

26th January, 1995

MINUTES OF SPECIAL CONVOCATION

Thursday, 26th January, 1995  
9:30 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Arnup, Bastedo, Blue, Campbell, Copeland, Cullity, Curtis, Elliott, Finkelstein, Hickey, Kiteley, Lamont, Lax, McKinnon, Manes, Moliner, Richardson, Scott, Sealy, Somerville, Thom, Topp and Yachetti.

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The reporter was sworn.

Convocation commenced briefly in camera.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Mr. Michael Brown introduced Mr. John Morin of the firm of Fasken, Campbell who was acting as Duty Counsel.

Re: George STRUK - Brampton

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom and Ms. Moliner did not participate.

Ms. Christina Budweth appeared for the Society and Mr. M. Sandler appeared on behalf of the solicitor who was present.

Counsel for the Society requested an adjournment on consent to the March Discipline Convocation. She advised that Mr. Sandler was recently retained by the solicitor and needed additional time to prepare and further advised that the solicitor had given an Undertaking not to practice.

An adjournment was granted to the March Discipline Convocation.

Counsel and solicitor retired.

Re: John William NICHOLSON - Hamilton

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom and Ms. Moliner did not participate.

Mr. Michael Brown appeared on behalf of the Society and Mr. John Morin, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Mr. Brown requested an adjournment on consent to the March Discipline Convocation. He advised that Mr. Nicholson was not well enough to attend but would have his Factum completed by the end of February.

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An adjournment was granted to the March Discipline Convocation on the understanding that the solicitor's Factum would arrive at the Society on March 1st.

Counsel retired.

Re: Pasquale IANNETTA - Windsor

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom did not participate.

Mr. Michael Brown appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Mr. Brown requested an adjournment on consent to the March Discipline Convocation. He advised that Mr. Iannetta's Mother was dying. Also arrangements had to be made for the solicitor's files in anticipation of a suspension.

An adjournment was granted to the March Discipline Convocation.

Counsel retired.

Re: Jeffrey Mark LEVY - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate.

Ms. Christina Budweth appeared for the Society and Mr. Morin appeared on behalf of the solicitor. The solicitor was not present.

Ms. Budweth requested an adjournment on consent to the March Discipline Convocation. She advised that a report had not yet been finalized on the additional discipline charges.

An adjournment was granted to the March Discipline Convocation subject to the solicitor's counsel, Mr. Fox being available.

Counsel retired.

Re: Ross HAINSWORTH - Edmonton

The Secretary placed the matter before Convocation.

Messrs. Copeland and Thom did not participate.

Mr. Michael Brown appeared for the Society and Mr. Frank Marrocco appeared for the solicitor who was present.

Mr. Brown requested an adjournment on consent to the March Discipline Convocation as Reasons from the November 1994 Convocation had not yet been received.

An adjournment was granted to the Discipline Convocation in March.

Counsel and solicitor retired.

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Re: Yaroslav MIKITCHOOK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp and Lamont did not participate.

Mr. Neil Perrier appeared on behalf of the Society and Mr. M. Singer appeared on behalf of the solicitor. The solicitor was not present.

Mr. Perrier requested an adjournment on consent to the March Discipline Convocation to enable Mr. Singer who was recently retained additional time to prepare.

An adjournment was granted to the March Discipline Convocation.

Counsel retired.

Re: David Eric HOWLETT - Niagara Falls

The Secretary placed the matter before Convocation.

Mr. Scott, Ms. Richardson and Ms. Curtis did not participate.

Ms. Georgette Gagnon appeared on behalf of the Society and the solicitor appeared on his own behalf.

Ms. Gagnon requested an adjournment on consent to the April Discipline Convocation in order that the solicitor who had filed a Notice of Disagreement have time to prepare. She advised that the solicitor was not practising and would give an Undertaking not to practice.

An adjournment was granted to the April Discipline Convocation.

Counsel and solicitor retired.

William Donald GRAY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott, Copeland and Thom did not participate.

Mr. Michael Brown appeared on behalf of the Society and the solicitor appeared on his own behalf.

Mr. Brown requested an adjournment on consent to the March Convocation to enable the solicitor who had filed a Notice of Disagreement additional time to prepare a Factum.

An adjournment was granted to the March Discipline Convocation peremptory and on the understanding that the Factum be delivered no later than February 20th.

Counsel and solicitor retired.

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Re: Frederick Bernard SUSSMANN - Ottawa

Counsel for the Society, Mr. Perrier and the solicitor were advised that Convocation would not hear this matter until the afternoon.

The solicitor who was contesting the Report was given permission to leave the Society and return at 2:00 p.m.

The matter was stood down.

Re: Stephen Lorne MCDONALD - Sudbury

Convocation was advised that counsel for the solicitor Mr. Brian Greenspan would not be available to proceed until the afternoon.

The matter was stood down.

Re: Raymond Vincent DONOHUE - Sarnia

The Secretary placed the matter before Convocation.

Messrs. Scott, Campbell and Thom and Ms. Moliner did not participate.

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

Ms. Wootton requested an adjournment on consent to the March Discipline Convocation. She advised that the solicitor was in the hospital preparing for surgery. A letter from the solicitor had been received requesting the adjournment.

An adjournment was granted to the March Discipline Convocation.

Counsel retired.

Re: Robert Emerson PRITCHARD - Sault Ste. Marie

The Secretary placed the matter before Convocation.

Ms. Curtis withdrew for this matter.

Mr. Scott did not participate.

Ms. Christina 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 19th December, 1994, together with an Affidavit of Service sworn 5th January, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

26th January, 1995

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Carole Curtis, Chair  
Kenneth E. Howie, Q.C.  
Netty Graham

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

Christina Budweth  
for the Society

ROBERT EMERSON PRITCHARD  
of the City  
of Sault Ste. Marie  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: September 27, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On April 12, 1994 Complaint D66/94 was issued against Robert Emerson Pritchard alleging that he was guilty of professional misconduct.

The matter was heard in public on September 27, 1994 before this committee composed of Carole Curtis, Chair, Kenneth E. Howie, Q.C. and Netty Graham. The Solicitor was not present nor was he represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D66/93

2. a) He has failed to reply to the Society respecting the Law Society's request that the member produce a copy of his mixed trust account bank statement as at his assignment into bankruptcy on October 7, 1992, despite letters dated July 23, 1993, August 9, 1993 and September 8, 1993.
- b) He has breached an Order of convocation by continuing to practise while under suspension during the period June 1 to June 18, 1993

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 D66/94 and is prepared to proceed with a hearing of this matter on September 27 and 28, 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 D66/94 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 in 1971. He practices as a sole practitioner. The Solicitor is currently suspended for non-payment of his annual fees.

Complaint D66/94

Particular 2a) He has failed to reply to the Society respecting the Law Society's request that the member produce a copy of his mixed trust account bank statement as at his assignment into bankruptcy on October 7, 1992, despite letters dated July 23, 1993, August 9, 1993 and September 8, 1993.

5. On October 7, 1992, the Solicitor filed an Assignment in Bankruptcy.

6. On June 16, 1993, Anita M. McCann, Examiner, left a telephone message on the Solicitor's answering machine advising him that an audit was instructed to examine the Solicitor's records.

7. By letter dated June 18, 1993 (Tab 1, Document Book), which was sent by registered and ordinary mail, Ms. McCann confirmed her June 16, 1993 telephone message and the scheduled appointment on June 28, 1993. The Solicitor was requested to make available to the examiner his books and records. The registered letter was returned "unclaimed".

8. On June 28, 1993, Ms. McCann attended at the Solicitor's office in Sault Ste. Marie to commence the audit. The Solicitor advised her that he no longer maintained a trust account which had a nil balance. Ms. McCann advised the Solicitor that she would require a copy of his mixed trust account statement. The Solicitor advised that the bank statements were at the bank (Royal Trust) and he would pick up same. Ms. McCann further requested a copy of the Solicitor's Statement of Affairs with respect to his bankruptcy. A copy of the audit questionnaire is attached at Tab 2 of the Document Book.

9. By letter dated July 23, 1993 (Tab 3, Document Book), Ms. McCann confirmed receipt of a copy of the Solicitor's Statement of Affairs with respect to his bankruptcy. Ms. McCann requested that the Solicitor forward to her a copy of the mixed trust account bank statement as soon as possible. No response was received.

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10. By letter dated August 9, 1993 (Tab 4, Document Book), which was sent by registered and ordinary mail, the Law Society wrote to the Solicitor enclosing a copy of its July 23, 1993 letter and requested a response to same. The registered letter was returned "unclaimed".

11. By registered letter dated September 8, 1993 (Tab 5, Document Book), the Law Society advised the Solicitor that should he fail to respond within 15 days, the matter would be referred to the Chair and Vice-Chair of the Discipline Committee. No response was received.

12. On or about January 5, 1994, a further audit was authorized.

13. On March 28, 1994 and March 29, 1994, Mr. Doug Weber, Investigation Auditor, attended at the Solicitor's office to commence the audit. The Solicitor advised him that he was suffering from severe depression and would not open his mail. For this reason, the Solicitor indicated that he was not aware of the Notices and letters sent to him from the Audit department. The Solicitor advised that he has not engaged in the practice of law since being advised in mid November that he was suspended. The Solicitor explained that he did not file his annual forms with the Society as he could not afford to pay an accountant to complete the forms.

14. During the course of the audit, the Solicitor made available his diary and signed a letter authorizing his bank to release the trust bank information. The bank provided Mr. Weber with copies of the bank statements of the Solicitor's trust account (Tab 6, Document Book) for the months from July 1992 to February 1993 at which time the account was closed with a nil balance.

15. On or about April 7, 1994, Mr. Weber completed the audit. Mr. Weber found no evidence of the Solicitor practising under suspension or any other problems. As a result, the file was closed.

Particular 2b) He has breached an Order of Convocation by continuing to practise while under suspension during the period June 1 to June 18, 1993.

16. On or about December 7, 1992 (Tab 7, Document Book), the Law Society forwarded to the Solicitor a Notice advising him that his Errors and Omissions Insurance Levy was due and payable for the period from January 1, 1993 to June 30, 1993.

17. On or about April 1, 1993 (Tab 8, Document Book), the Law Society forwarded to the Solicitor a Second Notice advising him that his Errors and Omissions Insurance Levy was due and payable for the period from January 1, 1993 to June 30, 1993. The Solicitor did not respond to the Notice.

18. On or about May 3, 1993 (Tab 9, Document Book), the Law Society forwarded to the Solicitor a Final Notice advising him that his Errors and Omissions Insurance Levy was due and payable for the period from January 1, 1993 to June 30, 1993.

19. By letter dated June 1, 1993 (Tab 10, Document Book), the Solicitor was advised that his rights and privileges as a member of the Society have been suspended effective June 1, 1993 as ordered by Convocation pursuant to section 36 of the Law Society Act due to his non-payment of the Errors and Omissions Insurance Levy for the period from January 1, 1993 to June 30, 1993. The Solicitor received the Society's letter on June 15, 1993.

20. By letter dated June 18, 1993 (Tab 11, Document Book), the Law Society confirmed receipt of the Solicitor's cheque in the amount of \$1,605.00 certified on either June 15 or 16, 1993. The Solicitor was advised that his suspension was terminated as of June 18, 1993.

21. On June 28, 1993, Ms. McCann attended at the Solicitor's office to conduct an audit. While at his office, Ms. McCann obtained information from the Solicitor's daily diary showing the court appearances he had attended upon during the period from June 1, 1993 to June 18, 1993. The Solicitor admits that all of the court appearances contained in his diary and recorded in Ms. McCann's notes reflect court appearances upon which he personally attended. A copy of Ms. McCann's notes are attached at Tab 12 of the Document Book.

V. DISCIPLINE HISTORY

22. On June 7, 1989, the Solicitor was found guilty of professional misconduct for failing to serve clients in a conscientious, diligent and efficient manner and misleading client. The Solicitor was suspended by Convocation for one month beginning July 1, 1989.

DATED at Toronto this 26th day of Sept, 1994."

RECOMMENDATION AS TO PENALTY

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1. The Committee recommends a suspension for a period of 18 days, and after that an indefinite suspension until such time as the following conditions are met:

- (a) The Society receives a report from the Chief of Psychiatric Medicine of the Sault Ste. Marie General Hospital, Dr. Leung, that the Solicitor is continuing a medication program using the drug prozac and that the Solicitor is capable of practising law while adhering to the drug regime;
- (b) The Solicitor provides to the Society a release authorizing Dr. Leung to advise the Society immediately if he becomes aware that the Solicitor has ceased the prescribed drug regime;
- (c) The Solicitor will not practice as a sole practitioner but will practice only in association with another solicitor or solicitors who are apprised of his medical history and are prepared to supervise his practice and report to the Society if they form any concerns that the Solicitor is no longer participating in prescribed regime. This condition is to continue until relieved by Senior Counsel Discipline;
- (d) The Solicitor gives an Undertaking not to operate a trust account; and
- (e) The Solicitor participates in and completes the Practice Review Program before returning to practice and that after his return to practice he continue to participate in and co-operate with the Practise Advisory Department.

REASONS FOR RECOMMENDATION

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2. The Solicitor was not present and not represented. The Solicitor advised the Law Society that he would not be coming. The Committee is satisfied that the Solicitor had proper notice of the hearing and voluntarily chose not to attend. As a result, the Committee proceeded in the absence of the Solicitor.

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3. At the time of the hearing, the solicitor was subject to an administrative suspension with respect to the failure to pay his annual fees. On the conclusion of that suspension, the Solicitor will then be subject to a suspension for a period of 3 months, and to continue thereafter until all his obligations of membership in the Society are fulfilled. That suspension results from the order of convocation made 26 May, 1994 regarding complaints D205/93 (failure to reply to the Law Society regarding complaints; failure to honour financial obligations to other solicitors, in connection with his practice of law) and D306/93 (failure to file with the Law Society the necessary forms within 6 months of the end of the fiscal year ending 31 December, 1992).

4. At the time of the hearing, the Solicitor was not practicing. He had been extremely co-operative with discipline counsel. No medical evidence was offered. However, the solicitor did produce his books and records when confronted with the attendance of the Law Society auditor.

5. The suspension with the specific conditions attached was a joint submission as to penalty. This Solicitor is not ungovernable, but he is unwell. As a result of the ongoing administrative suspension, and the previous discipline suspension by order of Convocation, there are many hurdles to be met before the current recommended suspension would take effect. The term of this suspension is less significant than the conditions of the suspension, which are designed to ensure that the public is protected should the solicitor decide to return to practice.

Robert Emerson Pritchard was called to the Bar on the 26th day of March, 1971.

ALL OF WHICH is respectfully submitted

DATED this 19th day of December, 1994

Carole Curtis  
Chair

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

The Report was adopted.

It was moved by Mr. McKinnon, seconded by Mr. Yachetti that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 18 days and thereafter indefinitely until the conditions set out in the Report are met.

Ms. Budweth advised that she had received a letter dated January 25th, from the solicitor that he accepted the Committee's recommendation.

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

Convocation amended 1.(a) of the conditions by deleting the words "using the drug prozac" and inserting the words "under his supervision". In addition 1.(d) of the conditions was amended by adding at the end of the sentence the words "without approval of the Secretary".

The Recommendation as to Penalty as amended was adopted.

Counsel retired.

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Re: Sidney Irving LOVAS - Toronto

The Secretary placed the matter before Convocation.

Mr. Blue withdrew for this matter.

Mr. Scott did not participate.

Mr. Neil Perrier 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 2nd December, 1994, together with an Affidavit of Service sworn 19th December, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

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

Neil Perrier  
for the Society

SIDNEY IRVING LOVAS  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 18, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

REPORT

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On February 23, 1994 Complaint D444/93 was issued, and on August 26, 1994 Complaint D224/94 was issued against Sidney Irving Lovas alleging that he was guilty of professional misconduct.

The matter was heard in public on October 18, 1994 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Ian Blue, Q.C. and Netty Graham. The Solicitor was not present at the hearing nor was he represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D444/93

2. a) He breached an Order of Convocation by continuing to practise law while under suspension during the period November 2nd 1992 until December 9th 1992.
- b) He failed to file with the Society within six months of the termination of his fiscal year ending January 31st 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 the Regulation made pursuant to the Law Society Act.

Complaint D224/94

2. a) He failed to reply to the Law Society requesting that he provide a response to inadequacies discovered during an examination of the member's books and records on June 11, 1993, despite letters dated October 14, 1993, November 15, 1993, April 14, 1994 and May 30, 1994.

The Solicitor did not appear at the hearing and appeared to be somewhat indicative of the misconduct complained of.

The panel considered the matter of proceeding in his absence very seriously and were mindful of the endorsements on the Record and of the submissions made by the Society's counsel, that every consideration had already been extended to this Solicitor.

The Record was first endorsed on April 26, 1994 and set out the matter was to proceed on September 13 & 14, 1994 subject to Counsel being retained. On September 13, 1994 it was adjourned on consent to proceed on October 12, 1994 with or without Counsel. On October 12, 1994 the solicitor made a request to adjourn which was denied, but the matter was not reached on that date and was endorsed to proceed October 18 & 19, 1994 peremptory to the Solicitor.

Under all of these circumstances, the panel was not prepared to have the matter adjourned yet again and proceeded.

Findings

The matter of Complaints D444/93 and D224/94 proceeded by way of viva voce evidence lead by the Society to establish the Complaints.

Complaint D444/93 - Particular 2(a)

The allegation herein sets out that the Solicitor practised law while under suspension during the period from November 2, 1992 until December 9, 1992.

The panel heard evidence from Lorraine Campbell, an examiner with the Audit Department of the Law Society. Part of her responsibilities include going out to law offices and checking the maintenance of books and records and to investigate allegations of practising while under suspension. The Society is authorized to proceed on these matters under Sections 9 and 18 of the Regulations.

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Pursuant to Section 9, Ms. Campbell was authorized by the Society on February 7, 1993 to investigate the practising under suspension particular. Her evidence to the panel, supported by documentation, which she verified, was as follows:

The Solicitor had been administratively suspended on November 2, 1992 for non payment of his Errors and Omissions levy. By registered mail to the Solicitor dated November 3, 1992 he was advised of Convocation's Order of October 23, 1992 that his privileges as a member were suspended effective November 2, 1992. On December 9, 1992, the Society's Records department acknowledged receipt of the Errors and Omissions payment and advised that effective that date the suspension of his rights and privileges was terminated.

The Solicitor had received three prior Notices regarding the late fees on June 3, 1992, September 10, 1992 and a final Notice on October 14, 1991.

Ms. Campbell provided a copy of t transcript of a proceeding before the Honourable Judge M.H. Harris on November 4, 1992 in the Ontario Court (Criminal Division) wherein the Solicitor advises the Court as follows: (from the transcript)

"THE COURT: Is there nobody representing Food Court International?"

MR. LOVAS: May I rise on that point, Your Honour? I'll place myself on the record for Food Court International. I think it will expedite proceedings if all parties are shown to be represented by Counsel..."

later in the transcript:

"MR. LOVAS: I didn't get instructions from my client and --- but I think I must say, Your Honour, that while we would be most agreeable on behalf of Mr. Zoneburg and Food Court International, while we would be agreeable to a severance to allow Counsel to be present for his client, in --- I have strict instructions from Mr. Zoneburg that he wishes to proceed to trial today..."

On November 13, 1992, the Solicitor wrote to Miss Sara Blake, Senior Investigation Counsel, the Ontario Securities Commission in connection with the previously set out Court matter and he was writing to confirm the plea bargain made on behalf of the defense and the prosecution. A copy of this letter was provided for the panel. On November 20, 1992 Miss Sara Blake wrote to the Solicitor and responded to his November 13 correspondence and by letter dated December 3, 1992 the Solicitor responded to her November 20, 1992 correspondence. Both of these letters were also before the panel.

Based on the above information and evidence, the panel made the finding of misconduct on this particular.

Complaint D444/93 - Particular 2(b)

This is an allegation of failing to file his forms for his fiscal year ended January 31, 1993.

The panel heard evidence from Irene Andrighetti of the Audit Department at the Law Society. She is responsible for collecting the annual filings and to follow-up with members who haven't made their filings. She advised that the Solicitor had last filed for his year ended January 31, 1992 and that at the time of the hearing he was in default of his 1993 and 1994 filings. She verified the Notices sent to the Solicitor and indicated there had been no response to them and that the filings had not been made. The Solicitor has paid the late filing fee.

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Based on the above evidence, the panel made a finding of misconduct on this particular.

Complaint D224/94 - Particular 2(a)

The allegation here is a failure to reply to the Law Society regarding the inadequacies of the member's books and records.

The panel heard from Lorraine Campbell of the Audit Department in connection with this particular and she indicated that she had been authorized under Section 18 of the Regulations to conduct and audit of the member's books and records. She attended at the Solicitor's office and conducted the audit on June 11, 1993. As a result of the audit, certain deficiencies were noted and discussed which the Solicitor acknowledged at the time and on June 11, 1993 both the Examiner and the Solicitor signed an Acknowledgment. A copy of same is attached as Schedule "A".

The panel then heard from Ms. Margot Devlin, Manager - Examiner Programs of the Law Society. She advised that she followed-up on the deficiencies of the Solicitor's books and records by way of a letter to the solicitor dated October 14, 1993. In that letter she advised the Solicitor of the deficiencies and asked for his response. She followed-up again with him by letter dated November 15, 1993 and asked again for a response. The Solicitor called the Society on December 14, 1993 and advised that he would respond by December 24, 1993. The telephone transaction memo was filed at the hearing. No response was received. On April 14, 1994, Ms. Devlin wrote to the Solicitor again in connection with the previous letters and requested a response. There was no response.

On May 30, 1994, she sent a registered letter to the Solicitor and advised him therein that if a full and complete written response had not been received within 15 days an Authorization for a formal complaint would be sought. The acknowledgement and receipt of same was entered before the panel. At the date of the hearing the Solicitor had still not made a reply.

Based on the foregoing, the panel made a finding of misconduct on this particular.

#### RECOMMENDATIONS AS TO PENALTY

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It is recommended that the Solicitor be suspended for a period of 3 months and said suspension to continue until such time as he has:

- a) replies to the Audit department in connection with the inadequacies set out during an examination of the member's books and records;
- b) files his Forms 2 and 3 pursuant to the Regulations.

and that the Solicitor pay costs fixed in the amount of \$2,500.00

#### REASONS FOR RECOMMENDATION

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The Solicitor does not have a prior discipline record, however, the panel was significantly concerned with his blatant disregard for his governing body.

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The filing of the Forms is the only means available to the Law Society wherein they can ascertain that the profession is maintaining their books and records. In the case of this Solicitor, the Audit department has conducted an examination of the books and records and has been trying, unsuccessfully, to have the inadequacies uncovered during the examination addressed. His total lack of response is unacceptable and unexplainable. The lack of responses to the many letters and calls from the Society seriously questions the ability of the Society to govern this member.

In all of the above circumstances, the panel has recommended the penalty set out herein as a specific deterrence to this Solicitor and to indicate that we deem his misconduct to be very serious and bordering on ungovernability.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of December, 1994

Netty Graham (for the Committee)

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

The Report was corrected on page 3, 5th paragraph, by deleting the letter "t" and replacing it with the letter "a" so the sentence would then read "Ms. Campbell provided a copy of a transcript...".

The Report as amended was adopted.

It was moved by Ms. Sealy, seconded by Mr. Cullity that the Recommendation as to Penalty be adopted, that is, the solicitor be suspended for a period of 3 months and continue thereafter until the conditions set out in the recommendation are met and costs in the amount of \$2,500 are paid.

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

There were questions from the Bench.

Counsel, the Reporter and the public withdrew.

It was moved by Mr. Topp but failed for want of a seconder that costs be deleted.

It was moved by Mr. Yachetti, seconded by Ms. Curtis that the solicitor be disbarred.

Withdrawn

The Recommendation as to Penalty was adopted.

Counsel, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 3 months and continue until conditions are met and costs are paid.

Counsel retired.

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Re: Dragan VUJIC - Kitchener

The Secretary placed the matter before Convocation.

Mr. Thom withdrew for this matter.

Ms. Christina 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 16th December, 1994, together with an Affidavit of Service sworn 5th January, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 20th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

S. Casey Hill, Chair  
Stuart Thom, Q.C.  
Netty Graham

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

Gavin MacKenzie  
Christina Budweth  
for the Society

DRAGAN VUJIC  
of the City  
of Kitchener  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: August 9, 10, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On January 20, 1993, Complaint D19/93 was issued against Dragan Vujic alleging that he was guilty of professional misconduct.

The matter was heard in public on August 9 and 10, 1993 before this Committee composed of S. Casey Hill, Chair, Stuart Thom, Q.C. and Netty Graham. The Solicitor was not present nor represented. Gavin MacKenzie and Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D19/93

2. a) While acting on the purchase/sale and/or financing of properties located at: 94 Avondale Avenue South, Waterloo; 156 Mill Road, Kitchener; 43 Peter Street, Kitchener; 89 St. Andrews Street, Mitchell; 371-373 Victoria Street North, Kitchener; and, 93-95 Water Street, Kitchener,
- i) he acted contrary to the provisions of Rule 5 of the Rules of Professional Conduct by acting in a conflicts of interest without adequate disclosure to or the informed consent of the parties. While acting in such conflicts the Solicitor preferred the interest of his borrower clients to those of his lender clients;
  - ii) he acted contrary to the provisions of Rule 3 of the Rules of Professional Conduct by assisting various of the parties who were artificially inflating the values of and over-financing various of the above-noted properties;
  - iii) he violated the provisions of Rule 2 of the Rules of Professional Conduct by failing to report to clients within a reasonable time after the completion of the transactions and by failing to provide complete and accurate reports with respect to the work completed. He also failed to advise clients on the legal implications of the execution of documents, including execution of and acceptance of promissory notes as consideration on a real estate transaction;
  - iv) he breached the provisions of Rule 9 of the Rules of Professional Conduct in that the fees charged in the circumstances of the above noted transactions were not fair and reasonable;
  - vi) he breached the provisions of Rule 14 of the Rules of Professional Conduct by attempting to evade service of legal processes initiated as a result of the above-noted transactions; and
  - vii) in the circumstances outlined above he breached his obligations to the profession as outlined in Rule 1 of the Rules of Professional Conduct by failing to discharge with integrity his duties to clients and other members of the profession.
- b) His letters of September 11, 1992 and October 16, 1992 to solicitor David Thrasher contained language and were of such a tone as to be totally inconsistent with the proper tone of a professional communication from a lawyer.
- c) He violated the provisions of Rule 4 of the Rules of Professional Conduct by disclosing information about his former client, R. Lemelin, to Revenue Canada following a complaint by Mr. Lemelin to the Law Society regarding the Solicitor's conduct.

The Committee made findings of professional misconduct on all counts.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

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The main allegation in particular 2 (a) of the complaint deals with a series of six Real Estate transactions wherein the solicitor caused losses in excess of \$2,000,000.00. Throughout the transactions he preferred the interests of clients who were Vendors and Borrowers to the interests of clients who were Purchasers and Lenders. He failed to disclose several very important matters in light of his representations on all sides of these transactions: the prices of sales in recent past transactions, the fact that prior mortgages were in arrears, the fact that Powers of Sale proceedings had been commenced and the fact that he had a continuing relationship with the Vendor and Borrower clients that he preferred. This was demonstrated by the artificial inflated values of the properties. These transactions dealt with the same parties, the same realtors and the same appraisers. There were no cash deposits and deposits were arranged by way of Promissory Notes.

For ease of reference, find attached as Schedule "A" excerpts from "Abstracts" of titles for the six transactions. They were prepared from the copies of abstracts in the materials filed with the panel in Exhibit 3 and show only the instruments registered on title that affect the subject matter of these complaints in order of registration. These abstracts would be very similar to searches of title that would be prepared for the individual transaction files.

Transaction #1 - 94 Avondale Avenue South

The panel heard from Colleen Wright, a Solicitor and Chartered Accountant with the audit department of the Law Society. Ms. Wright was responsible for and prepared Exhibit 3 to the hearing and was a witness on all of the six transactions. She advised the panel of the sources of all the documents in Exhibit 3. She also set out the fees charged by the solicitor for the six transactions as follows:

94 Avondale Ave. South	\$ 7,237.50
156 Mill Street	10,835.00
43 Peter Street	\$13,984.00
89 St. Andrews Street	18,475.00 +
	2,100.00
371-373 Victoria Street	7,935.00
93-95 Water Street	5,587.50

We heard from Patricia Ward (nee O'Connor) whose father, Frederick D. O'Connor, Barrister and Solicitor, was a principal of Davcal Limited, a holding company for the family's personal mortgage portfolio. Evidence was also heard from Billy Niklaus, the purchaser of the property and Igor Dmitriev, an 83 year old retired engineer, a lender on the property.

This sale to Mr. Niklaus was closed and registered on title on June 27, 1990 for a purchase price of \$377,00.00. From the Abstract one will note that the Vendors' original purchase price at the time of their purchase was \$175,500.00 for the same property. Mr. Niklaus assumed a first mortgage in favour of Settlers Savings and Mortgage Corp. and on June 27, 1990 a second mortgage in favour of Davcal Ltd. in the amount of \$38,000.00 was registered. On July 24, 1990, a third mortgage was registered in the amount of \$10,000.00 in favour of Igor Dmitriev.

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Ms. Ward's evidence was that Davcal Ltd. generally dealt with first mortgages only and occasionally on second mortgages. As an absolute minimum, the borrowers were required to have an equal cash deposit to the amount required on the mortgage. They were advised that Mr. Niklaus' cash contribution to the transaction was \$74,700.00 and he was looking for a \$38,000.00 second mortgage. She advised the panel that Mr. Vujic had confirmed to her the amount of the cash deposit and she indicated that Mr. Vujic was to be their agent on closing. The funds from Davcal were forwarded to the solicitor in trust to be held in escrow pending the certification of the mortgage being a good and valid second charge against the lands, the solicitor's personal undertaking to provide a copy of the search, proof that the first mortgage in favour of "Settlers" was in good standing, proof of clear tax certificate and a copy of the Lodging House License. Davcal had never been advised or knew that Mr. Niklaus had only paid \$5,000.00 as a cash deposit. Had this information been known at the time, Ms. Ward's evidence was that they would not have done business with him. Davcal had also not been advised that the first mortgage was two months in arrears at this time and of the three payments received on account of the mortgage, the third payment went N.S.F.

As a result of the Power of Sale that followed, Davcal did not receive any proceeds and have basically lost all of the funds plus costs.

Mr. Billy Niklaus was a 29 year old with a Grade XII education at the time of the purchase. He had been a truck driver, a restaurant manager and had held various factory jobs. He was not sophisticated in real estate matters and had owned a property before that he rented out as a duplex. He had been made aware of the property through his room-mate who knew Mr. Robinson, the vendor. Mr. Robinson, together with others, owned 10 to 12 other properties as rooming houses. He offered to sell Mr. Niklaus the Avondale property and indicated that "it would carry itself". The panel was advised that he paid \$5,000.00 cash only as a deposit and no other deposits, despite signing an Amendment to Agreement of Purchase and Sale on May 22, 1990 that sets out an additional cash deposit by him of \$35,000.00. (Attached as Schedule "B").

A Promissory Note signed by Mr. Niklaus on June 25, 1990, attached as Schedule "C", sets out he is to pay \$40,000.00 to Mr. Robertson, the vendor by June 25, 1995 without interest or penalty. His evidence was that he never borrowed the \$40,000.00, he was supposed to get a second mortgage for these funds to do extensive plumbing work on the premises.

He indicated to us that he was aware that Mr. Vujic was everyone's lawyer on the transaction, and he thought that was "O.K."

In connection with his assuming the "Settlers" mortgage, he did not know it was in arrears, or that a Notice of Sale had been issued. His position to the panel was that had he known that information, he would not have bought the property. He had always thought the second mortgage was for \$40,000.00 - not \$38,000.00 and from the \$40,000 mortgage he received only \$5,000.00. He had never received any reports from the solicitor, who then arranged a third mortgage in the amount of \$10,000.00 for Mr. Niklaus. From this \$10,000.00, Mr. Niklaus' evidence was that he received only \$4,172.00, without any accounting being made to him.

He lost the property and was being sued by the two mortgagees.

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Mr. Igor Dmitriev advised that he is an 83 year old retired engineer who had known the solicitor since he was one year old. Mr. Vujic called him "Uncle" and they were very close. Mr. Dmitriev's income is \$650.00 per month from Pensions. He trusted the solicitor completely, who was going to help him earn extra money by dealing in mortgages. The solicitor would always bring the papers to him to sign but he never received any reports and sometimes he would be told about the properties. He considered the solicitor to be his lawyer, though he was never billed for any of the transactions. The \$10,000.00 mortgage he put on the Avondale property came from three months interest payments on another mortgage that he held. The solicitor told him that the property was a rooming house, but he advised the panel that he did not need to know these things, it was not important. None of the cheques submitted on account of this mortgage cleared. Mr. Dmitriev lost the entire amount.

Transaction #2 - 156 Mill Street

Ms. Wright verified the documentation in connection with this transaction and advised of their sources. On May 3, 1988, Christopher Palmer and Ares Theologos purchased the property for \$115,000.00. They turned around on November 3, 1989 and transferred the same property to Robert Hunter for \$415,000.00. There was an appraisal dated August 28, 1989 setting out the value at \$380,000.00 done by Ruth Veder of ARL Appraisal Research Ltd. and attached as Schedule "D". We heard from David Johnson, Associate Broker with Re/Max Urban Realty Inc. of Toronto that he had seen the Mill Street appraisal and said that most of the information contained therein was misinformation. By way of a letter from him to Mr. Kavanagh (one of the mortgagees) dated Sept. 22, 1990 and attached hereto as Schedule "E", he advised that the original appraisal had to have been improperly prepared. This document goes to each of the six transactions herein.

This particular transaction ended up with \$424,000.00 in total mortgages as compared to a purchase price of \$415,000.00. Again, the solicitor acted on all sides and for the borrowers and lenders.

Thomas Kavanagh gave evidence in connection with the \$66,000.00 mortgage on this title. He was introduced to this investment through Royal Mortgage Services, a brokerage firm in Brampton. He indicated it was one of a number of investments he had at the time. The mortgage instructions to the solicitor clearly sets out the mortgage is to be a good and valid second mortgage on the property. (See Schedule "F") The abstract clearly shows it in fact is a third mortgage. The solicitor reports to Royal Mortgage Services that they have a good and valid second mortgage. (See Schedule "G") Mr. Kavanagh referred to the mortgagor herein as a "dead bear" and all of the cheques came back not honoured.

This transaction also included part of the funds as being a cash deposit, which in fact came from a promissory note in the amount of \$81,090.46. This was not reported to any of the lenders. (See Schedule "H")

Mrs. Susanna Kleedorfer, a 71 year old widow from Cambridge gave evidence in connection with mortgage no. 958916 on this title. She came to Canada from Germany in 1952 and her husband passed away in 1986. She receives CPP and Old Age and some monthly supplement. The solicitor is her nephew and she became involved with him financially in 1988-1989. She said she gave him \$25,000.00 which he needed for repairs and so a week or two later she gave him the money. He did not mention a mortgage at all to her. She advised the panel she had signed an empty paper after she had given him the money, \$10,000.00 cash and \$15,000.00 by cheque which the solicitor filled out for her and she signed. She also indicated that she did not know what a mortgage was and had never invested before. She was not given any particulars of the mortgages on this property or on the Peter Street property (Transaction #3). The solicitor did not tell her that he was investing the money in mortgages and did not advise her that he was acting for the borrower. The solicitor then gave her cheques for a whole year and Mrs. Kleedorfer advised that the first couple of months were "O.K." and then

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they started coming back marked N.S.F. The solicitor kept telling her not to worry and he would give her some money. Then he asked her for \$15,000.00 more. She was very leery about doing that in light of the returned cheques, but again the solicitor said he would pay, and gave her \$2,000.00 in cash. He called it three months payment in advance, she called it interest. There were no further payments made after the \$2,000.00 received from the solicitor and at the time of the hearing, she still had not been paid. When asked where the solicitor was at the time of the hearing, she replied that he was in the U.S. - Virginia, she thought. She said he had got married July 1, 1993 in Russia and expected him back in Canada in a weeks time.

Transaction #3 - 43 Peter Street

The panel relied on the evidence of Colleen Wright verifying the documents and Exhibits in connection with this transaction and the sources for same.

This transaction involved the purchaser, Robert Hunter and the Settlers Savings and Loan Corporation again. By way of Promissory Note attached as Schedule "I", (in lieu of cash down payment) dated October 6, 1989. Mr. Hunter promises to pay \$45,480.69 and interest to 816670 Ontario Limited. The Corporate search conducted by the Law Society showed that Christopher Palmer is the only director and officer of this company. None of this information becomes known to "Settlers".

Mrs. Kleedorfer is a mortgagee on this title, and her evidence to the panel in addition to that given in connection with the Mill Street property was that she received a letter, she called it "anonymous", regarding this property, which was the Notice of Sale Under Charge (attached as Schedule "J"). When she contacted the solicitor about this, he said not to worry, and it was at this point that he personally paid her the \$2,000.00 in cash. It should be noted that the said Notice is dated May 30, 1990 and the mortgage in favour of Mrs. Kleedorfer was registered on June 8, 1990 after Settlers advises of the default of its mortgage. The solicitor is advised by fax from Shibley, Righton & McCutcheon, solicitors for Settlers that the Hunter mortgage is in default and said letter is dated June 8, 1990. (Attached as Schedule "K") From the solicitor's trust ledger, the panel was advised that on June 8, 1990, Mr. Vujic received \$15,000.00 from Mrs. Kleedorfer and on the same day, forwarded \$3,371.25 to Settlers. This was the amount set out in the letter that would be required to bring the mortgage in good standing. The page of the trust ledger dealing with these items is attached as Schedule "L". It is noted that the entry dates are not clear on the copy of the ledger and it was Ms. Wright's evidence from the originals in the solicitor's office, that the dates were in fact June 8, 1990.

It should also be noted that the solicitor was aware that the payments to Mrs. Kleedorfer from Hunter were being returned NSF by his letter to her of May 3, 1990, wherein he is sending her replacement cheques. (Schedule "M")

Transaction #4 - 89 St. Andrews Street

The panel relied on evidence from Ms. Wright again on this transaction, verifying the documents as submitted in evidence.

Further to the evidence of Mr. Dmitriev regarding transaction #1, his evidence on this transaction was very sad. The \$185,000.00 that he put up for this mortgage was derived from mortgaging his own farm for that amount. The solicitor had advised him that the investment was secure. He considered Mr. Vujic to be his lawyer, even though no fees were ever charged to him. His mortgage ranked third on this property but that had not been relayed to him as there was no reporting to him on the mortgage. When asked if he understood about rankings of mortgages, he advised that he knew that first mortgages were the most secure and that third mortgages were "very bad". He said he did not know how a lawyer could make such a mistake. A few months later he was asked to advance

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\$55,000.00 more and Mr. Vujic asked him to trust the lawyer. Mr. Dmitriev signed the documentation without knowing the nature of the property. \$35,000.00 of this money came from another property Mr. Dmitriev owned and he put a mortgage on it for \$35,000.00. \$20,000.00 came from three months payments on another mortgage he held. The solicitor had advised Mr. Dmitriev that the property was worth \$890,000.00. Christopher Palmer, who subsequently became the sole director and officer of 868267 Ontario Ltd., had indicated the property was worth \$1.5 million. It should be noted here that the Law Society verified Mr. Palmer's position in the numbered company by way of a corporate search as verified by Ms. Wright's evidence. Mr. Palmer's take over of the company was on Feb. 6, 1990. The solicitor did not advise Mr. Dmitriev that there was now over \$1 million in mortgages on the property. Mr. Dmitriev also found out later that this was a nursing home. His advice to the panel was that had he been aware that the property had been flipped from a previous price of \$220,000.00 he would never have invested any of his monies on this property. On the initial \$185,000.00 mortgage, he got three months interest payments only and nothing after that. Any payments subsequent to that were not honoured. On the \$55,000.00 further on the property, he got three months payment, and the first cheque bounced.

As of the hearing, Mr. Dmitriev cannot pay the mortgage on his own property and there is a pending law suit in that regard.

This transaction also starts out with a Promissory Note (Schedule "N") which purports to be a down payment on property for the purposes of obtaining the "Settlers" mortgage. It is also indicated on the Statement of Adjustments. (Schedule "O")

Clifford Megginson, on behalf of Megginson Investments Ltd. gave evidence before the panel in connection with his mortgage on this property. He was introduced to the property through Royal Mortgage Services, who instructed the solicitor to place a second mortgage on the property in the amount of \$90,000.00, said mortgage to be signed by Christopher Palmer as guarantor.

Mr. Megginson is a retired 79 year old man who had extensive experience in the mortgage business. He advised the panel that he had been involved in about 200 mortgage transactions over the years and most were second mortgages in the \$8,000.00 bracket. He used the same solicitor, Frank Lewis, on all of these investments. The \$90,000.00 St. Andrews Street mortgage was the largest he was ever involved with and it was for a 6 month term only on the understanding that the mortgagor was obtaining a new mortgage in favour of the Federal Business Development Bank within 90 days. All this was set out in the mortgage summary attached hereto as Schedule "P" (2 pages). Mr. Megginson advised the panel he had only spoken to the solicitor on one occasion before issuing the certified cheque. He could never reach him after that and the only thing close to a reporting letter he ever received was a copy of the solicitor's letter of Feb. 9, 1990 to Royal Mortgage Services, which he got from them, not the solicitor. (See Schedule "Q") He indicated that he had no knowledge of the information of the prior valuation of title and he felt that the solicitor should have told him.

The first of his three post dated cheques went NSF and he received no other payments. The principal amount remained outstanding. At that point he took matters in his own hands and went to Mitchell to investigate. He saw that the property was not occupied and then went to the Registry Office for further investigation. It was here he determined the nature of the title. He advised the committee he had always done his own conveyancing on this other investments, but not for those out of town and it was his position that he trusted the solicitor in this matter to be acting in his best interests.

It should be noted that the property is encumbered by \$1,074,090.00 prior to the registration of the increase of Mr. Dmitriev's mortgage to \$240,000.00 which at that point considerably exceeds the property value.

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Transaction #5 - 371-373 Victoria Street

Ms. Wright verified the documents and their sources as in the previous transactions. From the abstract of Transaction #5, one can see the flip of the property from an amount of \$165,000.00 as agreed at November 15, 1989 and then upon the registration of the deed to Robert Hunter for \$413,500.00 registered on December 15, 1989. There is an appraisal on the property for \$419,000 by Ruth Veder of Redwood Realty Kitchener Ltd. attached as Schedule "R". Part of the monies forming part of the transaction result from a "Direction" to the solicitor regarding an amount of \$210,725.00, said Direction attached as Schedule "S" and also referred to in the Statement of Adjustments attached as Schedule "T".

The panel heard evidence from A. A. Meneian, Vice President of AGF Trust Co. and he advised they gave mortgages based on the quality of the real estate and they required 25% equity for private mortgages and a higher equity for commercial ones. Attached as Schedule "U" hereto are the instructions to the solicitor (2 pages) as well as further Special Conditions as set out on Schedule "V" attached. One should note that the borrower is to provide not less than \$94,800.00 as a cash down payment. The solicitor, by signing the Preliminary Report (Schedule "W") reports under the Warranty portion of same, that the mortgagor purchased the property for \$413,500.00 with \$94,800.00 by way of cash down payment. Mr. Meneian advised that the mortgage went into arrears and AGF initiated Power of Sale proceedings.

The Law Society called Jonathan E. Fedder, a lawyer in the Society's complaints department. He set out the Lore and Raymond Radke complaint as received through their lawyers, Menzies and Von Bogen, who wrote to the Law Society in connection with the Radke mortgage from Robert Hunter on this property. Mr. Fedder identified the documents as contained in the complaints file as follows:

- a) letter from solicitors to Law Society dated Mar. 21, 1991 with enclosures (10 pages)
- b) copy of letter from Fedder to Vujic of Apr. 19, 1991
- c) Vujic's response to Law Society of Apr. 25, 1991
- d) Fedder's letter to Complainant of July 5, 1991 enclosing solicitor's response
- e) further letter from Complainant of July 23, 1991 (2 pages) Note: enclosures not attached herein - abstract clear
- f) Fedder's letter to solicitor of Aug. 13, 1991
- g) Solicitor's response to Law Society of Sept. 3, 1991 (2 pages)

All of the above are attached as Schedule "X" and are self evident.

As a result of the above materials, the panel was advised that the Radke's lost the entire investment on this mortgage as the very first payment was returned NSF and no payments were made on principal or interest after that. It is interesting to note the solicitor's response in (g) in light of the documentation materials.

Transaction #6 - 93-95 Water Street

All of the evidence dealing with this transaction was supplied by Ms. Wright of the Law Society. She verified all of the documents received and marked as Exhibits and identified their source and we accepted same. Attached as Schedule "Y" is the appraisal of Ruth Veder on the above noted property setting out a value of \$612,000.00. Part of the transaction included a Promissory Note from Robert Hunter to Christopher Palmer in the amount of \$197,782.15 and attached as Schedule "Z". The solicitor's file also included an acknowledgement by Christopher Palmer (Schedule "AA") as well as an acknowledgement by Bradley Brohman (Schedule "BB") on behalf of the corporation setting out they are aware the solicitor is acting on both sides of the transaction. In this transaction,

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again we have the inflated flip price of the property and the mortgage in favour of Settlers going into default resulting in a Power of Sale which nets them \$170,000.00.

#### Evasion of Service

Particular 2(a)(vi) alleged that the Solicitor:

"... breached the provision of Rule 14 of the Rules of Professional Conduct by attempting to evade service of legal processes initiated as a result of the above-noted transaction"

The transactions in question related to the above-described properties in which clients of the Solicitor, Ms. Kleedorfer and Mr. Dmitriev, were mortgagees. These clients had both retained David Thrasher, as solicitor, to advance their legal claims against Vujic through civil actions.

Rule 14 states:

The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith.

Mr. Thrasher, acting on behalf of his clients, retained process servers (Servco Legal Services of Guelph, Ontario) to assist in serving documentation in the course of the civil action commenced by the plaintiffs. The principals of Servco were Bruce Edwards and Sherry King.

Bruce Edwards, a former Metropolitan Toronto Police Force officer, testified before the Committee.

Mr. Edwards testified that on November 1, 1991 he attended the solicitor's business address at 372 Queen Street South in Kitchener to serve legal documents relating to Mr. Thrasher's clients and found the office closed at 4:00 p.m. He left one of his cards at the door for the solicitor to call him. Edwards again attended the solicitor's office on November 5, 1991 at 2:00 p.m. and found that his card had been removed and the mail collected. There was no one at the office. Attempts to reach the solicitor during this time-period at his residential address and through his mother's address proved unsuccessful. As a result of a return telephone communication from the solicitor an appointment was set for November 12 at 10:00 a.m. at the solicitor's Queen Street law office. Mr. Edwards kept this appointment but neither the solicitor nor anyone else was at the office at the appointed time. The process server remained for two hours without having the opportunity to serve the relevant documents. The process server made several unanswered calls to the business phone of the solicitor's office.

The process server commenced surveillance upon the solicitor's residence at 461 Lee Avenue. This occurred on several occasions without success. Finally, on November 14 at about 9:50 p.m. Bruce Edwards walked to the front of the solicitor's residence having observed the solicitor's vehicle in the driveway. On looking in a front window, the process server observed a male sitting watching television. Having observed the male person sitting in the sitting room area of the house, Mr. Edwards knocked several times on the front door but the male occupant, who later became known to Mr. Edwards as the solicitor, refused to answer the door. Mr. Edwards knocked on the side window of the residence and the solicitor was seen to leave the room and enter the hallway area with what appeared to be a weapon in his hand. Mr. Edwards quickly retreated and telephoned the Waterloo Regional Police. The police attended the scene and despite repeated knocking on the front door and the side areas of the house there was still a refusal to answer the door.

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Continuing attempts to serve the solicitor during office hours proved unsuccessful.

On November 28, 1991, at about 7:50 p.m., Edwards and King attended at the solicitor's residential address to serve documentation relating to Mr. Thrasher's clients. The Waterloo Regional police were in attendance on the street in the event of further difficulties. By way of an intercom communication, the solicitor identified himself as present in the residence and demanded information as to what Ms. King wanted. She indicated that she had legal documents for service and requested that the door be opened. Mr. Edwards testified that he saw the solicitor come to the entrance way but that he refused to open the door. He told the process server to leave the documents in the mailbox. Ms. King taped the documents to the front door of the residence as the solicitor stood inside. The process servers withdrew from the immediate location of the residents and maintained surveillance. After 4 or 5 minutes, the solicitor opened the door, grabbed the documents and took them inside.

On October 13, 1992 Mr. Edwards and a second process service attended the laneway area adjacent to the solicitor's business address in Kitchener. The solicitor exited the business office and surveyed the surrounding area before entering his vehicle. Mr. Edwards approached the vehicle and on recognizing the solicitor stated that he had documents for Vujic. Vujic took possession of the documents and examined the exterior of the envelope where the name of the plaintiff's law firm appeared. He became angry and hostile and stated "who the fuck are you and what is this?" Mr. Edwards identified himself and told the solicitor that he had been served with several notices of examination. At this point the solicitor threw the large envelope out of the window of the vehicle striking the server in the side of the head. Mr. Edwards stepped back from the vehicle as the solicitor reached out trying to push, grab or strike the process server. Vujic then started his vehicle and steered the truck toward the witness who jumped out of the way. Further down the laneway, the solicitor drove his truck toward the second process server who jumped to the side as the truck moved to the right as though to strike him.

The legal documents were left lying on the laneway as the solicitor drove away. The matter was reported to the Waterloo Regional Police Force. The evidence of Mr. Edwards was given in a straight-forward manner and is uncontroverted. We accept his evidence. The conduct evidences a clear pattern of evasion of documents known to the solicitor to be legal documents in the context of on-going civil proceedings. Accordingly, we are satisfied that this particular of the professional misconduct alleged has been proven.

#### Unprofessional Communications

Particular 2(b) of the complaint alleges the following:

"His [Vujic's] letters of September 11, 1992 and October 16, 1992, to solicitor David Thrasher contain language and were of such a tone as to be totally inconsistent with the proper tone of a professional communication from a lawyer."

Mr. David James Thrasher testified before the Committee as to steps he undertook to advance his clients' civil litigation against the solicitor in the matters of Kleedorfer v. Vujic and Dmitriev v. Vujic. Necessarily, this involved an exchange of correspondence between Mr. Thrasher and the defendant solicitor. Mr. Thrasher's clients had not only commenced civil litigation by March of 1991 but had also complained to the Law Society of Upper Canada about the solicitor's conduct in having acted for them on various mortgage transactions which are the subject matter of other particulars of the complaint herein. Mr. Thrasher undertook considerable efforts to schedule examinations of the defendant

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solicitor without success. The defendant solicitor refused to retain counsel on his behalf to defend in the civil proceedings. Despite persistent efforts by Mr. Thrasher to schedule the requisite examinations, the solicitor remained entirely uncooperative. Although the letters which are the subject matter of the complaint are of those of September 11 and October 16, 1992 there pre-existed an escalating pattern of aggressive and unprofessional language in communication from the solicitor to Mr. Thrasher. For example:

"I am not impressed with your mendacity and under handed tactics...All this deceit and dishonest on your behalf is totally unnecessary. A little professional courtesy would be greatly appreciated"

(letter of March 16, 1992)

Mr. Thrasher became increasingly concerned that the solicitor was personalizing the litigation and becoming increasingly confrontational with the plaintiff's law firm. In the letter of September 11, 1992, the solicitor authored the following passages:

"At this point your mendacity does not surprise me any more. Deceit and dishonest appear to be your long-suite and you seem to wear it well.

In my telephone conversation with your secretary I stated that given the fact that this matter was against me personally and given my perception of your past record as some less than truthful, I insisted that any and all your proposals be in writing prior to you expecting any cooperation from me".

In a letter dated October 16, 1992, the solicitor addressed the issue of the service of documents by Bruce Edwards on behalf of Mr. Thrasher's law firm. In that letter, the solicitor stated inter alia:

"I had no contact whatsoever with your alleged process server whoever he may be on October 13, 1992. In fact I was in conference that day with two other lawyers at another lawyer's office.

On October 14, 1992 at approximately 10:15 a.m., John Opolko handed me an envelope addressed to myself which he had found that morning in the parking lot. That envelope contained your notices. I weary of your mendacity and the outright lies of your supposed process server.

In addendum, after having spent twenty-two (22) years in the "Ring" in active and full contact competition, if I had intended to strike anyone, I certainly would not use my vehicle and believe me my intended victim would be dead. In marshal arts, I hold a Black Belt, Third Dan. So let us just cease and desist with the "Bull-shit"!

Govern yourself accordingly."

We have examiner Thrasher's relevant correspondence during the time-period of the impugned communications and are entirely satisfied that he conducted himself in a professional fashion. We accept his uncontroverted evidence. The language and tone of the solicitor's letters fall short of compliance with the Rules and accordingly this particular of the alleged misconduct has been proven.

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Breach of Solicitor/Client Privilege

Particular to (c) of the complaint reads as follows:

"He [the solicitor] violated the provisions of Rule 4 of the Rules of Professional Conduct by disclosing information about his former client, R. Lemelin, to Revenue Canada following a complaint by Mr. Lemelin to the Law Society regarding the Solicitor's conduct".

Mr. Vujic had represented two clients, Mr. Lemelin and Ms. Borutski. The client file related to the sale of property and a dispute arose between Mr. Lemelin and his counsel, the subject solicitor, regarding the removal of liens against the property which was to be sold on May 25, 1990 as a result of dissatisfaction with the solicitor's work Mr. Lemelin made a complaint about Mr. Vujic to the Law Society of Upper Canada.

In the ordinary course, the correspondence of the complainants, including Mr. Lemelin, was forwarded to the solicitor for his review and response to the Society.

An aspect of the solicitor's response to the Society included the following:

"Initially, Mr. Lemelin came to my office and informed me that he himself was buying 263 Ottawa Street, Kitchener, in his daughter's name in order to avoid tax consequences. I informed Mr. Lemelin that this was not lawful and advised him of the consequences thereof. I also advised him that I would not complete this transaction under these circumstances. ...Mr. Lemelin told me that this [registering the property in his daughter's name] was solely for the purpose of evading his creditors. I informed him that this was also illegal and advised him of the consequences"

(letter of June 29, 1990)

On June 5, 1990, after the Lemelin/Borutski complaint had been filed with the Law Society, the solicitor wrote to Ms. Borutski, care of Ron Lemelin, and stated inter alia:

"It is also my intent to draft a letter to Revenue Canada (Taxation Department) concerning the purchase and attempted sale of 263 Ottawa Street, North, Kitchener.

Govern yourself accordingly."

The subject solicitor informed the Society during the course of its inquiries that he had in fact written such a letter the Revenue Canada. When an explanation for this conduct was solicited from the solicitor he responded on September 10, 1990 as follows:

"I was of the opinion that he [Lemelin] was attempting to avoid paying tax on income earned. Thus I felt that it was my duty to inform the appropriate authorities. I did in fact, forward a copy of my previous letter to you to Revenue Canada which I believe is self-explanatory.

I fail to see any wrong-doing on my behalf for informing a former client of my intention of informing Revenue Canada of his activities, not for so doing."

26th January, 1995

On October 4th, 1990, Ms. Denise Ashby, a staff lawyer for the Society, communicated by letter with Mr. Vujic and stated inter alia:

"You indicated that you failed to see any wrong-doing in informing Revenue Canada of a former client's activities. I would refer you the Rules of Professional Conduct, particularly Rule 4 Confidentiality of Information, a copy of which is enclosed for your assistance. I particularly draw your attention to Commentaries 10 and 11 regarding justified disclosure. I would suggest that Commentary 8 is unlikely to apply as the sale to Mr. Mitchell's client aborted and, therefore, the "flip" was not completed and was not public knowledge."

The Solicitor responded on October 22, 1990 and stated:

"I may be somewhat confused, however, it was my understanding that Tax Evasion and defrauding the Government were criminal offences and therefore I assume that I was justified in informing Revenue Canada of Mr. Lemelin's activities."

We regard the communication to Revenue Canada by the solicitor, following his client's complaint to the Law Society of Upper Canada, as a breach of solicitor/client privilege with no saving justification from the commentaries to Rule 4 or from the common law. Indeed, the sequence of events irresistibly raised the interference that the communication was motivated by spite and a retaliatory posture. We are satisfied that this particular of the complaint has been proven to the requisite standard.

#### RECOMMENDATION AS TO PENALTY

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It is recommended that the solicitor be disbarred.

#### REASONS FOR RECOMMENDATION

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The panel heard and went through a significant amount of evidence over a two day period and the solicitor chose not to appear at the hearing despite being properly advised of and served with notice of same. The documentation was voluminous and the transactions complicated. The panel found the solicitor to be guilty of all of the particulars of misconduct alleged and this clearly sets out a pattern of an unscrupulous practise on the part of the solicitor.

The solicitor was actively involved in all of these matters to the grave detriment to many of his clients, including two elderly, unsophisticated persons who considered him to be family and who blindly trusted him to take care of their best interests and their life's savings. The solicitor purposely involved these people to participate in very shaky and shady deals. He clearly preferred the interests of several of his clients over others. Mrs. Kleedorfer and Mr. Dmitriev did not go to the solicitor to invest their monies, he lured them into the deals. He was responsible for making them all parties to the fraudulent transactions and by his lack of disclosure and conflict of interest by acting on all sides of each of these transactions, he was able to carry on the deceit and dishonesty. He is responsible for over \$2 million of losses. These people have also been put to the additional burden of pursuing these matters in the Courts, the Society's Errors and Omissions department and the Compensation Fund.

26th January, 1995

This man can no longer be allowed to practise law and victimize any more members of the public. He has breached Rules 1, 2, 3, 4, 5, 9, and 14 and clearly has no integrity. There is but one solution to this matter and the panel strongly recommends that the solicitor be disbarred.

The solicitor was called to the Bar on 15th day of April, 1985.

ALL OF WHICH is respectfully submitted

DATED this 16th day of December, 1994

Netty Graham (for the Committee)

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

There were no submissions and the Report was adopted.

It was moved by Mr. Campbell, seconded by Ms. Sealy 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 Recommendation as to Penalty was adopted.

Counsel retired.

Re: Hugh Gordon O'LEARY - Thunder Bay

The Secretary placed the matter before Convocation.

Ms. Kiteley and Ms. Richardson withdrew for this matter.

Mr. Neil Perrier 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 15th December, 1994, together with an Affidavit of Service sworn 5th January, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 19th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Frances Kiteley, Chair  
Mary P. Weaver, Q.C.  
Nora Richardson

26th January, 1995

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

Neil Perrier  
for the Society

HUGH GORDON O'LEARY  
of the City  
of Thunder Bay  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: March 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On September 20, 1993, Complaint D239/93 was issued against Hugh Gordon O'Leary alleging that he was guilty of professional misconduct.

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

DECISION

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

2. (a) He practised while under suspension by order of convocation, made on or about May 1, 1993 by continuing to practice during the period May 1, 1993 until May 19, 1993.
- (b) He practised while under suspension by order of convocation, made on or about November 2, 1992 by continuing to practice during the period November 2, 1992 until December 23, 1992.

[Note: the final date - December 23, 1992 - was amended at the hearing to correct a typographical error]

Evidence

The evidence before the Committee consisted of the oral evidence of Lorraine Campbell (a Law Society Examiner) and various documents. From this evidence, the following facts were found to have been established:

6. A letter dated November 3, 1992 was forwarded by registered mail to the solicitor containing the following notification:

"This letter is to notify you that pursuant to s.36 of the Law Society Act, Convocation on October 23, 1992, ordered that your rights and privileges as a member of the Society be suspended effective November 2, 1992.

26th January, 1995

The Society's records indicate that you have not complied with the requirements respecting the Society's compulsory Errors and Omissions Insurance Plan for the period July 1st through December 31, 1992. Accordingly your rights and privileges have been suspended from the 2nd of November, 1992 for one year and from year to year thereafter or until an application for exemption has been approved or the necessary levy has been paid together with any other fee or levy owing to the Society which has then been owing for four months or longer... The Registrar of the Ontario Court (General Division) will be notified of the suspension. Notice will also be published in the Ontario Reports...

Richard F. Tinsley, Secretary"

(Ex. 4, Tab 1)

2. On December 3, 1992, the solicitor paid his errors and omissions insurance premium and an instalment for his 1992/93 annual fees. He was notified by letter dated December 9, 1992 that the suspension was lifted effective December 3, 1992. (Ex. 4, Tab 2)
3. The first suspension was for a period of approximately 1 month.  
During the suspension, the solicitor was engaged in the practice of law by acting on a real estate transaction as is evident from:
  - his firm trust bank account statements for the period October 31, 1992 to November 30, 1992. (Ex. 4, Tab 3)
  - six (6) cheques drawn on his trust account dated between November 2, 1992 and November 26, 1992. (Ex. 4, Tab 4)
  - the deposit book for his trust account for various dates in November 1992. (Ex. 4, Tab 5)
  - a mortgage which he prepared, supervised execution and registered on or about November 12, 1992 in favour of a financial institution. (Ex. 4, Tab 6)
5. Notice was sent to the solicitor dated December 15, 1992 requiring payment of the 1993 annual fees. When that notice was prepared, credit was given for the instalment in advance referred to in paragraph 2 above. (Ex. 4, Tab 7)
6. A final notice was sent to the solicitor dated March 16, 1993 requiring payment of the balance of the 1993 annual fees. (Ex. 4, Tab 8)
7. By letter dated May 4, 1993 forwarded by registered mail, the solicitor received the following notification:

"This letter is to notify you that your rights, and privileges as a member of the Society are suspended effective May 1, 1993 as ordered by Convocation pursuant to Section 36 of the Law Society Act.

The Society's records indicate that you have not paid the second instalment of the annual fees which was due on the 1st of January, 1993. Accordingly, your rights and privileges have been suspended from the 1st of May, 1993 for one year and from year to year thereafter or until that fee has been paid, together with any other fee or levy owing to the Society which has then been owing for four months or longer.

The Register of Ontario Court, General Division will be notified of the suspension. Notice will also be published in the Benchers Bulletin and the Ontario Reports. ...

Richard N. Tinsley, Secretary"

(Ex. 4, Tab 9)

8. On May 19, 1993, the solicitor paid the balance of annual fees and his suspension was lifted effective that day.
9. The second suspension was for a period of 15 days.
10. During the second suspension, the solicitor was engaged in the practice of law by acting in a mortgage transaction and in a purchase transaction as is evident from:
  - his firm trust account bank statements for the period April 30, 1993 to May 31, 1993. (Ex. 4, Tab 10)
  - six (6) cheques drawn on his trust account dated between May 3, 1993 and May 14, 1993. (Ex. 4, Tab 11)
  - his deposit books for his trust account for May 6, 1993 and May 10, 1993. (Exhibit 4, Tab 12)
  - a reporting letter to a credit union dated May 7, 1993 advising the credit union that it held a valid first mortgage on certain property and a reporting letter to the mortgagor confirming registration of the mortgage. (Ex. 4, Tab 13)
  - a letter dated May 13, 1993 to the local Water Department with respect to the purchase transaction. (Ex. 4, Tab 14)
  - a requisition letter dated May 14, 1993 with respect to the purchase. (Ex. 4, Tab 15)
11. Effective November 1, 1993 and continuing until the hearing on March 9, 1994, the solicitor was under administrative suspension.

#### DECISION

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The solicitor did not attend the hearing although he had been served as required. The date of the hearing was scheduled on consent on November 2, 1993. No evidence was heard by way of explanation or contradiction. Accordingly, based on the evidence, the Committee made a finding of professional misconduct on both particulars.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that a penalty of a suspension for 75 days be imposed, to begin when the solicitor's administrative suspension ends.

REASONS FOR RECOMMENDATION

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The Committee reviewed the reports of Committees in the cases of Roderick Grant MacGregor and Marvin Larry Ellison. Convocation adopted those reports on April 22, 1993 and January 27, 1994, respectively. Those cases reflect the following propositions:

- the solicitor has an obligation to ensure that he or she is in good standing;
- the solicitor must be taken to know that he or she is not permitted to practice while under suspension;
- a solicitor who practices while under suspension breaches his or her obligation to the profession;
- a solicitor who practices while under suspension on more than one occasion should be treated more seriously than a case where there is a single default in a single period of suspension;
- a penalty of at least a period of suspension equal to the period of practising while under suspension should be imposed;
- an additional period of suspension should also be imposed as a specific and general deterrent;
- the solicitor should not be put in a better position by the disposition of the case than s/he would have been in had there been compliance with professional obligations.

The Committee agrees with the foregoing propositions and sees no reason to in this case to depart from that approach.

In view of the lapse of time between the hearing on March 9, 1994 and the date of preparation of this report, the Chair asked the Clerk to the Discipline Committee to advise as to the status of the solicitor's administrative suspension. The Clerk advised that the administrative suspension referred to in paragraph 11 above continued to the date when this report was signed.

The solicitor was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on April 14, 1978.

ALL OF WHICH is respectfully submitted

DATED this 15th day of December, 1994

Frances Kiteley  
Chair

26th January, 1995

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

Mr. Perrier asked that the Report be amended on page 1, particular 2.(b) and in the following Note by deleting the words "December 23" and replacing it with "December 3".

The Report as amended was adopted.

It was moved by Mr. McKinnon, seconded by Mr. Somerville that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 75 days to begin when the solicitor's administrative suspension ends.

Counsel, the Reporter and the public withdrew.

It was moved by Mr. Yachetti but failed for want of a seconder that the solicitor be disbarred.

The Recommendation as to Penalty was adopted.

Counsel, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 75 days beginning when the solicitor's administrative suspension ends.

Counsel retired.

Re: Bert JACQUES - Markham

The Secretary placed the matter before Convocation.

Mr. Blue withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 27th October, 1994, together with an Affidavit of Service sworn 19th December, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th December, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 26th January, 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

Kenneth E. Howie, Q.C., Chair  
Ian A. Blue, Q.C.  
Netty Graham

26th January, 1995

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

Christina Budweth  
for the Society

BERT JACQUES  
of the City  
of Markham  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 18, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 21, 1994 Complaint D173/94 was issued against Bert Jacques alleging that he was guilty of professional misconduct.

The matter was heard in public on October 18, 1994 before this Committee composed of Kenneth E. Howie Q.C., Chair, Netty Graham and Ian A. Blue, Q.C. The Solicitor was present at the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D173/94

2. (i) in acting on the refinancing of Apt. #108 at 3145 Queen Frederica Drive, he breached his duty; to his client, General Trust, by advancing the portion of the mortgage funds intended to be used for the payout of the second mortgage on the property directly to Mr. Yarde without the authority of General Trust; and;
- (ii) he issued a false report to General Trust certifying that they had a good and valid first mortgage on the property when in fact they had only a second mortgage.

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 D173/94 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 D173/94 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 58 years of age. He was called to the Bar in 1976 and practices as a sole practitioner with a general practice having an emphasis on real estate.

5. A Society auditor attended the Solicitor's offices on November 29, 1993. At the time of the auditor's attendance, she found the Solicitor's books and records to be fairly current, being several weeks in arrears. During the auditor's attendance she reviewed the file for the transaction detailed below.

6. The Solicitor's client, Learie Yarde, purchased 3145 Queen Frederica Drive, Apartment #1108, Mississauga, on or about September 30, 1987 for the sum of \$88,000. The Solicitor represented Mr. Yarde on the transaction. He also represented Mutual Trust Company on whose behalf he registered a first mortgage in the amount of \$66,000.

7. Secondary financing to complete the transaction was obtained by Mr. Yarde from Norman Ontario through a mortgage broker. A second mortgage was prepared and registered by solicitor, Seth Cook, September, 30, 1987. This mortgage secured the principal sum of \$13,200. A copy of the title abstract showing the initial two transactions is attached as Exhibit 1 to this Agreed Statement of Facts.

8. In early September, 1989, Mr, Yarde arranged a new first mortgage with General Trust on the above-noted property for \$90,000.00. Mr. Yarde required these funds to purchase a property described as Unit 165, 2001 Bonnymede Drive, Mississauga. The closing was scheduled to take place on September 22, 1989. The purpose of the refinancing was not known to General Trust and is not alleged by the Law Society to be relevant. As the Solicitor was the solicitor for Mr. Yarde, General Trust agreed to retain the Solicitor to act for them on the transaction. By letter dated September 21, 1989, General Trust confirmed the Solicitor's retainer. A copy of General Trust's September 21, 1989 letter of instruction complete with the commitment letter which was enclosed is attached as Exhibit 2 to this Agreed Statement of Facts. Page 2 of the commitment letter stated:

The Solicitor will confirm discharge of existing first and second mortgage(s) from the proceeds of this loan.

9. The Solicitor accepted the General Trust retainer. He provided an interim report dated September 26, 1989, a copy of which is attached as Exhibit 3 to this Agreed Statement of Facts. In his interim report, the Solicitor informed General Trust that the existing first and second mortgages totalling \$78,500, would be discharged out of the mortgage proceeds.

10. General Trust advanced funds pursuant to the mortgage commitment and the Solicitor registered a mortgage from Mr. Yarde to General Trust on September 28, 1989, securing the principal sum of \$90,000. A copy of the mortgage is attached as Exhibit 4 to this Agreed Statement of Facts. At the date of registration the mortgage described in paragraph's 6 & 7 above remained on title although the Mutual Trust mortgage was paid out.

11. The Solicitor would testify that prior to the advance of funds by General Trust he advised Mr. Yarde that both the Mutual Trust and the Ontario mortgages on the Queen Frederica Drive apartment would have to be paid off in order to give the General Trust mortgage first priority. The Solicitor would testify that Mr. Yarde seemed surprised and advised him that it was his belief that the Ontario mortgage could remain in second place. The Solicitor would testify that Mr. Yarde informed the Solicitor he would approach Mr. Ontario about transferring his mortgage to another one of his condominium units. He would also testify that shortly afterwards Mr. Ontario assured him the Ontario mortgage would be transferred. The Law Society would not offer any evidence to refute the evidence that Mr. Jacques would give.

12. The Solicitor would testify that based on Mr. Yarde's assurance that Mr. Ontario would transfer his mortgage, he applied the sum of \$23,600 toward Mr. Yarde's purchase of apartment #165 at 2001 Bonnymede Drive, Mississauga. The remaining \$65,655.43 was used to discharge the Mutual Trust first mortgage.

13. The Solicitor reported to General Trust by letter dated November 17, 1989, a copy of which is attached as Exhibit 5 to this Agreed Statement of Facts. The Solicitor reported to General Trust that it had a good and valid first mortgage on the property when, in fact, it did not.

14. The Solicitor wrote to Mr. Yarde by letter dated October 15, 1990, indicating that his recent examination of the "parcel register" indicated that Mr. Ontario's mortgage had not been transferred. The Solicitor advised Mr. Yarde to make arrangements to clear the title of Mr. Ontario's mortgage. A copy of the Solicitor's October 15, 1990 letter is attached as Exhibit 6 to this Agreed Statement of Facts. The Solicitor did not write to General Trust to advise them of this development.

15. On August 29, 1991 the Solicitor registered to discharge of the Mutual Trust Company mortgage. Copy of the discharge is attached as Exhibit 7 to this Agreed Statement of Facts.

16. By letter dated February 16, 1993, counsel for General Trust wrote to the Solicitor advising that Mr. Yarde had fallen behind in his mortgage payments. Counsel for General Trust advised that both General Trust and counsel for Mr. Ontario had commenced power of sale proceedings. Counsel for General Trust set out its requirements of the Solicitor in regards to rectifying its obligations to his former client. A copy of the February 16, 1993 letter is attached as Exhibit 8 to this Agreed Statement of Facts.

17. By letter dated February 19, 1993 the Solicitor wrote to Mr. Yarde enclosing a copy of General Trust's February 16, 1993 letter. A copy of the Solicitor's February 19, 1993 letter is attached as Exhibit 9 to this Agreed Statement of Facts.

18. The condominium unit was sold under power of sale on or about November 30, 1993 for \$62,000. General Trust suffered a shortfall of \$68,060.30, instead of \$51,241.25 which would have been the loss if its mortgage had been in first priority. Mr. Yarde filed an assignment in bankruptcy on December 22, 1993.

19. The Society has since interviewed Mr. Ontario and it would be his evidence that Mr. Yarde did not approach him about transferring the first mortgage to another of Mr. Yarde's properties. The Solicitor would not contest this evidence.

V. DISCIPLINE HISTORY

20. On April 27, 1993 the Solicitor was found guilty of professional misconduct for failing to maintain books and records in accordance with Sections 14 and 15 of Regulation of 573, as it then was; and, for practising law while under suspension for a period of approximately one month. The Solicitor was reprimanded in Committee and ordered to pay the Society's costs in the amount of \$1,000.00. The Solicitor also undertook to participate in the Practice Review Program. A copy of the transcript of the Reprimand is attached as Exhibit 10 to this agreed statement of facts.

DATED at Toronto this 17 day of October, 1994."

RECOMMENDATION AS TO PENALTY

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The Committee recommends to Convocation that the Solicitor be suspended for a period of three (3) months from practice and that he be assessed costs in the amount of \$3,000.00.

REASONS FOR DECISION

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We find the Solicitor honest and straightforward in his evidence and in his explanation for his conduct. It is clear that his only excuse for failing to protect the interests of his client, the Trust Company, was his reliance upon the promise of his client, Yarde, that he would in effect arrange for the transfer of the second mortgage to another property.

The solicitor is guilty of deliberately advancing the funds of his client, General Trust, to his client Yarde with full knowledge that the second mortgage had not been discharged.

After he had discovered that his client had failed to fulfill his agreement to have the second mortgage discharged from the title, he did nothing in terms of advising his client, General Trust. After the closing of the original transaction, he simply falsely certified the first mortgage interest of his client, General Trust.

It is quite clear that in this situation in which the solicitor clearly had two clients, he preferred the interests of his borrower client over those of his lender client.

At no time before he was approached by Solicitors acting on behalf of Guarantee did he disclose to his client, General Trust, that the second mortgage had not been removed from title.

It was disclosed that an E & O claim has been made against the Solicitor for the losses suffered by General Trust.

The Solicitor is heavily in debt, bankrupt in fact, and is considering an assignment. His submission to the Committee was that he would prefer a deferred suspension, if the Committee was of the view a suspension was necessary, and a deferral with respect to the obligation to pay costs.

26th January, 1995

Counsel for the Law Society, Ms. Christina Budweth, recommended that there should be a range of punishment - to a reprimand in Convocation to a short suspension. She urged that the Solicitor should pay costs in the amount of \$3,000.00 which were broken down as 32 hours of investigation and 6 hours time of counsel.

The Committee takes a serious view of the misconduct of the Solicitor. He personally did not profit from his conduct, but he caused his client a loss which was attributable directly to his failure to serve his client properly.

The Committee is of the view that a three (3) month suspension may hopefully prove not only to the solicitor himself, but to the profession generally, the heavy obligation whenever a Solicitor in a real estate transaction is going to act for both parties that he must serve both clients equally, and must in every case when a potential conflict arises, advise both clients and, if necessary, withdraw from acting for either client.

The Committee sees no reason why costs should not be assessed at the sum of \$3,000.00. Because of the financial difficulties of the solicitor, however, the Committee is satisfied that the \$3,000.00 figure for costs should be ordered to be paid at the rate of \$200.00 per month commencing in January, 1996.

ALL OF WHICH is respectfully submitted

DATED this 27th day of October, 1994

Kenneth E. Howie, Q.C.  
Chair

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

There were no submissions by counsel and the Report was adopted.

The Recommendation as to Penalty is that the solicitor be suspended for a period of 3 months and pay costs in the amount of \$3,000.

Ms. Budweth advised that she had had discussions with Mr. Morin, Duty Counsel, and informed Convocation that the solicitor wished to resign. Ms. Budweth further advised that the solicitor had been suspended since September 1994 and there were no outstanding complaints against him.

Mr. Morin asked Convocation to waive the request for costs. He asked that the solicitor be permitted to resign as a substitute for the recommended penalty that is a discipline resignation not administrative. He further advised that the solicitor was moving to the United States.

The Secretary advised that in order to be permitted to resign the solicitor must advertise his intention in the Ontario Reports and make an application to the Finance Department.

Mr. Morin asked that the solicitor's request for permission to resign be withdrawn and that the solicitor consents to a 3 month suspension.

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

It was moved by Mr. Topp, seconded by Mr. Campbell that costs be deleted.

Carried

The Recommendation as to Penalty as amended was adopted.

Counsel, the solicitor, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 3 months with no costs.

Counsel and solicitor retired.

.....

Convocation took a brief recess at 11:05 a.m. and resumed at 11:20 a.m.

Re: Joseph LINZNER - Scarborough

The Secretary placed the matter before Convocation.

Ms. Elliott withdrew for this matter.

Mr. Scott did not participate.

Mr. Neil Perrier appeared on behalf of the Society and Mr. Morin appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 13th December, 1994, together with an Affidavit of Service sworn 5th January, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 16th December, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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

Philip M. Epstein, Q.C., Chair  
Robert J. Carter, Q.C.  
Susan E. Elliott

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

Neil Perrier  
for the Society

JOSEPH LINZNER  
of the City  
of Scarborough  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 5, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On April 20, 1993, Complaint D108/93 was issued against Joseph Linzner alleging that he was guilty of professional misconduct.

The matter was heard in public on October 5, 1993 before this Committee composed of Philip M. Epstein, Q.C., Chair, Robert J. Carter, Q.C. and Susan E. Elliott. Mr. Linzner attended the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

2. a) He failed to comply with Sections 14 and 15 of Regulation 573 as it relates to maintenance of proper books and records;
- b) He failed to comply with Section 18 of Regulation 573 as it relates to producing all evidence, vouchers, records, books, and papers for the purpose of an investigation;
- d) He has failed to maintain sufficient trust balances to cover his obligations to clients and had trust shortages of up to \$18,600.54 in late 1988;
- e) He breached an Undertaking given to the law Society before the Discipline Committee on December 4, 1990 not to engage in any way in the practice of law until he had filed his Forms 2/3 for his fiscal year ending December 31, 1989.

Evidence

Part of the evidence in the hearing contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D108/93 and is prepared to proceed with a hearing of this matter on October 5 and 6, 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 D108/93 and admits the particulars contained therein, save and except particular 2(c). The Law Society will move to withdraw particular 2(c). The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor's practice consists almost exclusively of real estate law. He has been operating as a sole practitioner since 1979.

5. An investigation into the Solicitor's practice was conducted under Section 18 of Regulation 573 of the Law Society Act.

6. During the preliminary visits made by Law Society representatives to the Solicitor's office, the Solicitor could not provide books and records for periods subsequent to December 31, 1988. The Solicitor was not maintaining books and records in accordance with section 15(1) of the Regulation.

7. On August 13, 1992, the Solicitor was able to provide books and records only up to the end of December 31, 1991. By September 2, 1992, the Solicitor was able to provide a complete set of books and records pertaining to his trust account up to the end of August, 1992. Records for the general account were updated only to the end of July, 1992:

8. Examination of the books and records made available on September 2, 1992 indicated the following inadequacies:

- a. Overdrawn client trust ledger balances were not corrected forthwith;
- b. Differences existed between the reconciled bank balance and the total trust liabilities to clients. These differences were neither explained nor corrected forthwith;
- c. Fees drawn from the trust account prior to delivery of a client fee bill;
- d. Errors and other reconciling items recognized in monthly bank reconciliations not recognized and corrected forthwith;
- e. Source of funds received into trust not recorded on the trust receipts journal or on the deposit slips;
- f. Books and records entered in pencil;
- g. One stale-dated trust cheque for \$267.50 to Messrs. Kaplan, Brown used to reconcile the trust bank account; and
- h. Inactive client trust balances.

Particulars 2(a) and (b) - Failure to Maintain and Produce Books and Records

9. The Law Society examiner's initial visit to the Solicitor's office in January, 1991 disclosed that the Solicitor did not maintain books and records pertaining to his law practice since December, 1988. Consequently, co-signing controls were placed on the Solicitor's mixed trust account. Co-signing controls were removed in the summer of 1992.

10. Although frequent visits were subsequently made to the Solicitor's office in an attempt to review his books and records, the Solicitor was unable to produce more current records until a Law Society examiner attended at his office on August 13, 1992.

11. On August 13, 1992 the Solicitor produced for inspection books and records which appeared to be up to date; however, the Solicitor had prepared trust comparisons only up to the end of December 31, 1991. The examiner questioned the Solicitor as to his manner of recording expenditures for each transaction. The Solicitor informed the examiner that his practice is to record this accounting information on the ledger on the inside back of the related real estate client file.

12. When the examiner re-attended at the Solicitor's office on September 2, 1992, the Solicitor's trust comparisons were completed up to the end of July, 1992. Entries in his trust books were to the end of August, 1992; entries in his general books were to the end of July, 1992. The Solicitor advised that there was no point in entering August, 1992 information in the general books until his bank statement was received.

13. In subsequent discussions with the Solicitor regarding errors that have occurred in relation to his trust account, he advised the examiner that he had not been maintaining client trust ledgers for each client transaction. The particular errors will be discussed later in this Agreed Statement of Facts.

14. The Solicitor did not maintain proper, and/or complete, books and records. This was admitted by the Solicitor and is evidenced by the fact that errors made on his trust account in 1988 were not discovered and corrected until 1990 when the 1988 annual filing was prepared.

#### Particular 2(e) - Breach of Undertaking

15. The Solicitor failed to file annual Form 2/3 reports for a number of years with the Law Society because he had not been maintaining books and records in connection with his practice. The Solicitor was not able to produce books and records to the Law Society representative for inspection.

16. Under section 16(2) of the Regulation, a member is obliged to file with the Law Society Forms 2 and 3 within six months of the end of his fiscal year.

17. As at July 1, 1990, the Solicitor should have, but had not, filed for each fiscal year up to and including 1989. At that point his annual filings were late for his fiscal years ending December 31, 1987, 1988, and 1989.

18. A Complaint was sworn in June, 1990 alleging that the Solicitor was guilty of professional misconduct by reason of his not having filed these annual forms. The Solicitor petitioned the Discipline Committee for, and was granted, adjournments of his hearing on three occasions for the purpose of bringing his records up to date.

19. The Solicitor's final adjournment was to December 4, 1990, at which time the hearing proceeded. He was to have annual filings for all three years submitted by that date. The Solicitor was not able to complete his Forms 2/3 for the fiscal year ended December 31, 1989 prior to the hearing December 4, 1990. At that time, he was found guilty of professional misconduct and reprimanded in Committee on the basis of a written Undertaking he provided to the Law Society.

20. The Solicitor signed an "Undertaking" dated December 6, 1990 (Document Book, Tab 1) that he would have the 1989 filing submitted by December 10, 1990, failing which he would discontinue his practice of law until such time as he was able to complete and submit the Forms.

21. The Solicitor did not submit his 1989 Forms until April 10, 1991, although it is apparent that he continued to practise law in breach of his December 4, 1990 Undertaking to the Law Society.

26th January, 1995

22. The Solicitor was requested to produce several real estate files which related to transactions that had closed between December 1990 and April 1991. A file referenced by "*Scarlat purchase from Kim*" indicated that the Solicitor had co-signed a letter issued to Shopper's Trust regarding confirmation that the transaction had closed (Document Book, Tab 2).

23. As shown at Document Book, Tab 3, closing funds were received into the Solicitor's trust account and cheques were paid out from the same account. The Solicitor sent the reporting letter to Mr. and Mrs. Scarlat December 31st 1990 (Document Book, Tab 4).

24. A file referenced as "*Chetty purchase from Rainbow Village*" indicates that funds were received and disbursed in a real estate purchase by the Solicitor. The Solicitor corresponded with the purchasers, Mr. and Mrs. Chetty (see Document Book, Tab 5, copy of the client trust ledger and final report to the Chettys). However, there was another solicitor, Mr. Reginald P. Rawana, who corresponded with the mortgagee, The Bank of Nova Scotia (Document Book, Tab 6).

25. In or about February of 1991, the Solicitor acted on the following files: "*DeClerq purchase from McGraw*", "*Southern purchase from Leung*", "*Cheok purchase from Price Waterhouse*", and "*Francis purchase from Cougs Investment*". Copies of letters and documents from these files are included in Document Book, Tabs 7, 8, 9, and 10, respectively. It is clear from these documents, and the Solicitor's bank statements (Document Book, Tab 11), and deposit slips (Document Book, Tab 12), that the Solicitor was practising law during this period.

26. At Document Book, Tab 13 is a memorandum addressed to Mr. Yakimovich January 4th 1991 from Mr. Ken Jones which states that as of the date of the memorandum, the Solicitor "has yet to make his filings for the year ending December 31st 1989". Mr. Jones states that the Solicitor claimed he was not very busy in his law practice, yet it took him several months to complete his annual filings. Mr. Jones expressed some concerns that the Solicitor was continuing his practice of law in spite of his undertaking.

27. Inquiries made from records of the Administration Section of the Department of Audit and Investigation indicate that the Solicitor's filing for 1989 was not received by the Law Society until April 5, 1991 (Document Book, Tab 14). The filings for 1989 received by the Law Society are contained at Document Book, Tab 15.

28. The Solicitor has therefore breached his Undertaking to the Law Society not to engage in the practice of law until he had filed his Forms 2/3 for the fiscal year ended December 31, 1989.

Particular 2(d) - Trust Shortages Up to the Sum of \$18,600.54

29. The Solicitor has failed to maintain sufficient balances in the trust account to cover client liabilities. The shortages which are set out in Document Book, Tab 16 between the funds the Solicitor should have had available in his trust bank account (client liabilities), and what he actually did have available, are compounded by the fact that the total client liabilities include negative client trust balances. The Solicitor overdrew several client trust ledger accounts.

30. The Solicitor has had overdrawn client balances since at least April, 1987. Since December, 1988, the Solicitor has also had a further, unexplained difference between the amount he should be holding in the trust account, and the actual funds held in that account. The Solicitor has failed to maintain sufficient balances in the mixed trust account to cover client liabilities.

31. An examination of the Solicitor's books and records indicates that the shortage continued until December, 1991. The total shortages, including both overdrawn client balances and unexplained shortages, amounted to as much as \$18,600.54 in late 1988. All shortages were corrected by the end of December, 1991. The chart attached at Document Book, Tab 16 summarizes the amount of the shortages which have existed in previous years.

32. As the Solicitor was not maintaining books and records during this time period, it appears the error probably was not detected until the filing was prepared and submitted in late 1991. The Solicitor deposited \$2,644.99 into the trust account in December, 1991 to clear the remaining shortages.

Particular 2(c) - Failure to File

33. The Solicitor's fiscal year end is December 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending December 31, 1990 as required by s.16(2) of Regulation 573 under the Law Society Act.

34. A Notice of Default in Annual Filing (Document Book, Tab 17) dated July 9, 1991 was forwarded to the Solicitor by the Law Society.

35. By registered letter dated August 9, 1991 (Document Book, Tab 18), the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500 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 respond to this correspondence.

36. The late filing fee began to accrue on August 26, 1991.

37. The Solicitor filed his Forms 2/3 for his fiscal year ending December 31, 1990 on November 11, 1991 and paid a late filing levy in the amount of \$770 on January 22, 1992.

38. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending December 31, 1991 as required by s. 16(2) of Regulation 573 under the Law Society Act.

39. A Notice of Default in Annual Filing (Document Book, Tab 19) dated July 14, 1992 was forwarded to the Solicitor by the Law Society.

40. By registered letter dated August 14, 1992 (Document Book, Tab 20), the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500 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 respond to this correspondence.

41. The late filing fee began to accrue on August 31, 1992.

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42. 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.

43. The Solicitor filed his Forms 2/3 for his fiscal year ending December 31, 1991 on December 15, 1992 and paid a late filing levy in the amount of \$1,060 on January 26, 1993.

#### Prior Discipline

44. At a hearing on December 4, 1990, the Solicitor was found guilty of professional misconduct and reprimanded in Committee in regards to not submitting his Form 2/3 filings for 1987, 1988 and 1989 within six months of the termination of his fiscal year end.

45. The Solicitor's hearing had been adjourned three times prior to eventually being heard on December 4, 1990 in order to give him an opportunity to bring his Forms up to date before the matter was dealt with by the Discipline Committee.

46. The Solicitor filed for his fiscal year ending December 31, 1987 on October 29, 1990 and he submitted his filing for 1988 on the day of the hearing, December 4, 1990. His 1989 filing was still outstanding.

47. The Solicitor signed the Undertaking (Document Book, Tab 1) to either file his 1989 Forms by December 10, 1990 or not practise law until such filings were made.

DATED at Toronto this 5th day of October, 1993."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Joseph Linzner be suspended for a period of 3 months effective February 1, 1994.

#### REASONS FOR RECOMMENDATION

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The purpose of the delayed suspension was to give the solicitor an opportunity to complete certain files that were outstanding without disadvantaging the clients. These reasons have been delayed through no fault of Mr. Linzner. Apparently, Mr. Linzner has not renewed his membership in the Society or paid his up-to-date fees. Given that we recommend the suspension end effectively on April 30, 1994, the solicitor should be free to resume practice once his fees are paid in accordance with the Law Society regulations.

The solicitor must be suspended because he was clearly practicing while he was under administrative suspension by the Law Society with respect to failure to file his forms 2/3 for his fiscal year ending December 31, 1989.

The solicitor clearly had financial problems and handled very few transaction during the administrative suspension but nevertheless, breached an undertaking given to the Law Society that he would not practice until the Form 2/3 was filed. The solicitor is not making a living at the practice of law and is supplementing his income by repairing computers. Although he had a real

26th January, 1995

estate practice, it went progressively downhill, and he was unable to earn sufficient monies to maintain his practice. The solicitor was forthright that he was guilty of the offenses as charged but it was clear to the members of the Committee that his financial circumstances are at the root of this problem.

The suspension may mean little in the context of this particular case given the solicitors present inability to pay his fees. Nevertheless, it is an indication of the Committee's disapproval of the solicitor's breach of the undertaking and his continuing to practice, albeit in a very small way, while he was under suspension.

Joseph Linzner was called to the Bar on the 11th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 13th day of December, 1994

Philip M. Epstein, Q.C.  
Chair

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

Mr. Morin made brief submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Mr. Campbell that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 3 months effective February 1, 1994.

Mr. Morin made submissions in favour of taking into account the solicitor voluntarily ceased practising on February 1, 1994.

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

The Recommendation as to Penalty was adopted.

Counsel, the solicitor, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 3 months from February 1, to April 30, 1994, that suspension deemed to have been completed after the solicitor voluntarily ceased practising on February 1, 1994.

Counsel and solicitor retired.

Re: Charles MORGAN - Toronto

The Secretary placed the matter before Convocation.

Mr. Blue withdrew for this matter.

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

26th January, 1995

Convocation had before it the Report of the Discipline Committee dated 30th November, 1994, together with an Affidavit of Service sworn 19th December, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th December, 1994 (marked Exhibit 1) and the Report and Affidavit of Attempted Service of Mr. Michael Mitchell 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

Kenneth E. Howie, Q.C., Chair  
Ian A. Blue, Q.C.  
Netty Graham

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

Georgette Gagnon  
for the Society

CHARLES MORGAN  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 19, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 4, 1994 Complaint D135/94 was issued against Charles Morgan alleging that he was guilty of professional misconduct.

The matter was heard in public on October 19, 1994 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Ian A. Blue, Q.C. and Netty Graham. The Solicitor was not present nor represented. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

26th January, 1995

Complaint D135/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending March 30, 1991, March 30, 1992, and March 30, 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

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

"STATEMENT OF FACTS

1. The Solicitor was called to the Bar on March 30, 1990.
2. The Solicitor's filings are due on or before November 30 in each year. The Solicitor has not filed a Form 2 or Form 2-3 since he was called to the Bar on March 30, 1990, as required by S.16(2) of Regulation 708 under the Law Society Act.

1991

3. A Notice of Default in Annual Filing, dated October 4, 1991 was delivered to the Solicitor by the Law Society at the Solicitor's address as recorded on the Law Society's Records Department computer. (Document Book, Tab 1) The Solicitor did not reply to this correspondence.
4. By registered mail, the Law Society delivered a Second Notice of Default in Annual Filing dated November 8, 1991. 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 applied on filings made after their due dates 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 Law Society's Second Notice was returned to the Law Society by Canada Post and marked as unclaimed mail. (Document Book, Tab 2)
5. The late filing fee began to accrue on November 22, 1991.

1992

6. By registered mail the Law Society delivered a letter to the Solicitor dated March 6, 1992 advising him that his rights and privileges as a member of the Law Society were suspended for failure to pay annual membership fees. The Law Society's letter of March 6, 1992 was not signed for by any person at the Solicitor's address as recorded on the Law Society's Records Department nor was it returned to the Law Society by Canada Post and marked unclaimed mail. (Document Book, Tab 3)
7. A Notice of Default in Annual Filing dated October 6, 1992 was delivered to the Solicitor by the Law Society at the Solicitor's address as recorded on the Law Society's Records Department computer (Document Book, Tab 4). The Solicitor did not reply to this correspondence.

26th January, 1995

8. By registered mail, the Law Society delivered a Second Notice of Default in Annual to the Solicitor dated November 9, 1992. 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 his from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Law Society's Second Notice was returned by Canada Post and marked as unclaimed mail. (Document Book, Tab 5)

1993

9. By registered mail, the Law Society delivered a letter to the Solicitor dated June 9, 1993 enclosing copies of the Notices of Default in Annual Filings. The letter further advised the Solicitor that he had failed to file a change of address notice as required under Section 16(1) of the Law Society Act. As a result, the Notices of Default in the filing of Forms 2 and 3 were sent to his last known address as recorded on the Records Department computer and subsequently returned. The Solicitor was further advised that it was his obligation to notify the Law Society of an address change and that no extensions on the date of the late filing penalty accruing would be granted. The Law Society's letter of June 9, 1993 was signed for by a person at the Solicitor's address and delivered on June 14, 1993. (Document Book, Tab 6)

10. A Notice of Default in Annual Filing dated October 6, 1993 was delivered to the Solicitor by the Law Society (Document Book, Tab 7). The Solicitor did not reply to this correspondence.

11. By registered mail, the Law Society delivered a Second Default in Annual Filing to the Solicitor dated November 9, 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 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 Law Society's Second Notice was returned to the Law Society by Canada Post and marked as unclaimed mail. (Document Book, Tab 8)

12. The Law Society has never received a change of address from the Solicitor.

V. PRESENT STATUS

13. The Solicitor remains under administrative suspension.

14. The Solicitor has not made the required filings for the fiscal years ending November 30, 1991, 1992 and 1993.

IV. DISCIPLINE HISTORY

15. The Solicitor does not have a discipline history.

DATED at Toronto this 19th day of October, 1994

26th January, 1995

RECOMMENDATIONS AS TO PENALTY

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The Committee recommends that the Solicitor be suspended for a period of three months, such suspension to continue thereafter until the Solicitor has made his filings. In the event that the Solicitor should appear before Convocation, and his filings are made at that time, then the recommendation as to penalty will be a reprimand in Convocation. The Solicitor is also to pay the Society's costs in the amount of \$3,000.00.

REASONS FOR RECOMMENDATION

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The Solicitor did not appear at the hearing and the panel noted from the endorsement on the record that he did not appear on the last occasion the matter was dealt with as well. The Chair of the previous panel instructed the Law Society staff to advertise in a Toronto daily publication notifying the Solicitor that the matter would be dealt with on October 18 and 19, 1994. Attached to this report and marked as Schedule "A" is a copy of the Notices as they appeared in the Toronto Star. The previous panel had also determined that the notice of the prior date for hearing was proper.

The Solicitor is presently under administrative suspension and has been since January of 1992. The Society heard evidence from Irene Andrighetti, a Supervisor in the Audit Department of the Law Society and she verified the Statement of Facts and advised that they have been set out from the records of the Law Society which she supplied. She also identified the materials and their sources of the documents in the Document Book and swore that the information in both the Statement of Facts and the Document Book to be true and both are attached hereto.

Although the nature of the misconduct found herein would result in a reprimand in Committee usually, this case is quite different. It is a fundamental matter to comply with the administration requirements of the Society and as the Solicitor is so obviously far behind in his filings and as he has already been suspended for a considerable period of time, one might rightfully ask, does this Solicitor really want to practice law? It was the Committee's view, and in agreement with the submissions made by the Law Society, that in all of the circumstances of this particular case the recommendation as to penalty has been made even though there has been no previous discipline record.

Charles Morgan was called to the Bar on the 30th day of March, 1990.

ALL OF WHICH is respectfully submitted

DATED this 30th day of November, 1994

Netty Graham (for the Committee)

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

Ms. Gagnon asked that an amendment be made to page 1 of the Report, first sentence under the heading Evidence, by deleting the word "Agreed".

The Report as amended was adopted.

26th January, 1995

Ms. Gagnon advised Convocation that the solicitor's filings had not been made and he was presently under administrative suspension.

It was moved by Mr. Campbell, seconded by Mr. McKinnon that the Recommendation as to Penalty be adopted that is, that the solicitor be suspended for a period of 3 months, to continue thereafter until filings are made and to pay costs in the amount of \$3,000.

Mr. Arnup asked that an amendment be made to the recommended penalty that the discipline suspension follow the administrative suspension.

The Recommendation as to Penalty as amended was adopted.

Counsel retired.

Re: David Jean ROYER - Cornwall

The Secretary placed the matter before Convocation.

Ms. Richardson withdrew for this matter.

Mr. Scott did not participate.

Ms. Christina 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 12th December, 1994, together with an Affidavit of Service sworn 19th December, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 15th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip Epstein, Q.C., Chair  
Mary P. Weaver, Q.C.  
Nora Richardson

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

Christina Budweth  
for the Society

DAVID JEAN ROYER  
of the City  
of Cornwall  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: March 9 and 24, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 21, 1993 Complaint D145/93 was issued against David Jean Royer and on September 13, 1993 Complaint D244/93 was issued against David Jean Royer, both alleging that he was guilty of professional misconduct.

The matters were heard in public on March 9, 1994 and March 24, 1994 before this Committee composed of Philip M. Epstein, Q.C., Chair, Mary P. Weaver, Q.C., and Nora Richardson. The Solicitor was not present on March 9, 1994 but attended on March 24, 1994. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D145/93

2. a) He breached escrow terms imposed on him by Jack Goodman, a fellow solicitor, by using letters delivered to him by Mr. Goodman to lift registered executions without complying with conditions requiring the payment of funds by him to Mr. Goodman.
- b) He is guilty of professional misconduct in that he practised law while suspended by the Law Society for the non-payment of his Errors and Omissions levy.
- c) He failed to file with the Society within six months of the termination of his fiscal year ending June 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 D244/93

2. a) he undertook to act for a client, Richard Daze, in connection with certain legal matters during the period of December 1992 to and including May 1993, during which time he had been suspended by the Law Society from the practice of law;
- b) during the time set out in sub-paragraph (a) that he purported to practise law, he accepted monies from Richard Daze to be held in trust as a retainer against his fees but has failed to account for these monies or to return them to the complainant.
- c) he has failed to provide a reply to the Society regarding a compliant by Richard Daze despite letters dated June 21 and August 19, 1993 and telephone requests on July 22, and August 9, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D145/93 and is prepared to proceed with a hearing of this matter on December 14 and 15, 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 D145/93 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 was called to the bar on April 9, 1979. He practised as a partner in the firm Bergeron, Royer in Cornwall, Ontario until June 24, 1993 at which date he was suspended by an order of Convocation resulting out of the discipline set out in paragraph 20.

5. The Solicitor was suspended from the practice of law beginning November 2, 1992 as a result of his failure to pay his errors and omissions levy. The Solicitor did not take any and has not to date taken steps to bring himself into good status.

Particular 2(a)

6. The Solicitor was retained by Peter and Gail Savoie to act on their behalf on the sale of a property located in Cornwall, Ontario. Mr. and Mrs. Savoie were the subject of at least two writs of execution, numbered 14161/92 and 14135/93.

7. In preparation for the closing of the transaction, the Solicitor telephone solicitor Jack Goodman, solicitor for the Canadian Imperial Bank of Commerce on November 13, 1992 in respect to a judgment which the CIBC had registered against his clients.

8. Later that day, the Solicitor's secretary contacted Mr. Goodman and advised that in order to lift the executions original signed letters would be required from Mr. Goodman directed to the Sheriff in appropriate counties asking that the executions be lifted.

9. By letter of that same day, a copy of which, complete with enclosures, is attached as Exhibit 1 to this agreed statement of facts, Mr. Goodman provided the Solicitor with the letters requested. In his covering letter Mr. Goodman stated:

These letters are sent to you on the express understanding that you undertake to forward to our office a certified cheque in the amount of \$16,588.88 as of November 16, 1992 with a per diem of \$5.02 to the date of payment together with a cheque payable to us in the amount of \$578.35 for our fees in respect of lifting the above executions.

26th January, 1995

10. On November 17, 1992, the Solicitor wrote to Mr. Goodman providing him with a cheque in the amount of \$15,172.88. In his November 17 letter, the Solicitor explained the source of the balance of the funds. A copy of the Solicitor's November 17, 1992 letter is attached as Exhibit 2 to this agreed statement of facts.

11. Mr. Goodman responded by letter dated November 19, 1992, a copy of which is attached as Exhibit 3 to this agreed statement of facts. In his November 19 letter, Mr. Goodman specifically reminded the Solicitor that the letters lifting the executions were sent on the express understanding that balances as set out in the letter including the payment for legal fees would be honoured. The Solicitor did not respond to Mr. Goodman's correspondence.

12. Mr. Goodman wrote again by letter dated November 26, 1992, a copy of which is attached as Exhibit 4 to this agreed statement of facts.

13. The Solicitor responded by letter dated December 3, 1992 in which he advised that there were "insufficient funds to pay your firm the full balance". The Solicitor made no reference to the payment of any costs being claimed by Mr. Goodman. A copy of the Solicitor's December 3, 1992 letter is attached as Exhibit 5 to this agreed statement of facts.

14. To date, the Solicitor has failed to honour his undertaking to Mr. Goodman. Particular 2(b)

15. The Solicitor admits that his actions in respect of this matter constitute practice while under suspension in contravention of Convocation's order. However he states it did not come to his attention until month of Dec and that the registered notice was misplaced.

Particular 2(c)

16. The Solicitor's fiscal year end is June 30.

17. The Solicitor did not file his form 2 or form 3 within six months of the fiscal year ended June 30, 1992 as required by section 16(2) of Regulation 708 under the Law Society Act.

18. The Solicitor was provided with notices regarding his failure to file on January 6, 1993 and February 11, 1993. Copies of the notices are attached collectively as Exhibit 6 to this agreed statement of facts.

Solicitor state all financial material was brought to his accountant Mike Doyle in early January 1993 for completion.

19. To date, the Solicitor has not yet filed the required forms. Solicitor states he does not have funds to pay his accountant for completion of Form. Also that an auditor from the Law Society review all trust account in March of 1993 and found them to be in order.

#### V. PRIOR DISCIPLINE

20. On January 28, 1992, the Solicitor was found guilty of professional misconduct for acting in a conflict of interest and borrowing from a client; as well as, filing false forms 2/3 with the Law Society. The Solicitor was reprimanded in committee on that occasion.

26th January, 1995

21. In March, 1993, the Solicitor was found guilty of professional misconduct for having borrowed from a client; for misleading the Law Society in respect of that borrowing; as well as, swearing a false statutory declaration. The matter was heard in Convocation on June 24, 1993. Convocation accepted the committee's recommendation that the Solicitor be suspended for a fixed term of one year and thereafter until such time as he had completed all his filings for the years 1989, 1990 and 1991.

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D244/93 and is prepared to proceed with a hearing of this matter on December 14 and 15, 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.

II. ADMISSIONS

3. The Solicitor has reviewed Complaint D244/93 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 was called to the bar on April 9, 1979. He practised as a partner in the firm Bergeron, Royer in Cornwall, Ontario until June 24, 1993 at which date he was suspended by an order of Convocation resulting out of the discipline set out in paragraph 24.

Particulars 2(a) and (b) - Practice While Under Suspension

5. The Solicitor was suspended from the practice of law beginning November 2, 1992 as a result of his failure to pay his errors and omissions levy. The Solicitor did not take any and has not to date taken steps to bring himself into good status.

6. During the spring of 1992 a Richard Daze retained the Solicitor to act for him in a matrimonial matter. Mr. Daze provided the Solicitor with \$1,000 as a retainer.

7. To the best of Mr. Daze's knowledge, the Solicitor sent one letter to Mrs. Daze's solicitor on his behalf.

8. Mr. Daze attended at the Solicitor's office on two occasions in the summer of 1992 to discuss the matter as he was concerned that he was still living in the matrimonial home with his wife and was anxious to resolve the matter. The Solicitor, although he promised to do so, did not report to Mr. Daze.

9. In December, 1992, Mr. Daze was involved in an automobile accident. The Solicitor advised Mr. Daze that he would handle the matter on his behalf and would negotiate a settlement with the insurer. The Solicitor asked for a \$1,000 retainer but Mr. Daze was only able to provide \$250 which he understood would represent disbursements.

26th January, 1995

10. During December 1992 and early January 1993, Mr. Daze attempted, unsuccessfully, to contact the Solicitor on a number of occasions. On occasion, Mr. Daze would speak to the Solicitor's secretary. At other times when he attended at the Solicitor's office he found it to be locked.

11. Mr. Daze spoke with the Solicitor on January 6, 1993. The Solicitor assured Mr. Daze that he was moving forward with both matters but that he required another \$1,000 by way of a retainer. Mr. Daze provided the additional \$1,000 requested.

12. In March, 1993, the Solicitor telephoned Mr. Daze to advise that the insurer, Pilot Insurance, had arranged for a medical examination for Mr. Daze in Kingston. He advised Mr. Daze that he would leave instructions regarding the medical appointment stapled to his office door. Mr. Daze attended at the Solicitor's office but found no such information.

13. Mr. Daze visited the Solicitor's office on a number of occasions in an attempt to determine the status of his files and on each occasion the door was locked.

14. In May, 1993, Mr. Daze's wife's solicitor wrote to Mr. Daze advising that he was to respond to a settlement proposal put within seven days or litigation regarding the matter would be commenced.

15. Mr. Daze immediately attended at the Solicitor's office and found the office to be vacant.

16. Mr. Daze was finally able to determine that a bulk of the Solicitor's files had been transferred to solicitor Don White of Cornwall. Mr. Daze visited Mr. White's office and was advised the file could not be located. Eventually the file was located and turned over to Mr. Daze; however, Mr. Daze did not receive any of the \$2,250 retainer funds with which he had provided the Solicitor.

17. Mr. Daze has now retained Mr. White to act for him both in the insurance and matrimonial matters.

18. Mr. Daze made a complaint to the Law Society regarding the Solicitor's actions by letter dated May 30, 1993. Under cover of correspondence dated June 21, 1993, the Society wrote to the Solicitor to seek his response to Mr. Daze's complaint. A copy of the Society's June 21, 1993 letter complete with enclosure is attached as Exhibit 1 to this agreed statement of facts.

19. On July 22, 1993, a staff member of the Society spoke to the Solicitor by telephone requesting the response sought in the Society's letter of June 21. The Solicitor agreed to provide a response by July 30, 1993. No response was received.

20. On August 9, 1993, a staff member of the Society telephoned the Solicitor again to request a response to the earlier correspondence. A message was left with the Solicitor to return the call. No response was received.

21. By registered letter dated August 19, 1993, the Society once again wrote to the Solicitor to request a reply to earlier correspondence. A copy of the Society's August 19, 1993 letter is attached as Exhibit 2 to this agreed statement of facts.

22. To date, the Solicitor has failed to reply to the Society's inquiries regarding Mr. Daze's complaint.

26th January, 1995

V. PRIOR DISCIPLINE

23. On January 28, 1992, the Solicitor was found guilty of professional misconduct for acting in a conflict of interest and borrowing from a client; as well as, filing false forms 2/3 with the Law Society. The Solicitor was reprimanded in committee on that occasion.

24. In March, 1993, the Solicitor was found guilty of professional misconduct for having borrowed from a client; for misleading the Law Society in respect of that borrowing; as well as, swearing a false statutory declaration. The matter was heard in Convocation on June 24, 1993. Convocation accepted the committee's recommendation that the Solicitor be suspended for a fixed term of one year and thereafter until such time as he had completed all his filings for the years 1989, 1990 and 1991.

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

RECOMMENDATION AS TO PENALTY

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The Committee recommends that David Jean Royer be granted permission to resign. If the Solicitor fails to do so within 30 days, we recommend that he be disbarred.

REASONS FOR RECOMMENDATION

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The solicitor did not attend the initial hearing although duly served. He was found guilty of professional misconduct and given an opportunity to appear and make representations as to penalty. The solicitor did so without counsel.

The solicitor had not been practicing for about two years. He has health problems and appeared to the committee to be very depressed. He has a previous record of some severity. The matters for which the solicitor has been found guilty are serious, although by themselves might not warrant disbarment. Nevertheless, the solicitor at this point in his life really appears to be ungovernable and is a potential danger to the public. Accordingly, in all of the particular circumstances, we believe the Committee recommends the appropriate penalty is to permit the solicitor to resign his membership in the Society. If the Solicitor fails to do so within thirty (30) days, we recommend that he be disbarred.

David Jean Royer was called to the Bar on the 9th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 12th day of December, 1995

Philip Epstein, Q.C.  
Chair

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

Carried

26th January, 1995

Mr. Copeland asked that the Report be amended on the last page by changing the date of the Report to "December 12, 1994" instead of December 12, 1995.

It was moved by Mr. Campbell, seconded by Mr. Blue that the Recommendation as to Penalty be adopted, that is that the solicitor be permitted to resign and if he fails to do so within 30 days, that he be disbarred.

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

The following amendments were made:

Page 6, second paragraph - should read "Dated at Toronto this 9th day of March, 1994" not 1993. Also the same amendment on page 9, last paragraph - March 9th, 1994 not 1993.

Page 10, second paragraph under heading of Reasons for Recommendation - sentence beginning with "Accordingly", by deleting the words "the Committee recommends" so that the sentence reads:

Accordingly, in all of the particular circumstances we believe the appropriate penalty....

Counsel, the Reporter and the public withdrew.

It was moved by Mr. Topp, seconded by Mr. Yachetti that the solicitor be disbarred.

Carried

The motion to adopt the recommended penalty was not put.

Counsel, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be disbarred.

Counsel retired.

Re: Edward John BROGDEN - Sarnia

The Secretary placed the matter before Convocation.

Mr. Blue withdrew for this matter.

Ms. Christina Budweth appeared for the Society and Mr. Morin appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 29th November, 1994, together with an Affidavit of Service sworn 19th December, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th December, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 26th January, 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

26th January, 1995

Kenneth E. Howie, Q.C. Chair  
Ian Blue, Q.C.  
Mrs. Netty Graham

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

Christina Budweth  
for the Society

EDWARD JOHN BROGDEN  
of the City  
of Sarnia  
a barrister and solicitor

Joseph Foreman  
for the solicitor

Heard: October 18, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On February 28, 1994 Complaint D427/93 was issued against Edward John Brogden alleging that he was guilty of professional misconduct.

The matter was heard in public on October 18, 1994 before this committee composed of Kenneth E. Howie, Q.C., Chair, Ian Blue, Q.C. and Mrs. Netty Graham. The Solicitor was present and was represented by Joseph Foreman. Christina Budweth appeared on behalf of the Law Society.

DECISION

---

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

Complaint D427/93

2. b) He has breached an Order of Convocation by continuing to practise while under suspension during the period June 1st to June 22nd 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D427/93 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 D427/93 and this Agreed Statement of Facts with his counsel, Joseph Foreman, and admits the particular 2(b) contained therein. The Solicitor further admits that the said particular constitutes professional misconduct.

IV. FACTS

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

Particular 2(b)

He breached an Order of Convocation by continuing to practise law while under suspension during the period June 1, 1993 to June 22, 1993.

5. By registered mail dated December 2, 1992 (Document Book, Tab 1), the Law Society advised the Solicitor that his rights and privileges as a member had been suspended effective December 1, 1992 as a result of his failure to pay his annual fees. The Solicitor paid the outstanding annual fee and was reinstated to the practice of law on December 7, 1992.

6. The Law Society forwarded to the Solicitor a final Errors and Omissions Insurance Levy notice, dated April 1, 1993 (Document Book, Tab 2). The final notice advised the Solicitor that should he fail to pay any fee or levy within four months after the date on which payment is due, that pursuant to section 36 of the Law Society Act, Convocation may order that his rights and privileges as a member be suspended for such time and on such terms that it considers proper in the circumstances. The Solicitor did not pay the outstanding Errors and Omissions Insurance Levy.

7. The Law Society forwarded to the Solicitor an additional final Errors and Omissions Insurance levy notice, dated May 3, 1993, (Document Book, Tab 3) along with a further notice respecting payment of the Errors and Omissions levy. The notices advised the Solicitor that should he fail to pay the levy by May 31, 1993 he would be suspended. The Solicitor did not pay the outstanding Errors and Omissions Insurance Levy.

8. By registered mail dated June 1, 1993 (Document Book, Tab 4), the Law Society advised the Solicitor that his rights and privileges as a member had been ordered suspended by Convocation effective June 1, 1993 as a result of his failure to pay his errors and omissions insurance plan levy for the period January 1, 1993 through June 30, 1993. The Law Society's June 1, 1993 letter was returned by the post office marked "unclaimed".

9. The Solicitor paid the outstanding errors and omissions insurance plan levy on June 22, 1993 and was reinstated to the practice of law.

10. The Solicitor continued to practice law from June 1, 1993 to June 22, 1993 while suspended from the practice of law as evidenced by the following:

- Solicitor's date book, docket and legal aid account indicated he represented Roger Carron in a criminal hearing on June 2, 1993 (Document Book, Tab 5)
- Solicitor's date book, and docket indicated he represented Denny McGee in a criminal hearing on June 2, 1993 (Document Book, Tab 6)
- Solicitor's date book and docket indicated he represented Denson Riley in a criminal hearing on June 3, 1993 (Document Book, Tab 7)

26th January, 1995

- Solicitor's date book, docket, legal aid account and letter to Paul Abma dated June 8, 1993, indicated he represented Paul Abma in a criminal hearing on June 8, 1993 (Document Book, Tab 8)
- Solicitor's date book, docket, legal aid account and letter to the Assistant Crown Attorney, dated June 9, 1993, indicated he represented Roger Carron in a criminal hearing on June 9, 1993 (Document Book, Tab 9)
- Solicitor's date book, docket, and legal aid account indicated he represented Shannon Avery in a criminal hearing on June 16, 1993 (Document Book, Tab 10)
- Solicitor's date book and docket indicated he represented Brian Bell in a criminal hearing on June 18, 1993 (Document Book, Tab 11)
- Solicitor deposited funds into his trust account, account #1014-04 on June 4, 1993, June 11, 1993, June 14, 1993, and June 16, 1993 (Document Book, Tab 12)
- Solicitor issued cheque #2105, to Minister of Finance in the amount of \$170.000 from his trust account (Document Book, Tab 13)
- Solicitor issued cheque #2094, to Minister of Finance in the amount of \$27.00 from his trust account (Document Book, Tab 13)

11. By way of explanation, the Solicitor advised the Law Society that he did not know he was suspended until he noticed his name in the Ontario Reports on June 22, 1993 listed under members who had been suspended. The Solicitor stated he paid the outstanding Errors and Omissions Insurance levy at that time. The Solicitor further advised that upon receipt of the Law Society final notice dated April 1, 1993, he was waiting for payment of his Legal Aid accounts. The Solicitor stated that upon receipt of the Law Society's final notice dated May 3, 1993 he stated that he still was not in receipt of the funds from Legal Aid.

#### PRIOR DISCIPLINE

12. The Solicitor was found guilty of professional misconduct on November 9, 1989 for failure to maintain books and records and having improperly transferred the sum of \$1,278.00, more or less, from his mixed trust account from November, 1987 to May, 1988. The Solicitor provided the Law Society with a written undertaking in which he undertook, among of things;

- 6. To maintain books and records for my trust account on current basis as required by Regulation 573 of the Law Society Act.
- 10. To reply to written communications from the law Society within a period of two weeks from the date of my receipt of such communications and to telephone communications from the law Society by the end of the second working day that I am in the office after receipt of such messages

The Solicitor was reprimanded in committee.

13. The Solicitor was found guilty of professional misconduct and reprimanded in committee on May 29, 1990 was a result of his failure to reply to the Law Society and his failure to provide mortgage documentation to a client, the Toronto Dominion Bank.

Dated at Toronto this 17th day of Oct, 1994"

FINDING

The Committee finds Edward John Brogden guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

---

The Committee recommends that Edward John Brogden be suspended for a period of two months and that he pay the Law Society's costs in the amount of \$2,000.00.

REASONS FOR RECOMMENDATION

---

The Committee believes that practising while under suspension is a serious matter and is equivalent to defying the authority of the Law Society. In this case, the Solicitor, in the Committee's view, was wilfully blind to the notices informing him that he would be suspended if he did not pay his fees. In addition, the Committee was mindful of the Solicitor's unattractive discipline history. The Committee, therefore, believes that the two month suspension is appropriate as is the requirement that the Solicitor should pay the Law Society's costs in the amount of \$2,000.00.

Edward John Brogden was called to the Bar on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 29th day of November, 1994

Ian Blue, Q.C. (for the Committee)

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. McKinnon that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of two months and pay costs in the amount of \$2,000.

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

Mr. Morin made submissions asking Convocation to delete the costs of \$2,000. and the suspension commence on February 1st to allow two court dates to be met.

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

It was moved by Mr. Topp, seconded by Mr. Somerville that the solicitor be suspended for a period of two months commencing February 1st and pay costs in the amount of \$2,000.

Carried

It was moved by Mr. McKinnon, seconded by Ms. Lax that the costs be deleted.

Lost

26th January, 1995

It was moved by Mr. Yachetti, but failed for want of a seconder that the costs be reduced from \$2,000. to \$1,000.

The Recommendation as to Penalty as amended was adopted.

Counsel and solicitor retired.

Re: Brian David WOODLEY - Grimsby

The Secretary placed the matter before Convocation.

Ms. Richardson withdrew for this matter.

Mr. Neil 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 12th December, 1994, together with an Affidavit of Service sworn 5th January, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 19th December, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Q.C., Chair  
Mary P. Weaver, Q.C.  
Nora Richardson

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

Neil Perrier  
for the Society

BRIAN DAVID WOODLEY  
of the Town  
of Grimsby  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: March 9, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On April 6, 1993, Complaint D87/93 was issued and on April 23, 1993, Complaint D106/93 was issued against Brian David Woodley alleging that he was guilty of professional misconduct.

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

DECISION

---

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

Complaint D87/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending January 1, 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 D106/93

2. a) He practised law while under suspension in breach of the Order of Convocation made on or about November 29, 1991;
- b) He has failed to co-operate with a Law Society representative in her attempt to audit his books and records pursuant to Section 18 of Regulation 573 of the Law Society Act.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

---

Numerous recent attempts to contact the solicitor have been unsuccessful. The solicitor has not filed any annual returns with the Law Society since 1991. The last address recorded with the Society was 8 Summer Crescent in Grimsby, but attempts to serve the solicitor at that address have resulted in an indication that he has moved. Ms. Anita McCann, an examiner with the Audit Investigation Department has attempted to contact the solicitor in order to audit his books and records. The solicitor had been suspended as of November 29, 1991 and, clearly, he was aware of the suspension. The Law Society received authorization to contact Mr. Woodley with respect to an audit investigation on March 23, 1992 and Ms. McCann made numerous efforts to contact the solicitor in order to conduct the audit. In the course of that investigation, Ms. McCann came across various documents, including directions, deeds and letters, that indicate that the solicitor has been practicing while under suspension. Those documents were obtained from various complainants that had provided information to the Law Society.

Ms. McCann specifically wrote letters to the solicitor in an attempt to reach him. The solicitor responded to one of those letters, concluding that "I am suspended. I no longer practice law." That was obviously an insufficient reply and Ms. McCann continued in her efforts to obtain the books and records for the purposes of an audit.

The solicitor was advised that, unless he produced the books and records, the matter would be referred to discipline.

Mr. Woodley promised that he would set up an interview with Ms. McCann and produce the requisite records.

26th January, 1995

Ultimately, after numerous false starts, the solicitor agreed to meet with Ms. McCann at Osgoode Hall on October 2, 1992 and to bring his books and records with him. That meeting did not take place because the solicitor did not attend. He called to cancel the meeting. Ms. McCann left numerous messages with the solicitor after that date in an attempt to make contact and get the books and records. Mr. Woodley subsequently cancelled the next arranged meeting by simply indicating that he could not make it on that day.

Mr. Woodley explained to Ms. McCann that he was not practicing law, but that he was doing odd jobs in physical labour and construction. Ms. McCann advised him as to the consequences of continuing to avoid her. She made numerous other appointments and Mr. Woodley cancelled all of them.

Ms. McCann went to visit the solicitor in January of 1993. The solicitor was distraught and upset. Ms. McCann asked the solicitor for his books and records and the solicitor said he had none. The meeting was terminated and the discipline matter proceeded.

Ms. Andrighetti is the Manager of the Administration Section of the Audit Investigation Department for the Law Society. Her duties include ensuring that members have filed their annual Forms 2 and 3. She attempted to make contact with Mr. Woodley for the purposes of obtaining his annual filing for the period ending January 1, 1992 and did not receive a reply from Mr. Woodley. The second notice was sent on September 11, 1992 and that letter was returned by the post office with an indication that the address was unknown.

Mr. Woodley has been requested for his filings for 1993 and that letter, too, was returned by the post office. Mr. Woodley has not completed any filing since 1991.

The solicitor has failed to file his annual forms. He has clearly practiced while under suspension and has failed to co-operate with the Law Society representative in her attempt to audit his books and records to the Law Society Act.

#### RECOMMENDATION AS TO PENALTY

---

The Committee recommends that Brian David Woodley be disbarred.

#### REASONS FOR RECOMMENDATION

---

Mr. Woodley has evaded and avoided his responsibilities in accordance with the Law Society Act. Mr. Woodley clearly has no interest in complying with any Law Society regulations and is clearly ungovernable. Since the solicitor is not prepared to respond to the discipline process, he is not prepared to file annual returns and he is not prepared to produce his books and records for the appropriate audit, and in light of the serious office of practicing while under suspension, the Committee sees no alternative but to recommend that the solicitor be disbarred.

26th January, 1995

Brian David Woodley was called to the Bar on the 10th day of April, 1986.

ALL OF WHICH is respectfully submitted

DATED this 12th day of December, 1994

Philip M. Epstein, Q.C.  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Mr. Campbell that the Recommendation as to Penalty be adopted, that is, that the solicitor be disbarred.

Mr. Perrier asked that an amendment be made on page 4, the 1st paragraph under the heading Reasons for Recommendation, by deleting the word "office" and replacing it with the word "offense".

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

The Recommendation as to Penalty was adopted.

Counsel retired.

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:30 P.M.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Arnup, Bastedo, Blue, Bragagnolo, Brennan, Copeland, Cullity, Curtis, Elliott, Hickey, Kiteley, Lamont, Lax, McKinnon, Manes, Moliner, Peters, Richardson, Scott, Somerville, Thom, Topp and Yachetti.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Re: Lee Edward WARD - Carleton Place

The Secretary placed the matter before Convocation.

Messrs. Topp and McKinnon withdrew for this matter.

Ms. Christina Budweth appeared for the Society, Mr. Neville appeared for the solicitor who was present.

26th January, 1995

Convocation had before it the Report of the Discipline Committee dated 26th May, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 3rd June, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 20th January, 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

Colin McKinnon, Q.C., Chair  
Samuel Lerner, Q.C.  
Mary P. Weaver, Q.C.

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

Christina Budweth  
for the Society

LEE EDWARD WARD  
of the Town  
of Carleton Place  
a barrister and solicitor

Michael Neville  
for the solicitor

Heard: November 11, 1992  
April 20, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 3, 1992, Complaint D104/92 was issued against Lee Edward Ward, alleging that he was guilty of professional misconduct.

The matter was heard in public on November 11, 1992 before this Committee composed of Colin D. McKinnon Q.C., Chair, Mary Weaver Q.C. and Samuel Lerner Q.C.. Mr. Ward attended the hearing and was unrepresented. Christine Budweth appeared on behalf of the Law Society.

The matter was adjourned for decision.

Pending the decision of the Committee in relation to a recommended penalty, the Chair was contacted by Michael J. Neville who had been retained by Mr. Ward following the hearing. In correspondence dated December 10, 1992, Mr. Neville requested that the Committee hear further material and submissions which "would include some character evidence, possible psychiatric or psychological evidence and some precedents related to previous discipline decisions...".

The Committee acceded to the request and scheduled the date of May 7, 1993 to hear the further evidence.

26th January, 1995

On May 4, 1993, Mr. Neville wrote the Hearings Coordinator asking for a further adjournment, citing various factors bearing upon his request including the need to obtain psychiatric reports for both Mr. Ward and his wife. As a condition of the further adjournment, the Committee required that Mr. Ward undertake to practise only in the areas of criminal defence litigation, uncontested divorces and residential real estate; that he execute a formal co-signing agreement which would require the co-signing of all trust cheques by Mr. A. Jones; and that he cooperate with the office of the staff trustee in transferring all other files to Mr. Jones or outside counsel. Mr. Ward was further required to authorize his psychiatrist, Dr. Kunjukrishnan to immediately advise the Law Society if during the course of his treatment he prematurely terminated treatment.

The matter was then rescheduled for Hearing on December 6, 1993. A further adjournment was requested by Mr. Neville because Dr. Kunjukrishnan was not able to prepare his report on time for the hearing.

The matter was finally scheduled to continue on April 20, 1994, at which time Mr. Ward attended the Hearing and was represented by Michael J. Neville. Christine Budweth once again appeared on behalf of the Law Society.

#### DECISION

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#### Complaint D104/92

The particulars of the complaint are as follows:

- (a) He failed to serve his clients, Bernard Lee, Christine Cleroux-Carisse and Ghassan Saad in a conscientious and diligent fashion, contrary to Rule 2 of the Rules of Professional Conduct.
- (b) He misled his clients, Bernard Lee, Christine Cleroux-Carisse and Ghassan Saad as to the status of their litigation files, contrary to Rule 1 of the Rules of Professional Conduct.
- (c) He misled the Law Society of Upper Canada during its investigation into the status of the Bernard Lee file.

On November 11, 1992, counsel for the Law Society sought leave of the Committee to delete the reference in particulars (a) and (b) to Ghassan Saad. The Committee granted the request thereby leaving three particulars, two of which alleged failing to serve clients and misleading clients, namely Bernard Lee and Christine Cleroux-Carisse.

On November 11, 1992, Mr. Ward made a motion before the Committee seeking severance of particulars (a) and (b) and requested that the Committee hear evidence in relation to the matter involving Christine Cleroux-Carisse prior to hearing any particulars relating to the Bernard Lee complaint. The Committee allowed the motion and heard evidence in relation to the allegations involving Christine Cleroux-Carisse.

Following evidence and argument, the Committee dismissed the complaint involving Christine Cleroux-Carisse.

Thereafter, the Committee considered an Agreed Statement of Facts relating to the Bernard Lee complaint and found the following particulars of professional misconduct to be admitted and established:

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- (a) He failed to serve his client, Bernard Lee, in a conscientious and diligent fashion, contrary to Rule 2 of the Rules of Professional Conduct;
- (b) He misled his client, Bernard Lee, as to the status of his litigation file, contrary to Rule 1 of the Rules of Professional Conduct;
- (c) He misled the Law Society of Upper Canada during its investigation into the status of the Bernard Lee file.

#### Evidence

The evidence before the Committee comprised the following Agreed Statement of Facts.

#### "AGREED STATEMENT OF FACT

##### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D104/92 and is prepared to proceed with a hearing of this matter on October 27 and 28, 1992.

##### 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 D104/92 and admits the particulars of the allegations of professional misconduct contained therein as they relate to Bernard Lee. The Solicitor admits that those particulars supported by the facts as stated herein constitute professional misconduct.

##### IV. FACTS

4. The Solicitor was called to the bar on April 19, 1978. He is a sole practitioner practising in the Town of Carleton Place, Ontario.

Particulars 2(a), (b) and (c) - Bernard Lee

5. Jean Diane Lee was killed in a motor vehicle accident on June 5, 1984. She was alone in her vehicle when she was struck broadside on the driver's side by another vehicle which had failed to stop before entering the highway. Mrs. Lee's vehicle was severed in two. Mrs. Lee was survived by her husband, Bernard, and two infant daughters, Shelley and Pamela.

6. The driver of the other car was Kenneth Conway, apparently unlicensed. The car driven by Mr. Conway was owned by Leonard Snyder, a cousin of Mr. Conway. The vehicle and its plates were registered in the name of Eleanor Conway, Mr. Conway's mother.

7. On June 26, 1984, Mr. Lee retained the Solicitor.

8. Mr. Lee, shattered by the death of his wife and overwhelmed by the responsibility of caring for his two young daughters, decided to leave Carleton Place to return to his home of Cape Breton. He left on or about September 22, 1984.

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9. For the next two years communications between the Solicitor and Mr. Lee were limited. During that two year period the Solicitor received two items of correspondence on behalf of Mr. Lee.

10. One letter was from a social worker with Family Services of Eastern Nova Scotia dated April 23, 1985. A copy of this letter is attached as Exhibit 1 to this agreed statement of facts. The letter asked for a "progress report" on the law suit and advised the Solicitor of the anxiety caused to Mr. Lee by the loss of his wife and the "perceived lack of action on this case".

11. Another letter in the file dated January 27, 1986 from Mr. Lee to the Solicitor provided the Solicitor with certain information that he had requested during a telephone conversation. A copy of Mr. Lee's January 27, 1986 letter is attached as Exhibit 2 to this agreed statement of facts.

12. In or about March, 1986, the Solicitor prepared an affidavit of documents on behalf of Mr. Lee. The draft affidavit was forwarded to Mr. Lee who had it notarized before a lawyer in the town of Glace Bay on or about March 25, 1986. The sworn document was returned to the Solicitor. A copy of the affidavit of documents is attached as Exhibit 3 to this agreed statement of facts. At this time no statement of claim had yet been prepared or issued.

13. On or about June 2, 1986, Mr. Lee flew from Nova Scotia to Ottawa. Mr. Lee travelled to Carleton Place to meet with the Solicitor on June 3, 1986. At that meeting the Solicitor reviewed with Mr. Lee a draft statement of claim. During the meeting, Mr. Lee executed a letter of authorization instructing the Solicitor to proceed on behalf of himself and his two infant children. In addition, Mr. Lee executed an affidavit in support of his application to act litigation guardian for the two infant girls. Copies of the letter of instruction and affidavit are attached collectively as Exhibit 4 to this agreed statement of facts.

14. A statement of claim in the matter was issued in Ottawa on June 4, 1986. A copy of the statement of claim is attached as Exhibit 5 to this agreed statement of facts.

15. The Solicitor hired Shaun Farr to serve the statement of claim. Mr. Farr was unsuccessful. There was no follow up by the Solicitor in the matter. No motion for substituted or extended service was brought. The Solicitor did not advise Mr. Lee that the statement of claim had not been served nor did he advise that the time for serving the claim had run out.

16. In May, 1988, Mr. Lee travelled from Nova Scotia to Carleton Place in an effort to determine the status of the litigation. At that meeting, the Solicitor presented Mr. Lee with a final release under the terms of which each of Mr. Lee and his two daughters would receive \$75,000 plus \$11,376.18, total, for costs and special damages. These releases were witnessed by the Solicitor at his office on May 28, 1988, they are attached collectively as Exhibit 6 to this agreed statement of facts. There had, at this time, not been any negotiation with the insurer opposite.

17. After Mr. Lee had returned to Cape Breton he was advised by the Solicitor that technical problems had arisen and that the settlement proceeds were not available.

18. In March, 1989, the Solicitor advised Mr. Lee that the technical problems had been resolved. The Solicitor had Mr. Lee execute new final releases in Carleton Place on March 31, 1989, copies of these releases are attached collectively as Exhibit 7 to this agreed statement of facts. There still had not been any negotiation with the insurer.

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19. There is evidence of only one written communication with the insurer in the Solicitor's file this being a one page letter of June 22, 1984 providing the customary initial notice of claim. A copy of the Solicitor's June 22, 1984 letter is attached as Exhibit 8 to this agreed statement of facts.

20. The Solicitor provided Mr. Lee with various explanations for why the settlement funds were not forthcoming. These explanations included information that at least six court attendances were necessary to implement various aspects of the settlement; that the insurance company's cheque did not clear the bank; that a direct transfer could not be made to Mr. Lee's bank account; and, that the bank, which bank is unclear, required an indemnification to release the cheque.

21. Again, Mr. Lee was not provided with the settlement proceeds. Ultimately, Mr. Lee retained a Nova Scotia solicitor to communicate with the Solicitor.

22. Counsel on behalf of Mr. Lee corresponded with the Solicitor. The Solicitor did not reply.

23. The Society corresponded with the Solicitor by letters dated April 19, 1990 and September 19, 1990. His failure to reply led to a formal complaint of professional misconduct being issued. The initial appearance date before that complaint was January 29, 1990. A hearing date was set for April 30, 1991. On April 29, 1991 the Solicitor faxed a letter to discipline counsel with carriage of prosecution of the complaint of failing to reply. In the first paragraph of page 2 of the letter the Solicitor stated:

... a settlement has been reached. The process of structuring the settlement and a schedule for payment has however proven to be very difficult and very slow.

A copy of the Solicitor's April 29 letter to the Society is attached as Exhibit 9 to this agreed statement of facts. The matter was actually heard on June 26, 1991.

24. The fact that the above stated information was inaccurate and in fact misleading was not known to the discipline committee or to the Society at the time of the Solicitor's finding of misconduct and the determination of penalty.

DATED at Toronto this 28th day of October, 1992."

On April 20, 1994, the Committee was provided with a Supplementary Agreed Statement of Facts and a Second Supplementary Agreed Statement of Facts, together with certain psychiatric reports.

The further evidence before the Committee contained in these Supplementary Agreed Statement of Facts are as follows:

#### "SUPPLEMENTARY AGREED STATEMENT OF FACTS

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##### I. PREVIOUS DISCIPLINE

1. On September 29, 1987 the Solicitor was reprimanded in committee and ordered to pay the Society's costs of \$1,000 for his failure to serve clients in a conscientious, diligent and efficient manner, and for his failure to reply to the Society, a copy of the complaint is attached as Exhibit 1 to this agreed statement of facts.

2. On June 26, 1991, the Solicitor was found guilty on two complaints of professional misconduct one of which was the complaint of failing to reply to the Society in connection with a complaint made by Bernard Lee. By order of Convocation dated September 24, 1991, the Solicitor was suspended for one month commencing December 1, 1991 and ordered to pay the Society's costs in the amount of \$1,750, copies of these complaints are attached as Exhibit 2 to this agreed statement of facts.

3. In July, 1991, the Solicitor was charged with professional misconduct in respect of two particulars of failing to reply to the Society regarding complaints by Mr. Saad and Ms. Carisse. On November 13, 1991 the Solicitor was found guilty of professional misconduct in respect of that complaint. In March, 1992, Convocation ordered that the Solicitor be suspended from practice of law for two months commencing July 1, 1992.

DATED at Toronto this 28th day of October, 1992."

SECOND SUPPLEMENTARY AGREED STATEMENT OF FACTS

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1. As is set out in paragraph 7, Exhibit 11, Bernard Lee retained the Solicitor on or about June 26, 1984 to act in a claim arising from the death of his wife in a motor vehicle accident. Mr. Lee initially retained another solicitor to act in respect of the accident. However, several weeks later he decided to retain the Solicitor.

2. The Solicitor did issue a statement of claim, Court File #3312/86, on June 4, 1986, Mrs. Lees' car accident having occurred on June 5, 1984.

3. As was also admitted in paragraph 15 of Exhibit 11, the statement of claim was not served by the Solicitor.

4. Although the Solicitor was aware of the possible claim against him in 1987, he did not report the claim to his insurer. The potential claim was reported to the Director of Insurance by Stanley Jenkins, counsel in the Department of Audit and Investigation, in late August, 1991 as a result of a disclosure made to Mr. Jenkins by the Solicitor during his investigation of a complaint made by Mr. Lee to the Society.

5. On March 17, 1992, a statement of claim, Court File #62001/92, was issued on behalf of the Lee family in against the Solicitor. The Law Society had already, approximately one month prior, advised the Solicitor that it would deny coverage on any claim made against the Solicitor arising out of the Lee matter on the basis both of his late reporting of the claim and as a result of his failure to cooperate with the insurer. The denials of coverage were made under exclusions (a) and (f) of the Lawyer's Professional Indemnity Company policy.

6. Action #60021/92 proceeded to trial before the Honourable Mr. Justice Houston. Mr. Justice Houston delivered his judgment on October 21, 1992. He awarded the plaintiffs approximately \$550,000.00 and solicitor and client costs throughout. A copy of Mr. Justice Houston's decision is attached as Exhibit 1 to this second supplementary agreed statement of facts.

7. On April 30, 1993, counsel for Mr. Lee obtained an order extending the time for service of the statement of claim in court action #3812/86. The discoveries were subsequently scheduled for late March, 1994 and have now been adjourned to the early summer of 1994.

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8. On May 4, 1993, Claim #744236/93 was issued on behalf of the Lee family against Royal Insurance Company of Canada, among others, pursuant to a policy of motor vehicle insurance which Mr. Lee had taken out with Royal Insurance. In this action, the Lee family is seeking indemnity for any amounts owing to them by the defendants in Action #381/86 in the event of the defendants in that action are found to be inadequately insured.

9. By order dated July, 1993, Actions #3812/86 and #74236/93 were ordered to be tied together.

10. The issue of which automobile insurance policy will be called upon to provide indemnity for the Lee accident remains unclear. The vehicle which caused the accident was driven by an unlicensed driver, Kenneth Conway. The vehicle which he was driving was registered to Ms. Eleanor Conway, but the actual owner may have been Mr. Leonard Snyder. Each of Ms. Conway and Mr. Snyder had insured the vehicle.

11. On October 20, 1993, the Lees commenced action against the Law Society of Upper Canada and the Lawyer's Professional Indemnity Company seeking indemnity for the amounts awarded to them in Court Action #62001/92. That action has been defended.

12. Counsel for the Society's insurer has communicated his intention to bring a motion to strike the Lee family's claim against the Law Society and the Lawyer's Professional Indemnity Company. The motion is presently scheduled to be heard on May 9, 1994.

13. Counsel for Mr. Lee has prepared a letter setting out, in general terms, the status of each of the actions, a copy of Mr. Cooligan's letter, dated April 18, 1994, is attached to Exhibit 2 of the Second Supplementary Agreed Statement of Facts.

DATED at Toronto, this 25th day of April, 1994."

ADDITIONAL EVIDENCE:

In addition to the two Supplementary Statements of Fact, the Committee received the report of Dr. M. Gautam relating to the emotional and mental profile of Mrs. Donna Ward.

The Committee considered a seven page psychiatric report prepared by Dr. Kunjukrishnan with respect to Mr. Ward and a further psychiatric report relating to Mr. Ward prepared by Dr. Kunjukrishnan in relation to a previous discipline proceeding which report was dated March 20, 1992. The reports of Dr. Gautam and Dr. Kunjukrishnan are included with this report as appendix 1 through 3.

The Committee was also provided with a brief of character references filed on behalf of Mr. Ward incorporating twenty-three letters from lawyers and judges in Eastern Ontario.

Both Mr. and Mrs. Ward gave viva voce testimony before the Committee.

Mrs. Ward has testified that she had been born and raised in Carleton Place and that her family lived there. She and her husband bought a home in Carleton Place in 1981. In 1985, an opportunity arose to purchase the practise of a local practitioner who had been elevated to the bench. Her husband had been pursuing his practise in Ottawa, mainly restricted to criminal law, and was commuting from

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Carleton Place. She described the stress suffered by her husband in running two practises in Ottawa and Carleton Place. Moreover, the practise in Carleton Place was a much more general practise dealing with client matters with which her husband was unfamiliar. She described how her husband would often not return home until 11:00 at night and would require medication to sleep and further medication to enable him to cope during the day.

She described how she developed her eating disorder in early 1991 and its impact upon the family. She withdrew from the family unit and became obsessed by exercise when not working at her teaching position. She could not deal with food requiring her husband to come home and feed their son. She became anorexic and described how supportive her husband was of her disorder. In fact, he did not inform her of his appearance before the Discipline Committee in June of 1991 and she was unaware of his suspension for one month in December of 1991.

He also hid from her his second appearance before the Discipline Committee in November of 1991 and of the two month suspension commencing July 1992. She learned of the suspension while shopping in Carleton Place where she saw an article in the Carleton Place Canadian titled "Local Lawyer Suspended" with her husband's picture prominently displayed. She described this as the "nightmare of nightmares".

She admitted that her relationship with her family had become dysfunctional and she was continuing to see Dr. Gautem and that her husband would continue to see Dr. Kunjukrishnan. She told the Committee that she was fully supportive of her husband and asked the Committee to be merciful.

Mr. Ward testified that he was extremely busy with his Ottawa practise until the end of 1987. He told the Committee that he had completed approximately three thousand criminal cases since his call to the bar, much of it comprised of duty counsel work. He described the difficulty of practising in Carleton Place and having to commute to Ottawa to do criminal defence cases and to Smith Falls for Provincial Court cases and to Perth for cases in the General Division. Moreover, when he purchased the Carleton Place practise, he found it to be heavily weighted towards real estate, requiring his attendances at two registry offices in Almonte and Perth. He told the Committee that he is the second busiest practitioner in his area and has active criminal files numbering at any given time from fifty to a hundred.

He spoke of the financial pressure arising from the litigation in relation to the Bernard Lee case including the requirement to pay the costs of the civil trial amounting to over \$30,000.00 of which he had paid approximately \$10,000.00 by way of garnishment from his legal aid accounts.

He told the Committee that his wife had encouraged him to purchase the Carleton Place practise.

He was cross-examined with respect to the statement made in the March 20, 1992 report of Dr. Kunjukrishnan wherein he is alleged to have said to the doctor, "Mr. Ward informs that there were no irregularities in the way he handled the client's (Bernard Lee) case". Mr. Ward explained that the statement by Dr. Kunjukrishnan is incorrect in that by March 20, 1992, the Law Society knew that he had mishandled the Bernard Lee matter and he had fully informed the Law Society of his involvement in the case, and therefore would have no reason to make the alleged statement to Dr. Kunjukrishnan. He admitted to his doctor that he was downplaying what was going wrong in his marriage.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Lee Edward Ward:

- (a) Be suspended for a period of twelve months;
- (b) Be required to pay the expenses incurred by Bernard Lee for his two trips to Ottawa from Cape Breton in order to sign releases which were useless;
- (c) That upon his reinstatement, he restrict his practise to the areas of criminal defence litigation, uncontested divorces and residential real estate;
- (d) Be required to execute a co-signing agreement with Mr. A. Jones or another counsel approved by the staff trustee for all trust cheques; and
- (e) Be required to pay the costs of the Law Society in the amount of \$5,000.00.

REASONS FOR RECOMMENDATION

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The solicitor is clearly a respected, competent and efficient defence counsel. The twenty-three character references filed on behalf of the solicitor from judges and practitioners all testify to the fact that the solicitor is dedicated, diligent, caring, conscientious and trustworthy when he deals with criminal law matters. Some letters speak of his empathetic character and his devotion to cases involving the mentally ill. The Committee is satisfied that the solicitor possesses the attributes required of a criminal defence lawyer and that he should be permitted to re-establish himself in that area of practise following his suspension. Moreover, the Committee has no reason to doubt his capability to deal with uncontested divorces and real estate. There is no evidence before the Committee to indicate that the solicitor has any problems in those two areas.

The solicitor's problems stem from his involvement in civil litigation. His completely inexplicable conduct in relation to the Bernard Lee matter is of profound concern to this Committee. His conduct can only be described as awful. The suffering of Bernard Lee is ongoing. Since the matter arose in June of 1984, almost ten years ago, Mr. Lee has not received one penny in respect of the tragic accident resulting in the death of his wife. Mr. Lee continues to litigate in the Courts. He has a hollow judgment against the solicitor, and both the insurance company and the Law Society Insurer are denying coverage. The public interest demands that the solicitor never be permitted the opportunity to repeat his conduct in the future in relation to civil litigation matters.

The reports of Dr. Kunjukrishnan are of little assistance to the Committee in assessing the reason why the solicitor would create fraudulent documents for Mr. Lee's signature. It would appear that Mr. Ward does not suffer from any major psychiatric problem. He has shown some anxiety and depression and shows a tendency to procrastinate. Further, he requires ongoing professional help and marriage counselling.

However, a tendency to procrastinate does not explain a wilful act of fraudulent misrepresentation to a client - particularly a client who, as Mr. Lee was, vulnerable and grieving.

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Much of the evidence led by Mr. Ward related to his difficulties between 1985 and 1987 and the Committee is mindful that the Bernard Lee matter arose in 1984. The Committee also notes that the problem relating to Mr. Ward's wife did not arise until 1989, and therefore, the Committee puts little weight, if any, in the testimony of Mrs. Ward with respect to her problem with her eating disorder as it may have impacted upon her husband. By 1989, the solicitor was dealing exclusively in Carleton Place and his Ottawa practise had been closed down. The Committee notes that the final releases were executed by Mr. Lee on May 28, 1988, and new releases were executed on March 31, 1989. The misleading of the Law Society occurred on April 29, 1991. Thus, the Committee finds it difficult, if not impossible, to put any weight on the solicitor's description of the stressful years, 1985 to 1987. Those years may account for his inactivity on the Lee file, but they do not account for the relevant dates upon which the solicitor has been found guilty of professional misconduct.

Similarly, Mrs. Ward's eating disorder did not come to full fruition until 1991. The releases signed by Mr. Ward were executed in 1988 and in 1989. Simply put, in assessing all the evidence, the years 1988 and 1989 should have been relatively calm years for the solicitor. These years post-dated the stress of carrying on two practises and predated the stress brought on by his wife's eating disorder.

Mr. Neville asked the Committee to consider a recommendation that the solicitor be reprimanded in Convocation. Ms. Budweth asked the Committee to consider a lengthy serious suspension of at least nine months and, while not urging the penalty of disbarment, asked the Committee to consider it.

The Committee is unanimous in its view that to recommend a reprimand in Convocation would be a serious error in principle, particularly given that the solicitor has been previously disciplined on three occasions beginning in September of 1987 when he was reprimanded in Committee for failing to serve clients in a conscientious, diligent and efficient manner and for failing to reply to the Society. In June 1991, the solicitor was found guilty of two complaints of professional misconduct of failing to reply to the Society in connection with the Bernard Lee complaint. For that, he was suspended for one month commencing December 1, 1991, and was ordered to pay costs. On November 13, 1991, he was found guilty of professional misconduct for failing to reply to the Society regarding complaints of Mr. Saad and Ms. Carisse, for which he was suspended from practise for two months commencing July 1, 1992.

Given the previous discipline history of the solicitor, this Committee has no difficulty in recommending a lengthy suspension.

The Committee was referred to the case of Karla Gower who was suspended by Convocation for a one year period. Ms. Gower had no previous discipline history. Her psychiatric profile was more sympathetic than that of the solicitor in the present case.

The case of Michael Stoyka was cited. Mr. Stoyka was given permission to resign. He had failed to serve and misled his client and misled the Law Society on facts similar to the case at Bar. Mr. Stoyka had, like the solicitor in the present case, three previous findings of professional misconduct. He had been reprimanded in Committee twice and reprimanded in Convocation for his third transgression. The Committee finds the Stoyka case compelling in its application to the present case, but notes that Society Counsel was not urging the penalty assessed in the Stoyka case upon this Committee, but rather urging a penalty of "at least nine months".

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Mr. Neville asked the Committee to consider the case of Altimas who, on serious facts, was suspended for one month by Convocation. Mr. Altimas had deceived clients by recourse to the creation of fictitious disbursements supported by altered surveys. He also misled the Law Society. It is noted that Mr. Altimas had no discipline history.

The Committee has noted the case of Bolton v. Law Society, a decision of the English Court of Appeal, per Sir Thomas Bingham, M.R. The Committee is mindful that a twelve month suspension of the solicitor shall cause significant turmoil to the life of the solicitor, to his future prospects in practise and to his clients, but this Committee adopts the words used in the Bolton case:

"...it often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real effort made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practise when the period of suspension is past. If that proves, or appears likely, to be the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price."

For these reasons, this Committee is comfortable with its recommendation that the solicitor be suspended for twelve months upon the terms set out.

Lee Edward Ward was called to the bar and admitted as a solicitor of the Supreme Court of Ontario on 19th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 26th day of May, 1994

Colin D. McKinnon Q.C.  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. Cullity that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended for a period of 12 months, pay costs in the amount of \$5,000. and comply with the conditions set out in the Report.

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Mr. Neville made submissions that the penalty was harsh and unreasonable and that the conditions and the costs were inappropriate and he also took issue with the timing of the suspension.

A letter from the firm of Cooligan Ryan to Mr. Neville dated January 25th, 1995 was marked as Exhibit 3.

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

There were questions from the Bench.

Mr. Neville made brief submissions in reply.

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

It was moved by Ms. Elliott, seconded by Mr. Brennan that the solicitor be suspended for 6 months.

Not Put

It was moved by Mr. Brennan, seconded by Ms. Elliott that condition (d) re: co-signing agreement, be deleted.

Carried

It was moved by Mr. Brennan, seconded by Mr. Hickey that condition (e) re: costs, be deleted.

Lost

It was moved by Mr. Bragagnolo but failed for want of a seconder that the costs be reduced from \$5,000. to \$3,000.

The Recommendation as to Penalty as amended was adopted.

It was moved by Ms. Kiteley, seconded by Mr. Somerville that the suspension commence May 1, 1995.

Carried

Counsel, the solicitor, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 12 months with conditions.

Counsel and solicitor retired.

#### APPLICATION FOR READMISSION

Re: Asgareli Mohamed MANEK - Stoney Creek

Convocation advised that the readmission matter of Mr. Manek would be heard on Thursday, February 23rd, at 3:30 p.m.

#### DISCIPLINE COMMITTEE

Re: Stephen Lorne MCDONALD - Sudbury

The Secretary placed the matter before Convocation.

Ms. Curtis and Ms. Moliner withdrew for this matter.

Mr. Scott and Mr. Topp did not participate.

26th January, 1995

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

Convocation had before it the Report of the Discipline Committee dated 11th October, 1994, together with an Affidavit of Service sworn 14th October, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 14th October, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 18th October, 1994 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

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

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

Neil Perrier  
for the Society

STEPHEN LORNE MCDONALD  
of the City  
of Sudbury  
a barrister and solicitor

Brian Greenspan  
for the solicitor

Heard: November 30, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On September 3, 1992, Complaint D140/92 was issued against Stephen Lorne McDonald alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced with Complaint D140a/92.

The matter was heard in public on November 30, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Carole Curtis and Marie Moliner. The Solicitor was present and was represented by Brian Greenspan. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D140a/92

- 2. a) He misappropriated the sum of \$1,199,622 from his trust account from the following client files: Frankic Estate; Kinsmen Family Centre Foundation, Anne Coe, Lynn Desormeaux; Garderie Touche A Tout; Paul Gushue; Joyce Lapointe; Lois Lawrence; Todd McGrayne; Martel, Chapman, McNichol; and Guhbawin Co-Operative;
- b) i) He misapplied the sum of \$10,000 from the trust account of Mr. Cividino to settle an action on another file;
- ii) He misapplied the sum of \$17,200 to pay a loan debt from one client, Ms. Joanne Brule, to another client, Mr. Charles Wayne Ure;
- c) i) He breached Rule 6 of the Rules of Professional Conduct by failing to promptly notify clients of the receipt of funds. The funds being held for clients by the Solicitor were as follows:
 

CLIENT	AMOUNT
Anne Coe	\$ 2,729.00
Martel, Chapman, McNichol	\$49,900.00
- ii) The Solicitor also breached Rule 2 of the Rules of Professional Conduct by failing to adequately safekeep his client's money by lending Mr. Ure's money to clients without obtaining adequate security for Mr. Ure;
- d) He misled his client Joyce Lapointe, as the status of her claim by advancing funds to her under the pretext that these funds had been received from an insurance company;
- e) He breached Rule 7 of the Rules of Professional Conduct by borrowing the sum of \$50,000 from his client, Mrs. Helen Adams.

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 D140a/92 and is prepared to proceed with a hearing of this matter on November 30, 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 D140a/92 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor had previously been a partner of the law firm Pharand Kuyek McDonald. The Solicitor experienced personal problems in 1981 and it was decided by his partners that the Solicitor should no longer be associated with their firm. The Solicitor commenced his sole practice by leasing office space from Pharand Kuyek and he also continued using Pharand Kuyek letterhead. His trust account cheques and bank statements were also printed with the name Pharand Kuyek McDonald. Although Pharand Kuyek and McDonald were legally two separate firms, both Mr. Pharand and Mr. Kuyek had co-signing authority on the Solicitor's trust account.

5. The Law Society was informed on December 10, 1991 that the Solicitor had been hospitalized at the Homewood Health Centre in Guelph, Ontario. The Solicitor had apparently attempted to commit suicide on December 6, 1991. On the instructions of the Solicitor, his counsel informed the Law Society that the Solicitor had admitted to him that monies had been misappropriated from his client trust account.

6. An audit was conducted under Section 18 of the Regulation made pursuant to the Law Society Act.

7. Subsequent to the start of the Law Society's investigation, several complaints were received from clients and lawyers representing the Solicitor's former clients.

8. The Solicitor's books and records were examined. The most recent trust reconciliation was for the month of July, 1991 (Document Book, Tab 1). The Solicitor's bookkeeper, Serge Gervais, attempted to perform the reconciliations for the period August to December 1991. Mr. Gervais was unable to complete these reconciliations because the September bank statement could not be found. In addition, client trust ledger cards had not been updated. It was not possible, without the Solicitor's assistance, to determine to which client trust ledger cards should be posted certain receipts and expenditures. The Solicitor's client files appeared organized and properly documented.

9. In order to determine the trust shortage existing in the Solicitor's trust account, a listing was prepared by the bookkeeper of the balance in each client's trust account. It was noted in the review of the bank statements and by reviewing the trust receipts and trust disbursements journals that not all transactions had been posted to the client ledger cards. Using the information that was available, the bookkeeper was able to prepare a client trust listing as at November 30, 1991. Client ledger cards for clients with either a debit or credit balance in their accounts were also obtained. Using this information, and by reviewing the client files, a list was prepared showing the names of clients and amounts of money that were misappropriated, or misapplied from their client trust accounts. The total amount of client trust funds that had been misappropriated or misapplied amounted to the sum of \$1,226,822. A list showing the names of the clients and the amounts that were misappropriated or misapplied as well as the balance of the Solicitor's trust account is contained at Document Book, Tab 2.

A. Misappropriation of Client Trust Funds

1. Frankic Estate - \$460,775

10. The complainant provided the Law Society with a copy of a cheque dated May 27, 1991, in the amount of \$400,130.76 payable to a Marian Nosich (Document Book, Tab 3). The endorsement of the cheque indicates that it was deposited on May 28, 1991 to the Solicitor's client trust account. A review of the May, 1991 receipts journal (Document Book, Tab 4) does not show the sum of \$400,130.76 being deposited.

11. A second cheque in the amount of \$60,644.32, dated May 2, 1991, was also obtained (Document Book, Tab 5). Although the endorsement on the cheque was stamped for a deposit to the Solicitor's trust account, there is no evidence from reviewing either the May, 1991 (Document Book, Tab 6) trust account bank statement or the May, 1991 trust receipts journal (Document Book, Tab 4) that these funds were deposited in trust.

12. The Solicitor admits to having misappropriated the above funds totalling \$460,775.08.

2. Kinsmen Family Centre Foundation - \$400,000

13. The Solicitor was well known in the Sudbury region for his volunteer work. He had been the President of the Kinsmen Family Centre Foundation since 1987. The Foundation had proposed to build or purchase a residence for family and friends of patients undergoing medical treatment in Sudbury Hospitals. The proposal was submitted to the Ontario Ministry of Northern Development and Mines for funding assistance. The proposal was accepted in July, 1990 and the Ministry provided a grant in the amount of \$400,000 to the project. A cheque in the sum of \$400,000 was issued on August 14, 1990 (Document Book, Tab 7) payable to the Sudbury Kinsmen Family Centre Foundation. These funds were deposited in the Solicitor's trust account on August 27, 1990 as per a review of the August 1990 trust account bank statement (Document Book, Tab 8). A review of the August, 1990 Trust Receipts Journal (Document Book, Tab 9) however does not show \$400,000 being received on August 27, 1990.

14. A review of the September, 1990 bank statement reveals how some of the Kinsmen funds were used. These cheques included the following:

Cheque #	Paid To	Explanation	Amount
462	Workshop Group	Repayment Promotion	\$ 30,000
431	Stephen McDonald	Capital Repayment Workshop	\$ 12,000
430	Stephen McDonald	Capital Repayment	\$ 30,000
433	Diotte	Kinsmen House Bldg.	\$ 50,000

15. Mr. Diotte was contacted in order to determine the reason why he received \$50,000 from the Solicitor on cheque #433. Mr. Diotte is the owner of Barne Builders, a company active in the real estate market. Mr. Diotte stated that he was unable to confirm the reason for the \$50,000 payment. He stated, however, that the payment probably related to mortgage funds provided by a bank. He stated that he never did any work for the Kinsmen and he could not explain why the cheque would be referenced as being for Kinsmen House Building Renovations.

16. Mr. Chris Sheridan, Secretary-Treasurer of the Kinsmen Foundation, was also contacted. He stated that he was unaware that a cheque had been made in September, 1990 to Mr. Diotte re: Kinsmen House Building Renovation. He stated that the Kinsmen Foundation did not incur any liability to Mr. Diotte and further that this expense had never been authorized by the Foundation.

17. Cheque #462 was paid the The Workshop Group, which is a managment consulting company owned by the Solicitor. Cheques #430 and #431, payable to the Solicitor, were also applied to the Solicitor's consulting company.

3. Cividino - \$10,000

18. The Solicitor misapplied the sum of \$10,000 from the trust account of a client, Mr. Cividino, for the benefit of another client, who was a defendant in a motor vehicle accident claim. The Solicitor improperly paid the sum of \$10,000 to the plaintiff in settlement of an action by way of a cheque dated October 7, 1991 (Document Book, Tab 10) from his trust account.

4. Anne Coe - \$2,729

19. Anne Coe retained the Solicitor in a personal injury matter as a result of a motor vehicle accident. The Solicitor was provided with a cheque from the insurance company for the defendant payable to Ms. Coe in the sum of \$2,729 (Document Book, Tab 11), which monies were deposited in his trust account. There is no evidence in the file that Ms. Coe was informed about either the offer to settle or the settlement agreement.

20. No record of this amount owing to Ms. Coe was made in her client trust ledger and the cheque was deposited by the Solicitor in his trust account. The Solicitor misappropriated the funds.

5. Charles Wayne Ure - \$10,000

21. Mr. Charles Wayne Ure gave the Solicitor \$20,000 to be loaned to the Solicitor's clients. The Solicitor's trust account slip (Document Book, Tab 12) indicates that \$10,000 of these funds were credited to another client's trust account on November 15, 1991. On the same date, a cheque in the amount of \$7,000 was issued to the other client and the Royal Bank of Canada (Document Book, Tab 13). The cheque was deposited at the same branch of the Royal Bank where the Solicitor maintains his trust account. Therefore, the Solicitor misappropriated \$10,000 from his client, Charles Wayne Ure.

6. Garderie Touche A Tout - \$70,000

22. On October 11, 1991, the Solicitor received \$70,000 (Document Book, 14) from Garderie Touche A Tout to be held in trust pending the organization of a new child care centre. On November 20, 1991, a cheque in the amount of \$70,000 (Document Book, Tab 15) was issued on behalf of the client. On the same day, a further deposit of \$70,000 was recorded in the client trust account (Document Book, Tab 14), despite the fact that no further deposit was made.

23. The Solicitor's law clerk has stated that the deposit on November 20, 1991 was made in order to ensure that the cheque made to Garderie was not returned "NSF".

24. The Solicitor misappropriated the original \$70,000 received from Garderie on October 11, 1991 and was subsequently required to cover the shortage in the trust account by using money received from unknown sources.

7. Paul Gushue - \$42,000

25. Mr. Paul Gushue was involved in a motor vehicle accident on August 26, 1988. Because of injuries suffered as a result of the accident, Mr. Gushue retained the services of the Solicitor. The defendant was Jacqueline Perusini, represented by Michael P. O'Hara of the law firm Miller, Maki.

26. A tentative settlement was reached between the parties and on November 1, 1991, Miller, Maki forwarded a cheque in the amount of \$42,000 to the Solicitor (Document Book, Tab 16). On that same day, this cheque was deposited in the Solicitor's trust account.

27. Mr. O'Hara expressed his concerns to the Law Society as to the whereabouts of the funds paid in trust to the Solicitor. A review of Mr. Gushue's client trust account shows that these funds were never paid to Paul Gushue.

28. Mr. Gushue was contacted and he stated that he retained the services of the Solicitor in 1989. Mr. Gushue stated that he was not informed by the Solicitor that the defendant's insurer had reached a tentative settlement with the Solicitor. He had also not been told that the Solicitor had received \$42,000 and he stated that he had not received any of these funds.

8. Joyce Lapointe - \$35,000

29. The Solicitor represented Mrs. Lapointe in a motor vehicle accident which occurred on August 29, 1989. The insurance adjusters and the action confirmed that no payments had been made to the Solicitor in respect of that claim. Nevertheless, a review of Mrs. Lapointe's client trust account shows that that \$25,000 was deposited in her client trust account. The source of these funds is unknown. On September 30, 1991, the Solicitor issued cheque #492 in the amount of \$35,000 to Mrs. Lapointe (Document Book, Tab 17). Both the cheque and the entry on the client trust ledger shows this amount as being an advance on her insurance claim. Mrs. Lapointe was contacted and stated that she was informed by the Solicitor that the insurance company had made an advance on her claim. As the source of these funds is unknown, Mrs. Lapointe may have to repay these funds. Therefore, the payment represents a misappropriation of funds from the Solicitor's trust account. Additionally, the Solicitor misled Mrs. Lapointe as to the status of her claim.

9. Lois Lawrence - \$30,200

30. The Solicitor represented Ms. Lawrence and settled a motor vehicle accident claim in late 1991. Two cheques totalling \$30,200 (Document Book, Tab 18 "Letters enclosing cheques") were deposited in the Solicitor's trust account and properly credited to Ms. Lawrence's client trust ledger.

31. Ms. Lawrence never received payment from the Solicitor. As these funds cannot be located in the Solicitor's trust account, it is the Law Society's position that he has misappropriated this client's trust funds.

10. Todd McGrayne - \$3,500

32. On May 31, 1990, the Ontario Court (General Division) ordered that the sum of \$3,500 of a total of \$5,500 held by the Solicitor in his trust account for the infant, Todd McGrayne, be paid into Court (Document Book, Tab 19). The remainder of the funds were to be paid to the Solicitor on account of his legal fees. The Solicitor has never complied with the Court's Judgment nor has he issued a reporting or accounting of the disposition of the \$5,500.

33. Since the Solicitor's trust account is now in a debit position, this \$3,500 has been misappropriated from the client's trust account.

11. Charles Wayne Ure - \$17,200

34. The Solicitor represented Mr. Ure and another client, Ms. Joanne Brule.

35. Mr. Ure's client trust account shows that cheque #491, in the amount of \$17,200, was issued to him on October 7, 1991. Mr. O'Hara, now representing Mr. Ure, was contacted and he stated that this amount was a repayment of a \$15,000 loan made in July, 1991 by Mr. Ure to the Solicitor's client. The additional \$2,200 represented interest on the loan. A review of the Receipts Journal and the client trust ledger shows that \$15,000 was credited to Joanne Brule's client trust account on July 16, 1991 (Document Book, Tab 20) with the explanation "received from Ure".

26th January, 1995

36. Mr. Ure had provided the Solicitor with funds to be invested on his behalf. The Solicitor acted for Ms. Brule on a personal injury claim and the payment of \$15,000, which was credited to her account, appears to be an advance on the claim. The Solicitor did not provide Mr. Ure with adequate security on the loan, nor did he advise Mr. Ure to obtain independent legal advice.

37. Despite the fact that the claim had not been settled, on October 7, 1991, the Solicitor issued a cheque to Mr. Ure in the amount of \$17,200 representing the original loan of \$15,000 plus \$2,200 interest on the loan. As Ms. Brule had not yet settled her claim, and therefore, had not received any monies in her trust account to make such repayment, the \$17,200 must be a misapplication of other trust funds.

12. Martel, Chapman, McNichol - \$49,900

38. The Solicitor represented the above-named clients with respect to a motor vehicle accident claim. On November 21, 1991, the Solicitor received a letter from the insurers including three cheques totalling \$49,900 (Document Book, Tab 21). These cheques were traced to a duplicate bank deposit book as evidence that they were deposited in trust. However, the client ledger cards did not show that the monies had been credited to their account. A review of the receipts journal for November of 1991 (Document Book, Tab 22) reveals that the monies were credited to the file of Diotte-Kress Age. There is no evidence that the clients had been advised on their behalf and therefore, as the Solicitor's trust account is in a debit balance, the Solicitor misappropriated the said funds.

13. Guhbawin Co-Operative - \$107,568.00

39. Guhbawin Co-Operative ("Guhbawin") was a client of the Solicitor and was involved in the building of a housing project. Guhbawin received the sum of \$128,244.86 from Canada Life, which funds were deposited in the Solicitor's trust account. The Solicitor was to release these funds to the builder of the project as the work advanced.

40. A review of the client trust ledger shows that as at November 28, 1991, the Solicitor was to be holding \$107,567.56 for the client. As this amount is part of the trust shortage, the Solicitor misappropriated these funds from the client.

B. Borrowing From Client - Breach of Rule 7

1. Helen Adams \$50,000

41. The Solicitor had a previous solicitor/client relationship with Ms. Adams.

42. The client trust listing for Helen Adams shows that a payment in the amount of \$50,000 was made to her on November 6, 1991 (Document Book, Tab 23, copy of cheque).

43. Ms. Adams mentioned to the Solicitor that she had a sum of money which she was interested in investing. The Solicitor suggested that he would borrow the \$50,000 from her and would pay \$10,000 in addition to giving a bonus of \$5,000 on the loan. Ms. Adams lent the Solicitor the money in return for a personal Promissory Note. Ms. Adams did not have a copy of the Promissory Note as she had left it with the Solicitor in his office in November, 1991. No copy of the Promissory Note was found in the Solicitor's office during the investigation.

44. The monies were deposited in the Solicitor's trust account and were recorded on the duplicate bank deposit as coming from "SLM for Workshop" (Document Book, Tab 24). The Workshop was a consulting business owned by the Solicitor. The Solicitor did not advise Ms. Adams to obtain independent legal advice.

45. The Solicitor therefore breached Rule 7 of the Rules of Professional Conduct by borrowing \$50,000 from his client.

DATED at Toronto this 30th day of November, 1993."

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RECOMMENDATION AS TO PENALTY

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The Committee recommends that Stephen Lorne McDonald be given permission to resign.

REASONS FOR RECOMMENDATION

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1. Stephen McDonald is a 44 year old lawyer with a long history of severe mental illness, which includes repeated suicide attempts. Although his suicide attempts began in 1981, his illness was not properly diagnosed until 1987, at which time it was identified as mixed bi-polar affective (manic depressive) disorder with rapid cycling. This is a psychiatric illness in which there are wide mood swings from very low or depression, with risk of suicide, to highs or mania, with inappropriate behaviour and expansive ideas that can result in extremely poor judgment. Rapid cycling refers to a sub-type in which these mood shifts occur at least four times a year, but in the case of Stephen McDonald, occur at times in a matter of days or even hours, and are referred to as "ultra rapid" or "continuous" cycles. The term "mixed" refers to the fact that both depressed and manic moods are present, and may even be present at the same time.

2. The solicitor's mental illness is severe in character, requiring a great deal of monitoring and treatment, including medications, all of which will be required for the rest of his life. Depression and the risk of suicide are both accepted aspects of this illness. The risk of suicide for this solicitor is greater in that there have been numerous serious attempts at suicide, there is a family history of this illness (including a suicide), and both rapid cycling and panic feelings are associated with increased risks of suicide. The solicitor's preoccupation with suicide and his repeated attempts at suicide have also been coupled with repeated psychiatric admissions, and long term treatment.

3. The solicitor grew up in Sudbury, and returned there to practice following law school. The solicitor was one of eleven children who was raised by an aunt and uncle because of his mother's mental illness. The solicitor's mother had substantial emotional difficulties, including manic depression and her hospitalizations and emotional difficulties were the root cause of the solicitor being sent at 3 months old, to be raised by his aunt and uncle. The solicitor had been active in the community and had a long history of contribution to charities, including charities connected with the Catholic Church, Steelworkers Union, and the United Way. In 1987 he had been one of 25 Canadians to receive a reward as a volunteer from Health and Welfare Canada.

4. The solicitor's sister also suffered from manic depression, had been ill for a long time and had received treatment in the Sudbury area. In fall 1991 she committed suicide by intentionally walking in front of a train. The solicitor's brother spent 35 years in a psychiatric hospital, suffering from manic depressive psychosis.

First admission 1981

5. The solicitor's first psychiatric admission (the Homewood Sanitarium in Guelph) was a two month admission in spring 1981. The solicitor had been depressed for about a year and revealed to his wife that he had made suicide attempts. He disclosed that he had been responsible for a recent explosion in his garage that had been a suicide attempt. There was an explosion and a serious fire. The solicitor had thrown gasoline all over the garage and set it on fire.

He had intended to be killed in the explosion and fire but was rescued by his wife and brothers. There had also been a recent car accident on the highway, which he had deliberately planned in the hope that he would be killed. He had also considered killing himself with a knife or a gun. The solicitor's wife was the chief pharmacist at a Sudbury hospital, and the solicitor was then a well-known lawyer in Sudbury, both of which factors contributed to the solicitor's psychiatric admission in Guelph, and as well, his ongoing treatment in Guelph.

6. At the time of that admission he was diagnosed as manic depressive, depressed. He was also tested regarding the suicide factor, and since 1981 has been diagnosed as suicidal. He was discharged and prescribed medication (imipramine, an anti-depressant drug). He continued to see Dr. Ferguson in Guelph for psychotherapy, and to have his medications monitored. The sessions continued three or four times a year until 1984.

#### Second admission 1987

7. The solicitor was readmitted to Homewood Sanitarium for one month in July, 1987 because of suicide ideation. He had been depressed for about a year. This admission was precipitated by suicidal thoughts and dangerous behaviour that could have resulted in death. The diagnosis at this admission was bi-polar affective disorder, mixed with melancholia. On discharge he was prescribed imipramine and lithium.

8. He continued to travel to Guelph for psychotherapy with Dr. Ferguson, which visits varied from three to seven times a year. In 1987 his increasing episodes of anxiety and panic resulted in the additional prescription of the drug clonazepam.

9. Prior to 1987, even though the solicitor was manic depressive, he was able to control it, and had normal periods. In 1987, the situation deteriorated. His moods would change in days or even hours. He never had normal periods, and he had an extreme attraction to suicide instead of fear. All he wanted to do was kill himself.

#### Third admission 1991

10. The solicitor's third admission to the Homewood Health Centre followed the activities which led to the findings of professional misconduct. He was a patient in the Homewood Health Centre for six months (December, 1991 to June, 1992). There had recently been increasing amounts of suicidal thoughts and activity. On 6 December, 1991 he had slashed his wrists over a period of three hours, in an attempt to find the right vein. The solicitor had several stitches to repair the lacerations. He reported that he experienced an inner peace once the task was completed. In November, 1991, the solicitor had carried out a serious overdose on large amounts of lithium and four to five boxes of extra-strength tylenols. When that activity was not a successful suicide, he went on to plan another suicide involving suffocation with a cleaners bag.

11. Approximately two years earlier, the solicitor had made another suicide attempt while being involved in a car accident. He reached down and unbuckled his seatbelt at the time in the hope that he would be killed and there would be no questions about it. He did receive physical injuries as a result.

12. He was highly suicidal on admission, and admitted to being envious of his sister for her suspected suicide a month earlier. On discharge he was prescribed four different medications (duralith, rivotril, carbamazepine, and bupropion). His risk of occurrence was considered increased as a result of the rapid cycling with suicide ideation, plus his then uncertainty about the future, and the likelihood of his giving up his law practice.

26th January, 1995

CURRENT MEDICAL SITUATION

13. There was a substantial amount of medical evidence available for the Committee, including both admission notes and discharge summaries from each of the psychiatric admissions at the Homewood Health Centre, as well as reports from a psychiatrist and a psychologist treating the solicitor at the time of the hearing. Kenneth Breitman, Ph.d, C.Psych, wrote on 19 November, 1993:

"In the case of Stephen McDonald, continuing psychiatric and psychotherapeutic maintenance are essential. It is not the case, in my opinion, that such required attention hinges on his behavioral tendencies, or their potential for exhibition of anti-social characteristics. It is, rather, because of the very considerable time and effort, to say nothing of personal suffering and expenses, required to stabilize this man, and the greater probability that provision of these services will contribute to its preservation. Currently his stabilization appears reasonably good, but, in my opinion, tenuous, and requiring ongoing medical and psychological attention, in the same context in which he has been receiving it from Dr. Ferguson, and me. I believe that clinically sensitive and informed management of both prolonged depressive periods, and hypo-manic experiences, are critical to the avoidance of retrogressive, self-damaging adjustment, and suicidality...

...Mr. McDonald has, as always, recognized, acknowledged and genuinely (in my opinion) lamented the illegal behaviours he enacted during his pathological periods of (most probably) marked emotional and mental illness. Similarly, he has never sought to avoid their legal consequences.....a genetically determined disease, which has already cost him his career, his marriage, his lifestyle, his associated health, financial reversal, and his status in his home community, at a time when a monumental personal and professional struggle has finally produced a modicum of health...Certainly, continuation of Mr. McDonald's current therapeutics is, in my opinion, essential...

...To summarize, I find that in the case of Mr. McDonald, developmental dynamics, and genetically loaded components of bi-polar affective disorder, with spontaneous, rapid cycling, have made both historical behaviours and pathology stabilization and remediation extraordinarily difficult. I have dealt with this man for a substantial period of the recent times, in which stabilization of a complex of disorders, probably extant since 1968, has been a focal clinical objective."

14. The solicitor is presently on the following six medications for the treatment of mixed bi-polar affective disorder with rapid cycling:

bupropion  
carbamazepine  
clonazepam  
lithium  
metotrimeprazine  
valproic acid

15. Bupropion is not available on prescription in Canada, and its use requires the authorization of the Health Protection Branch of the Federal Department of Health. It was not really until bupropion was initiated for the solicitor in May, 1992, that he began to show some improvement in his depression and control of the rapid cycling.

16. The solicitor admitted all the allegations and admitted those acts constituted professional misconduct. The solicitor himself reported to his partners that the Law Society should be contacted about his practice, with respect to certain of the acts of misappropriation. There were parallel criminal proceedings which had not been completed at the time of the hearing. The solicitor was uncertain where the funds he misappropriated went, and it had been impossible to sort out accurately where the money went. There was no evidence that the solicitor benefited to a substantial degree from the misappropriation.

17. When initially prescribed medication, the level of medication was very modest. The solicitor now takes enormous dosages of medication on a daily basis to control his illness. He now takes 21 pills a day of 5 different medications. The mix of pills is changed every two months. There are side effects from almost all of the medications, including seizures, liver problems, thyroid problems and gall stones.

18. The combination of mixed bi-polar defective disorder (manic depression) with rapid cycling rarely occurs. As a result, the solicitor was not properly diagnosed or properly medicated for a long time. Lack of medical expertise and knowledge was referred to as an issue. At no time did anyone say to this lawyer after 1987 that he should not be practicing law. The solicitor has never been told that he is so severely incapacitated that he should not be a lawyer. There was no suggestion that the solicitor did not do what doctors had told him to do.

19. The solicitor openly accepted responsibility for his misconduct and indicated that in the criminal proceedings there would be a simple acceptance of responsibility coupled with a plea of guilty. The root of the solicitors misconduct was not the traditional dishonesty, but rather, medical issues totally beyond the solicitor's control. Manic depression can be biological and there is a history of manic depression in the solicitor's family.

#### THE SOLICITOR AND SUICIDE

20. The solicitor gave detailed evidence about his relationship with suicide. He is tremendously fearful of suicide and attracted to it at the same time. He was obsessed by it. The solicitor's evidence also described the highs and lows of manic depression. He could go for several months in a normal mode. The highs were very bright, talkative, vivid and intelligent. During the lows, he would be so depressed that sometimes the bottom would flush out from under him. At times, when he was getting mixed manic depression, he would adjust his medication so that he would be able to sleep during the highs and still have energy during the lows.

21. From October, 1987, the solicitor admitted that suicide took over his life. He became attracted to it. Before that he had been fearful of it.

"...I slit my wrists on December 6, 1991 because I was attracted to it and like a surgeon, you have to be able to cut the skin and it is the hardest thing to do but once you cut, you just dig and you dig and you dig and I have -- I had a pail of water and I was in the shower and I was just cutting and there was a stream and Tracy, my niece, found me in the morning."

22. The solicitor does not recall doing the events set out in the agreed statement of fact. In fact, the solicitor does not recall events from even earlier, even from 1988 onward. Following the solicitor's suicide attempt on 6 December, 1991, he felt it had opened a window of clarity to him. He called in his associates and told them that there were distinct problems with his practice and they should call in the Law Society.

23. The misappropriation took place during a six month period from March or April, 1991 through to November, 1991, during which the solicitor was in sole practice. At the time of the misappropriation, he was seeing Dr. Ferguson (psychiatrist) regularly at approximately 2 month intervals, and had been seeing Dr. Ferguson for about 10 years. He was taking lithium and rivotril at the time.

24. The solicitor also had anxiety attacks and panic attacks. He had disassociation attacks which he took care of by injuring himself. He would smash his head against the door and then would bite himself until he bled.

#### SUMMARY

25. This is a unique case. Over a million dollars were misappropriated by a severely mentally ill solicitor. No restitution was made. The solicitor's illness is rare, long lasting, certainly life-threatening, and may be genetic in nature. Counsel for the Law Society did not contest the solicitor's mental illness and admitted that the condition of the solicitor was extreme to say the least.

26. The Committee reaffirms the governing principal that where a solicitor is found to have misappropriated trust funds, he or she should be disbarred unless there are strong extenuating circumstances indicating otherwise (Philip Upshall).

27. The Committee is also mindful of the two principles it should consider, that is the principle of general deterrence, and the maintenance of the integrity of the profession in the eyes of the public. The Committee is also mindful of its responsibility to send a strong message to the profession and to the public that it will not tolerate the misconduct of members who take large sums of money from clients, particularly where there is no restitution.

28. There may not be a precedent for the recommendation the committee is making. In fact, there may not be much precedent for the solicitor's mental illness and the consequences it has for him in his life. The uniqueness and severity of the solicitor's illness suggest that the principal of general deterrence may not usefully apply in this case. Who are we going to generally deter by disbarring Stephen McDonald? The answer is probably no one, other than another solicitor who is diagnosed with the rare combination of bi-polar disorder, severe manic depression and rapid cycling of a mixed fashion.

29. It is essential that the public believe that the Law Society protects their interests and strongly sanctions the behaviour of a solicitor who has misappropriated over a million dollars. At the same time, the Law Society has an obligation to consider the unique circumstances of this solicitor's extreme mental illness. This solicitor is a disabled person. His disability is so extreme that he is chronically suicidal, unless he takes large quantities of medications on a daily basis, and continues in long term therapy.

30. The Committee is of the view that the unusual circumstances of this case, and the degree of disability experienced by the solicitor require a recommendation fashioned to meet these unique circumstances. Accordingly, notwithstanding the amount of money misappropriated, and bearing in mind the unusual circumstances of the case and the disability suffered by the solicitor, the Committee recommends the solicitor be given permission to resign.

26th January, 1995

Stephen Lorne McDonald was called to the Bar on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 11th day of October, 1994

Carole Curtis (for the Committee)

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

There were no submissions and the Report was adopted.

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

Submissions were made by both counsel in support of the recommended penalty.

There were questions from the Bench.

Counsel, the Reporter and the public withdrew.

It was moved by Mr. Blue but failed for want of a seconder that the solicitor be disbarred.

The Recommendation as to Penalty was adopted.

Counsel, the Reporter and the public were recalled and informed of Convocation's decision that the solicitor be permitted to resign.

CONVOCATION ROSE at 5:05 P.M.

Confirmed in Convocation this . day of , 1995

Treasurer