

MINUTES OF SPECIAL CONVOCATION

Thursday 24th May, 1990
9:30 a.m.

PRESENT:

The Treasurer (Mr. Lee K. Ferrier), Ms. Callwood, Mr. Campbell, Mr. Carey, Ms. Chapnik, Messrs. Cullity, Farquharson, Furlong, Hickey, Lamont, Lawrence, Lerner, Noble and O'Connor, Ms. Peters, Messrs. Shaffer, Spence, Strosberg, Thom, Thoman, Topp and Wardlaw, Mrs. Weaver, Mr. Yachetti.

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Ms. Callwood and Messrs. Carey and Shaffer did not participate in the Discipline proceedings.

DISCIPLINE COMMITTEE

Re: WILLIAM GEOFFREY MILNE, Toronto

Mr. Topp placed the matter before Convocation.

The reporter was sworn.

Mr. Shaun Devlin appeared for the Society. No one appeared for Mr. Milne. Mr. Devlin indicated that he was there to request an adjournment on consent to the next Discipline Convocation.

It was moved by Mr. Topp, seconded by Mr. Lerner that the matter be adjourned to the next Discipline Convocation.

Carried

Counsel retired.

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Re: ROBERT ANDREW KOMINAR, Windsor

Mr. Topp placed the matter before Convocation.

The reporter was sworn.

Mr. Strosberg did not participate in this matter.

Mr. Shaun Devlin appeared for the Law Society and Mr. Brian Greenspan appeared for the solicitor who was present.

Convocation had before it the Section 35 Report of the Discipline Committee dated 14th May, 1990, together with the Affidavit of Service sworn 23rd May, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 16th May, 1990 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 24th May, 1990 (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

John D. Ground, Q.C. (Chair)
Philip M. Epstein, Q.C.
Mary P. Weaver, Q.C.

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

Shaun Devlin
for the Society

ROBERT ANDREW KOMINAR
of the City
of Toronto
a barrister and solicitor

Brian Greenspan
for the Solicitor

Heard: March 20, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

By Notice dated May 25, 1989, Robert Andrew Kominar was given notice that Convocation had ordered that a Committee inquire, pursuant to section 35 of the Law Society Act, as to whether he was incapable of practising law as a barrister and solicitor by reason of physical or mental illness, including addiction to alcohol or drugs, or any other cause.

The matter was heard on March 20, 1990, before this Committee composed of John D. Ground, Q.C., as Chair, Philip M. Epstein, Q.C. and Mary P. Weaver, Q.C. Mr. Kominar attended the hearing and was represented by his counsel, Brian Greenspan. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The appointment of a Committee, pursuant to section 35 of the Law Society Act, followed from the recommendation of the Discipline Committee in its Report dated November 7, 1988. The Discipline Committee, in that Report, found a number of particulars of professional misconduct to have been established but found that this appeared to be a situation where the solicitor was unable to function properly as a lawyer because of the stress which he undergoes in attempting to conduct his practice alone and in coping with his personal problems at the same time. Rather than recommending a penalty, the Committee recommended that a section 35 hearing be convened.

Your Committee had before it medical reports dated July 30, 1989 and March 1, 1990 from R. Wood Hill, M.D., FRCP(C), who practises in the area of general and forensic psychiatry. Having considered such reports and having heard the submissions of counsel for the Solicitor and for the Society, your Committee has concluded that, whereas the Solicitor is in a state of some depression and finds it difficult to cope with the pressures of practice, there is no evidence that he is incapable of practising law as a barrister and solicitor by reason of physical or mental illness, including addiction to alcohol or drugs or any other cause.

24th May, 1990

Robert Andrew Kominar was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 6th day of April, 1982.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 14th day of May, 1990

John D. Ground, Q.C.
Chair

Mr. Devlin made representations regarding the Report outlining the history of the matter and the effect of the finding by the Section 35 Committee that the solicitor was not incapable of practising law.

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

Carried

Mr. Greenspan and Mr. Devlin made a joint submission as to Penalty which was that the solicitor be reprimanded in Convocation on the following conditions:

- (2) The Solicitor may practice only as an employee or partner of another member of the Society or as an employee of a corporation or as duty counsel;
- (3) The Solicitor submits reports from a psychiatrist or psychologist providing an assessment of the Solicitor, which report shall be supplied annually for a period of two years on the first and second anniversary dates of the Order of Convocation;
- (4) The Solicitor will ensure that books and records for the period January 1, 1985 to the date on which the Solicitor wound up his private practice, which records shall be in accordance with Regulation 573 made under the Law Society Act, are made available for inspection by the Society. The effective date of this term of the Order shall be the earlier of:
 - (i) three months after the date on which the Solicitor obtains employment as a solicitor, or
 - (ii) six months after the date of the Order of Convocation in this matter.

In regard to the conditions the following amendments were accepted by counsel and the solicitor:

- (a) paragraph 2 was amended by the addition of the words "provided he make full disclosure to the prospective employer of this discipline proceeding" and "or as an employee of the government" and deleting the words "or partner".
- (b) paragraph 4 was amended by striking out "the date" and substituting therefore "April 27th, 1989".

24th May, 1990

The conditions now read:

Paragraph 2

- (a) The Solicitor may practice only as an employee of another member of the Society or as an employee of a corporation, duty counsel, or as an employee of the government, provided he make full disclosure to the prospective employer of this discipline proceeding.

Paragraph 4

- (b) The Solicitor will ensure that books and records for the period January 1, 1985 to April 27, 1989, on which the Solicitor wound up his private practice, which records shall be in accordance with Regulation 573 made under the Law Society Act, are made available for inspection by the Society.

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

It was moved by Mr. Topp, seconded by Mr. Lerner that the Recommendation as to Penalty as set out in the joint submission as amended be adopted.

It was moved by Mr. Wardlaw, seconded by Mr. Furlong that paragraph 2 be amended by deleting "as an employee or partner of another member of the Society".

Not Put

It was moved by Mr. Yachetti, seconded by Mr. Thoman and accepted by counsel and the solicitor that paragraph 2 be amended by adding "provided that he makes full disclosure to the prospective employer of this Discipline proceeding."

The Recommendation as to Penalty contained in the joint submission as amended and moved by Mr. Topp and seconded by Mr. Lerner was adopted.

The solicitor and counsel were recalled and informed of the decision. The solicitor signed a waiver of appeal and counsel, members of the public and the reporter withdrew and the Treasurer administered a Reprimand in Convocation.

The solicitor retired.

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Re: GERALD BRUCE FOX, Toronto

Mr. Topp placed the matter before Convocation.

The reporter was sworn.

Mr. Shaun Devlin appeared for the Society and Mr. Brian Greenspan appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 9th May, 1990, together with the Affidavit of Service sworn 23rd May, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th May, 1990 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 24th May, 1990 (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

Philip M. Epstein, Q.C. (Chair)
D. Jane Harvey
Stuart Thom, Q.C.

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

Shaun Devlin
for the Society

GERALD BRUCE FOX
of the City
of Toronto
a barrister and solicitor

Brian Greenspan
for the Solicitor

Heard: April 3, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 31, 1989, Complaint D65/89 was issued against Gerald Bruce Fox, alleging that he was guilty of professional misconduct.

The matter was heard in public except that of the medical report of Dr. Hans J. Arndt be treated as confidential and be received in camera on April 3, 1990 before this Committee, composed of Philip M. Epstein, Q.C., Chair, D. Jane Harvey and Stuart Thom, Q.C. Mr. Fox attended the hearing and was represented by Brian Greenspan. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The following particulars of professional misconduct in 2(b) and 2(c) were found to have been established with 2(a) of this Complaint being withdrawn:

(Paragraph 2, Complaint D65/89)

(b) Since October 31, 1988, he has failed to reply to correspondence from the Society regarding a complaint made on behalf of his former client, Nicholas Theodorou.

(c) Since March, 1988, he has failed to cooperate with the Society in fully resolving a complaint made by his clients, Mr. & Mrs. Nick Kataras.

Evidence

On the basis of the admissions contained in the Agreed Statement of Facts, the Committee found the particulars of professional misconduct to be established and, accordingly, found the solicitor guilty of professional misconduct.

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D65/89 and is prepared to proceed with a hearing of this matter before the Discipline Committee on April 3, 1990.

II. IN PUBLIC/IN CAMERA

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

III. BACKGROUND FACTS

3. The Solicitor was called to the Bar March 21, 1975. During the period 1987 to 1989 he practised as a sole practitioner in Toronto. He practised primarily in the areas of civil litigation and family law. Since January 1990, Mr. Fox has practised in Newmarket in association with a firm where he practises solely in the areas of civil litigation and family law.

IV. FACTS

Particular 2(b) - Theodorou Matter

4. The Solicitor acted for Nicholas Theodorou in a real estate transaction in which Mr. Theodorou purchased property at 4132 Dundas Street West, Etobicoke. The transaction closed on August 17, 1987.

5. The Solicitor did not send a reporting letter, trust accounting or fee billing to Mr. Theodorou regarding the purchase. Mr. Theodorou then retained new solicitors, Holden, Murdoch, to defend him in an action arising from the transaction brought by the vendors in Small Claims Court for relief in the amount of \$1,097.19. This occurred in about the spring of 1988.

6. Mr. Theodorou himself wrote to the Solicitor on March 30, 1988 requesting a deed, survey, any documents pertaining to the property, a signed lease for a new tenant of the property and his final bill. The Solicitor did not reply to that correspondence.

7. The new solicitors for Mr. Theodorou wrote to the Solicitor on May 6, 1988 in relation to the Small Claims Court action. In addition, the vendors as Plaintiffs claimed compensation for a mortgage payment they had been required to make on the property. Mr. Theodorou required the report and the trust accounting to properly prepare a Statement of Defence. The Solicitor did not reply to that correspondence.

8. Mr. Theodorou then complained to the Law Society by letter dated May 20, 1988. The Society wrote to the Solicitor on June 8, 1988 requesting the Solicitor's comments and asking him to inform the Director of Insurance of the Law Society of the relevant facts of the matter. The Solicitor did not reply to that correspondence nor did he make the requested report to the Director of Insurance.

9. On July 11, 1988, Mr. Theodorou's solicitor wrote to the Solicitor enclosing an executed direction of Mr. Theodorou and asking for delivery of Mr. Theodorou's files as soon as possible. The Law Society left telephone messages for the Solicitor on July 11 and July 25, 1988. On July 26, 1988 the Society representative spoke with Mr. Fox who advised that he was moving his offices that week and that he was without a secretary until the first week of August. The representative advised Mr. Fox that the Society required his response to be in the possession of the Society by Friday, August 5, 1988, failing which authorization for disciplinary proceedings would be sought.

24th May, 1990

10. On August 5, 1988, the Solicitor telephoned the Society and left a message that the required information would be in the possession of the Society on August 8, 1988.

11. On August 10, 1988, the Society's representative left a message with the Solicitor's office requesting that he complete arrangements for a meeting at the Law Society to discuss the matter. The Solicitor did not telephone the Society to arrange a meeting. On August 29, 1988, the Society's representative sent a letter to the Solicitor confirming some of the above unsuccessful attempts to reach the Solicitor. The Solicitor was advised that authorization would be sought as soon as possible and that the Solicitor would be notified as to the results.

12. On October 4, 1988 the Plaintiffs in the Small Claims Court action issued a Notice of Trial in the Small Claims Court matter for December 16, 1988. The Solicitors for Mr. Theodorou requested an adjournment of that trial because they had not at that time received the file from the Solicitor. Copies of the correspondence were copied to, among others, the Solicitor and the Law Society.

13. On October 7, 1988, the Society's representative spoke to the Solicitor. They agreed to meet at the Law Society's offices on October 20, 1988. In addition, the Solicitor agreed to transfer copies of the Theodorou file material to Holden, Murdoch by October 12, 1988 and to provide proof of the transfer to the Law Society. As well, the Solicitor agreed to set down a motion in the Kataras matter (a separate complaint matter which is dealt with below in this Agreed Statement) by October 18, 1988.

14. The Solicitor did not meet those deadlines. The Society's representative spoke to the Solicitor by telephone on October 18, 1988 at which time the Solicitor advised him that those deadlines had not been met. The representative expressed his disapproval of the Solicitor's actions. The Solicitor promised that the matters would be done by the date of their meeting on October 20, 1988.

15. On October 18, 1988, the Solicitor delivered to Holden, Murdoch copies of much of the relevant information and documents from the file. No report, trust accounting or fee billing was enclosed. The Solicitor also provided a copy of that material to the Society on the same date.

16. A meeting occurred between the Society's representative and the Solicitor on October 20, 1988. At that time, the Solicitor had not provided a formal report or provided an accounting or trust statement. The Solicitor advised that the Kataras file was ready to go and a motion could be set down. The Solicitor promised to set that down and fax evidence of the same to the Society's representative by Friday of that week.

17. On October 31, 1988 the Society wrote to the Solicitor requesting his written reply regarding the matter. On the same date, the Society wrote to Holden, Murdoch advising that firm that it should contact the Society's Errors and Omissions department directly. Holden, Murdoch was also advised that the Discipline Department had earlier sent copies of the file to the Errors and Omissions department to put that department on notice. Holden, Murdoch was also advised that the Society expected a written response from the Solicitor.

18. On February 1, 1989, the Society wrote to the Solicitor requesting that the Solicitor immediately provide the further information requested by Holden, Murdoch. The Solicitor did not reply to that correspondence. The Society wrote again on June 19, 1989 and the Solicitor did not reply.

19. On July 31, 1989, the formal complaint in this matter was sworn against the Solicitor. On August 15, 1989, the Solicitor provided to Holden, Murdoch copies of a trust accounting and fee billing. The Solicitor provided copies to the Law Society on the same date. On August 21, 1989 the Solicitor provided a reporting letter to Mr. Theodorou and a copy to the Society.

20. Mr. Fox provided an amended report and a further and better trust accounting on February 8, 1990. There is no allegation of improper handling of trust funds. The civil dispute between the Solicitor and Mr. Theodorou has now been resolved.

Particular 2(c) - Kataras Matter

21. Mr. and Mrs. Nick Kataras complained to the Law Society regarding the Solicitor by letter dated March 7, 1988. Mr. and Mrs. Kataras advised that they had retained the Solicitor in or about 1985 to pursue a personal injury claim. They advised that the matter had been settled but that they had not received their settlement funds.

22. On March 21, 1988, the Society wrote to the Solicitor enclosing a copy of the complaint letter and asking for the Solicitor's comments. The Solicitor did not reply and the Society wrote again on April 26, 1988. The Solicitor replied by letter dated May 20, 1988 advising that he would immediately bring a motion before the District Court to finalize the matter of the infant settlement which was involved.

23. On June 13, 1988, the Law Society representative asked the Solicitor to inform the Society of the date of the motion. The Solicitor agreed to deliver a response with respect to the complaint by August 5, 1988. On August 5, 1988, the Solicitor requested an extension to August 8, 1988 and that extension was granted.

24. On August 10, 1988, the Solicitor had still not brought the motion and the Society left a telephone message with his office regarding the meeting which was referred to earlier in this Agreed Statement.

25. The Solicitor did not reply and, on August 29, 1988, the Society wrote to the Solicitor asking for a response. The Solicitor met with the Society's representative on October 20, 1988 as referred to above. At that time, the Solicitor promised to bring the motion on for October 27, 1988.

26. The Solicitor did not comply with his obligation and the Society wrote to the Solicitor again on February 21, 1989 requesting an explanation as to why the matter had not by that time been resolved. The Solicitor telephoned the Society on February 21, 1989 and advised that he was required to be out of town for a couple of days but that he would attend to the outstanding matters upon his return. He advised the Society that he would telephone on March 1, 1989 to advise of his progress.

27. The Solicitor did not advise of his progress and the Society wrote to the Solicitor on March 7, 1989 and requested he telephone the Society in order to discuss the matter. The Solicitor did not respond.

28. The Society telephoned the Solicitor on April 5, April 14, April 19, April 21, 1989. The Solicitor then responded and advised that May 10 was the deadline that he had set for himself and that May 10 was the deadline that he had set for himself and that he expected to meet that deadline.

29. The Solicitor did not meet that deadline and the Society left messages with his office on May 9, May 10, May 11, May 12, 1989. The Solicitor telephoned the Society on May 18, 1989 to advise that the order had been filed and that he expected to receive the same back by May 23 or 24, 1989.

On May 24, 1989 the Solicitor telephoned the Society to advise that the order had been obtained and that he was in the process of dictating a letter to the client. He advised that he would courier a copy of the order to the Society on May 25, 1989.

31. The Solicitor did not fulfill his promise and the Society left telephone messages at the Solicitor's office on June 19 and June 21, 1989. The Solicitor did not reply to those messages nor did he provide a written reply to the Society or a report to the client.

32. The formal complaint in this matter was issued on July 31, 1989. On August 14, 1989, the Solicitor wrote a reporting letter to the client enclosing documentation and advising that the matter had been completed.

DATED at Toronto this 3rd day of April, 1990"

RECOMMENDATION AS TO PENALTY

This Committee recommends that the said Gerald Bruce Fox be Reprimanded in Convocation and that the Solicitor be ordered to pay costs of the investigation, fixed at the sum of \$750.00.

REASONS FOR RECOMMENDATION

Counsel for the Society submitted that the Solicitor should be reprimanded in Convocation. Counsel for the Solicitor submitted that the Solicitor should be reprimanded in Committee.

Counsel for the Solicitor pointed out that the Solicitor has recognized that he has a problem that needs psychiatric assistance. He has engaged the services of a psychiatrist and has been seeing him regularly since early 1990. The report of Dr. Hans J. Arndt, the psychiatrist, was before the Committee and the Committee recognizes that the Solicitor has taken positive steps to deal with his problems in a proper and appropriate fashion.

The Solicitor also put before the Committee letters from fellow solicitors attesting to the good character of Mr. Fox.

The Committee heard submissions from the Solicitor's counsel that the Solicitor has now joined a firm as counsel and has adopted office procedures that will significantly lessen the possibilities that the kind of conduct that led to this complaint will not happen again in the future.

The Solicitor's counsel submits that because of the clear attempts made at rehabilitation and its success, a reprimand in Committee would be appropriate.

The Committee is cognizant of the fact that no clients suffered any losses as a result of Mr. Fox's dilatory conduct, nor is there any suggestion that Mr. Fox was in any way dishonest or lacks integrity. The problem essentially is that Mr. Fox is not prompt in dealing with enquiries from the Law Society and unfortunately this is not the first time that this problem has arisen.

This is unfortunately the third time that Mr. Fox has been before the Society on similar complaints. On the two earlier occasions, in 1983 and 1986, the Solicitor was found guilty of professional misconduct and reprimanded in Committee.

In all of the circumstances of this case, and notwithstanding the Solicitor's rehabilitative efforts, the Committee feels that it must bring home to the Solicitor and the profession the seriousness of failing to respond to enquiries of the Society in a reasonable and timely fashion. The Solicitor has had, in essence, two previous warnings from the Society in connection with such conduct and obviously did not learn to appreciate the significance of such conduct by him. Accordingly, the Committee feels it has no other alternative but to recommend a penalty of a Reprimand in Convocation. In view of the extensive delay by the Solicitor and the repeated efforts by the Society to get a response, we also recommend that the Solicitor be ordered to pay the costs of the investigation, fixed at the sum of \$750.00.

Gerald Bruce Fox was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 21st day of March, 1975.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 9th day of May, 1990

Philip M. Epstein, Q.C.
Chair

There were no submissions in regard to the Report.

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

Carried

Representations by both counsel were made supporting the Recommendation as to Penalty set out in the Report of the Discipline Committee.

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

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

Carried

The solicitor and counsel were recalled and informed of the decision.

Counsel, members of the public and the reporter withdrew and the Treasurer administered the Reprimand in Convocation.

The Solicitor retired.

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Re: ROY CLIFFORD ROBERTSON, Toronto

Mr. Topp placed the matter before Convocation.

The reporter was sworn.

Mr. Reg Watson appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 10th May, 1990 together with the Affidavit of Service sworn 23rd May, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th May, 1990 (marked Exhibit 1) together the Acknowledgement, Declaration and Consent signed by the solicitor 24th May, 1990 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Q.C. (Chair)
Ronald D. Manes
Mrs. Netty Graham

24th May, 1990

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

Shaun Devlin and Susan Carlyle
for the Society

ROY CLIFFORD ROBERTSON
of the City
of Toronto
a barrister and solicitor

Not Represented
for the Solicitor

Heard: December 13, 1989
March 21, 1990 and
April 26, 1990

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Three separate complaints are involved in this matter:

1. Complaint D56/89, sworn June 26, 1989, which alleged that the Solicitor was guilty of professional misconduct;
2. Complaint D59/89, sworn July 19, 1989, which alleged that the Solicitor was guilty of professional misconduct; and
3. Complaint D98/89, sworn November 27, 1989, which alleged that the Solicitor was guilty of professional misconduct.

The matter was heard in public on December 13, 1989, March 21, 1990 and April 26, 1990 before this Committee composed of Thomas G. Bastedo, Q.C., Chair, Ronald D. Manes and Mrs. Netty Graham.

The Solicitor attended the hearings and was not represented by Counsel. Susan Carlyle appeared as counsel for the Law Society on April 26, 1990, while Shaun Devlin served in that capacity on December 13, 1989 and March 21, 1989.

DECISION

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

(Para 2; Complaint D56/89)

- (a) He failed to reply to correspondence from the Law Society and return telephone messages from the Law Society with regard to a complaint filed by his client Dwayne Cook.

Para 2; Complaint D59/89

- (a) He failed to reply to correspondence from the Law Society and return telephone messages from the Law Society with regard to a complaint filed by his client Michael Peck.
- (b) He failed to reply to correspondence from the Law Society and return telephone messages from the Law Society with regard to a complaint filed on behalf of his former client Delores Tabone.
- (c) During the period February 23rd, 1989 to July 12th, 1989, he practised as a barrister and solicitor while his rights and privileges as a member of the Law Society were suspended for non-payment of his annual fee.

Para 2; Complaint D98/89

- (a) In or about September 1989, he abandoned his practice without making adequate arrangements for the protection of his clients.

Evidence

The evidence before the Committee was in the form of an Agreed Statement of Fact as set out below:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D56/89, D59/89 and D98/89 and is prepared to proceed to hearing on those complaints on December 13, 1989.

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 with the exception of the report of Dr. Andrew Malcolm, which it is submitted, should be received in camera.

III. BACKGROUND FACTS

The Solicitor was called to the Bar in 1974. Most recently, he practised in Toronto as a sole practitioner. He was suspended on November 24, 1989 for failure to pay his Errors and Omissions Levy.

IV. FACTS

Particular 2(a) - Complaint D56/89

4. The Law Society received a letter of complaint from Dwayne Cook, a client of the Solicitor on February 7, 1989. The complaint raised concerns about the quality of the service that the Solicitor had provided to the client on a real estate transaction.

5. The Society wrote to the Solicitor on February 16, 1989, enclosing a copy of the complaint and asking for the Solicitor's comments. A follow-up letter was sent on March 17, 1989 which indicated that, unless a reply was received within two weeks, the matter would be referred to the Chair of the Discipline Committee for authorization to issue a complaint.

6. The Solicitor did not reply to that correspondence and telephone messages were left with his office on April 10 & 12, 1989. The Solicitor had not replied as of the date of the issuance of Complaint D56/89.

7. After the issuance of Complaint D56/89, the Solicitor attended at the Society. He undertook during the course of that meeting to reply promptly to the complaint and did so by letter dated July 12, 1989. That letter has now been forwarded to the complainant and additional questions have been asked of the Solicitor. As well, the Society has asked the Solicitor to provide Mr. Cook with copies of a:

1. Statement of Adjustments
2. Trust Statement
3. Reporting Letter
4. Fee Billing

These requests were made in letters dated August 23rd and September 23rd, 1989. To date, Mr. Robertson has neither replied to the Society nor provided the material to Mr. Cook.

Michael Peck Particular 2(a) - Complaint D59/89

8. In February, 1989, the Society received a letter of complaint from Michael Peck, a client of the Solicitor. Mr. Peck had retained the Solicitor to complete a mortgage refinancing. Mr. Peck alleged that the Solicitor had failed to respond to telephone calls and had failed to obtain and register a mortgage discharge. The Society wrote to the Solicitor on February 23 and by registered mail on April 20, 1989. Telephone messages were left at the Solicitor's office on March 22, June 12, June 13, June 14 and June 15, 1989. The Solicitor replied to the Society on August 14, 1989, after the issuance of Complaint D59/89. He admitted the allegations and promised to obtain the discharge. To date, the Solicitor has not written to the Society to advise as to the completion of the matter.

Tabone - Particular 2(b) - Complaint D59/89

9. On December 16, 1988, the Society received a complaint from Delores Tabone, a former client of the Solicitor in a motor vehicle accident claim matter. The complaint was made through Mrs. Tabone's new lawyer, Rodney Godard. The complainant alleged that the Solicitor had delayed on the matter and had not finalized it. A further allegation was made that the Solicitor had not replied to correspondence from Mr. Godard regarding the status of the matter.

10. The Society wrote to the Solicitor on January 19, 1989 and by registered mail on April 5, 1989. Telephone messages were left with the Solicitor's office on March 22, May 4, May 11, May 12, and May 16. The Solicitor replied on August 14, 1989 acknowledging that the complaint was accurate. The Solicitor advised the Society orally on August 15, 1989 that he would look for the material that the complainant was requesting and advise the Society whether it could be found. To date, the Solicitor has not advised the Society further on the matter.

Practising while Suspended - Particular 2(c) - Complaint D59/89

11. On February 23, 1989, the Solicitor was suspended by Convocation as a result of the non-payment of his annual Law Society Fee. Notice of the suspension was sent to the Solicitor on February 24, 1989 by registered mail.

12. The suspension continued until July 11, 1989. On that date, the suspension was discussed with the Solicitor in the course of discussing Complaint D56/89. The Solicitor then paid the outstanding fee and was re-instated on or about July 12, 1989.

13. The Solicitor practised law during the entire period of suspension.

14. The Solicitor has a past history of suspensions of his membership for non-payment of fees and levies. The Solicitor was suspended by Convocation in November, 1988 for failure to pay his Errors and Omissions insurance levy. Notice of the suspension was sent by registered mail on November 29, 1988 and received by the Solicitor on December 1, 1988. The Solicitor attended to the matter in January, 1989 and was reinstated on January 19, 1989 as a result of payment tendered at that time.

15. The Solicitor was suspended on February 26, 1988 and reinstated on March 8, 1988.

16. The Solicitor was suspended on November 26, 1987 and reinstated on December 2, 1987.

17. The Solicitor was suspended on May 29, 1987 and was reinstated on June 5, 1987.

18. The Solicitor was suspended on November 28, 1986 and reinstated on December 5, 1986.

Particular 2(a), Complaint D98/89 - Abandoning Practice

During a period of several weeks immediately prior to October 11, 1989, the Solicitor abandoned his practise without making adequate arrangements for the protection of his clients, which abandonment necessitated the obtaining of an Order under Section 43 of the Law Society Act by the Law Society effecting a trusteeship over the practise. In part, the problems exhibited by the Solicitor which led to the obtaining of the order included:

1. The Solicitor was not in his office and was not generally working on files.
2. The Solicitor was not responding to client communications.
3. The Solicitor had not arranged for another lawyer to take carriage of his files nor had he advised his clients to obtain other legal assistance.
4. The Solicitor had failed to reply to the Law Society regarding several client complaints.
5. The Solicitor had failed to make his books and records for his practice available for inspection by the Law Society.

These circumstances are more particularly described in the material in the Application Record tendered in evidence by the Society on the Trusteeship Application, copies of which material is provided to the Committee.

On October 11, 1989, Mr. Justice Philp made the Order above referred to, a copy of which is provided to Committee.

Subsequent to the obtaining of the Order, David McKillop, a Staff Lawyer from the Office of the Staff Trustee with carriage of the file, met with the Solicitor and other solicitors in the building in which the Solicitor's office was located and made the following arrangement:

1. Mr. McKillop appointed Raymond Creed, a Barrister and Solicitor as his agent and most of the Solicitor's open files were disbursed to Mr. Creed, Joel Freedman and Larry Hadbavny, all sole practitioners at that address.
2. The Solicitor was allowed to keep possession of a group of approximately 36 real estate files in which the transactions had closed but the Solicitor had not yet reported. The arrangement between Mr. McKillop and the Solicitor was that the Solicitor would complete reporting letters on each of the files and have them reviewed by Larry Hadbavny for completeness, after which the Solicitor was to mail the reporting letters to clients and otherwise close the files.
3. The Solicitor was allowed to retain a few open files to conduct as Solicitor those files being Small Claims Court Claims, Uncontested Matrimonial Proceedings and a few other miscellaneous files.
4. The Solicitor agreed to produce his books and records to the Society for inspection.

As of December 11, 1989, the status of the four matters referred to was as follows:

1. Messrs. Creed, Freedman and Hadbavny have taken carriage of the open files and are proceeding to deal with them while maintaining communications with Mr. McKillop.

2. The Solicitor produced reporting letters on less than half of the 36 files for approval by Mr. Hadbavny. The balance of the matters have not been reported out. The Solicitor cannot complete the balance of the reporting letters while the suspension of his membership, which was ordered on November 24, 1989, continues. A further concern is that, on the matters where the Solicitor has now provided the reporting letters, there appears to be a concern that at least some of those reporting letters were not sent to the clients. An informal poll of two clients conducted by the Society indicates that both clients did not receive the reporting letters prepared by the Solicitor. The Society requires these files so that they can be given to other lawyers for reporting.

3. The Solicitor cannot provide any further services on these files because of his suspension. The Solicitor still has possession of these files. The Society wants these files either given back to the clients, transferred to other solicitors or given to the Society so they can be transferred to the Trustee.

4. The books and records have not been produced despite two oral requests from Mr. McKillop and a formal written demand dated November 22, 1989 from Mr. McKillop requesting the books and records by November 30, 1989. A copy of the letter is provided to the Committee.

Matters Relevant on the Issue of Penalty

Form 2/3

19. The Solicitor last filed his Form 2/3 for the period ending November 30, 1987. His filing for the period ending November 30, 1988 was due at the Society on May 30, 1989. To date, he has not provided that filing to the Society.

Other Complaints

20. At present, there are seven outstanding complaints against the Solicitor with the Society, other than the complaint files referred to in Complaints D56/89 and D59/89. A list of those complaints, as well as the Cook, Pech and Tabone (Godard) matters, is provided to the Committee.

Psychiatric Report

21. At the request of the Society, the Solicitor consulted Dr. Andrew Malcolm. A copy of the report of Dr. Malcolm is provided to the Committee.

Past Discipline

22. The Solicitor was reprimanded in Committee on September 22, 1988 and required to pay a fine of \$1,500.00 and costs in the amount of \$500.00 to the Society for failing to reply to the Law Society and failing to serve clients in a conscientious, diligent and efficient manner. Copies of the Formal Complaint and the Agreed Statement of Facts in that matter are provided to the Committee.

DATED at Toronto this 13th day of December, 1989."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Roy Clifford Robertson be permitted to resign.

REASONS FOR RECOMMENDATION

The Solicitor was charged with professional misconduct, the particulars of which are set out in exhibits one to three which relate to his failure to reply to correspondence in the instance of the first two counts, and that he practised as a Barrister and Solicitor while his rights and privileges were suspended due to non-payment of his annual fee. In addition, the Society alleged that the Solicitor abandoned his practice without making adequate arrangements in or about September of 1989 which forms the subject matter of a separate complaint. The Society has proceeded in this matter on the grounds that the Solicitor was ungovernable.

The Solicitor has signed an Agreed Statement of Facts, dated December 13, 1989, which is marked as exhibit four in these proceedings.

The Solicitor was called to the Bar in 1974 and most recently practised in Toronto as a sole practitioner.

We do not think it is necessary to go through the particulars of the complaints but suffice it to say that there are grounds for finding the Solicitor to be ungovernable. The issue is one of penalty.

We have had the opportunity to review the Solicitor's history with the Society which includes a reprimand in committee on September 22nd, 1988 for failing to serve clients in a conscientious, diligent and efficient manner. We have been provided with a report from Doctor Andrew Malcolm who is a highly regarded psychiatrist. That report (which is marked as exhibit nine) underscores the prominent inertia in the Solicitor's life, and especially in his professional life. Although there is no evidence of major mental illness or organic disease of the brain, and therefore no psychosis, Doctor Malcolm concludes that there is a personality disorder. Doctor Malcolm was unable to pinpoint the classification of this disorder because of the enigmatic figure that the Solicitor presents. Suffice it to say that the Solicitor's mental condition was characterized by enigmatic indifference.

The Solicitor has not been practising law for some time. His practise of law was sporadic; he ran a bowling alley for a couple of years when he was working at all.

The Society sought disbarment unless the Solicitor complied with their reasonable requests for assistance in winding up his practice which was the subject matter of a section 43 order by Mr. Justice Philp; and, if there was compliance with these requests, they sought the Solicitor's resignation.

The Solicitor received the indulgence of the Committee over a somewhat extended period of time in order to comply with the Society's requests. We were advised April 26th, 1990, by Ms. Susan Carlyle of the Complaints Department that the Solicitor has complied with those requests as much as could reasonable be expected. He has now provided the Society with all of his books, records and files, and made reasonable attempts to respond to a number of outstanding complaints that are pending at the Society.

On the last occasion that the Committee heard this matter, that is, March 21st, the Committee had indicated its preliminary view to the Solicitor and the Society that unless the Society's reasonable expectations were complied with, the Solicitor would be disbarred. Ms. Carlyle advised this Committee on April 25th, 1990, that she is prepared to recommend, although she cannot consent to the Solicitor's resignation. We had concern as to whether permission to resign was in the public interest, but have been completely satisfied by Ms. Carlyle's contentment with the Solicitor's satisfying their conditions that it would not be contrary to the public interest to permit the Solicitor's resignation. Notwithstanding that, some of his answers to the

outstanding complaints would have required further elaboration had he been permitted to continue to practise. That not being the case, we are unanimously of the view that the Solicitor should be permitted to resign. After some deliberation, we have decided that under the circumstances, the Solicitor shall be permitted to resign by Thursday, May the 3rd, 1990, failing which, the Solicitor will be disbarred.

Roy Clifford Robertson was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 22nd day of March, 1974.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 10th day of May, 1990.

T. Bastedo

There were no submissions as to the adoption of the Report and it was moved by Mr. Topp, seconded by Mr. Lerner that the Report be adopted.

Carried

There were no submissions on the issue of Penalty and it was moved by Mr. Topp, seconded by Mr. Lerner that the Recommendation as to Penalty contained in the Report that is that the solicitor be permitted to resign be adopted.

Carried

The solicitor's letter of resignation was filed and marked Exhibit 3.

Counsel and the solicitor retired.

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Re: JAY DUNCAN ROWATT, Toronto

Mr. Topp placed the matter before Convocation.

The reporter was sworn.

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

Convocation had before it the Report of the Discipline Committee dated 6th April, 1990, together with the Affidavit of Service sworn 23rd May, 1990 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th May, 1990 (marked Exhibit 1 together with the Acknowledgement, Declaration and Consent signed by the solicitor on 16th April, 1990 (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

Roger D. Yachetti, Q.C. (Chair)
Earl J. Levy
Allan M. Rock

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

Patrick Ballantyne
for the Society

JAY DUNCAN ROWATT
of the City
of Toronto
a barrister and solicitor

Not Represented
for the Solicitor

Heard: October 3, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 21, 1989, Complaint D52/89 was issued against Jay Duncan Rowatt, alleging that he was guilty of professional misconduct.

The matter was heard in public on October 3, 1989 before this Committee composed of Roger D. Yachetti, Q.C. as Chair, Earl J. Levy, Q.C. and Allan M. Rock, Q.C. Mr. Rowatt was in attendance and was not represented by Counsel. Patrick Ballantyne appeared as counsel for the Law Society.

DECISION

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

Complaint D52/89

2. (a) On or about August 3rd, 1988, he altered a trust cheque payable to himself in trust to the benefit of his client, Steven Yau, by deleting the words "in trust" without the client's knowledge, and thereafter deposited the altered cheque to his personal bank account in satisfaction of a financial obligation of the client to him without advising the client.

Evidence

The entirety of the evidence before the Committee on the issue of professional misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D52/89 and agrees to proceed with a hearing of this matter before the Discipline Committee on October 3, 1989.

II. IN PUBLIC/IN CAMERA

2. The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor admits particular 2.(a) as contained in this Complaint and agrees that it constitutes Professional Misconduct.

IV. BACKGROUND

4. The Solicitor is a sole practitioner. He was called to the Ontario Bar in 1978.

V. FACTS

5. The Solicitor made two loans to Somnath Makherjee, totalling \$13,604.14. As security the Solicitor received a third mortgage and promissory note. Both the mortgage and promissory note were guaranteed by the solicitor's client Steven Yau. Both Somnath Mukherjee and Steven Yau obtained independent advice. The principle amount due on the promissory note was \$6000 to cover a loan for \$5000 and the principle due on the mortgage was \$15,000 to cover a loan of \$7,604.14. By July 1987, both the note and mortgage were in default.

6. No payments were ever made on the first or second mortgage and any security that ever existed on the third mortgage disappeared by the fall of 1987.

7. The solicitor continually requested payment and was always assured that Somnath Mukherjee would be paying very soon.

8. By the winter of 1988, the Solicitor was unable to locate Somnath Mukherjee.

9. The Solicitor did no further work for Steven Yau but kept in contact with him with respect to repayment of the loan - Steven Yau promised repayment numerous times but it never took place.

10. Steven Yau requested that the Solicitor attempt to obtain judgement and collect upon a debt owing to Mr. Yau by another party.

11. The Solicitor accordingly negotiated a settlement of this debt to Mr. Yau with Mr. Thomas Wood, the lawyer for the debtor.

12. There was no written agreement, but both the Solicitor and Steven Yau were initially of the understanding that the funds being collected were to be used to pay the debt owing to the Solicitor.

13. The Solicitor formed the opinion that Steven Yau was getting into a more and more difficult financial situation and that Steven Yau was planning to bypass the Solicitor and go directly to the debtor's solicitor to collect the funds himself.

14. On or about August 3, 1988, the Solicitor received from Mr. Wood a cheque for \$17,021.88 in trust for Steven Yau. This was sent in settlement of the debt referred to in paragraphs 10 and 11.

15. The Solicitor altered the trust cheque by deleting the words "in trust" without his client's knowledge and thereafter deposited the altered cheque to his personal bank account in satisfaction of Mr. Yau's financial obligation to the Solicitor.

16. Upon learning of the receipt of the funds by the Solicitor, Mr. Yau requested that the Solicitor pay him the funds.

17. When the Solicitor advised Mr. Yau that he had applied the funds to cover the amounts due the Solicitor by Mr. Yau on the guarantee of the mortgage and promissory note, Mr. Yau complained to the Society.

VI. PENALTY

18. Counsel for the Society and the Solicitor acting personally jointly recommend a Reprimand in Committee.

DATED at North York this 24th day of November, 1989"

RECOMMENDATION AS TO PENALTY

The Committee recommends that Jay Duncan Rowatt be Reprimanded in Convocation.

REASONS FOR RECOMMENDATION

Although the Solicitor acting on his own behalf and counsel for the Law Society made a joint submission for a Reprimand in Committee, the Committee is of the opinion that such a penalty would not properly reflect the seriousness of the act of Professional Misconduct admitted by the Solicitor. In fact, were it not for the rather unusual circumstances in which Mr. Rowatt found himself and the unblemished career which he has enjoyed to date, we would have considered a more serious penalty than that of a Reprimand in Convocation.

It would appear that Mr. Rowatt altered the cheque in question on the basis of a "Colour of Right" to the funds which it represented. He now appreciates that he had no such right and that his act in altering the cheque constituted a forgery.

However, we were impressed with his admission of guilt, his sincerity and his previous good character as a lawyer since 1978, when he was called to the Bar. Further, we are convinced that the proceedings to date have constituted a substantial penalty and that the publication of the fact of a Reprimand in Convocation will constitute a further substantial penalty.

Under all of the circumstances, we recommend that Jay Duncan Rowatt be Reprimanded in Convocation.

Jay Duncan Rowatt was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 13th day of April, 1978.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 6th day of April, 1990.

"Roger D. Yachetti"
Roger D. Yachetti, Q.C.
Chair

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

There were no submissions on the Report.

The solicitor, counsel, members of the public and the reporter then withdrew.

It was moved by Mr. Wardlaw, seconded by Mr. Lerner that the finding of professional misconduct in the Report be set aside.

Not Put

The motion for adoption of the report was carried and the solicitor and counsel were recalled and informed that the Report of the Discipline Committee had been adopted.

There were no submissions on Penalty.

It was moved by Mr. Topp, seconded by Mr. Lerner that the Recommendation as to Penalty contained in the Report that is that the solicitor be reprimanded in Convocation was adopted.

Carried

Counsel, members of the public and the reporter withdrew and the Treasurer administered the reprimand.

The solicitor retired.

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"IN CAMERA"

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Confirmed in Convocation this day of , 1990.

Treasurer