

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 27th April, 1995
9:30 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Arnup, Bastedo, Blue, Bragagnolo, Brennan, Campbell, Carey, Carter, Cullity, Elliott, Feinstein, Graham, Hickey, Howie, Lamont, Lax, Lerner, McKinnon, Mewett, Moliner, S. O'Connor, Palmer, Peters, Richardson, Scott, Strosberg, Thom, Topp and Weaver.

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The reporter was sworn.

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IN PUBLIC

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Mr. Michael Brown introduced Ms. Kathryn Chalmers who would be acting as Duty Counsel.

DISCIPLINE COMMITTEE

Re: David Eric HOWLETT - Niagara Falls

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Lerner and Ms. Richardson did not participate.

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

Ms. Gagnon requested an adjournment on consent to the June Discipline Convocation. She advised that the solicitor had filed some documents but due to some personal and financial difficulties he has yet to file his factum. Ms. Gagnon further advised that the solicitor was not practising and had given an Undertaking not to Practice.

An adjournment was granted to the June Discipline Convocation.

Counsel retired.

Re: Yaroslav MIKITCHOOK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp and Lamont and Ms. Graham did not participate.

Mr. Neil Perrier appeared for the Law Society and Mr. Mark Singer appeared for the solicitor. The solicitor was not present.

Mr. Perrier advised that a Notice of Disagreement had been filed by the solicitor and that he had just received the material yesterday. Mr. Perrier requested an adjournment on consent to the June Discipline Convocation in order to prepare the Society's response.

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An adjournment was granted to the June Discipline Convocation.

Counsel retired.

Re: Anthony William KLYMKO - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg and Scott and Ms. Weaver and Ms. Richardson did not participate.

Mr. Neil Perrier appeared for the Society and Ms. Chalmers, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Ms. Chalmers requested an adjournment to the June Discipline Convocation so that the solicitor could attend to some outstanding client matters.

Counsel for the Society did not oppose.

An adjournment was granted to the next Discipline Convocation in June.

Counsel retired.

Re: Martin Harold JACOBS - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott, Blue and Lamont and Ms. Graham did not participate.

Mr. Perrier appeared for the Society and Mr. Ernest DuVernet appeared for the solicitor who was present.

The solicitor requested an adjournment to the June Discipline Convocation to allow completion of a psychiatric assessment. He advised that he was not practising and was turning his files over to another solicitor.

The Society's counsel opposed the request for an adjournment advising Convocation that the solicitor had not co-operated fully with the staff trustee as undertaken on granting the last adjournment.

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

It was moved by Ms. Palmer, seconded by Mr. Carey that an adjournment be granted peremptory to the solicitor and that he co-operate with the staff trustee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to adjourn the matter to the June Discipline Convocation peremptory to the solicitor and that the solicitor co-operate with the staff trustee.

Counsel and solicitor retired.

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Re: Jeffrey Mark LEVY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Thom, Ms. Graham, Ms. Moliner and Ms. O'Connor did not participate.

Ms. Christina Budweth appeared on behalf of the Society and Ms. Chalmers appeared on behalf of the solicitor who was present.

Convocation was advised that this matter came before Ms. Curtis, the Discipline Committee Hearing Assignment Benchers who denied an adjournment.

Ms. Chalmers requested an adjournment to the June Discipline Convocation as the solicitor had 30 days to respond to a second Report of the Discipline Committee. She advised that the solicitor was seeing a psychiatrist and a report would not be available until June. Ms. Chalmers further advised that there was a dispute over the retainer of the solicitor's counsel, Mr. Fox and if the matter was cleared up then Mr. Fox would represent the solicitor in June.

Ms. Budweth opposed an adjournment as the matter had gone on too long. She advised that the first Report could be dealt with.

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

It was moved by Ms. Palmer, seconded by Mr. Carey that the matter be adjourned to the June Discipline Convocation peremptory to the solicitor.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to grant the adjournment to the next Discipline Convocation in June peremptory to the solicitor.

Counsel and solicitor retired.

Re: Paul Francis O'NEILL - Mississauga

The Secretary placed the matter before Convocation.

Ms. Elliott and Ms. O'Connor withdrew for this matter.

Mr. Gagnon appeared for the Society and Mr. Charles Mark appeared for the solicitor who was present.

The Report of the Discipline Committee dated 14th April, 1995 was filed as Exhibit 1. The Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Carole Curtis, Chair
Susan Elliott
Shirley O'Connor

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

Georgette Gagnon
for the Society

PAUL FRANCIS O'NEILL
of the City
of Mississauga
a barrister and solicitor

Martin Rosen
for the solicitor

Heard: February 14, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The matter was heard in public on February 14, 1995, before this Committee comprised of Carole Curtis, Chair, Susan Elliott and Shirley O'Connor. The Solicitor attended the hearing and was represented by Martin Rosen. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

Evidence

Part of the evidence before the Committee contained the following agreed statement of facts:

"REINSTATEMENT HEARING OF PAUL F. O'NEILL
UNDER SECTION 47 OF THE LAW SOCIETY ACT

I. BACKGROUND

1. The Solicitor was called to the Bar on April 13, 1962.

Discipline Committee Hearing

2. The Solicitor appeared before a Discipline Committee on August 31, 1993 and was found guilty of professional misconduct respecting Complaint D145a/92 for failing to file Forms 2/3 for fiscal years ending 1991 and 1992; practising while under suspension for the period May 19-28, 1992; and for failure to maintain books and records in accordance with the requirements of Section 15 of Regulation 708 under the Law Society Act. (Document Book, Tab 1)

3. At the time of the hearing before the Discipline Committee, the Solicitor was under administrative suspension.

4. The Discipline Committee recommended that the Solicitor be Reprimanded in Convocation and be ordered to pay costs in the amount of \$500.00 immediately upon recommencing practice following his administrative suspension. The Committee further recommended that, if at the time of Convocation the Solicitor was still in default, he be suspended indefinitely until his books and records were up to date and filings made to the satisfaction of the Law Society. (Document Book, Tab 1)

Order of Convocation

5. On January 27, 1994, Convocation ordered that the Solicitor be Reprimanded in Convocation and pay costs in the amount of \$500.00 payable immediately upon recommencing practice following his suspension. Convocation also ordered that the Solicitor be suspended from the practice of law indefinitely until his books and records were up to date and filings made to the satisfaction of the Law Society. (Document Book, Tab 2)

II PRESENT STATUS

Annual Filings and Penalties/Costs

6. The Solicitor has filed Forms 2/3 to the end of January 31, 1994 and is current with annual filings. (Document Book, Tab 4)

7. The Solicitor has paid all amounts owing for late filing penalties and the sum of \$500.00 in costs that he was ordered to pay by Convocation. (Document Book, Tab 3)

Trust Account Books and Records

8. In May 1992, the Law Society attempted an audit of the Solicitor's books. Co-signing controls were put in place as a result of the condition of the Solicitor's books and records. The last trust reconciliation completed with the benefit of all the Solicitor's books and records was in December 1990. (Document Book, Tab 4)

9. The Solicitor hired a chartered accountant, Mr. David Alexander of Goebell, MacAdam, Alexander to bring his books and records up to date in compliance with the Regulation. (Document Book, Tab 5)

10. In January 1994, the Law Society's Investigation Auditor, Andrew Cawse, reviewed the Solicitor's monthly trust reconciliations for January 1991 to June 1992 and determined that the Solicitor's trust account books and records were satisfactory. (Document Book, Tab 4)

General Account Records

11. The Solicitor's general account records have not been updated since 1991.

12. The Solicitor's accountant Mr. David Alexander determined that the Solicitor's general account records cannot be reconstructed or reconciled due to insufficient records and the overlapping of the Solicitor's business activities into his general account. (Document Book, Tab 5)

III DISCIPLINE HISTORY

13. The Solicitor was found guilty of professional misconduct on August 25 and 27, 1982 for acting in a manner grossly negligent of his duties to his client. He was Reprimanded in Committee and required to pay the Law Society's costs.

DATED at Toronto this 6th day of February, 1995."

RECOMMENDATION

The Committee recommends that Paul Francis O'Neill be reinstated on the following conditions:

1. The solicitor maintain on a current basis the books and records for his law practice as required by section 15 of Regulation 708 made under the *Law Society Act*.
2. The solicitor make all filings as required by section 16 of Regulation 708 made under the *Law Society Act* within the time period prescribed by that section.
3. The solicitor submit monthly trust bank reconciliations for all his trust accounts to the Law Society, as well as submit monthly general bank reconciliations for his general bank account no later than 20 days after the end of each particular month, such submissions to continue for 36 months from the date of reinstatement, if he operates a trust account and general bank account for his law practice.
4. The solicitor inform his accountant/bookkeeper in writing of his obligations to the Law Society concerning maintenance and updating of his books and records.
5. The solicitor operate newly established trust bank accounts and general bank accounts, should he re-establish a law practice.

REASONS FOR RECOMMENDATION

This is a hearing held under section 47 of the *Law Society Act* which states that:

"47. Where the rights and privileges of a member or student member are suspended for a definite period or indefinite period, the member or student member may apply at any time to have them restored, and Convocation, after due inquiry by a committee thereof, may restore them."

By virtue of section 48 of the *Law Society Act*, if the suspension is terminated the Committee or Convocation "may impose upon the person such terms and conditions as it considers proper."

The hearing is necessitated because the solicitor was indefinitely suspended by order of Convocation dated January 27, 1994 and he now wishes to have that suspension terminated. The relevant portion of the order of convocation reads as follows:

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"Convocation hereby orders that Paul Francis O'Neill be reprimanded in convocation and pay costs in the amount of \$500.00 payable immediately upon recommencing practice following his suspension, and that he be suspended from the practise of law indefinitely until his books and records are up to date and his filings made to the satisfaction of the Law Society."

The solicitor has filed his forms and paid any monetary amounts owing to the Society. The sole issue for the Committee is whether the solicitor's books and records are up to date to the satisfaction of the Law Society.

The auditor for the Law Society and the solicitor's accountant both agree that the solicitors trust account is satisfactory but, the general account can't be reconstructed and will never be reconciled, because the records have been destroyed by the solicitor's former landlord.

The solicitor testified that when he was practising he maintained his books and records on the premises where he operated his office. As he had been locked out of his office by his landlord over a rent dispute, he asked his accountant to go to his office and obtain the books and records to reconcile them for the Society and bring them up to date. The accountant was denied access to the office by the landlord and the solicitor's one-write accounting system was contained in the office.

The solicitor's evidence, which was not contradicted by the Society and which the Committee accepts, was that his former landlord sold the one-write accounting system, along with the rest of the solicitor's office assets, and the records which were in the office were destroyed at that time.

At his original discipline hearing in this matter, the solicitor was leaving practise and not intending to return. He gave no testimony before the Committee and signed an agreed statement of facts. He is still not intending to practise but he would like to reinstate his right to do so.

The Society's auditor, Andrew Cause, filed an affidavit and also testified at the hearing. He said the solicitor's records were not perfect but they were "as good as they were going to get" and, using a relative definition of satisfactory, he was satisfied. The missing documents simply cannot be retrieved from any source whatsoever.

The solicitor's accountant, David Alexander, filed an affidavit that he was of the opinion that "a satisfactory reconciliation of the general account records cannot be completed" but that he is satisfied that "the books and records relating to Mr. O'Neill's trust account substantially reflect the actual status thereof in accordance with the requirements of the Law Society of Upper Canada."

While it is true that the solicitor's books and records were unsatisfactory long before his landlord lost or destroyed the accounting cards, it is also true that the solicitor and his accountant have now done everything possible to reconstruct the records and, they have largely succeeded.

Mr. Cause, the auditor, indicated he was comforted by the fact that there had been no complaints from clients since Mr. O'Neill ceased practise and that there was a positive balance in the trust account, indicating to him that the records had been misallocated as among clients and that no serious client issues existed. The Committee was also satisfied with this information.

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If the solicitor's suspension is not terminated, it becomes a permanent suspension, because he can not improve upon his compliance, ever. He has done all that he can. However, as his books and records were in poor condition prior to his ceasing practise, the Committee feels a number of controls are necessary should the solicitor ever return to practise.

The solicitor proffered an undertaking to the Committee, concerning his record keeping should he be reinstated and resume practise, which undertaking the Committee has accepted and modified. The terms and conditions upon which the Committee recommends that the suspension of Paul Francis O'Neill be terminated are as set forth above under "Recommendations".

Paul Francis O'Neill was called to the Bar on the 13th day of April, 1962.

ALL OF WHICH is respectfully submitted

DATED this 14th day of April, 1995

E. Susan Elliott

It was moved by Mr. Campbell, seconded by Mr. Blue that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Ms. Graham that the Recommendation of the Committee be adopted, that is, that the solicitor be reinstated with the conditions set out in the Report.

Both counsel made submissions in support of the Recommendation.

The Recommendation was adopted.

Counsel and solicitor retired.

Re: Gordon Alexander MACKAY, Jr. - Guelph

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Brennan and Ms. Richardson withdrew for this matter.

Ms. Budweth appeared for the Society and Mr. Frank Marrocco assisted by Ms. Mahoney appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (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

Lloyd Brennan, Q.C., Chair
Nora Richardson
E. Susan Elliott

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

Christina Budweth
for the Society

GORDON ALEXANDER MACKAY, JR.
of the City
of Guelph
a barrister and solicitor

Frank Marrocco and Lynn Mahoney
for the solicitor

Heard: October 12, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 15, 1993 Complaint D159/93 was issued against Gordon Alexander MacKay Jr. alleging that he was guilty of professional misconduct.

The matter was heard in public on October 12, 1994 before this Committee composed of Lloyd Brennan, Q.C., Chair, Nora Richardson and E. Susan Elliott. The Solicitor was present at the hearing and was represented by Frank Marrocco and Lynn Mahoney. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D159/93

2. a) On or about July 31, 1992, he misappropriated \$35,000 that was being held in his firm's mixed trust account to the credit of a client;
- b) In or about the month of December, 1990, he attempted to deceive a client by providing to the client two documents that he had falsified, namely, articles of dissolution purportedly received by the Ministry of Consumer and Commercial Relations on March 23, 1990.

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 D159/93 and is prepared to proceed with a hearing of this matter on October 12, 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. ADMISSION

3. The Solicitor has reviewed Complaint D159/93 and this Agreed Statement of Facts with his counsel, Frank. N. Marrocco, and admits that particular (a) contained therein constitutes professional misconduct. The Solicitor will not offer any evidence to contradict the evidence in support of particular (b) set out in this agreed statement of facts and admits that the facts alleged by the Society, if accepted by this Committee and Convocation, constitutes professional misconduct.

IV. FACTS

4. The Solicitor was born and raised in Kitchener, Ontario. He attended primary and secondary school in Kitchener. The Solicitor graduated from the University of Western Ontario with a Bachelor of Arts in 1975 followed by a Bachelor of Laws in 1978.

5. The Solicitor is 40 years of age, single and currently resides in Guelph, Ontario.

6. The Solicitor was called to the Bar in 1980. During the period 1980 to 1985, the Solicitor practised as an associate at the firm of Mackay, Kirvan, Guy in Kitchener, Ontario where his father was a partner. In 1985, the Solicitor became a partner in the firm of Mackay, Kirvan, Seitz which later became Mackay, Artendale, Wunder. In 1988, four lawyers, including the Solicitor and his father, joined the firm of Gowling, Strathy & Henderson ("Gowling's") where the Solicitor continued in the practice concentrating in the area of corporate and commercial law with some real estate.

7. In August, 1992, subsequent to the discovery of the facts leading to the complaint, the Solicitor took a leave of absence from the firm. He has not practised law since that date and has given a voluntary undertaking not to do so until the conclusion of this proceeding.

8. During the period described in Complaint D159/93, the Solicitor had a severe problem of alcohol abuse.

9. The Solicitor has never been previously charged with professional misconduct.

10. The Solicitor has cooperated fully with every aspect of this investigation.

Particular 2(a) - Misappropriation

11. In July 1989, the Solicitor was retained by Marcel Bradbury, or whom the Solicitor had previously acted, to act on his behalf in relation to a loan secured by a first mortgage on real property owned by Mr. Bradbury fronting on the Grand River. Settlers Savings and Mortgage Corporation ("Settlers") agreed to provide first mortgage financing in the amount of \$300,000.00. The Solicitor was retained to act for Settlers as a result of acting for Mr. Bradbury. The

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property was improved and there was a substantial dwelling erected on the property. In accordance with their normal practice, Settlers caused the property to be inspected and appraised, and upon receipt of the inspection and appraisal report, it proceeded with the transaction.

12. By letter dated August 15, 1989, a copy of which is attached as Exhibit 1 to this agreed statement of facts, the Solicitor provided an interim report on title to Settlers in which he represented that a potability certificate had been ordered and that the process normally takes approximately one week and would not therefore be available prior to the date of the advance of funds. The letter also advised that problems set out in a letter from the Township of North Dumfries regarding Grand River Conservation Authority ("GRCA") problems would be reported upon as soon as he received information from the GRCA and that further advice would be provided regarding the septic tank certificate.

13. During a telephone conversation between the Solicitor's office and a representative of Settlers on or about August 16, 1989, Settlers confirmed that it was acceptable to them that they receive the potability certificate and septic tank certificate together with the signed direction re funds under cover of the Solicitor's final report. There were no further discussions concerning the difficulty in obtaining the potability certificate and septic tank certificate prior to the advance of funds. The Solicitor would testify that due to the new construction on the Bradbury property, the Solicitor believed that there was only a small potential risk that the potability certificate and septic tank certificate would not be available, although the Solicitor did not communicate this information to Settlers.

14. By letter dated August 16, 1989, Settlers sent a cheque dated August 17, 1994 in the amount of \$295,413.08 to Gowlings in trust representing the first and final advance on the mortgage. On August 18, 1989 the mortgage funds were advanced by Gowlings and the mortgage was registered.

15. By letter dated September 6, 1989 to Settlers, the Solicitor enclosed a copy of his final report in which he stated that copies of the potability certificate and septic tank certificate would follow under separate cover. A copy of the September 6, 1989 letter is attached as Exhibit 2 to this agreed statement of facts.

16. The Solicitor reported the completion of the refinancing to Mr. Bradbury by letter dated September 8, 1989 a copy of which is attached as Exhibit 3 to this agreed statement of facts. In that letter the Solicitor reported in some detail regarding problems with the Township of North Dumfries zoning and building compliance as well as the Grand River Conservation Authority problems.

17. Further to his final report dated September 6, 1989, the Solicitor sent a copy of a "Bacteriological Analysis of Water" Certificate, the potability certificate, to Settlers on October 18, 1989, a copy of which is attached as Exhibit 4 to this agreed statement of facts.

18. Further to his final report dated September 6, 1989, the Solicitor prepared a letter dated December 15, 1989 addressing the issue of the septic tank certificate a copy of which is attached as Exhibit 5 to this agreed statement of facts. The Solicitor's evidence would be that this letter was sent and the Society could not offer evidence to the contrary. Settlers, through its counsel, has conducted a complete review of its original file in the matter and the December 15, 1989 letter is not contained therein. This December 15, 1989 letter enclosed engineering reports and diagrams for the construction of the septic tank. The enclosed engineering certificate certified that the installation of

the septic tank was carried out according to design specifications. This certificate, in the Solicitor's opinion, was sufficient assurance that the septic tank system was properly installed. The Solicitor, after receipt of the engineer's report, took no further steps to obtain any further septic tank certificates. A Septic Tank Certificate was never issued for the septic tank installed by Mr. Bradbury.

19. The mortgage went into default in March of 1990 due to financial difficulties experienced by Mr. Bradbury and power of sale proceedings were commenced by Settlers and a statement of claim was issued April 18, 1990. There were extensive negotiations between McClenaghan of Gowling's on behalf of Mr. Bradbury and Sandra Dawe of Shibley Righton on behalf of Settlers. At the time of these negotiations to put the mortgage in good standing. Settlers was unaware of the alleged deficiencies regarding the property. Summary judgment was obtained on September 17, 1990. Pursuant to that judgment, a Writ of Possession was obtained and executed. Settlers sold the property in 1992.

20. For the purpose of selling the property, Settlers obtained an Assessment Report prepared by RPA Consultants Limited dated August 14, 1991, regarding the various deficiencies with respect to the property and the estimated cost of repair. The report breaks down the work to be done on the property into three categories:

- 2.1 Recommended work that would be necessary to bring the property to an acceptable standard.
- 2.2 Potential costs that would depend on additional requirements by various authorities.
- 2.3 Optional costs that would not be required unless specifically directed by an authority or the owner.

The total of all estimated allowances is \$95,400.00, however, the estimated costs of the first category is only \$36,100.00 including the septic appraisal. The second and third categories deal only with potential or optional costs which would not be required, in the opinion of the author of the report, and were never required but are provided with a view to "upgrading" the property. With respect to the Septic tank, which is discussed in Section 3.6 of the report, a copy of which is attached as Exhibit 6 to this agreed statement of facts, RPA recommended that an appraisal of the existing septic system be carried out at an estimated cost of \$1,000.00. The report cautions that if the septic bed is too close to the creek and extends into the neighbouring property, then the cost of replacing the septic bed would be \$25,000.00.

21. By letter dated June 24, 1991, Settlers, through its counsel, put the Solicitor on Notice of a potential claim regarding the Bradbury mortgage. The letter set out the specific concerns respecting the Solicitor's conduct, which would later be amplified in the Statement of Claim. A copy of the Shibley Righton letter of June 24, 1991 is attached as Exhibit 7 to this agreed statement of facts. A further letter seeking a response to the June 24, 1991 letter was sent on August 16, 1991. The Solicitor responded by letter dated August 20, 1991 in which he sought particulars of the "concerns [which] negatively impacted on the value of the property."

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22. In response to the Solicitor's letter dated August 20, 1991, by letter dated September 24, 1991 Gloria Yeung of the Grand River Conservation Authority reported to the Solicitor regarding an investigation by the Conservation Authority into a violation of a regulation relating to the construction and alteration of the water ways and its possible impact on the construction at the Bradbury property. The GRCA letter stated that further details, if required, were available by contacting the GRCA. Copies of the Solicitor's letter dated August 20, 1991 and the GRCA letter of September 24, 1991 are attached collectively as Exhibit 8 to this agreed statement of facts.

23. On October 31, 1991, Settlers commenced an action against Gowling, Strathy & Henderson claiming damages in the amount of \$500,000 for negligence and breach of contract. Settlers alleges that the Solicitor knew or should have known that there was no reasonable prospect that Mr. Bradbury could obtain either a potability or a septic tank certificate. Settlers further alleged that the Solicitor failed to disclose to them material facts which would have made the issuance of such certificates unlikely. Settlers, however, had received the "Bacterial Analysis of Water", the potability certificate, under cover of a letter from the Solicitor dated October 18, 1989. Settlers also claimed that the Solicitor failed to report upon or provide particulars of "problems" with the Grand River Conservation Authority. The Solicitor was not named personally in the litigation.

24. In October 1991, Gowling's had Errors and Omissions insurance which was well in excess of the amount of the claim. At this time, Gowling's mandatory deductible was \$5,000.00. Notwithstanding the availability of coverage, the Solicitor did not disclose the claim either to the Law Society's Errors and Omissions Department or to his own firm. The Solicitor delivered a statement of defence in the name of Gowling's on or about March 16, 1992. The statement of claim and statement of defence in this matter are attached collectively as Exhibit 9 to this agreed statement of facts.

25. Shortly after receipt of the statement of claim the Solicitor had a conversation with Clifford Cole of Shibley Righton, counsel for the plaintiff, at which time Mr. Cole inquired if the Solicitor had referred the matter to Gowling's insurers. The Solicitor advised Mr. Cole of his intention to deal with the matter personally without the involvement of the insurers and indicated that he was hopeful that the matter could be settled. At that time, Mr. Cole advised the Solicitor that the claim was substantially more than Gowling's deductible. The Solicitor indicated that he was aware of this and reiterated his intention to deal with the matter personally.

26. The Solicitor and Mr. Cole had a number of conversations regarding settlement of the matter. There was, in addition, an exchange of correspondence which included a letter of March 26, 1992, a copy of which is attached as Exhibit 10 to this agreed statement of facts, in which Settlers' counsel outlined their claim for damages. Finally, the Solicitor and Settlers settled the claim in June 1992 for \$110,000. Immediately, prior to the settlement of this matter Settlers' counsel was pushing for examinations for discovery to be completed in June.

27. On June 29, 1992, the Solicitor sent a hand-written note to Settlers' counsel enclosing a personal cheque for \$75,000.00, copies of these documents are attached as Exhibit 11 to this agreed statement of facts.

28. On July 31, 1992, the Solicitor sent further cheque in the amount of \$35,000.00 and another hand-written letter to Settlers' counsel. The cheque was drawn on Gowling's mixed trust account. A copy of the Solicitor's July 31, 1992 note as well as a copy of the cheque are attached collectively as Exhibit 12 to this agreed statement of facts.

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29. Home Hardware Ltd ("Home Hardware") was a longstanding client of the Solicitor's father. The Solicitor himself assumed increasing responsibility for Home Hardware's legal work over a period of years.

30. The source of the \$35,000.00 were funds held at the credit of the Solicitor's client Home Hardware. Home Hardware had no knowledge that its funds were being used for this purpose.

31. As of July 31, 1992, when he drew the cheque on Gowling's mixed trust account the Solicitor had a total amount of approximately \$144,000.00 in liquid assets including a value of \$37,000.00 held in stocks, \$5,000.00 held in a back account and \$102,000.00 held in a Registered Savings Plan, and a net worth of approximately \$495,000.00.

32. After the settlement was completed, Settlers' counsel sent a letter dated August 26, 1992 to Mr. Paliare, another partner at the Gowling firm. The letter was inadvertently sent to the wrong address and was received by the Solicitor on August 27, 1992. A copy of the letter is attached as Exhibit 13 to this agreed statement of facts.

33. The Solicitor informed Home Hardware what he had done shortly after the matter was brought to light. The Solicitor delivered a personal cheque in the amount of \$35,000.00 postdated one week to Home Hardware. The Solicitor then instructed his brokers to sell his portfolio of stocks, valued at approximately \$37,000.00, to cover the \$35,000.00 deficiency.

34. Home Hardware returned the Solicitor's personal cheque to Gowlings and indicated its preference to receive a cheque in the amount of \$35,000.00 drawn from Gowlings trust account. A certified cheque in the amount of \$35,000.00 from the Solicitor's father was received by the firm on September 1, 1992 and deposited in the firm's trust account on September 8, 1992. The Solicitor then repaid his father for the \$35,000.00. Home Hardware did not suffer any loss.

35. The Solicitor reported his conduct to Robert Logan, the managing partner of Gowling's Kitchener office, on August 27, 1992 following receipt of Mr. Cole's letter referenced in paragraph 32 above. The Solicitor advised Mr. Logan that the matter should be reported to the Law Society. Mr. Logan asked the Solicitor to delay reporting the matter himself to allow the appropriate designate executive committee to make the report. Mr. Logan advised the Solicitor that the matter would have to be reported both to Errors & Omissions and also to the Discipline Committee.

36. On September 1, 1992, the Solicitor agreed to take a leave of absence from the firm. Three conditions were attached to the leave of absence namely, that the Solicitor co-operate fully with Gowling's in the investigation and examination, that the Solicitor immediately cease the practice of law and that the Solicitor seek appropriate medical treatment for alcohol abuse with the assistance of Gowlings. The conditions continue to be observed by the Solicitor.

37. On September 2, 1992, the Solicitor voluntarily attended with Mr. Steven Goudge, partner at the Gowling firm in Toronto, at the Law Society and made full disclosure of information regarding the above activity.

Internal Review

38. In September 1992, an internal review was carried out under the supervision of Mr. Logan, the managing partner of Gowling's Kitchener office, in order to determine the extent, if any, of unauthorized or inappropriate disbursements from trust accounts requisitioned by the Solicitor. The review covered a four year period from the time the Solicitor joined the firm as a partner of Gowling's on October 1, 1988 through to the suspension of his trust authority on August 31, 1992.

27th April, 1995

39. The scope of the trust review included a review of trust activity on all files for which the Solicitor was the responsible lawyer during the four year period. Due to the existence of matter files on which the Solicitor and his father worked together, trust activity for the Solicitor's father was also included in the scope of the review. In addition, all documents for the deposit and withdrawal of trust funds, having been requisitioned by the Solicitor, were reviewed whether or not the Solicitor was the responsible lawyer.

40. The scope of the file content review included all files recorded as active files under the management and control of the Solicitor.

41. The file content review was performed on 247 active files under the Solicitors responsibility and appearing on his active file list as of the date of his leave of absence. In addition, the review included files located in the Solicitor's filing cabinets which were not listed on the active file list. While the review was going on, Particular 2(b) came to light and was reported to the Law Society. The review was completed and a full report of the results of that review was provided to the Law Society.

Particular 2(b) - Falsification of Articles of Disillusion

42. In September 1989, the Solicitor was retained to dissolve a wholly owned subsidiaries of his client ATS Automation Tooling Systems, namely Micro Aud Systems Limited and Xenotech Systems Inc.

43. In early October 1989, the Solicitor prepared a resolution of the Board of Directors authorizing dissolution, confirmation of resolution by shareholders and Articles of Dissolution. In addition, the Solicitor arranged for the advertisement of the dissolution in the Ontario Gazette and in the local newspaper. The contents of the Ministry of Revenue were obtained in October and November of 1989 and were valid for a period of sixty days. The Articles of dissolution and the contents could have been filed at this time but they were not.

44. Additional consents were obtained in May of 1990. The Articles of Dissolution were not filed at this time.

45. On November 23, 1990, Mr. Martin of ATS wrote to the Solicitor as follows:

I am writing to you in an appeal for the papers concerning the dissolution of two former ATS companies, Micro Aud and Xenotech. You have told me several times over the phone that you were in possession of these documents and will forward them to me shortly. To my knowledge this has not yet occurred. I am starting to get frustrated with this situation, and would like it resolved.

If you do have the documents, please forward them without delay. If the documents are not available, please inform me of this, so that I am no longer misled.

A copy of Mr. Martin's letter is attached as Exhibit 14 to this agreed statement of facts.

46. The Society would also offer the following evidence in support of this particular. The Solicitor does not take issue with or question the truth of or accuracy of any of the following information. The Solicitor would testify that he has no recollection of the events as set out below:

47. The Solicitor responded to Mr. Martin's letter (referred to in paragraph 43 above) by providing photocopies of what purported to be Certificates of Dissolution for the two companies to Mr. Martin.

27th April, 1995

48. On January 31, 1991, the Solicitor billed ATS for services that included "completing all necessary material to wind up Micro Aud and Xenotech", a copy of the January 31, 1991 account is attached as Exhibit 15 to this agreed statement of facts.

49. On August 13, 1992, ATS received a notice from the corporations tax branch of the Ministry of Revenue that it was in default of filing its corporations' tax returns.

50. On September 29, 1992, ATS wrote to the managing partner of Gowling's Kitchener office, Robert Logan, to bring the company's concerns to Gowling's attention. A copy of Mr. Martins' letter is attached as Exhibit 16 to this agreed statement of facts.

51. Gowling's received Mr. Martin's letter after the discovery of the facts regarding particular 2(a) of the complaint and subsequent to the Solicitor's entry into an alcohol treatment facility. Mr. Logan investigated the Solicitor's file regarding ATS and discovered a cut out Ministry receipt from an unrelated filing. The date on the cut out had been amended and affixed to the original articles of dissolution and one or more photocopies had been made. Mr. Logan discovered that the same course of action had been taken with respect to Micro Aud and Xenotech.

52. Mr. Logan also determined through investigations that Articles of Dissolution were not filed at the Ministry. Gowling's has now arranged for the proper Articles of Dissolution to be filed.

DATED at Toronto this 7th day of October, 1994."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gordon Alexander Mackay be suspended for a period of two years and that his right to return to practise is conditional upon his making arrangements satisfactory to Senior Counsel, Discipline or confirmation of his employment with Gowling, Strathy, Henderson upon the following terms and conditions, which are to continue for a period of five years:

- the Solicitor is to have no cheque signing authority within the firm.
- a second signature of a partner of the firm will be required on any cheque requisition which he might initiate.
- set up with the Solicitor's input and assistance, a file monitoring system, whereby another lawyer within the firm will be assigned as the file monitor on each file in his control. The file monitor will be at liberty to review that particular file at any time, for which review full cooperation is expected.
- the Solicitor to attend a number of continuing legal education seminars selected in consultation with the Business Law Department Head in Kitchener.
- the Solicitor to maintain his involvement in Alcoholics Anonymous.
- costs to be agreed upon by counsel for the Law Society and counsel for the Solicitor

REASONS FOR RECOMMENDATION

1. Gordon Mackay's fall from his respected and privileged position shows the sad consequences of alcohol abuse and addiction. The evidence demonstrates that this solicitor enjoyed the benefits of a prosperous practice, in a respected firm. He acted for substantial clients who had complete faith in him. The son of a respected lawyer, he practised first in his father's firm, later moving with

27th April, 1995

his father and other members of that firm to Gowling, Strathy & Henderson. It was while there that he engaged in the misconduct he has admitted. We have no doubt that his alcohol abuse was a major cause of that misconduct. We were provided with evidence from Shepherd Hill and Homewood Health Centre, well-respected alcohol treatment facilities, and with the psychiatric report of Dr. Peter Collins. Dr. Collins also testified at the hearing.

2. On that strong evidence we were persuaded that Mr. Mackay suffered true alcoholic blackouts occasionally and suffered from seriously impaired judgment persistently, at the time of the misconduct.

3. His reaction to the claim of Settlers Trust was a reaction of seriously impaired judgment. Settlers suffered a loss upon realizing on its security, and sought to pass the loss along to the solicitor's firm. On all the evidence, and especially in the light of the opinion of Mr. Marin (Exhibit 4), that action would likely have been dismissed. Rather than disclose the claim to his firm and his insurers, the solicitor chose to settle it personally, and agreed to damages of \$110,000.

4. Disbarment is the appropriate penalty in most cases of misappropriation. Exceptions are few. We recommend an exception in this case because we are convinced by the evidence that this misappropriation was the product of an illness. The illness, alcoholism, is not rare, unfortunately. In this case it led a respected member of the profession to acts which were completely out of character and quite irrational. Mr. Mackay did not act with malice or for personal gain. No greed motivated these acts. We are satisfied that the solicitor's decision not to disclose the claim referred to in paragraph 24 to his firm and to the Errors and Omissions Department, was the result of judgment profoundly impaired by alcoholism. We find that impairment was the probable cause of his decision to "deal with the matter personally without the involvement of the insurers" and his decision to pay a large sum in settlement of the claim. He was incapable of exercising reasoned judgment on the question of the validity and value of such a claim. So he determined that he would cover up his alleged errors by paying the claim himself.

5. To the extent of \$75,000, he did so from personal funds. In an act which we consider to be the product of seriously impaired judgment, he then advanced another \$35,000 from his firm's mixed trust account, from funds held for his client Home Hardware.

6. Home Hardware suffered no loss because this solicitor was fortunate enough to have sufficient funds at his disposal to make good the misappropriation. Both his firm and his father, a partner in the firm, took the steps required to ensure restitution, in addition to the solicitor's own steps to that end. We do not "condone" the misappropriation, and we would emphatically reject any suggestion that a solicitor who could afford to repay misappropriated funds should, ipso facto, receive a lesser penalty than one who could not.

7. Home Hardware's president gave character evidence in support of the solicitor. This evidence was helpful not on the issue of restitution but because it helped us to see that the acts complained of were quite out of character.

8. In addition to the misappropriation, another transgression came to light in the course of an internal review of all the solicitor's files over the four years since his firm had joined Gowling, Strathy & Henderson. The solicitor claims that he has no recollection of the events set out in paragraphs 47 to 52. That is consistent with the extent of his alcoholism as established in the evidence, although the acts appear to have been conscious and wilful. There was not enough evidence on this particular to cause us to recommend disbarment. The penalty for this misconduct should be encompassed in the suspension for two years.

9. Although satisfied that the solicitor suffered profound impairment of his judgment, and operated under the effects of advanced alcoholic disease, we had no difficulty accepting his admission of culpability for professional misconduct on both particulars. The matter of penalty is more difficult.

10. The fact of his illness, his acceptance of treatment for it, and the strong evidence of the respect he enjoyed (and still enjoys) among clients, colleagues and community, cause us to conclude that this is one of the cases where disbarment is not the right penalty. In all the circumstances, a lengthy suspension followed by a long period of supervision, better serves the profession and the public interest.

Gordon Alexander MacKay, Jr. was called to the Bar on the 10th day of April, 1980.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1995

Lloyd Brennan, Q.C.
Chair

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

Ms. Budweth advised of two typographical errors in the Report that is:

- page 3, paragraph 11 - the word "or" at the end of the first line should be "for"; and
- page 5, paragraph 19, fourth line - the word "Teresa" be inserted before "McClenaghan".

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

It was moved by Mr. Cullity, seconded by Mr. Carey that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of two years with conditions imposed as set out in the Report upon the solicitor's return to practice.

Both counsel made submissions in support of the recommended penalty.

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

It was moved by Ms. Graham, seconded by Mr. Blue that the solicitor be given permissions to resign from the Society.

Counsel, the solicitor, the reporter and the public were recalled and informed of the decision of Convocation of a motion for an increased penalty.

Mr. Marrocco advised that he needed time to prepare and requested an adjournment until the June Discipline Convocation.

Counsel waived the requirements for a quorum composed of those Benchers present in Convocation.

Counsel and solicitor retired.

27th April, 1995

Re: Jeffrey Bernard MERRIMAN - Haileybury

The Secretary placed the matter before Convocation.

Messrs. Strosberg and Scott and Ms. O'Connor withdrew for this matter.

Ms. Budweth appeared for the Law Society and Mr. Marrocco appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 17th March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (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

James Wardlaw, Q.C., Chair
Roger Yachetti
Shirley O'Connor

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

Christina Budweth
for the Society

JEFFREY BERNARD MERRIMAN
of the Town
of Haileybury
a barrister and solicitor

Frank Marrocco
for the solicitor

Heard: January 31, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 10, 1993, Complaint D337/93 was issued and on August 12, 1994, Complaint D216/94 was issued against Jeffrey Bernard Merriman alleging that he was guilty of professional misconduct.

The matter was heard in public on January 31, 1995 before this Committee composed of James Wardlaw, Q.C., Chair, Roger Yachetti, Q.C. and Shirley O'Connor. The Solicitor was in attendance at the hearing and was represented by Frank Marrocco.

DECISION

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

Complaint D337/93

2. a) He failed to reply to the Society regarding a complaint by Barbara M. Wellard despite letters dated May 11, 1993 and August 27, 1993, and telephone requests on June 3, 1993, June 4, 1993, June 7, 1993, June 9, 1993 and July 12, 1993.
- b) He misled his client, Eevie Ylimaki, by advising her that he had obtained a divorce judgment on her behalf when such was not the case.
- c) He prepared and provided to his client, Eevie Ylimaki, a certificate of divorce and divorce judgment which he knew to be false.

Complaint D216/94

2. a) he made false and misleading statements regarding the status of a number of young offender appeals during a show cause hearing before Mr. Justice R.P. Boissonneault, on Tuesday, April 5, 1994.

Evidence

Part of the evidence before the Committee contained the following Agreed Statements of Fact:

"AGREED STATEMENT OF FACT - D337/93

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D337/93 and is prepared to proceed with a hearing of this matter on April 26 and 27, 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 D337/93 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 April 11, 1983. The Solicitor practised in the firm of Wood, Woltz & Merriman from the date of his call to the Bar until March 1991 when he jointed the Crown's office. The Solicitor ceased practice on May 3, 1994 upon giving an Undertaking not to practice to the Society.

27th April, 1995

Particular 2(b) He misled his client, Eevie Ylimaki, by advising her that he had obtained a divorce judgment on her behalf when such was not the case.

and

Particular 2(c) He prepared and provided to his client, Eevie Ylimaki, a certificate of divorce and divorce judgment which he knew to be false.

5. Eevie Ylimaki separated from her husband, Deuvo Matias Ylimaki in 1975. She has not seen or heard from him since their separation.

6. During 1989, Eevie Ylimaki retained the Solicitor to assist her in obtaining a divorce.

7. During the retainer, the Solicitor encountered several procedural difficulties due to Mr. Ylimaki's disappearance and the fact that the Ylimakis had emigrated from Finland in 1959.

8. Mrs. Ylimaki executed an affidavit on February 5, 1990 to be filed with a motion to dispense with service on Mr. Ylimaki.

9. During the summer of 1991, the Solicitor advised Mrs. Ylimaki by telephone that she could attend at his office to pick up her Certificate of Divorce and her Divorce Judgment. Mrs. Ylimaki attended at the Solicitor's office shortly thereafter and picked up an envelope that contained photocopies of what purported to be true copies of those documents. A copy of the Certificate of Divorce and Divorce Petition picked up by Mrs. Ylimaki from the Solicitor's office are attached as Exhibit "A" to this Agreed Statement of Facts.

10. In December, 1992 or January, 1993, Mrs. Ylimaki attended at the municipal office in North Bay to obtain a marriage licence. She was advised that without the original Certificate of Divorce she could not obtain the licence. Shortly thereafter she attended at the Court House in North Bay to obtain the original and was advised that a Divorce Petition had not been issued. The solicitor is neither able to confirm or deny this information but accepts the version of the facts set out.

11. Shortly thereafter, Mrs. Ylimaki met with the Solicitor at her residence. The Solicitor returned Mrs. Ylimaki's \$500.00 retainer and told her he would make arrangements for her to be represented by a new solicitor. The Solicitor did so within the week by making arrangements for another solicitor, Barbara Morland Wellard, to assume carriage of the matter.

12. By letter dated March 30, 1993 Ms. Wellard advised the Law Society that she had been retained by Mrs. Ylimaki to obtain her divorce. Ms. Wellard advised the Law Society of the Solicitor's actions respecting his representation of Mrs. Ylimaki. Ms. Wellard advised the Law Society that she has issued the Petition for Divorce and was in the process of obtaining an order dispensing with service. A copy of Ms. Wellard's March 30, 1993 letter is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor admits the truth of the facts set out in Ms. Morland's letter.

13. The Solicitor admits that he never commenced divorce proceedings on Mrs. Ylimaki's behalf.

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

14. By letter dated May 11, 1993, the Law Society forwarded to the Solicitor a copy of Ms. Wellard's letter. The Solicitor was requested to provide his comments to the same within two weeks. A copy of the Law Society's May 11, 1993 letter is attached as Exhibit "C" to this Agreed Statement of Facts. No reply was received.

27th April, 1995

15. A Law Society staff employee left telephone messages for the Solicitor at his office on June 3, 1993 and June 7, 1993 requesting he return the calls. The calls were not returned.

16. A Law Society staff employee spoke with the Solicitor by telephone on June 9, 1993. The Solicitor advised that he had only received the Society's May 11th letter last week and would provide his reply to the same by June 18, 1993. No reply was received.

17. A Law Society staff employee spoke with the Solicitor by telephone on July 7, 1993. The Solicitor advised that his response was completed, however, that due to an illness he had not forwarded the same to the Society. The Law Society advised the Solicitor that should his reply not be received by July 16, 1993, the matter would be referred to the Discipline Committee. No reply was received.

18. By registered mail dated August 27, 1993, the Law Society forwarded to the Solicitor a copy of its May 11th letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. A copy of the Law Society's August 27, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts. No reply was received.

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

V. DISCIPLINE HISTORY

20. The Solicitor does not have a discipline history.

DATED at Toronto this 31st day of January, 1995."

"AGREED STATEMENT OF FACT - D216/94

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D216/94 and is prepared to proceed with a hearing of this matter on January 31 and February 1, 1995.

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 D216/94 and this agreed statement of facts with his counsel, Frank Marrocco, Q.C. and Lynn Mahoney, and admits the particular contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor is 38 years of age. He was called to the Bar on April 11, 1983. The Solicitor practised in the firm of Wood, Wooltz & Merriman from the date of his call to the Bar until March 1991 when he joined the Crown's office. The Solicitor ceased practice on May 3, 1994 upon giving an Undertaking not to practice to the Society.

27th April, 1995

5. On Tuesday, April 5, 1994, the Solicitor appeared before Mr. Justice R.P. Boissonneault on a number appeals from acquittals on summary conviction matters in Youth Court. The appearance was a show cause hearing resulting from the Crown's failure to file Factums within the requisite time.

6. The Solicitor advised the court, page 1 of the transcript, that in relation to Crown appeals items 2-7 on the court's list, that the Respondents were being represented by solicitor Rumble. The Solicitor further stated that although the Crown's factums were "due" on March 18, they had not yet been filed. The Solicitor explained that the factums had been prepared but were, as a result of a miscommunication between the Crown's office and that of the Kirkland Lake Police Service, not served. A copy of the transcript is attached as **Exhibit 1** to this agreed statement of facts.

7. The Solicitor indicated that the factums in regard to those matters referred to in paragraph 7 above had been faxed to Mr. Rumble, that discussions between the two had been held and that Mr. Rumble had authorized him to speak as his agent on the matters.

8. The Solicitor asked Mr. Justice Boissonneault to endorse those matters as requiring the Crown's factums to be filed with proof of service by April 8. On the basis of the Solicitor's representations the endorsement was made.

9. Regarding the R appeal, on pages 5 and 6 of the transcript, the Solicitor indicated to the court that the deadline for the filing of the Crown's Factum with proof of service was March 18. The Solicitor advised the court that the Crown Factum had been conveyed to the Kirkland Lake Police Service for service and that through "some administrative mix up", it did not happen.

10. The Solicitor sought an Order extending the time for filing of the Crown's factum to April 8. Mr. Justice Boissonneault made an Order extending the time to April 15.

11. On May 16, 1994, solicitor Mark Huneault, the acting Crown Attorney for the District, as well as Mr. Rumble and Ms. Levine, for various of the appellants, appeared before Mr. Justice Trainor regarding the Crown appeals which were the subject of the show cause hearing before Mr. Justice Boissonneault. A copy of the transcript of that attendance is attached as **Exhibit 2** to this agreed statement of facts.

12. Mr. Huneault advised the court that regarding the matters referred to on page 1 of the transcript, **Exhibit 1**, contrary to the Solicitor's advice to Mr. Justice Boissonneault, only one of the six Factums had been prepared and faxed to Mr. Rumble. Mr. Huneault pointed out that all six appeals raised essentially the same issue and involved the same defence counsel. The appeals did, however, differ on a factual basis although they shared a common principal of law.

13. Mr. Huneault took the position that the Solicitor's advice to the court on April 5 regarding the status of the Factums was "not true" and "was misleading".

14. Regarding the matter, beginning at page 5 of **Exhibit 1**, Mr. Huneault advised the court that contrary to the Solicitor's representation to Mr. Justice Boissonneault, the factum was not completed until April 5 and no efforts had been made to effect service as of the date of the appearance before Mr. Justice Boissonneault.

27th April, 1995

V. DISCIPLINE HISTORY

15. The Solicitor does not have a discipline history.

DATED at Toronto this 31st day of January, 1995."

It is the decision of the Committee that a finding of professional misconduct with respect to both complaints D337/93 and D216/94 is made on the basis of the Agreed Statement of Fact and the admissions.

RECOMMENDATION AS TO PENALTY

The Committee accepted the joint submission that the appropriate penalty in the circumstances of this case be a suspension of the Solicitor's right to practise for a period of 12 months with the Solicitor's right to return to practise being conditional on a number of requirements being fulfilled:

- (a) he provide a report from his treating psychologist, Dr. Phillips, or psychiatrist, Dr. Collins, confirming that he is capable of returning to the practice of law;
- (b) that if at the time of the giving of the opinion referred to above it is Dr. Phillips'/Dr. Peter Collins' professional opinion that the Solicitor requires further psychotherapy that the Solicitor undertake to attend such treatment and authorizes Dr. Phillips/Dr. Collins to report to the Society any premature termination of such treatment;
- (c) upon his return to practise the Solicitor practise under the supervision of a fellow solicitor for a period of two years;
- (d) in regard to condition (c) above, that the supervising solicitor must be fully advised of these complaints and the Report of the Committee and that he/she sign an Acknowledgement that they will report any concerns regarding the Solicitor's ability to practice to the Society;
- (e) that if at the conclusion of the two year period in (c) and (d) above, the Solicitor elects to commence sole practice, he be required to enrol in and co-operate with the Practice Review Program of the Professional Standards Department;
- (f) that he reply to the complaint of Ms. Wellard before the date of Convocation;
- (g) that he be required to pay the Society's costs in the amount of \$2,000.00 payable over the period of a year commencing on today's date,

REASONS FOR RECOMMENDATION

The Committee accepted the joint submissions on penalty and recommends to Convocation that the Solicitor be suspended for a period of twelve months, and thereafter, not allowed to resume practice until the conditions contained in the agreed submissions are satisfied. Absent the medical explanations contained in the reports, the Committee would have dealt with this in a more severe manner. Given the explanations, your Committee is content to accept the recommendations for penalties, the same penalty applying to both complaints.

Jeffrey Bernard Merriman was called to the Bar on the 11th day of April, 1983.

ALL OF WHICH is respectfully submitted

DATED this 17th day of March, 1995

James Wardlaw, Q.C.
Chair

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

Ms. Budweth advised of a typographical error, that is:

- page 2., under heading of Facts, third line - that the word "jointed" be changed to "joined"

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

It was moved by Mr. Feinstein, seconded by Mr. Topp that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for 12 months with costs and the solicitor's right to return to practise is conditional on a number of requirements as set out in the Report.

Mr. Budweth advised that the solicitor had complied with condition (f) of the recommended penalty, and had replied to the complaint of Ms. Wellard.

Both counsel made brief submissions in support of the recommended penalty.

The motion on the recommended penalty was adopted.

Counsel and solicitor retired.

Re: John ROTHEL - Timmins

The Secretary placed the matter before Convocation.

Ms. Peters, Ms. Elliott, Messrs. Strosberg and Brennan withdrew for this matter.

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

Mr. Greenspan requested an adjournment to the June Discipline Convocation as the solicitor had sustained a back injury and was unable to travel.

The Society's counsel opposed the adjournment.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Lerner, seconded by Mr. Carey that the matter proceed today.

Lost

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the matter be adjourned to the Discipline Convocation in June peremptory to the solicitor.

Counsel retired.

Re: Ian Douglas Knoll HENDERSON - Brampton

The Secretary placed the matter before Convocation.

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

Ms. Janet Leiper appeared for the Society and Mr. Martin Teplitsky appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th April, 1995 (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

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

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

Janet Leiper
for the Society

IAN DOUGLAS KNOLL HENDERSON
of the City
of Brampton
a barrister and solicitor

Martin Teplitsky
for the solicitor

Heard: January 11, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On the 13th of June, 1994, Complaint D178/94 was issued against Ian Douglas Knoll Henderson alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced with Complaint D178/94A.

The matter was heard in public on the 11th day of January, 1995 before this Committee composed of Mary P. Weaver, Q.C., Chair, Nora Richardson, and Stuart Thom, Q.C. The solicitor was in attendance at the hearing and was represented by Martin Teplitsky. Janet Leiper appeared on behalf of the Law Society.

DECISION

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

2. a) As solicitor for a co-tenancy composed of Robert Glover, Ronald Walmer, Steven Racey and Gary Quinnell, and himself, he breached the duty he owed as solicitor to the other members of the co-tenancy by failing to disclose that he had divested himself of a significant asset.
- b) He improperly personally guaranteed a mortgage in which his client Steven Racey, was involved, contrary to Rule 23 of the Rules of Professional Misconduct.

EVIDENCE

Part of the evidence before the Committee was contained in the following agreed statement of facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint 178A/94 and is prepared to proceed with a hearing of this matter on January 11th, 1995.

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 178A/94 and admits the particulars contained therein. The Solicitor admits that the particulars in the Complaint together with the facts as set out within this statement constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1985. He practises as a sole practitioner in Brampton.

5. Robert Glover ("Glover") and Ronald Walmer ("Walmer") were the principals in Glover Walmer Management Limited, a construction and development business. Walmer met the Solicitor in August, 1988.

6. The Solicitor was subsequently retained by Glover Walmer Management Limited to handle the sale of two or three properties owned by Glover Walmer Management Limited.

7. By Agreement dated November 2, 1988 Robert Glover agreed to purchase 233 Douglas Avenue in Toronto in trust for himself, Ronald Walmer, Steven Racey and Gary Quinnell.

8. Mr. Glover and Mr. Walmer had conversations with the Solicitor about the purchase of the Douglas property. The Solicitor advised he could assist them with financing for the project. The Solicitor advised Glover and Walmer that he had a lender but that a guarantee from the Solicitor was required as a condition of the loan. The investors and the Solicitor agreed that he would become a partner in the venture. He agreed to provide the necessary guarantee, and do the legal work for the venture.

9. Steven Racey was employed by Monarch Refrigeration as a heating, ventilation and air conditioning specialist. He had some prior experience in buying and selling investment property. It was contemplated that he would perform some of the work on the renovation of the property in his area of knowledge. Racey had no prior dealings with the Solicitor.

10. Gary Quinnell was employed by Canadian Tire as a sporting goods buyer. He has no skills which were to be employed directly by the venture. Gary Quinnell had no previous dealings with the Solicitor.

11. The Solicitor assisted with the preparation of a financing document titled "Lending Opportunity, Residential Redevelopment" (hereinafter, the Lending Opportunity Document). This undated document describes the proposed redevelopment for 233 Douglas Avenue, noting that "the Solicitor for the project is Ian D. Henderson". This document included copies of a survey, the Agreement of Purchase and Sale, the Statements of Net Worth for each investor (namely Steven Racey, Gary Quinnell, Robert Glover, Ron Walmer and the Solicitor), and other related materials. A copy of the Lending Opportunity Document is attached at Tab 1 to this Agreed Statement of Fact.

12. At the time of the preparation of the Lending Opportunity Document each of the investors owned a home jointly with his spouse. The approximate value of each house was disclosed in each investor summary and shown as full value, undiminished by spousal interests. The Solicitor's statement of worth dated December 15th, 1988 showed his assets to include his home valued at \$325,000.00. Combined with his other assets and liabilities his total net worth was estimated to be \$285,000.00. A copy of Mr. Henderson's statement of worth is attached as Tab 2 of this Agreed Statement of Fact.

13. The Solicitor drafted a Co-Tenancy Agreement (the "Co-Tenancy Agreement") setting out the respective rights and obligations of the investors. A copy of the Co-Tenancy Agreement dated February 1st, 1989 is attached at Tab 3 to this Agreed Statement of Fact.

14. The Co-Tenancy Agreement provided in part:

- (a) That the co-tenants had agreed to purchase 233 Douglas Avenue with the property to be registered in the name of Robert Glover as trustee for the co-tenants;
- (b) Each co-tenant was to have an undivided 20% interest;

- (c) Each co-tenant was to make an \$8,000.00 capital contribution;
 - (d) Glover Walmer Management Limited was to act as the General Contractor for the purpose of making extensive renovations to the property;
 - (e) The property was anticipated to be listed for sale as soon as reasonably possible after the renovations and sold for the best possible price;
 - (f) The funds for the purchase were to come from a lender to be identified, securing the principal sum of \$250,000.00 by way of a first mortgage on the property;
 - (g) Glover Walmer Management Limited was to attend to all administrative matters and make an accounting upon sale of the property;
 - (h) The funds for the renovation were to be financed and secured by a collateral mortgage in the amount of \$200,000.00 on the Quinnell residence. The co-tenants indemnified Quinnell for their respective proportionate share;
 - (i) All profits and losses were to be shared equally after deducting financing costs, legal fees and disbursements, realty, commissions and principal under mortgages from sale proceeds;
 - (j) The solicitor for the co-tenancy was to be Ian Henderson; and
 - (k) Any disputes were to be resolved by binding arbitration administered through the mediation services of the Toronto law firm of Teplitsky, Colson.
15. The portion of the Co-Tenancy Agreement dealing with the Solicitor's role was drafted as follows:
- 9. The co-tenants agree that the Solicitor for this co-tenancy is Ian Douglas Henderson. The co-tenants acknowledge that the Solicitor has invested in this property and that Rule 5, Section 8 of the Rules of Professional Conduct set by the Law Society of Upper Canada provides that it is undesirable for the Solicitor to represent anyone with respect to an investment in which the Solicitor has an interest, and that in such a situation, the Solicitor must insist that the client receive independent legal advice. By executing this co-tenancy agreement, each co-tenant confirms that they have received independent legal advice or that they do not want such advice and that they are satisfied to rely on their own knowledge and experience with respect to the investment herein.
16. When the draft Co-Tenancy Agreement was circulated, the Solicitor advised the individuals to obtain their own independent legal advice ("ILA"). Mr. Quinnell was using his home as security for a portion of the first loan. He obtained independent legal advice on this aspect of the investment. Neither Mr. Glover, Mr. Walmer nor Mr. Racey sought nor obtained independent legal advice.
17. All transactions were carried out by various members of the co-tenancy on behalf of the others. For example, the title of the property at Douglas Avenue was put in Robert Glover's name, in trust for the other members.
18. The Solicitor acknowledges that the investors, Robert Glover, Gary Quinnell, Steven Racey, Ronald Walmer were de facto his client.

19. The five signatures on the Co-Tenancy Agreement were Ian Henderson, Robert Glover, Ronald Walmer, Mildred Racey (Steven Racey's wife), Ingrid Quinnell (Gary Quinnell's wife). The active investors were Steven Racey, Gary Quinnell, Ronald Walmer and Robert Glover.

FINANCING OF THE VENTURE

20. On February 2nd, 1989, Mr. Robert Glover took title to 233 Douglas Avenue, in trust. A first mortgage in the amount of \$450,000.00 was divided between Keseph Investments Inc. (44.44%) and Income Trust (55.56%). The mortgage was secured by the property at Douglas Avenue and by a collateral mortgage on Robert Glover's personal residence dated February 2nd, 1989. The Solicitor, along with the other members of the Co-Tenancy personally guaranteed this mortgage. Attached to this Agreed Statement of Fact at Tab 5 is the mortgage document dated February 1st, 1989.

21. The Solicitor is shown as the Solicitor for the transferee on the transaction. Attached at Tab 4 is the Transfer of Land and the Land Transfer Tax Affidavit sworn on February 1st, 1989.

22. By letter dated March 10, 1989, the Solicitor reported on the purchase to Robert Glover. The Solicitor's account was sent under separate cover. Attached hereto at Tab 6 is a copy of the Solicitor's reporting letter and attachments to the Solicitor's reporting letter.

23. On November 9th, 1989 a second mortgage was obtained from the Laurentian Bank of Canada in the amount of \$30,000.00. The Solicitor personally guaranteed this mortgage along with Ronald Walmer and Robert Glover. Neither Racey nor Quinnell guaranteed this mortgage. Attached at Tab 7 is the second mortgage registered on November 10, 1989.

24. By March of 1990 the house had been listed but was not selling because the local real estate market had begun to decline. New financing was required to carry the property. A new first mortgage was obtained in the amount of \$412,500.00 through Michael Diamond, trustee. This sum was not enough to replace the existing financing needs.

25. At a meeting of the co-tenants to discuss the shortfall, Racey volunteered to advance \$80,000.00 in exchange for a second mortgage on the property, (hereafter "the Racey Mortgage"). Glover, Walmer and the Solicitor expressed the view not to refinance, but to sell the property and to cover the forecast deficiency or, alternately, let the property be sold under power of sale. Racey's offer to advance \$80,000.00 was accepted by the co-tenants and the refinancing was completed in April, 1990.

26. Prior to the loan from Steven Racey, the Solicitor advised Racey to obtain independent legal advice. Racey spoke informally by telephone to his first cousin, Ron Crane. Although Ron Crane advised against the loan, this was not given as formal independent legal advice. The Solicitor did not insist on obtaining a certificate of independent legal advice and none was obtained.

27. The replacement first mortgage to Michael Diamond, trustee was registered in April, 1990. The Solicitor personally guaranteed this mortgage. The replacement first mortgage to Michael Diamond, trustee is attached at Tab 8.

28. On April 10th, 1990 the second mortgage in favour of Steven Racey for \$80,000.00 was registered against 233 Douglas Avenue. The Solicitor personally guaranteed this mortgage, a copy of which is attached at Tab 9.

29. The Solicitor prepared the mortgage documentation for Steven Racey's loan to the co-tenancy. The terms of the second mortgage were that it was repayable interest only, at Canada Trust prime rate plus 2.002% on the 27th day of each month, commencing May 27, 1990 in favour of Steven Racey. The mortgage was made repayable within thirty days of written demand, provided that demand not be made within twelve months from the date of registration. The Racey Mortgage incorporated by reference all standard charge terms as contained in Standard Charge Terms 851, which include a provision for acceleration in the event of default.

30. The Solicitor rendered an account for his services in preparing the mortgage which he sent to Robert Glover by facsimile transmission on April 12th, 1990. A copy of the account is included at Tab 10.

31. On March 28th, 1990, the Solicitor transferred his interest in his primary asset, the home at 14 Glebeholme Boulevard to his wife, Darlene Madott, a barrister and solicitor, practising with the firm of Teplitsky, Colson. This was 10 days prior to the day on which Steven Racey advanced the funds to assist with the refinancing of the venture at 233 Douglas Avenue. Attached at Tab 11 is the abstract of title showing the transfer from the Solicitor to Darlene Madott.

32. The consideration for the transfer was described in the Land Transfer Tax Affidavit to be the sum of \$2.00 and the natural love and affection. In an Addendum to their Marriage Contract dated March 26, 1990, the Solicitor and his wife described the consideration for the transfer as being their unequal contributions to the matrimonial home subsequent to the date of marriage (the Addendum quantifies the Wife's greater contributions to that date) and further states the consideration as being the likelihood of future discrepancies. The Solicitor has also described the consideration for the transfer as being continuation of the marriage, which was at that time in jeopardy. Attached within the Supplementary Document Book are the Land Transfer Affidavit and the Addendum to the marriage Contract dated March 26, 1990.

33. The Solicitor did not disclose to Steven Racey nor to the other investors that he had conveyed away his interest in his principal residence.

34. In early September of 1990, the members of the co-tenancy held a meeting at Mr. Quinnell's home. At that time the Solicitor advised the other members that he would not continue to make any further payments to support the investment because he was insolvent. Prior to the meeting, a number of the Solicitor's cheques had been returned by the bank. The other participants suspended payments in November, 1990.

35. On June 3rd, 1991, 233 Douglas Avenue was sold under power of sale.

36. On September 5th, 1991 the Solicitor made a voluntary assignment in bankruptcy.

37. Steven Racey lost the \$80,000.00 he had loaned to the co-tenancy on April 10, 1990. He began a civil claim against the Solicitor, Darlene Madott, Robert Glover and Ronald Walmer seeking payment of \$80,000.00, interest and repayment of sums paid on behalf of the defaulting members of the co-tenancy. He also sought to set aside the conveyance of the Solicitor's residence by the Solicitor to his spouse. The matter was ultimately settled with the Solicitor paying Mr. Racey \$10,000.00, without any admission of liability.

V. PREVIOUS DISCIPLINE

38. The Solicitor was reprimanded in Committee on December 11th, 1991 for practising law while under suspension for non-payment of dues. The Solicitor inadvertently was late, and remitted dues within days of being notified of the suspension.

27th April, 1995

V. CONCLUSION

39. The Solicitor has read this Agreed Statement of Fact and acknowledges its contents to be true.

DATED AT TORONTO, this 11th day of January, 1995."

RECOMMENDATION AS TO PENALTY

Counsel for the Law Society and counsel for the solicitor made a joint submission as to penalty. The Committee agreed to accept the joint submission and recommends the penalty as follows:

1. That the solicitor be suspended for a period of two months following Convocation.
2. That the solicitor pay the Law Society's costs in the amount of \$2,500.00.

REASONS AS TO RECOMMENDATION

1. The conduct that gave rise to this complaint occurred in the context of a business venture involving the purchase, redevelopment, and re-sale of a residential property between November 1988 and September of 1990.
2. The solicitor became one of a group of five investors referred to in the documents as co-tenants. He also acted as solicitor for the co-tenancy.
3. The solicitor had acted for two of the co-tenants, Glover and Walmer, principals in Glover Walmer Management Limited, on several occasions between 1988 and the development project that gave rise to this complaint. The solicitor had not previously acted for two of the co-tenants.
4. Each of the co-tenants had some investment experience. The solicitor had advised his co-tenants of his obligations under Rule 5 Section 8 and had advised them to obtain independent legal advice. The co-tenancy agreement contains an acknowledgment or waiver as to independent legal advice.
5. The details of the proposal are set out in documents named, particularly the document described as lending opportunity under tab 1, and co-tenancy agreement under tab 2 of the document book.
6. The co-tenancy agreement dated the 1st day of February, 1988 is shown in Tab 8 of the Law Society document book. Each of the co-tenants signed an application for a mortgage loan to provide financing for the purchase. Each of the co-tenants was aware of the details of all of the applications. The solicitor's application showed a real estate asset worth \$325,000.00 with an indebtedness of \$130,000.00. Tab 1 of the document book.
7. On March 28th, 1990, the solicitor transferred his interest in the real property to his wife. Shortly after the transfer, the solicitor became insolvent. He failed to advise his co-tenants of his financial situation and on April 1st, 1990, the co-tenant Racey advanced a further \$80,000.00 by placing a second mortgage on his home.

27th April, 1995

8. The Committee finds that the solicitor had an obligation to advise his co-tenants of the significant change in his personal worth before accepting further financing from Racey. It is probable that Racey would not have advanced the additional funds if he had been aware of the change in the solicitor's financial status.
9. In addition to his breach of duty to his clients, he was guilty of the misconduct set out in paragraphs (b), (c), (d), and (e) of the agreed statement of facts. Taken altogether, the agreed statement of facts is a sorry tale of misconduct by the solicitor that cannot be taken lightly.
10. The Committee was aware that the solicitor had cooperated fully with the Law Society in the investigation of the complaint. The fact that each of the co-tenants raised part of their capital contribution by placing mortgages on their individual properties guaranteed by the solicitor may have contributed to the losses suffered by all. The main cause of the losses however was the collapse of the real estate market.
11. After considering the agreed statement of facts, the viva voce evidence of the solicitor, and the joint submission of counsel, the Committee accepted the joint submission as the most appropriate penalty.

Ian Douglas Knoll Henderson was called to the Bar on the 18th day of April, 1985.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1995

Mary P. Weaver, Q.C.
Chair

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

Ms. Leiper asked that two corrections be made to the Report:

- page 11, paragraph 7., fourth line - change the date of April 1st, 1990 to "April 10th, 1990"
- page 11, paragraph 9, second line - delete first sentence starting with "In addition to his breach of duty...."

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

It was moved by Mr. Carey, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of two years and pay costs in the amount of \$2,500.

Ms. Leiper made submissions in support of the recommended penalty and advised that the costs had been paid.

Mr. Teplitsky also made submissions in support of the recommended penalty but asked that the commencement date be deferred for two months to permit the solicitor time to organize his practice.

27th April, 1995

The motion on the Recommendation as to Penalty was adopted with the suspension to commence on July 1, 1995.

Counsel and solicitor retired.

Re: Oscar Jan MULLERBECK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Hickey and Ms. Palmer and Ms. Richardson withdrew for this matter.

Mr. Perrier appeared for the Society and Mr. Bernard McGarva appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 3rd March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 14th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (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

Michael G. Hickey, Q.C., Chair
K. Julaine Palmer
Nora Richardson

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

Neil Perrier
for the Society

OSCAR JAN MULLERBECK
of the City
of Toronto
a barrister and solicitor

Bernard McGarva
for the solicitor

Heard: December 13, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 17, 1994 Complaint D98/94 was issued and on August 24, 1994 Complaint D244/94 was issued against Oscar Jan Mullerbeck alleging that he was guilty of professional misconduct.

The matter was heard in public on December 13, 1994 before this Committee composed of Michael G. Hickey Q.C., Chair, Nora Richardson and K. Julaine Palmer. The Solicitor was present and was represented by Bernard McGarva. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D98/94

2. a) He failed to serve his client, Sheila Quigley, in a conscientious, diligent and efficient manner regarding the purchase of Unit 312, 160 The Donway West, North York, in that he:
 - i) failed to report on the closing of the transaction;
 - ii) failed to account for monies received and disbursed;
 - iii) failed to respond to her numerous telephone calls; and
 - iv) failed to answer his client's communications dated May 18, 1993, which required an answer.
- b) he failed to provide a reply to the Society regarding a complaint by his client, Sheila Quigley, despite letters dated October 29, 1993 and January 20, 1994, and telephone messages left on December 21, 1993 and January 4, 1994.

Complaint D244/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending October 31, 1993, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

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 D98/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 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 D98/94 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor is a sole practitioner in Toronto.

5. In the fall of 1992, the Solicitor was retained by Ms. Sheila Quigley to act on the acquisition of an interest in land as tenant in common on a percentage basis and leasehold interest and a purchase of shares in a company known as 160 The Donway West Co-ownership Inc. (the "Donway West Inc."). The closing was originally scheduled for December 28, 1992. The closing was delayed as a result of the actions of the assignee of the vendor-take-back mortgage (the "Equitable Trust Co.").

6. On December 27, 1992, the Solicitor met with Ms. Quigley at her house to sign the requisite closing documentation. [Funds were provided to the Solicitor just prior to the closing (January 14, 1993)].

7. As mentioned above, the closing was originally scheduled for December 28, 1992 but it did not actually occur until January 15, 1993. On that date the Solicitor called Ms. Quigley and advised that the deal had closed and that he would forward all documentation to her in "two or three weeks".

8. Between February and May of 1993 (Document Book, Tab 1), Ms. Quigley attempted to contact the Solicitor on numerous occasions by telephone. She left messages with the Solicitor's receptionist as well as messages on the Solicitor's answering machine, inquiring as to the whereabouts of her purchase documentation. No reply was received.

9. By registered letter dated May 18, 1993, Ms. Quigley complained to the Solicitor about his failure to return her telephone calls and his failure to provide her with her purchase documentation. She concluded by asking that the Solicitor expedite the matter. No reply was received.

10. By letter dated August 6, 1993 (Document Book, Tab 2), Ms. Quigley wrote to the Law Society complaining about the Solicitor.

11. By letter dated October 29, 1993 (Document Book, Tab 3), the Law Society wrote the Solicitor enclosing a copy of the letter of complaint and requesting a reply in writing within two weeks or by telephone.

12. On November 18, 1993, the Solicitor contacted the Law Society and requested an extension to November 30, 1993 for his response (Document Book, Tab 4). The Solicitor stated that the extension was required because he was presently preparing the account and report. The Solicitor stated that he would be in a position to report to the Law Society that he had forwarded the requisite materials to the complainant by that date.

13. On December 21, 1993 (Document Book, Tab 5), the Law Society contacted the Solicitor by telephone and left a message with his receptionist, asking for a response to the October 29, 1993 letter (Document Book, Tab 3).

14. On January 7, 1994, a follow-up telephone call requesting a reply was left with the Solicitor's answering machine (Document Book, Tab 5).

15. By registered letter dated January 20, 1994 (Document Book, Tab 6), received by the Solicitor, the Law Society again demanded a reply, reminding the Solicitor of his obligation to reply to the Law Society pursuant to Rule 13, Commentary 3 of the Rules of Professional Conduct and stated that unless a response was received no later than fourteen days from the date of the letter the matter would be referred to Discipline. By way of a letter dated September 26, 1994 (Appendix "A"), the Solicitor provided the Society with a response in respect of his failure to reply.

16. By letter dated December 9, 1994, the Solicitor forwarded to Ms. Quigley a reporting letter with the requisite enclosures.

V. PRIOR DISCIPLINE HISTORY

17. On October 17, 1989, the Solicitor was reprimanded in Committee for his failure to respond to correspondence and telephone calls from the Law Society.

DATED at Toronto this 13th day of December, 1994."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D244/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 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 D244/94 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1984. He practises as a sole practitioner.

5. The Solicitors fiscal year end is October 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending October 31, 1993, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. A Notice of Default in Annual Filing, dated May 4, 1994 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, the Solicitor received a Second Notice of Default in Annual Filing dated June 3, 1994 from the Law Society. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates on defaults in filings. The solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not reply to the Second Notice. A copy of the Society's Second Notice and Acknowledgment of Receipt of a Registered Item card is attached as Exhibit "B" to this Agreed Statement of Facts.

8. The late filing fee began to accrue on June 20, 1994.

27th April, 1995

9. By registered mail, the Solicitor received a Third Notice of Default in Annual Filing dated October 28, 1994 from the Law Society. The Solicitor was advised that his name would go before Convocation on November 25, 1994 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on November 24, 1994. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's Third Notice and Acknowledgment of Receipt of a Registered Item card is attached as Exhibit "C" to this Agreed Statement of Facts.

10. Payment of the late filing fee was made on or about November 22 or 23, 1994.

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

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

V. DISCIPLINE HISTORY

13. On October 17, 1994, the Solicitor was found guilty of professional misconduct for failure to respond to correspondence and telephone calls from the Law Society. The Solicitor was reprimanded in Committee.

DATED at Toronto this 13th day of December, 1994."

RECOMMENDATION AS TO PENALTY

The Committee accepted the joint submission that Oscar Jan Mullerbeck be reprimanded in Convocation if his filings are made prior to his appearance before Convocation. If the filings are not made the Solicitor be suspended for one month and thereafter month to month until filings are completed. The Solicitor is to pay costs in the amount of \$1,000.00 with 30 days to pay.

REASONS FOR RECOMMENDATION

After his call to the Bar in 1984 the Solicitor practised with various firms until 1989 when he commenced practice as a sole practitioner. His practice is largely restricted to small real estate transactions and estates. He serves the Estonian Community, being fluent in the Estonian language and is presently Chair of the St. Lutheran's Estonian Church.

The Solicitor has undergone a period of difficulty in his life and since March, 1993 has been receiving family counselling resulting in some improvement in his personal life.

The Solicitor readily acknowledges the seriousness of the charges and is contrite about the delay in reporting to his client, Sheila Quigley, on the completion of a real estate transaction, and the delay in responding to communications from the Law Society regarding the complaints of his client. Although the client was extremely frustrated by the delay, she suffered no financial loss and is satisfied with the Solicitor's reporting letter.

27th April, 1995

The Committee accepted the joint submission for a reprimand in Convocation if the Solicitor's filings are made prior to his appearance in Convocation, and if the filings are not made the Solicitor is to be suspended for one month, and the suspension is to continue until the filings are made. The Solicitor is to pay costs of \$1,000.00 with 30 days to pay.

Oscar Jan Mullerbeck was called to the Bar on the 10th day of April, 1984.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of March, 1995

Michael G. Hickey, Q.C.
Chair

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

Mr. Perrier advised that two amendments be made to the Report that is:

- page 4, under the head Prior Discipline History - the date October 17, 1989 should be change to "October 4, 1989"
- page 8, first paragraph under the heading Reasons for Recommendation - St. Lutheran's Estonian Church should be changed to "St. Peter's Lutheran Estonian Church"

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

Mr. Perrier advised that the solicitor's filings were made.

It was moved by Mr. Blue, seconded by Mr. Carey that the Recommendation as to Penalty be adopted, that is, that the solicitor be reprimanded and pay costs in the amount of \$1,000 within 30 days.

Both counsel made brief submissions in support of a reprimand in Convocation.

The motion on the Recommendation as to Penalty was adopted.

The solicitor was reprimanded and ordered to pay costs in the amount of \$1,000 within 30 days.

Counsel and solicitor retired.

Convocation took a brief recess at 11:25 a.m. and resumed at 11:40 a.m.

Re: Murray HERMAN - Thornhill

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Topp and Thom and Ms. Graham withdrew for this matter.

Ms. Budweth appeared for the Society and Ms. Chalmers appeared on behalf of the solicitor who was present.

27th April, 1995

Convocation had before it the Report of the Discipline Committee dated 22nd March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (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

Netty Graham, Chair
Laura L. Legge, Q.C.
Stuart Thom, Q.C.

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

Christina Budweth
for the Society

MURRAY HERMAN
of the Town
of Thornhill
a barrister and solicitor

Alan S. Price
for the solicitor

Heard: November 30, 1994 and
February 23, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 10, 1992, Complaint D106/92 was issued and on April 6, 1993, Complaint D98/93 was issued against Murray Herman alleging that he was guilty of professional misconduct.

The matter was heard in public on November 30, 1994 and February 23, 1995 before this Committee comprised of Netty Graham, Chair, Laura L. Legge, Q.C. and Stuart Thom, Q.C. The Solicitor was in attendance at the hearing and was represented by Alan S. Price. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D106/92

2. b) On a number of instances during the period April, 1990 to December, 1990, the Solicitor failed to maintain sufficient balances in his mixed general trust account to meet his obligations with respect to monies held in trust for clients contrary to the provisions of the section 14(12) of Regulation 573.
- c) During the period October, 1988 to May, 1991, the Solicitor failed to maintain books and records in connection with his practice in accordance with the provisions of section 15 of Regulation 573.
- d) On numerous occasions during the period March 19, 1991 to December 19, 1991 he withdrew funds from his trust account representing payment of fees prior to rendering a fee billing to the client contrary to the provisions of section 14(7) of Regulation 573.
- e) He failed to deposit, In Trust, retainer funds in the amount of \$5,000 more or less, in aggregate, received from his clients Hazel Owen-Hicks, Lidia Rietta and Timothy Mew in violation of Sec. 14(1) of Regulation 708.
- f) He violated the provisions of section 14(9) of Regulation 573 in May, 1990 and in December 1991 when he withdrew amounts of \$641.15 and \$988.50 from his trust account contrary to the provisions thereof.
- g) He breached an Undertaking given to the Law Society on June 12, 1991 to respond to written communications within 10 days of receipt of letters, in that he has failed to provide a response to a letter from the Law Society dated February 24, 1992 with respect to a complaint by his client, Frank Esposito, despite requests that he do so;
- h) He failed to honour a financial obligation with respect to an outstanding account dated May 8, 1991 from Dr. Philip Naiman.

Complaint D98/93

2. a) He failed to pay audit costs in the amount of \$1,712.00 assessed pursuant to Rule 50a of the Law Society Act.
- b) He failed to provide a reply to the Law Society regarding outstanding audit costs in the amount of \$1,712.00 despite letters dated July 23, 1992, October 21, 1992, December 21, 1992, January 4, 1993 and February 4, 1993.
- c) He failed to comply with his undertaking to the Law Society dated June 12, 1991 by failing to reply to letters from the Law Society dated May 6, 1992, July 23, 1992, October 21, 1992, December 21, 1992, January 4, 1993 and February 4, 1993 within ten days of receipt.

Evidence

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

"AGREED STATEMENT OF FACTS - D106/92

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D106/92 and is prepared to proceed with a hearing of this matter on February 10, 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 D106/92 and this agreed statement of facts with his counsel, Carol Bargman, and admits the truth of the contents and the truth of the documents attached hereto.

IV. FACTS

4. The Solicitor is 57 years of age. He was called to the bar in 1965 and presently practices as the sole practitioner in Thornhill, Ontario.

Particular 2(b) - Violation of Section 14 (12) of Regulation 573

5. The Solicitor's trust account was in an overdraft position in the months of April, June and December, 1990. Copies of the Solicitor's trust bank statements for these periods are attached collectively as Exhibit 1 to this agreed statement of facts. It is apparent from the document that the shortages were of short duration, one business day.

6. On December 21, 1990, a fellow Solicitor, John Cannings, attempted to negotiate a trust cheque for \$535 representing payment of costs assessed which was drawn on the Solicitor's trust account. The cheque was returned by the bank NSF. The Solicitor has now provided Mr. Cannings with a replacement cheque under cover of letter dated August 16, 1991 a copy of which is attached as Exhibit 2 to this agreed statement of facts. The overdraft in the Solicitor's account was precipitated by an NSF cheque from a client in the amount of \$1,500 which was returned on the same day that the client's cheque was negotiated.

Particular 2(c) - Failure to Maintain Books and Records

7. At the time of the Law Society's attendance to the Solicitor's office in May, 1991, the Solicitor produced bank trust reconciliations and cancelled trust cheques. The Solicitor was not maintaining any other record of disbursements and receipts other than cancelled cheques and a bank passbook. The Solicitor was not using a trust deposit book and did not maintain a general practise account.

8. The following is a list of books and records required by the Regulation which were not maintained by the Solicitor's office prior to the Law Society's attendance in May, 1991.

<u>Required Book/Record</u>	<u>Period Not Maintained</u>
a) Client trust lists	October 1988 to February 1, 1989 and June 30, 1989 to May 1991
b) Trust receipts journals	October 1988 to February 1, 1989 and June 30, 1989 to May 1991
c) Trust disbursements journals	October 1988 to February 1, 1989 and June 30, 1989 to May 1991
d) Client ledger cards	October 1988 to February 1, 1989 and June 30, 1989 to May 1991

Particular 2(e) - Misappropriation of \$ 5,000
Lidia Rietta

17. Lidia Rietta retained the Solicitor in the spring of 1989 in respect of her involvement in a motor vehicle accident. At that time she provided him with a retainer of \$ 1,000.

18. In May, 1991, Mrs. Rietta wrote to the Law Society complaining of the Solicitor's conduct in the matter. Subsequently, the Solicitor issued a fee billing to Mrs. Rietta in the amount of \$600 and provided her with a refund of the remainder of the retainer in the form of a \$400 money order. A copy of the Solicitor's account to Mrs. Rietta dated January 22, 1992 is attached as Exhibit 5 to this agreed statement of facts. The money order was not drawn on his trust account.

19. Mrs. Rietta's money was not deposited into any trust account nor was there any entry on a client ledger card evidencing its receipt. The Law Society does not contend that work on the file was not done.

Hazel Owen-Hicks

20. Mrs. Owen-Hicks retained the Solicitor to act for her in a matrimonial matter on May 9, 1989. Shortly after that meeting Mrs. Owen-Hicks mailed a retainer cheque in the amount of \$2,500 to the Solicitor. On May 15, 1989 the Solicitor negotiated Mrs. Owen-Hicks' cheque.

21. Mrs. Owen-Hicks terminated her retainer on the Solicitor on May 21, 1989 as it appeared that she and her husband were going to resolve their matrimonial differences. She communicated this to the Solicitor and requested a reimbursement of her retainer.

22. By letter dated October 3, 1989, Mrs. Hicks reiterated her request for return of the retainer paid, a copy of Mrs. Hicks' October 3, 1989 letter is attached as Exhibit 6 to this agreed statement of facts.

23. The Solicitor rendered an account to Mrs. Owen-Hicks in the amount of \$500 dated October 23, 1989. The remaining \$ 2,000 was returned at that time. The funds representing the \$2,000 reimbursement did not come from the Solicitor's trust account. When the Society's examiner attended at the Solicitor's office she found an account dated May 13, 1989 in the Owen-Hicks file, a copy of which is attached as Exhibit 7 to this agreed statement of facts.

24. The Society contends that Mrs. Owen-Hicks retainer was not deposited into a trust account. The Solicitor will lead evidence to the contrary.

Timothy Mew

25. Mr. Timothy Mew retained the Solicitor to act for him in a matrimonial matter. Mr. Mew gave the Solicitor a \$1,500 retainer on September 25, 1991.

26. Mr. Mew terminated his retainer and requested the return of his \$1,500 on October 27, 1991.

27. The Solicitor sent Mr. Mew an account dated November 1, 1991 which itemizes fees of \$750 and disbursements of \$69.55 for a total bill of \$819.55. The balance of the retainer was returned to Mr. Mew under cover of the account, a copy of which is attached as Exhibit 8 to this agreed statement of facts.

28. The Solicitor did not deposit Mr. Mew's retainer into a trust account instead he deposited the funds into his own account. He did not prepare a client ledger card evidencing its receipt.

Particular 2(f) - Violation of Section 14(8) and 14(9) of Regulation of 573

29. By cheque dated May 28, 1990, the Solicitor withdrew \$641.15 from trust. The justification for this withdrawal is noted to be "Capital Withdrawal".

30. The Solicitor made additional "capital withdrawals" by cheques 578 and 580 in the amounts of \$1,500.00 and \$15.00 respectively.

31. The Solicitor's bank statement for December, 1991 evidences a debit of \$ 988.50. The accounting notation in regard to this amount is indicated as being to a file for "William Wine". This fee withdrawal was made using a bank withdrawal slip. There is no fee billing on file for this amount.

Particular 2(g) - Breach of Undertaking

32. The Solicitor gave an undertaking to the Society dated June 12, 1991, a copy of which is attached as Exhibit 9 to this agreed statement of facts. The undertaking required the Solicitor to respond to the Society with 10 days of written communications and within 3 days of telephone communications.

33. Mr. Esposito complained to the Law Society of the Solicitor's conduct by letter dated December 13, 1991 a copy of which is attached as Exhibit 10 to this agreed statement of facts.

34. Mr. Esposito had retained the Solicitor in the spring or summer of 1986 to commence an action for recovery of monies owing under a contract. Examinations for discovery were held on December 7, 1987. Mr. Esposito complained that he had received no statement of account or reporting letter from the Solicitor throughout this proceeding. Mr. Esposito further advised that a review of the court file in the fall of 1991 revealed the action had been dismissed at a status hearing on November 21, 1988.

35. The Law Society wrote to the Solicitor by letter dated January 20, 1992 enclosing a copy of Exhibit 10 and requesting the Solicitor's comments within 2 weeks of the date of the letter, a copy of the Law Society's January 20, 1992 letter is attached as Exhibit 11 to this agreed statement of facts.

36. By letter dated February 7, 1992, the Solicitor advised that he had been unaware that the matter had been struck from the trial list that he was in the process of preparing a motion to restore the action. A copy of the Solicitor's letter is attached as Exhibit 12 to this agreed statement of facts.

37. The Society corresponded further with the Solicitor regarding issues raised in Exhibit 12 by letter dated February 24, 1992 copy of which is attached as Exhibit 13 to this statement of facts.

38. A staff member of the Society telephoned the Solicitor on March 11, 1991 regarding the February 24, letter. The Solicitor advised he had not received it and a copy was faxed to him on the same day.

39. On March 25, 1992 a staff member of the Society spoke with the Solicitor who advised he had just fired his secretary and would not be able to respond within the time suggested. It was then agreed that the Solicitor would reply to the Society by Monday, March 30, 1992. On that date the Solicitor telephoned to advise that a temporary secretary whom he hired had not shown up and advised the Society would receive his response by April 1, 1992. The Solicitor telephoned again on April 1, 1992 to advise that the temporary secretary was not expected at his office until April 3, 1992.

27th April, 1995

40. During the April 1 conversation the Solicitor was advised that a handwritten response would be acceptable and that no more extensions would be granted. The Solicitor advised he could not locate the file and the Society would simply have to wait. By registered letter dated April 2, 1992, the Society confirmed its attempts to obtain a response from him and requested a written reply to the questions posed in the letter of February 24, 1992. A copy of the Society's registered letter of April 2, 1992 complete with a registered mail receipt card is attached as Exhibit 14 to this agreed statement of facts.

41. To date the Society has not received a response to its communications requesting the Solicitor's comments regarding Mr. Esposito's complaint.

Particular 2(h) - Failure to Honour Financial Obligation

42. By letter dated December 18, 1991, Mr. Philip Naiman complained to the Society of the Solicitor's failure to honour an account for a medical legal report. A copy of Mr. Naiman's December 18, 1991 letter is attached as Exhibit 15 to this agreed statement of facts. Mr. Naiman's letter accurately sets out the attempts by his office to contact the Solicitor.

43. The Solicitor had retained Mr. Naiman to write the report by letter dated December 21, 1990, a copy of which is attached as Exhibit 16 to this agreed statement of facts.

44. The Society corresponded with the Solicitor by letter dated January 22, 1992, a copy of which is attached as Exhibit 17 to this agreed statement of facts.

45. By facsimile transmission of February 5, 1992 the Solicitor requested the name of the client with respect to Mr. Naiman's account. This information was provided to the Solicitor on February 11, 1992 by telephone. During that telephone conversation the Solicitor indicated he would attempt to recover the funds from the client. The staff member reminded the Solicitor that he had personally undertaken to audit the account "promptly, upon receipt". The Solicitor indicated he was not in a position to pay the account. He was given an opportunity to contact his client in an attempt to recover the funds.

46. A second letter was sent to the Solicitor on February 27, 1992 by registered mail, a copy of this letter is attached as Exhibit 18 to this agreed statement of facts.

47. Telephone messages were left for the Solicitor on April 6 and April 8, 1992 regarding this matter. The Solicitor did return the Society's calls on April 10, 1992 and undertook to deal with the account by the "end of the week".

48. As the matter had not been dealt with a further call was placed by the Society to the Solicitor's office on April 28, 1992 and a message was left for the Solicitor to respond by the end of that week.

49. The Solicitor has not communicated further with the Society or the complainant regarding this outstanding account. The account has not been paid as at Monday, February 8, 1993.

Prior Discipline

50. On April 30, 1974, the Solicitor was reprimanded in convocation for failing to meet financial obligations; failure to reply to letters from the Law Society; failure to maintain sufficient balances in his trust account to meet ongoing obligations to clients and failure to maintain books and records.

51. On June 12, 1991 the Solicitor was reprimanded in committee for failing to reply to the Law Society and failing to cooperate in its investigation.

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

"AGREED STATEMENT OF FACTS - D98/93

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D98/93 and is prepared to proceed with a hearing of this matter on December 8, 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 D98/93 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on March 26, 1965. He practices as a sole practitioner in Thornhill.

Particulars 2 (a), (b) and (c)

5. On January 22, 1992, an audit by the Law Society's Audit and Investigation department was commenced on the Solicitor's practice.

6. By letter dated May 6, 1992, the Society advised the Solicitor that as a result of the problems with his books and records, the audit department performed extra work and a Cost Assessment was made against the Solicitor, pursuant to Rule 50A of the Law Society Act. A copy of the Society's May 6, 1992 letter is attached as Exhibit "A" to this Agreed Statement of Facts. The letter enclosed a copy of the Cost Assessment. The assessed costs amounted to \$1712.00, inclusive of the G.S.T. No response was received from the Solicitor to the Society's correspondence. A copy of the Society's Cost Assessment is attached as Exhibit "B" to this Agreed Statement of Facts.

7. By letter dated June 10, 1992, the Society referred the Solicitor to its earlier letter of May 6, 1992 which remained unanswered. The Solicitor was also reminded that the audit costs remained unpaid. The Solicitor was requested to provide his response forthwith. A copy of the Society's June 10, 1992 letter is attached as Exhibit "C" to this Agreed Statement of Facts. No response was received.

8. By registered mail dated July 10, 1992, the Society attached copies of its earlier letters of May 6 and June 10, 1992, which remained unanswered. The Solicitor was advised that if this matter was not resolved within two weeks from the date of this letter, the matter would be referred to Discipline Counsel. A copy of the Society's July 10, 1992 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

27th April, 1995

9. By letter dated July 17, 1992, the Solicitor advised the Society that he was presently without sufficient funds to pay the audit costs, but would do so as soon as possible. The Solicitor expressed some concern over the amount of the time claimed by the Audit department and requested that the Cost Assessment be reviewed. A copy of the Solicitor's July 17, 1992 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

10. By letter dated July 23, 1992, the Society provided the Solicitor with documentation on the process for appeal of Cost Assessments. The Solicitor was requested to advise the Society whether he intended to appeal same or to pay the Assessment. No response was received. A copy of the Society's July 23, 1992 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

11. By letter dated October 21, 1992, the Society addressed the Solicitor's concerns which he raised in his letter of July 17, 1992. The Solicitor was requested to advise the Society when he expected to be in a position to satisfy this account. No response was received. A copy of the Society's October 21, 1992 letter is attached as Exhibit "G" to this Agreed Statement of Facts.

12. By letter dated December 21, 1992, the Society enclosed a copy of its October 21, 1992 letter which remained unanswered. The Solicitor was requested to provide his response forthwith. No response was received. A copy of the Society's December 21, 1992 letter is attached as Exhibit "H" to this Agreed Statement of Facts.

13. By letter dated January 4, 1993, the Society enclosed a further copy of its October 21, 1992 letter which remained unanswered. The Solicitor was requested to provide his response forthwith to the Society. No response was received. A copy of the Society's January 4, 1993 letter is attached as Exhibit "I" to this Agreed Statement of Facts.

14. By registered mail dated February 4, 1993, the Society enclosed copies of its earlier letters, which remained unanswered. The Solicitor was advised that if this matter was not resolved within two weeks from the date of this letter, it would be referred to Discipline Counsel. No response was received. A copy of the Society's February 4, 1993 letter is attached as Exhibit "J" to this Agreed Statement of Facts.

15. By failing to respond to the above mentioned letters from the Society of May 6, 1992, July 23, 1992, October 21, 1992, December 21, 1992, January 4, 1993, and February 4, 1993, within ten days of receipt of same, the Solicitor has failed to honour his undertaking of June 12, 1991 to the Law Society which reads as follows:

1. To respond promptly to all communications from the Law Society, from clients and from other lawyers; in the case of written communications, within 10 days of the receipt of the letter, and in the case of telephone communications, within 3 days of receipt of such communications.

A copy of the Solicitor's June 12, 1991 undertaking is attached as Exhibit "K" to this Agreed Statement of Facts.

V. DISCIPLINE HISTORY

16. On June 12, 1991, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society and failing to cooperate with the Society's investigation. The Solicitor was reprimanded in Committee and provided an undertaking to the Society.

27th April, 1995

17. On April 30, 1974, the Solicitor was found guilty of professional misconduct for his failure to meet a financial obligation; failure to maintain sufficient balances in his trust account; and failure to maintain books and records. The Solicitor was reprimanded in Convocation.

DATED at Toronto this 10th day of February, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Murray Herman be suspended for a period of two months, that he continue his participation in the Practice Review Program, that he file monthly trust reconciliations with the Law Society for a period of two years, said reconciliations to commence at the time that he will be permitted to do so in light of his recent declaration of Bankruptcy, that he pay the Law Society's costs in the amount of \$2,500.00 and that he undertake to prepare and deliver a file list and that he implement a file tickler system in his office by March 15, 1995.

REASONS FOR RECOMMENDATION

Counsel for the Law Society and for the Solicitor made the above noted recommendation as to penalty by way of a joint submission which was accepted by the Committee as falling within the appropriate range for the misconduct found.

There were several factors that were submitted in support of the penalty and the Committee accepted them as follows:

The Solicitor does not have a lengthy previous discipline record.

The two staff reports from the Practice Review Program of February 3, 1995 and February 20, 1995 clearly indicate that the Solicitor wants to continue practising and has made changes in his office according to recommendations made to him by the Reviewer and staff.

There were no client losses involved in the misconduct found and there was no dishonesty on the part of the Solicitor.

The problems with his books and records have been corrected to the satisfaction of the Law Society.

The Solicitor has and continues to cooperate fully with the Law Society.

The matter of the Solicitor's file list and implementation of the file tickler system in his office remained outstanding at the hearing date. The Committee was made aware that the Solicitor had been ill for a two week period of time between the two staff reports and we therefore accepted as part of the submission as to penalty that the Solicitor undertake to attend to those two outstanding matters by March 15, 1995.

It is hoped that this penalty will be rehabilitative for the Solicitor and that he use the time to put his affairs in order. The misconduct found herein is of a serious nature and requires a suspension as a specific deterrence to the Solicitor and a general deterrence to the profession.

27th April, 1995

Murray Herman was called to the Bar on the 26th day of March, 1965.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of March, 1995

Netty Graham
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Carey, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of two months together with the conditions set out in the Report including the payment of costs in the amount of \$2,500.

Ms. Budweth made submissions in support of the recommended penalty and advised that the only issue of concern was the implementation of a file tickler system by the solicitor.

Ms. Chalmers supported the recommended penalty and advised that the solicitor was working with the Practice Review Program to put a file tickler system in place.

The motion on the Recommendation as to Penalty was adopted.

Counsel and solicitor retired.

Re: David Michael POMER - Woodbridge

The Secretary placed the matter before Convocation.

Messrs. Strosberg and Scott and Ms. O'Connor withdrew for this matter.

Ms. Janet Brooks appeared for the solicitor and Mr. Douglas Crane appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 17th March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

27th April, 1995

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

James Wardlaw, Q.C. Chair
Roger Yachetti, Q.C.
Shirley O'Connor

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

Janet Brooks
for the Society

DAVID MICHAEL POMER
of the Town
of Woodbridge
a barrister and solicitor

J. Douglas Crane
for the solicitor

Heard: January 31, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 8, 1994, Complaint D409/93 was issued and on May 3, 1994, Complaint D19/94 was issued against David Michael Pomer alleging that he was guilty of professional misconduct.

The matter was heard in public on January 31, 1995 before this Committee composed of James Wardlaw, Q.C., Chair, Roger Yachetti, Q.C. and Shirley O'Connor. The Solicitor attended the hearing and was represented by J. Douglas Crane, Q.C. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D409/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending February 28, 1993, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

27th April, 1995

Complaint D19/94

2. a) He failed to provide a reply to the Law Society regarding a complaint by his client, Ed Marchese, despite a letter dated March 18, 1993 and telephone messages left on April 15, April 22, April 29, May 3 and May 7, 1993;
- b) He failed to serve his client, Ed Marchese, in a conscientious, diligent and efficient manner with respect to his claim against his former partners, Pat and Zahida Haghoo in a business known as "All Signs";
- c) Upon the termination of his retainer, he failed to promptly release his client's (Ed Marchese) file to his new solicitor, A. Patrick Wymes, despite a written direction, dated February 18, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D409/93 and D19/94 and is prepared to proceed with a hearing of these matters on January 31 and February 1, 1995.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D409/93 and D19/94 with his counsel, J. Douglas Crane and admits the particulars contained therein. The Solicitor further admits that the said particulars supported by the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 14, 1978. He practices as a sole practitioner.

Complaint D409/93
Particular 2(a)
Failure to File for fiscal year ended February 28, 1993

5. The Solicitor's fiscal year end is February 28th. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending February 28, 1993, as required by section 16(2) of Regulation 708 under the Law Society Act.

6. A Notice of Default in Annual Filing, dated September 10, 1993 was forwarded to the Solicitor by the Law Society (Tab 1, Document Book). The Solicitor acknowledges receipt of the Law Society's Notice.

27th April, 1995

7. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated October 19, 1993. (Tab 2, Document Book) The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on October 25, 1993. The Solicitor acknowledged receipt of the Law Society's Second Notice. The Solicitor did not reply to this correspondence. The Solicitor forwarded the Notice to his accountant, Ferdinando Torrieri, who had been preparing his annual filings since 1978. Mr. Torrieri did not prepare the filing for the fiscal period ended February 28, 1993 due to the time constraints of his business. Mr. Torrieri received telephone calls from the Solicitor and his bookkeeper, Ms. Wong, asking him to attend to the filing. The Solicitor acknowledges his responsibility to ensure that the filing was made on a timely basis. A copy of Mr. Torrieri's letter with respect to the annual filing is attached at Tab 3 of the Document Book.

8. The late filing fee began to accrue on November 10, 1993.

9. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated February 15, 1994. (Tab 4, Document Book) The Solicitor was advised that his name would go before Convocation on March 25, 1994 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on March 24, 1994. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. The Society's Third Notice was signed for and delivered on February 27, 1994. The Solicitor acknowledges receipt of the Law Society's Third Notice.

10. On March 25, 1994, the Solicitor was suspended for non-payment of the late filing fee. (Tab 5, Document Book)

11. On or about March 25, 1994, the Solicitor retained a new accountant, Stefan Pileggi, who completed the annual filing on April 4, 1994. A copy of a letter from Mr. Pileggi with respect to the annual filing is attached at Tab 6 of the Document Book.

12. On April 6, 1994, the Solicitor made the filing for the fiscal year ended February 28, 1993 and paid the late filing fee. He was reinstated on April 8, 1994. (Tab 7, Document Book)

13. On March 3rd, March 17th and March 24th, 1994, two of the Society's examiners attended at the Solicitor's office and confirmed that the books and records of his practice were up to date. Minor inadequacies were noted which were to be dealt with through correspondence with the Society. (Tab 8, Document Book)

Complaint D19/94
Particular 2(a)
Failure to reply to the Law Society

Particular 2(b)
Failure to serve his client, Ed Marchese in a conscientious,
diligent and efficient manner

27th April, 1995

14. On September 2, 1992, Ed Marchese retained the Solicitor in order to obtain an injunction to restrain Zahida Haghoo, a former business partner of Mr. Marchese, and Mrs. Haghoo's husband, from using the downtown business telephone number of Mr. Marchese's company, 770992 Ontario Inc. carrying on business as *All Signs*.

15. The Solicitor did not bring an application for an injunction on Mr. Marchese's behalf, nor did he advise Mr. Marchese that he had not done so.

16. Mr. Marchese delivered certain documentation to the Solicitor's office on September 10, 1992. These documents are:

- a. Letter of instruction dated September 10, 1992 (Tab 9, Document Book);
- b. Summary of Facts prepared by Mr. Marchese (Tab 10, Document Book);
- c. Minute Book of 770992 Ontario Inc. carrying on business as *All Signs* which included corporate resolutions and other corporate documents relating to the transfer of the share from Mrs. Haghoo to Mr. Marchese (Tab 11, Document Book);
- d. Documentation relating to the transfer of Mrs. Haghoo's share: a copy of letter from Rayson, Wallach, the solicitors for Mrs. Haghoo to Mr. Marchese dated June 30, 1992 (Tab 13, Document Book); and
- e. Copy of letter dated September 8, 1992 from Mr. Marchese to Bell Canada (Tab 14, Document Book) in which Mr. Marchese advised Bell Canada that the Solicitor would be in touch with them directly respecting this matter.

17. Mr. Marchese's summary of facts, referred to in paragraph 16 above, provides as follows:

- a. in March of 1979, Ed Marchese established a company to manufacture and sell signs called *All Signs Co.* Mr. Marchese incorporated his company in 1985. In 1988, Mr. Marchese sold 50% of his company to Zahida Haghoo. The new company was incorporated as 770992 Ontario Inc. carrying on business as *All Signs*. The Articles of Incorporation listed Mr. Marchese as the president, Zahida Haghoo as vice-president and Pat Haghoo as chief executive officer.
- b. At the end of 1991, *All Signs* opened a second location. The second location was at the back of a store owned by Mr. Haghoo at which he carried on a "variety" business under the name of *Food Plus*.
- c. In January 1992, Mr. Haghoo, who was responsible for the bookkeeping of *All Signs* requested a separate line for *All Signs* at the back of his *Food Plus* store. The advertisements placed in the 1992 yellow pages indicates two locations for *All Signs* with both the new downtown telephone number arranged by Mr. Haghoo and the old telephone number.
- d. Since February 1992, *All Signs* began to register a financial loss.
- e. In June of 1992, Mr. Marchese discovered that the telephone number listed in the yellow pages as belonging to the downtown *All Signs* had actually been registered by Mr. Haghoo to *Food Plus*.

27th April, 1995

- f. On July 15, 1992, Mr. Marchese entered into an agreement with Mr. and Mrs. Haghoo in which Mrs. Haghoo would sell her share of *All Signs* to Mr. Marchese and renounce the use of the downtown telephone number in the *Food Plus* store.
 - g. On August 18, 1992, Mr. Marchese discovered that the downtown *All Signs* telephone was being answered as *All Signs Centre* and that orders coming through that telephone number were being accepted by Mrs. Haghoo instead of going to Mr. Marchese's company.
 - h. Mr. Marchese and the Haghoo's were unable to come to an agreeable arrangement with respect to the *All Signs* downtown telephone.
18. Mr. Marchese met the Solicitor, by chance, at a dinner party on October 22, 1992. The Solicitor advised Mr. Marchese that he had good news for him and that he would call him the following week. Mr. Marchese did not receive a telephone call from the Solicitor.
19. During the week of November 1, 1992, Mr. Marchese left some telephone messages for the Solicitor requesting he return the calls. The calls were not returned by the Solicitor.
20. By registered mail dated November 20, 1992, (Tab 15, Document Book) Mr. Marchese advised the Solicitor that he would advise the Law Society of his conduct should he not receive a satisfactory explanation regarding the status of his file within twenty-four hours. The Solicitor did not respond to this letter.
21. Mr. Marchese states that on November 30, 1992, he received a telephone call from Bell Canada in which they threatened to disconnect service to his personal telephone number should the outstanding amount of \$2,500.00 not be paid with respect to the downtown business line of *All Signs*. The Solicitor has no knowledge of this telephone call.
22. By letter dated December 1, 1992, (Tab 16, Document Book) Mr. Marchese advised the Law Society of the Solicitor's failure to pursue his matter.
23. By letter dated December 18, 1992, (Tab 17, Document Book) the Law Society forwarded to the Solicitor a copy of Mr. Marchese's December 1st letter. The Solicitor was requested to provide his comments to the same within two weeks. The Solicitor did not respond to this letter.
24. A Law Society staff employee left telephone messages for the Solicitor at his office on January 7, 1993 and January 11, 1993 requesting he return the calls. (Tab 18, Document Book) The calls were not returned.
25. By registered mail dated January 19, 1993, (Tab 19, Document Book) the Law Society forwarded to the Solicitor a copy of its December 18, 1992 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a response within seven days, the matter would be referred to the Discipline Committee. The Solicitor did not respond.
26. A formal Complaint was conditionally authorized against the Solicitor on February 11, 1993 as a result of his failure to reply to the Law Society.
27. A Law Society staff employee left a telephone message for the Solicitor at his office on February 12, 1993 requesting he return the call. (Tab 20, Document Book) The call was not returned.

27th April, 1995

28. By registered mail dated February 25, 1993, (Tab 21, Document Book) the Law Society forwarded to the Solicitor a copy of its December 18, 1992 and January 19, 1993 letters. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a full and complete response to the Law Society on or before March 5, 1993, a formal Complaint would be issued against him.

29. By letter dated March 1, 1993, (Tab 22, Document Book) the Solicitor advised that Law Society that he was attempting to resolve this matter with his client and that a formal response would be forthcoming. No further response was delivered by the Solicitor.

30. A Law Society staff employee left telephone messages for the Solicitor at his office on March 3, 1993 and March 4, 1993 requesting he return the call. (Tab 23, Document Book)

31. The Solicitor returned the Law Society's call on March 4, 1993. The Solicitor advised that he would forward his response the following day by facsimile transmission. The Solicitor was advised that should his response not be received by 5:00 p.m. on March 5, 1993, a formal complaint would be issued against him. (Tab 24, Document Book)

32. By letter dated March 4, 1993, (Tab 25, Document Book) the Solicitor advised the Law Society that Mr. Marchese's matter was of a very specialised nature and that he believed it required the expertise of a lawyer having full knowledge of injunctions. The Solicitor stated that an attempt was made to settle the matter without the necessity of obtaining an injunction. The Solicitor further stated that Mr. Marchese had not provided his office with a monetary retainer. The Solicitor advised that he now has an associate who specialises in litigation and should Mr. Marchese still wish his office to proceed with the matter, that the new associate was willing to do so. The Solicitor advised that he was willing to release the minute book and that the same would be available for pick-up by another solicitor of Mr. Marchese's choosing.

33. By letter dated March 18, 1993, (Tab 26, Document Book) the Law Society advised the Solicitor that in its opinion his letter of March 4, 1993 was not a full and frank reply to the issues raised in Mr. Marchese's letter of December 1, 1992. The Law Society requested the Solicitor advise as to following:

- why he failed to communicate with Mr. Marchese with respect to his case?
- what action had he taken to settle Mr. Marchese's matter without having to take the route of an injunction?
- a chronology of steps he had taken on Mr. Marchese's behalf since their meeting in August of 1992.
- did he offer Mr. Marchese the sum of \$300.00 to settle the matter?

The Solicitor was further advised that a copy of the Society's file had been forwarded to the Director of Insurance as Mr. Marchese had claimed that as a result of the Solicitor's delay in advancing his case he had suffered a personal and financial loss. The Solicitor was requested to provide his response within ten days from the date of the letter. No reply was received.

34. A Law Society staff employee left a telephone message for the Solicitor at his office on April 15, 1993 (Tab 27, Document Book) requesting he return the call. The call was not returned.

27th April, 1995

35. A Law Society staff employee spoke with the Solicitor by telephone on April 22, 1993. The Solicitor advised that he would provide the Law Society with his response by April 30, 1993. (Tab 28, Document Book) No reply was received.

36. A Law Society staff employee left a message for the Solicitor at his office on April 29, 1993 advising that his response was expected by April 30, 1993. (Tab 29, Document Book) The Solicitor did not respond.

37. A Law Society staff employee left a telephone message for the Solicitor at his office on May 3, 1993 requesting that he provide his response by May 5, 1993. (Tab 30, Document Book) The Solicitor did not respond.

38. A Law Society staff employee left a telephone message for the Solicitor at his office on May 7, 1993 requesting that the Solicitor provide his response by May 10, 1993. (Tab 31, Document Book) The Solicitor did not respond.

39. In December 1993, a settlement of Mr. Marchese's claim for damages against the Solicitor was reached through the Society's insurer. The claim was settled at \$2,500 and the Solicitor reimbursed the insurer in that amount. Attached at Tabs 32 and 33 respectively to the Document Book are the Law Society's letter to the Solicitor regarding the settlement and the Solicitor's letter to the Law Society.

40. On January 24, 1995, the Solicitor, through his counsel, advised that the Solicitor did not reply to the Law Society's telephone calls and letters since he understood that the complaint of Mr. Marchese had been resolved by the settlement through the insurer referred to above.

Complaint D19/94
Particular 2(c)
Failure to release file

41. On or about February 18, 1993, the Solicitor was provided with the written direction of Mr. Marchese which directed that the Solicitor release his complete file to his new counsel, Patrick Wymes. (Tab 34, Document Book)

42. The Solicitor released the Minute Book of Mr. Marchese's company to Mr. Marchese directly.

43. The Solicitor failed to release Mr. Marchese's file to Mr. Wymes during the period of time that Mr. Wymes was retained by Mr. Marchese, that is, from February, 1993 to June 1993. However, Mr. Marchese had copies of the documents which he provided to the Solicitor, as outlined in paragraph 16 herein; accordingly, there was not prejudice to Mr. Marchese.

V. DISCIPLINE HISTORY

44. The Solicitor was found guilty of professional misconduct on January 20, 1988 with respect to his failure to serve clients in a conscientious, diligent and efficient manner, failure to reply to telephone calls and letters from other solicitors, having communicated with a member of the public in an unprofessional manner and having breached his undertaking to a fellow solicitor. The Solicitor was reprimanded in Committee and gave an undertaking to participate in the Practice Advisory Service in 1988.

DATED at Toronto, this 31st day of January, 1995."

27th April, 1995

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Michael Pomer be Reprimanded in Convocation.

REASONS FOR RECOMMENDATION

The recommendation is not based on the Solicitor's failure to file his annual returns. The responsibility is that of the Solicitor but the fault is that of his accountant which was freely admitted by the accountant. In the circumstances, the Committee might have converted itself into a Committee hearing an Invitation to Attend with respect to that aspect of the complaints.

The recommendation rather is based on the Solicitor's flagrant disregard of letters and telephone calls from both the Society and client Marchese. These letters and telephone calls began in November 1992 and ran to May of 1993. The response was to ignore them or to give meaningless promises. An eventual Errors and Omissions claim resulted in a payment to the client of \$2,500.00 and the Solicitor reimbursed the Society for that amount.

The Solicitor is not beyond redemption by any means. He has enrolled in the Practice Review Programme on his own initiative as a result of starting to do some litigation work. But, the Solicitor was reprimanded in Committee in 1988 for failing to serve clients in a conscientious, diligent and effective manner; for failure to reply to telephone calls and letters from other solicitors; having communicated with a member of the public in an unprofessional manner and having breached an undertaking to a fellow solicitor. It appears he has not learned from this previous warning and therefore, we recommend that he be reprimanded in Convocation.

David Michael Pomer was called to the Bar on the 14th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 17th day of March, 1995

James Wardlaw, Q.C.
Chair

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

There were no submissions and the Report was adopted.

It was moved by Ms. Graham, seconded by Mr. Carey that the Recommendation as to Penalty be adopted, that is, that the solicitor be reprimanded in Convocation.

Both counsel made submissions in support of the recommended penalty.

The motion on the Recommendation as to Penalty was adopted.

The Treasurer administered the Reprimand.

Counsel and solicitor retired.

Re: Thomas Alan KELLY - North York

The Secretary placed the matter before Convocation.

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

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

Ms. Wootton advised that the solicitor requested an adjournment to the June Discipline Convocation in order to have time to prepare a Notice of Disagreement. The solicitor had undertaken not to practice.

The adjournment was granted to the June Discipline Convocation peremptory to the solicitor.

Counsel retired.

Re: John Melville HARTLEY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg and Thom and Ms. Peters withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 6th October, 1993, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Roger D. Yachetti, Q.C. Chair
Stuart Thom, Q.C.
Paul D. Copeland

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

Neil Perrier
for the Society

JOHN MELVILLE HARTLEY
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 17, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 24, 1993, Complaint D137/93 was issued against John Melville Hartley alleging that he was guilty of professional misconduct.

The matter was heard in public on November 17, 1993, before this Committee composed of Roger D. Yachetti, Q.C., Chair, Stuart Thom, Q.C. and Paul D. Copeland. Mr. Perrier appeared on behalf of the Law Society. Neither the Solicitor nor counsel for the Solicitor appeared before the Committee.

DECISION

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

Complaint D137/93

2. a) He failed to reply to the Law Society regarding an inadequacy discovered during a review of the Form 2 declaration, despite letters dated September 3, 1992, October 2, 1992, November 4, 1992, January 4, 1993 and February 3, 1993.
- b) He failed to comply with his undertaking to the Law Society, dated November 7, 1989, by failing to promptly reply to written communications from the Law Society dated September 3, 1992, October 2, 1992, November 4, 1992, January 4, 1993 and February 3, 1993.
- c) He failed to promptly release files belonging to his former clients Dr. and Mrs. DeMar-Marshall.
- d) He failed to reply to the Law Society regarding a complaint by David R. Miller despite letters dated January 18, 1993 and March 5, 1993, and telephone requests on February 9, 1993, February 12, 1993, February 15, 1993, March 22, 1993 and March 25, 1993.
- e) He failed to comply with his undertaking to the Law Society, dated November 7, 1989, by failing to promptly reply to written and oral communications from the Law Society dated January 18, 1993, February 9, 1993, February 12, 1993, February 15, 1993, March 5, 1993, March 22, 1993 and March 25, 1993.
- f) He failed to reply to the Law Society regarding a complaint by Martha Haines despite letters dated January 28, 1993 and March 5, 1993, and telephone requests on February 15, 1993, February 22, 1993, March 22, 1993 and March 25, 1993.
- g) He failed to comply with his undertaking to the Law Society, dated November 7, 1989, by failing to promptly reply to written and oral communications from the Law Society on January 28, 1993, February 15, 1993, February 22, 1993, March 5, 1993, March 22, 1993 and March 25, 1993.

Evidence

A summary of the evidence with respect to each particular of the complaint follows hereafter.

Particulars 2(a) and 2(b)

Margot Devlin of the Law Society staff (Manager - Examiner Programs) testified with respect to these two particulars. Her evidence was that because the Solicitor had responded affirmatively to holding mortgages in trust on his Form 2 for the Fiscal period ended January 31st, 1992, she sent out her standard inquiry letter dated September 3rd, 1992 which ended with the following paragraph:

"Would you please complete for your own client investors' files a copy of the Form 4 and Form 5 for each of the mortgages or other charges on real property which were being held in trust as at the date of your most recent fiscal year end. Also please provide to us within one month of the date of this letter a list of the mortgages held in trust as at the date of your most recent fiscal year end and copies of the Forms 4 and 5 for each of these mortgages."

The Solicitor did not respond to that letter or to the follow up letters sent by Margot Devlin dated October 2nd, 1992, November 4th, 1992, January 4th, 1993 and February 3rd, 1993, this last letter having been sent by registered mail.

To this date the Solicitor has not responded. We are satisfied that the letters were properly addressed and came to the Solicitor's attention.

As at the date of the hearing the Solicitor had not filed for the fiscal period ended January 31st, 1993.

Particular 2(c)

David R. Miller of the firm of Aird & Berlis gave testimony with respect to this particular. He testified that as a partner in the firm of Aird & Berlis he began acting for Dr. K. Wayne Marshall in December of 1992 in regard to certain island properties in the Peterborough area. He testified that the Solicitor had been retained by Dr. Marshall to obtain severances creating four (4) separate properties that could be sold separately. Mr. Miller told the Committee that an Ontario Municipal Board Order permitting the severances was granted on or about November 18th, 1991 and that a one (1) year limitation period required that the Order be acted upon within the ensuing year. When Dr. Marshall first came to see Mr. Miller, Dr. Marshall believed that the limitation period would not expire until late February of 1993.

What followed were extensive attempts by Mr. Miller to obtain the file from the Solicitor, all of which attempts proved fruitless. The Committee was provided with the following documentation in regard to these attempts:

1. A letter from Dr. Marshall to the Solicitor dated December 21st, 1992 requesting all of his files including the file dealing with the severances;
2. A letter from Mr. Miller to the Solicitor dated December 24th, 1992 requesting the severance file;
3. A letter from Mr. Miller to the Solicitor dated December 29th, 1992 requesting all of Dr. Marshall's files and enclosing a Direction from Dr. Marshall and Mrs. Marshall authorizing the release of these files which letter was sent by facsimile and by courier.

27th April, 1995

4. A memorandum to Mr. Miller's file from his secretary, Karen, dated January 5th, 1993 confirming a telephone request left with the Solicitor's secretary who indicated that she had not yet received instructions from the Solicitor;
5. A further memorandum to Mr. Miller's file from his secretary, Karen, detailing a further telephone request dated January 6th, 1993 and once again recording that the Solicitor's secretary had not been given instructions by the Solicitor;
6. A further memorandum to Mr. Miller's file from his secretary, Karen, detailing a further telephone request on that same date of January 6th, 1993 and containing the Solicitor's secretary's confirmation that the Solicitor had told her that "he would take care of it";
7. The following letter from Mr. Miller to the Solicitor sent by facsimile and dated January 7th, 1993;

Dear Sir:

WAYNE AND VAUGHN MARSHALL

Despite our letters of December 24 and 29, and my secretary's numerous telephone conversations with your secretary, we are still not in receipt of our clients' files from your office. Please be advised that, if I am not in receipt of such files by the close of business today, I will recommend to Dr. Marshall that he immediately contact the Law Society.

In the circumstances, I am certain that the Law Society will share my view that your failure to respond to these matters is most serious.

Yours very truly,
AIRD & BERLIS
David R. Miller
DRM/ker
cc Dr. and Mrs. W. Marshall"

Confirmation slips with respect to the facsimile transmissions were also placed in evidence.

Although the attempts to obtain the file as set out above met with no success, it would appear that the Solicitor sent an account to Dr. and Mrs. Marshall dated January 8th, 1993 which account contained numbers and calculations which according to Mr. Miller made little sense.

Mr. Miller sent a further letter by facsimile to the Solicitor dated January 8th, 1993 in the following terms:

"We have now contacted the Law Society in an effort to obtain our clients' files. We trust that their involvement will ensure that you honour your obligations to immediately forward these files to our office."

Once again a confirmation of receipt slip was filed in evidence and once again, there was no response from the Solicitor.

Mr. Miller next testified that the Solicitor's secretary called and told him that the Solicitor had called her and told her that she could release the files to Mr. Miller and that she would call Mr. Miller the next day when those files were ready to be retrieved. This conversation was confirmed by Mr. Miller's note in the file dated January 11th, 1993 at 5:29 p.m.

A further note in the file confirmed Mr. Miller's conversation with the Solicitor's secretary on the following date in which the secretary confirmed that she did not have the files, that they were not ready to be retrieved and that she would call back.

27th April, 1995

The Solicitor's secretary did not call that day or the next day but Mr. Miler did call on the 14th day of January at 3:49 p.m., as confirmed by a further note in his file. On this occasion the Solicitor's secretary advised Mr. Miller that she understood that the Solicitor was going to "take care of it". Later that day at 4:40 p.m., the Solicitor's secretary called Mr. Miller to advise that she could not locate the Solicitor but that she would relay to him the urgency of the matter.

Ultimately, on January 19th, 1993 Mr. Miller issued a Notice of Action by Dr. Marshall and Mrs. Marshall against the Solicitor claiming recovery of all files \$750,000.00 in damages and other relief.

Before the actual hearing of a Motion for an Order for recovery of the files Mr. Miller received from the Solicitor the file or files relating to the severances. Subsequently Mr. Miller obtained an Order for the recovery of all of the Marshall files from the Solicitor.

Since the limitation period had already expired on or about the 18th day of November 1992, the Marshalls reapplied for the severances in question but were denied at the Council level. As at the date of this hearing an appeal to the Ontario Municipal Board was pending. According to Mr. Miller the damages could range from \$500,000.00 to \$750,000.00 if new severances are not obtained.

Finally, Mr. Miller confirmed that the Solicitor had never spoken to him or come to see him and as far as Mr. Miller was concerned was probably not in his office at the relevant times.

Particular 2(d)

Mr. Miller's formal letter of complaint to the Law Society concerning the Solicitor in relation to his failure to deliver the Marshall files was sent to the Law Society by facsimile letter dated January 8th, 1993 (Tab 25 of Exhibit 4). Paul McCormick, a complaints staff lawyer with the Law Society was called as a witness in regard to the processing of that complaint. Basically, as set out in the particular itself, Mr. McCormick testified that he wrote to the Solicitor on two (2) separate occasions and made five (5) separate telephone requests for a response to the complaint. All of these attempts to elicit a response from the Solicitor failed. The letter of March 5th, 1993 was sent by registered mail and receipt of the letter by the Solicitor's secretary was confirmed by an Acknowledgment of Receipt Card filed in evidence (Tab 27 of Exhibit 4). The only response received was a letter from the Solicitor's secretary dated March 9th, 1993 in which she advised Mr. McCormick that Mr. McCormick's letter of March 5th, 1993 would be placed before the Solicitor on his return to his office on March 12th, 1993. Mr. McCormick testified that the solicitor never did contact him.

Particulars 2(e) 2(f) and 2(g)

Mr. McCormick testified that the Solicitor signed an undertaking dated November 7th, 1989 in which he undertook to reply to written and oral communications from the Law Society in a prompt fashion. That undertaking was received in evidence under Tab 32 of Exhibit 4.

Mr. McCormick testified that the Solicitor's client, Martha Haines, wrote a letter of complaint to the Solicitor dated January 12th, 1993 and sent a copy of that complaint to the Law Society. The complaint was related to a child support matter and the Solicitor's total lack of communication with the client in this regard. By letter dated January 28th, 1993 sent by fax by Mr. McCormick to the Solicitor, the Solicitor was asked for his comments in regard to the complaint of Martha Haines.

27th April, 1995

Mr. McCormick sent a follow up registered letter to the Solicitor dated March 5th, 1993 but, once again, received no response. In the interim, there were to (2) telephone messages left with the Solicitor's office on February 15th, 1993 and February 22nd, 1993 which messages went unanswered. Receipt of the letter by the Solicitor's office was confirmed by the same Acknowledgement of Receipt Card filed as an exhibit with respect to the Marshall complaint referred to above.

Subsequent telephone messages of March 22nd and March 25th of 1993 also went unanswered.

The Solicitor's undertaking of November 7th, 1989 referred to previously was the subject of a letter from Shaun M. Devlin, Discipline Counsel for the Law Society to the Solicitor dated November 17th, 1989. That letter read as follows:

"Dear Mr. Hartley:

Thank you for your executed undertaking dated July 12, 1989 sent by fax. I trust that, in the circumstances, the faxed copy can be treated as an original for the purposes of the Society.

As we discussed, any breach of the undertaking in the future could lead to formal disciplinary proceedings and the undertaking could be filed as evidence at such hearing.

With regard to the interpretation of the undertaking, I have advised you that it is my opinion that your obligation to reply promptly means that you should reply to written correspondence within two weeks of your receipt of that correspondence and to reply to telephone communications by the end of the second working day that you are in the office after the receipt of such messages. I have told you that I anticipate that the undertaking will be monitored this way by the staff of the Society and that, if you fail to meet such deadlines, authorizations may be sought for formal disciplinary proceedings in the unfortunate event that you exhibit a delay to that extent. The decision to issue a complaint in such circumstances would rest with the Chairman or Vice-Chairman of the Discipline Committee. If proceedings were authorized, the Discipline Committee would make the final determination as whether such conduct amounted to a breach of the undertaking and amounted to professional misconduct in the circumstances.

Yours truly,
Shaun M. Devlin
Discipline Counsel"

DISCIPLINE HISTORY

A finding of professional misconduct against the Solicitor was confirmed by Convocation on the 23rd day of November 1993. Convocation imposed a penalty of a suspension for a period of three months with conditions and ordered to pay costs in the sum of \$5,000.00.

RECOMMENDATION AS TO PENALTY

Your Committee recommends that John Melville Hartley be disbarred.

27th April, 1995

REASONS FOR RECOMMENDATION

Counsel for the Law Society filed as exhibits in this matter a letter from the Law Society Staff Trustee to the Solicitor dated September 3rd, 1993 (Exhibit 5) as well as the report of the Discipline Committee dated October 6th, 1993 (Exhibit 6). Those exhibits are attached hereto for Convocations consideration.

Having heard all of the evidence with no explanation from the Solicitor who, although duly served and well aware of the proceedings against him, failed to appear for his hearing, we have no hesitation in recommending to Convocation that the Solicitor be disbarred. Convocation is asked to consider the following factors in reviewing this recommendation:

1. It would appear that the Solicitor has abandoned his law practice as well as his obligations to the Law Society;
2. The facts established in regard to the present complaint;
3. Mr. Hartley's failure to attend the hearing of that complaint, although duly served and having been advised of the seriousness of the matter;
4. Mr. Hartley's previous encounter with the discipline process as recorded in Exhibit 6, being a report of a Discipline Committee dated October 6th, 1993 and resulting from a hearing of three (3) complaints in July of 1993;
5. Mr. Hartley's failure to attend that hearing;
6. Mr. Hartley's total disregard for his clients;
7. Mr. Hartley's total disregard for the Law Society, indicating complete ungovernability.

Counsel for the Law Society has provided your Committee with four (4) relevant decisions of Convocation in the cases of Gordon Ross MacKay, Thomas Bruce Robson, Douglas Keith Robertson and Howard Norman Gasoi. In the case of Robson, the solicitor was permitted to resign, whereas in the other three (3) cases, the solicitors were ordered disbarred.

The principle is clear: Where a solicitor exhibits unaccountability to his clients and ungovernability by the Law Society, the solicitor should be disbarred.

John Melville Hartley was called to the Bar on the 13th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 6th day of October, 1995

Roger D. Yachetti,
Chair

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

Carried

The Recommendation of the Committee was that the solicitor be suspended for 3 months, such suspension to continue until the solicitor complied with the conditions set out in the Report.

Mr. Perrier made submissions for an increased penalty of disbarment. He advised that the solicitor was ungovernable and had abandoned his practice.

27th April, 1995

It was moved by Mr. Lerner, seconded by Mr. Brennan that the solicitor be disbarred.

Carried

Counsel retired.

Re: David Samuel HOVLAND - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Howie and Blue and Ms. Graham withdrew for this matter.

Ms. Leslie Cameron appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 22nd March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (marked as 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
Ian Blue, Q.C.
Netty Graham

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

Audrey Cado
for the Society

DAVID SAMUEL HOVLAND
of the City
of Toronto
a barrister and solicitor

Not Represented
for the Solicitor

Heard: October 18, 1994 and
February 23, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 1, 1994, Complaint D405/93 was issued against David Samuel Hovland alleging that he was guilty of professional misconduct.

The matter was heard in public on October 18, 1994 and February 23, 1995 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Ian Blue, Q.C. and Netty Graham. The Solicitor attended the hearing and was not represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

2. a) He has failed to file with the Society, since his call to the Bar on February 7, 1992, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D405/93 and is prepared to proceed with a hearing of this matter on October 18 and 19, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D405/93 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on February 7, 1992. He practised as a sole practitioner from April 1, 1992 to March 31, 1993 when he joined the firm Sclodnick & Associates as an associate.

5. The Solicitor has not filed his Form 2 or Form 3 since his call to the Bar on February 7, 1992. As the Solicitor has not advised the Law Society of his fiscal year, for the purposes of the Notices and accrument of the late filing fee, the Law Society assumes the Solicitor's day of call to the Bar, February 2nd, as his fiscal year end. The Solicitor has not filed for the fiscal year ended February 7, 1993, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. On December 18, 1992, the Solicitor forwarded to the Law Society his Form 2 for the fiscal year ended March 31, 1993. A copy of the Solicitor's December 18, 1992 letter is attached as Exhibit "A" to this Agreed Statement of Facts. The Law Society did not receive the Solicitor's December 18, 1992 letter.

27th April, 1995

7. A Notice of Default in Annual Filing, dated September 10, 1993 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "B" to this Agreed Statement of Facts.

8. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated October 19, 1993. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on October 25, 1993. A copy of the Society's Second Notice and Acknowledgement of receipt of a registered item is attached as Exhibit "C" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

9. The late filing fee began to accrue on November 10, 1993.

10. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated February 15, 1994. The Solicitor was advised that his name would go before Convocation on March 25, 1994 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on March 24, 1994. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. The Society's Third Notice was signed for and delivered on February 18, 1994. A copy of the Society's Third Notice and Acknowledgement of receipt of a registered item card is attached as Exhibit "D" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

10. The Solicitor's rights and privileges as a member of the Law Society were suspended by Convocation on March 25, 1994.

11. On or about May 31, 1994, the Solicitor attended at the Law Society and paid the late filing fee and reinstatement fee. The Solicitor attempted to provide the Law Society with his Form 2 for the fiscal year ended March 31, 1993. The Law Society's audit department advised him that a Form 2 was only acceptable with the Form 3. The Solicitor advised that he was under the mistaken impression that the 1993 and 1994 filing could be provided by September 30, 1994.

12. A Notice of Default in Annual Filing, dated September 7, 1994, was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "E" to this Agreed Statement of Facts. The Solicitor advises that he did not receive the Law Society's Notice dated September 7, 1994.

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

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

V. DISCIPLINE HISTORY

15. The Solicitor does not have a discipline history.

DATED at Toronto this 18th day of October, 1994."

27th April, 1995

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Samuel Hovland be reprimanded in Convocation. However, if the filings have not been made at the time of Convocation, then it is recommended that the Solicitor be suspended for a period of one month and said suspension to continue thereafter until such time as the filings have been made. The Solicitor is also to pay the Society's costs at \$250.00.

REASONS FOR RECOMMENDATION

This matter was first dealt with by the Committee on October 18, 1994 and a finding of professional misconduct was made on that date.

Attached hereto and marked Schedule "A" is an excerpt from the transcript of the hearing on October 18, 1994 which is self evident.

When the Committee reconvened on February 24, 1995, we were advised that the filings not only had not been made by the end of December, 1994, but were still not filed on the date of the hearing.

The Solicitor indicated that he had to change accountants during this time, but did not advise the Law Society of that fact.

Under all of the circumstances and keeping in mind the position of the Committee which was clearly set out to the Solicitor in October both verbally and subsequently by way of a copy of the transcript, which the Solicitor acknowledges receipt of, we respectfully make the above noted recommendation as to penalty.

David Samuel Hovland was called to the Bar on the 7th day of February, 1992.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of March, 1995

Netty Graham (for the Committee)

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

There were no submissions and the Report was adopted.

Convocation was advised that the solicitor's filings were made on March 22, 1995.

It was moved by Ms. Palmer, seconded by Mr. Bragagnolo that the Recommendation as to Penalty be adopted, that is, that the solicitor be reprimanded and pay costs in the amount of \$250.

Both counsel and the solicitor made brief submissions in support of the recommended penalty.

The motion on the Recommendation as to Penalty was adopted.

27th April, 1995

The Treasurer administered the reprimand.

Counsel and solicitor retired.

Re: Steven Walter JUNGER - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Blue and Ms. Graham withdrew for this matter.

Ms. Gagnon appeared for the Society and Ms. Chalmers appears for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 14th February, 1995, together with an Affidavit of Service sworn 20th March, 1995 by David Munro that he had effected service on the solicitor personally on 20th March, 1995 (marked Exhibit 1), together with the Report of the Discipline Committee and an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th February, 1995 (marked Exhibit 2) together with the Acknowledgement, Declaration and Consent signed by the solicitor March, 1995 (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ross W. Murray, Q.C., Chair
Ian Blue
Netty Graham

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

Stephen Foster
for the Society

STEVEN WALTER JUNGER
of the City
of Toronto
a barrister and solicitor

Ken Jones
for the solicitor

Heard: July 19, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 6, 1993, Complaint D275/93 was issued, on November 18, 1993, Complaint D310/93 was issued and on May 31, 1994, Complaint D155/94 was issued against Steven Walter Junger alleging that he was guilty of professional misconduct.

The matter was heard in public on July 19, 1994 before this Committee composed of Ross W. Murray, Q.C., Chair, Netty Graham and Ian Blue. The Solicitor was present at the hearing and was represented by Ken Jones. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D275/93

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

Complaint D310/93

2. a) He failed to serve his client, Tony Primerano, in a conscientious, diligent and efficient manner in that he failed to keep Mr. Primerano reasonably informed of the status of his civil action, court file 92CU 62925 (Toronto);
- b) He failed to provide his client, Tony Primerano, with a complete report of a real estate and mortgage transaction regarding properties municipally known as 48 Tansely Road, Thornhill and 186 Westhampton Drive, Thornhill;
- c) He failed to provide a reply to the Law Society regarding a complaint by Tony Primerano, despite a letter dated May 31, 1993 and telephone messages left on July 21, 1993, July 27, 1993 and August 23, 1993.
- d) He failed to provide his client, Canada Trust, with a complete report of a mortgage transaction regarding a property known municipally as 183 Lee Avenue, Toronto;
- e) He failed to provide a reply to the Law Society regarding a complaint by Canada Trust despite letters dated August 3, 1993 and August 31, 1992 and telephone messages left on August 20, 1993 and August 25, 1993;
- f) He failed to provide his client, Marion V. Furlotte, with a complete report of a real estate and mortgage transaction regarding property municipally known as 55 Grove Drive, Brampton;
- g) He failed to provide a reply to the Law Society regarding a complaint by Marion V., Furlotte despite a letter dated May 31, 1993 and telephone messages left on July 21, 1993, July 27, 1993 and August 23, 1993.

27th April, 1995

Complaint D155/94

2. a) He failed to cooperate with the Law Society's Examiner in conducting an audit, pursuant to section 18 of Regulation 708 of the Law Society Act by failing to produce all of this books and records as required by section 15 of Regulation 708 of the Law Society Act.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D275/93 and D310/93 and is prepared to proceed with a hearing of these matters on July 19, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D275/93 and D310/93 and admits that the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

Complaint D275/93
Particular 2(a) Failure to File for the Fiscal Year Ended November 30, 1992

4. The Solicitor was called to the Bar on March 30, 1990.
5. The Solicitor practised as an employee of a law firm until November, 1991. The Solicitor began to practise as a sole practitioner in mid-December, 1991.
6. The Solicitor did not advise the Law Society of the termination of his fiscal year as required by S.16(1) of Regulation 708 made under the Law Society Act.
7. The Solicitor states that his fiscal year end is January 31.
8. The Solicitor did not file his Form 3 within six months of his fiscal year ending January 31, 1992 as required by S.16(2) of Regulation 708 made under the Law Society.
9. A Notice of Default in Annual Filing, dated June 2, 1993 (Tab 1, Document Book) was forwarded to the Solicitor by the Law Society stating that: Filings are due under section 16 within six months from the end of your fiscal year, or by November 30th in each year if Form 2 only is to be filed. According to our records, the date of your last filing under section 16 was for the period ending 30 November, 1991.

27th April, 1995

10. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated July 7, 1993 (Tab 2, Document Book). The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 26 of the Law Society Act. The Solicitor was advised that the paying of a late filing fee would not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not respond to this correspondence.

11. The late filing fee began to accrue on July 23, 1993 based on the default to file from November 30, 1992. In February, 1994 the Solicitor paid a \$1,500.00 late filing fee.

12. The Solicitor made the filings on July 19, 1994.

Complaint D310/93

Particular 2(a) Solicitor failed to keep his client, Tony Primerano reasonably informed as to the status of his civil action, court file no. 92CU 62925 (Toronto)

13. In early February, 1993, Tony Primerano consulted the Solicitor about a lawsuit against him by Municipal Savings and Loan Corporation, Court file no. 92CU 62925.

14. The Solicitor looked into the matter and reported to Mr. Primerano that default judgment had been obtained and that he would look into bringing a motion to set the judgment aside.

15. Mr. Primerano and his wife attempted to contact the Solicitor on numerous occasions between February, 1993 and May 1, 1993. On each occasion a telephone message was left for the Solicitor at his office requesting he return the call. Mr. Primerano says that the calls were not returned. The Solicitor states that he attempted to return the calls to Mr. Primerano's place of business, and left messages, but Mr. Primerano did not return those calls.

16. On or about May 4, 1993, Mr. Primerano, by chance at a hockey game, spoke with the Solicitor. The Solicitor advised Mr. Primerano that he had only received two or three of his telephone messages. The Solicitor assured Mr. Primerano that he would contact him by telephone the next business day. Mr. Primerano has neither heard nor received any documentation from the Solicitor. The Solicitor states that he left a telephone message at Mr. Primerano's place of business on or about May 5, 1993.

17. The Solicitor states that after looking into the matter at the time and determining in consultation with Mr. Primerano that there was no defense to the suit against Mr. Primerano, he determined that a motion to set aside the default would fail. However, the Solicitor admits that he failed to serve his client, Mr. Primerano, by not keeping him informed of the status of this matter.

Particular 2(b) Solicitor's Failure to provide his client, Tony Primerano, with a complete report of a real estate and mortgage transaction regarding properties municipally known as 48 Tansley Road, Thornhill, and 186 Westhampton Drive, Thornhill.

18. In January 1992, Cheryl Obront retained the Solicitor to act on her behalf regarding the sale of a property municipally known as 48 Tansley Road, Thornhill, Ontario. The sale closed in early March, 1992.

27th April, 1995

19. On May 28, 1992, the closing of the purchase of property municipally known as 186 Westhampton Drive, Thornhill, for Ms. Obront and her fiancée, Tony Primerano, was completed, subject to the need to put in place additional financing through the Toronto-Dominion Bank. In August, 1992 this additional financing was secured.

20. Subsequent to August, 1992 the Solicitor failed to provide to Ms. Obront and Mr. Primerano the closing documentation, a reporting letter and formal written account as to how the funds were disbursed on closing regarding both the sale and purchase. The Solicitor states that, at the time of closing the purchase transaction, in May of 1992, he reviewed in detail the way in which funds had been and would be disbursed, with both Ms. Obront and Mr. Primerano.

21. Mr. Primerano says that he tried on numerous occasions from December, 1992 to May, 1993 to obtain the closing documentation. Mr. Primerano says that the Solicitor did not respond to any of his communications. The Solicitor states that he attempted to return Mr. Primerano's calls on several occasions, leaving messages for Mr. Primerano that were not returned. The Solicitor further states that when Mr. Primerano consulted him and spoke with him in February of 1993, regarding the lawsuit, no mention was made by Mr. Primerano of this matter and no request was made for documentation or an accounting of any kind.

22. During the last week of November, 1993, Mr. Primerano spoke to the Solicitor by telephone. The Solicitor advised that he would drop the closing documentation off at Mr. Primerano's store on December 3, 1993. The documents were not received.

23. During the week of December 6, 1993, Mr. Primerano spoke with the Solicitor by telephone. The Solicitor advised that he would forward the documents to Mr. Primerano, by registered mail, that week. The documents were not received.

24. By letter dated February 24, 1994, the Solicitor apologized to Mr. and Mrs. Primerano for the delay in reporting on these matters. A copy of the Solicitor's letter of apology is attached at Tab "A" of the Book of Documents.

25. Enclosed with the Solicitor's letter of February 24, 1994 were the reporting letters to Mr. and Mrs. Primerano concerning these matters. Copies of the reporting letters are attached at Tab "B" of the Book of Documents.

Particular 2(c) Failure to Reply to the Law Society - Primerano

26. By letter dated May 4, 1993 (Tab 3, Document Book), Mr. Primerano advised the Law Society of the Solicitor's failure to inform him of the status of his civil action, Court File no. 92CU 62925 and his failure to provide him and Ms. Obront with the closing documentation on their purchase and sale.

27. By letter dated May 31, 1993 (Tab 4, Document Book), the Law Society forwarded to the Solicitor a copy of Mr. Primerano's May 4th letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

28. A Law Society staff employee left telephone messages for the Solicitor on his answering machine on July 21, 1993, July 27, 1993 and August 23, 1993 requesting he return the calls. A copy of the Society's verbal transaction form is contained at Tab 5, of the Document Book. The calls were not returned.

27th April, 1995

29. By registered mail dated August 26, 1993 (Tab 6, Document Book), the Law Society forwarded to the Solicitor a copy of its May 31st letter. The Solicitor was reminded of his obligation to reply to communications from the Law Society. The Solicitor was advised that should he fail to provide a reply to the Law Society within seven days, the matter would be referred to the Discipline Committee. The Law Society's August 26th letter was returned by the post office marked "unclaimed".

30. The Solicitor was married on August 26, 1993. He and his spouse were away on a short honeymoon after that, which was cut short by three deaths in the family. The Solicitor does not recall receiving a notice of registered letter at Tab 6. However, it should be noted that the registered letter from the Society at Tab 20 was set a few days after the item at Tab 6 and received by the Solicitor.

31. The Solicitor did not request an extension to reply nor did he provide the Society with an explanation for his failure to reply.

32. By letter dated February 25, 1994 the Solicitor replied to the Law Society in respect of these matters. A copy of the Solicitor's letter dated February 25, 1994 is attached at Tab "C" of the Book of Documents.

Particular 2(d) Failure to provide his client, Canada Trust, with a complete report of a mortgage transaction regarding a property municipally known as 183 Lee Avenue, Toronto

and

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

33. On June 26, 1992 Canada Trust advanced funds to the Solicitor, for which he had been retained to ensure that a mortgage was registered respecting the same, on property municipally known as 183 Lee Avenue, Toronto.

34. By letter dated July 27, 1992 (Tab 7, Document Book), Canada Trust requested the Solicitor provide all the final documentation regarding the advance of funds within fifteen days. No reply was received.

35. By letter dated August 18, 1992 (Tab 8, Document Book), Canada Trust requested the Solicitor forward the final documents as soon as possible. No reply was received.

36. By letter dated September 11, 1992 (Tab 9, Document Book), Canada Trust requested the Solicitor forward the duplicate registered mortgage, Solicitor's final report, sheriff certificate and tax certificate. No reply was received.

37. A staff employee of Canada Trust left a telephone message for the Solicitor at his office on October 1, 1992 requesting he return the call. The call was not returned.

38. By letter dated October 19, 1992, (Tab 10, Document Book), Canada Trust requested the Solicitor forward the final documentation. No reply was received.

39. A staff employee of Canada Trust left a telephone message for the Solicitor at his office on February 2, 1993 requesting he return the call. The call was not returned.

40. By letter dated February 22, 1993 (Tab 11, Document Book), Canada Trust advised the Solicitor that should the final documentation not be received by March 5, 1993, the matter would be referred to the Law Society. No reply was received.

27th April, 1995

41. By letter dated April 6, 1993 (Tab 12, Document Book), Canada Trust advised the Law Society of the Solicitor's failure to respond to its numerous letters and telephone calls requesting the final documentation regarding funds advanced on property known municipally as 183 Lee Avenue, Toronto.

42. A Law Society staff employee spoke with the Solicitor by telephone on April 29, 1993. The Solicitor advised that he would forward the required documents to Canada Trust within a week and confirm the same with the Society. A copy of the Society's verbal transaction form is contained at Tab 13, of the Document Book. As of May 19, 1993, Canada Trust had not received any documents from the Solicitor.

43. By letter dated May 21, 1993 (Tab 14, Document Book), the Law Society forwarded to the Solicitor a copy of Canada Trust's April 6, 1993 letter. The Solicitor was requested to confirm with the Law Society, within two weeks, that the documentation had been forwarded to Canada Trust. No reply was received.

44. A Law Society staff employee left telephone messages for the Solicitor at his office on June 11, 1993 and June 24, 1993 requesting he return the calls. A copy of the Society's verbal transaction form is contained at Tab 15 of the Document Book.

45. The Solicitor returned the Law Society's calls on June 25, 1993. The Solicitor advised that he had delivered the documentation to Canada Trust the night before. A copy of the Society's verbal transaction form is contained at Tab 15 of the Document Book.

46. By letter dated June 24, 1993 (Tab 16, Document Book), the Solicitor provided Canada Trust with his Solicitor's final report and documentation. The Solicitor apologized to Canada Trust for his delay in providing the same. The Solicitor advised Canada Trust that should they have any questions concerning the documentation, to contact him.

47. A staff employee of Canada Trust left telephone messages for the Solicitor at his office on June 29, 1993 and July 7, 1993 requesting he return the calls. Canada Trust called the Solicitor in an attempt to obtain insurance particulars which were not provided with his June 24, 1993 letter. The calls were not returned.

48. A staff employee of Canada Trust advised the Law Society by telephone on July 14, 1993 that the insurance particulars were not included in the documents received from the Solicitor. A copy of the Society's verbal transaction form is contained at Tab 17 of the Document Book.

49. A Law Society staff employee left telephone messages for the Solicitor at his office on July 14, 1993, July 20, 1993 and July 22, 1993 requesting he return the calls. A copy of the Society's verbal transaction form is contained at Tab 17 of the Document Book. The calls were not returned.

50. By letter dated August 3, 1993 (Tab 18, Document Book), the Law Society requested the Solicitor provide written confirmation that Canada Trust had been provided with the insurance particulars. The Solicitor was requested to provide confirmation within two weeks of the date of this letter. No reply was received.

51. A Law Society staff employee left telephone messages for the Solicitor on his office answering machine on August 20, 1993 and August 25, 1993 requesting he return the calls. A copy of the Society's verbal transaction form is contained at Tab 19 of the Document Book. The calls were not returned.

27th April, 1995

52. By registered mail dated August 31, 1993 (Tab 20, Document Book), the Law Society forwarded to the Solicitor a copy of its August 3, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a reply within seven days of the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

53. The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply. On November 18, 1993 the formal Complaint was issued in this matter.

54. By letter January 18, 1994 the Solicitor reported to Canada Trust in respect of this matter. A copy of the Solicitor's letter of January 18, 1994 is attached at Tab "D" of the Book of Documents.

55. By letter dated January 18, 1994 the Solicitor replied to the Law Society in respect of this matter. A copy of the Solicitor's letter of January 18, 1994 is attached at Tab "E" of the Book of Documents.

Particular 2(f) Failure to provide his client, Marion V. Furlotte, with a complete report of a real estate and mortgage transaction regarding property municipally known as 55 Grove Drive, Brampton.

Particular 2(g) Failure to Reply to the Law Society

56. On or about November 15, 1992, Marion V. Furlotte and her son, Alan P. Furlotte purchased real property municipally known as 55 Green Drive, Brampton.

57. The Solicitor advised Mrs. Furlotte that the closing documentation and a refund would be forwarded to her and her son by the end of February, 1993. As Mr. Furlotte qualified for the Ontario Home Ownership Savings Plan, a return of the Land Transfer Tax had been applied for by the Solicitor.

58. Sometime between February, 1993 and April 6, 1993, after leaving numerous telephone messages for the Solicitor on his answering machine, the Solicitor advised Mrs. Furlotte that his answering machine was not working properly and that as it appeared the Land Transfer Tax Application had been lost in the mail, he was attempting to trace it. The Solicitor advised Mr. Furlotte that he would forward the documentation to her once everything was completed.

59. On April 7, 1993, the Solicitor advised Mrs. Fulotte that he had mailed the closing documentation to her. No papers were received.

60. On April 27, 1993, Mrs. Furlotte left a message for the Solicitor on his answering machine requesting he return the call. Mrs. Furlotte requested the mortgage broker, who had referred her to the Solicitor, Bruno Marsalla, contact the Solicitor on her behalf. Mr. Marsalla advised Mr. Furlotte, that same day, that the Solicitor had advised him that should she not receive the documentation within a week, to contact the Solicitor's office and he would forward a copy of same.

61. By letter dated May 5, 1993 (Tab 21, Document Book), Mrs. Furlotte advised the Law Society of the Solicitor's failure to provide her with the final report and closing documentation.

62. By letter dated May 31, 1993 (Tab 22, Document Book), the Law Society forwarded to the Solicitor a copy of Mrs. Furlotte's May 7, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

63. A Law Society staff employee left telephone messages for the Solicitor on his answering machine on July 21, 1993, July 27, 1993 and August 23, 1993 requesting he return the calls. A copy of the Society's verbal transaction form is contained at Tab 23 of the Document Book. The calls were not returned.

64. By registered mail dated August 26, 1993 (Tab 24, Document Book), the Law Society forwarded to the Solicitor a copy of its May 31, 1993 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. The Society's August 26, 1993 letter was returned by the post office marked "unclaimed". It was contained in the same envelope as the letter at Tab 6 of the Document Book, also not received by the Solicitor. See also Paragraph 30 above.

65. The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply. On November 18, 1993 the formal Complaint was issued in this matter.

66. By letter dated February 24, 1994 the Solicitor apologized to Mr. and Mrs. Furlotte for his delay in reporting on this matter. A copy of the Solicitor's letter of February 24, 1994 is attached at Tab "F" of the Book of Documents.

67. Enclosed with the Solicitor's letter of February 24, 1994 was the Solicitor's reporting letter to Mr. Furlotte and Ms. Furlotte. A copy of the Solicitor's reporting letter is attached at Tab "G" of the Book of Documents.

68. By letter dated February 25, 1994 the Solicitor replied to the Law Society in respect of this matter. A copy of the Solicitor's letter of February 25, 1994 is attached at Tab "H" of the Book of Documents.

B. DISCIPLINE HISTORY

69. The Solicitor does not have a discipline history.

DATED at Toronto, this 19th day of July, 1994."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D155/94 and is prepared to proceed with a hearing of this matter on July 19, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D155/94 and admits the particular contained therein. The Solicitor also admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 30, 1990. He practices as a sole practitioner.

27th April, 1995

Particular 2a) He failed to cooperate with the Law Society's Examiner in conducting an audit, pursuant to section 18 of Regulation 708 of the Law Society Act by failing to produce all of his books and records as required by section 15 of Regulation 708 of the Law Society Act.

5. On October 15, 1993, an audit was instructed to be commenced on the Solicitor's practice as a result of his failure to file his annual forms for the fiscal year ended November 30, 1992.

6. On January 4, 1994, Christine Phillips, an Examiner with the Law Society's Audit and Investigation Department attended unannounced at the Solicitor's last known address according to the Law Society's records. The address corresponded to an apartment listed under the name of "Kates". That is the name of the Solicitor's spouse. The Solicitor was not in. The Solicitor advises that he was out of the country on vacation on that date. A copy of the handwritten notes regarding the visit are at Tab 1, Document Book.

7. On January 12, 1994, Ms. Phillips again attended unannounced at the Solicitor's residence and left a business card with the Superintendent of the building to give to the Solicitor. The Superintendent assured Ms. Phillips that he would give her card to the Solicitor and advised that the apartment was leased to Carolyn Kates. Ms. Kates is the Solicitor's spouse. Ms. Phillips did not hear from the Solicitor. A copy of the handwritten notes regarding the visit is at Tab 1, Document Book.

8. On January 21, 1994, Ms. Phillips telephoned the Solicitor and left a message on his answering machine for him to return the call. A copy of the handwritten telephone notes are at Tab 2, Document Book.

9. On January 25, 1994, the Solicitor returned Ms. Phillips call and left a message on her voice mail. A copy of the handwritten telephone notes are at Tab 2, Document Book.

10. Ms. Phillips returned the Solicitor's call the same day and left a message for the Solicitor to call her back. The Solicitor did not return the call. A copy of the handwritten telephone notes are at Tab 2, Document Book.

11. By letter to the Solicitor dated February 11, 1994 (Tab 3, Document Book), forwarded by ordinary and registered mail, Ms. Phillips advised that she had received instructions to conduct an examination of the Solicitor's books and records. Ms. Phillips confirmed a telephone message that she left for the Solicitor on February 9, 1993, in which she indicated that she wished to review his books and records prior to March 1, 1994. The Solicitor was requested to present his books and records to the offices of the Law Society by 5:00 p.m. on February 23, 1994. The Solicitor was invited to contact the Society if he could not comply with this request. The Solicitor was reminded of his professional obligation to respond to communications from the Society and advised that should he fail to provide a response as set out above, the matter would be referred to the Chair of the Discipline Committee with a request for a formal Complaint to be authorized against him. No response was received.

12. On February 23, 1994, Ms. Phillips telephoned the Solicitor and left a detailed message on his answering machine that his response was required to the Society's letter of February 11, 1994. The call was not returned. A copy of the handwritten telephone notes are at Tab 2, Document Book.

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13. Under cover of letter dated February 25, 1994 (Tab 4, Document Book), the Solicitor provided the Society with photocopies of his trust bank account statements, copies of his client ledger cards and what appeared to be copies of trust receipts and disbursements journal. Ms. Phillips telephoned the Solicitor to acknowledge her receipt of the above mentioned materials.

14. On March 1, 1994, the Solicitor attended at the Law Society and met with Ms. Phillips to review what documentation remained outstanding. The Solicitor advised that the balance of his books and records were with his accountant, but he expected to have them back by the end of the week. The Solicitor agreed to contact Ms. Phillips to arrange an appointment to complete the audit. Under cover of letter dated March 1, 1994 (Tab 4, Document Book), hand delivered to the Solicitor, Ms. Phillips provided the Solicitor with a detailed list regarding the outstanding documentation and confirming that she would like to arrange a mutually convenient time to meet with the Solicitor to complete her audit.

15. On March 4, 1994, Ms. Phillips telephoned the Solicitor and left a message on his answering machine for him to return the call. The call was not returned. A copy of the handwritten telephone notes are at Tab 2, Document Book.

16. On March 9, 1994, Ms. Phillips telephoned the Solicitor and left a message on his answering machine for him to return the call. The call was not returned. A copy of the handwritten telephone notes are at Tab 2, Document Book.

17. On March 21, 1994, Ms. Phillips placed a further telephone call to the Solicitor and left a message on his answering machine for him to advise whether he had received his books and records from his accountant. The call was not returned. A copy of the handwritten telephone notes are at Tab 2, Document Book.

18. By letter dated April 8, 1994 (Tab 6, Document Book), forwarded to the Solicitor by ordinary and registered mail, Ms. Phillips advised the Solicitor that she completed her review of the materials which he had provided to the Society on March 1, 1994 and found that he had only provided the following documentation:

- i) Copies of client ledger cards;
- ii) Copies of trust bank statements dating from March 1993 to December 1993;
- iii) Copies of General bank statements dated from December 1991 to November 1993; [these bank statements were in fact the trust bank statements relating to that period]
- iv) Copies of what appeared to be a portion of his trust cash book.

Ms. Phillips advised the Solicitor that the documents which he had provided to date, did not constitute a complete set of books and records, as set out under section 15 of Regulation 708 of the Law Society Act. The Solicitor was requested to contact Ms. Phillips to set up a time to meet and complete the audit. The Solicitor's response was requested within a period of 14 days, and advised that if he did not respond within that time frame, the matter would be referred to the Discipline Committee with a request that a formal Complaint be authorized for his failure to produce adequate books and records. The Solicitor did not respond to this correspondence.

19. The Solicitor has now produced all required books and records to the Society (except his fees book which the Solicitor states is available and will be produced forthwith) and the audit is anticipated to continue with the Solicitor's cooperation.

DATED at Toronto, this 19th day of July, 1994."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Steven Walter Junger be suspended for a period of one month and that he pay costs in the amount of \$1,500.00.

REASONS FOR RECOMMENDATION

The Solicitor was 31 years of age at the time of the Discipline Hearing. He practised commercial law in a firm for 2 years and then commenced practising as a sole practitioner in 1991. During 1992 and 1993 the evidence is that 50% of his practice was real estate and 50% commercial law. During the period in question, the evidence was that he had no support staff, although periodically he would have someone doing his typing. He had no regular bookkeeper. His records were not in proper form.

We think it is fair to say that during the period in question his practice, small as it was, was out of control.

Counsel for the Law Society, Mr. Foster, submitted that the penalty should range from a reprimand in Convocation to a short suspension. On the positive side, Mr. Foster submitted that the Solicitor managed to get everything up-to-date before the date of the discipline hearing and that the Solicitor did good work. On the other hand, Mr. Foster submitted that given the totality of the counts of professional misconduct that this was a serious matter.

Mr. Jones submitted on behalf of the Solicitor that although the conduct was serious the Solicitor had taken steps to correct things.

Mr. Jones submitted that the appropriate penalty was a reprimand in Committee and offered as mitigating factors the Solicitor's youth and inexperience and the fact that the Solicitor had no previous discipline record.

When asked why the Solicitor got himself into the difficulties that brought him into the discipline process, Mr. Jones indicated that the Solicitor had been painted into a corner by his own fear and paralysis.

The Committee has recommended that the Solicitor be suspended for a period of one month and that he pay costs in the amount of \$1,500.00. The Committee regards the matters at issue to be quite serious. The Solicitor has been found guilty of professional misconduct in respect to three complaints, one complaint of which consists of seven individual counts. Neither a reprimand in Committee nor a reprimand in Convocation would, in the Committee's view, be appropriate. Neither, on the other hand, would a long period of suspension be appropriate in these circumstances.

It was felt that a one month suspension would bring the message home both to this Solicitor and to the profession that this type of conduct will not be tolerated in our profession.

27th April, 1995

Steven Walter Junger was called to the Bar on the 30th day of March, 1990.

ALL OF WHICH is respectfully submitted

DATED this 14th day of February, 1995

Ross W. Murray, Q.C., Chair

It was moved by Mr. Carey, seconded by Mr. Brennan that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Carey, seconded by Ms. Palmer that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 1 month and pay the Society's costs in the amount of \$1,500.

Both counsel made submissions in support of the recommended penalty and requested that the commencement date of the suspension be June 16, 1995.

The motion on the Recommendation as to Penalty was adopted, the suspension to commence on June 16, 1995.

Counsel and the solicitor retired.

Re: Peter David CLARK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Strosberg, Scott and Feinstein, Ms. Graham and Ms. Weaver withdrew for this matter.

Mr. Perrier appeared for the solicitor. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 14th February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 22nd February, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Abraham Feinstein, Q.C., Chair
Mary P. Weaver, Q.C.
Netty Graham

27th April, 1995

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

Neil Perrier
for the Society

PETER DAVID CLARK
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 14, 1994 Complaint D11/94 was issued, on May 27, 1994 Complaint D105/94 was issued, on May 31, 1994 Complaint D150/94 was issued and on January 19, 1994 Complaint D366/93 was issued against Peter David Clark alleging that he was guilty of professional misconduct.

The matters were heard in public on November 9, 1994 before this Committee composed of Abraham Feinstein, Q.C., Chair, Netty Graham and Mary P. Weaver Q.C. The Solicitor was present at the hearing but 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 D11/94

2. (b) He failed to cooperate with the Law Society by not producing books and records on specific dates;

Complaint D105/94

2. (a) He failed to reply to the Law Society's enquiries regarding a complaint by Naeem Dar, despite letters dated August 10, 1993, November 30, 1993 and March 8, 1994 and telephone messages left for him on October 28, 1993 and November 11, 1993;
- (b) He failed to serve his client, Naeem Dar, in a conscientious, diligent and efficient manner with respect to his motor vehicle claim for which he was retained in or about December, 1989, in that he:
- (i) Failed to keep his client reasonably informed of any steps taken with respect to his case;
 - (ii) Failed to answer requests from his client for information on the status of his case;
 - (iii) Failed to render an account for trust monies received;

27th April, 1995

- (iv) Failed to follow his client's instructions to commence an action with respect to his motor vehicle accident;

Complaint D150/94

- 2. (a) He breached an Order of Convocation, made on or about November 1, 1993 that he suspend his practice for failure to pay the Annual Fees, by continuing to practise during the period November 1, 1993 to on or about April 7, 1994.

Complaint D366/93

- 2. (a) He failed to maintain books and records in accordance with the provisions of Section 14 and 15 of Regulation 708 of the Law Society Act;
- (b) As solicitor for Gina Hill, he:
 - (i) failed to advise Ms. Hill that a limitation period had expired without a claim being issued;
 - (ii) falsely advised Ms. Hill that settlement negotiations were continuing; and
 - (iii) paid Ms. Hill the amount of \$12,982.25 from his general account which he misrepresented as being a settlement from the defendant;
- (c) He misled the Law Society during its investigation by representing that he had deposited settlement funds in the Gina Hill matter when, in fact, no settlement funds had been received.

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 Compliant D366/93 and D11/94 and is prepared to proceed with a hearing of this matter on November 9, 1994.

II. IN PUBLIC/IN CAMERA

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

II. ADMISSIONS

3. The Solicitor has reviewed Complaints D366/93 and D11/94, and admits the particulars, save and except particular 2(c) of D11/94, contained therein. The Solicitor also admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1986. He has been suspended since November 1, 1993 for non-payment of the annual fee.

27th April, 1995

Complaint D366/93

Particular 2a) He has failed to maintain books and records in accordance with the provisions of Section 14 and 15 of regulation 708 of the Law Society Act;

Complaint D11/94

Particular 2a) He failed to produce books and records pursuant to Section 18 of Regulation 708 of the Law Society Act;

Particular 2b) He failed to cooperate with the Law Society by not producing books and records on specific dates;

5. On January 29, 1993, a Law Society Examiner attended at the Solicitor's office to review his books and records. As a result of the Solicitor's failure to produce books and records, co-signing controls were placed on his trust account.

6. By letter dated January 29, 1993 (Tab 1, Document Book), the Law Society confirmed with the Solicitor's accountant, Andy Deeder, that he agreed to act as co-signer on the Solicitor's trust account. The Solicitor also undertook to deposit all trust money forthwith into his trust account (Tab 2, Document Book) and advised the Bank of the co-signing controls (Tab 3, Document Book).

7. By letter dated June 3, 1993 (Tab 4, Document Book), Mr. Deeder advised the Society's Examiner that to date, he had not received any records from the Solicitor.

8. On June 4, 1994, a Law Society Auditor telephoned the Solicitor regarding another matter and discussed the situation concerning his books and records. A decision was reached to await the production of his books and records until the conclusion of his discipline hearing scheduled for July 13, 1993. A copy of the handwritten notes of the telephone conversation are at Tab 5, Document Book.

9. By facsimile dated July 16, 1993 (Tab 6, Document Book), the Solicitor requested an extension from the Auditor to the week of August 23, 1993 to arrange to obtain his books and records for the purposes of an audit.

10. Upon receipt of the Solicitor's facsimile, the Auditor telephoned the Solicitor that day and advised him that she would be on holidays the week of August 23 and would contact him the week of September 6, 1993. A copy of the handwritten telephone notes are at Tab 6, Document Book.

11. On September 7, 1993, the Auditor spoke with the Solicitor and an appointment was arranged for September 22, 1993 to review his books and records.

12. On September 22, 1993, the Auditor attended at the Solicitor's office for their meeting, however, the Solicitor was not present. The Auditor was advised by the Solicitor's secretary that the Solicitor was ill and would not be in the office that day. A copy of the handwritten notes are at Tab 7, Document Book.

13. Upon the Auditor's return to her office, she found that the Solicitor had left a message on her voice mail that morning cancelling their appointment. The Solicitor's message stated that he would be available to meet with the Auditor on October 5, 7 or 8, 1993. A copy of the handwritten notes are at Tab 7, Document Book.

14. On September 27, 1993, the Auditor telephoned the Solicitor and an appointment was arranged for October 13, 1993.

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15. Due to a conflict in the Auditor's schedule, she cancelled the appointment and re-scheduled same for October 26, 1993. A copy of the handwritten notes of the telephone conversation are at Tab 8, Document Book.

16. The Auditor attended at the Solicitor's office on October 26, 1993 wherein he produced a copy of a letter dated October 26, 1993 (Tab 9, Document Book) which he had forwarded earlier that day to the Society advising that he could not be produce any books and records as he had not maintained same. The Solicitor advised that he cleared his calendar for the month of November and expected to work exclusively on preparing the necessary books and records. The Auditor and Solicitor arranged for the meeting to take place on November 30, 1993. A copy of the handwritten notes concerning the meeting are at Tab 10, Document Book.

17. By facsimile transmission dated November 29, 1993 (Tab 11, Document Book), the Solicitor advised the Society's Auditor that his books and records would not be available to be picked up and requested an extension to December 14, 1993. The Solicitor advised that he would not be requesting any further extensions from the Society.

18. On December 1, 1993, the Society's Auditor telephoned the Solicitor's office regarding his letter of November 29, 1993. The Solicitor's secretary advised that the Solicitor was in court and a message was left for him to return the call. A copy of the handwritten notes of the telephone message are at Tab 12, Document Book.

19. Later that day, the Solicitor telephoned the Auditor and stated that the Auditor could pick up his books and records on December 14, 1993. In light of the Solicitor's attendance in court, he was reminded of his suspended status. The Solicitor advised that he was aware of his suspension and expected to pay his annual fee the following day. The fee was not paid. A copy of the handwritten notes of the telephone conversation is at Tab 12, Document Book.

20. On December 14, 1993, the Society's Auditor telephoned the Solicitor and confirmed that she would be attending at his office to pick up his books and records. The Solicitor advised that that would be fine. A copy of the handwritten telephone notes are at Tab 13, Document Book.

21. The Auditor attended at the Solicitor's office on December 15, 1993. The Solicitor's receptionist advised that the Solicitor was not in the office and would not be in for the rest of the week. A message was left for the Solicitor to telephone the Society. A copy of the handwritten notes are at Tab 14, Document Book.

22. By facsimile transmission dated December 15, 1993 (Tab 15, Document Book), the Solicitor advised the Auditor that he had been embarrassed to explain in their telephone conversation on December 14, 1993 that his records were not complete. The Solicitor advised that he intended to take the next few days off in order to complete his books and records and would deliver same to the Society by 9:30 a.m. on Monday, December 20, 1993.

23. On December 16, 1993, the Society hand-delivered a letter (Tab 16, Document Book) to the Solicitor acknowledging receipt of his facsimile of December 15, 1993 and advising that in light of the delay, there was no alternative but to refer this matter to the Discipline Committee for consideration.

24. By facsimile transmission dated December 20, 1993 (Tab 17, Document Book), the Solicitor acknowledged receipt of the Society's December 16, 1993 letter and advised that he was not in a position to provide the Society with his books and records until his return from his holidays on January 4, 1993.

25. To date, the Solicitor has not produced his books and records to the Society.

Complaint D366/93

- Particular 2b) As solicitor for Gina Hill, he:
- (i) failed to advise Ms. Hill that a limitation period had expired without a claim being issued;
 - (ii) falsely advised Ms. Hill that settlement negotiations were continuing; and,
 - (iii) paid Ms. Hill the amount of \$12,982.25 from his general account which he misrepresented as being a settlement from the defendant;
- Particular 2c) He misled the Law Society during its investigation by representing that he had deposited settlement funds in the Gina Hill matter, when, in fact, no settlement funds had been received.

26. The Solicitor was retained by Gina Hill in or about January, 1990, with respect to injuries she sustained in a motor vehicle accident on or about September 8, 1989.

27. By letter dated February 9, 1990 (Tab 18, Document Book), the Solicitor wrote to State Farm Automobile Insurance Company inquiring whether they represented the Defendant involved in Ms. Hill's motor vehicle accident. The Solicitor placed State Farm on notice that his client intended to commence a claim for damages.

28. On February 26, 1990, the Solicitor forwarded letters (Tab 19, Document Book) to various hospitals and doctors for medical reports on Ms. Hill's injuries.

29. Under cover of letters dated March 26, 1990 and April 23, 1990 (Tab 20, Document Book), the Solicitor forwarded copies of medical reports to State Farm.

30. By letter dated May 17, 1990 (Tab 21, Document Book), Diane Gerus, a Claim Representative with State Farm wrote to the Solicitor inquiring whether he wished to enter into settlement negotiations on Ms. Hill's claim.

31. By letter dated June 19, 1990 (Tab 22, Document Book), the Solicitor advised Ms. Gerus that he was awaiting further medical evidence, and as such he was not in a position to commence settlement discussions.

32. After receiving the final medical report, the Solicitor wrote to Ms. Gerus by letter dated January 14, 1991 (Tab 23, Document Book), enclosing a copy of same and requesting that she contact him to schedule a meeting to discuss a possible settlement.

33. On April 2, 1991, the Solicitor met with Ms. Gerus in an effort to reach a settlement of Ms. Hill's claim.

34. By letter dated May 1, 1991 (Tab 24, Document Book), Ms. Gerus wrote to the Solicitor inquiring whether he had been able to contact Ms. Hill who had been out of the country in order to obtain her instructions with respect to a settlement. The Solicitor did not respond to this correspondence.

35. By letter dated June 18, 1991 (Tab 25, Document Book), Ms. Diane Pell requested a response from the Solicitor to her letter of May 1, 1991. The Solicitor did not respond to this correspondence.

27th April, 1995

36. By letter dated July 23, 1991 (Tab 26, Document Book), Ms. Pell again requested that the Solicitor contact her with respect to Ms. Hill's claim. The Solicitor did not respond to this correspondence.

37. The limitation period for issuing a Statement of Claim expired on September 8, 1991. The Solicitor failed to issue a Statement of Claim and failed to advise Ms. Hill that he had missed the limitation period.

38. By letter dated October 21, 1991 (Tab 27, Document Book), Ms. Diane Pell, Senior Claim Representative with State Farm Insurance wrote to the Solicitor advising that the claim had past the proscription period with no Statement of Claim being issued; and, as a result, they had closed their file.

39. Ms. Hill correspond with the Solicitor during January and February 1992 providing him with additional information on lost wages and expenses (Tab 28, Document Book).

40. By letter dated August 30, 1992 (Tab 29, Document Book), the Solicitor advised Ms. Hill that he had received a settlement offer, in the amount of \$15,000.00, inclusive of damages, interest and costs. The Solicitor requested that Ms. Hill contact his office if she wished to accept the settlement offer and arrangements would be made for her to attend at his office to execute Minutes of Settlement.

41. Ms. Hill accepted the purported settlement offer and on December 17, 1992 executed a Full and Final Release (Tab 30, Document Book), releasing the Defendant and her insurers. Ms. Hill, however, did not receive a settlement cheque from the Solicitor until March 9, 1993. The cheque, in the amount of \$12,982.25 from the Solicitor's general account was returned by the Bank marked "non-sufficient funds".

42. By letters dated March 24, 1993, April 6 and April 10, 1993 (Tab 31, Document Book), Ms. Hill wrote to the Society regarding this matter and filed a complaint against the Solicitor.

43. The Solicitor forwarded a certified replacement cheque to Ms. Hill on March 31, 1993 (Tab 32, Document Book).

44. Under cover of letter dated April 14, 1993 (Tab 33, Document Book), the Law Society forwarded to the Solicitor copies of Ms. Hill's letters of March 24 and April 6, 1993 for his comment.

45. As a result of the concerns raised by Ms. Hill's complaint, copies of her letters were forwarded to the Law Society's Audit and Investigation department for further investigation.

46. On April 23, 1993, a Society Examiner attended at the Solicitor's office regarding this matter. The Solicitor advised the Examiner that he had received a settlement cheque from State Farm Insurance in January, 1993 and had not deposited same until March 1993. The Solicitor further advised that he had deposited the funds into his general account in order to avoid the co-signing controls placed on his trust account. The Solicitor advised that he had issued a general cheque to Ms. Hill prior to depositing said funds into his account and that was the reason for the cheque being returned marked "non-sufficient funds".

47. On May 14, 1993, the Society's Auditor spoke with a representative at State Farm Insurance who confirmed that State Farm never settled Ms. Hill's claim and that a cheque had never been issued to her. A copy of the handwritten notes of the telephone conversation are at Tab 34, Document Book.

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48. The Solicitor responded to Ms. Hill's letters of complaint, by letter dated June 7, 1993 (Tab 35, Document Book), advising that he had issued the cheque using his own personal funds and misrepresented to Ms. Hill that the funds represented settlement funds from her motor vehicle case. He confirmed that his initial cheque to Ms. Hill was returned as there was not sufficient funds in his account to cover same. The Solicitor went on to state that he:

...misrepresented to the client that settlement negotiations were ongoing. There were no settlement negotiations subsequent to the expiry of the limitation period. I made an effort to evaluate the measure of damages that Ms. Hill could recover for her injuries without having regard to my own financial interests but of course I must have been aware of the obvious conflict of interest in purporting to settle her claim with my own funds.

49. After a request from the Society's Auditor for his file on the Gina Hill matter, the Solicitor wrote to the Auditor by letter dated June 10, 1993 (Tab 36, Document Book), confirming that the source of the funds which he used to issue the "purported" settlement cheque to Ms. Hill was his own, which he took from funds from his general account and legal aid billings.

50. By letter to the Law Society dated July 14, 1993 (Tab 37, Document Book), the Solicitor expressed his remorse over his conduct in this affair and apologized to Ms. Hill for his actions in this matter.

V. DISCIPLINE HISTORY

51. On April 6, 1993, a formal Complaint was sworn against the Solicitor for failing to make his annual filings for the fiscal year ended November 30, 1991. A finding of professional misconduct was made and on the Solicitor filing an Undertaking not to practise law until his annual filings had been made, the Solicitor was reprimanded in Committee.

DATED at Toronto this 9th day of November, 1994."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D105/94 and D150/94 and is prepared to proceed with a hearing of these matters on November 9, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D105/94 and D150/94 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 April 10, 1986 and practised in the city of Toronto. The Solicitor has been suspended for non-payment of annual fees since November 1, 1993.

Complaint D105/94

Particular 2b) He failed to serve his client, Naeem Dar, in a conscientious, diligent and efficient manner with respect to his motor vehicle claim for which he was retained in or about December, 1989, in that he:

- i) Failed to keep his client reasonably informed of any steps taken with respect to his case;
- ii) Failed to answer requests from his client for information on the status of his case;
- iii) Failed to render an account for trust monies received;
- iv) Failed to follow his client's instructions to commence an action with respect to his motor vehicle accident.

5. On or about September 23, 1988, the Complainant, Mr. Naeem Dar, was involved in a motor vehicle accident.

6. In or about December, 1989, the Solicitor was retained to act on behalf of Mr. Dar to commence an action for damages. By letter dated December 4, 1989 (Tab 1, Document Book), the Solicitor requested a retainer from the complainant in order to obtain a medical legal report regarding Mr. Dar's injuries.

7. Mr. Dar met with the Solicitor on three occasions, the last one being in March, 1992. Subsequently, Mr. Dar had left numerous telephone messages for the Solicitor, none of which were returned in an attempt to ascertain the status of the action. Mr. Dar also forwarded to the Solicitor two registered letters requesting information about the status of the matter. The Solicitor did not reply to the registered letters.

8. By letter dated January 20, 1993 (Tab 2, Document Book), Ms. Sharon Bros of Bros Claims Consulting advised the Solicitor that she had assumed carriage of the matter for the defendant, Mr. Sultan, and would be in touch with him in due course.

9. By letter dated April 16, 1993 (Tab 3, Document Book), Ms. Bros advised that upon reviewing the matter, she noted no statement of claim had been issued and that the Plaintiff's limitation period had expired on September 23, 1990. She further advised that she was closing the file.

10. By letter dated December 14, 1992 (Tab 4, Document Book), Mr. Dar complained to the Law Society about the Solicitor's failure to return his telephone calls and to keep him advised about the status of his case.

Particular 2a) He failed to reply to the Law Society's enquiries regarding a complaint by Naeem Dar, despite letters dated August 10, 1993, November 30, 1993 and March 8, 1994 and telephone messages left for him on October 28, 1993 and November 11, 1993;

11. By letter dated January 18, 1993 (Tab 5, Document Book), the Law Society forwarded a copy of Mr. Dar's letter of complaint. The Solicitor was requested to provide his comments about the complaint to the Law Society within a period of two weeks.

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12. The Solicitor responded by letter dated February 3, 1993 (Tab 6, Document Book). With respect to the telephone calls, the Solicitor advised that Mr. Dar left messages on each occasion advising his secretary that he would call back later in the day. The Solicitor indicated that he did not believe that Mr. Dar called later and also he did not leave a telephone number at which he could be reached. The Solicitor further advised that he has had numerous contacts with Mr. Dar by telephone and in person. The Solicitor indicated that he would be willing to keep Mr. Dar advised of the status of the matter and that he will continue to resolve the matter favourably.

13. By letter dated March 22, 1993 (previously dated December 22, 1993 and received on March 25, 1993) (Tab 7, Document Book), Mr. Dar acknowledged receipt of the Solicitor's letter dated February 3, 1993. Mr. Dar took the position that the Solicitor had his telephone number. Mr. Dar set out his telephone numbers in the letter. He once again set out his concerns to the Law Society.

14. On July 23, 1993, the Solicitor telephoned a Society staff member, Andrew Tyrrell, and advised that he would forward a report to Mr. Dar. The Solicitor further advised that a statement of claim had not been issued. However, he would seek the instructions of his client to bring a motion to extend the time for issuing the claim. A copy of the handwritten note is attached at Tab 8 of the Document Book.

15. Under cover of letter dated August 10, 1993 (Tab 9, Document Book), the Solicitor received a copy of Mr. Dar's letter dated March 22, 1993. The Solicitor was requested to provide the Society with a summary of the steps he had taken on behalf of Mr. Dar. The Solicitor was requested to respond within a period of two weeks. The Solicitor did not respond to this letter.

16. On October 28, 1993 and November 11, 1993, a Society staff member telephoned the Solicitor's office and left messages for him to return the call. The Solicitor did not return the calls. A copy of the telephone messages is at Tab 10 of the Document Book.

17. On November 16, 1993, Mr. Dar advised the Law Society that he provided the Solicitor with documents regarding the damages to his car, a doctor's report for his neck injuries and a letter from his employer regarding his wages. Mr. Dar indicated that he had not heard from the Solicitor. He further advised that the Solicitor neither returned any of his telephone calls nor responded to his registered letters. A copy of the handwritten note is at Tab 11 of the Document Book.

18. By letter dated November 30, 1993 (Tab 12, Document Book), the Solicitor was requested to provide his response to the Law Society within a period of two weeks. The Solicitor was reminded of his professional obligation to respond to communications from the Society. The Solicitor did not respond to this letter.

19. By registered letter dated March 8, 1994 (Tab 13, document Book), the Solicitor was once again reminded about his professional obligation to respond to communications from the Society. The Solicitor was advised that if a response is not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Solicitor did not respond to this letter.

Complaint D150/94

Particular 2a) He breached an Order of Convocation, made on or about November 1, 1993 that he suspend his practice for failure to pay the Annual Fees, by continuing to practise during the period November 1, 1993 to on or about April 7, 1994.

20. By registered mail dated November 2, 1993 (Tab 14, Document Book), the Solicitor was advised that his rights and privileges were suspended effective November 1, 1993.

21. On December 1, 1993, a Society examiner, Lorraine Campbell, telephoned the Solicitor and advised him that he had been suspended since November 1, 1993. The Solicitor indicated that he was aware of his suspension and that he would have himself reinstated the following day. A copy of the handwritten note is at Tab 15 of the Document Book.

22. On March 8, 1994, Ms. Campbell requested a Legal Aid Search at which time she received material which evidence that the Solicitor practised while under suspension for the non-payment of his annual fees from November 1, 1993 to February 22, 1994. The following documents support that the Solicitor practised during this period:

- a) Solicitor's account to Ontario Legal Aid dated November 2, 1993 for client, B. Adeniran (Tab 16, Document Book);
- b) Solicitor's letter to Ontario Legal Aid dated November 2, 1993 for client, S. Nalliah (Tab 17, Document Book);
- c) Solicitor's letter and account to Ontario Legal Aid dated November 2, 1993 for client, K. Ramalingam (Tab 18, Document Book);
- d) Solicitor's letter to Ontario Legal Aid dated November 3, 1993 requesting payment of his account for client, M. Saleh (Tab 19, Document Book);
- e) Solicitor's letter to Ontario Legal Aid dated November 3, 1993 requesting payment of his account for client G. Sayed (Tab 20, Document Book);
- f) Solicitor's letter to Ontario Legal Aid dated November 3, 1993 requesting payment of his account for client, R. Sivaprakasam (Tab 21, Document Book);
- g) Solicitor's letter to Ontario Legal Aid dated November 4, 1993 requesting payment of his account for client, P. Sivasamy (Tab 22, Document Book);
- h) Solicitor's letter to Ontario Legal Aid dated November 4, 1993 requesting payment of his account for client, F. Syed (Tab 23, Document Book);
- i) Solicitor's letter to Ontario Legal Aid dated November 4, 1993 requesting payment of his account for client, N. Thevarajah (Tab 24, Document Book);
- j) Solicitor's letter to Ontario Legal Aid dated November 4, 1993 requesting payment of his account for client, S. Veerakathy (Tab 25, Document Book);
- k) Solicitor's letter to Ontario Legal Aid dated November 4, 1993 requesting payment of his account for client, Y. Vinagithamby (Tab 26, Document Book);
- l) Solicitor's letter and account to Ontario Legal Aid dated November 5, 1993 for client, M. Ayala (Tab 27, Document Book);

- m) Solicitor's letter to Ontario Legal Aid dated November 5, 1993 requesting payment of his account for client, V. Gunaluxmy (Tab 28, Document Book);
- n) Solicitor's letter and account to Ontario Legal Aid dated November 5, 1993 for client, J. Losolohoh (Tab 29, Document Book);
- o) Solicitor's letter and account to Ontario Legal Aid dated November 5, 1993 for client, S. Yousufzai (Tab 30, Document Book);
- p) Solicitor's letter to Ontario Legal Aid dated November 8, 1993 requesting payment of his account for client, M. Iruthayathas (Tab 31, Document Book);
- q) Solicitor's letter and account to Ontario Legal Aid dated November 9, 1993 for client, M. Hazer (Tab 32, Document Book);
- r) Solicitor's letter and account to Ontario Legal Aid dated November 5, 1993 for client, A. Khamis (Tab 33, Document Book);
- s) Solicitor's opinion letter to Ontario Legal Aid dated November 9, 1993 for client, A. Netisov (Tab 34, Document Book);
- t) Solicitor's letter and account to Ontario Legal Aid dated November 9, 1993 for client, M. Noor (Tab 35, Document Book);
- u) Solicitor's opinion letter to Ontario Legal Aid dated November 9, 1993 for client, A. Popal (Tab 36, Document Book);
- v) Solicitor's opinion letter to Ontario Legal Aid dated November 9, 1993 for client, E. Salle (Tab 37, Document Book);
- w) Solicitor's letter and account to Ontario Legal Aid dated November 9, 1993 for client, S. Sivraj (Tab 38, Document Book);
- x) Solicitor's letter and account to Ontario Legal Aid dated November 10, 1993 for client, D. Ramirez (Tab 39, Document Book);
- y) Solicitor's letter and account to Ontario Legal Aid dated November 11, 1993 for client, M. Gyamfi (Tab 40, Document Book);
- z) Solicitor's letter and account to Ontario Legal Aid dated November 11, 1993 for client, M. Hernandez (Tab 41, Document Book);
- aa) Solicitor's letter to Ontario Legal Aid dated January 21, 1994 requesting certificate for client, A. Cox (Tab 42, Document Book);
- bb) Solicitor's letter to Ontario Legal Aid dated January 26, 1994 requesting certificate for client, P. Velupillai (Tab 43, Document Book);
- cc) Solicitor's letter to Ontario Legal Aid dated February 16, 1994 requesting certificate for client, A. Naufal (Tab 44, Document Book);
- dd) Solicitor's letter to Ontario Legal Aid dated February 17, 1994 requesting certificate for client, K. Panah (Tab 45, Document Book); and
- ee) Solicitor's letter to Ontario Legal Aid dated February 22, 1994 requesting certificate for client, C. Nanthinathan (Tab 46, Document Book).

V. DISCIPLINE HISTORY

23. On April 6, 1993, a formal complaint of professional misconduct was sworn against the Solicitor for failing to make his annual filings for the fiscal year ended November 30, 1991. A finding of professional misconduct was made and, on the Solicitor filing an undertaking not to practice law until his annual filings had been made, the Solicitor was reprimanded in Committee.

DATED at Toronto this 9th day of November, 1994."

RECOMMENDATIONS AS TO PENALTY

The Committee recommends that the solicitor be suspended for a fixed period of eight (8) months and if the following conditions are not satisfied within the eight (8) month period, the suspension to continue thereafter until the following conditions are satisfied:

1. The solicitor has made all his filings to the Law Society.
2. The solicitor makes available to the Law Society adequate books and records for audit.
3. The solicitor immediately delivers the DAR file to Mr. Perrier.
4. The solicitor satisfies Senior Discipline Counsel of the Law Society that he is psychologically fit to continue the practice of Law. If the solicitor disagrees with the decision of the Senior Discipline Counsel, this matter will be referred to a Committee of Convocation.

REASONS FOR RECOMMENDATION

WITHDRAWAL

The solicitor admits the particulars of the Agreed Statement of Facts and further admits that those particulars constitute professional misconduct.

COMPLAINT D366/93 2(a) and
COMPLAINT D11/94 2(b)

The solicitor has failed to maintain books and records in accordance with the provisions of Sections 14 and 15 of Regulation 708 of the Law Society Act. The solicitor failed to produce books and records pursuant to Section 18, Regulation 708 of the Law Society Act.

On January 29, 1993, a Law Society Examiner attended at the solicitor's office to review his books and records. As a result of the solicitor's failure to produce books and records, co-signing controls were placed on his Trust account.

On October 26, 1993, a Law Society Auditor attended at the solicitor's office and was advised that the solicitor could not produce any books and records as he had not maintained the same. To this date, the solicitor has not produced his books and records to the Society.

Since January, 1993, the Law Society has made attempts to review the solicitor's books and records but the solicitor has failed to produce the required books and records.

27th April, 1995

COMPLAINT D366/93, 2(b) and 2(c)

The solicitor failed to advise Ms. Hill that a limitation period had expired without a claim being issued and falsely advised Miss Hill that settlement negotiations were continuing. The solicitor paid Ms. Hill the amount of \$12,982.25 from his general account which he misrepresented as being a settlement from the defendant.

The solicitor misled the Law Society during its investigation by representing that he had deposited settlement funds in the Gina Hill matter when, in fact, no settlement funds had been received.

In August of 1992, the solicitor misled his client, Ms. Hill, by advising her that he had received a settlement offer in the amount of \$15,000.00 inclusive of damages, interest and costs. Ms. Hill accepted the purported settlement offer. Ms. Hill, however, did not receive a settlement cheque from her solicitor until March 9, 1993. A cheque in the amount of \$12,982.25 issued from the solicitor's general account was returned by the Bank for not sufficient funds. The solicitor forwarded a certified replacement cheque to Ms. Hill on March 31, 1993. On April 23, 1993, the solicitor misled the Law Society by advising its Examiner that the solicitor had received the settlement cheque from State Farm Insurance in January, 1993, and had not deposited the same until March, 1993. In May of 1993, the Society's auditors spoke to a representative of State Farm Insurance who confirmed that State Farm never settled Miss Hill's claim and a cheque had never been issued to her. This conduct is a breach of Rule 1 which requires the lawyer to discharge with integrity all duties owed to clients.

COMPLAINT D105/94 2(b)

The solicitor failed to serve his client, Naeem Dar, in a conscientious, diligent and efficient manner with respect to his motor vehicle claim for which he was retained in or about December, 1989.

In December, 1989 the solicitor was retained to act on behalf of Mr. Dar to commence an action for damages. In April of 1993, the Defendant's Claims Consultant advised the solicitor that no Statement of Claim had been issued and that she was closing the file. Mr. Dar complained to the Law Society about the solicitor's failure return his telephone calls and to keep him advised as to the status of the case.

COMPLAINT D105/94, 2(a)

The Solicitor failed to reply to the Law Society's enquiries regarding a complaint by Naeem Dar, despite letters dated August 10, 1993, November 30, 1993 and March 8, 1994 and telephone messages left for him on October 28, 1993 and November 11, 1993.

COMPLAINT D150/94, 2(a)

The Solicitor breached an Order of Convocation, made on or about November 1, 1993, that he suspend his practice for failure to pay the Annual Fees, by continuing to practise during the period November 1, 1993 to on or about April 7, 1994. By Registered Mail dated November 2, 1993, the solicitor was advised that his rights and privileges were suspended effective November 1, 1993. The solicitor continued to practice for a period of four months after that date during which period he wrote opinion letters to Ontario Legal Aid and requested Certificates for clients.

27th April, 1995

The solicitor's wife and daughter have serious health problems. In addition, marital problems and monetary problems have created a great deal of stress for the solicitor. Presently, the solicitor appears to be unable to meet the minimum administrative requirements of the Law Society to maintain a law practice.

Peter David Clark was called to the Bar on the 10th day of April 1986.

ALL OF WHICH is respectfully submitted

DATED this 14th day of February, 1995

Abraham Feinstein, Q.C.
Chair

It was moved by Mr. Carey, seconded by Mr. Brennan that the Report be adopted.

Mr. Perrier asked that two corrections be made to the Report, that is:

- page 20, under the heading Withdrawal - add the words "Particulars 2(a)(c) of Complaint D11/94 were withdrawn at the commencement of the hearing"

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

It was moved by Mr. Blue, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 8 months together with the conditions set out in the Report.

Both counsel and solicitor made brief submissions in support of the recommended penalty.

The motion on the Recommendation as to Penalty was adopted.

Counsel and solicitor retired.

Raymond Vincent DONOHUE - Sarnia

Messrs. Scott, Campbell and Thom and Ms. Moliner withdrew for this matter.

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

The solicitor attended Convocation to be reprimanded.

The Treasurer administered the reprimand and ordered the solicitor to pay costs in the amount of \$2,500.

Counsel and solicitor retired.

Re: Christophe Marc CLOUTIER - Gloucester

Mr. Perrier appeared on behalf of the Society. No one appeared for the solicitor and the solicitor was not present.

27th April, 1995

In March, Convocation adopted the Report of the Discipline Committee and suspended Mr. Cloutier for 8 months with the suspension to commence following the termination of any administrative suspension. Since it was not clear that Mr. Cloutier was aware that the 8 month discipline suspension would be consecutive to his administrative suspension, Convocation ordered that he be given notice of the penalty and the opportunity to appear before Convocation. Although duly notified M. Cloutier did not appear.

Counsel retired.

Re: Stephen John KENNEDY - Mississauga

The Secretary placed the matter before Convocation.

Messrs. Scott and Feinstein, Ms. Weaver and Ms. Graham withdrew for this matter.

Ms. Budweth appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 3rd March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 14th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 12th April, 1995 (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

Mary P. Weaver, Q.C., Chair
Abraham Feinstein, Q.C.
Netty Graham

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

Christina Budweth
for the Society

STEPHEN JOHN KENNEDY
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 11, 1994 Complaint D120/94 was issued against Stephen John Kennedy alleging that he was guilty of professional misconduct.

The matter was heard in public on November 9, 1994 before this committee composed of Mary P. Weaver Q.C., Chair, Netty Graham and Abraham Feinstein, Q.C. The Solicitor was in attendance at the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D120/94

2. (a) In or about the period October 31, 1990 to June 28, 1991, he acted in a conflict of interest on real estate transactions involving condominiums at 320, 370, 380 and 390 Dixon Road, Etobicoke, by acting for both the lenders and borrowers in these transactions. In the course of so doing, he preferred the interest of his borrower clients over those of his lender clients by failing to make full disclosure of all relevant facts to his lender clients as required by the provisions of Rule 5 of the Rules of Professional Conduct;
- (b) In the circumstances of particular (a) above, he commissioned false statutory declarations respecting the borrowers' satisfaction of downpayment requirements;
- (c) In the circumstances giving rise to particular (a) above, he commissioned two statutory declarations of Jaya Shanmughathsan dated January 28, 1991 and June 27, 1991 that were not signed in his presence contrary to the Commissioner for Taking Affidavits; and
- (d) In the circumstances of particular (a) above, he issued false reporting letters to his lender clients.

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 D120/94 and is prepared to proceed with a hearing of this matter on November 9, 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.

27th April, 1995

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D120/94 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor is 60 years of age. He was called to the Bar in 1979 and practices as a sole practitioner in Mississauga, Ontario.

5. There are several individuals who were involved in the events described below as follows:

Tim Rajkumar - a real estate agent with Homelife/Westway Realty Ltd. He was the sole agent on all transactions;

Vida Ramothar - Wife of Tim Rajkumar;

Ambrose Kumusuthu - This individual also uses the name Ambrose Kurus and Ambrose Kurumsuthu.

6. During the period October 31, 1990 to July 1991, the Solicitor acted for both purchaser/borrower and lenders on a number of real estate transactions involving various condominium units at 320, 370, 380 and 390 Dixon Road, Etobicoke.

A. 370 DIXON ROAD - UNIT 1709

7. On September 15, 1990, Robert Manu executed an Agreement of Purchase and Sale to purchase a condominium at the above captioned address from Reinhold Benner. The stated consideration was \$100,000.00 with an anticipated closing of October 31, 1990.

8. On September 29, 1990, Kwabena Bobie executed an Agreement of Purchase and Sale to purchase the condominium from Mr. Manu. The Agreement of Purchase and Sale called for consideration of \$124,000.00 with a \$10,000.00 deposit. The agreement anticipated a closing of October 31, 1990. A copy of the September 29, 1990 Agreement of Purchase and Sale is attached as Exhibit 1 to this agreed statement of facts.

9. The Agreement of Purchase and Sale was altered by an amending agreement of the same date which reduced the deposit to \$5,000.00 and further reduced the purchase price of the unit by \$14,000.00 on account of a refund for "repairs and renovations". A copy of the September 29, 1990 amending agreement is attached as Exhibit 2 to this agreed statement of facts.

10. On October 11, 1990, National Trust issued a mortgage commitment to the Bobies based in the amount of \$101,475.00 based on a purchase price for the unit of \$124,000.00 with a \$25,000.00 down payment coming from the borrowers' own resources. The commitment indicated the solicitor for the transaction to be the Solicitor. A copy of the October 11, 1990 commitment is attached as Exhibit 3 to this agreed statement of facts.

11. On October 29, 1990, the Solicitor swore a Statutory Declaration of the Bobies in which they declared:

We hereby confirm the down payment of \$25,000.00 came from our own resources and not borrowed.

27th April, 1995

A copy of the Statutory Declaration is attached as Exhibit 4 to this agreed statement of facts. The Solicitor admits that at the date of the swearing of the declaration he was aware that the Bobies were not providing \$25,000.00 of their own resources toward the transaction.

12. Under cover of letter dated October 30, 1990 the Solicitor provided National Trust with a number of documents including the Statutory Declaration in anticipation of the closing and confirmed a closing date of October 31, 1990. A copy of the Solicitor's October 30, 1990 letter is attached as Exhibit 5 to this agreed statement of facts.

13. The Solicitor prepared a Statement of Adjustments for the second sale of the condominium unit. Another solicitor prepared a Statement of Adjustments on the first sale, a copy of which was provided to the Solicitor and both are attached collectively as Exhibit 6 to this agreed statement of facts. He also prepared one Land Transfer Tax Affidavit for the "two" transactions which indicated a sale directly from Benner to Bobie. A copy of the Land Transfer Tax Affidavit is attached as Exhibit 7 to this agreed statement of facts.

14. The deed registered on title to the property on December 14, 1990 also shows a transfer directly from Benner to Bobie for consideration of \$100,000.00, a copy of the deed is attached as Exhibit 8 to this agreed statement of facts. The mortgage in favour of National Trust also registered on December 14, 1990 shows a principle amount advanced of \$101,475.00. A copy of the registered mortgage is attached as Exhibit 9 to this agreed statement of facts.

15. The Solicitor prepared a final report on the purchase to the Bobies which included a statement of trust funds. The final report to the Bobies, complete with enclosure, is attached as Exhibit 10 to this agreed statement of facts. The Solicitor's trust ledger for this transaction, attached as Exhibit 11 to this agreed statement of facts, shows that the only funds received by the Solicitor for this transaction were funds in the amount of \$98,664.15 received from National Trust.

16. The Solicitor prepared a final report and title opinion to National Trust dated January 11, 1991, a copy of which is attached as Exhibit 12 to this agreed statement of facts. In that report the Solicitor represented the sale price of the subject property to be \$124,000.00. At the date of the preparation of the report the Solicitor knew this to be untrue. The Solicitor also did not provide National Trust with any advice about the false Statutory Declaration.

17. The mortgage went into default and on March 9, 1992 the property was transferred to Canada Mortgage and Housing Corporation pursuant to Power of Sale proceedings. The property was sold on October 27, 1992 for \$72,000.00.

B. 380 DIXON ROAD - UNIT 1903

18. On October 4, 1990 Ambrose Kumusuthu executed an Agreement of Purchase and Sale to purchase the above captioned property from the estate of Dezso Sarkozi for \$80,000.00. The transaction was expected to close on November 30, 1990.

19. On October 5, 1990 Sadia Kahn executed an Agreement of Purchase and Sale to purchase the same property from Mr. Kumusuthu for \$102,000.00 with a deposit of \$10,000.00. Again the anticipated closing was November 30, 1990. A copy of the October 5, 1990 Agreement of Purchase and Sale is attached as Exhibit 13 to this agreed statement of facts. An amendment agreement attached as Exhibit 14 to this agreed statement of facts was executed the same day. The amendment agreement reduced the deposit to \$1,000.00 and reduced the purchase price by \$12,000.00 for "renovations and repairs".

27th April, 1995

20. On October 15, 1990, National Trust issued a mortgage commitment to Mr. and Mr. Kahn respecting the transaction. The mortgage commitment was in the amount of \$92,250.00 conditional on a purchase price of \$102,000.00 with a \$12,000.00 down payment from the borrowers own resources. A copy of the commitment is attached as Exhibit 15 to this agreed statement of facts.

21. On October 29, 1990 National Trust issued a letter of instruction to the Solicitor, was received by his office on November 1, 1990, a copy of which is attached as Exhibit 16 to this agreed statement of facts. The letter of instruction confirmed that National Trust required the Solicitor to represent them in this matter on the terms outlined in the enclosed commitment letter. The letter of instruction asked the Solicitor to confirm the \$102,000.00 purchase price and specifically stated "if our security or the financial transaction will be different than represented, do not advance the funds and advise us immediately".

22. The Solicitor commissioned a Statutory Declaration of the Kahns that they confirmed the down payment of \$12,000.00 was coming from their own resources and not borrowed. The Solicitor admits that at the date of the swearing of the declaration he was aware that the Kahns were not providing \$12,000.00 of their own resources toward the transaction. The Solicitor couriered his interim report, complete with the Statutory Declaration to National Trust on November 27, 1990. A copy of the Solicitor's November 27, 1990 report is attached as Exhibit 17 to this agreed statement of facts.

23. The Solicitor prepared a Statement of Adjustments for the second sale of the condominium unit. Another solicitor prepared a Statement of Adjustments on the first sale, a copy of which was provided to the Solicitor and both are attached collectively as Exhibit 18 to this agreed statement of facts.

24. The Solicitor prepared only one Land Transfer Tax Affidavit for both transactions which confirmed a conveyance directly from the estate of Dezso Sarkozi to the Kahns and noted a purchase price of \$102,000.00. A copy of the Statutory Declaration is attached as Exhibit 19 to this agreed statement of facts. The transfer of deed also shows a transfer directly from the Sarkozi estate to the Kahns. A copy of the transfer is attached as Exhibit 20 to this agreed statement of facts. The charge securing the National Trust advance was prepared by the Solicitor and is attached as Exhibit 21 to this agreed statement of facts.

25. The Solicitor's final report to the Kahns was mailed to them on March 8, 1991. The report to the Kahns shows the adjustment in the purchase price and the correct deposit. A copy of the final report to the Kahns is attached as Exhibit 22 to this agreed statement of facts.

26. The Solicitor's trust ledger, a copy of which is attached as Exhibit 23 to this agreed statement of facts, indicates that the only funds received for the closing of this transaction were \$89,567.41 from National Trust and \$1,574.44 from the Kahns. In the Solicitor's final report on title to National Trust, a copy of which is attached as Exhibit 24 to this agreed statement of facts and which appears to have been mailed on April 9, 1991, the Solicitor reported the sale price of the property to be \$102,000.00.

27. The property was sold under power of sale on July 31, 1992 for \$64,000.00.

C. 390 DIXON ROAD - UNIT 1414

28. On September 6, 1990, Kurumsuthu executed an Agreement of Purchase and Sale for a condominium unit at the above captioned address from Jamshed Hira and Dinaz Hira. The stated consideration was \$120,000 with an anticipated closing of November 30, 1990.

29. On September 10, 1990, Abram P. Puri executed an Agreement of Purchase and Sale to purchase the property from Mr. Kurumsuthu for \$135,000. The Agreement of Purchase and Sale called for consideration of \$135,000 with a \$5,000 deposit. The scheduled Agreement anticipated a closing of November 30, 1990. A copy of the September 10, 1990 Agreement of Purchase and Sale is attached as Exhibit 25 to this agreed statement of facts.

30. The September 10, 1990, Agreement of Purchase and Sale was altered by an amending agreement of the same date which reduced the purchase price by \$12,000 for "renovation and repairs". A copy of the amending agreement is attached as Exhibit 26 of this agreed statement of facts.

31. On September 28, 1990, Shopper's Trust Company issued a mortgage commitment to the Puris in the amount of \$117,045 on the basis of a purchase price of \$135,000. The commitment contained a condition that \$20,250 of funds necessary to close the transaction would come from the borrowers' own resources. A copy of the Shopper's Trust Company mortgage commitment is attached as Exhibit 27 to this agreed statement of facts.

32. On November 28, 1990, the Solicitor swore a Statutory Declaration of the Puris in which they declared:

We hereby confirm that the down payment of \$20,250 came from our own resources and not borrowed.

A copy of the Statutory Declaration is attached as Exhibit 28 to this agreed statement of facts. The Solicitor admits that the date of the swearing of the declaration he was aware that the Puris were not providing \$20,250 of their own resources toward the transaction.

33. Under cover of letter dated November 28, 1990, the Solicitor provided Shopper's Trust with a number of documents including the Statutory Declaration in anticipation of the closing and confirmed a closing date of November 30, 1990. A copy of the Solicitor's November 28, 1990 letter is attached as Exhibit 29 to this agreed statement of facts.

34. The Solicitor prepared a Statement of Adjustments for the second sale of the condominium unit. Another solicitor prepared a Statement of Adjustments on the first sale, a copy of which was provided to the Solicitor and both are attached collectively as Exhibit 30 to this agreed statement of facts. He also prepared one Land Transfer Tax Affidavit for the "two" transactions which indicated a sale directly from Benner to Bobie. A copy of the Land Transfer Tax Affidavit is attached as Exhibit 31 to this agreed statement of facts.

35. The deed registered on title to the property on December 6, 1990 shows a transfer directly from Hira to Puri for consideration of \$135,000, a copy of the deed is attached as Exhibit 32 to this agreed statement of facts. The mortgage to Shopper's Trust was also registered on December 12, 1990 which shows a principle amount advanced of \$117,045.

36. The Solicitor prepared a final report on the purchase to the Puris which included a trust reconciliation. A copy of the final report is attached as Exhibit 33 to this agreed statement of facts. The Solicitor's final report to the Puris showed the true amount of the deposit as well as the reduction in price.

37. The Solicitor's trust ledger for this transaction is attached as Exhibit 34 to this agreed statement of facts and shows the only funds received by the Solicitor for this transaction were funds in the amount of \$114,708.31 from Shopper's Trust and \$2,788.51 from Puri.

27th April, 1995

38. The Solicitor prepared final report and title opinion to Shopper's Trust dated March 13, 1991, copy of which is attached as Exhibit 35 to this agreed statement of facts. The Solicitor did not report Shopper's Trust on the true amount of the deposit nor of the reduction in the purchase price as he did to the Puris.

39. The mortgage went into default and the property was sold under Power of Sale on September 29, 1992 for \$86,000.

D. 390 DIXON ROAD - UNIT 2314

40. On December 13, 1990, George Mochocki executed an Agreement of Purchase and Sale to purchase a condominium at the above captioned address from Major Singh and Harbans Kaur. The stated consideration was \$109,000.00 with a deposit of \$3,000.00. The anticipated closing date was January 31, 1991.

41. On January 3, 1991, Ambrose Kurus executed an Agreement of Purchase and Sale to purchase the condominium from Mr. Mochocki. The Agreement of Purchase and Sale called for consideration of \$129,000.00 with a \$10,000.00 deposit. The anticipated closing was January 31, 1991. A copy of the January 3, 1991 Agreement of Purchase and Sale is attached as Exhibit 36 to this agreed statement of facts.

42. On January 16, 1991, National Trust issued a mortgage commitment for a first mortgage of \$118,900.00 to Ambrose Kurus and Jaya Shanmughathasan on the basis of a purchase price of \$129,000.00 and on condition that their down payment, not borrowed but from their own resources, was \$13,000.00. A copy of the National Trust commitment is attached as Exhibit 37 to this agreed statement of facts.

43. By letter dated January 22, 1991, National Trust wrote to the Solicitor confirming his retainer. National Trust confirmed the Solicitor's instructions to act on the financing of the purchase and asked the Solicitor to confirm a \$129,000.00 purchase price. National Trust's instructions specifically stated:

If our security or the financial transaction will be different then represented do not advance the funds and advise us immediately.

A copy of National Trust's instructions are attached as Exhibit 38 to this agreed statement of facts.

44. On January 28, 1991, the Solicitor swore the Statutory Declaration of Mr. Kurus and Ms. Shanmughathasan confirming a \$13,000.00 down payment from their own resources and that the property would be their primary residence. A copy of the Statutory Declaration is attached as Exhibit 39 to this agreed statement of facts. The Solicitor did not, as described below, in fact witness the signature of Jaya Shanmughathasan. He has never met with or spoken to her at all regarding this transaction.

45. On January 29, 1991, Ambrose Kurus attended at the Solicitor's office to sign the documents required for closing. Tim Rajkumar also attended at the Solicitor's office and advised that Ms. Shanmughathasan could not attend his office. The Solicitor gave Mr. Rajkumar the documents and they were returned the next day signed.

46. The Solicitor admits that at the date of the swearing of the Statutory Declaration he was aware that the \$13,000.00 was not coming from the purchasers' own resources.

47. On January 29, 1991, the Solicitor sent an interim report to National Trust in anticipation of the January 31, 1991 closing. A copy of the Solicitor's January 29, 1991 letter is attached as Exhibit 40 to this agreed statement of facts.

48. The transaction closed on January 31, 1991. The Solicitor acted for all parties on the transaction except for the original vendors, Singh/Kaur. The deed transferring title to the property was registered on that day, although the first mortgage in favour of National Trust in the amount of \$118,900.00 was not registered until February 12, 1991.

49. Two Statements of Adjustment, contained in the Solicitor's file, were prepared for this transaction, they are attached collectively as Exhibit 41 to this agreed statement of facts. The Solicitor prepared one Land Transfer Tax Affidavit for the "two" transactions which indicated a sale directly from Singh/Kaur to Kurus/Shanmugathan. Copies of the Land Transfer Tax Affidavits are attached as Exhibit 42 to this agreed statement of facts.

50. The Solicitor prepared a final report on title to Ambrose Kurumsuthu dated August 12, 1991, a copy of which is attached as Exhibit 43 to this agreed statement of facts. The report shows the true amount of the deposit. The Statement of Trust Funds also shows \$7,959.09 being paid to Mr. Kurus although the Solicitor's trust ledger indicates that the money was paid directly to Tim Rajkumar which it in fact was.

51. The Solicitor's final report on title which was sent to National Trust was dated May of 1991. The Solicitor reported the sale price of the property to be \$129,000.00. The only funds received on closing were in the amount of \$115,836.86 which were from National Trust. It is evident that \$129,000.00 of consideration was not paid on the closing of the transaction and that the Solicitor knew this to be untrue at the time he prepared the report. The Solicitor also did not provide National Trust with any advice about the false Statutory Declaration.

52. On May 21, 1993 the property was transferred to Canada Mortgage and Housing Corporation under power of sale. It was sold on August 31, 1993 for \$77,000.00.

E. 320 DIXON ROAD - UNIT 1113

53. On February 5, 1991, Vita Ramotar executed an Agreement of Purchase and Sale to purchase a condominium at the above-captioned address from Makhan Singh. The stated consideration was \$90,000.00 with an anticipated closing of February 28, 1991.

54. On February 6, 1991, Agyeman Osei executed an Agreement of Purchase and Sale to purchase the condominium from Vita Ramotar. The Agreement of Purchase and Sale called for consideration of \$109,000.00 with a \$10,000.00 deposit. Again the transaction was scheduled to close February 28, 1991. A copy of the February 6, 1991 Agreement of Purchase and Sale is attached as Exhibit 44 to this agreed statement of facts.

55. The Agreement of Purchase and Sale was altered by an Amending Agreement of the same date which reduced the deposit to \$2,500.00 and reduced the purchase price by \$12,000.00 on account of a refund for "repairs and renovations". A copy of the February 6, 1991 Amending Agreement is attached as Exhibit 45 to this agreed statement of facts.

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56. On January 28, 1991, the Solicitor commissioned the Statutory Declaration of Agyeman Osei and Navin Brijbassi confirming that they would be providing \$11,000.00 for the purchase of the unit from their own resources. A copy of the Statutory Declaration is attached as Exhibit 46 to this agreed statement of facts. The Solicitor admits that at the date of the swearing of the Declaration he was aware the purchasers were not providing \$11,000.00 from their own resources toward the transaction.

57. On February 14, 1991, National Trust issued a first mortgage commitment in the amount of \$100,450.00. The basis for the mortgage commitment was a purchase price of \$109,00.00 and a condition that the purchasers fund \$11,000.00 of the purchase from their own resources. A copy of the mortgage commitment is attached as Exhibit 47 to this agreed statement of facts.

58. On February 27, 1991, the Solicitor sent an interim report to National Trust enclosing the Statutory Declaration, the signed mortgage commitment and various other documents in anticipation of the February 28, 1991 closing. A copy of the Solicitor's February 27, 1991 letter is attached as Exhibit 48 to this agreed statement of facts.

59. The Solicitor prepared a Statement of Adjustments for the second sale of the condominium unit. Another solicitor prepared the Statement of Adjustments for the first sale which was provided to the Solicitor in advance of the closings. Copies of both Statements of Adjustments are attached collectively as Exhibit 49 to this agreed statement of facts. The Solicitor prepared one Land Transfer Tax Affidavit for the "two" transactions which indicated a sale directly from Singh to Osei/Brijbassi. Copies of the Land Transfer Tax Affidavit are attached as Exhibit 50 to this agreed statement of facts.

60. The deed registered on title to the property on February 28, 1991 also shows a transfer directly from Singh to Osei/Brijbassi. The deed was not prepared by the Solicitor. It shows consideration of \$109,000.00. The mortgage in favour of National Trust, prepared by the Solicitor, was also registered on February 28, 1991 and shows a principal amount of advance of \$100,450.00. A copy of the registered mortgage is attached as Exhibit 51 to this agreed statement of facts.

61. The Solicitor's final report to Osei/Brijbassi was picked up by the client on August 26, 1991. The final report, complete with enclosures is attached as Exhibit 52 to this agreed statement of facts. The report revealed the "refund for renovations" in the amount of \$12,000.00 as well as the true deposit of \$2,500.00.

62. The only funds received on closing by the Solicitor was \$97,769.09 received from National Trust and \$1,660.00 received from Tim Rajkumar. This latter amount was not received until March 13, 1991. The balance due on closing for the transaction was \$94,508.38 and even with the Solicitor's fees of \$1,585.00 only \$96,093.38 was required to close the transaction. These number are found in the client trust ledger regarding this transaction which is attached as Exhibit 53 to this agreed statement of facts.

63. On March 18, 1991 Mr. Osei wrote to the Solicitor regarding the transaction. Mr. Osei advised the Solicitor that there was an error in the Statement of Adjustments which indicated a purchase price of \$109,000.00 when it was in fact only \$95,000.00. A copy of Mr. Osei's March 18, 1991 letter is attached as Exhibit 54 to this agreed statement of facts.

64. The Solicitor responded by letter of same date in which he advised that the offer showed a \$109,000.00 consideration and confirmed the amount of the mortgage. The Solicitor also forwarded to Mr. Osei \$1,350.71 from the funds received back from Mr. Rajkumar.

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65. On May 10, 1991 Mr. Brijbassi's half interest in the property was transferred to Mr. Osei.

66. On May 21, 1991 R.C. Waddell, National Trust's Assistant Vice President, Corporate Security, spoke with the Solicitor about this transaction on the phone. Mr. Waddell made notes of his conversation which were converted to memorandum, a copy of which is attached as Exhibit 56 to this agreed statement of facts. The Solicitor admits that Mr. Waddell's notes are an accurate reflection of their conversation.

67. Despite the May 21, 1991 conversation, when the Solicitor issued his final report on title to National Trust on June 17, 1991 which was forwarded on June 28, 1991, a copy of which is attached as Exhibit 57 to this agreed statement of facts, the Solicitor did not advise National Trust of the Amending Agreement reducing the purchase price nor did he advise them about the false Statutory Declaration.

F. 370 DIXON ROAD - UNIT 1506

68. On January 16, 1991, Ambrose Kurumsuthu executed an Agreement of Purchase and Sale to purchase a condominium at the above-captioned address from Luis Emanuel Melo Massa. The stated of consideration was \$95,000.00. A \$6,000.00 deposit was required and the transaction was scheduled to close April 30, 1991. The closing date was subsequently amended to February 28, 1991.

69. Also on January 16, 1991, Hardeep and Aroma Khokha in turn executed an Agreement of Purchase and Sale to purchase the condominium unit from Ambrose Kurumsuthu for \$104,900.00. The Agreement called for a deposit of \$3,000.00 and a closing date of February 28, 1991. A copy of the second January 16, 1991 Agreement of Purchase and Sale is attached as Exhibit 58 to this agreed statement of facts.

70. On January 21, 1991, an amendment to the Agreement of Purchase and Sale was executed reducing the purchase price by \$7,900.00 for "repairs and renovations". A copy of the Amending Agreement is attached as Exhibit 59 to this agreed statement of facts.

71. On January 28, 1991, National Trust issued a mortgage commitment for a first mortgage of \$90,948.30 to the Khokhas on the basis of a purchase price of \$104,900.00 and on condition that their down payment was \$15,735.00. A copy of the National Trust commitment is attached as Exhibit 60 to this agreed statement of facts.

72. By letter dated February 8, 1991, received in the Solicitor's office February 12, 1991, National Trust provided its instructions to the Solicitor. These instructions included his obligation to confirm a purchase price of \$104,900.00 and their instructions that:

If our security or the financial transaction will be different than represented, do not advance funds and advise us immediately.

A copy of the February 8, 1991 letter of instruction is attached as Exhibit 61 to this agreed statement of facts.

73. On February 27, 1991, the Solicitor commissioned a Statutory Declaration of the Khokhas confirming their down payment of \$15,735.00. A copy of the Statutory Declaration is attached as Exhibit 62 to this agreed statement of facts. The Solicitor admits that at the date of the swearing of the Declaration he was aware that the Khokhas were not providing the funds indicated in the Declaration of their own resources towards the transaction.

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74. The Solicitor forwarded the Statutory Declaration to National Trust and the closing was concluded on March 1, 1991. The Solicitor acted for all parties except the original vendor, Luis Emanuel Melo Massa. The Solicitor prepared a Statement of Adjustments for the second sale of the condominium unit. Another solicitor prepared the Statement of Adjustments for the first sale, copies of both Statements of Adjustment are attached as Exhibit 63 to this agreed statement of facts. The Solicitor prepared one Land Transfer Tax Affidavit indicating a sale directly from Massa to Khokha for the purchase price of \$104,900.00. A copy of the Land Transfer Tax Affidavit is attached as Exhibit 64 to this agreed statement of facts.

75. The deed on title to the property registered on March 1, 1991, also indicates a consideration of \$104,900.00. The mortgage registered on the same date shows a principal advanced of \$90,948.30. The Solicitor prepared a final report on the purchase to the Khokhas which is dated July 23, 1991. In that report the Solicitor shows the "refund for renovations" and a deposit of \$3,000.00. A copy of the Solicitor's final report to the Khokhas complete with enclosures is attached as Exhibit 65 to this agreed statement of facts.

76. The Solicitor's trust ledger statement indicates that the only funds on closing were received from National Trust, being funds in the amount of \$88,947.61; and approximately \$5,500.00 from the Khokhas. Of that amount, \$87,524.06 was disbursed to the Royal Bank to pay off the existing first mortgage. An additional \$4,922.61 was paid to Tim Rajkumar.

77. The Solicitor prepared a final report and title opinion to National Trust dated June 14, 1991, a copy of which is attached as Exhibit 66 to this agreed statement of facts. In that report the Solicitor represented the sale price of the property to be \$104,900.00. At the date of the preparation of the report the Solicitor knew this to be untrue. The Solicitor also did not provide National Trust with any advice about the Statutory Declaration or copies of the subsequent Agreement of Purchase and Sale and Amending Agreement despite the conversation with Mr. Waddell referred to in paragraph 66 above. The abstract of title indicates that this property is still owned by the Khokhas.

G. 390 DIXON ROAD - UNIT 216

78. On February 13, 1991 Tim (Chumar) Rajkumar executed an Agreement of Purchase and Sale for the purchase of a condominium at the above-captioned address from Belinda Investments Limited. The stated consideration was \$80,000.00 with a deposit of \$2,000.00. The transaction was scheduled to close on April 1, 1991.

79. On February 16, 1991, Oumkhar Rambhajue executed an Agreement of Purchase and Sale to purchase the same condominium unit from Tim Rajkumar for a \$107,900.00. The agreement called for a deposit of \$10,000.00 with a closing of April 2, 1991. A copy of the February 16, 1991 Agreement of Purchase and Sale is attached as Exhibit 67 to this agreed statement of facts.

80. On February 27, 1991 National Trust issued a mortgage commitment for a first mortgage of \$98,707.50 on the basis of a purchase of \$107,900.00 and on the condition that a down payment of \$11,600.00 came from the borrowers' own resources. A copy of the commitment is attached as Exhibit 68 to this agreed statement of facts.

81. By letter dated March 22, 1991, National Trust issued instructions to the Solicitor. Among the instructions were a requirement that he confirm the purchase price and instructions previously noted that the transaction not close if the financial security or transaction was different than represented to be.

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82. On March 26, 1991, the Solicitor swore a Statutory Declaration of the Rambhajues confirming the down payment of \$11,600.00 coming from their own resources. A copy of the Statutory Declaration is attached as Exhibit 70 to this agreed statement of facts. The Solicitor admits that at the date of the swearing of the Declaration he was aware that the Rambhajues were not providing \$11,600.00 from their own resources.

83. Under cover of letter dated March 27, 1991, the Solicitor provided National Trust with a number of documents including the Statutory Declaration in anticipation of the closing of April 2, 1991. A copy of the Solicitor's March 27, 1991 letter is attached as Exhibit 71 to this agreed statement of facts.

84. The transaction did close on April 2, 1991 and the Solicitor acted for all parties except for the original vender, Belinda Investments Limited. The Solicitor prepared a Statement of Adjustments, a copy of which is attached as Exhibit 72 to this agreed statement of facts. The Land Transfer Tax Affidavit indicated a consideration of the property to be \$107,900.00 with a sale directly from Belinda Investments to the Rambhajues.

85. The deed registered on title to the property on April 2, 1991 also shows a consideration of \$107,900.00. The mortgage registered on title the same day in favour of National Trust indicates a principal advance of \$98,707.50.

86. The only funds received on closing by the Solicitor were funds in the amount of \$96,040.00 from National Trust. The Solicitor's file did not reveal an actual report sent to Rambhajues but did contain a Statement of Account to them as well as a Statement of Trust Funds. The Statement of Trust Funds indicates that the Solicitor received \$3,456.66 from Tim (Chumar) Rajkumar. The Solicitor admits that although the Statement of Adjustments indicates these funds were received they were not in fact received by his office. The Statement of Account of the client and enclosed Statement of Trust Funds is attached as Exhibit 73 to this agreed statement of facts.

87. \$72,042.99 was paid to the vendor on closing. Tim Rajkumar received a cheque for in excess of \$13,000.00. These transactions are recorded on the Solicitor's client trust ledger, a copy of which is attached as Exhibit 74 to this agreed statement of facts.

88. The Solicitor reported to National Trust by letter dated July 29, 1991. The Solicitor failed to reveal the actual purchase price of the property and also failed to provide National Trust with updated information regarding the Statutory Declaration, or the true amount of funds paid on closing. As well, the Solicitor failed to provide the subsequent Agreement of Purchase and Sale despite his conversation with Mr. Waddell referred to in paragraph 66 above. A copy of the Report to National Trust is attached as Exhibit 75 to this agreed statement of facts.

89. The mortgage went into default in 1991. Although legal action has been commenced against the Rambhajues, as at November 24, 1993, the property was still registered in their name.

H. 380 DIXON ROAD - UNIT 2406

90. An Agreement of Purchase and Sale was executed for Vita Ramotar in trust for the purchase of a condominium at the above-captioned address from Vladan and Valantina Vujosevic. The stated consideration was \$98,000.00. The agreement called for a deposit of \$5,000.00 and a closing of April 30, 1991.

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91. On March 19, 1991 Sadia Khan executed an Agreement of Purchase and Sale to purchase the same unit from Vita Ramotar for \$113,000.00. A deposit of \$10,000.00 and a closing of April 29, 1991 were called for in the agreement. A copy of the March 19, 1991 agreement is attached as Exhibit 76 to this agreed statement of facts.

92. On April 4, 1991 an amendment to the March 19 agreement was executed reducing the deposit to \$3,000.00 and the purchase price by \$7,900.00 as a "refund for repairs and renovations". A copy of the Amending Agreement is attached as Exhibit 77 to this agreed statement of facts.

93. The mortgage financing for the transaction was to be provided by the Mutual Life Assurance Company of Canada and instructions were provided to the Solicitor on April 2, 1991. A copy of those instructions are attached as Exhibit 78 to this agreed statement of facts.

94. On April 25, 1991 the Solicitor swore the Khans Statutory Declaration confirming that they were making a \$13,000.00 down payment on the property from their own resources. A copy of the Statutory Declaration is attached as Exhibit 79 to this agreed statement of facts. The Solicitor admits that at the time he commissioned the Khans Declaration he was aware that they were not providing these funds for the closing of the transaction.

95. On April 25, 1991 the Solicitor sent an interim report on title including the executed Statutory Declaration to First National Financial Corporation on behalf of Mutual Life as requested. A copy of the April 25, 1991 letter is attached as Exhibit 80 to this agreed statement of facts.

96. The transaction closed on April 30, 1991 with the Solicitor acting for all parties with the exception of the original vendor Vujosevic. Two Statements of Adjustments were prepared for the "closing" one of which was prepared by the solicitor for the vendor but both of which were contained in the Solicitor's file and attached to this agreed statement of facts collectively as Exhibit 81. The closing documents being the deed and mortgage were not registered on the property until May 5, 1994. The mortgage shows consideration of \$102,500.00. The deed of land indicates a consideration on the transaction of \$113,000.00.

97. The Solicitor reported to the Khans which report is attached as Exhibit 82 to this agreed statement of facts. The report showed an actual deposit on the second transaction of \$5,000.00. The Solicitor's trust ledger, a copy of which is attached as Exhibit 83 to this agreed statement of facts, indicates the only funds received on closing for this transaction were \$99,969.82 received from Mutual Life. The Solicitor reported to Mutual Life by report dated July 5, 1991, a copy of which is attached as Exhibit 84 to this agreed statement of facts. The Solicitor did not reveal the reduction in the purchase price nor the failure of the purchasers to meet the down payment from their own resources requirement.

98. The mortgage went into default and on January 28, 1993 the property was transferred to Canada Mortgage and Housing Corporation under Power of Sale. The property was sold on September 2, 1993 for \$65,000.00.

I. 390 DIXON ROAD - UNIT 2315

99. On March 13, 1991, Ockumar Retraj executed an Agreement of Purchase and Sale to purchase a condominium from Helen and Athmaram Balappa for \$106,000.00. The agreement called for a deposit of \$3,000.00 with a closing of June 27, 1991.

Ockumar Retraj is the pseudo name of Tim Rajkumar.

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100. On May 27, 1991 Ambrose Kurus executed an Agreement of Purchase and Sale to purchase the same condominium unit from Ockumar Retraj for \$127,000.00. This agreement called for a deposit of \$10,000.00 and a closing of June 27, 1991. This agreement was superseded by another dated June 20, 1991 under the terms of which Homelall Kumar purchased the unit from Ockumar Retraj for \$127,000.00. Again the agreement called for a deposit of \$10,000.00 with a closing of June 27, 1991. A copy of the June 20, 1991 agreement is attached as Exhibit 85 to this agreed statement of facts. On June 25, 1991 the Laurentian Bank issued a mortgage commitment for a first mortgage of \$116,085.00 to Homelall Kumar and Jaya Shanmugathanan on the basis of a \$127,000.00 purchase price. A copy of Laurentian Bank's commitment is attached as Exhibit 86 to this agreed statement of facts.

101. On June 27, 1991, the Solicitor purported to commission the Statutory Declaration of Homelall Kumar and Jaya Shanmugathanan regarding the Construction Lien Act. A copy of the Statutory Declaration is attached as Exhibit 87 to this agreed statement of facts. The Solicitor admits that he did not witness the signature of Jaya Shanmugathanan.

102. The draft mortgage documents were forwarded by the Solicitor to the Laurentian Bank June 27, 1991. Laurentian Bank declined to finance the closing of the transaction and last minute financing was obtained from the Royal Bank. On June 27, 1991 the Royal Bank issued a letter of instruction to the Solicitor agreeing to provide a mortgage of \$110,700.00 on the basis of a \$127,000.00 purchase price. A copy of the instructions are attached as Exhibit 88 to this agreed statement of facts. The instructions to the Solicitor specifically referred to CMHC conditions being met prior to the advance of funds. The Solicitor admits he was aware of the CMHC financing ratio requirements and that this transaction did not meet those requirements.

103. Two Statements of Adjustments were prepared in anticipation of the "closings", one of which was prepared by the Solicitor, both of which were found in his file and attached collectively as Exhibit 89 to this agreed statement of facts.

104. The transaction closed on June 28, 1991. The Land Transfer Tax Affidavits show consideration of \$127,000.00 passing on the transaction of the sale directly from Balappa to Kumar. The Solicitor acted for all parties except for the original vendor, Balappa. The transfer documents and mortgage were not registered until July 3, 1991. The Solicitor reported to the Royal Bank on July 23, 1991 by report, a copy of which is attached as Exhibit 90 to this agreed statement of facts. The Solicitor did not reveal that the only funds he received on closing were from the Royal Bank of Canada in the amount of \$108,218.41 as is indicated from the client trust ledger a copy of which is attached as Exhibit 91 to this agreed statement of facts.

DATED at Toronto this 9th day of November, 1994."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Stephen John Kennedy be:

1. Suspended for a period of six months;
2. Undertake to participate in the Practice Review Program; and
3. Pay the Society's costs of \$11,500.00 within six months following the termination of his suspension.

REASONS AS TO RECOMMENDATION

The solicitor is 60 years of age and has practiced as a sole practitioner for 15 years without prior discipline history. Prior to entering law school the solicitor was a Roman Catholic priest. He left the priesthood and worked as a probation officer for 7 years. He married and has a daughter. At the time of the misconduct his daughter had suffered serious injuries in an automobile accident. She had been in intensive care in hospital and was in a coma. The solicitor and his wife undertook tremendous personal and financial responsibilities by bringing her home in order to rehabilitate her. They incurred substantial debt (including three mortgages on their home) to renovate their home including installing a pool. They engaged the services of a neurosurgeon. His wife is a physiotherapist. Through their efforts the daughter is now able to drive a car.

The Agreed Statement of Facts shows that the misconduct took place over a period of 8 months and occurred throughout a series of nine "flip"-sales and purported resales of residential property. A vendor sold to an intermediary or "straw purchaser" for one price and on the same day or before the original closing day the "straw purchaser" resold the property for a considerably higher price. Both transactions were scheduled to close on the same day. The second agreement was amended on the day it was signed or within a few days thereafter to reduce the sale price so that the price paid by the purchaser was about the amount of the mortgage.

All sales were made through one real estate agent, Tim Rajkumar. In each of the 9 transactions the solicitor acted for the intermediate or straw purchaser, the ultimate purchaser and the mortgage lender. The real estate agent's wife Vida Ramothar, or a third party Ambrose Kumusuthu, also known as Ambrose Kurus or Ambrose Kurumsuthu were the intermediary or "straw" purchasers in all but one of transactions. The vendors were independently represented and there was no evidence, nor was it likely that they ever became aware of the second sale of their property.

The price reduction in the amending document was said to be an allowance for repairs, notwithstanding that the condition of the premises had not changed from the date of the offer. The mortgage application stated the price to be the higher price shown in the second offer. The original offer and the amendment to the second offer were never disclosed to the mortgage company. The purpose of the "flip" sale was to inflate the price of the property to mislead the mortgagee. The Mortgage companies approved mortgage loans and advanced funds relying on the artificially arranged high price and on the on the false evidence supplied by the solicitor. In at least one case there was a surplus of mortgage funds paid to the purchaser after the purchaser price and all fees and disbursements were paid.

The solicitor altered the transfers prepared by the solicitors for the vendors to show the consideration to be the high flip price so that the registered transfers were consistent with the mortgage documentation. The Land Transfer Tax affidavits in these transactions, prepared and commissioned by the solicitor, were false in that they stated the actual price to be higher than the price actually paid. In cases where the vendor's lawyer had prepared a statement of adjustments reflecting the lower purchase price, the solicitor prepared a second statement of adjustments which purported to show the adjustments based on the higher purchase price. The transaction reflected in the second statement of adjustments was a sham.

In each case the solicitor received specific instructions from the lending institution to provide evidence that the down payment shown in the original offers to purchase came from the purchasers' own resources and was not borrowed. The solicitor deliberately failed to follow the instructions he received and sent false mortgage reports to his lender clients. In the transaction for 390 Dixon Road, unit 2315, the mortgagee required the borrowers to include in their

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statutory declaration a declaration that no part of the mortgage funds was used to finance alterations or repairs. The solicitor prepared and commissioned the requested declaration knowing it to be false.

In order to explain his conduct he stated in evidence
"I think in all fairness, an institution, if it is going to be allowed to lend money, should take 100 per cent responsibility for two things. That they do a complete and adequate appraisal on the property. If these were done and all these details complete and adequate appraisals done on the property, I would say five or six would not go through".-----"If they do what the major banks usually do, took full responsibility, that they prove that this person has a full down payment by going back into their bank records and so on ."

It was the solicitor's firm opinion that the lender had no right to burden him with the responsibility of providing the evidence of the fair market value or the clients' down payment by means of the statutory declarations. After the closing of the transaction for 320 Dixon Road, unit 1113, (tab 56 in the document book) Mr. R. C. Waddell of National Trust Company prepared a memorandum setting out the details of his meeting with Mr. Kennedy. Mr. Waddell became concerned because the vendor who sold the property was not the vendor shown on the application form and documents submitted to the mortgage company. The memorandum recounts the solicitor's position taken at the hearing that the mortgage lender should be relying on appraisal reports to establish the fair market value of the property. He expressed surprise that in the case of CMHC insured mortgages an appraisal was not required. He overlooked or failed to consider that fair market value is the price paid by a willing buyer to a willing seller. The solicitor never told the mortgage lenders that he was not prepared to follow their instructions until his meeting with Mr. Waddell. His practice is entirely real estate and was producing little income while he was incurring indebtedness during his daughter's recovery. In his evidence concerning his attitude towards his practice when he and his wife were in charge of his daughter's rehabilitation he stated

"I pointed out to my friend when business came, especially in those years immediately after the accident, I took it."

His explanation had three ingredients:

1. During this period he was under the personal and financial stress arising from his daughter's automobile accident.
2. He rejected the instruction from his mortgagee clients on the grounds that the obligations imposed on him were unfair or unjustified .
3. He sought to justify the conduct on the grounds that he acted for immigrant purchasers who would never otherwise be able to save enough funds for a down payment for a home.

He now realizes that his conduct was wrong and it will not be repeated. It is clear that the solicitor lacked integrity in all of his dealings with his mortgage lender clients. At the date of the hearing, notwithstanding that he admitted to the professional misconduct set out in the complaint, it was clear that he did not comprehend the gravity of his conduct in preparing and commissioning the false statutory declarations and affidavits. It was his contention that his conduct was less serious because of the "Robin Hood " role he played. There can be no more obvious example of acting in conflict of interest.

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The Law Society is seeking a penalty of a suspension in the range of three to six months. Once his conduct became the subject of a complaint he realized that his conduct was wrong. He cooperated with the Society in all aspects of its investigation and in the preparation of the Agreed Statement of Facts. The solicitor agreed that the penalty be a suspension and did not object to the payment of the Society's costs. He asked that the suspension be at the low end of the scale, namely three months.

In this conduct the solicitor shows a very serious lack of integrity. The explanations offered by the solicitor to justify the conduct fall far short of justification. Even while admitting that his failure to disclose and his conflict of interest were serious acts of professional misconduct he failed to comprehend that in his dealings with his mortgage lender clients he acted without integrity. We therefore recommend the most serious penalty sought by the society. In addition we recommend that the solicitor participate in the practice review program when his period of suspension ends.

The Solicitor was called to the Bar on the 11th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of March, 1995

Mary P. Weaver, Q.C.
Chair

It was moved by Mr. Brennan, seconded by Mr. Carey that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. McKinnon, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for 6 months, participate in the Practice Review Program and pay costs in the amount of \$11,500 within six months.

Ms. Budweth advised that she had received a letter dated April 19, 1995 from the solicitor who wished to be permitted to resign as he wanted to retire and was winding down his practice.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Carey, seconded by Mr. Lamont that the solicitor be permitted to resign.

Carried

It was moved by Mr. Lerner, seconded by Mr. Lamont that the solicitor be disbarred.

Mr. Lamont withdrew as seconder on the motion to disbar.

It was moved by Mr. McKinnon, seconded by Mr. Blue that the condition to participate in the Practice Review Program be deleted.

Not Put

The motion on the Recommendation as to Penalty was not put.

27th April, 1995

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

Counsel retired.

Re: Ansis SEMENOVs - Toronto

The Secretary placed the matter before Convocation.

Messrs. Blue and Thom and Ms. Graham withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 23rd March, 1995, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 27th March, 1995 (marked Exhibit 1), together with the Report of the Discipline Committee and an Affidavit of Service sworn 12th April, 1995 by David Munro that he had effected personal service on the solicitor on 10th April, 1995 (marked Exhibit 2), together with the Acknowledgement, Declaration and Consent signed by the solicitor 26th April, 1995 (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ian Blue, Q.C., Chair
Stuart Thom, Q.C.
Netty Graham

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

Christina Budweth
for the Society

ANSIS SEMENOVs
of the City
of Toronto
a barrister and solicitor

Not present nor represented
for the solicitor

Heard: November 1, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Re: Ansis Semenovs

There were three sets of professional misconduct complaints against Ansis Semenovs before the Committee; Complaint D289/93 sworn February 8, 1994 alleging nine particulars; Complaint D67/94 sworn April 7, 1994 alleging twelve particulars; and Complaint D176/94 sworn June 17, 1994 alleging fourteen particulars. In all, the Committee considered thirty-five particulars of professional misconduct.

DECISION

All particulars of professional misconduct were found to have been established. Specifically, these are:

Complaint D289/93

2. a) He failed to provide a reply to the Law Society regarding a complaint by Ivar Pavasars despite letters dated January 29, 1993 and March 18, 1993 and telephone messages left on February 18, 1993 and March 1, 1993.
- b) He failed to serve his clients, Mr. and Mrs. Arturo Stiebrins, in a conscientious, diligent and efficient manner in that he failed to promptly register the deed to title on property municipally known as 15 Shand Avenue, Etobicoke.
- c) He failed to reply to communications from a fellow solicitor, J. J. Doane, who had been retained by the Solicitor's former clients, Mr. and Mrs. Stiebrins, regarding the purchase of property municipally known as 15 Shand Avenue, Etobicoke.
- d) He failed to provide a reply to the Law Society regarding a complaint by Donna Jobin despite letters dated September 14, 1993 and October 13, 1993 and telephone messages left on September 28, 1993 and October 4, 1993.
- e) He failed to provide a reply to the Law Society regarding a complaint by George Sunaitis despite letters dated August 12, 1993 and September 20, 1993 and telephone message left on August 27, 1993, August 30, 1993, September 7, 1993 and September 16, 1993.
- f) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1993, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

- h) He failed to produce books, records and client files pursuant to sections 9 and 18 of Regulation 708 of the Law Society Act and thus failed to co-operate with a Law Society investigator despite telephone calls on January 18, 1993, January 19, 1993, January 25, 1993, February 2, 1993, February 15, 1993, February 16, 1993, February 17, 1993, July 5, 1993, August 18, 1993, September 22, 1993, September 24, 1993, September 27, 1993, September 28, 1993, October 4, 1993 and October 5, 1993 and letters dated February 22, 1993, June 18, 1993, July 19, 1993, September 8, 1993 and October 22, 1993.
- i) He failed to provide an accounting to his client, Olga Dundurs, for all monies received in trust by him after settling a claim on her behalf.

Complaint D67/94

1. He failed to honour his financial obligation in the amount of \$685.87, more or less to Victory Verbatim Reporting Services.
2. He failed to comply with his undertaking to the purchaser, Linda Anne Johnson, and her solicitor, Charles A. Stafford, dated November 27, 1992 to obtain and register a correcting deed incorporating the true legal description, and to advise them of the details of registration, within 90 days of the date thereof.
3. He failed to reply to a letter dated September 28, 1993 from a fellow solicitor, Charles Stafford.
4. He failed to reply to the Law Society regarding a complaint by his clients, Louis Gallant and the Bank of Montreal, despite letters to him dated July 5, and September 10, 1993 and his assurance in a telephone conversation with the Society on September 20, 1993 that he would reply.
5. He failed to reply to the Law Society regarding a complaint by his client Helen Thomas, despite letters to him dated July 13, and September 10, 1993 and his assurance in a telephone conversation with the Society on September 20, 1993 that he would reply.
6. While representing his clients, Anthony Barkas and Debra McIntyre, in connection with claims against a mutual neighbour, he failed to serve him in a conscientious, diligent and efficient manner in that:
 - a. he failed to keep them reasonably informed about the status of their files; and
 - b. he failed to proceed with their claims in a timely manner.
7. He failed to account for a \$500.00 retainer entrusted to him by his client, Debra McIntyre.
8. He failed to deliver the file to his client, Debra McIntyre, despite her request that he do so.
9. While representing his clients, Louis Gallant and the Bank of Montreal, in connection with a real estate transaction, he failed to serve them in a conscientious, diligent and efficient manner, the particulars of which are as follows:

27th April, 1995

- a. with respect to Louis Gallant;
 - i. he failed to complete the purchase transaction;
 - ii. he failed to advise his client that he had failed to complete the purchase transaction;
 - b. with respect to the Bank of Montreal;
 - i. he failed to complete the mortgage transaction despite instructions to do so;
 - ii. he failed to report and account.
10. He failed to serve his client, Helen Thomas, in a conscientious, diligent and efficient manner in that:
- a. he failed to reply to messages left by her on April 5, 12, 19, 26 and May 3, 4, 10, 11, 18, 20, 25, 26, 27, 28, 31, 1993;
 - b. he failed to proceed with her support, custody and divorce matters in a timely manner;
 - c. he failed to keep his client reasonably informed throughout the course of the retainer.
11. He failed to deliver the file to his client, Helen Thomas, or her new lawyer, Patrick Hengen, despite their requests that he do so.
12. He failed to provide a reply to the society regarding a complaint by Ms. Avery Wright-Kinch despite letters dated November 10, 1993 and December 21, 1993 and attempts to reach him by telephone on November 25, December 13, and December 17, 1993.

Complaint D176/94

2. a) He failed to honour a financial obligation incurred in connection with his practice to the Sheriff's Office in the Niagara Region, account number 2456, dated May 28, 1991 in the amount of \$28.92, despite having advised the Law Society on January 18, 1994 that he paid it.
- b) He failed to reply to the Law Society regarding the on-going investigation of a complaint by the Sheriff's Office in the Region of Niagara, despite a letter, dated February 28, 1994.
- c) He failed to honour a financial obligation incurred in connection with his practice to Eckler Partners Ltd., actuaries and consultants, invoice number 8991, dated July 15, 1992 in the amount of \$469.73 despite having advised the Law Society on January 14, 1994 that he paid it.
- d) He failed to reply to the Law Society regarding the ongoing investigation of a complaint by B.B. Dibbon of Eckler Partners Ltd., despite a letter dated February 28, 1994.

- e) He failed to honour a financial obligation incurred in connection with his practice to Sandy Kates, Shelley Stober and Howard Chaiken, freelance conveyancers, for the following invoices:
- | | | |
|---------|-------------------------------|----------|
| Stober | Aug. 26/93 Invoice No. 22662 | \$124.25 |
| Chaiken | Sept. 15/93 Invoice No. 20429 | \$76.00 |
| Kates | Sept. 22/93 Invoice No. 68180 | \$95.25 |
| Kates | Sept. 24/93 Invoice No. 68187 | \$69.20 |
- f) He failed to reply to the Law Society regarding a complaint by Sandy Kates, Shelley Stober, and Howard Chaiken, freelance conveyancers, despite letters to him dated February 9, 1994 and March 25, 1994 and a telephone request on March 3, 1994.
- g) He failed to honour a financial obligation incurred in connection with his practice to Rosenberger, Weir, MacDonald, official examiners, for the following invoices:
- | | |
|------------------------------|---------|
| May 21/91 Invoice No. 59294 | \$17.97 |
| Nov. 25/91 Invoice No. 43188 | \$50.02 |
| Feb. 11/92 Invoice No. 45616 | \$82.39 |
| Mar. 2/92 Invoice No. 69511 | \$35.85 |
- h) He failed to reply to the Law Society regarding a complaint by Rosenberger, Weir, MacDonald, official examiners, despite letters to him dated March 10, 1994, and April 11, 1994 and telephone messages left on March 30, 1994 and April 6, 1994.
- j) He failed to reply to the Law Society regarding a complaint by All Languages Ltd. despite letters to him dated April 6, 1994 and April 27, 1994 and telephone messages left on April 21, 1994 and April 25, 1994.
- k) The Solicitor failed to provide property accounting to his client, Maia Reis, for all monies received by him.
- l) The Solicitor failed to transfer the file of his client, Maia Reis, to her new solicitor, Susan Switch, despite his client's direction that he do so, and despite written requests from Ms. Switch dated November 5, 1993 and November 26, 1993 and telephone requests from Ms. Switch on November 26, 1993, December 17, 1993 and February of 1993.
- m) The Solicitor has failed to provide a reply to the Society regarding a complaint by Maia Reis despite letters dated January 18, 1994 and March 9, 1994 and telephone requests on February 16, 1994, February 21, 1994, March 1, 1994, and April 28, 1994.
- n) The Solicitor failed to co-operate with a Law Society investigation of a complaint by Maia Reis.

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Preliminary Issue - Request For An Adjournment

At the hearing the Law Society was represented by Ms. Christina Budweth. The Solicitor was not represented and did not appear. The first issue that the Committee had to consider was whether the hearing should be adjourned at the Solicitor's request due to his absence.

The Committee accepted evidence in the form of a Document Book relating to all three complaints pursuant to s.15(1) of the Statutory Powers Procedure Act to assist it on the issue of whether the hearing should proceed.

On July 6, 1994 Ms. Budweth had written to the Solicitor after previous adjournments confirming that all three complaints "will now be heard on November 1 and 2, 1994". She further informed the Solicitor "that the Society will seek your disbarment in these circumstances failing some compelling evidence on mitigation of penalty from you". Draft Agreed Statements of Facts ("ASF's") with respect to all three complaints were personally served on the Solicitor on September 27, 1994. Convocation is aware that Draft ASF's are tantamount to "will says" in criminal proceedings. During the week of October 3, Ms. Budweth tried to follow up with the Solicitor. There is no doubt in the Committee's mind that Mr. Semenovs was fully aware of the charges against him, the evidence supporting them and that the most serious penalty of all - disbarment - was being sought against him.

On October 19, the Solicitor wrote to Ms. Budweth stating:

"I enclose medical report from Dr. Basmajian.

I am further scheduled to attend at the Princess Margaret Hospital on Nov. 17th for another assessment.

I am also under treatment for extreme depression by Dr. L. Chad, the Director at the Crises Unit, East General Hospital, and a report will be coming next week from Dr. Chad. For all of the above reasons I will not be able to attend on Nov. 1st + 2nd."

The complete medical report from Dr. Basmajian dated October 17, 1994 stated:

"Mr. Semenovs was initially seen April 18, 1994 and was found to have Rectal Carcinoma. He had a course of Radiation treatment and surgery was undertaken on August 19, 1994. His course in hospital was unfortunately complicated and discharge was on September 7, 1994.

Mr. Semenovs was seen on October 5, 1994 with slow recovery being made due to continued weight loss, pain and fatigue.

He has been unable to attend court proceedings and hearings. It is unlikely that significant improvement will occur to allow attendance at court proceedings until late November."

On October 21, 1994, Ms. Budweth wrote to the Solicitor stating:

"The Society will not consent to a further adjournment of this matter. I will offer Eileen McIntyre, the staff trustee, as a witness in opposition to your request to give evidence regarding your continued practise while under suspension. Quite frankly, if you are well enough to continue to practise in contravention of the section 43 order obtained by the Society,

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then I cannot, in the interest of protecting the public, agree to an adjournment of your matter. If you have information in mitigation of penalty to present in this matter I urge you to contact me. In addition, I urge you to execute the Agreed Statement of Facts in this matter so that your efforts in that regard could be taken into account as a possible mitigating factor on penalty."

On October 27, the Solicitor wrote to Ms. Budweth again stating:

"Further to the report of Dr. Basmajian with my earlier letter, I now enclose report of Dr. Chad for your information and filing clearly. I will not be able to attend on Nov. 1st & 2nd."

The complete medical report from Dr. Chad dated October 26, 1994 stated:

"This is to confirm that the above named is a patient under my care. He is suffering from a Major Depression and is followed [sic] in the Crisis Unit, Department of Psychiatry, Toronto East General Hospital. He sees Linda Di Nardo, psychometrist, as well as myself, a psychiatrist. He is severely depressed and in his present state is clearly unable to attend to his business affairs. His concentration is very poor and his attention span is diminished. He is currently on antidepressant medications as follows: Zoloft 100 mg at bedtime. As well, he is on Ativan as needed for his anxiety.

It is difficult to anticipate when Mr. Seminovs will be sufficiently recovered to take care of his business affairs. I would anticipate that it would be at least 2-3 months.

I hope the above is of some benefit to you and Mr. Seminovs. If you do require any additional information please feel free to contact me."

Neither doctor was called to give evidence to the Committee.

Normally, the Committee would not refuse to grant a *bone fide* adjournment request where disbarment is being sought, when made by a solicitor who alleges medical problems evidenced by a letter from a medical practitioner, nor would the Law Society oppose such a request. We stress the qualifier "*bone fide*".

Here, however, the Committee was urged to refuse an adjournment on the grounds that despite his alleged medical condition, despite having been suspended from practice by Order of Convocation dated February 25, 1994 and despite having executed on July 7, 1994 an undertaking not to practise law, the Solicitor had continued to practise law, and had continued to lead clients of his practice to believe that he was continuing to practise law and continuing to deal with their matters.

Ms. Budweth spoke to the Solicitor on October 31 in the evening. She urged him to attend and indicated that she would be opposing an adjournment request and would be adducing evidence of his continuing to practise. She urged him to send counsel or even a member of his family to appear before the Committee but Mr. Semenovs did not do so.

The Committee, therefore, decided to hear evidence about the Solicitor continuing to practise contrary to his suspension from practice and contrary to his undertaking not to practise. Remember that the Solicitor had, with the assistance of the reports of Drs. Basmajian and Chad, represented that he was too ill to attend to his business affairs in the months of April through October 1994 and that the Solicitor had been under suspension since February 25, 1994. The evidence that the Committee heard was from three unrelated witnesses bearing on his alleged inability to practise.

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Mrs. Burgess testified that her family had retained the Solicitor to act with respect to her father's estate in October 1992 and paid him a \$1,000.00. The family then consulted the Solicitor in late 1993 about the mental incompetence of their mother who had Alzheimer's disease and paid him another \$1,000.00. Between February 1994 and June 1994 Mrs. Burgess set up four or five meetings with the Solicitor but all were subsequently cancelled by the Solicitor. In June 1994 the Solicitor met with Mrs. Burgess at her home and had her execute some documents relating to her mother's mental incompetency. He told her that the matter would be dealt with in about five weeks. In September, Mrs. Burgess tried to contact the Solicitor by phone three times but her voice mail messages were not returned. Then about three weeks after this the Solicitor's wife phoned saying that the Solicitor had had an operation but had wanted Mrs. Burgess to know that her matter was "within the courts". Then the Solicitor's son called with a similar message that "the matter was still in the courts". Mrs. Burgess placed these two conversations in mid to late September, 1994. These meetings and telephone conversations occurred when the Solicitor was supposedly unable to attend to his business affairs and had been suspended.

Mr. Juris Jekabsons testified that he had known the Solicitor since he had been twelve years old being a member of the same Latvian community. In 1992 he retained the Solicitor to obtain title to a house that his daughter and her husband had purchased but the mortgages on which, including a second mortgage held by Mr. Jekabsons, were in default due to the daughter's husband leaving her. The Solicitor had only to redeem the first mortgage on behalf of Mr. Jekabsons and then take power-of-sale proceedings under the second mortgage which would then become the first mortgage. The Solicitor demanded and received a retainer of \$2,000.00 in December 1992 but nothing seemed to happen. Mr. Jekabsons phoned the Solicitor and approached him at Latvian community social events but got only the Solicitor's voice mail or vague assurances such as "everything is okay". In September 1994 Mr. Jekabsons learned that the Solicitor's office phone had been disconnected. Mr. Jekabsons phoned the Solicitor at home and spoke to him. The Solicitor told Mr. Jekabsons that his phone had been disconnected because he was moving to a bigger office but he could not provide Mr. Jekabsons with an address or phone number. The Solicitor said "your deal will be finished. I know you're anxious to have it done. In three days." Mr. Jekabsons has heard nothing from the Solicitor subsequent to this conversation. Again this was in a period when the Solicitor was suspended and had represented that he was too ill to attend to business affairs.

Eileen McIntyre, the Law Society's Staff Trustee obtained a section 43 order against the Solicitor on July 5, 1994 and on the same day personally served it on the Solicitor at the Law Society's offices, when he supposedly was unable to attend to his business affairs. She attended the Solicitor's home under the authority of this order on September 21, 1994 in order to collect client files that had not been recovered from his former office. The Solicitor handed her one file saying this was the only client file that he had but she and her assistant found several more files in his basement, but did not find either of the Burgess file or the Jekabsons file. Throughout this the Solicitor looked relaxed though Ms. McIntyre said that she knew he wasn't well.

In light of the evidence just summarized, the Committee concluded that despite his illness, despite his suspension and despite his undertaking not to practise, the Solicitor was in fact purporting to practise law and apparently able to do so. Due to the number and gravity of complaints made against him the Committee concluded that it would be contrary to the public interest not to deal with the Solicitor's case despite his absence. The Committee was not convinced by Dr. Basmajian's and Dr. Chad's letters that the Solicitor could not attend the hearing and there was no other evidence to suggest that the Solicitor could not be present for the hearing on November 1 and 2. The Committee took into account the fact that the Solicitor knew or ought to have known that it was open to him to put more specific evidence of his inability to attend before the Committee by agent or by letter but did not do so. The Committee also took into account the

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possibility that the Solicitor's refusal to attend either personally or by counsel or an agent was a tactic to avoid facing the inevitable of answering the professional misconduct charges against him or to try to establish the basis of an argument to be made elsewhere that he had not been treated in procedurally fair manner.

For these reasons the Committee refused to grant an adjournment and proceeded to hear evidence supporting the charges.

In the course of the hearing the Committee became increasingly curious about why Mr. Semenovs, despite having received letters from Law Society counsel that the hearing would proceed on November 1st and 2nd, 1994 and disbarment was being sought, did not attend personally or arrange to have someone to attend on his behalf. After the first day of the hearing and after the Committee decided to proceed in light of the evidence from three witnesses summarized above that Mr. Semenovs was, indeed, practising law after he had committed not to do so, at the request of the Committee Ms. Budweth contacted Mr. Semenovs and left a voice mail message. Mr. Semenovs returned the phone call on the night of November 1, 1994 and left a voice mail message. The Committee received a transcript of it. The Committee also listened to the tape of the voice mail message.

Consideration of the contents of the message did not persuade the Committee that there was any basis for the Committee not rendering a decision on professional misconduct. Nothing in the voice mail message suggested a defence to the allegations of professional misconduct. The circumstances pleaded by Mr. Semenovs for not being able to attend, were a flooded basement, inability to make mortgage payments and, generally, treatment for cancer of the rectum. None of these points went to the issue of professional misconduct or to his ability to attend or retain an agent or counsel to appear on his behalf.

The Committee was, therefore, not prepared to forestall or to use Mr. Semenovs' voice-mail-message as reasons "to suspend consideration of professional misconduct".

Facts and Findings on Professional Misconduct

The Committee received no ASF's due to the Solicitor's refusal to meet with counsel for the Law Society despite his absence. The Committee, therefore, heard the evidence relevant to each specific charge of professional misconduct and has made findings on each. We consider our Recommended Penalty and Reasons commencing at page 65.

Complaint D289/93

Particular 2(a)
Failure to provide a reply to the Law Society regarding a complaint by Ivar Pavasars

The evidence supporting this charge was in documents admitted under sub-section 33(9) of the *Law Society Act* ("LSA") and under sub-section 15(1) of the *Statutory Powers Procedure Act* ("SPPA").

In January, 1992, Ivar Pavasars provided the Solicitor with a monetary retainer of \$750.00 to pursue the reclamation of land and property in the Independent Republic of Latvia. In a January 7, 1993 letter, Mr. Pavasars advised the Law Society that the Solicitor has failed to return his telephone calls and had failed to respond to his written requests about the status of his matter. Mr. Pavasars also said that the Solicitor had not provided him with a statement of account for the retainer. By letter dated January 29, 1993, the Law Society forwarded to the Solicitor a copy of Mr. Pavasars January 7, 1993 letter. The Solicitor was requested to provide his comments within two weeks. No reply was received.

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A Law Society staff employee spoke with the Solicitor's secretary by telephone on February 18, 1993. The Solicitor's secretary advised that the work had been completed on this matter and that the Solicitor would provide his reply to the Society by February 25, 1993. No reply was received. A Law Society staff employee left a telephone message for the Solicitor at his office on March 1, 1993 advising that his reply was requested by March 5, 1993. No reply was received. By registered mail dated March 18, 1993, the Law Society forwarded to the Solicitor a copy of its January 29, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should his reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received. The Society's March 18, 1993 letter was signed for and delivered on March 26, 1993. A Law Society staff employee spoke with the Solicitor by telephone on March 25, 1993. The Solicitor advised that a response was coming. No reply was received.

By letter dated April 1, 1993, the Solicitor advised the Law Society that he was preparing his response to Mr. Pavasars' complaint and that he would deliver the same by the evening of April 7, 1993. No reply was received. The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

The Committee finds that the Solicitor's failure to reply to the Law Society constitutes professional misconduct as it is in clear violation of Rule 13, Commentary 3.

Particulars 2(b)

Failure to serve his clients, Mr. and Mrs. Arturo Stiebrins, in a conscientious, diligent and efficient manner in that he failed to promptly register the deed to title on property municipally known as 15 Shand Avenue, Etobicoke

and Particular 2(c)

Failure to reply to communications from a fellow solicitor, J.J. Doanne, who had been retained by the Solicitor's former clients, Mr. and Mrs. Stiebrins, regarding the purchase of property municipally known as 15 Shand Avenue, Etobicoke

The evidence on these particulars was provided by the *viva voce* testimony of Mr. Arturo Stiebrins and Mr. J.J. Doane and by documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*..

Arturo Stiebrins entered into an Agreement of Purchase and Sale to purchase 15 Shand Avenue, Etobicoke from Beverly Anne Jones-Collins and Stephen Michael Collins on October 5, 1984. The closing was to take place on November 30, 1984. Mr. Stiebrins retained the Solicitor to act on his and his fiance's, Anita I. Miniats, behalf respecting the purchase.

The Solicitor rendered his account on November 30, 1984 (Arturo Stiebrins and Anita Miniats). In the account he listed, under Disbursements, the fee of \$916.00 paid in land transfer tax and \$32.00 to register the deed and mortgage. By letter dated December 18, 1984, the Solicitor advised Mr. Stiebrins and Ms. Miniats that the transaction was now closed. He enclosed with his letter a copy of the Hamilton Teachers' Credit Union Limited mortgage statement and a copy of the statement of adjustments. The Solicitor advised that the full report would be forwarded in the near future. On January 4, 1985, the Solicitor forwarded to Mr. Stiebrins and Ms. Miniats his "Memorandum of Your Purchase" in which he stated under item "1." the following:

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The title to the property is registered in the name(s) of: ARTURS STIEBRINS and ANITA INTA MINIATS, both of the City of Etobicoke, in the Municipality of Metropolitan Toronto, as joint tenants and not as tenants in common,

TRANSFER: has been registered.

In our opinion you have a good and marketable title to your property and it is subject to the following mortgages:

In February or March of 1991, the Stiebrins received an assessment questionnaire from the City of Etobicoke which listed them as tenants. Mr. Stiebrins attempted to speak with the Solicitor over the following months, however, he was not successful. In early July, 1993, the Stiebrins consulted with J. J. Doanne, another solicitor. By letter dated August 14, 1991, Mr. Doanne advised the Solicitor that he had been consulted by Mr. and Mrs. Stiebrins. Mr. Doanne advised the Solicitor that a sub-search of the title to 15 Shand Avenue shows that no deed to Mr. and Mrs. Stiebrins was registered and that the Collins were still shown as the registered owners. Mr. Doanne requested that the Solicitor review his records and contact him as soon as possible. No reply was received. By letter dated March 26, 1992, Mr. Doanne advised the Solicitor that Mr. Stanislaw Mamak, solicitor for the Vendors, had provided him with an executed deed and same had now been registered. Mr. Doanne detailed the costs to Mr. and Mrs. Stiebrins to correct the matter and requested that the Solicitor pay them. No reply was received.

By letter dated May 13, 1992, Mr. Doanne advised the Law Society of the chronology of events as above noted. By letter dated June 4, 1992, the Law Society forwarded to the Solicitor a copy of Mr. Doanne's May 13, 1992 letter. The Solicitor was requested to provide his comments to the same within two weeks. By letter dated August 27, 1992, the Solicitor advised the Law Society that he had conducted an extensive search of his files from 1985 and could not locate the deed in this matter. The Solicitor advised that due to the passage of time, searches in the Registry Office have been of no assistance in locating the original documents, although the Registry Office has indicated that in all likelihood the documents would have been returned to the Solicitor if and when, a problem of description of any of the parties would have been discovered. The Solicitor advised that he would contact Mr. Doanne to arrange for the reimbursement of his account of the costs to Mr. and Mrs. Stiebrins.

By letter dated November 5, 1992, the Solicitor advised that he had a number of telephone conversation with Mr. Stiebrins and that Mr. Stiebrins had been informed of the problems with his file. The Solicitor further stated that he understood Mr. Doanne was handling the correction of the deed, as confirmed in a telephone conversation with Mr. Doanne's office and with Mr. Stiebrins. The Solicitor advised that he should be in a position in forward payment of Mr. Doanne's account by the end of the month. By letter dated December 8, 1992, Mr. Doanne advised the Law Society that there had been no telephone communication between his office and the Solicitor's but that the Solicitor may be confusing telephone conversations with Mr. Mamak's office. Mr. Doanne advised that he had not received payment from the Solicitor.

By letter dated April 1, 1993, the Solicitor forwarded to Mr. Doanne a cheque in the amount of \$500.00 towards the account. The Solicitor advised Mr. Doanne that the balance would be forthcoming shortly. The Solicitor delivered the balance of Mr. Doanne's account on June 25, 1993.

Finding

The Committee finds that the foregoing evidences establishes that the Solicitor failed to serve his client and failed to respond to communications from another lawyer and thus has breached Rule 2 and Commentary 8 thereof.

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Particular 2(d)
Failure to provide a reply to the Law Society regarding a complaint by
Donna Jobin

The evidence for this particular was provided by documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

On December 12, 1992 Donna Jobin advised the Law Society that she had retained the Solicitor in or about October, 1991, through Legal Aid, to obtain a divorce. Between October, 1991 and December, 1992, Ms. Jobin advised that she had spoken to the Solicitor twice and in both instances the Solicitor advised her that he would call her back. The Solicitor did not return the calls. Ms. Jobin stated that she had left numerous telephone messages for the Solicitor requesting the status of her matter. The Solicitor had not returned her telephone calls.

On January 18, 1993, the Law Society forwarded a copy of Ms. Jobin's December 12, 1992 letter to the Solicitor. The Solicitor was requested to provide his written comments within two weeks. No reply was received.

By letter dated January 24, 1993, Ms. Jobin advised the Law Society that on January 4, 1993, the Solicitor left a message on her answering machine requesting she return his call. Shortly thereafter, Ms. Jobin returned the Solicitor's call and spoke with his secretary. The Solicitor's secretary advised Ms. Jobin that there had been a mix-up with the process server. The Solicitor's secretary advised Ms. Jobin that they would be in contact with her husband's solicitor to determine, what, if any, steps he had taken and would advise her accordingly. Ms. Jobin did not hear back from the Solicitor or his secretary.

A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on February 4, 1993 requesting that either he or his secretary return the call. The Solicitor's secretary returned the Society's call that same day. She advised that the Solicitor was at the hospital with his mother-in-law and she requested an extension to reply. The Solicitor was granted an extension to February 11, 1993. No reply was received.

A Law Society staff employee spoke with the Solicitor's secretary on February 11, 1993. The Solicitor's secretary advised that the Solicitor would provide his reply by 5:00 p.m. on February 12, 1993. The Solicitor's office advised the Law Society by telephone on February 12, 1993 that his reply had been delayed due to a snow storm and would be provided by February 15, 1993.

By letter dated February 11, 1994, received by the Law Society on February 16, 1994, the Solicitor advised that at the time he was retained, it was an uncontested divorce with no request for collorary relief. He states that he had difficulty locating the respondent. Ms. Jobin then moved to Michigan and returned to Toronto for a visit. At that time, the Solicitor stated that Ms. Jobin advised him that her husband had contacted her to arrange for service of his divorce petition and he states that arrangements were made for her husband's solicitor to contact him. The Solicitor stated that as there appeared to be no pressing reason for the divorce and in light of the fact that the husband had commenced the proceeding and, in his opinion, that Legal Aid may be reluctant to finance the matter and would rather have the husband undertake the costs. The Solicitor stated that he presumed the husband's solicitor was proceeding with this matter since he had not heard otherwise from Ms. Jobin.

By letter dated February 26, 1993, the Law Society forwarded to the Solicitor a copy of Ms. Jobin's January 24, 1993 letter. The Law Society requested the Solicitor provide the specific dates of his conversations with Ms. Jobin and the exact difficulty he had in locating the whereabouts her husband. The Solicitor was also requested to provide the date when he was initially retained and whether

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he had kept Ms. Jobin advised of the difficulties in locating her husband. The Solicitor was also requested to provide a summary of the steps he had taken on Ms. Jobin's behalf. The Solicitor was requested to provide his comments at his earliest convenience. No reply was received.

A Law Society staff employee spoke with the Solicitor by telephone on March 25, 1993. The Solicitor advised that he did not recall receiving the Society's February 26th letter but he would check. The Solicitor did not return the call. By letter dated April 1, 1993, the Solicitor advised the Law Society that he would deliver his response by April 7, 1993. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on May 10, 1993 requesting he return the call. The Solicitor returned the Society's call on May 11, 1993 and advised that he would provide his response by May 11, 1993. No reply was received. A Law Society staff employee spoke with the Solicitor by telephone on May 17, 1993. The Solicitor advised that he was preparing his response and that same would be delivered within the next day or so. No reply was received.

By registered mail dated June 1, 1993, the Law Society forwarded to the Solicitor a copy of its February 26, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a written response within seven days, the matter would be referred to the Discipline Committee. The Society's registered mail was signed for and delivered on June 9, 1993. No reply was received.

The Solicitor advised the Law Society by telephone on June 14, 1993 that his response would be forwarded that same day or the following. By letter dated June 14, 1993, the Solicitor advised the Law Society that he is not in receipt of the Society's January 14, 1993 letter. The Solicitor stated that Ms. Jobin had been advised that service could not be effected. He stated that his office then waited for further information regarding her husband's address. The Solicitor further advised that upon Ms. Jobin's return to Toronto from the U.S., it was agreed that as her husband had already filed for divorce, that the matter had been satisfactorily resolved. By letter dated June 30, 1993, the Law Society acknowledged receipt of the Solicitor's June 14, 1993 letter. The Society advised the Solicitor that his latest correspondence was being taken into account.

By letter dated July 13, 1993, the Law Society advised the Solicitor that the matter had been reviewed. The Society also enclosed a copy of its January 24, 1993 letter. The Solicitor was advised that in order to evaluate the adequacy of service provided to Ms. Jobin, greater specificity with respect to the steps taken on her behalf were required. The Solicitor was requested to provide his comments with respect to the basis under which he advised Ms. Jobin that Legal Aid was unwilling to finance her matter. The Solicitor was also requested to provide copies of correspondence and/or file notes in connection with his efforts to keep Ms. Jobin advised of the progress of her divorce. The Solicitor was requested to contact the Society should he be unable to provide his written response within two weeks.

A Law Society staff employee spoke with the Solicitor by telephone on July 28, 1993 and reminded him that his written response was due the following day. The Solicitor advised the Law Society by telephone on July 29, 1993 that he was involved in an estate hearing in Barrie and would deliver his response on August 3, 1993. The Solicitor advised the Law Society by telephone on August 3, 1993 that he was working on his response. The Solicitor advised that he would provide his response later that same day or the following.

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The Solicitor advised the Law Society by telephone on August 4, 1993 that he could not locate the file and that some of his files had suffered water damage. The Solicitor advised that he would write to the Society within the next couple of days and advise as to whether he had located the file. The Solicitor advised the Law Society by telephone on August 6, 1994 that he was required to stay with his mother-in-law until a nurse arrived. He advised that he would drop off his response that same day or the following Monday. By letter dated August 6, 1993, the Solicitor advised the Law Society that there was a breakdown in communication between his office and Ms. Jobin partly due to the pressures upon a sole practitioner and particularly due to Ms. Jobin's absence from the city and country for some period of time. The Solicitor stated that he not aware of the identity of Mr. Jobin's solicitor and relied upon Ms. Jobin to advise him of the whereabouts of her husband. The Solicitor further stated that it appeared Mr. and Mrs. Jobin had discussed the matter and had agreed to have Mr. Jobin's solicitor proceed with the petition. The Solicitor stated that this was communicated to his office by Ms. Jobin. The Solicitor stated that Ms. Jobin did not provide the name of her husband's solicitor but requested the Solicitor accept service of the petition on her behalf. The Solicitor stated that at that time he would have felt obligated to notify Legal Aid that the husband was proceeding with the divorce and therefore, the legal aid certificate was unnecessary. The Solicitor advised that Ms. Jobin had attended at his office and there had been telephone conversations with her, however, the petition had not been received by his office.

By letter dated September 14, 1993, the Law Society advised the Solicitor that he had failed to provide the Society with a detailed summary of the steps he had taken on Ms. Jobin's behalf. The Solicitor was advised that a general reference to phone conversations and visits to his office were insufficient for the Society to evaluate whether the service provided to Ms. Jobin met the standards required under the Rules of Professional Conduct. The Solicitor was requested to provide his summary within two weeks. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on September 28, 1993 requesting he return the call. The call was not returned. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on October 4, 1993 advising that a response was required by October 6, 1993. The call was not returned and no reply was received.

By registered mail dated October 13, 1993, the Law Society reminded the Solicitor of his obligation to reply. The Solicitor was advised that should he fail to provide a response to its September 14, 1993 letter within seven days, the matter would be referred to the Discipline Committee. The Society's registered mail was signed for and delivered on October 21, 1993. No reply was received. As of this date, the Solicitor has not requested an extension to reply nor has he provided the Society with an explanation for his failure to reply.

Finding

The Committee has no hesitation in concluding that these failures to reply to the Law Society constitute professional misconduct under Rule 13 Commentary 3.

Particular 2(e)

Failure to provide a reply to the Law Society regarding a complaint by George Sunaitis

The evidence supporting this particular was provided by documents received under sub-section 33(1) of the LSA and sub-section 15(1) of the SPPA.

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During early 1991, Evalds Zirnitis provided the Solicitor with a retainer of \$350.00 to pursue the reclamation of land and property in the independent republic of Latvia. By letter dated February 23, 1993, George Sunaitis, on behalf of Evalds Zirnitis, advised the Law Society that the Solicitor had failed to pursue Mr. Zirnitis' claim. In 1992 Mr. Zirnitis retained another Solicitor to pursue the reclamation on his behalf. By letter dated May 21, 1993, the Law Society forwarded to the Solicitor a copy of Mr. Sunaitis' February 23, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on June 18, 1993 requesting he return the call. The Solicitor returned the Law Society's call on June 21, 1993. The Solicitor advised that he would review his file and provide a response within the next few days. No reply was received. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on June 25, 1993 requesting he return the call.

The Solicitor returned the call on June 28, 1993. He advised that he was busy with trials that week but would forward his response on June 30, 1993. The Solicitor advised that he did not act for Mr. Sunaitis. The Solicitor was requested to review the Society's letter of May 21st. Should he be unable to locate the same, the Society requested the Solicitor contact it in order that a copy could be forwarded to him by facsimile transmission. The Solicitor advised that he would search for the Society's May 21st letter. The Society did not receive a further telephone call from the Solicitor or a written response. The Solicitor advised the Law Society by telephone on July 5, 1993 that he would not be able to provide his response until July 12, 1993 as there had been a medical emergency in his family.

By letter dated June 30, 1993 received on July 6, 1993, the Solicitor advised the Law Society that he had not acted for Mr. Sunaitis although they had numerous discussions involving land assembly and buildings for resale. The Solicitor advised that his discussions with Mr. Sinaitis involved obtaining compensation for land in Latvia. The Solicitor advised that appropriate contacts were made to ascertain the possibility of doing so. The Solicitor advised that the aspect of compensation had yet to be resolved by the Latvian authorities. The Solicitor advised that to obtain reclamation of the land would entail Mr. Zirnitis' return to Latvia which, by reason his age and frail health, he was not willing to do. The Solicitor advised that he attempted to obtain possible compensation for Mr. Zirnitis through other means.

By letter dated August 12, 1993, the Law Society requested the Solicitor detail the steps he had taken on Mr. Zirnitis' behalf. The Solicitor was also requested to provide the Law Society with evidence that he had reported to Mr. Zirnitis on the status of his progress or lack thereof. The Solicitor was requested to provide his response at his earliest convenience. No reply was received.

A Law Society staff employee left telephone messages for the Solicitor on his office answering machine on August 27, 1993, August 30, 1993 and September 7, 1993, requesting he return the calls. The Solicitor advised the Law Society by telephone on September 10, 1993 that he would deliver his response by September 14, 1993 as he would be in Barrie until late on September 13, 1993. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on September 16, 1993 advising that his response was required by 5:00 p.m. that same day. The Solicitor returned the Society's call on September 16, 1993 and advised that he would hopefully be able to provide his response by September 20, 1993. No reply was received.

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By registered mail dated September 20, 1993, the Law Society forwarded to the Solicitor a copy of its August 12, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should his response not be received within seven days, the matter would be referred to the Discipline Committee. The Society's September 20th letter was signed for and delivered on September 28, 1993. No reply was received.

The Solicitor has not provided the Law Society with an explanation for his failure to reply not has he requested a extension to reply.

Finding

The Committee has no hesitation in finding that these failures to reply to the Law Society constitute professional misconduct under Rule 13, Commentary 3.

Particular 2(f)

Failure to file for the fiscal year ended January 31, 1993

The evidence proving this particular was provided in documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 31, 1993, as required by S.16(2) of Regulation 708 under the *Law Society Act*. A Notice of Default in Annual Filing, dated August 11, 1993 was forwarded to the Solicitor by the Law Society.

By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated September 15, 1993. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the *LSA*. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not respond to this correspondence.

The late filing fee began to accrue on October 8, 1993. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated January 13, 1994. The Solicitor was advised that his name would go before Convocation on February 25, 1994 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on February 24, 1994. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Society's third notice was returned by the post office marked "unclaimed".

By registered mail dated February 25, 1994, the Law Society advised the Solicitor that his rights and privileges as a member had been ordered suspended by Convocation on February 25, 1994 as a result of his failure to pay his late filing fee. To date, the Solicitor has not filed the required forms.

Finding

The Committee finds that the Solicitor's failure to file constitutes professional misconduct.

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Particular 2(h)
Failure to produce books, records and client files

This complaint was established by documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

A Law Society staff auditor attended at the Solicitor's office/home, unannounced, on January 18, 1993. The door was not answered. On January 18, 1992 and January 19, 1993 the auditor also attempted to reach the Solicitor by telephone by calling his office. The telephone was not answered. On January 20, 1993 the auditor left a telephone message for the Solicitor on his office answering machine requesting he return the call. The Solicitor's secretary returned the auditor's call. She left a telephone message for the auditor that she was returning the call on behalf of the Solicitor.

The Solicitor returned the auditor's call on January 21, 1993 advising that due to a family emergency, he was unable to meet with him. The Solicitor advised the auditor that he would call him again on January 25, 1993. The Solicitor does not return the call. The auditor left telephone messages for the Solicitor at his office answering machine on January 25, 1993 and February 2, 1993, requesting he return the call. The call was not returned.

The Solicitor advised the auditor by telephone on February 4, 1994 that due to his mother-in-law's ill health and due to his office being under renovations, it would be impossible for the auditor to attend his offices. The Solicitor advised the auditor that he would contact him during the following week to make arrangements for the delivery of his books and records to the Law Society. The Solicitor did not return the Society's call nor did he deliver his books and records. The auditor left telephone messages for the Solicitor on his office answering machine on February 15, 1993, February 16, 1993 and February 17, 1993 requesting he return the calls. The calls were not returned. The auditor left a telephone message for the Solicitor on his office answering machine on February 19, 1993 requesting he return the call.

The Solicitor returned the auditor's telephone call on February 22, 1993. The Solicitor advised that he was in the process of getting the books and records together but that he was required to attend to his mother-in-law for a few days. The Solicitor advises that he would arrange for deliver of the books and records upon his return, being February 25, 1993. The Solicitor's books and records were not received by the Law Society. By registered mail, dated February 22, 1993, the Law Society advised the Solicitor that should he not contact the auditor by March 4, 1993 and make firm arrangements for the review of his books and records, the matter of his failure to co-operate with the examination will be reported to the Society's Discipline Department. The Solicitor left a telephone message for the auditor on March 4, 1993 advising that he had received the Society's February 22nd letter and that he would produce his books and records on March 22, 1993 upon his return to town. The Solicitor did not provide the Society with his books and records.

The auditor left a telephone message for the Solicitor at his office on March 29, 1993 requesting he return the call. The Solicitor returned the Society's call that same day and advised that he required a few more days.

The Solicitor delivered a package of books and records to the Law Society on March 30, 1993. The Law Society reviewed the books and records.

The Solicitor's file was re-assigned to another Law Society auditor. The newly assigned auditor left a telephone message for the Solicitor on his office answering machine on June 17, 1993 advising that she had assumed carriage of this matter and advised him of the additional books and records which were required. The Solicitor returned the auditor's telephone call that day and left a message for her requesting she provide him with a list of the additional items required.

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By registered mail dated June 18, 1993 the Law Society provided the Solicitor with a list of the additional documents and information required being:

- a) *the deposit books for his general and trust bank accounts for February 1, 1991 to January 31, 1992 time period;*
- b) *the bank statements for his general bank account for the February 1, 1991 to May 31, 1991 time period;*
- c) *his accounting books and records (all ledgers, journals, billings, sub-ledgers and bank reconciliations and bank statements with cancelled cheques and deposit books) for both his general and trust bank account for the time period of February 1, 1992 to the present date.*

The Solicitor was requested to have the above noted material available for review by the auditor by June 30, 1992. The Solicitor was requested to contact the auditor to arrange for production of this material. No reply was received.

The auditor left a telephone message for the Solicitor on his office answering machine on July 5, 1993 requesting that he advise as to when the additional documentation would be available in order that the examination could continue. The Solicitor returned the auditor's call on July 5, 1993 by leaving her a telephone message advising that he was getting some things together. The delay was caused by his being in the midst of preparing for a trial and water damage at his premises. The Solicitor stated that he should be able to provide the material in the "next little while". The auditor returned the Solicitor's call on July 5, 1993 and left a message on his answering machine requesting for a specify date as to then the books and records would be available as the "next little while" was too vague. The Solicitor did not return the call.

The auditor left a telephone message for the Solicitor on his office answering machine requesting he call her back by the end of the day to advise as to when his books and records would be available.

The Solicitor returned the auditor's call on July 16, 1993. He left her a telephone message advising that due to a trial he would likely not be able to get back to her until July 19, 1992 to arrange for delivery of the additional documentation. The auditor left a telephone message for the Solicitor at his office on July 19, 1993 requesting he advise as to when the books and records would be available for delivery. The Solicitor returned the auditor's telephone call that same day. He advised that his trial had been delayed and would continue until Tuesday and Wednesday. The Solicitor stated that he would call her as soon as the trial was completed to provide the material, probably within the next couple of days.

By registered mail dated July 19, 1993 the Law Society forwarded to the Solicitor a copy of its June 18th letter. The Solicitor was advised that should he not contact the auditor by July 28, 1993 to make firm arrangements for the review of all of his books and records, the matter would be reported, for his failure to co-operate with the examination, to the Discipline Department.

The Solicitor advised the auditor by telephone on July 28, 1993 that he had some of the material together but that he had a trial in Barrie. He advised that he would deliver some of the material to the auditor that same day and that the remainder would be delivered on July 29th or 30th, 1993. The auditor left a telephone message for the Solicitor on his office answering machine on July 30, 1993 requesting he advise as to whether the material would be delivered that same day. The Solicitor returned the auditor's call that same day and provided his verbal undertaking to produce his books and records by August 3, 1993. The Solicitor's books and records were not received.

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The Solicitor left a telephone message for the auditor on August 4, 1993. He advised that he could only find some of the deposit books from 1991 due to water damage. He stated that he believed that the remainder might be with his bookkeeper. The Solicitor advised that he would check with her and advise the auditor. The auditor spoke with the Solicitor later that same day and requested he call her, later in the day, to advise of his bookkeeper's response. The Solicitor called the auditor later in the day to advise that he had some of the deposit books, bank statements and cancelled cheques. He advised that the summer of 1992 had been slow for him. The Solicitor advised that he would deliver the documents in his possession the following day.

The auditor left a telephone message for the Solicitor on his answering machine on August 6, 1993 requesting he advise as to whether the documents would be delivered to the Society that same day. The Solicitor returned the auditor's call that same day and advised that due to his mother-in-law's illness he may not be able to deliver the books and records until August 9, 1993. The documentation was not received.

The auditor left a telephone message for the Solicitor on his office answering machine on August 10, 1993 requesting he advise as to when the books and records would be delivered. The Solicitor returned the auditor's call that same day. He left a telephone message for the auditor advising that he was returning from Barrie and he should be able to deliver the books and records to her late that day or the following. The documentation was not received.

The auditor spoke with the Solicitor by telephone on August 17, 1993. The auditor requested the Solicitor provide the following files for review:

- *Richardson, Viola, Estate*
- *Boucher, Ralph*
- *Abergel, H. Emil*
- *Dundurs, Olga*
- *Murray, Marilyn*
- *Pavasars, I*

The Solicitor advised the auditor that it was not possible for her to review the files at his office but that he would deliver them to the Society. The auditor left a telephone message for the Solicitor at his office on August 18, 1993 requesting he also provide the Stiebrins files and his books and records. The Solicitor did not return the call.

The auditor made an unannounced visit to the Solicitor's office/home on August 19, 1993. The door was not answered. The auditor left her card in the door. The Solicitor left a telephone message for the auditor on August 19, 1993 advising that he would call her the following day and arrange for delivery of the files on August 23, 1993. The auditor returned the Solicitor's call that same day and advised that she would attend at the Solicitor's office to review the outstanding items.

The Solicitor advised the auditor by telephone on August 20, 1993 that he was in Barrie and that his office was under going renovations. The Solicitor advised that he would bring the files to the Society on August 23, 1993.

The Solicitor advised the auditor by telephone on August 23, 1993 that he was still in Barrie and would not be able to deliver the files that day. The Solicitor stated that he would deliver the files the following day. The Solicitor delivered a box of files to the Society on August 24, 1993.

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The auditor left a telephone message for the Solicitor on his office answering machine on August 27, 1993 requesting that he return the call as he had not provided the files requested by telephone on August 17, 1993 and August 18, 1993. The Solicitor returned the call that same day, advising that he was in Buffalo and would call back on August 30, 1993. The Solicitor left a telephone message for the auditor on August 31, 1993 advising that he was still unavailable but that he may be able to meet with her on September 2, 1993. The Solicitor did not return the call.

The auditor left a telephone message for the Solicitor on his office answering machine on September 7, 1993 advising that should he not return the call, the matter would be referred to the Discipline Department for failure to reply. The Solicitor returned the auditor's call that same day. They discussed the Abergel file and the outstanding books and records. By registered mail dated September 8, 1993, the Law Society advised the Solicitor of the files and books and records required. The Solicitor was advised that should the material not be made available for review by September 22, 1992, the matter would be reported to the Discipline Department for failure to co-operate. The auditor spoke with the Solicitor by telephone on September 14, 1993. The Solicitor advised that he did not have all of the required files or documents. The auditor advised the Solicitor that he could attempt to contact his clients in order to reproduce the files and that he could request the missing statements from his bank.

The auditor left a telephone message for the Solicitor on his office answering machine on September 22, 1993 inquiring whether the books and records would be delivered that day. The Solicitor did not return the call. The Solicitor left a telephone message for the auditor on September 24, 1993 advising that he was moving and that he was unable to produce the files, or books and records at this time and that he would call her the following week. The auditor returned the Solicitor's call on September 24, 1993. She left a message on his office answering machine advising that she would come to his office to pick up the files and books and records and that it was not necessary to wait until next week. The Solicitor did not return the call.

The auditor left a telephone message for the Solicitor on his office answering machine on September 24, 1993 requesting whether the files, books and records could be picked up that same day. The Solicitor did not return the call. The auditor left a telephone message for the Solicitor at his office on September 28, 1993 requesting he return the call. The call was not returned.

The Solicitor left a telephone message for the auditor at his office on September 30, 1993 advising that due to an illness in the family, he had been in Barrie. The Solicitor advised that he would deliver the outstanding items on October 4, 1993. No documentation was received from the Solicitor.

The auditor left a telephone message for the Solicitor on his office answering machine requesting he advise as to whether the books and records would be delivered that same day or the following. The Solicitor did not return the call. The Solicitor has not produced for the Society's examination a complete set of his books and records or the following requested files:

- *Richardson, Viola, Estate*
- *Boucher, Ralph*
- *Abergel, H. Emil*
- *Dundurs, Olga*
- *Murray, Marilyn*
- *Pavasars, I.*
- *Stiebrins, A.*

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Finding

The Committee has rarely seen such obvious evasiveness and ignoring of the Law Society's reasonable requests and has no hesitation finding that they constitute professional misconduct under Rule 13, Commentary 3.

Particular 2(i)

Failure to provide an accounting to his client Olga Dundurs for all monies received in trust by him after settling a claim on her behalf

The evidence supporting this complaint was provided by the *viva voce* testimony of Olga Dundurs and documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

During September or October, 1991, Olga Dundurs retained the Solicitor to assist her in obtaining money owed to her by her son.

Ms. Dundurs provided the Solicitor with the following monetary retainers:

\$500.00 (cash) on October 3, 1991
\$350.00 (cash) on October 15, 1991
\$200.00 (money order) on November 12, 1991
\$500.00 (cheque) on February 10, 1992
\$250.00 (cheque) on May 27, 1992

On May 11, 1992, Ms. Dundurs executed an Authorization and Direction authorizing the Solicitor to settle her matter on the terms that she recover \$2,000.00 together with legal fees in the amount of \$4,000.00. All funds were payable to the Solicitor. In July of 1992, the Solicitor verbally advised Ms. Dundurs that she owed him \$4,000. for his legal services. The Solicitor did not provide Ms. Dundurs with a statement of account.

On or about July 23, 1992, the Solicitor attended at Ms. Dundurs home and completed a cheque, for her signature, in the amount of \$5,000. payable to himself. After the Solicitor left, Ms. Dundurs contacted a friend, who assisted her in putting a stop-payment on the cheque. The Solicitor attended at Ms. Dundurs home on July 24, 1992 which another cheque in the amount of \$4,000.00 which he requested she sign. Ms. Dundurs advised the Solicitor that she could not read the cheque without her glasses, however, he urged her to sign the same. Ms. Dundurs signed the cheque. After the Solicitor left Ms. Dundurs discovered that the cheque was for \$4,500. rather than \$4,000. When Ms. Dundurs confronted the Solicitor about this, he advised her that he required the funds to pay his mortgage and that he would pay her back.

On August 26, 1992, Ms. Dundurs executed a Release and Direction authorizing the payment of funds, in the amount of \$2,000. to the Solicitor in settlement of her action against her son. The Solicitor received settlement funds in the amount of \$2,000. on September 10, 1992. That same day, he issued a trust cheque to himself in the amount of \$2,000.00.

On December 1, 1992, the Solicitor issued a cheque to Ms. Dundurs in the amount of \$1,000.00. By letter dated June 3, 1993 Ms. Dundurs advised the Law Society of the Solicitor's conduct and that he had not accounted to her regarding the funds she had provided. By letter dated July 6, 1993, the Law Society forwarded to the Solicitor a copy of Ms. Dundurs June 3, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks.

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By letter dated August 6, 1993, the Solicitor advised the Law Society that an investigation was conducted of the banking records regarding the deposit and withdrawal of funds from Ms. Dundurs various accounts by her son. The Solicitor stated that negotiations were carried out with the son's solicitor. The Solicitor stated that there was some doubt cast as to the mental competency of Ms. Dundurs. The Solicitor stated that he was required to meet with Ms. Dundurs due to her inability to travel and he further provided her with the service of estate planning and the completion of a will. The Solicitor stated that he was required to proceed with pleadings, production of documents, examination for discovery and cross-examination upon affidavits filed. He stated that the matter was eventually transferred to the District of Peel upon motions for judgment. The Solicitor advised that the eventual recovery by Ms. Dundurs was approximately \$6,000. The Solicitor stated that his fee was agreed upon by Ms. Dundurs.

By letter dated August 18, 1993, the Law Society requested the Solicitor provide a copy of his account in the amount of \$4,000.00 as well as an explanation for that account. No reply was received.

By registered mail dated October 5, 1993, the law Society reminded the Solicitor of his obligation to reply to the Society. The Solicitor was advised that should his reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

Finding

The Committee finds that the Solicitor's failure to account to Ms. Dundurs constitutes professional misconduct.

Complaint D67/94

Particular II(1)

Failure to honour a financial obligation to Victory Verbatim Reporting Services in the amount of \$685.87 more or less

The evidence supporting this particular was received under sub-section 33(9) of the *LSA* and sub-section of the *SPPA*.

Victory Verbatim Reporting Services ("Victory") forwarded to the Solicitor an account, dated March 10, 1992, in the amount of \$123.05 for the attendance of a reporter on March 9, 1992 regarding the Dundurs vs. Bredovskis matter. The account was not paid.

Victory forwarded an account to the Solicitor, dated March 25, 1992, in the amount of \$123.05 for the attendance of a reporter on March 24, 1992 regarding the Dundurs vs. Bredovskis matter. The account was not paid.

Victory forwarded an account to the Solicitor, dated May 14, 1992, in the amount of \$116.36 for the attendance of a reporter on March 13, 1992 regarding the Reis vs. Reis matter. The account was not paid.

Victory forwarded an account to the Solicitor, dated June 8, 1992, in the amount of \$323.41 for the attendance and preparation of transcripts on June 2, 1992 regarding the Coleville vs. Coleville matter. The account was not paid.

By letter dated August 11, 1992, Victory advised the Solicitor that he owed \$685.87 in outstanding accounts and that all accounts were due upon receipt. The Solicitor was advised that should payment not be received by August 21, 1992, the matter would be referred to the Law Society. The accounts were not paid. By

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letter dated August 25, 1992, Victory advised the Law Society of the Solicitor's failure to pay the outstanding accounts. By letter dated September 3, 1992, the Law Society forwarded to the Solicitor a copy of Victory's August 25, 1992 letter. The Solicitor was requested to provide his comments to me same within two weeks.

By letter dated October 6, 1992, the Solicitor advised the Law Society that the invoices that referenced the Dundurs vs. Bredovski matter related to an examination that was scheduled for March 9, 1992. The Solicitor stated that in his opinion, as the appointment had been cancelled within the prescribed time period, there should be no charge for the reporter. With respect to the March 24, 1992 invoice, the Solicitor advised that he attended the examinations on that day and waited 1/2 an hour to obtain a certificate of non-attendance and therefore, in his opinion, the account is excessive. With respect to the balance of the account, the Solicitor advised that he was in the process of negotiating a settlement and that thereafter, the account would be paid or in the alternative, the account would be paid forthwith.

By letter dated January 28, 1993, Victory advised the Law Society that the Solicitor had booked half day examinations when he could have booked for only one hour examination. Victory further stated that the rates are in compliance with the tariff contained in the Rules of Civil Procedure. Victory advised that the Solicitor's appointments were cancelled the same day of each discovery and a certificate of non-attendance was issued. The account rendered in those cases covered the expense of the court reporter and the room held for the Solicitor. Victory further advised that each account stated that payment of the account was due upon receipt. Victory stated that it expected payment of the accounts immediately.

By letter dated August 13, 1993, the Law Society forwarded to the Solicitor a copy of Victory's January 28, 1993 letter. The Solicitor was requested to provide his further comments regarding the view to the excessiveness of the fees charged by Victory. With respect to the account rendered on June 8, 1992, the Solicitor was requested to pay the same forthwith. No reply was received.

The Solicitor has not paid any of the outstanding accounts to Victory.

Finding

The Committee notes that Rule 13, Commentary 6 makes it clear that lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred on behalf of clients. The Committee concludes on the basis of the above evidence that the Solicitor breached this duty and is, therefore, guilty of professional misconduct.

Particular II(2)

Failure to comply with his undertaking to the purchaser, Linda Anne Johnson, and her solicitor, Charles A. Stafford, dated November 27, 1992 to obtain and register a correcting deed incorporating the true legal description, and to advise them of the details of registration, within 90 days of the date thereof.

and Particular II(3)

Failure to reply to a letter dated September 28, 1992 from a fellow solicitor, Charles Stafford

The evidence supporting this charge was the *viva voce* testimony of Charles A. Stafford, a solicitor and documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

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The Solicitor provided a written undertaking to Linda Anne Johnson and her solicitor, Charles A. Stafford, on November 27, 1992 to obtain and register a correcting deed incorporating the true legal description of 124 Glenwood Crescent, East York, and to advise them of the details of registration within 90 days.

By letter dated January 27, 1993, Loopstra, Nixon & McLeish ("Loopstra"), solicitors for the Corporation of the Borough of East York, advised Mr. Stafford that the delivery of a quitclaim or correcting deed would require Council authorization. They advised that it was Council's policy to require the person requesting the correction of the conveyance to reimburse the Borough for its legal costs. Once reimbursement of the costs are received, Loopstra advised that it would proceed with the subsearch and report to Council, authorizing the matter to be completed.

By letter dated March 26, 1993, Mr. Stafford requested the Solicitor to advise of his progress in obtaining a quitclaim or correcting deed from the Corporation of the Borough of East York. No reply was received.

By letter dated June 4, 1993, Mr. Stafford advised the Solicitor that he had been advised by counsel for the Borough of East York that he had not provided them with the draft quitclaim or correcting deed nor had he arranged for payment of the monies required as reimbursement to the Borough. Mr. Stafford advised the Solicitor that should he fail to contact him forthwith, he would refer this matter to the Law Society.

By letter dated August 5, 1993, Mr. Stafford confirmed with the Solicitor their telephone conversation of July 5, 1993, in which the Solicitor advised that he would speak to the Borough of East York. Mr. Stafford advised the Solicitor that despite his assurances that he would advise him of the progress of this matter, he had not heard from him further. Mr. Stafford advised the Solicitor that should he not honour his undertaking by August 20, 1993, the matter would be referred to the Law Society.

By letter dated September 28, 1993, Mr. Stafford confirmed with the Solicitor their telephone conversation of September 27, 1993 in which the Solicitor advised that he had prepared the quitclaim deed and had left a telephone message for the Borough of East York to contact him with respect to arranging for execution of the same. Mr. Stafford requested that the Solicitor forward to him a copy of the quitclaim deed as well as his letter to Mr. Loopstra. Mr. Stafford advised the Solicitor that should the undertaking not be complied with by October 18, 1993, the matter would be referred to the Law Society. No reply was received.

By letter dated October 26, 1993, Mr. Stafford advised the Law Society of the Solicitor's failure to comply with his undertaking given on November 27, 1992. By letter dated November 22, 1993, the Law Society forwarded to the Solicitor a copy Mr. Stafford's October 26, 1993 letter. The Solicitor was requested to provide his comments within two weeks. By letter dated January 14, 1994, the Solicitor advised the Law Society of the following:

The originally (*sic*) mistake in the description was acknowledged, yet following the arrangements to do a correcting deed some problem arose for council approval of our office doing the work for signature by East York.

I have indicated that we are agreeable to ourselves or East York preparing one paragraph in a description as long as it is done.

Mr. Stafford never heard further from the Solicitor.

Finding

The Committee notes that Rule 14 dealing with Responsibility to Lawyers Individually and specifically Commentaries 7 and 6 impose professional duties to fulfil undertakings and to answer with reasonable promptness all professional letters and communications from other lawyers which require an answer respectively. The Committee finds on this basis of the above evidence that the Solicitor breached these duties and is, therefore, guilty of professional misconduct.

Particular II(4)

Failure to reply to the Law Society regarding a complaint by his client, Louis Gallant and the Bank of Montreal

and Particular II(9)

While representing his clients, Louis Gallant and the Bank of Montreal, he failed to serve them in a conscientious, diligent and efficient manner, the particulars of which are as follows:

- a. with respect to Louis Gallant;
 - i. he failed to complete the purchase transaction.
 - ii. he failed to advise his client that he had failed to complete the purchase transaction

- b. with respect to the Bank of Montreal;
 - i. he failed to complete the mortgage transaction despite instructions to do so.
 - ii. he failed to report and account.

The evidence supporting these two allegations was the *viva voce* testimony of Louis Gallant and of Sylvian Painchaud, branch manager of the Bank of Montreal, 711 Queen Street East in Toronto and documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

In November of 1992, Louis and Maureen Gallant retained the Solicitor to act on their behalf regarding the purchase of 766 Churchill Lane, Willow Beach. A loan was obtained from the Bank of Montreal. The closing was scheduled to take place on December 2, 1992. At the initial meeting Mr. Gallant provided the Solicitor with a retainer of \$2,213.07. The Solicitor advised Mr. Gallant that the matter would take several months to complete.

The Bank of Montreal ("Bank") retained the Solicitor to act on its behalf regarding the discharge of the existing mortgage on the above noted property. The Bank advanced \$56,000.00, in trust, to the Solicitor on November 27, 1992.

On December 1, 1992, Louis and Maureen Gallant executed a Personal Loan Plan - Promissory Note to the Bank, on December 1, 1992, borrowing \$56,000.00 at 9.5% and promising to pay half-monthly payments of \$260.82 starting on December 16, 1992 through to and including December 1, 1997.

On December 1, 1992, the Bank provided the Solicitor with a Statement of Disclosure with respect to funds borrowed in the amount of \$56,000.00 On December 1, 1992, the Solicitor registered a deed/transfer of land on behalf of Louis and Maureen Gallant as joint tenants. The Solicitor had promised a full report to the Gallants by January, 1993. The Solicitor later changed the date upon which the report could be expect to March, 1993. No report was received.

On December 2, 1992 the Solicitor forwarded to Blair Rose of the law firm Rose, Rose & Shiner, a certified cheque in the sum of \$56,011.53 to discharge the mortgage on title, Kahn & S.H.R. first mortgage loan to Flynn on 766 Churchill Lane, Willow Beach.

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By letter dated December 2, 1992, Mr. Rose advised the Solicitor that there was a shortfall of funds of \$171.90 and that the executed discharge was being obtained and would be forwarded upon receipt of the outstanding funds. Shortly after March 1, 1993, the Bank of Montreal attempted to speak with the Solicitor by telephone on numerous occasions, however, unsuccessfully.

By letter dated March 9, 1993, the Town of Georgia advised Mr. and Mrs. Gallant that \$269.13 was owing from 1993 in property tax arrears on 766 Churchill Lane. Mr. and Mrs. Gallant were requested to forward payment of the same immediately to avoid any penalty charges. The Gallants forwarded this letter to the Solicitor on March 14, 1993. No response was received.

On March 14, 1993, Mr. and Mrs. Gallant forwarded a cheque in the amount of \$269.13 to the Town of Georgia, in payment of the property tax arrears.

In May of 1993, the Branch Manager of the Bank, Sylvian Painchaud, advised Mr. Gallant that the Bank had not received any of the closing documents, such as mortgage or transfer of land, from the Solicitor. The Solicitor assured Mr. Gallant in May of 1993 that the matter would be taken care of immediately. Mr. Gallant did not hear further from the Solicitor. After two weeks, Mr. Gallant attempted to contact the Solicitor by telephone. His calls were not returned. Mr. Gallant attended at the Solicitor's office however, the doors were locked.

On May 18, 1993, A.B.C. Property and Lien Reports advised Mr. and Mrs. Gallant that the property of 766 Churchill Lane, showed, as of that date, the following outstanding encumbrances:

an Instrument registered on September 26, 1991, by Sidney and Ida Kahn to 741977 Ontario Ltd. cob S.H.R. Investments, in the amount of \$56,000.00

an Instrument, registered on December 1, 1992, by Louis and Maureen Gallant to the Bank of Montreal, in the amount of \$56,000.00.

Mr. Gallant was informed by Sidney and Ida Kahn that they had not received full payment in order to have the mortgage registered on September 26, 1991 discharged.

By letter dated June 14, 1993, Mr. Gallant advised the Law Society of the Solicitor's failure to advise him of the outstanding amount required to pay the Kahn's in full.

In June or July, 1993, a representative of the Bank attended at the Solicitor's office unannounced. The representative was unable to meet with the Solicitor.

By letter dated July 5, 1993, the Law Society forwarded to the Solicitor a copy of Mr. Gallant's June 14, 1993 letter. The Solicitor was requested to provide his response within two weeks. By letter dated July 19, 1993, the manager of the Bank advised Mr. Gallant that one of the responsibilities of a solicitor acting on both his behalf and the Bank's, is to provide the Bank, within 30 days, with a final report after registration of the Mortgage. The Bank advised Mr. Gallant that should letters/documents not received by July 31, 1993, the Bank will have no alternative but to seek legal counsel to confirm that the transaction had been properly completed and that the costs associated with that effort, would be at Mr. Gallant's expense.

Mr. Gallant retained Paul Dinneen of Chapnick and Associates, Solicitors, to rectify the matter. On July 20, 1993, Mr. and Mrs. Gallant forwarded to the law firm of Rose, Rose and Shiner the amount outstanding of \$171.90 to obtain the discharge of mortgage.

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A Law Society staff employee left a telephone message for the Solicitor on August 13, 1993 on his office answering machine requesting that he return the call. The Solicitor returned the call on August 19, 1993 by leaving a telephone message for the Society's staff employee, advising that he was out of town and would respond first thing next week. No reply was received. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on August 30, 1993 requesting he return the call. The call was not returned.

On August 31, 1993, a Discharge of Mortgage was registered on August 31, 1993 on the property municipality known as 766 Churchill Lane, Willow Beach.

By registered mail dated September 10, 1993, the Law Society forwarded to the Solicitor a copy of its July 5, 1993 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. The Solicitor advised the Law Society, by telephone on September 20, 1993, that he would provide his response that week.

On December 20, 1993, Paul Dinneen reported to Mr. and Mrs. Gallant that they now have a good and marketable title and that the Khan mortgage had been discharged. Mr. Dinneen also forwarded his account, in the amount of \$508.25, regarding the discharge and final report to the Bank.

By letter, received by the Law Society on January 12, 1994, the Bank advised the Law Society of the Solicitor's failure to report.

The Solicitor provided no response to the Law Society nor has he provided an explanation for his failure to reply.

Finding

The Committee finds that the above evidence establishes failure to keep the client informed, slipshod work and mistakes and incompetence in respect of the Gallants and the Bank of Montreal all of which is professional misconduct under Rule 2, Commentaries 8 and 10. The Committee also finds that the Solicitor breached his professional duty to reply promptly to any communication from the Law Society imposed by Rule 13, Commentary 3.

Particular II(5)

He failed to reply to the Law Society regarding a complaint by Helen Thomas

and Particular II(10)

He failed to serve his client, Helen Thomas, in a conscientious, diligent and efficient manner in that:

- a. He failed to reply to messages left by her
- b. He failed to proceed with her support, custody and divorce matters in a timely manner
- c. He failed to keep her reasonably informed throughout the course of the retainer

and Particular II(11)

He failed to deliver the file to his client, Helen Thomas, or her new lawyer, Patrick Hengen, despite their requests that he do so.

The evidence supporting this charge was the *viva voce* testimony of Helen Thomas and of Patrick Hengen, a solicitor and documents admitted under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

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On or about December 13, 1990, Helen Thomas retained the Solicitor regarding the divorce and support and custody of her daughter, Jessica Thomas. Shortly after being retained the Solicitor verbally advised Ms. Thomas that he had obtained an interim custody order. A Legal Aid Certificate was issued to the Solicitor on May 27, 1991 to proceed with the divorce and support and custody matter on Ms. Thomas behalf.

By letter dated August 10, 1992, the Solicitor wrote a letter, addressed to "To Whom it may concern". In that letter he stated that he was the Solicitor for Ms. Thomas regarding the support and custody of Jessica Thomas. The Solicitor stated that he was currently in the process of preparing the necessary documents to bring the matter back on the list as the original Motion for support and custody had been adjourned sine die. He stated that he expected to have the final order within six to eight weeks. As the Solicitor did not provide Legal Aid with an opinion, and the Legal Aid Certificate was cancelled on August 5, 1992.

Ms. Thomas left telephone messages for the Solicitor on his office answering machine on April 5, 1993, April 12, 1993, April 19, 1993, April 26, 1993, May 3, 1993, May 4, 1993, May 10, 1993, May 11, 1993, May 18, 1993, May 20, 1993, May 25, 1993, May 26, 1993, May 27, 1993, May 28, 1993, and May 31, 1993 requesting he advise as to the status of her matter. The calls were not returned. By letter dated May 31, 1993, Ms. Thomas advised the Solicitor of her unsuccessful attempts to contact him. The Solicitor was requested to advise as to the status of her matter. No reply was received.

By letter dated June 22, 1993, Ms. Thomas advised the Law Society of the Solicitor's failure to advise her of the status of her matter. By letter dated July 13, 1993, the Law Society forwarded to the Solicitor a copy of Ms. Thomas' June 22, 1993 letter. The Solicitor was requested to provide his response within two weeks. No reply was received.

By letter dated July 19, 1993, Patrick Hengen, a barristers and solicitor, who had been retained by Ms. Thomas to assume carriage of her matter, requested the Solicitor deliver Ms. Thomas' files to him forthwith. Mr. Hengen provided the Solicitor with a duly executed Direction. No reply was received.

By letter dated August 19, 1993, Mr. Hengen forwarded to the Solicitor a copy of his July 19, 1993 letter. The Solicitor was advised that should the files not be received within one week, a complaint would be filed with the Law Society.

By letter dated September 10, 1993, the Law Society forwarded to the Solicitor a copy of its July 13, 1993 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, the matter would be referred to the Discipline Committee.

The Solicitor advised the Law Society by telephone on September 20, 1993, that he was taking care of the matter that week, as well as, forwarding a reply to the Society. No reply was received.

The Solicitor did not request an extension to reply nor did he provide the Society with an explanation for his failure to reply.

Finding

The Solicitor failed to do what the client asked him to do, he failed to reply to inquiries from his client, from another solicitor about his failure to act on the client's instructions and he failed to reply to inquiries from the Law Society. The Committee has no alternative but to find the Solicitor guilty of professional misconduct on these charges.

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Particular II(6)

While representing his clients, Anthony Barkas and Debra McIntyre, in connection with claims about a mutual neighbour, he failed to serve them in a conscientious, diligent and efficient manner in that:

- a. he failed to keep them reasonably informed about the status of their files, and;
- b. he failed to proceed with their claims in a timely manner.

and Particular II(7)

He failed to account for a \$500.00 retainer entrusted to him by his client, Debra McIntyre, despite her request that he do so.

The evidence supporting this charge was established by the *viva voce* testimony of Anthony Barkas and Debra McIntyre and documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

On September 18, 1992, Debra McIntyre retained the Solicitor to obtain an injunction against her neighbour to prevent the neighbour from cutting down trees near or on the lot line. The Solicitor advised Ms. McIntyre that he could have the injunction in place within a month. Ms. McIntyre provided the Solicitor with a retainer of \$500.00.

Anthony Barkas retained the Solicitor on October 4, 1992 to proceed with an injunction to prevent the same neighbour from cutting down trees on or near the lot line and to lay criminal charges against his neighbour. Mr. Barkas provided the Solicitor with a monetary retainer of \$300.00. The Solicitor had agreed to complete the action with respect to the injunction by mid-November, 1992.

On November 6, 1992, Mr. Barkas and the Solicitor attended before a Justice of the Peace. The Justice of the Peace advised Mr. Barkas and the Solicitor that they were in the wrong office and that he was unwilling to proceed with criminal charges. Immediately after this meeting, the Solicitor assured Mr. Barkas that he would talk to a Police Constable, obtain his report and proceed with criminal charges. He further assured Mr. Barkas that all paper work for the injunction was ready. The Solicitor advised Mr. Barkas that he would send him a copy for his review. Mr. Barkas did not receive a copy of the injunction documentation from the Solicitor.

Between December 11, 1992 and January 13, 1993, Mr. Barkas left eleven telephone messages for the Solicitor on his answering machine. The calls were not returned.

In or about December 18, 1992, the Solicitor's secretary, "Elma", advised Ms. McIntyre that she could not locate any information regarding the injunction.

By letter dated December 21, 1992, Ms. McIntyre terminated her retainer with the Solicitor and requested the return of her file and her \$500.00 retainer. Ms. McIntyre advised the Solicitor that should he fail to provide a response by January 8, 1993, the matter would be referred to the Law Society.

On January 12, 1993, the Solicitor's secretary advised Mr. Barkas that no action had been initiated on the injunction or the criminal charges. The Solicitor's secretary advised Mr. Barkas that the Solicitor would return his call later that same day. The call was not returned. By letter dated January 13, 1991 [*sic*], Mr. Barkas terminated his retainer with the Solicitor and requested the Solicitor return his \$300.00 retainer to him.

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By letter dated January 21, 1993, the Solicitor advised Mr. Barkas that he had proceeded with his matter by meeting with the Police Office to complete the criminal aspect of the case. He further advised that he was preparing the final draft of the affidavit in support of this injunction application. The Solicitor enclosed his account to Mr. Barkas showing a balance due of \$235.00.

By letter dated January 25, 1993, Ms. McIntyre and Mr. Barkas advised the Law Society that they had retained the Solicitor to proceed with an injunction action against one of their common neighbours on the agreement that the Solicitor would obtain the injunction not later than mid-November, they retained his services. They complained that the Solicitor had failed to serve them properly, if at all.

By letter dated February 22, 1993, the Law Society forwarded to the Solicitor a copy of Ms. McIntyre and Mr. Barkas' January 25, 1993 letter. The Solicitor was requested to provide his comments within two weeks.

By letter dated April 15, 1993, the Solicitor advised the Law Society that he had appeared before the Committee of Adjustments in East York which resulted in a decision against Mr. Barkas. The Solicitor advised that the matter was pending an appeal to the Ontario Municipal Board. The Solicitor further stated that both he and Mr. Barkas attended before a Justice of the Peace to lay criminal charges against Mr. Barkas' neighbour, however further information was required from the police and another neighbour. With respect to the complaint by Ms. McIntyre, the Solicitor advised that he had reviewed an extensive history, obtained a statement of claim from the prior solicitors who had commenced an action some two years prior. Due to an outstanding account with the previous solicitors, the Solicitor advises that he could not obtain numerous documents contained in their files. The Solicitor advised that the matter is in limbo pending further instructions as the Court file is not sufficient to conduct meaningful discoveries.

By letter dated April 26, 1993, Mr. Barkas advised the Law Society that the Solicitor took no part whatsoever with his application to the Committee of Adjustment.

By letter dated May 28, 1993, Ms. McIntyre advised the Law Society that at their initial meeting, the Solicitor advised her that she could ignore the previous solicitor's account and he would take care of the matter. Ms. McIntyre stated that she had retained the Solicitor to pursue the matter of the injunction only.

By letter dated December 22, 1993, the Law Society requested the Solicitor provide a copy of his account to Ms. McIntyre for the \$500.00 retainer. The Law Society also requested the Solicitor provide a summary of his activities and communications with both Mr. Barkas and Ms. McIntyre from the time he was retained, including instructions received and his advice to them. The Solicitor was requested to provide his response by January 5, 1994. No reply was received.

The Solicitor did not provide Ms. McIntyre with an account or her file. Mr. Barkas did not receive a status report from the Solicitor.

Finding

The Committee finds that the Solicitor failed to live up to his professional duties to proceed with instructions in a timely manner, to account to Ms. McIntyre, to keep his clients reasonably informed. The Solicitor is, therefore, guilty of professional misconduct with respect to this charge.

Particular II(12)

He failed to provide a reply to the Law Society regarding a complaint by Ms. Avery Wright-Kinch

The evidence supporting this charge was in documents received under sub-section 33(9) of the LSA and sub-section 15(1) of the SPPA.

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By letter dated October 15, 1993, Avery Wright-Kinch advised the Law Society that she had retained the Solicitor during 1985 to pursue a divorce on her behalf. The Solicitor had advised her that her divorce would be finalized in January of 1993. Ms. Wright-Kinch's divorce was not finalized in the time outlined by the Solicitor. Ms. Wright-Kinch advised that since January of 1993, the Solicitor advised her that the delay was due to the court. Ms. Wright-Kinch requested the Law Society assist her in obtaining the return of her marriage certificate in order that she may pursue her divorce as she would like to remarry.

By letter dated November 10, 1993, the Law Society forwarded to the Solicitor a copy of Ms. Wright-Kinch's October 15, 1993 letter. The Solicitor was requested to reply within two weeks. The Society's November 10, 1993 letter was returned by the post office marked "no longer at this address". A Law Society staff employee left a telephone message for the Solicitor on his answering machine on November 25, 1993 requesting he return the call. The Solicitor returned the Society's call that same day. He advised that he was still at the same address and requested that the letter be re-sent to the same address and he would pick it up. The Law Society resent the letter that same day. The Law Society's November 10, 1993 letter was again returned by the post office marked "moved". A Law Society staff employee left a telephone message for the Solicitor on December 6, 1993 advising the Solicitor that its November 10th letter had again be returned by the post office marked "moved". The Solicitor was advised that should he not provide the Society with a current address, the matter would be referred to the Discipline Department. The Solicitor returned the Society's call on December 6, 1993. He advised that he would pick up the Society's November 10th letter from the Society's reception. He advised that he did not have a new address. The Solicitor picked up the Society's November 10th letter on December 6, 1993. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on December 13, 1993 advising that should he not provide a response by Tuesday at 5:00 p.m., a registered letter would be sent. The solicitor returned the Society's call on December 14, 1993. He advised that he had discoveries the next two days but would respond by December 17, 1993. No reply was received. A Law Society staff employee left a telephone message for the Solicitor on his answering machine on December 17, 1993 advising that his response was required by that afternoon or a registered letter would be sent.

The Solicitor returned the Society's call on December 17, 1993. The Solicitor advised that he was attending a pre-trial in Barrie and would respond by December 21, 1993.

A Law Society staff employee left a telephone message for the Solicitor on December 17, 1993 advising that a response was required by December 21, 1993, before noon. The Solicitor was advised that he would not be granted any further extensions.

By registered mail dated December 21, 1993, the Law Society forwarded to the Solicitor a copy of its November 10, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should his response not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

Finding

The Committee finds that the above evidence establishes that the Solicitor breached his professional duty to respond to inquiries from the Law Society specified in Rule 13, Commentary 3. The Committee therefore finds the Solicitor guilty of professional misconduct with respect to these charges.

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Complaint D176/94

Particular 2(a)

He failed to honour a financial obligation incurred in connection with his practice to the Sheriff's Office in the Niagara Region, account number 2456, dated May 28, 1991, in the amount of \$28.92, despite having advised the Law Society on January 18, 1994 that he paid it.

Particular 2(b)

He failed to reply to the Law Society regarding the on-going investigation of a complaint by the Sheriff's Office in the Niagara Region.

The evidence supporting these charges was received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

The Sheriff's Office of the Judicial District of Niagara South, hereinafter referred to as the Sheriff's Office, forwarded to the Solicitor invoice #2456, dated May 28, 1991, in the amount of \$28.92 with respect to services rendered on May 27, 1991 regarding the service of documents on Sherry Craddock with respect to Doreen June Craddock vs. Sherry Craddock. The invoice was not paid. By letter dated July 31, 1991, the Sheriff's Office advised the Solicitor that payment of the invoice in the amount of \$28.92 had not been received. The Sheriff's Office enclosed a copy of the original account. Payment was not received. On September 13, 1991, the Sheriff's Office forwarded to the Solicitor a Second Notice requesting payment of the account in the amount of \$28.92. A copy of the original account was enclosed. Payment was not received. On January 7, 1992, the Sheriff's Office forwarded to the Solicitor a Third Notice requesting payment of the account in the amount of \$28.92. A copy of the original account was enclosed. Payment was not received.

On March 10, 1992, the Sheriff's Office forwarded to the Solicitor a final notice of the outstanding account. The Solicitor was advised that should full payment not be received by March 31, 1992, the matter would be referred to the Law Society for collection. The Sheriff's Office enclosed a copy of its original account and notices. Payment was not received. By letter dated May 13, 1992, the Sheriff's Office advised the Solicitor that payment of the invoice in the amount of \$28.92 had not been received. The Sheriff's Office enclosed a copy of the original account. Payment was not received. By letter dated June 10, 1992, the Sheriff's Office advised the Solicitor that should full payment of the account not be received by June 30, 1992, the matter would be referred to the Law Society. The Sheriff's Office enclosed a copy of its original account and notices. Payment was not received.

By letter dated July 27, 1992, the Sheriff's Office advised the Solicitor that payment of the invoice in the amount of \$28.92 had not been received. The Sheriff's Office enclosed a copy of the original account. Payment was not received. By letter dated September 2, 1993, the Sheriff's Office advised the Solicitor that should full payment of the account not be received by the end of September, 1993, the matter would be referred to the Law Society. The Sheriff's Office enclosed a copy of its original account and notices. Payment was not received. By letter dated October 1, 1993, the Sheriff's Office provided the Law Society with copies of its invoice and notices sent to the Solicitor. The Sheriff's Office requested the Law Society's assistance in collection of the outstanding account.

By letter dated November 10, 1993, the Law Society forwarded to the Solicitor a copy of the Sheriff's Office's October 1, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. The Law Society's November 10th letter was returned by the post office marked "no longer at this address".

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A Law Society staff employee left a telephone message on November 23, 1993, for the Solicitor on his answering machine requesting he advise as to his current address.

The Solicitor returned the Law Society's call on November 23, 1993. He advised that he was still picking up his mail at 1039 Woodbine Avenue. The Solicitor requested that the Society's November 10th letter be re-sent to the same address. The Law Society sent its November 10th letter to the Solicitor at the same address, that same day. On December 7, 1993, the post office again returned the Law Society's November 10th letter marked "moved".

A Law Society staff employee left a telephone message for the Solicitor on December 7, 1993 advising the Solicitor that its November 10th letter had again been returned by the post office. The Solicitor was requested to return the Society's call. The Solicitor returned the Society's call on December 7, 1993. He advised that he would pick up the Society's November 10th letter from the Society's reception. The Solicitor picked up the Society's November 10th letter on December 8, 1993.

A Law Society staff employee left a telephone message on December 21, 1993 for the Solicitor on his answering machine requesting he advise as to when he would respond to the Society's November 10th letter, as well as, a request that he provide the Society with his current address. The Solicitor advised the Law Society, by telephone on December 22, 1993 that he would provide his response by December 27, 1993. No reply was received.

By registered and ordinary mail dated December 22, 1993, the Law Society forwarded to the Solicitor a copy of its November 10, 1993 letter. The Solicitor was requested to provide his reply by January 5, 1994. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on his answering machine on December 22, 1993 advising that further correspondence was being sent to him by ordinary mail, that day. The staff employee further advised the Solicitor that a copy of the letter would be left at the Society's reception for him to pick up. By registered and ordinary mail dated January 7, 1994, the Law Society reminded the Solicitor of his obligation to reply. The Solicitor was advised that should he fail to provide a reply within seven days, the matter would be referred to the Discipline Committee.

By letter dated January 18, 1993 [sic], the Solicitor advised the Law Society that the Sheriff's Office account related to a family court matter between a grandmother and a daughter with respect to custody of the daughter's children. The Solicitor advised that the family took back the paperwork and the matter was resolved prior to the service of the documents. The Solicitor further stated that he had forwarded payment, with interest, to the Sheriff's Office.

By letter dated February 28, 1994, the Law Society advised the Solicitor that the Sheriff's Office had not received payment of the outstanding invoice. The Solicitor was requested to provide a copy of his correspondence to the Sheriff's Office paying the account, as well as, confirmation that the account had been paid. The Solicitor was advised that should payment not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

As of this date, the Sheriff's Office has not received payment of the invoice.

The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

Finding

The Committee is disgusted that a matter of \$28.92 has taken up so much time and was not attended to by the Solicitor. The Committee finds that the evidence establishes professional misconduct in the particulars alleged.

Particular 2(c)

Failure to honour a financial obligation incurred in connection with his practice to Eckler Partners Ltd., actuaries and consultants, invoice number 8991, dated July 15, 1992 in the amount of \$469.73 despite having advised the Law Society on January 14, 1994 that he paid it.

Particular 2(d)

Failure to reply to the Law Society regarding the ongoing investigation of a complaint by Eckler Partners Ltd.

The evidence supporting this complaint was the *viva voce* testimony of Barwell Dibben, a consulting actuary with Eckler Partners Ltd. and documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

By letter dated May 19, 1992, the Solicitor requested Eckler Partners Ltd. ("Eckler") to provide a report as to the value of his client's, Mildred Powell, pension as of February 1985 and August 1984. The Solicitor forwarded to Eckler the pension material provided by the Ontario Hospital Association. The Solicitor confirmed with the Eckler their fee quote of \$300. to \$500. for the assessment.

On July 15, 1992, Eckler forwarded to the Solicitor its account, in the amount of \$469.73 for actuarial services. The account included their fee for the determination of accrued entitlements, calculation of actuarial values, determination of impact of tax and a report dated June 29, 1992. Payment of the account was not received.

By letter dated November 9, 1992, Eckler forwarded to the Solicitor a copy of its account dated July 15, 1992. The Solicitor was requested to give the matter of payment of the account his earliest attention. Payment of the account was not received. By letter dated December 23, 1992, Eckler requested the Solicitor pay the outstanding account at his earliest convenience. The Solicitor was requested to advise whether there was any reason preventing him from paying the account. No reply was received.

By letter dated October 4, 1993, Eckler forwarded to the Solicitor a copy of its account dated July 15, 1992 and a copy of its subsequent letter. The Solicitor was advised that should full payment not be received by the close of business on October 29, 1992, appropriate action would be commenced to collect the outstanding account. No reply was received.

By letter dated November 29, 1993, Eckler advised the Law Society of the Solicitor's failure to pay its account, dated July 15, 1992, in the amount of \$469.73.

By letter dated December 23, 1993, the Law Society forwarded to the Solicitor a copy of Eckler's November 29, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

By registered mail dated January 7, 1994, the Law Society forwarded to the Solicitor a copy of its December 23, 1993 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a reply within seven days, the matter would be referred to the Discipline Committee. By letter dated January 14, 1994, the Solicitor advised the Law Society that although there was some dispute as to the balance due on the account, he had forwarded full payment.

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By letter dated February 28, 1994, the Law Society advised the Solicitor that Eckler had not received payment of the account. The Solicitor was requested to forward to the Society a copy of his correspondence to Eckler as well as, confirmation that the account had been paid. The Solicitor was advised that should his response not be received within seven days of the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

The Solicitor has not paid the account owing to Eckler.

The Solicitor did not request an extension to reply nor did he provide the Society with an explanation for his failure to reply.

Finding

The Committee finds that the evidence establishes professional misconduct in respect of the charges specified.

Particular 2(e)

He failed to honour a financial obligation incurred in connection with his practice to Sandy Kates, Shelley Stober and Howard Chaiken, freelance conveyancers, for the following invoices:

Stober	Aug. 26/93	Invoice No. 22662	\$124.25
Chaiken	Sept. 15/93	Invoice No. 20429	\$ 76.00
Kates	Sept. 22/93	Invoice No. 68180	\$ 95.25
Kates	Sept. 24/93	Invoice No. 68187	\$ 69.20

Particular 2(f)

He failed to reply to the Law Society regarding a complaint by Sandy Kates, Shelley Stober, and Howard Chaiken, freelance conveyancers

The evidence supporting these charges was the *viva voce* testimony of Shelly Stober and documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

On September 22, 1993, Sandy Kates ("Kates"), a freelance conveyancer rendered an invoice #68180, in the amount of \$95.25, to the Solicitor for services provided regarding the search of title regarding the purchase of property municipally known as 2285 Lakeshore Blvd. West. The account was not paid.

On September 24, 1993, Kates rendered invoice #68187, in the amount of \$69.20, to the Solicitor for services provided regarding the real estate closing of the purchase of property municipally known as 2285 Lakeshore Blvd. West. The account was not paid.

On August 26, 1993, Shelley Stober Paralegal Services rendered invoice #22662, in the amount of \$124.25, to the Solicitor for services provided regarding the search of title regarding property municipally known as 60 Houndtrail Drive, Scarborough. The invoice was not paid.

On September 15, 1993, Howard Chaiken, a freelance conveyance, rendered invoice #20429, in the amount of \$76.00, to the Solicitor for services provided regarding the real estate closing of property municipally known as 60 Houndtrail Drive, Scarborough. The invoice was not paid.

Between December, 1993 and January 1994, each conveyancer had attempted to contact the Solicitor by telephone on at least three occasions. The Solicitor did not return any of the calls.

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By letter dated January 14, 1994, Sandy Kates, Shelley Stober and Howard Chaiken advised the Law Society that they were freelance conveyancers who had been commissioned by the Solicitor to do search and real estate closing. They further advised that despite their repeated attempts to speak to the Solicitor by telephone, their invoices #22602, #20429, #68180 and #68187 had not been paid.

By letter dated February 9, 1994, the Law Society forwarded to the Solicitor a copy of Ms. Kates, Ms. Stobers and Mr. Chaiken's January 19, 1994 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

A Law Society staff employee left telephone messages on the Solicitor's answering machine on February 21, 1994, February 24, 1994 and March 2, 1994 requesting he return the calls. A Law Society staff employee spoke with the Solicitor by telephone on March 21, 1994. The Solicitor advised that he would forward a cheque to Ms. Kates. The Solicitor advised that he would forward the Society a response by March 21, 1994. No reply was received.

By registered mail dated March 25, 1994, the Law Society advised the Solicitor of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a response within seven days, the matter would be referred to the Discipline Committee. No reply was received.

As of the this date, the Solicitor has not paid the outstanding invoices.

The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

Finding

The Committee finds that the above evidence establishes that the Solicitor is guilty of professional misconduct for not honouring financial obligations in the particulars charged.

Particular 2(g)

He failed to honour a financial obligation incurred in connection with his practice to Rosenberger, Weir, MacDonald, official examiners, for the following invoices:

May 21/91	Invoice No. 59294	\$ 17.97
Nov. 25/91	Invoice No. 43188	\$ 50.02
Feb. 11/92	Invoice No. 45616	\$ 82.39
Mar. 2/92	Invoice No. 69511	\$ 35.85

Particular 2(h)

He failed to reply to the Law Society regarding a complaint by Rosenberger, Weir, MacDonald, official examiners

The evidence supporting these charges was the *viva voce* evidence of Mr. Paul Rosenberger, an official examiner well known to the profession and documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

Paul Rosenberger, an official examiner, forwarded to the Solicitor an account, #000333, in the amount of \$186.23, on May 31, 1993 for accounts owing as follows:

Invoice #43188, Canada Trust v. Semenovs, in the amount of \$50.02, dated November 25, 1991

Invoice #45616, Homelife v. Slesers, in the amount of \$82.39, dated November 2, 1992

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Invoice #59294, Privitera v Stemore Inv., in the amount of \$17.97, dated May 21, 1991

invoice #69511, Homelife v. Slesers, in the amount of \$35.85, dated March 2, 1992

The Solicitor did not pay the account.

The official examiner forwarded to the Solicitor a copy of account #000333 on August 3, 1993, October 1, 1993, November 1, 1993, January 12, 1994, January 25, 1994, February 1, 1994, February 18, 1994, March 1, 1994, and April 5, 1994. The Solicitor did not pay the account.

On June 10, 1993, June 11, 1993 and October 30, 1993, the official examiners' office left messages for the Solicitor on his answering machine requesting he return the calls. The calls were not returned.

By letter dated January 25, 1994, the official examiner advised the Solicitor that should payment in full not be received within fourteen days, the matter would be referred to the Law Society and/or small claims court. Payment of the account was not received.

By letter dated February 18, 1994, the official examiner advised the Law Society of the Solicitor's failure to pay the outstanding account. By letter dated March 10, 1994 [sic], the Law Society forwarded to the Solicitor a copy of the official examiner's February 18, 1994 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

A Law Society staff employee left telephone messages for the Solicitor on his office answering machine on March 3, 1994 and April 6, 1994, requesting he return the calls. The calls were not returned.

By registered mail dated April 11, 1994, the Law Society forwarded to the Solicitor a copy of its March 10, 1994 [sic] letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a reply within seven days, the matter would be referred to the Discipline Committee. No reply was received.

The Solicitor has not paid the outstanding account to the official examiner.

The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

Finding

The Committee finds on the basis of the above evidence that the Solicitor is guilty of professional misconduct for failing to honour financial obligations in the particulars charged.

Particular 2(j)

He failed to provide a reply to the Law Society regarding a complaint by All Languages Ltd. despite letters to him dated April 6, 1994 and April 27, 1994 and telephone messages left on April 21, 1994 and April 23, 1994

On September 17, 1993 the Solicitor irrevocably directed and instructed All Languages Ltd. to prepare the translation of a document from Latvian into English at a cost of \$95.23. The Solicitor agreed to payment by certified cheque upon completion of the translation.

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All Languages Ltd. rendered an account to the Solicitor, invoice #ADT 51136, on September 20, 1993 in the amount of \$95.23 for translation services rendered. The account stated that payment was due when the account was rendered. The account further stated that overdue accounts bore interest at the rate of 18% per annum. The account was not paid.

A copy of the account was forwarded to the Solicitor on October 20, 1993, October 30, 1993 and November 16, 1993. The account was not paid. By letter dated November 29, 1993, All Languages Ltd., requested the Solicitor advise them immediately of any reason he may be withholding payment otherwise payment was requested immediately. No reply was received.

Maurice Penzo, president of All Languages Ltd., left telephone messages for the Solicitor on his office answering machine on December 16, 1993, January 28, 1994 and February 3, 1994 requesting he return the calls. The calls were not returned.

By letter dated February 4, 1994, All Languages Ltd., reminded the Solicitor of his obligation to satisfy financial obligations in relation to his practice of law. The Solicitor was advised that should full payment of the account not be received within seven days, the matter would be referred to the Law Society, reported to the appropriate credit bureaus and that they would pursue their legal remedies. No reply was received.

Mr. Penzo left a telephone message for the Solicitor on his office answering machine on March 14, 1994, requesting he return the call. The call was not returned. By letter dated March 14, 1994, All Languages Ltd. advised the Law Society of the Solicitor's failure to pay the outstanding account.

Mr. Penzo left a telephone message for the Solicitor on his office answering machine on March 30, 1994 requesting he return the call. The call was not returned.

By letter dated April 6, 1994, the Law Society forwarded to the Solicitor a copy of All Languages Ltd.'s March 14, 1994 letter to the Law Society. The Solicitor was requested to provide his written comments to the same within two weeks. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor at his office on April 21, 1994 requesting he return the call. The call was not returned.

By registered mail dated April 27, 1994, the Law Society forwarded to the Solicitor a copy of its April 6, 1994 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a reply within seven days, the matter would be referred to the Discipline Committee. No reply was received.

The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

Finding

The Committee finds the Solicitor guilty of professional misconduct for failing to reply to the Law Society in the particulars charged.

Particular 2(k)

He failed to provide a proper accounting to his client, Maia Reis, for all monies received by him

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Particular 2(1)

He failed to transfer the file of his client, Maia Reis, to her new solicitor, Susan Switch, despite his client's direction that he do so, and despite written and verbal requests from Ms. Switch.

Particular 2(m)

He failed to provide a reply to the Law Society regarding a complaint by Maia Reis

Particular 2(n)

He failed to co-operate with a Law Society investigation of a complaint by Maia Reis

The evidence supporting these charges was the *viva voce* testimony of Maria Reis and Susan Switch, a solicitor and documents received under sub-section 33(9) of the *LSA* and sub-section 15(1) of the *SPPA*.

Ms. Reis retained the Solicitor on or about July 9, 1990 to represent her with respect to divorce proceedings. She provided him with a retainer of \$500.00.

By letter dated August 9, 1990, the Solicitor confirmed to Ms. Reis that he was in receipt of information with respect to her application for exclusive possession of the matrimonial home. The Solicitor further confirmed with Ms. Reis her instructions to hold the matter in abeyance until he heard from her further.

During September, 1990, Ms. Reis retained the Solicitor to represent her with respect to a motor vehicle accident which occurred during the first week of September, 1990.

On or about September 9, 1990, Ms. Reis paid the Solicitor \$200.00 to represent her in court with respect to assault charges laid against her husband. Mr. Reis had allegedly assaulted Mrs. Reis in early August of 1990.

On January 21, 1991, Ms. Reis instructed the Solicitor to recommence the divorce proceedings. She provided him with a further retainer of \$500.00.

On August 22, 1991, Ms. Reis provided the Solicitor with a further retainer of \$700.00 making the total retainers provided \$1900.00.

The Solicitor filed with the Ontario Court (General Division), court file #91-798 a Notice of Application on November 7, 1991. The application was set to be heard on January 20, 1992.

By letter dated December 13, 1991, the Solicitor advised Ms. Reis that the date for trial had been adjourned to January 10, 1992. The Solicitor requested Ms. Reis make arrangement to attend at Court on that day. The Solicitor also enclosed his account to Ms. Reis, dated December 13, 1991, in the amount of \$932.50.

The Solicitor provided Ms. Reis with a further account, dated December 17, 1991, totalling \$2,780. Ms. Reis provided the Solicitor with \$880.00 on December 18, 1991. She then provided the Solicitor with \$500.00 on March 17, 1992. She subsequently provided the Solicitor with \$1,500.00 on May 12, 1992.

In July or August, 1992, Ms. Reis provided the Solicitor with \$500.00 making the further amounts provided by Ms. Reis to the Solicitor \$2880.00.

During August of 1993, the Solicitor met with Ms. Reis at her home. He advised her that they had another two years to pursue her litigation matter and requested she provide him with a further retainer. Ms. Reis refused to provide the Solicitor with any further funds.

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Between August, 1993 and December 8, 1993, Ms. Reis left numerous telephone messages for the Solicitor on office answering machine requesting he return the calls. The calls were not returned.

By letter dated November 5, 1993, Susan Switch, a barrister and solicitor, forwarded to the Solicitor a Direction executed by Ms. Reis and advised him that she had been retained by Ms. Reis with respect to her matrimonial matters. Ms. Switch requested the Solicitor contact her office to advise when the file would be ready for pick up. No reply was received. By letter dated November 26, 1993, Ms. Switch requested the Solicitor provide her with Ms. Reis file. No reply was received.

On December 8, 1993, Ms. Reis attended at the Solicitor's office. The premises appeared to be abandoned and the window contained a no trespassing sign.

By letter dated December 12, 1993, Ms. Reis advised the Law Society of the Solicitor's failure to provide her with an account of all the funds she had provided him and of his failure to return her files over to her new solicitor, Susan Switch. By letter dated January 18, 1994, the Law Society forwarded to the Solicitor a copy of Ms. Reis' December 12, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

The Solicitor advised the Law Society by telephone on February 24, 1994 that he was stranded in Barrie. He advised that he would provide his response by February 28, 1994. No reply was received.

A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on March 1, 1994 advising that his response was required by March 2, 1994 at 5:00 p.m. or else a registered letter would be forwarded to him. No reply was received.

By registered mail dated March 9, 1994, the Law Society forwarded to the Solicitor a copy of its January 8, 1994 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, the matter would be referred to the Discipline Committee. No reply was received.

The Solicitor never provided Ms. Reis with a full accounting of all funds received nor did he turn her file over to Ms. Switch.

The Solicitor did not request an extension to reply nor did he provide the Law Society with an explanation for his failure to reply.

Finding

The Committee finds that the evidence establishes that the Solicitor is guilty of professional misconduct in the particulars charged.

RECOMMENDED PENALTY AND REASONS

We recommend that the Solicitor be disbarred.

The Solicitor was called to the Bar on March 19, 1970 at which time he commenced practice as a sole practitioner. He was suspended on February 25, 1994 as a result of his failure to pay his late filing fee. He had no discipline record prior to the complaints that are the subject of this decision.

We have found the Solicitor guilty of:

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1. Four charges of failure to serve clients (Stiebrins, Barkas and McIntyre, Gallant and the Bank of Montreal, and Thomas);
2. Three charges of failing to account to clients (Dundurs, McIntyre, and Reis);
3. Three charges of failing to deliver up a file pursuant to clients' instructions (McIntyre, Thomas and Hengen, Reis and Switch);
4. One charge of failing to comply with an undertaking (Johnson and Stafford);
5. Six charges of failure to honour financial obligations (Victory Verbatim Reporting, Sheriff's Office in Niagara Region, Eckler Partners Ltd., Kates Stober and Chaiken, Rosenbergers);
6. Two charges of failure to reply to communications from a fellow solicitor (Doane and Stafford);
7. Twelve charges of failure to reply to the Law Society (re: Pavasars, Jobin, Sunatis, Gallant and Bank of Montreal, Thomas, Wright-Kinch, Sheriff's Office in Niagara Region, Eckler Partners Ltd., Kates Stober and Chaken, Rosenbergers, All Languages Ltd., and Reis);
8. One charge of failure to file respecting his fiscal year ending January 31, 1993; and
9. One charge of failure to produce books, records and client files and failure to co-operate with a Law Society investigator.

All these incidents occurred between January, 1990 and February, 1994. While none reaches the level of fraud they are nevertheless grave offences of professional misconduct. Their gravity is created by the number of incidents found to have constituted professional misconduct, the odour of dishonesty stemming from them in the form of misleading statements to clients and the Law Society and broken promises and assurances to clients and the Law Society, the incompetence and sloppiness in practising law that they evidence, and the obliviousness to professional obligations and duty to clients that they bespeak.

To counterbalance the gravity of these offences there is nothing; no apologies, no explanations, no statements of remorse, no regrets, no attempts to rectify the wrongs and no appearance at the hearing, even by counsel or agent to recognize the jurisdiction of the Law Society to deal with these offences.

The only question for the Committee, therefore, was should the penalty be disbarment, or some lesser penalty?

The reasons why the Committee might consider a penalty of something less than disbarment are the evidence that the Solicitor is now ill with cancer and depression and the Solicitor's lack of a prior discipline record. The Committee is not prepared to give either of these factors sufficient weight to recommend anything less than disbarment.

The Solicitor's illness is indicated only by Dr. Basmajian's October 17, 1994 letter indicating that the Solicitor was diagnosed with rectal cancer on April 18, 1994 and Dr. Chad's October 26, 1994 letter indicating that at that time the Solicitor was suffering from 'a major depression'. The letters are each no more than half a page long and provide no details.

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There is no evidence or suggestion that either condition was an explanation for or cause of the incidents of professional misconduct that Mr. Semenovs has been found guilty of committing. As outlined above, in the Committee's reasons for refusing an adjournment, the Solicitor had full and fair notice after several adjournments that the hearing would proceed on November 1 and 2 and that disbarment was being sought. There was evidence that the Solicitor was well enough to turn his mind to the affairs of his clients until September/October 1994. There was no contrary evidence. The Committee concludes, therefore, that the Solicitor had ample opportunity to place evidence before the Committee that his medical condition was a mitigating factor but did not do so. The Solicitor could have exercised this opportunity through counsel or an agent but still failed to do so. The Committee, therefore, does not see the Solicitor's medical condition as an appropriate mitigating factor in determining penalty.

The Committee is unimpressed by the argument that the Solicitor's lack of previous discipline record should be a mitigating factor in determining penalty. This argument is effectively answered by the number of professional misconduct charges that Mr. Semenovs has been found guilty of by this Committee, the four year period over which they occurred, the fact that there were three separate sets of complaints and their overall gravity. They indicate a long course of professional misconduct without explanation, not an isolated and uncharacteristic incident. The Committee, therefore, does not see the Solicitor's prior discipline record as a mitigating circumstance in penalty.

Several convocation decisions indicate that professional misconduct like Mr. Semenovs' deserves disbarment.

In Roy (Topp, Murray and Richardson, September 15, 1994, approved by Convocation), The Solicitor was charged with failing to reply to the Law Society, failing to provide documentation to his client, failing to respond to letters from other lawyers, failing to serve his client and failing to comply with an undertaking. These charges bear an unhappy resemblance to those facing the Solicitor in this case. Roy had a prior discipline record. The Committee recommended and Convocation decided that Roy should be disbarred. The Committee said:

"It is clear to your Committee that the Solicitor is totally out of control and is ungovernable in every sense of the word.

In the absence of any submissions by the Solicitor or anyone on his behalf there is nothing that can be reported to Convocation in mitigation."

The same can be said about the Solicitor in this case.

In *Wickham* (Carter, Moliner with Curtis dissenting) of December 15, 1993, Wickham was found guilty of several charges of failing to reply to the Law Society, failing to file, failing to produce books and records for examination, failing to serve clients, failing to deliver up files, failing to respond to communications from other solicitors and failing to keep a client informed. Wickham had no prior discipline record and it was noted that his professional conduct did not amount to dishonesty. The majority would have suspended him for three months subject to conditions. Carol Curtis dissented holding that Wickham should be disbarred. On September 22, 1994 Convocation disbarred Mr. Wickham. This decision is indistinguishable.

In the earlier *David William Goldman* decision of November 25, 1993, Convocation accepted the recommendation of Ruby, Topp and O'Connor to disbar Goldman for several counts of failing to reply to the Law Society, failing to report to his client, failing to serve his client, and failing to release up documents. This case too is indistinguishable from Mr. Semenovs'.

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The Solicitor's conduct has shown that he is ungovernable by the Law Society and has frustrated all attempts by the Law Society to regulate his practice in the public interest and protect his clients against him. It shows that he has not the slightest interest in protecting his clients interests. It shows that he is a menace to the public because some unsuspecting client who goes to the Solicitor for succor and legal representation is likely to be prejudiced to their disappointment instead of helped, as were Stiebrins, Barkas and McIntyre, Gallant and the Bank of Montreal and Thomas. It shows that the Solicitor cannot be trusted to meet his professional obligations all to the disgust and upset of the public with lawyers. Mr. Semenovs is the type of lawyer who gives the profession a negative public image . There can be no place in the legal profession in Ontario for a lawyer guilty of such professional misconduct so harmful to the public and the public interest.

For these reasons, and in light of Convocation's penalties in the *Roy, Wickham* and *Goldman* decisions, the Committee recommends that the Solicitor be disbarred.

ALL OF WHICH is respectfully submitted

DATED at Toronto this 23rd day of March, 1995.

Ian Blue, Q.C.
(Chair)

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

There were no submissions and the Report was adopted.

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

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

The motion on the Recommendation as to Penalty was adopted.

Counsel retired.

Re: Ronald John COSWAY - Scarborough

The Secretary placed the matter before Convocation.

Messrs. Strosberg and Topp and Ms. Graham withdrew for this matter.

Ms. Budweth appeared for the Society and Mr. Crane appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 16th March, 1994, together with an Affidavit of Service sworn 31st March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton Ruby, Chair
Robert Topp
Netty Graham

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

Christina Budweth
for the Society

DONALD JOHN COSWAY
of the City
of Scarborough
a barrister and solicitor

Douglas Crane
for the solicitor

Heard: October 4, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 21, 1993 Complaint D269/93 was issued against Donald John Cosway alleging that he was guilty of professional misconduct.

The matter was heard in public on October 4, 1994 before this committee composed of Clayton Ruby, Chair, Robert C. Topp and Netty Graham. The Solicitor was present at the hearing and was represented by Douglas Crane. Christina Budweth appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established upon the evidence and the admission of the Solicitor:

Complaint D269/93

1. His failure to serve clients in a conscientious, diligent and efficient manner as follows:
 - a)(i) he failed to provide in a timely manner advice on an estate matter for his clients, Lionel and Connie Towle.
 - (ii) he failed to keep his clients, Lionel and Connie Towle, reasonably informed on the above estate matter.
 - b)(i) he failed to complete a divorce in a timely manner for his client, Ken Vickers.
 - (ii) he failed to keep his client, Ken Vickers, reasonably informed on the above divorce matter.

27th April, 1995

2. He breached an undertaking given to the Law Society on January 22, 1991 to reply promptly to any communications from the Law Society in that:
 - a) he failed to reply promptly to the Law Society inquiries regarding a complaint lodged by his client Ken Vickers.

Evidence

On September 11, 1990, Lionel and Connie Towle retained the Solicitor to give an opinion on an estate and property matter. Mr. and Mrs. Towle left a will and deed with the Solicitor, along with a cheque in the amount of \$200.00 as a retainer.

Mr. and Mrs. Towle periodically telephoned the Solicitor to inquire about the status of their legal affairs. When they spoke, the Solicitor would advise them that he had no new information to report. As a result, Mr. and Mrs. Towle decided to request the return of their legal documents.

Connie Towle attended at the Solicitor's office unexpectedly on December 31, 1991 in order to retrieve her papers. Mrs. Towle was advised by the Solicitor that his secretary was away on vacation and when she returned, her papers would be returned to her.

By registered mail dated April 24, 1992 Lionel Towle reminded the Solicitor that he had still not returned their papers. He requested that the Solicitor mail the documents to them, or telephone his wife and she would make arrangements to pick them up from his office. The Solicitor failed to respond to this correspondence.

Connie Towle spoke with the Solicitor about a month later and he assured her that he would mail the documents out to her that day.

As of August 19, 1992, Lionel and Connie Towle had still not received their documents. As a result, they lodged a complaint against the Solicitor with the Law Society.

By letter dated September 1, 1992 the Law Society forwarded to the Solicitor a copy of Mr. and Mrs. Towle's letter of complaint. The Solicitor was requested to provide his comments to same within a period of two weeks.

By letter dated September 18, 1992 the Solicitor responded to the Society. The Solicitor wrote that "he did not give the service to Mr. and Mrs. Towle in this matter that they might have reasonably expected".

The Solicitor advised that when he was first requested by Mr. and Mrs. Towle to return the documents, he had some difficulty in locating them. He recalled Mrs. Towle's follow up telephone call in which he had assured her that he would mail the documents to her, but did not.

The Solicitor apologized to Mr. and Mrs. Towle and advised that he sent a letter to them on September 18, 1992, enclosing a refund cheque for the full amount of their retainer, along with their documents.

Connie Towle confirmed receipt of the Solicitor's correspondence.

Mr. Ken Vickers retained the Solicitor on April 21, 1989, to institute divorce proceedings on his behalf. Mr. Vickers gave the Solicitor a cheque in the amount of \$500.00 as a retainer.

27th April, 1995

By registered mail dated January 28, 1993 Mr. Vickers expressed his concerns over the amount of time which had passed and that his divorce was still not completed. Mr. Vickers complained to the Solicitor of his many telephone calls which went unanswered. Mr. Vickers requested that the Solicitor contact him by the end of February, or he would consult with another solicitor. The Solicitor failed to response to Mr. Vickers' correspondence.

By letter dated March 1, 1993 Mr. Vickers filed a complaint against the Solicitor with the Law Society. Mr. Vickers expressed he wished to retain another solicitor and requested the Society's assistance in obtaining the release of his file.

By letter dated March 16, 1993 the Law Society forwarded to the Solicitor a copy of Mr. Vickers' letter of complaint. The Solicitor was requested to provide his comments to same within two weeks. No response was received.

On April 1, 1993, a Law Society staff employee telephoned the Solicitor inquiring about when his reply would be expected. The Solicitor advised that he would forward his response on the weekend. No response was received.

On April 19, 1993, a Law Society staff employee telephoned the Solicitor and left a message for him to return the call. The call was not returned.

By registered mail dated April 23, 1993 the Law Society forwarded to the Solicitor a copy of its March 16, 1993 letter. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

On May 7, 1993, the Solicitor telephoned the Society and advised a staff member that his response would be received by the Society by May 10, 1993. The Solicitor also advised that he had arranged for Mr. Vickers file to be transferred to another solicitor. The Solicitor also advised that he intended to refund Mr. Vickers' retainer.

By facsimile transmission dated May 11, 1993 the Solicitor responded to Mr. Vickers letter of complaint. The Solicitor advised that he had prepared all of the necessary documents to commence Mr. Vickers' divorce. The Solicitor advised that in late 1992, he spoke with Mr. Vickers and informed him that he was in the process of reorganizing his office and that he would give his case priority early in the new year. The Solicitor advised that as a result of his mother's death, he was unable to honour his commitment to Mr. Vickers. The Solicitor went on to state that "I realize that Mr. Vickers had a valid complaint in that he did not get the action from my office to which he was entitled".

The Solicitor advised that he had been in communication with Mr. Stephen Fleury who had been retained by Mr. Vickers. The Solicitor agreed to release his file to Mr. Fleury within 24 hours. He confirmed that he intended to refund Mr. Vickers' retainer to him.

By letter dated June 8, 1993 Mr. Fleury advised the Solicitor that he had still not received Mr. Vickers' file and requested that he attend to this matter shortly.

By letter dated June 19, 1993 Mr. Vickers advised the Society that Mr. Fleury had still not received his file from the Solicitor.

On June 22, 1993, Susan Carlyle, Staff Lawyer in the complaints department telephoned the Solicitor regarding this matter. The Solicitor advised that he would deliver his file and refund cheque to Mr. Fleury by noon on June 23, 1993. Such instructions were given, but the secretary doing it did not appreciate the urgency of the matter.

27th April, 1995

On June 23, 1993, Mr. Fleury spoke with Ms. Carlyle and advised that he had still not received Mr. Vickers' file. Mr. Fleury advised that he had received a telephone message from the Solicitor advising that he would send his file to him by courier that afternoon. That was done.

Mr. Fleury received Mr. Vickers' file and the Solicitor's refund cheque, in the amount of \$500.00 the afternoon of June 24, 1993.

By letter dated July 19, 1993 Ms. Carlyle confirmed an earlier telephone conversation with the Solicitor in which they had discussed the issue of crediting Mr. Vickers with the accrued interest on his retainer. The Solicitor was advised that the Society had no authority to order him to give this money to Mr. Vickers, and it was left to his discretion as to whether to send same to him. The Solicitor was also advised that this complaint was being referred to the Discipline Committee to request their advice as to the next step, if any, the Law Society would be taking on this matter.

By letter dated August 3, 1994 the Solicitor advised that he had considered paying the accrued interest to Mr. Vickers, but had difficulty in ascertaining the exact amount. Notwithstanding, the Solicitor advised that he sent a further cheque to Mr. Fleury, in the amount of \$200.00, representing the interest payment.

By letter dated September 8, 1993 Mr. Fleury enclosed a copy of the Solicitor's cheque, in the amount of \$500.00, drawn on his general account which was returned by the bank, marked non-sufficient funds. The Solicitor subsequently forwarded a certified replacement cheque.

Mr. Fleury advised that the cheque for \$200.00 was also returned by the bank, marked "funds not cleared".

In a telephone conversation with Mr. Fleury on October 26, 1993, he advised that to date, the Solicitor had not replaced the cheque.

The Solicitor has breached his Undertaking to the Law Society dated January 22, 1991 "to reply promptly to any communications from the Law Society of Upper Canada" by failing to respond to the Society's letter of March 16, 1993 and telephone call of April 19, 1993; and failing to respond to the Society's registered letter of April 23, 1993 until May 11, 1993.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Donald John Cosway be suspended for a period of one month.

DISCIPLINE HISTORY

On August 26, 1986, the Solicitor was reprimanded in Committee (non-publication Order) for misapplication.

On January 15, 1991, the Solicitor was reprimanded in Committee for failing to reply to the Society; and, failing to serve a client in a conscientious, diligent and efficient manner. As a result, the Solicitor gave an Undertaking to the Society dated January 22, 1991 to reply promptly to communications from the Law Society.

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On May 29, 1992, the Solicitor was reprimanded in Committee for failing to serve a client in a conscientious, diligent and efficient manner; and, for breaching his Undertaking to the Law Society. The Solicitor was also ordered to pay costs in the amount of \$750.00.

On June 2, 1992, the Solicitor was reprimanded in Committee for failing to reply to the Society; and, for breaching his Undertaking to reply promptly to communications from the Law Society. The Solicitor was also ordered to pay costs in the amount of \$300.00. A copy of the transcript of the decision of the Discipline Committee was before us.

REASONS FOR RECOMMENDATION

This is a solicitor who has made real improvements in a disastrous method of practice. The changes he has made are important ones. We note that some of the suggestions previously made by the Practice Advisory Service have still not been followed and in some cases, that is because of inadequate finances available to the solicitor.

It is clear from the character and other evidence that this is a good man who procrastinates. He has been referred to as a nice man who has difficulty saying no. Even Ms. Budweth, in a characteristic tempering of prosecutorial attitude, accepts that he was a kind man. Clearly, he is doing better at running his practice than he has done before; but he is still not doing enough.

We have noted the opinion of Dr. Orchard, who is a highly respected psychiatrist. Obviously Dr. Orchard thinks well of him, but his opinion to us cannot be determinative because, given the nature of the circumstances that have now been made available to us but apparently were not made available at that earlier time to Dr. Orchard, we do not have before us any real analysis of the difficulties that have occurred nor of any particular course of treatment that might see an end to them.

Harvey Kirk, a well-known television broadcaster, who testified before us, now of Midland, Ontario, gave evidence typical of the other evidence we've heard. This is a man who is highly regarded by his friends, his clients and his colleagues.

The principal problem in this case is the discipline record outlined above.

We are cognizant of the fact that the timing of these present offenses, when compared with the dates on which the previous offenses and discipline occurred, indicates that serious problems remain.

The delicts that are before us on this occasion are substantially similar to those which occurred before. They must stop.

Counsel for the Society has suggested a six to twelve month suspension. We are in agreement with her to this extent: there is no alternative to a suspension.

We bear in mind that this is a solicitor who has been in practice for thirty years and had no problem until 1986 and then again, a spate of problems commencing in 1991-92. There is a need for some measure of general deterrence. The Law Society of Upper Canada needs to be able to guarantee a higher level of service to the public and a higher level of responsibility to the Law Society.

27th April, 1995

In this case, there will be a good deal of harm caused to the solicitor by a suspension. His partner testified before us and indicates that he may go bankrupt. They have already had to drop one secretary in the joint premises they share and the solicitor has not been able to pay his share of expenses recently. He has creditors.

We have decided that the appropriate sentence to recommend to Convocation in this difficult case is a suspension of one month. We hope that Convocation will time the suspension so that the courts will be disrupted as little as possible in the criminal matters which constitute a large part of the solicitor's practice. Because of his financial difficulty, neither costs nor any further payment orders are an appropriate part of the disposition.

We say this to the solicitor: "get out of areas of practice about which you know little or nothing. You cannot cope with the complexity and difficulty those cases cause you. If there are any further difficulties, a further suspension is really quite unlikely. To be disbarred at your age would be a great tragedy."

We are very grateful to both counsel for the assistance they have offered us with what is always a difficult sentencing problem when a suspension is in question.

Donald John Cosway was called to the Bar on the 10th day of April, 1964.

ALL OF WHICH is respectfully submitted

DATED this 16th day of March, 1994

Clayton Ruby,
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Bragagnolo, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of one month.

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

Mr. Crane made submissions in support of the recommended penalty and in addition requested that the suspension be served in July to allow the solicitor time to arrange court dates.

Ms. Budweth opposed the commencement date of the suspension.

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

The motion on the Recommendation as to Penalty was adopted.

It was moved by Mr. McKinnon, seconded by Ms. Weaver that the commencement date of the suspension be June 1, 1995.

Lost

The commencement date of the suspension to be July 1, 1995 was voted on and adopted.

27th April, 1995

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for one month commencing July 1, 1995.

Counsel and solicitor retired.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Arnup, Blue, Bragagnolo, Brennan, Campbell, Cullity, Elliott, Graham, Hickey, Lamont, Lax, Lerner, Mewett, Moliner, S. O'Connor, Palmer, Peters, Richardson, Scott, Strosberg, Thom, Topp and Weaver.

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IN PUBLIC

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ADMISSIONS AND MEMBERSHIP COMMITTEE

APPLICATION FOR READMISSION

Re: Michael Angelo SPENSIERI - Toronto

Ms. Brooks appeared for the Society and Mr. Spensieri appeared on his own behalf assisted by Duty Counsel, Ms. Chalmers.

Mr. Cullity did not participate.

Counsel for the solicitor and the solicitor requested direction from Convocation as a result of the disqualification of a member of the panel hearing evidence in this matter.

After hearing submissions the Treasurer was authorized to constitute a new panel after May to hear evidence regarding events which have occurred since the last hearing on December 1, 1992.

APPLICATION FOR ADMISSION

Re: Courtney KAZEMBE

The Secretary placed the matter before Convocation.

Ms. O'Connor withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Edward Morgan appeared on behalf of the applicant who was present.

Mr. Morgan put to Convocation the issue of eligibility of those members of the Admissions Committee who participated in the consideration of this matter.

27th April, 1995

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

The names of those members of the Admissions Committee who considered this matter were read out by the Deputy Secretary.

Counsel, the applicant, the reporter and the public were recalled and informed of Convocation's decision that the members of the Admissions Committee that considered this matter would not participate.

Messrs. Brennan and Lamont and Ms. Moliner did not participate.

The Application of Courtney Kazembe was filed as Exhibit 1. The Joint Record Book was filed as Exhibit 2.

THE LAW SOCIETY OF UPPER CANADA

REPORT OF THE COMMITTEE OF BENCHERS appointed pursuant to Section 27(4) of The Law Society Act, R.S.O. 1990, C.L. 8,

IN RESPECT OF THE APPLICATION OF COURTNEY KAZEMBE for admission to the Law Society of Upper Canada as a Barrister and Solicitor

COMMITTEE: COLIN D. MCKINNON, Q.C., Chair
DENISE E. BELLAMY, Member
SHIRLEY O'CONNOR, Member

APPEARANCES: MICHAEL BROWN AND
CHRISTINA BUDWETH
for the Society

EDWARD MORGAN and
DEBRA STEGGLES
for the Applicant

HEARD: April 13, May 30, 31 and June 1, 1994

DECISION RELEASED: January 17, 1995

Nature of the Application and Onus

THIS APPLICATION is brought by Courtney Kazembe ("Mr. Kazembe" or "the applicant") for admission to the Law Society of Upper Canada pursuant to Section 27 of the Law Society Act, R.S.O. 1990, c. L. 8 which provides as follows:

27 (1) Every application for admission to the Society shall be on the prescribed form and be accompanied by the prescribed fees.

(2) An applicant for admission to the Society shall be of good character.

(3) No applicant for admission to the Society who has met all admission requirements shall be refused admission.

(4) No application for admission to the Society shall be refused until the applicant has been given an opportunity to appear in person before a committee of benchers.

(5) Where an applicant for admission to the Society is refused admission, he is entitled to a statement of the reasons for the refusal.

27th April, 1995

(6) Where an applicant for admission to the Society has been refused, another application based on new evidence may be made at any time. R.S.O. 1980, c.233, s.27."

In the reasons of Convocation dated May 1, 1994 in the matter of Michael John Spicer, Convocation determined that the Act and the Regulations passed under it contemplate that a student member may apply for admission to the Society only after he or she successfully completes the necessary educational requirements. To be admitted as a member, the student member must be of "good character". If this condition precedent is satisfied, then and only then is the student member entitled to become a "member" of the Society and be called to the bar as a Barrister and admitted as a Solicitor.

A Committee of Benchers was appointed to hear the application of Mr. Kazembe to consider whether or not the applicant is now "of good character". The hearing was heard in public over a period of four days. The Committee heard viva voce evidence from ten witnesses, six called by the Society, three called by Mr. Kazembe, and from the applicant himself. It received a total of eighteen exhibits, two of which were bound briefs, and considered the evidence contained in 1,182 pages of transcript.

At the commencement of the hearing, both parties acknowledged being bound by the decisions of Convocation in Re: P and Re: Spicer with respect to the applicable onus of proof. Both parties acknowledged that the applicant had the onus of establishing on a balance of probabilities that he is of good character (Re: P). Both parties acknowledged that because the applicant was facing allegations of sexual harassment, the Society had the onus of establishing the allegations on clear and convincing evidence (Re: Spicer).

At the outset of the hearing, the Committee granted the Law Society's request that the last names of the complainants would not be disclosed in the media. As such, the transcript of evidence has been altered by referring to the last names of the complainants through the use of initials (Re: P; Re: Spicer).

The Allegations Facing the Applicant Evidence of Renee V.

Ms. V. is 26 years of age. She graduated from Queen's University in 1990 with a B.A. in Politics and attended Osgoode Hall Law School, graduating in June 1993. She anticipates being called to the Bar in February 1995.

During her first year of law school, she met the applicant, who was one of 65 students in her first-year section at Osgoode. In October 1990, she moved into Passy Gardens, a graduate residence near the law school. The applicant also lived at Passy Gardens. Ms. V. found the applicant to be

"friendly, charming and very nice...a little flirtatious and suggestive sometimes, but not aggressively so at first".

On Thursday, November 19, 1990, the applicant and a friend of Ms. V.'s stopped by her apartment on their way to play tennis. That evening, L.A. Law was scheduled to play on television. The applicant noticed that Ms. V. did not have a television and invited her to watch L.A. Law at his apartment that evening. At about 9:45 p.m., Ms. V. decided that she was interested in watching the show. She phoned the applicant, but did not reach him. She left a message on his answering machine saying that she was interested in watching the show. Approximately 15 or 20 minutes later, she had begun to make tea when the applicant phoned and informed her that she would be welcome to go to his apartment to watch the show. He invited her to make tea at his apartment.

27th April, 1995

She stated that she dashed the distance between her apartment and that of the applicant, carrying her tea bags with her. She removed her shoes on entering and noticed that the applicant's apartment had a second floor which hers did not. She asked if she could look around and upon receiving permission, she headed up the stairs to scan the area. When she returned to walk back down the stairs, the applicant was at the bottom of the stairway, blocking the stairway with his body.

She stated that he

"...got a little flirtatious or quiet or glossy or seductive, whatever you want to call it, and asked me what was wrong".

She began to get nervous and tried to be a little more forceful. She asked him to move, but he would not. She testified that Mr. Kazembe knew she had a boyfriend, as they had discussed it previously. She talked about her boyfriend and said that she and her boyfriend were very much in love and that she was not interested in Mr. Kazembe. She made it very clear that she was in a monogamous relationship, but that Mr. Kazembe did not seem to be hearing her. She informed him that they were to be married in the spring and Mr. Kazembe said "What he doesn't know won't hurt him." She was shocked. During cross-examination, she stated that she tried, while on the stairs, to establish the parameters of their relationship because she thought he may have misunderstood why she was in his apartment. Mr. Kazembe then reached out very quickly and pulled her down the stairs into his arms and tried to kiss her several times. She dodged him. She asked him to let her go, but he would not. She then made a sudden movement and bolted under his arms and away. She then states that she went behind the kitchen table to place a barrier between herself and the applicant. He followed and "chased me around it a couple of times".

At that point Mr. Kazembe suddenly got calm and went to the couch.

"It was as if he flipped a switch. He went from being someone who wanted to get at me and something I felt a sense of danger about, to someone who just couldn't care less all of a sudden and he sat down on the corner of the couch."

She was confused and felt disbelief. Mr. Kazembe then invited her to sit down. Thinking he may have understood her concerns, she did, but sat at the far end of the couch. Mr. Kazembe then asked her why she was sitting so far away, "Come sit by me, don't you trust me?". She stated that she was confused and shocked and wanted to trust him. She asked if he understood that they were just friends and that she was seeing someone else, and that she did not want anything from him. She said he "kind of hedged it and dodged it". She persisted and Mr. Kazembe finally said with some impatience

"Yeah, yeah, whatever you want. You make the rules. I'll play by them. Trust me."

She felt silly, childish and humiliated. They conversed and she then moved over a bit and when she did, Mr. Kazembe lifted one leg and put his back to the corner of the couch. He then reached out very quickly and pulled her towards him. She stated that she fell back so that her head landed roughly on his upper chest. She stated that she crossed her arms over her chest to protect her breasts, as he was trying to feel them. She felt trapped and pinned against his body. She did not feel that she would be able to simply get up and leave. Indeed, she was afraid to make any rash movements. He then took the liberty of massaging her head. While this bothered her, she did not feel she could do anything about it.

27th April, 1995

She stated that when things calmed down, she relaxed a little bit, then got up suddenly and made an excuse to go to the door to put her shoes on. At this point, she stated that Mr. Kazembe came very close to her and stood

"very approximate to me and started to touch me and invade my personal space and physically I felt threatened".

He asked her for a hug saying "Even friends hug". He hugged her. She did not hug back. She stated that he hugged "not as friends would hug," but sufficiently close so that she "could feel his erection". She told him

"Friends don't hug that way. You ooze like you want to fuck me."

She stated that he spun around on his heels and said

"Yeah, so what if I want to fuck you. What's wrong with that?"

She stated that she just wished to be friends and that Mr. Kazembe then said in an accusing fashion "Are you a virgin?" She stated that she was sleeping with her boyfriend and Mr. Kazembe said

"If you haven't been fucked by a black man, you're still a virgin. You know what I want to do to you? I want to put my big penis into your cunt."

She stated that he then proceeded to graphically recount what he wished to do to her including something about "fist fucking". She felt ashamed that she did not understand what he was talking about. When she could cope with this talk no longer, she tried to open the door but it was locked. She was frightened. However, she unlocked the door looking out onto the dark street and field.

"It was all very dark and ominous. I was afraid to go out into the dark and I didn't know which was worse, to walk out there to some unknown attacker or to stay where I was with the one I knew."

Mr. Kazembe then offered to walk her home. She agreed, thinking that she could run or scream if anything happened. Her residence was not far from his and she walked a few feet ahead of him. Mr. Kazembe then asked if he could kiss her good night. She was "flabbergasted". He kissed her and she felt disgust and revulsion. Under cross-examination she stated:

"I was stunned. I didn't move. I didn't say no outright. I was in shock, but I didn't say yes. It happened. I did not say yes."

This contrasted with her written complaint where she stated that she allowed him to kiss her goodnight.

Ms. V. told the applicant that:

"He probably got turned down earlier that evening. That he probably had blue balls, that he was probably looking for a cheap thrill and that he wasn't going to get it from me. He should just go home and take care of it himself".

She stated that Mr. Kazembe appeared taken aback and that she then entered her apartment, and quickly locked the door behind her. The entire episode lasted approximately 45 minutes.

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She stated that the conversations in Mr. Kazembe's apartment were very repetitive in terms of her telling him that she was seeing someone and was not interested in him. She told him very clearly that she did not want him to touch her or to kiss her, nor was she interested in any sexual intercourse. She recalled that at one point in the encounter he called her a "bitch".

When she was safely inside her apartment, she immediately telephoned her best friend and tearfully recounted the incident to her. The next day she attended classes and felt very threatened by the presence of Mr. Kazembe in her classroom.

"To sit there in the same class was like reliving the night before, and he walked in as if nothing were wrong and I couldn't stand being there in that classroom and he left me feeling scared and somewhat threatened, although logically, I suppose, there was no need to feel threatened in a large classroom of people, but I didn't feel safe so I left."

Her friends followed her outside the class. Ms. V. cried some more and then decided to report the incident to the York University Sexual Harassment and Complaints Centre ("SHEACC"). She was afforded emotional support and was presented with several courses of action. She did not wish to pursue criminal charges nor was she certain that she wished to take her complaint to a tribunal for hearing. She merely wished to document his name and the incident in case there were similar complaints against Mr. Kazembe. Thereafter, she avoided all social contact with the applicant.

Evidence of Adele S.

Ms. S. is 25 years of age and is a graduate of Simon Fraser University with a B.A. in Criminology. She was born and raised in British Columbia and attended Osgoode Hall Law School, graduating in 1993. She is articling in British Columbia and anticipated being called to the Bar in May 1994.

Ms. S. first met the applicant at a wine and cheese reception held the second day of her first year at law school. The applicant introduced himself and commented on the fact that there were very few black women at Osgoode Hall and commented that Ms. S. had "nice legs". She found the comment inappropriate. She found the conversation

"intimidating and a little bit frustrating, because Courtney kept moving closer to me as he talked and I felt that that was an invasion of my personal space".

She stated that the applicant asked whether she would marry someone who was black and she stated that it didn't matter because people were people. He then offered to introduce her to other black law students and offered his arm to her. She was not interested. The applicant invited friends of his to meet her and she felt that she was being monopolized. She then engaged herself in conversation with other people and didn't talk to the applicant. At the conclusion of the reception, after approximately two hours, the applicant came over, hugged her and said "I bet you have never been hugged by a black man." She found the experience uncomfortable and the comment inappropriate.

A few nights later there was a boat cruise. She expected that the applicant might be there and asked a girlfriend to "run interference for me". The applicant did in fact approach her and asked if she wished to meet other black law students and she declined and spent the better portion of the evening avoiding the applicant. Later on, he asked her to dance and she declined.

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Later during the first semester, the applicant approached her during a mid-morning break in the student "mixing area" and asked for her phone number. She declined to provide it. The applicant gave her his phone number.

On another occasion during the mid-morning break, the applicant asked Ms. S. to have lunch and she declined once more.

During January or early February in the second semester, she was awakened by a phone call on a Sunday evening. She believed it was approximately 10:30 p.m. It was the applicant. He told her that the student newspaper would be publishing an edition on black history and asked her to participate by submitting an article or poem. She declined. She regarded the phone call as "an invasion of my privacy" and felt it was inappropriate.

During the last month of school, she recalled being on the fourth floor of the library where the computer facilities were located. She saw the applicant and avoided him by going down a different aisle. He came into the aisle and stated "Are you trying to avoid me?". She stated "No, I'm just looking for a book." He then made conversation about what a good year it had been and how he hoped that he would get to know her better the next year. She stated that the applicant then asked if he could hug her. She said "I am not like that" and he proceeded to hug her and left. She felt upset and a little bit afraid. After he left, she sat down on the floor and "cried for a bit". She stated that her first year was not a happy one because she spent lots of time just "avoiding Courtney". She did not join the Black Law Students Association specifically because Mr. Kazembe was a member.

At no time following any of the described incidents did Ms. S. make any complaint to SHEACC.

Under cross-examination, Ms. S. informed the Committee that there were approximately 300 to 325 people at the wine and cheese reception. She admitted that in fact there were only 10 to 14 black students in the law school in 1990 and that the applicant did wish to introduce her to the black students and that she was never interested in joining the Black Law Students Association. She stated that this was due to the fact the she was "turned off" by the applicant's conversation because "My parents are inter-racial. My dad's black, my mom's white." She stated that she met the applicant approximately one-half hour after she had arrived at the reception.

With respect to the boat cruise, she indicated that there were hundreds of students present and that she at no time told the applicant to "back off".

With respect to telephone listings, she admitted that Osgoode Hall publishes a list of student phone numbers in a publication referred to as "The Munchkin". She stated she was disturbed because she was asleep when the applicant phoned her to request that she participate in the special student newspaper edition highlighting black history.

During cross-examination with respect to the incident in the library, she admitted the applicant would not realize which way she was going and that she was not followed.

Evidence of Mary Anne C.

Ms. C. is 28 years of age and graduated from the University of Western Ontario with an honours degree in sociology. She attended Osgoode Hall Law School between 1989 and 1992 and is presently an Associate with a law firm in London, Ontario, practising in the area of family law and equality advocacy.

She knew the applicant by name and by appearance, but he was not a friend. She had seen him at weekly pub nights on Thursday nights and lived at Passy Gardens as did the applicant.

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October 18, 1991 was a particularly lovely day and Ms. C. decided to take a late afternoon walk. She was behind the Osgoode Hall Law School in the parking lot area and met the applicant who was walking in the opposite direction. The applicant said hello. Ms. C. stated that she was going for a walk and the applicant asked if he could join her. She was wearing a running outfit with pants, jacket and sneakers and the applicant had just completed a workout at the gym at York University and was attired in a tank top and shorts. They walked along pathways engaging in light conversation. She remembers attempting to maintain her course on the path as she felt she was being veered off her path by virtue of the applicant's body pressing against her. At one point, she asked whether they were going in a specific direction and the applicant answered "yes" and they proceeded onward. Approximately five minutes later, they arrived at Pioneer Village which is a fenced in area with a corral type fence. The applicant suggested they go inside. Ms. C. felt they might be trespassing but agreed to go. They crawled between the links of the fence and she recalls approaching a hill, when the applicant offered his hand, but Ms. C. ignored it and kept walking. The applicant then suggested they sit by the creek. Ms. C. remembers commenting on how pretty the scene was and joining him to sit down by the creek. Thereupon, she stated that the applicant immediately sat practically

"on top of me - so that his body was pressing right against mine. Immediately when we sat down, he put his left arm over my shoulder, sort of leaning in to me as he was talking."

She recalled that their faces would have been just an inch or two apart,

"we couldn't have physically gotten any closer, I don't think, sitting there".

Ms. C. became increasingly nervous, at which point the applicant suggested he was cold and asked her to warm him up. Ms. C. very quickly rubbed one of his arms to warm him up, because she felt very nervous and did not wish the applicant to notice that she was feeling nervous about his behaviour or to feel that he had any control over her. She told the Committee that she felt nervous because the applicant was not a close personal friend and yet he was touching her and using body language in a desolate, isolated area and this concerned her.

Ms. C. then stated that she had to go and made an excuse about having things to do. She got up and started walking away. The applicant followed and then put two arms around her from behind and gave her a "sort of bear hug sort of thing". Ms. C. manoeuvred her body away and starting walking briskly. She then felt the applicant grabbing her hand. She pulled her hand away. The applicant asked her whether she had a boyfriend. She said it was none of his business. The applicant asked if she was sleeping with her boyfriend and again Ms. C. said it was none of his business.

She then saw a friend driving by and commented "Oh look, there's Bill driving by." She felt immense relief at seeing a friend. She did not know what the applicant's intentions were. However, when the friend appeared her tension dissipated. The conversation turned to religion and spirituality and when they arrived at Passy Gardens, the applicant invited her into his apartment. Ms. C. declined.

When she arrived at her apartment, she was quite shaken. She called her boyfriend and recounted that she had just been through an "awful experience". She thereafter spoke to the President of the student caucus, Andrew Evangelista, who was a friend of both her and her boyfriend. Upon speaking with Andrew, she learned that "certain other individuals had experienced similar incidents with the applicant".

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Under cross-examination, Ms. C. did not recall meeting the applicant at a meeting which he chaired of representatives from various clubs at the law school, nor did she recall engaging in conversation with him and telling him that she enjoyed his Jamaican accent.

She admitted that Andrew and the applicant were involved in controversy over student politics. The applicant at the time was Vice-President of the Legal and Literary Society. Andrew Evangelista was the President.

She admitted she never told the applicant to "back off", nor confront the applicant with her feelings of disquiet.

She stated that she had no heightened fear, nor did she feel intimidated by the fact that the applicant was black and muscular, and that she had on a previous occasion taken a walk with a black male friend.

She did not recall being offered a hand to go through the fence and maintained that the hand was offered after they had straddled the fence. She did not make any comment to him about his arm being around her and admitted that both she and the applicant were conversing at the time. She admitted that he said nothing threatening, but that she felt threatened. She admitted that it was chilly and that his arms were bare. She admitted that the applicant may have been cold. She admitted that she said nothing when the applicant hugged her. Nor did she say anything about his attempt to hold her hand. She admitted that the conversation relating to spirituality may have emanated from the applicant.

She admitted that when she arrived back at her apartment, it was still light out but felt nonetheless that her safety had been in jeopardy and felt that she had "just escaped a rape". She admitted that there was no rape nor any attempted rape but

"He did a number of things; he pushed his body against mine as we walked. He tried to grab - he put his hand out for me to - he was gesturing for me to hold his hand on two occasions. He put his arm around me. He sat immediately beside me. He spoke inches away from my face. And he indicated that he was cold and he wanted me to warm him up. I had no idea what all of these things put together meant, although I did feel that my safety was in jeopardy."

Evidence of Courtney Kazembe

The applicant was born on May 5, 1964 in Kingston, Jamaica and emigrated to Canada in 1985. In Jamaica, he lived with his parents and sister and enjoyed a close relationship with an extended family including his grandparents and great grandparents, aunts and uncles. He attended Excelsia High School in Kingston and was very active in high school in both politics and sports. He participated in chess and was president of the Chess Club. He was president of the Key Club, a student service organization, and he also played cricket for the school.

On his arrival in Canada in 1985, he worked with Collyer's Encyclopedias and travelled coast to coast selling encyclopedias. He became the number one salesman in the country.

In 1987, he decided to enrol in undergraduate studies at York University. He pursued an honours B.A. with a double major in Political Science and African studies. He was involved in anti-apartheid groups.

He wished to attend law school which was a life dream. He described himself as a spiritual person and is a member of the Unity Church, a non-denominational Christian Church.

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His surname at birth was Murray. His great grandfather lived until 106 years of age, travelled extensively and spoke French and English. From his great grandfather, he learned his African history and the sound of his real name. He eventually changed his surname to Kazembe.

Upon gaining entrance to Osgoode Law School in September, 1990, he had a girlfriend, one Maureen McDonald. The relationship with Maureen McDonald continued until graduation from law school and in fact the applicant and Ms. McDonald lived together from March 1992 until graduation.

He took a keen interest in student politics, particularly black student politics. He organized the Black Law Students Association and was instrumental in forming the National Black Law Students Association. The applicant was at all times during law school keenly interested in motivating black law students to organize themselves and to become involved in issues significant to African-Canadians.

The applicant organized conferences, both local and national and also challenged some of the conventional thinking among the student caucus. This proved to be divisive and he found himself often at odds with the President of the student caucus, Andrew Evangelista. The applicant was the Vice-President of the student caucus at the time. As the applicant stated

"Because of our wanting to move from margin to centre, so to speak, really got a lot of people upset and there was definitely a lot of racial issues and backlash from some of the recommendations and some of the issues we were dealing with."

The applicant, with others, was successful in organizing a Legal Values course, which concentrated on African-Canadian issues as they related to the legal system. Papers written by the applicant pertaining to African-Canadian issues in law were submitted in evidence. These papers unambiguously establish the commitment and passion of the applicant in relation to African-Canadian legal issues.

In addition, the applicant established the "Kazembe Research Institute" which holds seminars in Canada and in the United States aimed at ghetto children with a view to empowering them and encouraging them to take pride in their African roots and become active in the mainstream of society.

Response to the Allegations of Renee V.

The applicant testified that he received a message on his answering machine from Ms. V. requesting to watch L.A. Law. He recalls phoning her at approximately 9:50 p.m. asking her to come by and watch the show. She came to his door, took off her shoes and he proceeded to make tea. He does not specifically remember locking his door, although he stated it was his custom to do so. Ms. V. began to look around the apartment and asked if she could go upstairs to see what it looked like. While she was upstairs, the applicant was in the kitchen. As she descended the stairs, she was talking but he could not hear her because the television was on and he was in the kitchen. As she came down the stairs, she walked by him and "she may have brushed by me when she passed". He stated that she then proceeded to look through his books on the bookshelf and when the tea was ready, they sat down on the sofa to watch the show. They watched the entire show to the end and talked about different things including the characters in the show. They talked about professors in school.

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He stated that he was sitting in a relaxed position and that Ms. V. was also very relaxed. He stated that they were not extremely close and that after the show was over Ms. V. mentioned that she had a headache and he asked to massage her head. She accepted and moved closer to him and he then massaged her head and she stated that "it felt good". At that point, the conversation turned to boyfriends and girlfriends. The applicant recollects telling Ms. V. about his girlfriend and Renee Ms. V. about her boyfriend.

Thereafter, both got up, Ms. V. put her shoes on and the applicant walked her home. He then asked if he could kiss her goodnight. She stated he could. He hugged her and there was a mutual kiss goodnight - "a very short mutual kiss". He stated that thereafter there was no discussion about the evening and that there was nothing unusual in their relationship. He does not specifically recall speaking to Ms. V. after that evening. He stated that Ms. V. and Ms. C were very close friends and often in the office of the Treasurer of the Student Caucus, Gary Kissick. He also stated that Gary was the roommate of Andrew Evangelista.

Response to the Allegations of Adele S.

The applicant recollected meeting Ms. S. at the wine and cheese reception and that there were only three or four black women in the first-year class and approximately twenty-four black law students in total. He stated that he took it upon himself to introduce black law students to other black law students. He offered to escort Ms. S. to meet other black law students. He recalls introducing her to two of his friends, namely Blair and Manley. He recollects seeing her leave. He does not recall giving her a hug when she left but

"I might have touched her, I don't recall if I hugged her."

With respect to the boat cruise he recalled asking Ms. S. if she wished to meet certain black law students and that she declined.

The applicant stated that Ms. S. was the only black law student who did not take part in black law student meetings and that one day he approached her in the cafeteria and invited her to lunch to discuss the matter. He stated that she did not wish to have lunch and that she did not wish to talk about black law students.

The applicant recollected phoning Ms. S. in late January in order to elicit her support for the special edition of the student newspaper. He stated that certain black law students agreed to contact all black law students in the school in order to have them submit articles. He stated that on the evening in question, he called all the students on his list between 8:30 and 9:30 and that she was somewhere in the middle of his list and found it unusual that she was the only student who said, blatantly, "No. I am not writing anything." The conversation lasted at most two minutes.

Tendered in evidence was the special edition of the student newspaper, *Obiter*, which appears to have articles submitted by numerous black law students including the applicant.

He recalled seeing Ms. S. in the library during the end of the first year of law school. It was the day he wrote his last exam and he was leaving school for the summer. Everybody was exchanging greetings and in a good mood. He stated that he said hello to Ms. S. in the library and that it had been a great year. He asked her how her exams were going. He told her he finished his last paper and also stated that it was unfortunate that she had not participated in the black law student events, but that he hoped next year would be a better year and she would come out for the events. He mentioned that there would be a major conference in the next year and he would be happy to see her there. As to whether he hugged her, he stated

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"No. I am pretty sure I didn't hug her. I'm sure I didn't hug her. I touched on the shoulder, like a gentle touch on the shoulder. Have a great year, and I left."

Thereafter he did not have any further dealings with Ms. S.

Response to the Allegations of Mary Anne C.

The applicant recollected meeting Ms. C. at a meeting he was chairing as Vice-President responsible for student affairs. It was a meeting with all representatives of different clubs and student organizations searching for a vision for the year. He recalled that following the meeting, Ms. C. approached him and stated "what a great meeting it had been and that she liked his Jamaican accent." He recalled that Ms. C. was close friends with Andrew Evangelista and Gary Kissick, the President and Treasurer of the student caucus.

The applicant recollected taking a walk with Ms. C. in the fall of 1991. He recalled that he had been for a run in University campus and then went to the gym to lift weights. He was dressed in gym attire, being a tank top, gym shirt and boxing shorts. The weather was in the high teens and the sun was shining. The applicant stated that he weighed 170 pounds and stood 5 feet 10 inches tall.

The applicant stated that it might have been he who suggested taking a walk and that they walked to the pond area. He stated that Ms. C. suggested that they walk towards Pioneer Village. He testified that he would often go running in that area instead of going to the gym. He stated that there were many people outside on that particular day and that there were a number of activities going on at Pioneer Village. There was an outdoor patio with numerous people around. He recalled that there was a very steep hill which they had to negotiate and a log fence and that he asked if he could help Ms. C. climb over the fence. He stated that Ms. C. insisted on talking about his involvement in student politics and particularly Andrew Evangelista and

"That was a conversation that she wouldn't give up, particularly, my relationship with Andrew, and she continued with Andrew for a while."

The applicant stated that they sat down by the creek and that they were sitting down close to each other. At no time was Ms. C. uncomfortable. They talked about different things, including school and people at Osgoode and who was dating whom. The applicant stated that "I don't think I ever had my arms on her shoulders." He recalled that he was sitting with his arms bracing himself and that one of his arms may have been behind her while he was in that position. He stated that they sat for about fifteen minutes and then mentioned that it was getting chilly and should be leaving. He did not recollect Ms. C. rubbing his arm. He recollected stretching when he got up because his muscles felt cramped, but denied that he hugged Ms. C. They then walked for a further ten or fifteen minutes talking about relationships. He stated that she was asking numerous questions about Andrew. He stated that the only time he held her hand was in assisting her over the gate and while going up the steep hill. He stated that the conversation turned to spirituality and religion and that they both went to their own apartments. Thereafter, they did not socialize.

Findings of the Committee as to the Allegations of Renee V., Adele S. and Mary Anne C.

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The Committee closely observed and listened to the evidence of all the witnesses. The Committee had full opportunity to scrutinize the evidence of the complainants and that of the applicant, including the manner in which they withstood cross-examination. The testimony of the complainants remained unscathed after a persistent, and, at times, aggressive cross-examination by experienced counsel. The testimony of the applicant, on the other hand, was at times rambling and evasive with respect to key points in issue, which left the Committee with little doubt as to the true facts. The Committee is clearly convinced that the events as recounted by the complainants occurred substantially in the manner described by them. Moreover, the Committee is completely satisfied that their evidence was in no way tainted by racial prejudice, nor prompted by inter-racial politics at Osgoode Hall Law School.

While the Committee is not prepared to conclude that the events occurring in relation to Ms. S. constitute actionable sexual harassment as that is defined under Rule 27 of the Rules of Professional Conduct or under the Ontario Human Rights Code, the Committee does conclude that the events occurred as recounted by her. Specifically, the Committee has concluded that the applicant hugged her on two occasions, namely during the wine and cheese party and in the library, and that he was rebuffed by her on at least five separate occasions in their first year at law school. The behaviour is illustrative of a person who appears to be insensitive to the feelings of women.

Taken alone, the complaint of Ms. S. would not cause the Committee serious concern about the good character of the applicant. Ms. S. did not wish to become involved in black student politics, while the applicant had a mission to engage all black students in student politics. The fact that he encouraged her to meet friends in the black community and telephone her to encourage her to submit an article for the student newspaper should not reflect poorly on the applicant. In all the circumstances, the Committee has concluded, particularly in relation to the hug in the library, that the applicant's conduct may be characterized as inappropriate, presumptuous and bold.

The Committee has concluded that Ms. C. was truthful in her recounting of the events in question. Specifically, the Committee finds that the applicant did walk in an inappropriately close manner with Ms. C., that he did put his arm around her at the creek. and that he did attempt to hold her hand. Moreover, the Committee has concluded that he did in fact hug Ms. C. from behind her back upon leaving the area of the creek, and that he asked inappropriate questions concerning her private life.

The Committee has concluded that in the circumstances, Ms. C. could not be said to have had an inappropriate reaction because the applicant was "black and muscular". Rather, the Committee has concluded in all the circumstances that Ms. C. had sufficient cause to feel threatened and react in the manner that she did. The applicant was essentially a stranger to her and had no justification for holding her hand, asking the questions he did, placing his arm around her shoulder or hugging her. Stated simply, these actions on the part of the applicant were inappropriate and needlessly provocative. The Committee has concluded that the applicant was being flirtatious, probably hopeful, inappropriately inquisitive and most certainly presumptuous. However, at no time did Ms. C. tell the applicant that she was not interested in him nor ask him to "back off". In the circumstances, the Committee can only conclude that the behaviour of the applicant was clearly inappropriate. Taken alone, this incident would not be sufficient to define the applicant as a person of bad character. Rather, it is indicative of egotistical flirtatiousness and poor judgment. In the circumstances, it was most inappropriate, and could be characterized as sexually harassing behaviour.

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With respect to the facts relating to the complaint of Ms. V., the Committee has concluded that the version of events recounted by Ms. V. are true. As such, the applicant sexually assaulted Ms. V. both physically and verbally and, in the circumstances, his conduct amounted to sexual harassment of a most serious nature. Indeed, the Committee noted that at numerous points during her lengthy examination, Ms. V. struggled unsuccessfully to hold back tears and, at times, cried uncontrollably.

In assessing the credibility of the witnesses, the Committee was struck by the fact that following the incident with Ms. V. and the incident with Ms. C., there was no further interaction between the applicant and the complainants. If the interactions had occurred as described by the applicant, there would be no reason for these women to avoid further dealing with the applicant, nor he with them. There would be even less reason for him to avoid them if his version of the events were true. Yet, the applicant himself testified that he had nothing whatsoever to do with Ms. V. and Ms. C. after the events in question. The applicant declared that he had been on friendly terms with both Ms. V. and Ms. C. Why then, one must ask, would these women suddenly and for no apparent reason turn against him and make allegations of sexual harassment? To this Committee, the suggestion that these women were making up these stories defies logic.

The Committee has concluded and is clearly convinced of such conclusion, that the applicant could not be said to have exhibited good character while in the company of Ms. V. on the evening of November 15, 1990. His conduct in relation to Ms. C. and Ms. S. also raises serious concerns in the minds of the Committee, particularly when coupled with the incident involving Ms. V.

Most serious, however, is the fact that the Committee has not accepted the evidence given on oath by the applicant as to his version of the events involving these three women. Further comment upon the effect of this finding shall be made later in these Reasons.

Complaints to SHEACC, Attempts to Settle, and the Evidence of Elizabeth Hopkins

Following the incident involving Ms. C., she spoke to Andrew Evangelista about her experience and discovered that other people were involved in similar incidents.

Both Ms. C. and Ms. S. were members of the Christian Legal Fellowship. Following one such meeting, Ms. C. and Ms. S. had occasion to speak to each other about the incidents aforementioned. Ms. C. recounts that during the conversation, Ms. S. said "You're talking about Courtney Kazembe aren't you?" and then stated that she had experienced a similar incident to that which Ms. C. was describing. In Ms. S.' evidence, she recounts that Ms. C. asked her how her first year was and that Ms. S. responded that she felt harassed by an individual and that Ms. C. then said "By any chance is this person Courtney Kazembe?" and Ms. S. stated "Yes".

Obviously, both versions cannot be correct. However, it is clear that during this conversation, both Ms. C. and Ms. S. discussed Mr. Kazembe, and that the conversation touched on behaviour that caused them concern.

In speaking to Andrew Evangelista, Ms. C. learned about the complaint of Ms. V. and contacted her. Ms. V. had previously spoken to Andrew Evangelista about the incident involving herself as a result of which Andrew was able to steer Ms. C. to Ms. V.

The women met together during October of 1991 and decided that there was a great deal of similarity to their incidents. They met with Dale Hall, a counsellor and complaint officer at SHEACC. They also met with Harriet Lewis, a lawyer for York University who informed them of options available to them. Between October 1991 and January 1992, the three complainants considered their

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options and on January 16 decided to make a formal complaint to York University by depositing a complaint registration form with Dale Hall. Attached to the complaint form were written complaints composed by each of the complainants. The written complaints were, for the most part, entirely consistent with their evidence before the Committee.

Ms. V. described her intention in filing the complaint as being to give the applicant the message that his behaviour towards her was inappropriate conduct and not to be condoned and not to be imposed on anyone else. She stated that she was open to a mediated settlement and hoped to achieve an admission that the facts as relayed by the complainants were substantially correct. She also wished to ensure that Mr. Kazembe move off campus.

Both Ms. C. and Ms. S. testified that they wished to bring about the same result, namely a negotiated settlement of the matter.

The complaints were forwarded to Elizabeth Hopkins, a Vice-President of York University and the person charged with dealing with issues of campus conduct.

It appears the applicant was notified about the complaints almost immediately, but it was not until March that he was made aware of the specific complaints and the identities of his accusers. Upon learning of the complaints, Elizabeth Hopkins summoned Courtney Kazembe to her office and informed him that there were complaints of sexual harassment. His reaction was one of shock and incredulity. He too wished to effect a settlement of the issue. He demanded to know the identity of his accusers. Ms. Hopkins was not forthcoming, and on March 8, 1992, E-mailed SHEACC as follows:

"I had a meeting with C.K. on Friday morning in which I warned him to stop pushing re. discovering complainants names and asked him to put his own feelings/sense of his situation in writing for me. I did both because I am disturbed by escalation of "punitive" stance on women's part. I also outlined what sort of remedies were being sought but said I was still awaiting their written submission. In the interim, Ms. V. called my office saying they were now absolutely determined that he must leave York apartments asap..."

Once being made aware of the specific complaints, Kazembe moved from campus almost immediately. He moved in with his girlfriend, but did not inform her of his involvement with SHEACC. At no time did he have independent legal counsel acting for him.

After March, 1992, various meetings were held involving University officials. With the assistance of Harriet Lewis and Professor Mary Jane Mossman, the complainants drafted a "Settlement Agreement". The agreement provided, inter alia:

"I have read the formal complaints attached to this agreement and labelled Schedules A, B and C, and I agree with the facts stated in each. I accept full responsibility for my actions as described in the formal complaints and I admit that I sexually harassed Ms. C., Ms. V. and Ms. S...."

"...I hereby agree to the following terms:

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1. I will move out of my residence accommodation...and vacate York University housing as soon as possible and no later than April 1, 1992.

2. I will participate in an educational/counselling program to overcome my tendency to engage in behaviour which constitutes sexual harassment. I will choose the program from a list presented to me by the complainants; and I agree the program must be approved by the complainants to constitute fulfilment of this part of my agreement. I also agree to provide ongoing proof to the York University's Provost Office that I have regularly attended the agreed upon program.

3. I will meet with the complainants and a mediator, at an agreed upon time to discuss these complaints.

4. I undertake to refrain from conduct of the kind which has resulted in these complaints. I further agree that if there is another incident of this sort reported about me to York University's Provost Office, the Sexual Harassment and Complaints Centre, York Security, the Administrators of Osgoode Hall Law School, or any other similar body at York University; or to the Ontario Human Rights Commission or the Law Society of Upper Canada, it will constitute a breach of this settlement agreement; and further actions may be taken in any appropriate form in relation to these or any other complaints."

It would appear from the evidence that Mr. Kazembe offered to meet with the complainants in an attempt to resolve the matter, but the complainants refused to meet with him until a settlement agreement was negotiated. Thereafter, Mr. Kazembe submitted a settlement agreement which provided, inter alia, the following:

"I have read the complaints "Schedules A, B and C". I have agreed to participate in a mediation process with the complainants and I agree that Ms. Elizabeth Hopkins, the Provost for York University, is acceptable to me as a mediator...."

This settlement agreement proposed by Mr. Kazembe was completely unacceptable to the complainants.

With the assistance of Elizabeth Hopkins, Mr. Kazembe forwarded a second draft settlement agreement which, while similar in terms to his first draft, including the following particulars:

"..2. I will participate in an educational/counselling program to be approved by the Provost.

3. I undertake to not engage in the conduct of the kind which is described in the complaints, Schedules A, B and C.

4. I will move out of my residence accommodation by April 1, 1992."

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This second draft agreement was also unacceptable to the complainants. In April 1992, the complainants, with the assistance of Ms. Susan Vella, of Osgoode Law School, submitted a further draft settlement agreement incorporating all the terms of their original agreement but adding the following additional terms:

"...5. Any breach of the above covenants shall result, at the option of the complainants, in a reinstatement of the complaint, and a finding of sexual harassment under the York University Sexual Harassment Policy, and I agree that I will be estopped from raising any defence to the allegations raised within the original complaint.

6. I further agree that if there is another incident in the nature of sexual harassment reported about me to York University's Provost Office, the Sexual Harassment and Complaints Centre, York Security, the Administrators of Osgoode Hall Law School, or any other similar body at York University; or to the Ontario Human Rights Commission or the Law Society of Upper Canada, it will also constitute a breach of this settlement agreement, and the complainants are free, at their option, to raise the impugned conduct outlined in the aforesaid complaints as a fresh basis for any appropriate forum and I again will be estopped from raising any defence thereto." (emphasis added)

The Committee is moved to comment that the terms contained in this second draft agreement appear unduly harsh and onerous. It is difficult to comprehend that the applicant, were he to have been afforded the advice of counsel, would have been advised to sign such an agreement. Indeed, the terms contradict the spirit and express finding of the report of Convocation in Re: Rizzotto as it relates to future good character:

"Convocation respectfully believes that the relevant and applicable test is not whether the risk of further or future abuse by an applicant upon the public trust is too high, but simply whether the applicant has established her or his good character on the balance of probabilities. Mr. Rizzotto did not need to demonstrate good character beyond a reasonable doubt, nor was he obliged to provide a warranty or assurance that in the future he would not breach the public trust. The Act does not permit a Committee to apply any other test than that relating to the applicant's good character."

Confronted with this new draft agreement, even stronger in its terms than the original draft submitted by the complainants, the applicant again turned to Elizabeth Hopkins for assistance. The summer recess then intervened. No progress was being made. Ms. Hopkins believed her only option was to call a hearing, and by registered mail dated 31 August 1992, Ms. Hopkins put the applicant on notice that there would be a hearing into the matter.

During the early days of September 1992, with a hearing looming, all parties appeared anxious to settle the matter and Ms. Hopkins dealt with the applicant on the one side and the complainants on the other and composed an Agreement that she believed met the concerns of all parties. The agreement reads as follows:

"Settlement Agreement Between York University and Courtney Kazembe

27th April, 1995

In consideration of the University dropping proceedings in the matter of complaints that he has violated the University's Code of Conduct.

1. I acknowledge that most of the events attributed to me in the formal complaints of Ms. C., Ms. V. and Ms. S. (attached) took place as described.

2. I understand that these events constitute sexual harassment and caused serious suffering to the complainants.

3. I will provide a sincere apology to the complainants in writing on or before September 8, 1992. These letters will be delivered to the Vice-President (Campus Relations and Student Affairs) who will ensure the complainants receive them promptly.

4. I further undertake to refrain from any such conduct during my time at York University.

5. I agree to attend regular counselling sessions with a qualified sexual harassment counsellor as designated by the Vice-President (Campus Relations and Student Affairs) for a period of four months to be completed by December 31, 1992. I agree that the counsellor may report my attendance and progress to the Vice-President at regular intervals.

6. I do not live in campus housing and will not seek to do so during my time at York University.

7. I agree that copies of this settlement will be retained by the complainants named above.

I have read and agree with all statements. I understand that if I violate any of the terms of this settlement agreement, the University may proceed immediately to hold a disciplinary hearing.

Signed: (Courtney Kazembe)

Witnessed: (Elizabeth Hopkins, Vice-President for the University)

Date: 4 December 1992

Addendum

We the complainants named in the above settlement agree that it constitutes resolution of our complaints by the University.

Signatures:

Witnessed:

Kazembe signed the agreement and sent letters to each of the complainants dated September 8, 1992 in the following terms:

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"Dear Ms.:

I profoundly apologize for any inappropriate manner in which I have related to you in the past. I promise to relate to you with utmost deference, courtesy and professionalism in the future. Thank you for your cooperation and generosity.

Your Colleague,
Courtney Kazembe"

As stated, Ms. Hopkins believed that the matter was resolved. She testified that:

"We informed the complainants that these points, the seven points, were all being agreed to and as far as the University was concerned that meant there was nothing to hold a hearing about. I felt it had resolved all the concerns that the University might have in the matter, and that the women would not be subject to the kinds of insecurity they felt when he lived on campus and so on."

Ms. Hopkins testified that it was not normal to require the signature of the complainants. She stated:

"It's really unusual for me to ask the complainants to sign off...but in this case the role of the complainants had been such that I felt it might be appropriate."

Further,:

"I was being, I felt, rather pushed by the complainants to move the University's processes in the direction that was not what they were intended for at the time. So I think that's where my frustration came from. I was being phoned a lot and pressed to hold a hearing which I had not, at that point, decided should be held."

And further,:

Q: "Okay. And is it fair to say that in fact you sensed in them an attitude that they wanted to ruin his future?"

A: "Yes, it's fair to say I sensed that at the time."

Ms. Hopkins testified that she was well aware that the complainants were upset at how the University was handling the process. She referred to:

"the incessant phone calls. The word from the SHEACC counsellor saying that they were getting upset and visiting her. They were upset with the length of time it was taking. They were upset that it was not moving much more automatically to a hearing."

In her view, the settlement agreement was satisfactory and she informed the complainants that the terms of the agreement responded to the complainants' concerns. As far as York University was concerned, the matter had been satisfactorily concluded.

Ms. Hopkins testified that throughout the settlement negotiations, the applicant was willing to attend mediation and counselling if necessary. She expected the complainants to sign the settlement agreement, but they did not.

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Q: "The point of reaching an agreement is to ensure that all parties are satisfied?"

A: "Yes."

Q: "Okay. And let me ask you this: if the complainants were not satisfied, why would the University be satisfied?"

A: "Because the University is dealing with transgressions of its Conduct Code which is a little different, although it's tricky, it took me a long time to learn this, which one is different from a student's complaint against another student's complaint.(sic) So we were dealing with our Conduct Code and what would be appropriate settlement or resolution. What would address the women's concerns about safety and so on."

Q: "I see. And what the complainants were seeking, if it was coming further than that, was beyond those concerns of the University?"

A: "They were not seeking anything further than that."

Q: "So why didn't they sign?"

A: "I have no idea."

On the date the agreement was signed, Ms. Hopkins E-mailed Harriet Lewis and the SHEACC office as follows:

"This afternoon, after extensive negotiations with all parties and lengthy advice sessions (Thank you so much David), CK signed a statement with the University which essentially grants all that complainants wanted. I am now calling off the UDT hearing as University's part of this bargain. Complainants are now reviewing what happened and I have told them University considers matters settled and I am asking them to sign that they agree their complaints have now been dealt with inside the University. (If they don't, their only option is to take me/University to Court for failing them.)..."

The Committee was struck with the similarity of explanations given by the three complainants as to their refusal to sign the agreement composed by Elizabeth Hopkins:

Ms. V.:

"...In paragraph one of this agreement, it says "I acknowledge that most of the events attributed." When Beth read this to me the first time, I asked her what "most" meant and she couldn't answer me. And I asked her if we could change it to "many" or take it out altogether. She said: Courtney was only amenable to signing "most". It concerned me a great deal because I had no idea what "most" meant and I was afraid that might mean, for instance, with relation to my incident that he knew that it was a Thursday night, that we watched L.A. Law and then I went home. And this to me was not an admission of any kind of fact that I was ready to accept...."

Ms. S.:

"...I was unhappy with the Settlement Agreement for several reasons:

In the first paragraph, there is an acknowledgment of most of the events. I don't know what "most of the events" refers to. I don't know if that meant that Courtney understood that what he did was wrong, if he did these events or if he didn't do them, and which events those referred to.

The second paragraph talks about understanding that these events constitute sexual harassment and they caused serious suffering. But which events - I still don't know what Courtney is admitting to or acknowledging..."

Ms. C.:

"...Well again, paragraph one, "I acknowledge most of the events attributed to me", etc. That is, in my mind, he could pick and choose what he was acknowledging. So there was no definite idea of what he was admitting to..."

In the opinion of the Committee, the wording of the Settlement Agreement signed by the applicant clearly establishes that the applicant was admitting that his conduct amounted to sexual harassment and the explanation given by the women as to their reluctance to sign the agreement appears less than satisfactory. It should be stated, however, that their reluctance proved in time to be somewhat well founded when one considers the evidence given by the applicant at this hearing, as recounted in further detail hereafter.

Throughout her dealings with the applicant, Ms. Hopkins found him to be respectful and dignified and honestly attempting to work the matter out.

During the discussions between the applicant and Ms. Hopkins, the applicant always took the position that "most" of the allegations were true, but "some" were not. However, no detail as to which allegations were untrue was ever sought by Ms. Hopkins except in the most general terms. She testified that the applicant felt, for example, that when Ms. V. was clearly signalling "no" to the applicant, that he believed she was not serious. To quote Ms. Hopkins' evidence in relation to Ms. V.:

"...my sense was that he didn't, in a sense, understand that his behaviour was violating a clear "no" message."

The applicant was pressed during cross-examination by Mr. Brown on why he would admit in a Settlement Agreement that his actions constituted sexual harassment when in fact he was now denying sexual harassment. The applicant explained as follows:

"...I signed this document because I wanted to first and foremost acknowledge the women. I wanted to apologize to them. I wanted to, if I inadvertently caused them any harm or anything that they thought was sexual harassment, I wanted to apologize to them for that. And in that sense, I wanted to acknowledge if they subjectively thought there was sexual harassment.

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"...So if someone comes and has a complaint against me, what I wanted to do, especially at the time with Vice-President Elizabeth Hopkins, was really very compliant, very apologetic. Please, you know, what can I do? How can I apologize to these women? How can I make up for whatever hurt I caused? So I was in that state with Vice-President Elizabeth Hopkins.

"...I wanted it resolved. I definitely wanted it resolved, but also I wanted to apologize. I wanted to set the air clear. I wanted to meet with the complainants...

"...I was prepared to do whatever it took to apologize to the women to really set the record clear. I was in law school. I wanted to continue on with my studies. It was a very stressful time. It was law school, and I wanted to get on with my life.

"...What I wanted to do was to acknowledge that if these women said that there was sexual harassment, if these women felt that in their own view there was sexual harassment, even if an objective tribunal would say, no, there wasn't, even if an objective judge would say, no there wasn't, I didn't want to have any animosity..."

Mr. Brown pressed the applicant on which precise events he believed constituted sexual harassment. The applicant answered as follows:

"...I was talking about the collective nature of the complaints and apologizing for the collective nature of the complaints...In my own mind what I am saying, for example, taking a walk with Ms. C., now I would not do that. As a black male dressed in a tank top and it's a summer day, I definitely would not take a walk with a white woman whom I do not know very well. I apologize to her for doing that. I will acknowledge that and I would say now that I am conscious of the situation. Now that I am conscious of people's perceptions, I would not now take a walk with a white female that I don't know very well. So I am apologizing for that.

"Secondly, in terms of Ms. S., here I was organizing the Black Law Students Association and approaching her a few times to join. Now I think that I would now, I think I would be very careful. I would not approach someone and try to enrol them in a project that I was working on unless that person gave me some absolutely clear indication that they wanted to participate in the project. Those are the things I am talking about.

"And thirdly, now if a white female called me and told me she wanted me to come to my house to watch L.A. Law, I would definitely say no. I would categorically not say yes, you can come to my house and watch L.A. Law. In fact, in my final two years at school, I made it absolutely clear that wherever I was going and I became very conscious of this." (sic)

Pressed by Mr. Brown as to how the events described above by the applicant could possibly constitute sexual harassment, the applicant testified:

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"...I don't think it necessarily constitutes sexual harassment. I don't think it constitutes sexual harassment in a legal sense. I don't think it constitutes sexual harassment in that sense that it would be covered by a Code, but I do think that people's perceptions play a role. I have definitely seen that, especially in my work in the community, I have definitely seen that, and I have definitely seen that in this case. Where just by, well, just probably being in a room with someone, you could misinterpret someone's intention.

"...I recognize now that people have their own particular likes and dislikes and that, as she (Ms. S.) wrote in her report, this aggressive guy approached me, that's that people's views can be different. And now, I now know that approaching someone to join the Black Law Students' Association when that's not what they wanted to do could lead to a possible complaint.

"...What I agree with is that I saw her in the library one day and in saying good-bye to her, I touched her on the shoulder. If she constituted that as a hug, I don't know. That was definitely not a hug. I have no recollection about talking to her about her legs. So I disagree.

"...I am saying I did massage Ms. V.'s head...I am talking about all those things that happened, including attempting to enrol Ms. S. including taking a walk with Ms. C., including having Ms. V. over, including massaging her head, including kissing her good-bye, including all that. I am saying that all of that, in my opinion, could have been what they subjectively thought was sexual harassment, and I wanted to apologize for all of that.

"...I can recall in the course of our interaction I might have touched all three of the complainants. None of the touching was sexual. None of the touching was of a sexual nature. None of the touching, in my view, remotely resembled anything sexual, and I am saying that in the settlement that I signed that I was willing to acknowledge that touching, for example, whether or not it was sexual or not, could in someone's mind be subjectively sexual harassment, and I was willing to apologize for that. I was willing to become conscious of that, and I was willing to be very conscious about that in the future."

In essence, the applicant has at all times maintained that he never touched any of the complainants for a sexual purpose, and that he was at all times prepared to apologize and settle the matter on the basis that the complainants perceived his actions as constituting sexual harassment.

The Committee has already commented on precisely what it has concluded his actions constituted earlier in these Reasons. The lessons learned by the applicant, as explained by him, at the very least, cause the Committee concern. It seems apparent from his evidence that the applicant has some way to go before the Committee can be satisfied that he has fully understood the nature of the events that occurred. Indeed, the Committee has great difficulty accepting Mr. Kazembe's explanation. Mr. Kazembe testified that he believes that racial and

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gender issues are closely linked and related, and that these are issues to which he is committed in his writing in his work, in his seminars and in his employment as a student-at-law with the Ontario Human Rights Commission. He presented the Committee with a considerable amount of material from which it would be reasonable to infer that he is quite involved with employment equity issues and, indeed, he testified that he was. He provided the Committee with a definition of sexual harassment that included the commonly accepted definitions of sexual harassment, including unwanted sexual advances or attention. The Committee, therefore, believes that Mr. Kazembe's evidence has been structured to avoid the clear difficulty he faces, being confronted with a written document signed by him, a document which defines his actions as constituting sexual harassment.

Evidence of Dr. Brian Phillips

Dr. Brian Phillips is the coordinator of the Intern Training Program at the Counselling and Development Centre at York University. Dr. Phillips saw the applicant in September of 1992. The applicant had been referred to Dr. Phillips by Vice-President Hopkins and Dale Hall of SHEACC. Dr. Phillips stated that he had not spoken to either Elizabeth Hopkins nor Dale Hall prior to his meeting with the applicant. He stated that he was not shown the settlement agreement at the time of the meeting. Dr. Phillips' understanding was that Mr. Kazembe was attending voluntarily at the suggestion of the Vice-President. The meeting lasted fifty minutes. In general terms, the allegations were discussed and it was determined at the end of the session that there would be no further contact.

Dr. Phillips testified that the applicant told him that he had come to a clear understanding of the nature of sexual harassment, what sort of behaviour constituted sexual harassment and was confident that he could avoid any misunderstandings of his behaviour in the future and that he did not see any purpose in further counselling. Dr. Phillips agreed with the view of the applicant.

However, Dr. Phillips testified that had he been aware of the terms of the settlement agreement, he would have taken a different stance. Dr. Phillips' notes disclose that:

"Courtney denies the allegations. He acknowledges interactions with the three women and is able to describe their version of events as his own. His description differ not factually, but more of the level of interpretation of intention."

Dr. Phillips explained that the applicant believed that he had not engaged in sexually harassing behaviour. He testified that:

"The applicant was not denying that interactions had taken place. In fact, his accounting of time and places and so on, as he reported to me, was consistent with that of the individuals making the allegations...."

"...Well, again, he was agreeing to or corroborating what the accusers had reported in terms of times and locations of their interactions. His position was that his behaviour had not been harassing and it was never his intention to harass them in a sexual fashion...."

Dr. Phillips was directed by the applicant to disclose to the Vice-President of the University only the fact that Mr. Kazembe had attended the session, but not what was discussed.

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Under cross-examination, Dr. Phillips expressed surprise that he had not been contacted by Dale Hall or Elizabeth Hopkins with respect to the attendance. The matter apparently fell through the cracks. However, he did explain that had he been informed, no particulars of the complainants would have been normally forthcoming. Dr. Phillips also stated that Mr. Kazembe:

"made it clear that if I was to recommend further sessions, he would be very pleased to attend"

However, the applicant was:

"...not motivated for counselling. He agreed to continue if (I) felt that it would be helpful. (I) explained that continuation would only be recommended if Courtney saw any possible benefit. Courtney did not."

Dr. Phillips also stated that he had no reason to believe that Kazembe suffered from any psychopathology.

The Committee notes that the evidence of Dr. Phillips seems to contradict an E-mail message sent to Elizabeth Hopkins from SHEACC on September 8, 1992. That E-mail message reads as follows:

"Subject: Counselling for CK with Brian

I spoke with Brian this morning, he is very booked but will attempt to see CK. Brian understands that CK is not exactly a voluntary client, but I attempted to explain that he agreed to go, not necessarily because he was forced. The agreement is that CK should call Brian and tell him that Dale Hall referred him, Brian has a short run-down of the situation that led up to the need for counselling and will attempt to help. Hope that is satisfactory. Thanks.

Dale"

It may be that Dr. Phillips, because of workload, did not recall being contacted by Dale Hall with respect to the counselling. Certainly the Committee finds it consistent that the telephone call would have been made as the agreement was signed on the 4th of September and the E-mail message is dated the 8th of September. Mr. Kazembe saw Dr. Phillips on the 21st of September.

The Committee is prepared to give the applicant the benefit of the doubt in that the E-mail message indicates that Dr. Phillips was given a short run-down of the situation that led up to the need for counselling. It would seem logical that Dale Hall would have told Dr. Phillips about the agreement. The applicant testified that Dr. Phillips was aware of the agreement.

Whether or not Dr. Phillips was aware of the agreement, the fact remains that in his Settlement Agreement with the University, the applicant agreed to undergo counselling for four months. While both Dr. Phillips and the applicant concluded their meeting by deciding no further meetings were necessary, the Committee believes that the applicant had a duty to be more insistent on the point, and should have advised or reminded Dr. Phillips of his obligations pursuant to the Settlement Agreement. A mere intellectual understanding of sexual harassment does not ensure an emotional grasp of his actions, which is what the applicant required and from which he would have greatly benefitted.

Conclusions of the Committee as to the York University Process

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In assessing the evidence relating to the handling of the complaints within the confines of York University, the Committee has concluded that the time delays caused the three complainants to become increasingly frustrated and assertive in their demands. On the other hand, the applicant at all times acted defensively in an attempt to defuse a highly volatile situation, one which threatened his career and reputation. On balance, the Committee has concluded that the applicant acted in an understandably defensive manner to the allegations.

However, fundamental to our judgment is the fact that the complainants had been wronged, and became assertive, and possibly aggressive at times, while the applicant was the wrongdoer, and became defensive. Therefore, it would be unfair to simply characterize the increased aggressiveness of the complainants as "vengeful" conduct. Rather, it must be viewed as ill-advised. Their desire for unconditional capitulation is seen by the Committee as regrettable, but not altogether mysterious, given that they were the victims, and not the aggressors.

Notwithstanding this finding, some equitable consideration must flow to the applicant, if for no other reason than that he thought the matter was settled and closed.

Why the matter was not finally settled nor closed shall soon become obvious. This Committee, however, would be loath to define its conclusions to the issue without taking into account the state of mind of the applicant at the moment he made his application to the Bar of Ontario.

The Involvement of the Law Society of Upper Canada

On January 25, 1993, the three complainants, following the advice of Professor May Jane Mossman, wrote to Mr. Alan Treleaven at the Law Society of Upper Canada. The letter reads as follows:

"Dear Mr. Treleaven:

It was suggested to us by our professor, Mary Jane Mossman of Osgoode Hall Law School that we contact you with respect to a matter we feel is of utmost seriousness. During the course of our legal studies at Osgoode Hall, the three of us experienced numerous independent acts of sexual harassment from a fellow student, Courtney Kazembe. (emphasis added)

As Mr. Kazembe is currently in his third year, and preparing for admission to the Bar Association, we believe that it is in the interest of the profession and the society it serves that these matters come to light.

In October of 1991, we filed formal complaints with the Sexual Harassment Education and Complaints Centre which proceeded to formal discussions and negotiations through York University's Provost Office. Throughout, the administration at Osgoode Hall, and in particular, our Dean, Mr. James MacPherson, were aware of the situation. Our objectives were to charge Mr. Kazembe through the University's Discipline Tribunal as quickly as possible, so as to neutralize the danger he presented to women on campus. We are aware that we were and are not the only women who have been attacked over the last three years by Mr. Kazembe. (emphasis added) The reality of his behaviour, especially as he is a future pillar of the profession and society, is alarming to us.

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To date there has not been an adequate resolution of the matter. After over two years, we finally prodded York University into action, only to proceed in a unilateral manner and without our consent. Ms. Elizabeth Hopkins, York University Provost and Vice-President (Campus Relations and Student Affairs) obtained a vague and inadequate agreement between the University and Mr. Kazembe, which we have enclosed. (emphasis added)

We have also enclosed our statements of fact as prepared for the University, and the inadequate apology letter sent identically to all of us by Mr. Kazembe as part of the terms of the agreement.

We feel strongly that this candidate for the Bar has acted in a morally reprehensible manner. He has used and abused his position of trust with women to harass and assault them. He shows no regret or remorse. We believe he is threat and danger to fellow students and colleagues as well as future clients. (emphasis added)

It is our request that you explore this matter and seriously consider the "good character" of Mr. Kazembe before the Law Society admits him to the Bar..."

The letter was given to the Deputy Secretary of the Society, Margaret J. Angevine, who then wrote to Mr. Kazembe informing him that his character was being questioned by three students from Osgoode Hall regarding formal complaints of sexual harassment.

By letter dated June 1, 1993, the applicant wrote to Mr. Treleaven confirming that he had received notification that complaints of sexual harassment had been laid against him. In his letter, he states as follows:

"These complaints were first brought to my attention in February of 1992. The Sexual Harassment Office at York University, the University Council and the Vice-President did a thorough investigation (all women with years of experience) and came to the conclusion that what was needed was a negotiated or mediated settlement. One or more of the complainants refused to cooperate with the University and after many more attempts by the University to settle the matter failed, the University decided to dismiss the matter with a settlement agreement constructed by the Vice-President, Elizabeth Hopkins, with or without the consent of all the complainants.

I categorically deny all allegations of sexual harassment. At no time did I explicitly or implicitly request sexual favours or enter into any conversation or behaviour with any of the complainants in any way that could remotely resemble sexual harassment. (emphasis

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added) Further, at no time, was I anything more than a school mate to any of the complainants, and at no time did I have or exercise any power or position of trust over any of the complainants. While all the complaints were primarily fabricated, Ms. V.'s complaint stands apart in that it is a blatant, malicious, vindictive and deliberate attempt to smear my character. (emphasis added) Ms. V.'s complaint is so blatantly and viciously orchestrated that it put her "good character" and "Bar worthiness" squarely at issue...

...Further, the complaints were more than adequately investigated and resolved at York University. Throughout the process, the University was appalled at the hostile and unusually vicious nature of the complainants which had nothing to do with the particular complaints. The University found no merit to the complaints that warranted a hearing and found the complainants so uncooperative that they decided to dismiss the matter with the agreement which is attached in the complainants' complaints to the Law Society. (emphasis added)

I have cooperated with the University in every way possible. I have also complied with the terms of the settlement agreement, which was prepared by York University Provost, Ms. Elizabeth Hopkins. I feel strongly that the matter has been dealt with, and that it should be dismissed by the Law Society.

If the Law Society should find that a hearing is necessary, I request that you also investigate and seriously consider the "good character" of the complainants, especially that of Ms. V. before the Law Society admits her to the Bar. I feel very strongly that these candidates for the Bar have acted in a morally reprehensible, scandalous and pernicious manner. They, especially Ms. V., have maliciously lied to the Law Society. Ms. V. has abused her position of trust as a prospective lawyer to vindictively assault my character. I believe that this blatant lying and scandalous behaviour is not in keeping with the standards of the legal profession. (emphasis added)

Throughout my University days, I have learned a great deal about issues of sexual harassment and other forms of discrimination. I have definitely grown as our society in general has learned more about these issues. I am committed to a non-racist and a non-sexist world where all human beings are treated with utmost respect and dignity.

Finally, this matter has caused me much pain and suffering and I am very anxious for a speedy resolution. I believe these complaints should be dismissed on their face. However, if the Benchers think otherwise, I welcome a speedy resolution..."

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The Committee notes that both the letter sent by the complainants to Mr. Treleaven and the applicant's reply to Mr. Treleaven are, to say the least, overstated and misleading. Neither letter fairly states the facts, nor fairly characterizes the involvement of York University in attempting to resolve the matter. Neither letter reflects well on the objectivity of the authors, a quality one would wish to encourage among applicants to the Bar. On balance, the applicant's letter is more overstated than that of the complainants. The result, inevitably, is the present hearing before this Committee.

Character Evidence Submitted by the Applicant

At the time of the hearing, the applicant was articling for the Ontario Human Rights Commission. Some twenty character letters were submitted in evidence as well as viva voce testimony touching on the character of the applicant. Character letters were received from representatives of the business world as well as letters from Alvin Curling, M.P.P., Mr. Charles Roach, fellow students, professors at York University, including numerous women with whom Mr. Kazembe has had dealings with over the years. These letters speak of his sincere commitment to equity issues, his leadership qualities, his commitment to social progress, his warm and dignified nature and his respectful treatment of women. The letter of Professor Alan Young was noted. In it, Professor Young states that he had never heard of, or been involved in, any matter in which the Provost of the University or the University Disciplinary Tribunal forced any complainant to agree to a settlement, and that the Settlement Agreement should not be dismissed as "a mere sham." The Committee notes that very few individuals at the stage of life of the applicant could produce such an impressive array of letters attesting to good character. The Committee has been duly impressed with these expressions of support. Suffice to say, the Committee has weighed these numerous expressions of support with sensitivity and seriousness.

Evidence of Dr. Raymond Morris

The applicant called Dr. Raymond Morris, a psychologist who specializes in clinical assessments in custody disputes. Dr. Morris has experience in family law mediation, was a member of the Clarke Institute of Psychiatry for fourteen years and a member of the Family Court Clinic. He is a teacher at York University, Department of Psychology, and has experience in evaluating psychotic cognitive disorders, including assessing individuals on the basis of whether they pose any threat to society. Dr. Morris has given evidence in numerous courts and is a recognized expert psychologist.

Dr. Morris met with the applicant on three occasions totalling almost six hours. He was made aware of the allegations of the three women including the complaints themselves. Dr. Morris administered the Bender Motor Gestalt Test, the Thematic Apperception Test and the Minnesota Multiphasic Personality Inventory Revised Tests which determine cognitive impairment, personality and psychiatric disorder.

His testing revealed that Mr. Kazembe showed no evidence of cognitive impairment, that he had an excellent memory, a good ability to plan, a good level of intellectual functioning and no evidence of aberrant personality. He had a high level of intellectual functioning and demonstrated no evidence of pathology in terms of interpersonal functioning and social judgment. There was evidence of depression arising from feelings of defensiveness as a result of the complaints. Dr. Morris found that the applicant was well within the normal range and that the tests confirmed his clinical observations of the applicant that allowed him to conclude that Mr. Kazembe exhibited no psychological dysfunctions.

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Dr. Morris confirmed what the applicant has maintained throughout, namely, that some of the women's allegations are true, some incorrect and some fabricated. Dr. Morris stated that it was clear the applicant believed he had not acted in an inappropriate manner with these women. He observed him to be a socially extroverted individual with a high degree of self-esteem which permitted him to promote his views and permitted him to be socially active. He found him to be a highly moral and very principled individual who attempts to the best of his ability to live up to the values that were taught to him as a youngster. He found that he was unable to find any evidence that he would be a risk to the public in general or to women in particular.

As to the apologies given to the women, Dr. Morris found that the apologies were in fact sincere, that the applicant did not take them lightly at all and that it was a serious matter to him. Dr. Morris confirmed that the applicant thought that the issue was closed until he received a letter from the Law Society.

Under cross-examination, it was revealed that Mr. Kazembe's explanations as to what had occurred with the women were substantially the same as his testimony before the Committee.

When asked why he would then sign the Settlement Agreement in light of his explanation, Dr. Morris confirmed that the applicant signed the agreement in order to resolve the matter.

Dr. Morris warned that it would be dangerous to characterize an individual as lacking in principle or morality based on one incident.

"I am not prepared to look at an individual from the point of view of their whole life, their history, their behaviour from every angle that I can perceive it and cross them off and put labels on them on the basis of a single act."

Dr. Morris was pressed upon the point of the complainants' story and asked if his opinion would in any way change if he found that the complainants were telling the truth. Dr. Morris admitted that he must then "relook at the information that I received".

Evidence of Maureen MacDonald

In addition, the Committee heard testimony from the applicant's former girlfriend, Maureen MacDonald, who stated that she had been the girlfriend of the applicant between 1988 and 1993. She referred to the applicant as a very confident, decent, honest, positive, outgoing person who is committed to his community and people of African descent and committed to the youth of society. She referred to the applicant as a motivator for his friends, his family and others. She stated that she never had any occasion to question his treatment of women, that he had many female friends and that he was always warm, friendly and outgoing with them. She stated that he was honest and straight-forward. She stated that it was the applicant's habit to hug people that he knows and even those he does not. She stated that it was his habit to hug people on first meeting.

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Evidence of Margaret Parsons

Margaret Parsons is a friend of the applicant and for two years was the coordinator of the Women's Centre at the University of Windsor. In that capacity, she coordinated speakers and ensured that the campus environment was safe for women. She, together with others, authored a letter to the Committee from the Black Law Students Association. Nine individuals signed the letter. She spoke of the applicant's involvement in forming the Black Law Students Association and his work in organizing the National Black Law Students Association. She said that he was a conciliator at all times and had the habit of encouraging people to hug each other - "...Come on you know, let's hug and get along...". She stated that his nickname was "Huggy Bear", that he was very gregarious, but that she never observed any untoward sexual physical conduct on the part of the applicant. She stated that he always had an important leadership role in the community of black lawyers.

Margaret Parsons described herself as a strong feminist and asked the Committee to be conscious of the fact that the events under review were non-academic, non-professional and had to be judged in that light. She stated that she had read the complaints and that much of the conduct complained of was trivial compared to what occurred at the Annual Law Games where, she stated, many women were pressured into sexual intercourse. She expressed the view that because York University had concluded its investigation and executed a final settlement agreement that it was unfair for the applicant to be put in a situation of having to answer the same complaints again. In referring to the joint letter submitted by the Black Law Students Association, she expressed the view that the other eight women who read the complaints stated that "This wasn't the Courtney that they knew."

With respect to the complaints themselves, she stated that she had read the complaints and:

"...having read them, all three of them, and having been familiar with the complaints of sexual harassment in terms of - like on a scale of sexual harassment and the seriousness of sexual harassment, that certainly this is -in no way has come close to some of the things I have witnessed or experienced or heard about having dealt with sexual harassment complaints. That it wasn't on that level of seriousness at all."

Comment of the Committee on the Evidence of Margaret Parsons

Members of the Committee took issue with certain statements in the letter submitted by the Black Law Students Association, particularly the suggestion that Mr. Kazembe was being singled out at the hearing because he was black and that the Law Society was using the hearing to establish a new standard for admission to the profession which would include sexual harassment and non-violent sexual conduct among peers.

The Committee is moved to comment that in its decision it must be mindful of its primary obligation to ensure that those seeking admission to the Bar of Ontario be of good character, without bias or prejudice in relation to any of the enumerated grounds of discrimination - in this case, racial origin. To decide otherwise would constitute a serious betrayal of the values that must guide and inform the legal profession in Ontario. Succinctly put, this Committee must, to the best of its ability, emulate the traditional image of Justice - a blindfolded woman weighing the scales of evidence.

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In fulfilling its function, this Committee cannot be swayed by those who might view these proceedings as an attempt by the Law Society to impose new standards of conduct upon those seeking admission to the Bar. This Committee must do what is right and just with the evidence before it.

This is not a hearing about race or gender in an abstract sense. It is a hearing about real and ascertainable facts which impact upon a valuable human being. This hearing must not betray all those individuals who seek justice in a non-discriminatory environment. To do less would betray the values which lawyers through the ages have fought to protect. To do less would diminish the sanctity of the lawyer's oath upon call to the Bar.

The Committee is most mindful of the applicant's past contributions to his community and of the contributions that he may make in the future. Recognizing the applicant's obvious strengths is not to be construed as an attempt to favour the applicant because of his colour or race, but merely to recognize the evidence adduced and the obligation of the Committee to be fair and impartial. Conversely, recognizing the applicant's failings should not be construed by anyone as a failure in the Committee to be unmindful of the necessity to do justice to a minority group deserving of support within an evolving and changing profession.

The Difficulty Facing the Applicant

In his application for admission to the 36th Bar Admission Course sworn the 7th day of January 1993, the applicant responded in the negative to the following question relating to good character:

"Is there any event, circumstance, condition or matter not disclosed in your replies to the preceding questions touching upon your conduct, character or reputation that might be an impediment to your admission, such as dependency on alcohol or drugs?"

The question the Committee must answer is whether the applicant should have brought the facts giving rise to the Settlement Agreement to the attention of the Law Society. Clearly, the applicant believed that the issue was closed. He had signed the Settlement Agreement and sent letters of apology to the three women. The applicant's explanation as to why he replied in the negative was as follows:

"...I came to the conclusion that in reading the whole section on good character and then reading especially Section 10, I came to the conclusion that good character was something that involved, 1, would involve some kind of intent or some of kind of consciousness on my part.

"I also read the entire context and got the sense of what was of concern to the Law Society...and I thought that I did sign this agreement at York University, but this is an agreement in that what I signed as part of an apology for things which I thought were inadvertent, for things I thought had no intention on my part to do any harm or any intent and, yes, I did apologize for this, but I definitely thought this was not meant to cover that..."

The applicant was asked whether he had brought the matter to the attention of his articling principals. He had not. His explanation was:

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"...I thought that I had an issue at York University which was settled, which was done, which was completed and that it was not something that would effect my articles in any way..."

In essence, the applicant's explanation is that because he signed a Settlement Agreement, he believed the matter was behind him and for that reason did not refer to it either to his articling principals or in his application for admission to the Bar Admission course.

The issue whether the applicant was bound to bring the facts leading to the Settlement Agreement to the attention of the Law Society is difficult to answer. The Committee is prepared to state that in the circumstances, it would have been preferable and well advised for the applicant to bring the facts to the attention of the Law Society. However, the Committee is also mindful of the state of mind of the applicant and of the fact that he believed the matter had been finally settled, and in such circumstances is not prepared to conclude that the applicant's negative answer to the question posed in the application amounted to fraudulent or material non-disclosure.

The issue of whether there has been fraudulent or material non-disclosure on application to the Bar must be assessed on a case by case basis. If for example, a candidate for the Bar had been convicted of a criminal offence, then clearly such event must be disclosed. But if, for example, the applicant had been pardoned for the same offence then there is good reason in law (Ontario Human Rights legislation) why such a fact need not be disclosed. The Committee is not prepared to make an adverse inference against the applicant for his non-disclosure of the Settlement Agreement. We would recommend that the Admissions Committee consider the form of application for admission to the Bar afresh and develop policy guidelines for the consideration of Convocation.

Turning to the letter sent by the applicant to Mr. Treleaven, the Committee has already commented that the contents of the letter were overstated and misleading. The applicant testified that he wrote the letter in anger in response to the letter written by the three women in circumstances where he believed that the matter had been finally settled. In our view, anger cannot sufficiently explain the misrepresentations contained in the letter. The Committee has already found that the applicant did in fact physically and verbally sexually assault Ms. V. and thus his comment that:

"I categorically deny all allegations of sexual harassment. At no time did I explicitly or implicitly request sexual favour or enter into any conversation or behaviour with any of the complainants in any way that could remotely resemble sexual harassment..."

can only be characterized as a statement which is false and misleading. His aggressive attack on the character of Ms. V. is both inexcusable and extreme.

The Committee has found that it did not believe the applicant in his testimony in relation to the three complainants, and particularly in relation to Ms. V. As such, the applicant falls squarely within the finding of the Committee in Re: Spicer where the Committee found at page 61:

"...In that we have concluded that D, E and I have told the truth, we must inevitably conclude that Michael Spicer was not telling the truth when he testified under oath before the Committee. That finding necessarily impacts on the issue whether Spicer is a good character at the present time."

The Meaning of Good Character

In Convocation's decision in Re: Spicer, Convocation determined that:

"...Character is that combination of qualities or features distinguishing one person from another. Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which undoubtedly include, among others, integrity, candour, empathy and honesty."

Convocation went on to approve of the reasons for judgment in Re Rainauth and Law Society of Upper Canada, 13 O.R. 3rd 380 at p. 384 wherein the Divisional Court declared:

"The requirement in Section 27(2) of the Law Society Act, that applicants for admission shall be of good character, finds expression also in Rule 1 of the Law Society of Upper Canada's Rules of Professional Conduct: "The Lawyer must discharge with integrity all duties owed to clients, the Court, the public and other members of the profession.

Commentary 1 to Rule 1 reads as follows:

1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt to the lawyers trustworthiness, the essential element in the true lawyer/client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer maybe. The purposes of the good character requirement include the protection of the public, the maintenance of high ethical standards, and the maintenance of public confidence in the legal profession."

Convocation also approved the statements of (now) Madam Justice Southin in her article titled, "What Is Good Character?", 1987, 35 The Advocate, 129:

"The requirement...as to character is mandatory, although the Act does not define good character.

I think in the context "good character" means those qualities which might reasonably be considered in the eyes of reasonable men and women to be relevant to the practice of law...at the time of application.

Character within the Act comprises, in my opinion, at least these qualities:

1. An appreciation of the difference between right and wrong;

2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;

3. A belief that the law, at least so far as it forbids things which are malum in se, must be upheld and encouraged to see that it is upheld;"

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The applicant has no inherent right to practice law and the Benchers of the Law Society are duty bound to investigate serious allegations of any lack of good character (see Re Kienan, 50 N.E. (2nd) 786 (Mass. S.C.) at 786; and Calvert et al v. Law Society of Upper Canada (1981) 32 O.R. (2nd) 176 (H.C.)).

The difficulty facing the applicant essentially relates to his lack of candour before the Committee while testifying on oath in relation to the allegations of the three women. Had the applicant's evidence accorded with that of the three women, this would be a relatively simple case to dispose of. The events took place in 1991 and 1992. A Settlement Agreement was achieved, at least in the mind of the applicant. Fundamental principles of equity might cause the Committee to admit the applicant to the Bar in circumstances where he had admitted his transgressions and sought the mercy of the Committee.

Sadly, however, that is not the case before us.

During the course of argument, the Chair made the following statement to Counsel:

"...In argument we wish you to pay particular attention to the possibility that the Committee will accept, for example, the evidence of the complainants and reject the evidence of the applicant. In that event, we wish to hear argument as to what the appropriate order would be of the Committee if the Committee makes such a credibility finding."

Mr. Morgan dealt with the issue in the following words:

"...Courtney is a person who has - there is no doubt about this - he has deep pride - deep pride in his accomplishments. Deep pride in his social vision. And this has hit him right in the heart, these complaints."

"One can imagine the sense of shock that Elizabeth Hopkins described Courtney - that Courtney experienced when he first read for the very first time, when she revealed to him these complaints, she was quite clear about that and she was there. He was in shock. Right, there is no doubt in her mind that he was shocked."

"And then one can imagine mental defences clicking in at that point and starting to sort out and mentally rewrite events."

"...Now I - one thing I do know is that these complaints, having to face these complaints and live with these complaints has traumatized him. There is no doubt in my mind. This isn't just an attack on his potential livelihood you know, he isn't just going to go out and find another profession. This is an attack on literally his identity."

"...Now he firmly believes what he told the Committee. He said that over and over again. In my submission either it is the truth or it is what he honestly believes until today to be truth (emphasis added), so I would say that you don't necessarily need to find him to have been dishonest even if you were to make an adverse finding of credibility or a finding of credibility in favour of Ms. V."

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"He took the honest - he testified as to his honest belief here. It was actually - I mean, you know, we can twist all these things around, which one facing up - which one is facing up to your deeds and which isn't facing up to your deeds, which one takes more courage and which one doesn't take more courage. But the fact is he testified the way he did because he believes it to be true. It took courage because he could have gotten out of this hearing in a sense or not the hearing, but he could have gotten out of the dilemma if he had, you know, taken the easy route...He hasn't mislead you in any conscious way.."

Mr. Morgan well knew his high obligation as a Barrister in making the submissions that he did. We are obliged to pay due deference to his submissions. The Committee has wrestled at length with the appropriate disposition in this difficult case.

Decision of the Committee

As stated at the outset, the Committee heard evidence over four long days. It read 1,182 pages of transcript and considered more than six inches of supporting material. The Committee finds it troublesome, to say the least, to accept the proposition that the applicant truly believes the testimony that he gave before the Committee. However, the applicant has been consistent in his statements to those with whom he has come into contact since the allegations were made. He has consistently denied any intentional sexual harassment. He has explained his reason for apologizing to the women on the basis that he believes that they misconstrued his intentions and as such deserve apology. The mass of evidence presented to the Committee as to his good character, honesty and truthfulness must be given weight.

The Committee believes it essential to the development of the applicant's character that he come to terms with his actions and recognize them for what they were: inappropriate, presumptuous, bold, and in the case of Ms. V., virtually inexcusable. The applicant's "good character" can only be assured at that point in time where he comes to terms, in an open, candid and honest basis, with his past conduct.

We are persuaded that that time is not now. The applicant's "good character" requires further definition and formation.

The Committee has concluded that Courtney Kazembe is an intelligent, valuable and dynamic human being. He has much to offer the legal profession in Ontario. But his progress as a lawyer must at this moment be abruptly halted so that he may take stock of himself, and those around him. This Committee views him as an individual held hostage to hubris. For his own benefit, and for the benefit of those whom he has offended, it is entirely fitting that the present hearing should be, to the extent possible, designed to ensure that the reputation of the Bar of Ontario and the ethical values that ennoble it are safeguarded in the person of the applicant.

In fairness to the applicant, there are a number of mitigating factors which the Committee has noted. In brief, they include:

1. The fact that these events are historic, and occurred while the applicant was a student;
2. The fact that the events occurred in a non-professional environment;

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3. The fact that these events occurred among peers and did not involve a trust relationship as the law has defined;
4. The fact that the applicant truly believed that a Settlement Agreement had been reached and the matter was behind him;
5. The fact that the applicant has been able to bring forth impressive evidence of good character, including psychological evidence showing that he does not pose a threat to society;

Since adjourning to consider its decision, the Committee has been provided with two further reports from psychologists who have worked with the applicant since May, 1994.

The report of Dr. Winnifred Van der Ross dated November 17, 1994, finds that:

"...the accounts of the three women complainants do not seem consistent with the behaviour that I would have expected from Mr. Kazembe, who, I would have thought would be respectful of women..."

"...I could find no evidence of dysfunction which could place his good character in question. With his determination to make a difference in this world, and his high degree of social interest, I find it unlikely that he would jeopardize his career and his values by harassing others..."

The report of Dr. Roz Roach dated October 20, 1994, establishes that work has been carried out on topics such as: consciousness raising about culturally coded conduct; insights into sexual harassment behaviour; understanding the impact of sexual harassment on victims; boundary issues; exploration of emotions; victims/perpetrators' reactions; designing a sexual harassment program.

She found Mr. Kazembe, over four one-hour session, to be "a highly motivated and ambitious man who valued the therapeutic space to emotionalize rather than intellectualize the issue of sexual harassment."

These reports cause the Committee to be optimistic about the character development of the applicant. They demonstrate that the applicant has taken independent steps to come to terms with the flaws in his character. Unfortunately, however, the reports do not deal with the facts as found by the Committee, for obvious reasons. While the reports cause optimism, they nonetheless do not answer fully the concerns of this Committee. Further evidence of character development would be required before this Committee could fairly urge Convocation to admit the applicant to the Bar of Ontario.

As a result, the Committee recommends as follows, if Convocation so approves:

1. The applicant's call to the Bar be delayed for twelve months;
2. During the twelve month period, the applicant will acknowledge in writing to the Law Society that he unconditionally accepts the findings of this Committee in relation to the allegations of the three complainants;

