that he was suffering from a psychiatric illness which is mainly a biochemical condition characterized by, among other symptoms, impairment of judgment.
4. The Solicitor has no prior discipline history. He has been co-operative and has exhibited a large measure of professionalism in all his dealings with the Society both in this instance and also in January, 1991.
5. The conduct is explained by the mental illness and is also consistent with it. The sense of euphoria and mood elevation during periods of mania can lead to acts of extreme generosity. Here, this is most strikingly demonstrated in his conduct toward Mr. Washington.

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6. While no one can predict the future and claim categorically that the conduct is aberrant and will not be repeated, all of the evidence overwhelmingly supports this. Mr. Davies is a compliant patient. He is on a program of treatment. He has performed well since his return to employment in August 1993.

7. Mr. Davies is a valued and respected member of the legal profession. He has the overwhelming and unqualified support of the bar, the bench and the community to return to the legal profession. In the opinion of those who know him best in both his professional and personal life, the misconduct was aberrant.

As a part-time Crown Attorney, Mr. Davies practises law in a structured and supervised setting and does not handle trust funds. If permitted to continue in the profession, he proposes to continue to practise as a Crown Attorney. I do not hesitate to conclude that the public is well-protected and that a reasonable and well-informed member of the public would concur with the joint submission as to penalty.

Counsel for the Law Society provided the Committee with precedents of prior cases in which misappropriation was found established and for which a penalty of less than termination of the solicitor's membership was administered.

In Biderman (Order of Convocation, April 25, 1991), a Committee consisting of Messrs. Epstein, Yachetti and Hall recommended that the solicitor be suspended for a period of eighteen months and be prohibited from operating a trust account or dealing with trust monies for three and one half years after the expiration of the suspension. In Biderman, as in this case, there was character evidence, there had been full restitution and the solicitor had fully co-operated and disclosed his misappropriation. In Biderman, unlike this case, there is evidence and findings which aggravate the misconduct beyond that of Mr. Davies. There, the solicitor had misappropriated all of the monies to his own use. He had created and maintained false trust ledgers to cover up his misappropriations which occurred over a period of six months. Finally, in Biderman, unlike this case, counsel for the Society took the position that the solicitor be disbarred.

In Lapedus (Order of Convocation, February 26, 1987), a Committee composed of Messrs. Ferrier, Howie and Shaffer recommended a suspension of three months in circumstances where the solicitor, acting as Executor and Solicitor for an estate, committed two acts of misappropriation totalling approximately \$60,000.00. There, counsel for the Society urged disbarment while counsel for the solicitor urged a Reprimand in Convocation. At Convocation, the solicitor was given permission to resign. In the Lapedus case, the aggravating element which is not present in this case was that the motivation for the misappropriation was to convert the money to his own use. Also present in Lapedus were the differing submissions on penalty.

In Benaiah (Order of Convocation, September 22, 1993), a Committee comprised of Messrs. Wardlaw, Hickey and Ms. Elliott, recommended that the solicitor be suspended for a period of three months with conditions. Despite the wording of the particular in the Benaiah complaint, the facts establish that the funds were monies held in trust by the firm which the solicitor appropriated for his own personal use. In substance, this is indistinguishable from a finding of misappropriation. All of the mitigating factors present in this case were also present in the Benaiah case. However, in this case, unlike Benaiah, there is strong evidence of a psychiatric condition which was not properly attended when the solicitor originally sought help.

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Finally, it must be remembered that Convocation has adopted a policy that where a joint submission on penalty has been made to the Committee, as it has in this case, it ought to be accepted unless it is wrong in principle. I can find no error in principle in the recommended penalty. It serves all the ends of the discipline process and in my view is the appropriate penalty in the circumstances.

Bryan Thomas Davies was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 9th day of April, 1984.

ALL OF WHICH is respectfully submitted

DATED this 14th day of April, 1994

Joan Lax
Chair

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

There were no submissions and the Report was adopted.

On the issue of penalty the Report contained majority and minority Reasons. The majority Reasons recommended that the solicitor be permitted to resign and the minority Reasons recommended a 1 year suspension with conditions.

Counsel for the Society and the solicitor made joint submissions supporting the minority recommendation that the solicitor be suspended for a period of 1 year.

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

It was moved by Mr. Campbell, seconded by Mr. Lerner, that the minority Reasons be adopted.

Carried

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision that the solicitor be suspended for a period of 1 year with the conditions set out in the Report and be given 60 days to pay costs.

Counsel and solicitor retired.

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

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CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

Philip Epstein (in the Chair), Bragagnolo, Campbell, Curtis, Elliott, Graham, Hickey, Kiteley, Lax, McKinnon, Murray, S. O'Connor, Palmer, Sealy, Scott, Somerville, Thom, Topp and Weaver.

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23rd June, 1994

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IN PUBLIC

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ADMISSIONS COMMITTEE

APPLICATION FOR ADMISSION

Re: DAVID MATTHEW SAVINO, Perth

The Secretary placed the matter before Convocation.

Mr. Lerner withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Jeremy Freedman appeared for the applicant who was present.

The Application for Admission was filed as Exhibit 1, the Joint Record Book, V.1 as Exhibit 2, the Joint Record Book, V.2 as Exhibit 3 and the Joint Book of Authorities as Exhibit 4.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act

AND IN THE MATTER OF David Matthew Savino,
of the Town of Perth, in the County of Perth

AND IN THE MATTER OF an Application for Admission
to the Law Society of Upper Canada

REASONS FOR DECISION

PANEL:

Mr. Kenneth E. Howie, Q.C.	-	Chair
Mrs. Laura Legge, Q.C.		
Mr. Samuel Lerner, Q.C.		

APPEARANCES:

Mr. Michael Brown	-	for the Law Society
Mr. Jeremy M. Freedman	-	for the Applicant

DATE:

May 10, 1994

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act

AND IN THE MATTER OF David M. Savino,
of the Town of Perth, in the County of Perth

AND IN THE MATTER OF an Application for Admission
to the Law Society of Upper Canada

This application is brought by David Savino for membership in the Law Society. Mr. Savino has finished the Bar Admission course successfully and but for the issue of his character, is entitled to be called to the Bar in Ontario.

The Admissions Committee has ordered that a Hearing, composed of three Benchers pursuant to Section 27 of the Law Society Act should be held, and the Hearing proceeded on May 10, 1994.

It is clear from the evidence, but for the facts about to be stated, the applicant was at all times of good character and fully qualified to become a member of the Law Society.

In 1991, while a student, age 24, at Queen's University in law school, he engaged for a period of about six weeks in September and October of that year, in a series of admitted obscene telephone calls. The number of these calls was approximately 100, or at the rate of about 15 per week during that period. These calls were made at random, the numbers selected at random, and it was clear the applicant had no knowledge of the persons who were the recipients of the phone calls.

The conduct of the applicant was paraphilic; it seriously victimized the female recipients of the calls. The conduct is inconsistent at the very least with the obligations that lawyers and law students owe not only to clients, but to the public.

For reasons that are not relevant to the issues before the Committee, the applicant was found out by the police, confronted with his activities and readily admitted his participation in the phone calls.

The phone calls obviously stopped immediately, and there is no evidence to suggest that the applicant has at any time engaged in that or any similar activity.

The Committee was greatly assisted in its deliberations by reports and oral evidence by Dr. Alan Preston (who had been consulted by the applicant for assistance and if necessary for treatment, and not for any purpose associated with these or any other proceedings), and most recently by Dr. Peter Collins who examined as a psychiatrist at the request of the Law Society.

A number of agreements emerged from the evidence of the two prominent psychiatrists. Both psychiatrists had nothing but praise for the general character of the applicant, about his sincere remorse for his conduct, and only disagreed on two matters.

- (a) Dr. Preston was firmly of the view that there wasn't any likelihood of any reoccurrence of the kind of conduct which the applicant engaged in in 1991, and felt that he had matured substantially since the date of that conduct, and would not benefit from any formal counselling.

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- (b) Dr. Collins on the other hand was of the view that there was nothing to indicate that the applicant was likely to re-offend. Nevertheless, his professional prognosis was that "Mr. Savino may be at risk for repeating this paraphilic behaviour when under stress" and went on to say that he "might want to consider counselling to address these issues".

The Committee is inclined to accept the evidence of Dr. Collins that the burst of intensive paraphilic activity, even over the short period of two weeks, stamps the applicant with a problem that could arise again. Tempering the opinion of Dr. Collins with that of Dr. Preston (whose evidence we accept) leads the majority of the Committee to the view that the likelihood or probability of a return to this aberrant activity is remote, and sufficiently remote as not to represent a threat of significance to the public.

It is quite clear from the evidence of both psychiatrists that the aberrant conduct was related to stress in existence at the time in the life of the applicant.

While conceding that the applicant may well come under comparable pressure at other times in his life, Dr. Preston was strongly of the view that since the behaviour, the applicant has "grown up" and matured; he has an understanding of his aberrant behaviour such that in Dr. Preston's view he is not going to reoffend.

The applicant testified and was obviously filled with remorse. Among other things, he said "I am embarrassed and ashamed about what I did", "My conduct was disgusting and unacceptable"; "I realize I frightened the people I called". The majority of the Committee is of the view that the remorse was genuine and was impressed with the evidence of the applicant who made no attempt to hide any facts and has always, since he was discovered, been honest. The majority of the Committee found the applicant to be honest and straightforward.

His activities as an articling student at Borden & Elliot in Toronto were thoroughly canvassed by partners, associates and students at that firm and character letters from these persons in that firm uniformly supported their belief that the incidents of aberrant behaviour were totally out of character and in no way were any of the persons in that firm, male or female who responded, concerned about their close association with the applicant.

The Committee is entirely mindful of the onus of proof with respect to the applicant to satisfy the Law Society on the balance of probabilities that he is of good character.

The Committee is also mindful of the fact that the obligation of the applicant is only to establish that he is of good character now. He is not under an obligation to warrant his future conduct.

Finally, this Committee is aware of the fact that the ultimate obligation of the Law Society in assessing whether the applicant is of "good character" is to protect the public from admission to practice those persons who, because of their past acts, may pose a risk of such things as sexual harassment as occurred in this case by obscene telephone calls in 1991.

The majority of the Committee is firmly of the view that the applicant is at this time of good character and is of the view that the possibility of re-occurrence is slight, sufficiently slight that it would be unfair to the applicant who is now of good character to assume the worst.

23rd June, 1994

CONCLUSION

For the foregoing reasons, on the balance of probabilities, the majority of the Committee concludes that the applicant is of good character and his application for admission to the Law Society of Upper Canada is accepted.

ALL OF WHICH is respectfully submitted

DATED this 13th day of June, 1994

Kenneth E. Howie, Q.C.
Chair

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act

AND IN THE MATTER OF David M. Savino,
of the Town of Perth, in the County of Perth

AND IN THE MATTER OF an Application for Admission
to the Law Society of Upper Canada

REASONS FOR DISSENT

I do not concur in the majority decision. The applicant, David Matthew Savino, may now be of good character, but by his conduct in 1991, to say the least, he was not at that time.

In an ordinary situation where there had been a misdemeanour of a serious nature e.g. theft, abuse of drugs, alcoholism or other conduct of a similar nature, it would be reasonable to accept an addiction for which the applicant was being continually treated.

In considering the professional opinions of Drs. Preston and Collins, both agree the conduct of making the obscene telephone calls by Mr. Savino in 1991, is a recognizable psychiatric condition. Both doctors agree unusual stress could re-ignite that type of conduct, and place the general female population at risk.

Dr. Collins suggests the applicant have counselling. Dr. Preston rules this out.

Mr. Savino, is an intelligent, suave, persuasive witness. However, I would not rely upon his evidence, nor am I impressed with his apologies and regrets.

To permit him, at this time, to enter the profession, would be exposing the public to a potential menace. Without counselling and supervision, it would be a betrayal of trust with which we are charged.

I am prepared to stay these proceedings for a reasonable period of time (one year) to allow Mr. Savino to seek counselling, and to allow continued supervision of his activities over that period of time, at the end of which, he can re-apply for admission.

Respectfully submitted

Samuel Lerner

23rd June, 1994

Both counsel made submissions in regard to the Report.

There were questions taken from the Bench.

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

It was moved by Mr. Topp, seconded by Ms. Elliott that the majority Reasons be adopted with an amendment that the applicant provide psychiatric reports every 6 months for 5 years.

Withdrawn

It was moved by Mr. McKinnon, seconded by Ms. Weaver that the majority Reasons be adopted.

It was moved by Ms. Palmer, seconded by Ms. Curtis that Mr. Savino not be admitted.

Withdrawn

It was moved by Mr. Scott, seconded by Mr. Topp that the applicant's call be deferred for 1 year and be subject to appropriate medical evidence of continuing fitness.

The Scott/Topp motion was ruled out of order as not being within the ambit of section 28 of the Law Society Act.

Counsel, the applicant, the reporter and the public were recalled.

The Application for Admission to the 35th Bar Admissions Course dated December 23, 1994 was filed as Exhibit 5.

Submissions were made by counsel for the applicant on the effect of Exhibit 5.

There were further questions from the Bench.

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

The Application filed as Exhibit 5 was withdrawn and disregarded.

It was moved by Ms. Graham, seconded by Mr. Thom that the matter be referred back to the Committee to consider the Application.

Lost

The main motion to adopt the majority Reasons was lost.

It was moved by Mr. Topp, seconded by Ms. Sealy that the minority Reasons be adopted.

Lost

It was moved by Ms. Graham, seconded by Ms. Curtis that the applicant not be admitted.

Carried

Reasons are to be prepared by Mr. Somerville and Ms. Elliott.

Counsel, the applicant, the reporter and the public were recalled and informed of Convocation's decision that the applicant not be admitted and that written Reasons would be provided.

Counsel and applicant retired.

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23rd June, 1994

APPLICATION FOR READMISSION

Re: JAMES FREDERICK HARRIS GRAY, Toronto

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

The applicant requested permission to return to his office to do work in regard to a private trust matter and confirmed to Convocation his continuing Undertaking not to practice law.

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

It was moved by Mr. Somerville, seconded by Mr. Scott that the applicant's proposal be accepted.

Carried

Counsel, the applicant, the reporter and the public were recalled and informed of Convocation's decision to accept the applicant's proposal and to adjourn the matter to the Special Convocation in September. In addition the applicant's associate Mr. Bateman was to be relieved of his undertaking to the extent necessary to accommodate the applicant's undertaking.

Counsel and applicant retired.

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CONVOCATION ROSE AT 5:15 P.M.

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Confirmed in Convocation, this day of 1994.

Treasurer