MINUTES OF DISCIPLINE CONVOCATION

Thursday, 28th May, 1998
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Angeles, Arnup, Backhouse, Bobesich, Carpenter-Gunn, Carter, Chahbar, Cole, Copeland, Crowe, Gottlieb, MacKenzie, Marrocco, Murray, Sachs, Stomp, Swaye, Topp, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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Ms. Lesley Cameron, Senior Counsel-Discipline introduced Mr. Peter Wardle who acted as Duty Counsel.

DISCIPLINE COMMITTEE

Re: Alex BORMAN - Toronto

The Secretary placed the matter before Convocation.

Mr. Wilson withdrew for this matter.

Mr. Glenn Stuart appeared on behalf of the Society. The solicitor was present and assisted by Mr. Wardle, Duty Counsel.

Mr. Stuart advised that the solicitor requested an adjournment to the June Convocation. He further advised that the solicitor would not contest the recommended penalty if the adjournment was granted.

The Society did not oppose the adjournment.

Mr. Wardle made submissions in support of the request for an adjournment because the solicitor had a number of real estate closings scheduled in June.

The matter was stood down.

Re: Frank Andrew THERIAULT - Toronto

The Secretary placed the matter before Convocation.

Messrs. Wilson and Topp withdrew for this matter.

Ms. Amanda Worley appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Ms. Worley advised that the solicitor requested an adjournment to the June Convocation. She explained that the solicitor's files had been seized by his landlord for non-payment of his rent and that the solicitor was taking steps to rectify the situation and to have his filings completed by the June Convocation.

The Society did not oppose the adjournment.

The adjournment was granted to the June Convocation.

Re: Pangiota Pat PAPADEAS - Windsor

The Secretary placed the matter before Convocation.

Ms. Sachs withdrew for this matter.

Mr. Jonathan Batty appeared on behalf of the Society and Mr. Wardle appeared on behalf of the solicitor. The solicitor was not present.

Mr. Wardle, on behalf of the solicitor requested an adjournment to the September Convocation. Mr. Wardle advised that because of personal and financial problems the solicitor required additional time to complete her filings.

Mr. Batty requested that the adjournment be made peremptory to the solicitor.

Convocation granted the adjournment to the September Convocation peremptory to the solicitor.

Re: Randall JAMES OICKLE - Osgoode

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 6th April, 1998, together with the Affidavit of Service sworn 17th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 15th April, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th May, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert C. Topp

In the matter of The Law Society Act and in the matter of	Audrey Cado for the Society
Randall James OICKLE of the Township of Osgoode a barrister and solicitor	Not Represented for the solicitor Heard: December 10, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 11, 1996 Complaint D241/96 was issued, and on April 21, 1997 Complaint D175/97 was issued, against Randall James Oickle alleging that he was guilty of professional misconduct. Complaint D175/97 was withdrawn on consent at the hearing.

The matter was heard in public on December 10, 1997 before Robert C. Topp sitting as a single bencher. The Solicitor participated in the hearing by teleconference. He was not represented by counsel. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D241/96

2. a) He failed to file with the Society within six months of the termination of his fiscal years ended November 30, 1993, November 30, 1994 and November 30, 1995 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 consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D241/96 and is prepared to proceed with a hearing of this matter on September 10, 1997.

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 D241/96 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on February 12, 1992. He practised as a sole practitioner until his suspension on May 26, 1995 as a result of his failure to pay his errors and omissions levy.

5. The Solicitor's fiscal year end is November 30th. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal years ending November 30, 1993, November 30, 1994 and November 30, 1995, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. A Notice of Default in Annual Filing, dated February 2, 1996 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, dated April 4, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to brings his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's April 4, 1996 letter was signed for and delivered on April 10, 1996. A copy of the Law Society's April 4, 1996 letter and Acknowledgement of receipt of a registered item card is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

8. By registered mail dated June 19, 1996, the Law Society forwarded to the Solicitor a copy of its Notices of Default in Annual Filing. The Solicitor was reminded of his obligation to make annual filings pursuant to section 16(2) of Regulation 708. The Solicitor was advised that a suspended member is subject to the annual filing requirements. The Solicitor was advised should he fail to provide the outstanding filings within thirty days of the date of this letter, the matter would be referred to the Discipline Committee for authorization of a formal complaint. The Law Society's June 19, 1996 letter was signed for and delivered on July 2, 1996. A copy of the Law Society's June 19, 1996 letter and Acknowledgement of receipt of a registered item card is attached as Exhibit "C" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

9. To date, the Solicitor has not provided the outstanding filings.

V. DISCIPLINE HISTORY

10. The Solicitor does not have a discipline history.

DATED at Toronto this 5th day of September, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Randall James Oickle be reprimanded in Convocation if he has made his filings by the time the matter is considered by Convocation, failing which, that he be suspended for a period of three months commencing at the conclusion of his administrative suspension and continuing from month to month thereafter until his filings are completed to the satisfaction of the Law Society.

REASONS FOR RECOMMENDATION

The ongoing problem of solicitors failing to provide The Law Society with the appropriate documentation to demonstrate the proper conduct of the practice can in this case be satisfied by the Solicitor being reprimanded in Convocation if he has made the appropriate filings and if he has failed to do so by imposing a period of suspension of one month commencing at the conclusion of the administrative suspension and continuing from month to month thereafter until his filings are completed to the satisfaction of the Society.

ALL OF WHICH is respectfully submitted

DATED this 6th day of April, 1998

Robert C. Topp

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he had made his filings, failing which, that he be suspended for a period of 1 month commencing at the conclusion of his administrative suspension and continuing from month to month thereafter until his filings are completed to the satisfaction of the Law Society.

Mr. Batty advised that the solicitor's filings were completed and made submissions in support of a reprimand in Convocation.

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

It was moved by Mr. Swaye, seconded by Mr. Gottlieb that the solicitor be reprimanded in Committee.

Carried

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

Convocation turned itself into a Committee of the whole and the Treasurer administered the reprimand.

CONTINUATION OF THE ALEX BORMAN MATTER

Convocation granted the solicitor an adjournment to the Discipline Convocation in June.

Re: Sarah Jean BAGNALL - Toronto

The Secretary placed the matter before Convocation.

Ms. Carpenter-Gunn withdrew for this matter.

Ms. Elizabeth Cowie appeared for the Society and Mr. Steven Clark appeared for the solicitor who was present.

Convocation granted the request of the solicitor to have the matter heard in camera.

The public withdrew.

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IN PUBLIC

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Re: Shannon Howard MARTIN - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Gottlieb, Topp and Wilson withdrew for this matter.

Ms. Janet Brooks appeared for the Society and Mr. James O'Grady appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 1st April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th May, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes, Chair
W. Michael Adams
Gary L. Gottlieb, Q.C.

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

SHANNON HOWARD MARTIN
of the City
of Ottawa
a barrister and solicitor

Janet Brooks
for the Society

James O'Grady
for the solicitor

Heard: February 17 & 18, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE BEGS LEAVE TO REPORT:

REPORT

On December 11, 1996 Complaint D351/96 was issued, and on April 1, 1997 Complaint D20/97 was issued against Shannon Howard Martin alleging that he was guilty of professional misconduct.

The matter was heard in public on February 17 and 18, 1998 before this Committee composed of Ronald D. Manes, W. Michael Adams and Gary L. Gottlieb, Q.C. The Solicitor attended the hearing and was represented by James O'Grady. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D20/97

2. a) During the period June 18, 1993 to June 24, 1993 he misused his trust account by operating personal and general office transactions through his mixed trust account.

b) He breached Rule 7 of the *Rules of Professional Conduct* by borrowing directly or indirectly, through his spouse, approximately $68,000 from his client McMullen Investments Limited, which loan was secured by a mortgage against his residence.

d) He breached Rule 7 of the *Rules of Professional Conduct* by borrowing directly or indirectly, through his spouse, approximately $30,000 from a client McMullen Investments Limited, which mortgage was secured by a mortgage against his residence.

f) He filed false Form 2 Certificates with the Law Society for the fiscal years ending June 30, 1989 through June 30, 1993, which failed to disclose:
i) his indirect indebtedness to a client, McMullen Investments Limited;

Particulars c), e), f) ii), iii), g) and h) were dismissed.

Complaint D351/96 was dismissed.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D351/96 and D20/97 and is prepared to proceed with a hearing of this matter on February 17 and 18, 1998.

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 Complaints D351/96 and D20/97 with his counsel, James O'Grady. The Solicitor admits that the facts underlying the Complaints, as set out in this Agreed Statement of Facts, when taken in their entirety, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1964. He practices as a sole practitioner in Ottawa. At times relevant to the Complaints herein, the Solicitor practised as a sole practitioner.

Complaint D20/97

2 a) during the period June 18, 1993 to June 24, 1993, he misused his trust account by operating personal and general office transactions through his mixed trust account.

5. In June 1993, Revenue Canada froze the general account of the Solicitor's practice due to unpaid tax liabilities. The Solicitor then opened a trust ledger in his name which he entitled: "Bank Problem". A copy of the ledger is at Tab 1 of the Document Book.

6. On June 18, 1993, the Solicitor deposited earned fees totalling $1,000.00 on account of his client Quill into his mixed trust account to the credit of the "Bank Problem" ledger. A copy of the deposit slip is at Tab 2 of the Document Book. A copy of the Solicitor's ledger for his client Quill Spring is at Tab 3 of the Document Book.

7. On June 18, 1993, the Solicitor also deposited petty cash totalling $9.57 into his mixed trust account to the credit of the "Bank Problem" ledger. A copy of the deposit slip is at Tab 2 of the Document Book.

8 On June 18, 1993, the Solicitor issued the trust cheques totalling $1,009.57 in payment of his employees' salaries:

a. Cheque 1234 to Jo-Ann Benn in the amount of $410.79 (Tab 4, Document Book);

b. Cheque 1235 to Linda Stonehouse in the amount of $313.12 (Tab 5, Document Book); and

c. Cheque 1236 to Carolyn Potvin in the amount of $285.57 (Tab 6, Document Book).

9. The issuance of cheques totalling $1,009.57 reduced the balance of the "Bank Problem" ledger to zero. On June 22, 1993, the Solicitor withdrew, by certified cheque debit memo, $1,210.84 to the credit of Turpin Leasing Ltd. in payment of a personal expense, his car lease (Tab 7, Document Book). As result, the balance of the "Bank Problem" ledger was overdrawn by $1,210.84.

10. On June 23, 1993, the Solicitor issued a further trust cheque against the "Bank Problem" ledger. This cheque in the amount of $120.00 was for another personal expense of the Solicitor, the filing fee to the Minister of Finance for the amendment to the articles of the Solicitor's corporation "C.E. Stonehouse Limited" to change its name to "346992 Ontario Inc." (Tab 8, Document Book). With the issuance of this cheque, the "Bank Problem" ledger was overdrawn by a total of $1,330.84.

11. On or about June 23, 1993, the Solicitor opened a new bank account for general office expenses under the corporate name 346992 Ontario Inc. On June 24, 1993, the Solicitor deposited $1,330.84 from the account of 346992 Ontario Inc. to the "Bank Problem" ledger to reimburse the trust account (Tab 9, Document Book).

2b) he breached Rule 7 of the *Rules of Professional Conduct* by borrowing, indirectly, through his spouse, approximately $68,000.00 from his client, McMullen Investments Limited, which loan was secured by a mortgage against his residence.

2c) in the circumstances of particular (b), he breached Rule 23(6)(a) of the *Rules of Professional Conduct* by personally guaranteeing the said mortgage loan.

2d) he breached Rule 7 of the *Rules of Professional Conduct* by borrowing indirectly, through his spouse, approximately $30,000.00 from a client McMullen Investments Limited, which loan was secured by a mortgage against his residence.

2e) in the circumstances of particular (d), he breached Rule 23(6)(a) of the *Rules of Professional Conduct* by personally guaranteeing the said mortgage loan.

12 Mary Aileen McMullen is the sole shareholder of McMullen Investments Limited. The company was incorporated February 22, 1917, under the *Ontario Corporations Act* as C.L. Perkins Limited, a company in the machinery business. It was renamed McMullen-Armstrong Limited as of August 9, 1918; McMullen-Perkins Limited as of March 22, 1920; and McMullen Investments Limited as of June 4, 1963. McMullen Investments Limited was used as vehicle to invest Ms. McMullen's inheritance from her father in private loans secured by mortgages. Ms. McMullen's inheritance was initially invested by her father's lawyer, J.H.McNulty of Ottawa, who was also her guardian for a period of time after her father's death. Until his death in 1972, Mr. McNulty was also the company's solicitor and acted on its various transactions. After Mr. McNulty's death, the firm McTaggart, Adams and Martin acquired McMullen Investments Limited as a client. The Solicitor states that as of 1989, the company had a portfolio of approximately $1,067,920. The Solicitor states that as of 1989, he personally acted on 9 of the total 24 mortgages which were held either by the company or by Ms McMullen at that time. He further states that his associate and former partner, Paul McTaggart acted on the majority of these remaining transactions.

13. From 1972 to 1995, Ms. McMullen and her company were clients of the Solicitor and Paul McTaggart. The Solicitor arranged mortgage investments for her company by selecting investments, arranging property inspections and completing all necessary legal work obtaining Ms. McMullen's authorization for mortgage investments where Ms. McMullen authorized the Solicitor to proceed with an investment. The Solicitor's bookkeeper was responsible for keeping records of investments of McMullen Investments Limited. Mortgage payments were deposited to a bank account in the name of McMullen Investments Limited for which a charge was made of 5% of the interest portion of the collections. Cheques on the account required 2 of 3 possible signatories. The possible signatories were: the Solicitor, his secretary and Mr. McTaggart. Upon Ms. McMullen's approval of a transaction, she expected the appropriate cheques to be drawn as required. Ms McMullen does not complain that any improper cheque was issued. The Solicitor and Mr. McTaggart shared equally an administrative fee amounting to 5% of all interest collected. A copy of one of the Solicitor's ledger with respect to collection charges for a McMullen investment is at Tab 10 to the Document Book. Annual meetings of the company were held at the Solicitor's office. The Solicitor, Ms. McMullen and her accountant attended and reviewed and approved financial statements.

14. On or about September 6, 1988, the Solicitor asked Ms. McMullen for a loan of approximately $68,000 to replace second and third mortgages on his residence. Ms. McMullen authorized a loan to be secured by a second mortgage on the Solicitor's residence at 41, 5th Avenue, Ottawa which was owned by his spouse. Ms. McMullen did not consider asking for a guarantee of the loan from the Solicitor; however he offered to guarantee the mortgage which offer Ms. McMullen accepted. Evidence will be called by the parties with respect to the request for the loan.

15. While he may have advised that Ms. McMullen and her company to obtain independent legal advice, he did not insist that she obtain independent legal representation nor did she obtain independent legal representation. Ms. McMullen declined independent legal advice because of her good working relationship with the Solicitor. She had vested a great deal of confidence in him. Evidence be called by the parties on the Solicitor's discussions with Ms. McMullen in relation to the conflict.

16 The Solicitor acted for McMullen Investments Limited on the loan transaction.

17 Douglas R. Adams acted for the Solicitor and his spouse in respect of the mortgage to McMullen Investments Limited. The Solicitor explained to the Law Society's examiner that Mr. Adams was retained so that the mortgage proceeds would not be deposited to his trust account. Mortgage proceeds of $66,000 were delivered by cheque from McMullen Investments Limited to Douglas R. Adams, Barrister & Solicitor, in trust, dated September 2, 1988 (Tab 12, Document Book). The cheque from McMullen Investments Limited was signed by the Solicitor and his secretary, Ms. Benn. The Solicitor will call evidence in this regard.

18. On September 6, 1988, the mortgage from the Solicitor's spouse to McMullen Investments Limited in the amount of $68,000 was registered as Instrument No. N455419. The mortgage rose in priority to a second mortgage subject to a first mortgage to the Toronto-Dominion Bank in the amount of $158,340, following the registration of the discharge of the second mortgage to Catherine Chell in the amount of $35,000 on September 25, 1988, and the discharge of the third mortgage to the Toronto-Dominion Bank in the amount of $20,000 on October 25, 1988. A copy of the abstract of title to the property is Tab 11 of the Document Book.

19. The Solicitor guaranteed the mortgage to McMullen Investment Limited.

20. The Solicitor did not obtain an appraisal for the property which supported the investment by McMullen Investments Limited. As for a reporting letter, Ms. McMullen is unable to locate a copy in her files. The Solicitor is unable to locate a copy of a reporting letter to Ms. McMullen in his files with respect to the mortgage investment.

21. On or about December 4, 1989, the Solicitor approached Ms. McMullen and requested an increase of approximately $33,000 in the mortgage loan. Ms. McMullen authorized the increase. On October 23, 1991, the mortgage in the amount of $68,000 was discharged.

22. The Solicitor acted for McMullen Investments Limited on the second loan transaction. With respect to any discussion of conflict of interest, or independent legal representation, with respect to this further loan, the situation was the same as is described in paragraph 15 above.

23. The Solicitor acted for McMullen Investments Limited on the second loan transaction. Mr. Adams acted for the Solicitor and his spouse. On December 6, 1989, a mortgage from the Solicitor's spouse to McMullen Investments Limited in the amount of $99,804.66 was registered as Instrument No.N515432. The mortgage was registered as a third mortgage following:

a. first mortgage to the Toronto-Dominion Bank in the amount of $158,340;
b. second mortgage to McMullen Investments Limited in the amount of $68,000.

The mortgage from the Solicitor's spouse to McMullen Investments Limited in the amount of $68,000 was discharged on October 23, 1991.

24. The Solicitor guaranteed the further mortgage to McMullen Investment Limited. A copy of the mortgage is at Tab 13 to the Document Book.

25. Mortgage funds of $33,000 were delivered by certified cheque from McMullen Investments Limited to the Bank of Montreal on or about December 8, 1989 (Tab 14, Document Book). The cheque from McMullen Investments Limited was signed by the Solicitor and his secretary, Ms. Benn.

26. With respect to an appraisal or reporting letter to Ms McMullen concerning this further loan, the situation was the same as is described in paragraph 20 above.

27. Over the course of the two mortgages, payments under the mortgages were deposited to the McMullen Investments Limited account by the Solicitor's bookkeeper, Linda Stonehouse. Immediately upon the loan having been made, payments were often not paid on a timely basis. The Solicitor did not advise Ms McMullen promptly when default occurred, but she was made aware of the default by her accountant at each annual review meetings of the entire mortgage portfolio first in the Spring of 1991 and thereafter each year or just prior to the annual meeting by the Solicitor. On each occasion, Ms McMullen asked the Solicitor to bring the mortgage in good standing. On occasion, he brought payments in good standing, but not overdue interest. The Solicitor did not insist that Ms. McMullen and her company obtain independent legal representation.

28. On December 6, 1990, the mortgage expired. The Solicitor and his spouse did not contact Ms. McMullen to renew the mortgage. The Solicitor did not advise Ms. McMullen and her company obtain independent legal representation.

29. In early 1991, Ms. McMullen's accountant advised her to seek independent legal representation, which advice she followed. By letter dated May 8, 1991 (Tab 15, Document Book), new counsel for Ms. McMullen asked the Solicitor to satisfy the arrears in mortgage payments. The Solicitor failed to do so.

30. In May 1994, Ms. McMullen through new counsel asked that the mortgage be refinanced or the property sold. The Solicitor advised the Society that he was unable to refinance and placed the property for sale in September 1994 without success (Tab 16, Document Book).

31. In May 1996, the property was sold under power of sale proceedings by the first mortgagee, the Toronto Dominion Bank. The net proceeds of the sale were $195,174.39 of which $161,460.43 was required to discharge the first mortgage. The balance of $33,713.96 was applied to the second mortgage held by Ms. McMullen's company.

32. In January 1977, McMullen Investments Limited issued an action in the Ontario Court (General Division) against Mrs. Martin in respect of the mortgage debt. On March 24, 1997, McMullen Investments Limited obtained summary Judgment against Mrs. Martin in the amount of $124,185.73 (inclusive of both interest to March 24, 1997 and costs) with interest at the rate of 5%. The Judgment of the Court, Statement of Claim and Statement of Defence are at Tab 16A of the Document Book.

33. Mrs. Martin made an assignment in Bankruptcy on March 26, 1997. In that Bankruptcy McMullen Investments Limited filed a proof of claim in which it calculated its loss at $131,789.26 as at April 14, 1997 (Document Book, Tab 16B). The company did not recover any portion of its loss in the bankruptcy.

34. On April 17, 1996, the Solicitor had made an assignment in Bankruptcy. He listed McMullen Investments Limited as one of his creditors in the amount of "$50,000 contingent". He was discharged on February 12, 1997. The company did not recover any portion of its loss in that bankruptcy.

2g) in the fiscal year ending June 30, 1993, he failed to obtain from private mortgagee clients, Ondrovic and Khan, completed Forms 4 and failed to complete Forms 5 as required under Regulation 708 made under the *Law Society Act.*

35. In the fiscal year ending June 30, 1993, the Solicitor acted for both lender and borrower in a private mortgage transaction between Frank Ondrovic, as mortgagee, in a mortgage loan to Stuart A. Armstrong as mortgagor (Tab 17, Document Book) The Solicitor failed to obtain a completed Form 4 from his clients. He failed to complete a Form 5 for the transaction.

36. In the fiscal year ending June 30,1993, the Solicitor acted for both lender and borrower in a private mortgage transaction between McMullen Investments Limited, as mortgagee, in a mortgage loan to Tajammul Khan and his spouse as mortgagors. (Tab 17, Document Book) The Solicitor failed to obtain a completed Form 4 from his clients. He failed to complete a Form 5 for the transaction.

2h) he acted in a conflict of interest by acting for a client Chaudhary in respect of a company known as Trizan Meat & Poultry Inc. in circumstances where his spouse held a 30% interest in the company and where he did not insist that his client Chaudhary obtain independent legal advice or obtain his waiver with respect to same.

37. The Solicitor acted Mr. Chaudhary in the incorporation of a private company known as Trizan Meat & Poultry Inc. Originally, Chaudhary was to be the sole shareholder. Subsequently the Solicitor's spouse became a partner. The Solicitor states that this was in lieu of payment of fees to him in the amount of approximately $20,000 which the client was unable to pay. In the period 1989 through to 1993, Chaudhary held a 70% interest in the company and the Solicitor's spouse held a 30% interest. The Solicitor did not insist that Chaudhary obtain independent legal advice nor did he discuss his conflict of interest with Chaudhary or obtain his client's written consent to act for him in the circumstances (Tab 18, Document Book).

2f) he filed false Form 2 Certificates with the Law Society for the fiscal years ending June 30, 1989 through to June 30, 1993, by failing to disclose:

i) his indirect indebtedness to a client, McMullen Investments Limited;
ii) the fact that he had acted for private lenders; and
iii) his indirect participation in a joint venture with a client.

38. In his Form 2 Certificates filed with the Law Society for the fiscal years ending June 30, 1989 through to and including June 30, 1993 (Tab 19, Document Book), the Solicitor the Solicitor declared or certified as required, in each filing:

> I HAVE NOT been indebted for borrowed money either directly or indirectly to a client or to a person or corporation who at the time of borrowing was or had been my client or a client of a firm of which I was then a member.

The Solicitor's declaration or certification in these filings did not include any disclosure of the loans from McMullen Investments Limited referred to herein.

39. In his Form 2 Certificates filed with the Law Society for the fiscal years ending June 30, 1989 through to and including June 30, 1993 (Tab 19, Document Book), the Solicitor failed to disclose the fact that he had acted for McMullen Investments Limited in lending money or in respect of the June 30, 1993 fiscal year, that he had acted for Mr. Ondrovic and Mr. Khan as lenders. Each year, the Solicitor declared or certified, as required:

> I HAVE NOT in the course of the practice of law, arranged for or acted for a lender in the lending of money on the security of real estate.

40. In his Form 2 Certificates filed with the Law Society for the fiscal years ended June 30, 1989 to June 30, 1993 (Tab 19, Document Book), the Solicitor declared or certified declared or certified as required, in each filing:

> I HAVE NOT either directly, or indirectly through a corporation in which I, or a related person has an interest, participated in a joint venture, syndicated mortgage investment, partnership or other form of business enterprise with a client or former client.

The Solicitor's declaration or certification in each filing did not include any disclosure of his spouse's acquired shareholding in Trizan Meats & Poultry Inc. as referred to herein.

Complaint D351/96

2 a) He failed to file with the Society within six months of termination of his fiscal year ended June 30, 1995, 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.*

41. The Solicitor's fiscal year end is June 30th. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending June 30, 1995, as required by S.16(2) of Regulation 708 under the *Law Society Act.*

42. A Notice of Default in Annual Filing, dated January 19, 1996 (Tab 20, Document Book) was forwarded to the Solicitor by the Law Society.

43. By letter dated January 26, 1996 (Tab 21, Document Book), the Solicitor advised the Law Society he had changed Accountants and apparently his filing had fallen between the cracks.

44. By registered mail, dated February 26, 1996 (Tab 22, Document Book), the Law Society advised the Solicitor he had not taken the necessary steps to brings his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the *Law Society Act* may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention.

45. The Solicitor advised the Law Society by telephone on February 29, 1996 (Tab 23, Document Book), he would file by March 8, 1996. The filing was not received.

46. The Solicitor advised the Law Society by telephone on April 2, 1996 (Tab 24, Document Book) he would follow-up with his accountant regarding the outstanding filing.

47. The Solicitor advised the Law Society by telephone on April 10, 1996 (Tab 24, Document Book) his accountant was not insured. The Solicitor advised he was attempting to contact the firm Ernst & Young to request they sign the report.

48. By letter dated April 10, 1996 (Tab 25, Document Book), the Solicitor undertook to the Law Society he would have his annual filing completed by May 6, 1996. The Solicitor advised it would be necessary for Ernst & Young to review his filing and do the certificate as he had changed accountants.

49. The Solicitor advised the Law Society by telephone on May 3, 1996 (Tab 26, Document Book) he would not be able to file until May 15, 1996.

50. By letter dated May 3, 1996 (Tab 27, Document Book), the Solicitor advised the Law Society he had made arrangements to have the filing completed and delivered to the Law Society by May 15, 1996. He asked the Law Society to consider his letter as his undertaking.

51. The Solicitor's bookkeeper advised the Law Society by telephone on May 3, 1996 (Tab 28, Document Book), the Solicitor was leaving the office that day for one week. The Law Society reminded the bookkeeper of the Solicitor's advice that he would file by May 15, 1996.

52. By letter dated May 16, 1996 (Tab 29, Document Book), the Solicitor advised the Law Society he had not received the auditor's certificate although a review of his books and records had taken place. The Solicitor advised the auditor had one or two questions which required his answer before the filing could be released to him. The Solicitor advised he had attempted to speak with the auditor's representative several times but had been unable to do so. The Solicitor advised he would provide the outstanding filing by May 22, 1996.

53. By letter dated May 23, 1996 (Tab 30, Document Book), the Solicitor's secretary confirmed her telephone conversation, of that same day, with the Law Society in which she advised the accountant's report was almost complete however due to prior timetable incompatibility on the Solicitor and his accountant's part, a few questions remained unanswered. The Solicitor's secretary advised the Solicitor thought it was just a matter of a few days before the report would be completed, signed and mailed to the Law Society. The Solicitor's secretary requested a one week extension to provide the filing.

54. By letter dated June 3, 1996 (Tab 31, Document Book), the Solicitor advised his accountants were following up on several private mortgage files as part of their audit. The Solicitor advised he anticipated filing within a week or two.

55. By further letter dated June 3, 1996 (Tab 32, Document Book), the Solicitor provided the Law Society with his new address. The Solicitor advised he would be able to complete his outstanding filing within three to four weeks. The Solicitor advised his books and records for the general and trust account had always been up to date and his bookkeeper had completed monthly reconciliations. The Solicitor advised the delay in filing was caused by the facts that in the past he had done private mortgage transactions and the auditor was required to make random audits and do written confirmations. The Solicitor advised, as well, an employee of Ernst & Young who had been working on his file had left the firm and the follow-up fell between the cracks. The Solicitor advised he would contact the Law Society on November 6, 1996 to advised of the status of the matter.

56. A Law Society staff employee spoke with the Solicitor by telephone on August 28, 1996 (Tab 33, Document Book). The Solicitor advised he had left a telephone message with his accountant. The Solicitor advised he would advise the Law Society of the status of filing on September 3, 1996. The Solicitor advised he would be able to file shortly as his accountant had advised him the filing was ready for his signature. The Solicitor did not contact the Law Society on September 3, 1996.

57. The Solicitor advised the Law Society by telephone on November 22, 1996 (Tab 34, Document Book) he would contact his accountant. The Solicitor advised he would contact the Law Society the following day to advise of the status of his filing. The Solicitor was advised by the Law Society no further extensions would be granted after November 26, 1996.

58. By letter dated November 28, 1996 (Tab 35, Document Book) the Solicitor advised the Law Society he had contacted his accountant. The Solicitor stated his accountant advised the person who had been working on his file had left the firm and his file could not be located. The Solicitor advised he had spoken to his bookkeeper who had possession of the original cheques and records and she stated she would make them available to the accountant. The Solicitor advised his accountant would complete his filing for the two years as soon as possible.

59. On March 24, 1997, the Solicitor submitted his Forms 2 and 3 for the fiscal year ended June 30, 1995.

V. DISCIPLINE HISTORY

60. The Solicitor does not have a discipline record.

DATED at Toronto, this 17th day of February, 1998."

REASONS FOR FINDING

The Solicitor, Shannon Howard Martin, is 60 years of age and was called to the Bar in 1964. He has no previous discipline history and essentially at the material times conducted a commercial and real estate practice.

In April of 1996 Mr. Martin made an assignment in bankruptcy, and within a year after that, to be specific in March of 1997, his wife made an assignment in bankruptcy. It was with respect to the audit that arose out of that assignment in 1996, that these charges arose.

The charges with respect to D20/97 and D351/96 allege professional misconduct in respect to the following particulars:

Complaint D20/97

2. a) during the period June 18, 1993 to June 24, 1993, he misused his trust account by operating personal and general office transactions through his mixed trust account.

b) he breached Rule 7 of the Rules of Professional Conduct by borrowing, directly or indirectly, through his spouse, approximately $68,000.00 from his client, McMullen Investments Limited, which loan was secured by a mortgage against his residence.

c) in the circumstances of particular (b), he breached Rule 23(6)(a) of the *Rules of Professional Conduct* by personally guaranteeing the said mortgage loan.

d) he breached Rule 7 of the Rules of Professional Conduct by borrowing directly or indirectly, through his spouse, approximately $30,000.00 from a client McMullen Investments Limited, which loan was secured by a mortgage against his residence.

e) in the circumstances of particular (d), he breached Rule 23(6)(a) of the *Rules of Professional Conduct* by personally guaranteeing the said mortgage loan.

f) he filed false Form 2 Certificates with the Law Society for the fiscal years ending June 30, 1989 through to June 30, 1993, by failing to disclose:
   i) his indirect indebtedness to a client, McMullen Investments Limited;
   ii) the fact that he had acted for private lenders; and
   iii) his indirect participation in a joint venture with a client.

g) in the fiscal year ending June 30, 1993, he failed to obtain from private mortgagee clients, Ondrovic and Khan, completed Forms 4 and failed to complete Forms 5 as required under Regulation 708 made under the Law Society Act.

h) he acted in a conflict of interest by acting for a client Chaudhary in respect of a company known as Trizan Meat & Poultry Inc. in circumstances where is spouse held a 30% interest in the company and where he did not insist that his client Chaudhary obtain independent legal advice or obtain his waiver with respect to same.

Complaint D351/96

2. a) he failed to file with the Society within six months of the termination of his fiscal year ended June 30, 1995, 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.

The parties have filed an Agreed Statement of Facts in which the Solicitor, having reviewed complaints, D351/96 and D20/97, admits that the facts underlying the complaints, as set out in the Agreed Statement of Facts, when taken in their entirety, constitute professional misconduct.

It is with respect to certain of the particulars characterizing the professional misconduct with which the Solicitor and his counsel, Mr. O'Grady, take issue. Accordingly, it is with respect to those particulars that we have addressed ourselves.

2. a) during the period June 18, 1993 to June 24, 1993, he misused his trust account by operating personal and general transactions through his mixed trust account.

In June of 1993 Revenue Canada froze the Solicitor's general account due to unpaid tax liabilities, which we understood from the Solicitor's evidence had been extant for at least a year, if not more.

The Solicitor opened a trust ledger in his name, which he entitled, "Bank Problem." On June 18th, 1993, the Solicitor deposited earned fees totaling $1,000 on account of a client, which fees he placed in his mixed trust account to the credit of the, "Bank Problem" ledger.

On June 18th, 1993, the Solicitor also deposited petty cash totaling $9.57 into this Bank Problem trust account which the Solicitor had set up for himself.

On June 18th the Solicitor issued trust cheques in the amount of $1,009.48 in payment of his employee salaries. The issuance of these cheques reduced the balance of the Bank Problem trust account to zero. We accept the Solicitor's evidence that the trust account was used, at least in part, to conduct his law practice and to pay his employees.

I say at least in part because on June 22nd, 1993, the Solicitor withdrew by certified cheque about $1,210.84 to the credit of the company which held the lease on his car. There is no issue that this was, of course, a payment of a personal expense. There is also no issue that as a result the Bank Problem trust account was overdrawn by $1,210.84.

On that same date the Solicitor also issued a cheque in the amount of $120, which admittedly is another personal expense, for the filing of an amendment to the articles of the Solicitor's corporation to change its name. With the issuance of that cheque, the Bank Problem trust account was overdrawn by $1,330.84.

On June 23rd the Solicitor opened a new bank account for his general office expenses under the corporate name, which change was instituted with the payment of $120.

On June 24th the Solicitor deposited $1,330.84 from the corporate account to the Bank Problem ledger to reimburse the trust account.

It is important to note that the Solicitor is not charged with overdrawing his trust account but, rather, is charged with misusing his trust account by, in effect, co-mingling personal and general office transactions with his mixed trust account. However, it is also important to note that the overdrawing was part of the implementation of the alleged misuse. We are also mindful of the short period of time over which these events occurred.

The Society's position is that the trust account is a matter of trust between the Solicitor and the client and that it is something that cannot be misused in any way for the benefit of the Solicitor, and it follows, of course, for the detriment of anyone else with whom the Solicitor deals.

> "A Solicitor's trust account is a matter of trust between the solicitor and his clients. It is something not to be misused in any way for the benefit of the solicitor and the detriment of anyone else with whom he or she deals." *Robert Allan Levine*, **Order of Convocation dated September 26, 1996 and Report and Decision of the Discipline Committee dated August 12, 1996 at p. 17.**

Section 14(6) of Regulation 708 made under the Law Society Act provides in part:

(6) Money shall not be paid into a trust account,
(a) that belongs entirely to the member in his or her firm including an amount received as a general retainer....

(b) that is received by the member on account of fees for which a billing has been delivered or for services already performed...

The Law Society simply submits that the fees paid by the client, and the petty cash, fall within subsection 14(6)(a) and 14(6)(b) respectively, and that they were paid into the trust account in breach of the Regulation. In Levine the committee concluded:

> "There are good reasons for the requirements of the regulation that client's funds and solicitor's funds not be co-mingled, and that trust accounts neither contain solicitor's funds nor be used to pay personal or practice expenses of solicitors." *Robert Allan Levine*, **Order of Convocation dated September 26, 1996 and Report and Decision of the Discipline Committee dated August 12, 1996 at p. 18.**

The Law Society submits that one reason is that the co-mingling of the funds exposes the client's funds to garnishment by the solicitor's creditors.

Ms. Brooks argues, for example, that Revenue Canada could have traced these funds from the Solicitor's general account into his mixed trust account and placed a freezing order on those funds as well. Ms. Brooks also argues that using a client's trust account for personal purposes, even for the shortest period of time, is, in effect, using the client's funds. She argues that the Solicitor has admitted that the act of co-mingling these funds, that is setting up a personal trust account in the mixed trust account, was an intentional or purposeful act, thereby clearly preferring his own interests over the interests of the clients, notwithstanding the short period of time that the situation prevailed. Accordingly, she argues that it was an impermissible use of a client trust for that period of time and constitutes professional misconduct.

Mr. O'Grady concedes that the Solicitor should not have co-mingled his personal account with his mixed trust accounts and, as such, concedes that under Section 14(6) the circumstances here could be construed as professional misconduct. Mr. O'Grady argues that under Section 14(8)(e) it is not professional misconduct if the money that went into the mixed trust account went in by inadvertence in contravention of 14(6). The Solicitor gave an explanation that he failed to understand how to operate his accounts in the face of a garnishment by Revenue Canada such that he did not intend any unethical conduct.

Mr. O'Grady argues that we ought to view this short-term unanticipated problem caused by the Revenue Canada garnishment as one being done primarily for the purpose of ensuring that the regular payroll could be paid and, in a sense, it was "by inadvertence". However, Mr. O'Grady, in his candor, conceded that inadvertence may be, "stretching it" in relation to the member's conduct. We find that the co-mingling of the personal with the clients' trust account was purposeful.

Mr. O'Grady argues that: "Not every breach of the Rules of Professional Conduct necessarily amounts to professional misconduct..." and that our committee has some latitude to determine what constitutes professional misconduct in the circumstances. He says here that this was a relatively minor and somewhat technical breach of the Regulation, which is simply not serious enough to constitute professional misconduct. Supporting his position, Mr. O'Grady cites the well-known case of re: *Stevens and the Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 (Ont. Div. Ct.) as well as re: *Fan and the Law Society of British Columbia* (1977), 77 D.L.R. (3d) 97 (B.C.C.A.) and MacKenzie, Lawyers and Ethics, pp. 25-5 and 26-16.

We are of the view that the application of neither Stevens nor Fan would tolerate the conclusion that the conduct which is the subject matter of this complaint was anything less than professional misconduct.

Even if it is accepted that the Solicitor failed to understand how to operate his trust account or failed to understand how to operate his practice in the face of Revenue Canada, the authority is clear that his obligation is to understand, his obligation is to abide by, the Rules of Professional Conduct, and his clear obligation was not to use his mixed trust account for his own purposes. See John Calvin Bracewell, Order of Convocation dated September 22, 1994 and Report of the Discipline Committee dated April 13, 1994 at p.6.

There was some discussion regarding the question of a solicitor overdrawing a trust account in a 24-hour period under certain circumstances, the force of which was that the overdrawing here was even more marginalized by the fact that it happened over a two-day period only. Reference was made to Regulation 708, Section 14(8) to (13). Section 14(13) reads as follows:

> For the purposes of subsections (8) and (12), cash, cheques negotiable by the member, cheques drawn by the member on the member's trust account and credit card sales slips in the possession and control of the member shall be deemed from the time the member receives such possession and control to be money held in a trust account if the cash, cheques or credit card sales slips, as the case may be, are deposited in the trust account not later than the following bank day.

This section 13 must be read in the context of the previous Sections (8) to (12). Subsection (12) states:

> At all times a member shall maintain sufficient balances on deposit in his or her trust account or accounts to meet all of his or her obligations in respect to money held in trust for clients.

The previous sections relate specifically to money drawn from a trust account, under these sections shall be drawn only by, and then goes on to describe how they shall be drawn.

These sections were never intended to permit a solicitor to draw on his or her clients' trust account purposefully, but rather, were remedial in nature and related to situations where, through inadvertence or through the ordinary course of business, clients' money was technically not deposited in the trust account when a cheque was drawn upon it, but rather, under those circumstances, that money received by the lawyer to be deposited in the trust account was deemed to be held in the trust account, but then only if it was deposited the very next day banking day.

That section read in that context is of no assistance to the Solicitor by way of explanation or mitigation or otherwise.

Accordingly, we find the solicitor guilty of particular 2(a).

Particulars 2(b), (c), (d) and (e) read as follows:

2. b) he breached Rule 7 of the Rules of Professional Conduct by borrowing, directly or indirectly, through his spouse, approximately $68,000.00 from his client, McMullen Investments Limited, which loan was secured by a mortgage against his residence.

c) in the circumstances of particular (b), he breached Rule 23(6)(a) of the Rules of Professional Conduct by personally guaranteeing the said mortgage loan.

d) he breached Rule 7 of the Rules of Professional Conduct by borrowing, directly or indirectly, through his spouse, approximately $30,000.00 from a client McMullen Investments Limited, which loan was secured by a mortgage against his residence.

e) in the circumstances of particular (d), he breached Rule 23(6)(a) of the Rules of Professional Conduct by personally guaranteeing the said mortgage loan.

The facts which are admitted by the Solicitor underlying those particulars are set out in paragraphs 12 through 34 of the Agreed Statement of Facts.

I will first deal with particulars 2(b) and (d). Rule number 7 and the Commentary reads as follows:

1. The lawyer must not borrow money from a client save:

(a) where the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or

(b) where in the case of a loan from a related person as defined by the Income Tax Act (Canada) the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice.

2. In any transaction other than one falling within the provisions of subparagraph 1(a), in which money is borrowed from a client by the lawyer's spouse or by a corporation, syndicate or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer must be able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal representation.

3. Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within the above principle, is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, then the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

COMMENTARY

1. The relationship existing between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and lawyer's duty to the client can be permitted to exist.

In the Bellefeuille decision, the committee stated the underlying concerns regarding the vulnerability of clients and the power imbalances between solicitors and clients that gave rise to the revision of the rule in 1981:

> "The rule against borrowing, having been Rule 7 of the Rules of Professional Conduct, is designed to ensure that clients, whose guard is understandably down when dealing with their own lawyer, are not taken advantage of by that same lawyer"
>
> In Baker, the committee stated:
>
> "It is our view that the spirit of Rule 7 is to protect those members of the public who are in a non-arms-length situation with a lawyer where they would ordinarily be putting a high degree of weight on the advice from the lawyer, and would be in a position of trusting the lawyer to be absolutely candid and to uphold the highest traditions of integrity and openness with members of the public."
>
> And, lastly, in Ellis the committee stated:
> "...the Rules presume vulnerability in respect to lawyers dealing with clients and especially in respect to lawyers who borrow from clients."

Ms. Brooks argues on behalf of the Society that the Solicitor borrowed money from Ms. McMullen contrary to Rule 7.1 She argues that Ms. McMullen's evidence was that the Solicitor asked her for the money and that she thought possibly his wife would get the money as well. The Solicitor agreed that he requested the money and we so conclude.

Ms. Brooks marked as Exhibit 8 a letter prepared by the Solicitor and his lawyer in the context of these proceedings, calculated to give information to those who would send in character references. This letter endeavours, she argues, to set out the background of the complaint and, in particular, with respect to the "borrowing" allegation, it states in a section entitled "Reply, Response to complaint 2(b)", that:

> "... *I was forced to declare bankruptcy on April 17th, 1996, and of course, lost my house and my client suffered the loss of a large part of the money.....she, through her investment company had loaned to me."* (emphasis mine)

Ms. Brooks argues that on the basis of all of this evidence the Solicitor borrowed money from his client. She argues in the alternative that even if he didn't borrow money from his client, (which here was on two occasions, once for $68,000 then an additional $33,000) then the borrowing was done by both Mr. Martin and his wife, and that this borrowing offended Rule 7.1 as well.

In the last alternative, Ms. Brooks argues that in any event Mr. Martin is caught by Rule 7.2 since even where money is borrowed by the lawyer's spouse, the lawyer must be able to discharge the onus of proving that the client's interests were fully protected and by independent legal representation. Ms. Brooks argues that neither of those branches of the onus were discharged by the Solicitor. She argues that he failed to fully protect his client because he did not disclose any personal financial information to her and he obtained no appraisal of the property, but rather, simply relied on his own subjective views as to his personal worth and the value of the security. She argues that in any event the Solicitor was required to, in turn, require his client to obtain independent legal advice, failing which, the Solicitor was not enabled by the rules to act in a transaction where his spouse was borrowing money from a client.

It is common ground that although the Solicitor discussed independent legal advice and the client may have declined, the Solicitor neither insisted on this independent legal advice nor was it ever obtained.

Mr. O'Grady argues that at worst the only transgression of the Solicitor in these circumstances was his failure to insist on his client obtaining independent legal advice and therefore was technically in breach of Rule 7.2. He argues that Rule 7 is unclear and in particular Rule 7.2 which clearly enables a spouse to borrow from a solicitor's client under certain circumstances.

In January of 1981 Rule 18 was amended to delete former Rule 18(1)(b) (Rule 18 is now Rule 7) which read:
Rule 18

1. A lawyer must not borrow money from his client save...

(b) where the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal representation, or....

In support of Mr. O'Grady's argument that this borrowing in these circumstances was a technical transgression only, he points out that prior to 1981 and only seven years prior to these circumstances giving rise to the borrowings in this case, a lawyer was always able to borrow money from a client so long as the lawyer discharged the onus. The absolute prohibition on borrowings as a result of the amendment and the present Rule 7 remains subject to the qualification set out in 7.2.

Mr. O'Grady argues that when read in light of the history of Rule 7, that the present Rule 7.2 permits borrowings from a client by the solicitor's spouse or by a "Corporation, syndicate or partnership" in which the solicitor or his spouse or both have a substantial interest, if the client is protected by independent legal representation and "the nature of the case". He argues forcefully that here it was the Solicitor's spouse who borrowed the money, borrowings which are permitted by Rule 7.2 ,and in consequence of that, when this Committee assesses his conduct as to whether it constitutes professional misconduct or not, it must assess it in light of a technical breach or lack of independent legal advice or, at worst, failing to fully protect the client, but not in the context of any breach of fiduciary duty to Ms. McMullen since the Solicitor was not in breach of any fiduciary duty because the borrowing was by the Solicitor's spouse.

He also argues that given the relatively recent rule amendments at the time of this transaction, and that Rule 7.2 enables borrowings by the lawyer's spouse directly or indirectly, or a corporation or partnership controlled by either of them or both of them directly or indirectly, that the rule could be very misunderstood, and we should assess the mind of the Solicitor with that difficulty in mind.

We are of the view that the Solicitor offended Rule 7.1 in that he borrowed money from his client on two occasions. We have found that the Solicitor requested that money from his client, that the client reasonably understood that that money was going to be lent to the Solicitor, and possibly his wife.

We conclude that the Solicitor structured the matter as a loan between his wife and the client, such that although it was clearly not his intention to do so, that action or that formality of the deal should not cloak its true nature.

We appreciate that the particulars use the word "indirectly" rather than "directly", but we have no difficulty in concluding that nothing turns on that description of the transaction and the particulars. We are mindful of the admonition in *Stevens and the Law Society of Upper Canada* that we are not to approach a particular with the technicality that a criminal court approaches an indictment. It seems to us that the word "indirectly" must certainly include the notion of directly. It was clear to us that during the entire course of the proceedings the distinction between the two and the consequences of same were both appreciated and fully advanced by both counsel such that there is no prejudice to the Solicitor with respect to the description of the particulars as one of an indirect as opposed to a direct borrowing.

We are also of the view that an amendment of particulars (b) and (d) should be granted and that no injustice would result from same, such that each of particulars (b) and (d) would read "directly or indirectly".

I might say that the direct borrowing, as well, is supported by the fact that there was evidence that the Solicitor put the Trizan Meat & Poultry Inc. investment, or interest in the company, in his wife's name where it was clear there that that interest was the Solicitor's interest and it arose out of an unpaid account, which I'll come to later.

In any event, for those reasons we find the Solicitor guilty of particulars 2(b) and (d).

With respect to particulars 2(c) and (e), which relate to personally guaranteeing the mortgage, we are of the view that these particulars should be dismissed. It seems to us that these particulars arise in the context of the borrowing counts for which the Solicitor has already been found guilty, and to go on and make a finding of guilt in respect to the guarantee particulars would be duplicitous or, in the alternative, that they are part of the implementation of the borrowing and are a necessary and included part of those counts. We find that this is especially so since the Solicitor offered that guarantee to his client to protect his client's interests, such that by finding the Solicitor guilty we would be penalizing a perfectly understandable professional act. We are not inclined to do that.

Particular 2(g) reads as follows:

2. g) in the fiscal year ending June 30, 1993, he failed to obtain from private mortgagee clients, Ondrovic and Khan, completed Forms 4 and failed to complete Forms 5 as required under Regulation 708 made under the Law Society Act.

In the fiscal year ending June the 30th, 1993, the Solicitor acted for both the lender and borrower in a private mortgage transaction between one Frank Ondrovic, as mortgagee in a mortgage loan to a mortgagor. The Solicitor admits that he failed to obtain completed Form 4s from his client and he failed to complete a Form 5 for the transaction. He also admits that in the fiscal year ending June 30th, 1993, he acted for both the borrower and lender and private mortgage transactions between McMullen Investments Limited as mortgagee and a mortgage loan to Mr. Khan and his wife as mortgagors. Again, he failed to obtain completed Form 4s from his client and failed to complete Form 5 for the transaction.

It should be noted that the Ondrovic mortgage was a pure mortgage renewal whereas the Khan mortgage was a second mortgage pursuant to which money was advanced. Ms. Brooks' position is that Section 15b of Regulation 708 establishes a positive obligation on the Solicitor to complete the forms and that failure to do so constitutes professional misconduct. Section 15b reads as follows:

15b (1) Every member who receives money from a client or other person for investment by way of a loan secured, or to be secured, by a mortgage or other charge on real property, including those to be held in trust either directly or indirectly through a related person or corporation, shall maintain records in addition to the requirements of sections 14 and 15, and as a minimum additional requirement shall maintain a file for each mortgage or other charge which shall include,

(a) an investment authority in a form prescribed by the rules, signed by each person from whom money has been received for investment before the advance of that money to or on behalf of the borrower;
(b) a copy of a report on investment in a form prescribed by the rules, the original of which shall be delivered forthwith to each person for whom money has been invested;
(c) a copy of a declaration of trust where the mortgage or other charge is held in the name of a person other than the investor, an original of which shall be delivered forthwith to each person for whom money has been invested; and
(d) a copy of the registered mortgage or other charge.

2. For the purposes of subsection (1),

(a) a member shall be deemed to have received money from a client or other person by way of a loan to be secured by a mortgage or other charge on real property where the member directs the client or other person to pay the money to be invested or loaned to an account, other than a trust account in the name of the member; and
(b) any change to a mortgage or other charge, any change in the rank on title of the mortgage or other charge, or any exchange or substitution of the mortgage or charge for another security shall be deemed to be a new investment by way of a loan to be secured by a mortgage or other charge.

Ms. Brooks argues that both these mortgage transactions were captured by 15b(2) in that the member is required to file Forms 4 and 5 where there is "any change to a mortgage such that it is deemed to be a new investment". She argues that that section is very wide and notwithstanding the fact that no monies were advanced under the Ondrovic mortgage, that that transaction is equally captured with the Khan mortgage.

We have filed before us by Ms. Brooks affidavits by Law Society representatives which she says demonstrate that the profession had sufficient notice in the Ontario Reports and in the Society's publication "The Adviser", so as to bring home the requirements with respect to 15b.

The Solicitor states that he was not aware when filing for fiscal 1993 of the requirements for Forms 4 and 5. Mr. O'Grady argues that as late as the February 1993 edition of "The Adviser" the Law Society was advertising the requirement for the forms and indicating that suggested revisions to them were being considered. Essentially, Mr. O'Grady's argument is that this is a technical breach and is a relatively minor matter.

We note that the Khan mortgage was January 15th, 1993, four months after the regulation was passed. We are not so sure about the a Ondrovic mortgage. It is certainly arguable that Rule 15b(2) required the Solicitor to report the Ondrovic mortgage, although it was a pure renewal, and certainly the Khan mortgage, where money came into the hands of the Solicitor. However, under all the circumstances we do not believe that the Solicitor's conduct in these circumstances constituted professional misconduct and we so find.

Particular 2(h) states as follows:

2. (h) He acted in a conflict of interest by acting for a client Chaudhary in respect of a company known as Trizan Meat & Poultry Inc. in circumstances where his spouse held a 30% interest in the company and where he did not insist that his client Chaudhary obtain independent legal advice or obtain his waiver with respect to same.

The Solicitor acted for Mr. Chaudhary in the incorporation of a private company known as Trizan Meat & Poultry Inc. Originally Chaudhary was to be the sole shareholder. Subsequently the Solicitor's spouse became in a sense a 30% shareholder. The Solicitor was owed a substantial amount of legal fees by Mr. Chaudhary, who was unable to pay them. All through the period 1989 to 1993 Mr. Chaudhary requested the Solicitor or any nominee of his choice to take first I believe a 15% interest and then, as the legal fees were incurred, a 30% interest in the company, and the Solicitor agreed such that he made his wife a shareholder of the company. The Solicitor did not insist that Mr. Chaudhary obtain independent legal advice nor did he discuss any alleged conflict of interest with Mr. Chaudhary, nor did he obtain Mr. Chaudhary's written consent to act for him in these circumstances.

The Law Society's position is that the Solicitor breached Rule 5 Commentary 8 of the Rules of Professional Conduct.

Rule 5

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

COMMENTARY

8. It is undesirable for a lawyer to represent anyone with respect to the investment by such person in a corporation or other entity in which the solicitor has an interest, other than a corporation or other entity whose securities are publicly traded. At the very least the lawyer must insist that the client receive independent legal advice where the corporation is not publicly traded. If such investment be by way of borrowing from the client, the transaction may fall within the requirements of Rule 7.

Ms. Brooks argues that under these circumstances the Solicitor was at least required to insist that Mr. Chaudhary receive independent legal advice.

Mr. O'Grady asked us to accept the Solicitor's explanation that he accepted a client's offer to transfer shares in an African poultry business, which never made any money and never had any assets and never resulted in any benefit to the Solicitor other than making an account receivable, a worthless interest in a client's business.

He argues that Commentary 1 to Rule 5 defines a conflicting interest as:

> "...one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or which the lawyer might be prompted to prefer to the interest of a client or prospective client."

Mr. O'Grady submits that the rule does not purport to deal with the situation described in the evidence. This was not a situation of a joint venture in which the lawyer's participation might have been used in conflict of interest to advise or encourage a client to invest. He argues that that rule really is intended to keep from under cover hidden interests by lawyers in their clients' affairs and prevent them from entering into situations which are prospective conflicts of interest. He says that no such situation obtains here.

We are of the view that, notwithstanding this forceful and common-sense argument, that the Solicitor was in a conflict of interest or a potential conflict of interest situation. We conclude this, mindful of the benevolent manner in which the Solicitor became involved. However, having regard to that latter statement and notwithstanding the breach of the Rules of Professional Conduct, we are of the view that it was a technical breach only and it was not professional misconduct for which the Solicitor should be found guilty. On that basis we would dismiss that particular.

Particular 2(f) has been amended as follows:

2. (f) he filed false Form 2 Certificates with the Law Society for the fiscal years ending June 30, 1989 through to June 30, 1993, which failed to disclose:

i) his indebtedness to a client, McMullen Investments Limited;
and he filed a false Form 2 Certificate with the Law Society for the fiscal year ending June 30, 1993, which failed to disclose:
ii) the fact that he had acted for private lenders; and
iii) his indirect participation in a joint venture with a client.

Simply put, Ms. Brooks argues that the Form 2 certificates for the fiscal years ending June 30th, 1989, through to and including June 30th, 1993, did not disclose the McMullen Investments Limited to which I have already referred.

Having regard to our previous finding, we find that the Solicitor is guilty of this particular, 2(f) (i). However, with respect to 2(f)(ii) and (iii) we do not find that the circumstances surrounding those particulars constitute professional misconduct.
With respect to 2(f) (iii), we have already expressed our conclusion that the Chaudhary transaction was not professional misconduct. It should be noted that Mr. Chaudhary has not complained to the Law Society in that regard either. We accept the Solicitor's evidence that with respect to 2(f)(ii) it was a slip, in the sense that he simply did not appreciate that he had filed a false Form 2, as alleged. I should note that in respect to that particular, that only obtained for 1993.

With respect to complaint D351/96, it reads as follows:

2. a) he failed to file with the Society within six months of the termination of his fiscal year ended June 30, 1995, 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.

The Agreed Statement of Facts completely sets out the factual underpinnings of that charge in paragraphs 41 to 59.

The Law Society's position on this particular matter is that Section 16(2) of the Regulation establishes a positive obligation on each member to complete his or her filings within six months of the end of the fiscal year and failure to fulfill that obligation constitutes professional misconduct.

The Solicitor admits he failed to comply with the Regulation and filed 15 months past the due date. He failed to comply with the undertaking to the Law Society to file the forms. He accepted this responsibility for not ensuring that his accountants attended to the filings in a timely fashion.

Ms. Brooks argues that the annual filings of solicitors signify that they continue in all respects to be financially responsible for money belonging to members of the public such that it is imperative that solicitors who fail to complete those filings in accordance with the Regulation be disciplined as that undermines the integrity of our self-regulation.

Mr. O'Grady concedes that the Solicitor was 15 months late in filing for fiscal 1995. Mr. O'Grady concedes that this was unacceptable. He asks us to consider the circumstances of the late filings. He asks us to consider the fact that the Solicitor was unable to file due to circumstances out of his control, circumstances where his previous partner had hired a firm of accountants, had not paid this firm of accountants, and the accountants would not do the filings. As a result, the Solicitor ultimately had to hire his own accountants after a period of several months in discussions and difficulties in getting records and finding records, such that when he finally did hire accountants, within three months the filings were done.

We accept the Solicitor's explanation but are left to decide whether under those circumstances there was professional misconduct. We had some concern over what could be described as the Solicitor's undertaking to the Law Society in May of 1996 where the Solicitor asked the Law Society to consider his letter as an undertaking that he had made arrangements to have the filing completed and delivered by May 15th, 1996.

While the Solicitor describes this as an undertaking, and no doubt the Society took it as an undertaking, that word has a technical meaning, and an important meaning to us. An "undertaking" is a formal promise by a solicitor to a court or fellow solicitor. We are of the view in these circumstances the Solicitor suffered from a terminal case of optimism but not from an intention to breach an "undertaking." What he was saying was that he was promising the Law Society he would complete the filing when he had no control over the circumstances of their production.

It is our view that while there is a breach of the Rules of Professional Conduct, clearly in these particular circumstances the Solicitor is not guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The majority of the Committee recommend that Shannon Howard Martin be suspended for a period of two months and that he pay Law Society costs in the amount of $1,000.

REASONS FOR RECOMMENDATION

The Solicitor was convicted of Particulars 2(a), (b), (d) and (f)(i). Basically for a brief period of time in June, specifically two days in 1993, he misused his trust account to avoid Revenue Canada's freeze on his personal account and for a very brief period to pay some personal expenses. The Solicitor also borrowed approximately $99,000 from his client, Ms. McMullen, (technically McMullen Investments Limited) and failed to disclose this borrowing in his Form 2 certificates.

Mr. Martin is a man of good character and reputation, which he is fortunate to retain after these matters were brought to public attention. He has no prior discipline history. We are of the view that he is genuinely remorseful.

We also appreciate that the bankruptcies and illness in his family and his own illness have taken their toll on his quality of life, which for a man of 60 is a real consideration. There are a number of cases we are asked to consider with respect to penalty. They comprise dissimilar situations which we are expected to thread together with some kind of logic and for which counsel have been of real assistance.

It is important that we attempt to assess the state of mind of the Solicitor at the time of the offences as well as the nature and extent of those offences together with whatever mitigating circumstances we are persuaded apply.

The common denominator of the borrowing and trust co-mingling offences is that the Solicitor, when confronted with situations that provoked his self-interest, responded by a breach of the Rules of Professional Conduct. We have no doubt that with respect to the borrowing from his client and, significantly enough, his major client, that he didn't believe that he was hurting her, nor, according to Mr. O'Grady's submissions, should we treat his client as less than a sophisticated client who knew the real estate residential market. She knew what interest rate she was receiving and knew it was a second mortgage, although she did not know the state of his personal finances nor the extent of the first mortgage.

There is nothing in Rule 7 that exempts clients such as Ms. McMullen from its application. There is nothing that suggests that she is not to a degree powerless or vulnerable in the sense that the rule was intended to protect such a class of people with respect to their dealings with solicitors. The fact is that Mr. Martin did not take any real steps to protect his client in the circumstances nor did he take any real steps to determine the nature and extent of his obligations to her.

Whenever solicitors borrow money from a client, they are profoundly vulnerable whatever the circumstances, whether it is a direct borrowing, which is strictly prohibited, or a borrowing in the context of Rule 7(2), that caution should remain.

It did not appear to us that at the time Mr. Martin made the borrowing, he felt any onus to either protect his client or check with the Law Society regarding the propriety of borrowing in the circumstances. We accept that he was of the opinion that there was adequate security to his client. We also accept that he went beyond what he actually had to do with this client in terms of what she would accept and offered his guarantee which was what he would reasonably expect any solicitor to do under the circumstances. The fact remains when it came right down to it and he needed $99,000, the Solicitor went to his client for the money. This borrowing led him to falsely report his Form 2s as he did not include this borrowing on the Form 2s.

In respect of the trust accounts, Mr. Martin was confronted with the situation where he simply did not know how he was going to operate his practice with Revenue Canada having frozen his trust funds, his personal funds or his general account. Rather than attempting to deal with the matter by opening another account and transacting business through that account, which Mr. O'Grady submits would not be in contravention of any law, Mr. Martin chose to use his trust account and, in effect, co-mingle it with his personal account to carry on business, albeit for a very short period of time and for a very small amount of money, which essentially went to pay his staff.

But he also ever so briefly took money from the mixed trust account to pay his car lease and a minor expense for incorporation related to his business which, in turn, enabled him to set up a general account. In both situations Mr. Martin used his position as a solicitor as a path of least resistance to accomplish a personal objective.

We accept Mr. Martin's evidence that he accepts responsibility and is remorseful, and we accept his evidence that he was not mindful of his obligations under the Rules of Professional Conduct when he did either of these transactions, but rather it was meant to be the most convenient way to deal with the situations. It was his position as a solicitor that enabled him to do it.

The range of sentence for roughly similar conduct with dissimilar people, appears anywhere in the area of a reprimand to 12 months. (See Baker, Royer, Herman, Hyrnkiw, Heller, Keys, Mantello, Levine and Bracewell). Levine and Bracewell related to misuse of a trust account whereas the remainder of the cases dealt with borrowing from clients, amongst other things,

In some of these cases such as Mantello and Hrynkiw repayment plans were made with the client and sanctioned by the Society and Convocation. So we find that Hrynkiw was suspended for a period of two months and thereafter indefinitely until the debt and interest had been repaid to his client.

Heller was an improper borrowing case. It was a 1983 case which was held *in camera*.

[in camera discussion is on page 38a]

We believe the same of Mr. Martin. We believe that Mr. Martin's conscience troubles him, and that he has learned his lesson.

There was some discussion here about the approach we should take to the lack of restitution or repayment. We are of the view that while that can be a positive factor to consider in mitigation, we should not in the circumstance where the solicitor has made an assignment in bankruptcy and been recently discharged, consider nonpayment as an aggravating factor. Suffice it to say that there has been no repayment, and no mitigation in that regard exists such as was the case in Mantello.

Levine misused his trust account for a period of approximately ten months, but the Committee was careful in that case to distinguish it from the Donohue matter because there was no complaint that Levine used the trust account to avoid creditors. Levine received a reprimand in Convocation.

Bracewell received a reprimand in Convocation, also on a joint submission, for misusing the trust account and overdrawing it in a six-month period. We are of the view that, standing alone, the Solicitor's co-mingling of the trust account over a brief period of two days was an isolated occurrence which may invite no more than a reprimand in Convocation, if not a reprimand in Committee.

However, the borrowing from clients and the lack of disclosure on the Form 2s is a more serious matter, especially when considered in combination with the trust account matters, and requires that some period of suspension be imposed. It is in regard to the period of suspension that has caused our committee to have to consider the implications upon this solicitor of the period of suspension.

In Bolton v the Law Society (1993), 1. W.L.R. 512(March 25, 1994) (England C.A.), the English Court of Appeal emphasized the manner in which committees such as ours should consider the consequences to the member and, on the other hand, the consequences to the integrity of the profession as follows:

> "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 practice when the period of suspension is past. If that proves, or appears likely, to be so 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 a part of the price."

Mr. O'Grady has made persuasive submissions based on the evidence of his client as to the impact of suspension. Mr. Martin has testified that he runs a small practice, and deals with small business clients who require his day-to-day attention or they are going to go elsewhere. He has testified that a period of suspension may ruin his practice and Mr. O'Grady has put it more forcefully, that a period of suspension may be tantamount to a disbarment.

We stand with the approach taken by the English Court of Appeal but, on the other hand, we are of the view that to not be mindful of the implications of a suspension on the Solicitor would be to fail to take a balanced view of the interests of the public and the interests of the Solicitor. While the interests of the public are paramount, the interests of the Solicitor are relevant.

And so it came for us to consider a range which on the one hand the Law Society sought, which was six to twelve months, or a range on the cases, of reprimand in Convocation to twelve months suspension, and what the solicitor sought, which was a reprimand in Committee, which in our view was not realistic, or a reprimand in Convocation.

In the circumstances of this case, we believe a suspension in the lower end of the range is appropriate. We believe that in the circumstances of this particular case, there is no parallel to the more aggravated circumstances that would invite a six- to twelve-month suspension. Without repeating the circumstances here, we feel that the public interest would be served if the Solicitor received a sentence between two and three months. I say two to three months so that one appreciates that we considered that the difference in two or three months could be appreciable to the Solicitor.

We have chosen two months suspension because we believe that the Solicitor's interests here are such that the longer the suspension, the riskier it is, and as between two and three months the public interest would be equally served by a suspension of two months. We are not unanimous in that conclusion.

As to the legal costs involved, we are of the view that an appropriate amount of costs should be a thousand dollars to cover the Society's expenses as we see them in respect to the investigation here. If there is a requirement of time to pay, then I am sure that that can be worked out between counsel.

Shannon Howard Martin was called to the Bar on April 10, 1964.

ALL OF WHICH is respectfully submitted

DATED this 1st day of April, 1998

Ronald D. Manes, Chair

DISSENT RE: SHANNON HOWARD MARTIN

RECOMMENDATION AS TO PENALTY

The dissenting member of the Committee recommends that Shannon Howard Martin be reprimanded in Committee.

REASONS FOR RECOMMENDATION

I respect the opinion of Mr. Manes and Mr. Adams, but I do not share it. In my opinion, what is appropriate in this case is a reprimand, and I feel that a reprimand in committee would be appropriate, and I'm going to give my reasons why.

We see many cases in discipline where lawyers finds themselves in dire financial straits and instead of doing the appropriate thing and declaring bankruptcy, they get involved in very serious misconduct and wind up getting disbarred.

Here we have a Solicitor who found himself in difficult financial circumstances. His wife went bankrupt and he went bankrupt. And when a solicitor goes bankrupt, the Law Society, as a matter of course, sends in the auditors, which is an understandable thing to do and the proper thing to do. However, in this Solicitor's case the auditors went in and the final result was that quite literally the book was thrown at him.

Every conceivable charge of misconduct that could have been laid in the circumstance was, and the ultimate result after this lengthy hearing was that the majority of the charges that were laid against the Solicitor were dismissed.

As Gavin MacKenzie, a fellow bencher and author of Lawyers and Ethics, noted in his book at pages 25 and 26, not every breach of the Rules of Professional Conduct amounts to professional misconduct.

With regards to the particular misconduct that we did find in this matter, one was the misuse of the Solicitor's client trust account, and I lay particular emphasis on the word "misuse." There was no misappropriation and there was no misapplication.

On June 18th of 1993 the Solicitor deposited an earned fee cheque of a thousand dollars in his trust account, and the reason he didn't deposit it in his general account was because on that day he learned that Revenue Canada had placed a freeze on his general account, and it was not available for him to deposit the money into.

It wasn't appropriate to deposit an earned fee cheque into his trust account, but he found himself in the situation where he had the salary of three staff to pay and he issued trust account cheques on the same day paying them. However, he had earlier that day deposited one thousand dollars earned fees cheque and an additional $9.57 into the trust account, and he issued the three trust cheques to those employees. So there was no trust shortage created. The behaviour was inappropriate and in no way do I condone it, but we have to look at what actually occurred.

On June the 22nd the Solicitor issued a cheque for $1210.84 from the trust account and on June 23rd issued a cheque of $120 from the trust account. Those latter cheques were again for personal expenses. On June the 23rd he succeeded in making arrangements for another general bank account from which he then made a deposit to reimburse his trust account.

When you look at the spectrum of behaviour that could be involved in the misuse of a client's trust account, this misuse is at the very lowest end of that spectrum and we should bear that in mind.

With regards to the borrowing from a client charge, again we have to look at what actually occurred and at the client who was involved. Mrs. McMullen of McMullen Investments Limited gave evidence before us, and it must be noted that she bore no rancor, no ill-will whatsoever against the Solicitor. And it should also be noted that she did not make any complaints against the Solicitor.

And, as I mentioned earlier, the way this case wound up before us is that the Solicitor declared bankruptcy, an audit was done, various matters came to light, and that's why he was here. At no time did any clients ever make any complaints against him.

With regards to the borrowing from McMullen Investments Limited, this is not a case that we often see where a Solicitor has been preying on a vulnerable client, nor is this a case where a Solicitor was misadvising or taking advantage of a vulnerable client.

The Solicitor had been looking after McMullen Investments Limited and Mrs. McMullen since 1972. Mrs. McMullen was sophisticated, and through her company had been dealing with mortgages over an extensive period of time that had begun even before 1972. Her present portfolio is over a million dollars. We heard evidence that two other mortgages over that time had not turned out well but, by and large, all the investments that had been made were fine.

Mrs. McMullen knew the type of mortgages she was investing in. Some of them were second mortgages. She knew that. And with regards to the particular mortgage that caused the Solicitor to end up before us, Mrs. McMullen knew the amount of the mortgage, and she knew it was a second mortgage, and she knew the interest rate. Again, I am not condoning borrowing from a client, but we have to look at the particular circumstances of this case in order to judge what an appropriate penalty would be.

With regards to the misconduct regarding the incorrect completion of the Form 2 Certificate, we heard a great deal of evidence and submissions about direct versus indirect borrowing and what actually occurred. And based on the manner in which the Solicitor gave his evidence and everything else I heard, it is plausible that he did not pay proper attention or was under a misapprehension when the forms were completed.

At this point I would also like to say that the Solicitor, in giving his evidence, was forthright, sincere, respectful, and admitted that he made a mistake.

The Solicitor is 60 years of age, and has been in practice for 33 years, actually, going on to 34 years. He began in 1964 and now it's 1998. Apart from the matters which find him before us, he has an unblemished record. It is not by accident that a lawyer could be in practice for that many years with such a good record, and I think we have to take cognizance of that fact.

I've looked at the numerous character letters that have been tendered in evidence and in particular I note the letter of Gail Nicholls of the firm Macdonald, Affleck in which she says: "I was associated with Mr. Shannon Martin in the practice of law for a ten-year period between 1985 and 1995." She has come to know him as an honourable, decent individual with the best interests of his clients being one of his paramount concerns.

There is a letter from Kenneth Radnoff of Radnoff, Peal, Slover, Swedko and Dwoskin, who has known Mr. Martin for in excess of 20 years, and he refers to him as being of an unblemished reputation for honesty and fairness.

Finally there's another letter from the Honourable Jean Jacques Blais, who refers to Mr. Martin as an experienced, competent, caring lawyer who provides a high standard of professional service and continues to have the confidence of his clients and members of the profession. It states he is an active and respected member of his community, participating in its many organizations including the Shepherds of Good Hope, for whom he was a pillar of support for many years.

There is also another letter from Michael McCabe, President and CEO of the Canadian Association of Broadcasters, that talks about Mr. Martin's assistance with the organization Broadcasting for International Understanding that was organized in 1985 by Father Bob Ogle.

Lastly there's a letter from Dr. Don Kilby, who notes that in December of 1994 the Solicitor suffered a mild stroke, that was likely due to high blood pressure, that he was under a lot of stress, and that Mr. Martin seemed to have difficulty managing his stress and could not make difficult decisions concerning his law practice. He has never been incapacitated. He is a very affable gentleman and a kind, gentle, caring, capable man. And he ends the letter by saying that he is honest and sincere.

We are not dealing here with a case of a venal or dishonest lawyer. We are dealing here with a solicitor that has provided many, many years of honourable service to his clients and those years have to count for something.

We've heard from his solicitor who represented him very ably that the Solicitor, who is a sole practitioner, has a marginal practice, and basically that any suspension will be tantamount to giving him the professional guillotine.

The Solicitor's wife has gone bankrupt. The Solicitor has gone bankrupt. His counsel said that he is struggling in practice. Therefore, in my opinion, it would not be appropriate to levy any type of costs against the Solicitor. He should be assisted and we should not in any way, no matter how small, cause him any further financial difficulties.

Once again, he has provided many years of honourable, honest service to his clients. He gave evidence in a sincere, forthright and respectful manner. He admitted he made a mistake. His mistakes fall in the realm of errors in judgment. But he has learned, and if ever there was a case where one could say a solicitor would never find himself back in discipline proceedings at the Law Society, this is such a case. That is why I am recommending a reprimand in Committee.

ALL OF WHICH is respectfully submitted

DATED this 7th day of April, 1998

Gary L. Gottlieb, Q.C.

There were no submissions.

It was moved by Mr. MacKenzie, seconded by Mr. Murray that the Report be adopted.

Carried

The majority recommendation of the Discipline Committee was that the solicitor be suspended for a period of 2 months and that costs be paid in the amount of $1,000.

Both counsel made submissions in support of the majority recommendation.

Mr. O'Grady, on behalf of the solicitor requested the commencement of the suspension be August lst, 1998.

It was moved by Mr. Marrocco, seconded by Mr. Cole that the solicitor be suspended for a period of 2 months commencing August lst, 1998 and that costs in the amount of $1,000 be paid in installments of $250 on the first and fifteenth over the months of September and October.

Carried

Re: Gerard MITCHELL - Toronto

The Secretary placed the matter before Convocation.

Ms. Sachs withdrew for this matter.

Mr. Hugh Corbett appeared on behalf of the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 5th March, 1998, together with an Affidavit of Service sworn 24th March, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on llth March, 1998 (marked Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th May, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

28th May, 1998

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Harriet E. Sachs

In the matter of The Law Society Act and in the matter of	Audrey Cado for the Society
GERARD MITCHELL of the City of Toronto a barrister and solicitor	Not Represented for the solicitor Heard: September l0, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 19, 1997 Complaint D101/97 was issued against Gerard Mitchell alleging that he was guilty of professional misconduct.

The matter was heard in public on September 10, 1997 before Harriet Sachs sitting as a single bencher. The Solicitor attended the hearing and represented himself. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D101/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 1, 1996, 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 consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D101/97 and is prepared to proceed with a hearing of this matter on September 10, 1997.

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 D101/97 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 31, 1989. He practises as a sole practitioner.

5. The Solicitor's fiscal year end is January 1st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 1, 1996, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. By letter dated August 9, 1996 the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended January 1, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's August 9, 1996 is attached as Exhibit "A" to this Agreed Statement of Facts.

7. A Law Society staff employee spoke with the Solicitor by telephone on August 21, 1996. The Solicitor advised in January, 1996 he declared bankruptcy and as a result his trustee in bankruptcy was in receipt of his records. The Solicitor advised his accountant would complete his filing by September 30, 1996. The Solicitor advised he retained no trust funds as of January 31, 1996. A copy of the Law Society's handwritten Telephone Transaction form, dated August 21, 1996, is attached as Exhibit "B" to this Agreed Statement of Facts.

8. By registered mail, dated September 9, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's September 9, 1996 letter was signed for and delivered on September 11, 1996. A copy of the Law Society's September 9, 1996 letter and Acknowledgement of receipt of a registered item card is attached as Exhibit "C" to this Agreed Statement of Facts.

9. A Law Society staff employee spoke with the Solicitor by telephone on September 11, 1996. The Solicitor advised he hoped to file by the end of September, 1996. A copy of the Law Society's handwritten Telephone Transaction form, dated September 11, 1996, is attached as Exhibit "B" to this Agreed Statement of Facts. The filing was not received.

10. A Law Society staff employee spoke with the Solicitor by telephone on January 6, 1997. The Solicitor advised he should be able to provide the filing shortly. The Solicitor stated his trustee in bankruptcy possessed some of his books and records, however, he anticipated being discharged from bankruptcy shortly. A copy of the Law Society's handwritten Telephone Transaction form dated January 6, 1997 is attached as Exhibit "C" to this Agreed Statement of Facts.

11. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

12. The Solicitor does not have a discipline history.

DATED at Toronto this 9th day of September, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gerard Mitchell be reprimanded in Convocation if he has made the requisite filing by the date the matter is heard in Convocation, failing which, that he be suspended for a period of one month and indefinitely thereafter until he had made the filing.

REASONS FOR RECOMMENDATION

The Society relies on its filing requirements to fulfil its obligations to govern the profession in the public interest. Solicitors who fail to comply with these requirements leave the Society no choice but to suspend their right to practise until the requirements are complied with.

Gerard Mitchell was called to the Bar on March 31, 1989.

ALL OF WHICH is respectfully submitted

DATED this 5th day of March, 1998

Harriet E. Sachs

There were no submissions.

It was moved by Mr. Marrocco, seconded by Mr. Murray that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he made the requisite filing, failing which, that he be suspended for a period of 1 month and indefinitely thereafter until he had made the filing.

Convocation was advised that the filing had been completed.

The solicitor sought a reprimand in Committee.

It was moved by Mr. Swaye, seconded by Mr. Cole that the solicitor be reprimanded in Committee.

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

The Swaye/Cole motion that the solicitor be reprimanded in Committee was voted on and adopted.

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

Convocation turned itself into a Committee of the whole and the Treasurer administered the reprimand.

Irving KIRSHENBLATT - North York

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Batty appeared for the Society and the solicitor appeared, assisted by Duty Counsel.

The Report and Affidavit of Service and Acknowledgement, Declaration and Consent were previously filed as Exhibits at the April Convocation.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert C. Topp

In the matter of The Law Society Act and in the matter of	Audrey Cado for the Society
IRVING KIRSHENBLAT of the City of North York a barrister and solicitor	Not Represented for the solicitor
	Heard: November 12 & December 10, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 7, 1997 Complaint D152/97 was issued against Irving Kirshenblat alleging that he was guilty of professional misconduct.

The matter was heard partially *in camera* on November 12, 1997 and in public on December 10, 1997, before Robert C. Topp sitting as a single bencher. The Solicitor attended the hearing on November 12, 1997. He was unrepresented by counsel. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D152/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, 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 consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D152/97 and is prepared to proceed with a hearing of this matter on October 8, 1997.

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 D152/97 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 29, 1977. He practises as a sole practitioner.

5. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 31, 1996, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. By letter dated August 9, 1996 the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended January 31, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's August 9, 1996 letter is attached as Exhibit "A" to this Agreed Statement of Facts.

7. The Solicitor advised the Law Society, by telephone on August 15, 1996, he would file by the middle of September, 1996. A copy of the Law Society's handwritten notes, dated August 15, 1996, is attached as Exhibit "B" to this Agreed Statement of Facts. The outstanding filing was not received by the Law Society.

8. By registered mail, dated September 9, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's September 9, 1996 letter was signed for and delivered on September 13, 1996. A copy of the Law Society's September 9, 1996 letter and Acknowledgement of receipt of a registered item card is attached as Exhibit "C" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

9. A Law Society staff employee spoke with the Solicitor by telephone on January 6, 1997. The Solicitor advised he needed to complete some things for the accountant. The Solicitor advised his filing would be completed by the end of the month. The Solicitor was advised by the Law Society that Discipline action may be taken against him. A copy of the Law Society's handwritten Telephone Transaction form dated January 6, 1997 is attached as Exhibit "D" to this Agreed Statement of Facts.

10. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

11. The Solicitor does not have a discipline history.

DATED at Toronto this 8th day of October, 1997."

Finding of the Committee

Pursuant to the Agreed Statement of Facts and on consent of the Solicitor given orally to Ms. Cado of the Law Society to proceed in his absence, and the admissions set out in the Agreed Statement of Facts, a finding of professional misconduct is made.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Irving Kirshenblat be reprimanded in Convocation if his filings have been completed by time the matter is heard by Convocation, failing which that he be suspended for a period of thirty days and indefinitely thereafter until the filings are completed to the satisfaction of the Law Society.

The Committee further recommends that the Solicitor pay costs in the amount of $850 to be payable within thirty days.

REASONS FOR RECOMMENDATION

It is recommended that if the Solicitor has completed his filings by the time this matter reaches Convocation, that a reprimand be imposed in Convocation. If the filings are incomplete, that the Solicitor be suspended for thirty days, such suspension to continue month to month thereafter until the filings are completed to the satisfaction of the Society.

With respect to costs, this matter has been outstanding since the date of the Complaint, which is the 7th day of April, 1997. There were five separate appearances. The matter has been set down for hearing on September 10th, October 8th, November 12th and again on December 10th, 1997.

The Solicitor still has not filed. It is clear to me that a message must be sent to this Solicitor and other solicitors that the tremendous costs involved in these proceedings must be borne by those who cause the problems to exist. Therefore I recommend costs in the sum of eight hundred and fifty dollars ($850) to be payable within thirty days.

Irving Kirshenblat was called to the Bar on March 29, 1977.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1998

Robert C. Topp

There were no submissions.

It was moved by Mr. MacKenzie, seconded by Mr. Murray that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation, failing which he be suspended for a period of 30 days and indefinitely thereafter until the filings are completed to the satisfaction of the Law Society.

Mr. Batty advised that the 1996 filings were made but with some matters outstanding and that the 1997 and 1998 filings had not been made.

Mr. Wardle on behalf of the solicitor made submissions in support of the 30 day suspension and requested that the suspension commence August lst, 1998 so that the solicitor could wind down his practice and get his filings in order. He advised that the solicitor was in a state of emotional distress and needed professional help.

Mr. Batty did not oppose the suspension commencing August lst.

There were questions from the Bench.

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

It was moved by Ms. Backhouse, seconded by Mr. Cole that the solicitor be suspended for a period of 30 days commencing June 8th, 1998.

Carried

It was moved by Mr. Marrocco, seconded by Mr. Gottlieb that the suspension commence on August lst, 1998.

Not Put

It was moved by Mr. Marrocco, seconded by Mr. Gottlieb that costs in the amount of $850 be waived.

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 30 days commencing June 8th, 1998 and indefinitely thereafter until the filings were completed to the satisfaction of the Society and that costs be waived.

Re: David George HEELEY - Peterborough

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Wilson and Carter and Ms. Angeles withdrew for this matter.

Mr. Stuart appeared for the Society and Mr. Wardle appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 15th April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (filed as 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

David W. Scott, Q.C., Chair
William D. T. Carter
Nora Angeles

In the matter of The Law Society Act and in the matter of	Glenn Stuart for the Society
DAVID GEORGE HEELEY of the City of Peterborough a barrister and solicitor	Not Represented for the solicitor Heard: February 3, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 10, 1997 Complaint D167/97 was issued against David George Heeley alleging that he was guilty of professional misconduct.

The matter was heard in public on February 3, 1998 before this Committee composed of David W. Scott, Q.C., William D.T. Carter and Nora Angeles. The Solicitor did not attend the hearing nor was he represented. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D167/97

2. a) In the circumstances of a loan, in or about June 1991, from Garth Davin McLaughlin, a client whose funds the Solicitor controlled under a power of attorney, to Mary Ellen Heeley, who was the Solicitor's spouse, and John Maguire,

i) a partnership syndicate in which the Solicitor's spouse, or the Solicitor, or both, had a substantial interest, borrowed approximately $104,000 from the Solicitor's client Mr. McLaughlin in circumstances in which Mr. McLaughlin's interests were not protected by the nature of the case and by independent legal representation, contrary to Rule 7 of the *Rules of Professional Conduct*,

ii) the Solicitor failed to fully disclose to his client Mr. McLaughlin in writing, prior to advancing his client's funds, all information which would have been of concern to a proposed investor, including the nature of the investment, the Solicitor's interest in the property which was the subject of the loan and the fact that the Solicitor's wife, Mary Ellen Heeley, was one of the borrowers; and,

iii) he failed to serve his client Mr. McLaughlin conscientiously, diligently and efficiently by failing to ensure that his client's funds were adequately secured;

b) he failed to account fully and in a timely manner to his client Garth Davin McLaughlin for funds which he held on behalf of Mr. McLaughlin; and,

c) he failed to maintain the books and records required by section 15(1) of Regulation 708 under the *Law Society Act* in connection with monies which he held in trust for Garth Davin McLaughlin.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. David George Heeley ("the Solicitor") admits service of Complaint D167/97 and is prepared to proceed with a hearing of this matter on February 3-4, 1998. The Solicitor states that he does not wish to attend or be represented at the hearing, although he is aware of his right to be present in person or by counsel and respond to these allegations, and agrees that the hearing proceed in his absence.

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 D167/97 and this Agreed Statement of Facts and admits the particulars and facts contained therein. The Solicitor further admits that the said particulars, as supported by the facts detailed in this Agreed Statement of Facts, constitute professional misconduct.

IV. FACTS

Background

4. The Solicitor was called to the Bar on April 13, 1981.

5. In March 1989, the Solicitor advised the Law Society that he had ceased practising law as of October 1988 and asked the Law Society for fee relief from the payment of Law Society fees (Document Book - Tab 1). The Solicitor chose to continue his membership in the Law Society, paying the fees applicable to a member who is retired or not working (Document Book - Tab 2).

6. The Solicitor was subsequently re-classified as a "retired or not working" member of the Law Society and remained as such until November 1, 1996. Consequently, he was not entitled to practise law during this period without changing his status with the Law Society and paying the requisite fees and insurance levies.

7. Since November 1, 1996, the Solicitor's membership has been suspended for non-payment of his annual fee.

Particular 2a)

In the circumstances of a loan, in or about June 1991, from Garth Davin McLaughlin, a client whose funds the Solicitor controlled under a power of attorney, to Mary Ellen Heeley, who was the Solicitor's spouse, and John Maguire,

(i) a partnership syndicate in which the Solicitor's spouse, or the Solicitor, or both, had a substantial interest, borrowed approximately $104,000 from the Solicitor's client, Mr. McLaughlin, in circumstances in which Mr. McLaughlin's interests were not protected by the nature of the case and by independent legal representation, contrary to Rule 7 of the *Rules of Professional Conduct*;

(ii) the Solicitor failed to fully disclose to his client Mr. McLaughlin in writing, prior to advancing his client's funds, all information which would have been of concern to a proposed investor, including the nature of the investment, the Solicitor's interest in the property which was the subject of the loan and that the Solicitor's wife, Mary Ellen Heeley, was one of the borrowers; and,

(iii) the Solicitor failed to serve his client Mr. McLaughlin conscientiously, diligently and efficiently by failing to ensure that his client's funds were adequately secured.

8. Garth Davin McLaughlin left high school in 1968, prior to graduating, to join the United States military. He left the U.S. military in 1980 having spent his years of service flying helicopters. Since 1980, Mr. McLaughlin has been employed as a commercial helicopter pilot in West Africa.

9. Due to Mr. McLaughlin's employment arrangements, he only returns to Canada for, at most, a six week leave each year. As a result of his long absences, Mr. McLaughlin required someone to take care of his finances.

10. Mr. McLaughlin has known the Solicitor since 1979 and has retained him as his solicitor since the Solicitor's call to the bar in 1981. The Solicitor prepared Mr. McLaughlin's will in 1982 and acted for him in a mortgage matter around the same time. In December 1988, the Solicitor acted for Mr. McLaughlin on a mortgage loan for the Royal Bank. From 1982 to June 1993, inclusive, Mr. McLaughlin understood the Solicitor to be acting as his solicitor and relied on his professional status as same.

11. On or about May 7, 1982, Mr. McLaughlin provided the Solicitor, in his capacity as Mr. McLaughlin's lawyer, with an unrestricted power of attorney over Mr. McLaughlin's affairs (Document Book - Tab 3). The Solicitor did not advise Mr. McLaughlin to seek independent legal advice with respect to the granting of the power of attorney and Mr. McLaughlin did not obtain such advice.

12. Under the authority of the power of attorney, the Solicitor managed and invested Mr. McLaughlin's assets, including a residential property in Greely, Ontario ("Greely Property"), a property in Florida, his bank account and other assets, while Mr. McLaughlin was absent from the country.

13. During the term of this power of attorney, the Solicitor wrote to Mr. McLaughlin from time to time to update him as to the status of his affairs. Copies of letters sent by the Solicitor to Mr. McLaughlin during the period from July 1990 to January 1993 are contained at Tabs 4-12 of the Document Book. This correspondence contained an overview of Mr. McLaughlin's affairs but did not contain a detailed accounting.

14. Although the power of attorney did not provide any restrictions on its face, Mr. McLaughlin did orally limit the Solicitor's authority. Mr. McLaughlin wanted to maintain his non-resident status for taxation purposes and specifically instructed the Solicitor not to make any investments that might jeopardize his non-resident status. Both understood that permissible investments for non-residents were limited to investments such as government securities and bonds.

15. Mr. McLaughlin confirmed these instructions to the Solicitor from time to time. For example, in a letter sent on or about September 1990 (Document Book, Tab 7), the Solicitor suggested that he invest Mr. McLaughlin's funds in a business of the Solicitor involving horse breeding. The Solicitor wrote that he understood Mr. McLaughlin's "desire not to be taxed as a Canadian" and offered to put the investment in his wife's name. On top of the letter was Mr. McLaughlin's handwritten notes which he marked: "phoned & wrote 'no' to horse deal. Again stressing = T Bills etc."

16. Mr. McLaughlin executed a further unrestricted power of attorney in favour of the Solicitor on or about February 27, 1990 (Document Book, Tab 13). This power of attorney superseded the previous power of attorney, although it did not provide new limits on the authority granted previously to the Solicitor.

17. At no time did the Solicitor advise Mr. McLaughlin that his status with the Society was changed in 1989. Mr. McLaughlin believed that the Solicitor was still entitled to practise law when this second power of attorney was executed. Mr. McLaughlin would not have entrusted his affairs to the Solicitor if he had known that the Solicitor was not entitled to practise law.

18. On February 22, 1991, the Solicitor sold the Greely Property for $155,000 (Document Book, Tab 14). The Solicitor retained Bruno Toneguzzi, then of the law firm of Toneguzzi, De Franco & Gray, to represent Mr. McLaughlin on the sale of the property. The firm provided the Solicitor with a reporting letter, dated March 1, 1991 (Document Book, Tab 15), in relation to the sale, along with a ledger statement and statement of adjustments (Document Book, Tab 16) showing that the net proceeds from the sale were $74,314.14. These funds were paid by Mr. Toneguzzi to the Solicitor in trust for Mr. McLaughlin by cheque, dated March 1, 1991 (Document Book, Tab 17).

19. The Solicitor deposited the proceeds, together with the proceeds of another loan that the Solicitor had collected for Mr. McLaughlin, into account #8303752 at the Royal Bank of Canada on or about March 6, 1991 as reflected by the deposit slips at Tab 18 of the Document Book. The Solicitor operated this account as a trust account in favour of, and in the name of, Mr. McLaughlin.

20. On June 4, 1991, the Solicitor withdrew $104,000.76 from account #8303752 as reflected by the withdrawal slip at Tab 18 of the Document Book. The Solicitor loaned these funds to a partnership syndicate in the names of Mr. John Maguire and Mrs. Mary Ellen Heeley, the Solicitor's wife.

21. A vacant property in the Township of Osgoode (the " Osgoode Property") had been purchased in the names of Mr. Maguire and Mrs. Heeley (as tenants in common) on November 3, 1989. The transfer is located at Tab 19 of the Document Book,). The property was purchased for possible development subject to the necessary approvals being obtained. Although she was the nominal joint owner of the property, Mrs. Heeley was not actively involved with the property; the property was being developed by the Solicitor. At all relevant times, the Solicitor oversaw and controlled the property, its acquisition, financing and planned development.

22. The purchase of the Osgoode Property was partially financed by a vendor take-back mortgage in the amount of $130,000. There were two subsequent encumbrances on the Osgoode Property. A second mortgage, registered on November 15, 1989, was granted by both Mr. Maguire and Mrs. Heeley in the amount of $30,000 to Mary Lee Jordan. A third mortgage, registered on May 25, 1990, was granted by Mrs. Heeley alone, on her half interest, in the amount of $25,000, again to Ms. Jordan. An abstract of the title of the Osgoode Property is located at Tab 20 of the Document Book.

23. The $104,000 which the Solicitor withdrew from Mr. McLaughlin's funds and loaned to the joint venture was used to retire the first mortgage on the Osgoode Property.

24. The Solicitor did not advise Mr. McLaughlin of the specific nature of the loan, the identities of the borrowers at the time of the transaction, or the Solicitor's involvement with the property. By virtue of the Solicitor's non-disclosure in this regard, Mr. McLaughlin denies that the Solicitor was authorized to apply these funds in this way for his own benefit as a "loan".

25. The Solicitor did not provide or obtain any security for Mr. McLaughlin on this loan, except a promissory note in the amount of $117,500 payable to Mr. McLaughlin by June 30, 1992 (Document Book - Tab 21). The promissory note was prepared by the Solicitor.

26. The Solicitor at no time recommended to Mr. McLaughlin that he obtain independent legal advice on this transaction. Mr. McLaughlin did not receive independent legal advice on this transaction until he retained counsel in May 1993 upon becoming concerned about the status of the funds controlled by the Solicitor.

27. In a letter, dated January 1992, the Solicitor advised Mr. McLaughlin, for the first time, that he had invested the proceeds from the sale of the Greely Property in a "nine month note", and that Mr. McLaughlin would receive "about $112,500" by September 1992 (Document Book, Tab 10). The Solicitor, however, did not advise Mr. McLaughlin that the funds were used to retire the mortgage against a development property which he controlled or provide any other information which a reasonable investor would require. If Mr. McLaughlin had known the specifics of the loan, he would not have consented to the transaction as he understood that it could have jeopardized his taxation status as a Canadian non-resident.

28. On October 1, 1992, the Solicitor registered a mortgage against the Osgoode Property in the amount of $85,000 in favour of the Royal Bank of Canada. The prior mortgages in favour of Ms. Jordan were discharged at the same time so that this became the first mortgage against the Osgoode Property (Document Book, Tab 20). The Solicitor did not advise Mr. McLaughlin of the mortgage loan from the Royal Bank of Canada.

29. No portion of Mr. McLaughlin's funds was repaid with the funds advanced under the Royal Bank mortgage. Instead, the funds advanced by the Royal Bank were used to retire the mortgages held by Ms. Jordan and to repay other sums invested in the property by Mr. Maguire and the Solicitor. Although it was not disclosed to Mr. McLaughlin, the Solicitor had invested about $30,000 of his own funds in the Osgoode Property. The Solicitor cannot recall, and no independent evidence has been located to establish, what portion of this investment was repaid to him.

30. Throughout the relevant period, the Solicitor continued to conceal the nature and particulars of the transactions from Mr. McLaughlin. In December 1992, the Solicitor advised Mr. McLaughlin by letter (Document Book - Tab 12) that he had "received an agreement of Purchase and Sale on the land owned by Mr. Maguire upon which [Mr. McLaughlin held] the note." The Solicitor did not identify the interest of his wife or himself in the property. The Solicitor represented that Mr. McLaughlin would be repaid from the proceeds of sale from the Osgoode property when the transaction closed in January 1993. The Solicitor was supposed to represent Mr. Maguire on the closing of the sale. The Solicitor has been unable to produce a copy of any such Agreement of Purchase and Sale. A sale of this property did not close in January 1993.

31. Furthermore, even though Mr. McLaughlin was supposed to have been repaid by June 1992 under the terms of the promissory note, the Solicitor stated in his December 1992 letter that he did not want to "get into any legal actions" to pursue the loan repayment due to Mr. McLaughlin's non-resident status.

32. Mr. McLaughlin ultimately became concerned about his investments and, in May 1993, retained the services of Richmond Wilson, Q.C., to investigate what had happened to his assets. Subsequent to Mr. Wilson's involvement, the Solicitor provided a mortgage to Mr. McLaughlin in the amount of $117,000 (Document Book, Tab 22) on the Osgoode Property on November 5, 1993. This mortgage is subsequent in priority to the Royal Bank mortgage.

33. The mortgage in favour of Mr. McLaughlin was due on June 30, 1995. The mortgage was not repaid at that time, and it remains unpaid to this date.

34. Mr. Wilson made a claim against the Solicitor on Mr. McLaughlin's behalf under the Solicitor's professional errors and omissions liability insurance coverage. It was only at that time that Mr. McLaughlin was first informed that the Solicitor was not covered by this insurance due to the fact that the Solicitor had advised the Law Society that he was retired or not practising at the relevant times.

35. Mr. McLaughlin thereafter retained Morris Kertzer of the Ottawa firm Lang Michener to commence an action to recover his funds. A Statement of Claim (Document Book, Tab 23) was issued on December 16, 1994, naming the Solicitor as one of several defendants.

36. The Solicitor did not file a Statement of Defence or take any steps to defend the action. Judgments were issued against both the Solicitor (Document Book, Tab 24) and Mary Ellen Heeley (Document Book, Tab 25) in 1995. The Solicitor and Mary Ellen Heeley subsequently brought proceedings to set aside these default judgments. These proceedings were ultimately abandoned in lieu of settlement discussions. In January 1996, Mr. McLaughlin settled the claim against the Solicitor and Mary Ellen Heeley upon the payment of $52,500, representing approximately one-half of the $104,000 loan, without interest.

37. The claim against the other defendants has not yet been settled. Mr. Maguire has declared bankruptcy so that no further recovery from him is possible.

38. Mr. McLaughlin states that he was forced to settle the claim against the Solicitor by the limited chance of recovery against any of the defendants. Mr. McLaughlin's reaction to the Solicitor's misconduct is set out in his letter, dated November 18, 1997, to the Law Society (Document Book, Tab 26).

Particular 2b) The Solicitor failed to account fully and in a timely manner to his client Garth Davin McLaughlin for funds which he held on behalf of Mr. McLaughlin; and,

Particular 2c) The Solicitor failed to maintain the books and records required by section 15(1) of Regulation 708 under the *Law Society Act* in connection with monies which he held in trust for Garth Davin McLaughlin.

39. Since he received the funds in trust for Mr. McLaughlin from the sale of the Greely property in March 1991, the Solicitor did not maintain any books or records in relation to those funds, other than copies of the relevant cheques and deposit slips.

40. From about July 1990 to December 1992, the Solicitor did not fully account to Mr. McLaughlin regarding the trust funds despite requests from Mr. McLaughlin for an accounting. The Solicitor only provided Mr. McLaughlin with periodic correspondence which provided incomplete information regarding those funds.

41. In May 1993, the Solicitor produced a statement purporting to be a bank reconciliation to Mr. McLaughlin (Document Book, Tab 27) regarding account #526905-5 at the Royal Bank of Canada for the period from January 1990 to May 1993. Account #526905-5 was the operating account which the Solicitor maintained for Mr. McLaughlin.

42. The Solicitor also prepared a handwritten schedule summarizing the various transactions involving account #526905-5 (Document Book, Tab 28). The summary prepared by the Solicitor failed to provide Mr. McLaughlin with sufficient detail as to the receipts deposited and payments made by the Solicitor. In particular, there is no reference to specific dates or to the sources of receipts or to particulars of the payments. Mr. McLaughlin subsequently hired a forensic accountant to analyze the transactions; however, to date, many matters remain unresolved.

43. The Solicitor did not disclose the existence of a second account, Royal Bank account #8307532, to Mr. McLaughlin until January 30, 1996, when the Solicitor was examined for discovery in Mr. McLaughlin's action. Even at that time, the Solicitor initially stated that account #562905-5 was the only account that he was looking after for Mr. McLaughlin; however, the Solicitor subsequently admitted that there was the second account #8307532, where certain deposits had been made and out of which the $104,000 loan was withdrawn.

44. At no time has the Solicitor provided to Mr. McLaughlin the particulars of the account #8307532. A small number of deposit and withdrawal slips relating to this account (Document Book, Tab 18) were provided by the Solicitor to the Society in the course of its investigation.

45. The Solicitor admits that he has no additional records relating to account #8307532, in particular bank statements, client trust ledgers or receipts and disbursement journals. Consequently, the Solicitor has failed to comply with s.15(1) of Regulation 708 of the *Law Society Act* by failing to maintain adequate records in relation to the funds he held on behalf of Mr. McLaughlin.

V. PRIOR DISCIPLINE

46. The Solicitor does not have a discipline history.

DATED at Peterborough, this 19th day of January, 1998."

Finding of Committee on the Allegations of Professional Misconduct

In the Agreed Statement of Fact executed by the Solicitor, he has admitted the particulars of the complaint and agreed that his behaviour amounts to professional misconduct. Accordingly, your Committee finds the Solicitor guilty of professional misconduct in respect of the particulars provided.

RECOMMENDATION AS TO PENALTY

At the present time, the Solicitor is administratively suspended. He is said to be retired and not working. Your Committee recommends to Convocation that he be suspended for a period of 12 months to commence at the end of his present administrative suspension.

REASONS FOR RECOMMENDATION

What the Solicitor did in this case is difficult to distinguish from a simple misappropriation of a substantial amount of money from his client. The gist of the Agreed Statement of Facts is that when the money was freed up on the sale of the Greely property (and the collection of an outstanding loan), the Solicitor simply took the money and lent it to a third party syndicate, one of the members of which was his wife, Mary Ellen Heeley. He did this knowing perfectly well that, if asked, the client would have declined to authorize such a transaction. In fact, at the moment that the money was taken, the Solicitor was aware that the client did not wish to embark upon such speculative transactions as a personal loan to anyone, let alone the Solicitor. Indeed, as the client points out in his letter (Tab 26 of the Document Book), the money was intended as part of his retirement plan and thus, to the knowledge of the Solicitor, loans of this kind were anathema. Notwithstanding, the Solicitor used the money for the direct benefit of his wife and the indirect benefit of himself. He arranged no meaningful security and indeed compounded the situation by arranging to borrow money from the Royal Bank on the security of a first mortgage on the investment property which thereafter made it impossible to provide adequate security for the complainant. At the time that the loan was made, the Solicitor withheld any information from his client as to its existence or the identity of the borrowers. He deliberately concealed the facts. It was not until six months later that the Solicitor advised his client that the money had been lent on a "nine month note." However, he did not advise the client that the funds were used to retire a mortgage on a development which he controlled. In short, he withheld, until the very end, information from the client which would enable him to know that his Solicitor had effectively taken the money for himself. The monies which were advanced by the Royal Bank resulting in the first mortgage were utilized to pay off sums of money then owing on the project, thereby benefiting the Solicitor. Indeed, there is a veiled implication in the Agreed Statement of Fact (Paragraph 29) which would suggest that some of this money was used to repay a portion of the Solicitor's investment.

In sum, the transaction was unauthorized, was one which would never, to the knowledge of the Solicitor, have been authorized, was deliberately concealed by the Solicitor and the proceeds were used, directly or indirectly, for the benefit of the Solicitor. The notion of "walking like a duck" comes to mind. This transaction was effectively a form of misappropriation.

The Solicitor did not appear at the hearing before your Committee but sent a letter (Exhibit 4) in lieu thereof. He refers in this letter to discussions about a three month suspension, however, the Society requests a suspension of from three to twelve months. He speaks of some medical disability but tenders no evidence in this respect. He notes that he is prepared to submit to whatever discipline the Committee considers appropriate. The Solicitor claims to suffer from manic-depression.

In the opinion of your Committee, withdrawal of the Solicitor's continued right to practice would not be an inappropriate response to this misconduct. On the other hand, the Society asks for something less than disbarment and the Solicitor has not appeared. In view of the fact that he is not presently practising and is under administrative suspension, and on the basis that the suspension of twelve months, which is recommended by these Reasons, will commence to run after his administrative suspension is terminated, we think it highly unlikely that he will be a threat to the public in the future. For these reasons we adopt the maximum end of the range suggested by the Society, specifically a suspension for twelve months commencing at the conclusion of the Solicitor's administrative suspension, and recommend accordingly.

ALL OF WHICH is respectfully submitted

Dated this 15th day of April, 1998

David W. Scott, Q.C., Chair

There were no submissions.

It was moved by Mr. Wright, seconded by Mr. Crowe that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 12 months to commence at the end of his present administrative suspension.

Both counsel made submissions in support of the recommended penalty.

It was moved by Mr. Murray, seconded by Mr. Bobesich that the solicitor be suspended for a period of 12 months, the suspension to commence at the end of the solicitor's present administrative suspension.

Counsel, the reporter and the public withdrew.

The Murray/Bobesich motion to suspend the solicitor for a period of 12 months was voted on and adopted.

It was moved by Mr. Topp, seconded by Mr. Crowe that the solicitor be permitted to resign.

Not Put

It was moved by Mr. Wright that after the 12 month suspension the solicitor provide evidence of a medical report stating that the solicitor is fit to return to practice.

Not Put

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 12 months to commence at the end of the solicitor's administrative suspension.

Re: Stanley Charles EHRLICH - Vaughan

The Secretary placed the matter before Convocation.

Messrs. Wilson and Gottlieb withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated lst April, 1998, together with an Affidavit of Service sworn 17th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 15th April, 1998 (filed as Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th May, 1998 (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

Ronald D. Manes, Chair
W. Michael Adams
Gary L. Gottlieb, Q.C.

28th May, 1998

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

STANLEY CHARLES EHRLICH
of the City
of Vaughan
a barrister and solicitor

Glenn Stuart
for the Society

Not Represented
for the solicitor

Heard: February 17, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 20, 1997 Complaint D24/97 was issued against Stanley Charles Ehrlich alleging that he was guilty of professional misconduct.

The matter was heard in public on February 17, 1998 before this Committee composed of Ronald D. Manes, W. Michael Adams and Gary L. Gottlieb, Q.C. The Solicitor attended the hearing and represented himself. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D24/97

2. a) He breached section 14(12) of Regulation 708 made under the Law Society Act, in that from 1992 to the present he failed to maintain sufficient balances on deposit in his trust account to meet all his obligations with respect to money held in trust for clients;

b) he breached section 15 of Regulation 708 in that he failed to maintain books and records as required;

c) he breached his undertaking to the Law Society dated February 3, 1995 to provide full and complete responses to written requests from the Law Society within three weeks from the date of such requests by not providing a full and complete response to correspondence from the Law Society dated November 7, 1995.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D24/97 and is prepared to proceed with a hearing of this matter on February 17-18, 1998.

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 D24/97 and this agreed statement of facts and admits the particulars and facts contained therein. The Solicitor also admits that the particulars alleged in Complaint D24/97, supported by the facts as hereinafter stated, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1985. Until December 1992, the Solicitor practised law in association with another solicitor, Allen Cooper. Mr. Cooper, although an associate, had signing authority on the trust and general accounts of the practice until the association was severed as of December 31, 1992. Throughout the period December 1992 to the present, the Solicitor has been a sole practitioner.

Particular 2(a) He breached section 14(12) of Regulation 708 made under *Law Society Act*, in that from 1992 to the present he failed to maintain sufficient balances on deposit in his trust account to meet all his obligations with respect to money held in trust for clients.

5. The Solicitor's Annual Filings for each of the fiscal periods ending December 31, 1992, January 31, 1993, and January 31, 1994, were all filed on October 3, 1994.

6. During the period 1992 to January 31, 1995, the Solicitor failed to maintain sufficient trust balances on deposit in his trust account to meet all his obligations with respect to money held in trust for clients, as follows:

(a) as at December 1992: trust shortage in the sum of $8,309.96 (Document Book, Tab 1&2).
(b) as at January 31, 1994: trust shortage in the sum of $8,443.56 (Document Book, Tab 3).
(c) as at January 31, 1995: trust shortage in the sum of $8448.56 (Document Book, Tab 4).

7. According to the Solicitor's records, as at December, 1994, the trust shortage was attributed to withdrawals having been made by either the Solicitor or Mr. Cooper as follows:

(i) Mr. Cooper was responsible for the trust shortage in the amount of $3,268.85;
(ii) the Solicitor was responsible for the trust shortage in the amount of $5,048.63; and
(iii) no individual was attributed responsibility for the trust shortage in the amount of $41.08.

These trust shortages are detailed in Appendix "A".

8. The Law Society commenced an audit of the Solicitor's books and records in July 1994, and continued the audit in January and March 1995. The Law Society examiner found that there were errors in the Solicitor's record keeping, that source documentation was not available and that there was a shortage in the Solicitor's trust account. The auditor's findings were brought to the attention of the Solicitor in a letter dated March 23, 1995 (Document Book, Tab 5).

9. As at today's date, the Solicitor has not rectified the deficiencies in his books and records, nor has he replaced the trust shortages.

Particular 2(b) He breached section 15 of Regulation 708 in that he failed to maintain books and records as required.

10. The following chart sets out the status of the Solicitor's books and records at the date of the auditor's initial visit on July 28, 1994, and follow up visits on January 20 and March 9, 1995, respectively:

REQUIRED BOOKS	Status as of July 28, 1994	Status as of January 20, 1995	Status as of March 9, 1995
Trust cash receipts journal s. 15(1)(a) of Regulation 708	Not being maintained	Not being maintained	Solicitor produced a book which he had purchased to institute this record - no entries were recorded.
Trust cash disbursements journal s. 15(1)(b) of Regulation 708	Not being maintained	Not being maintained	Solicitor produced a book which he had purchased to institute this record - no entries were recorded.
Clients' ledgers s. 15(1)(c) of Regulation 708	Entered to May 1994.	Same as previous visit. In arrears from May 1994.	Same as previous visit. In arrears from May 1994.
General cash receipts journal s. 15(1)(e) of Regulation 708	Sporadic entries to January 31, 1994 only.	Same as previous visit. In arrears from January 31, 1994.	Solicitor produced new journal which he had purchased to satisfy requirements of the Regulation. Solicitor was not able to bring the old records current as he did not have all of the required source documents from February 1, 1994.

REQUIRED BOOKS	Status as of July 28, 1994	Status as of January 20, 1995	Status as of March 9, 1995
General cash disbursements journal s. 15(1)(f) of Regulation 708	Not being maintained	Same as previous visit.	Solicitor produced a new journal which he had purchased to satisfy requirements. Solicitor was not able to bring old records current as he did not have all required source documents from February 1, 1994.
Fees book and/or chronological file copies of billings s. 15(1)(g) of Regulation 708	Not produced.	Produced - chronological file copies of billings was the record used; inadequate in that all fee bills were not included in this record. Additionally, some fee bills contained in the record were undated.	Same as in previous visit.
Monthly trust comparisons supported by detailed trust listing and detailed trust bank reconciliation s. 15(1)(h) of Regulation 708	Produced - completed to May 31, 1994 (one month in arrears)	Same as previous visit.	Same as previous visit. The Solicitor signed an undertaking not to use the trust account until all Law Society's requirements are met.

11. The Solicitor states that, since his call to the Bar, he had hired a bookkeeper to maintain his books and records and had wholly relied on this bookkeeper to fulfil the requirements of the Regulation to the Law Society Act with respect to books and records. The Solicitor did not adequately supervise the bookkeeper and did not take any steps personally to ensure that the books and records were being properly maintained. In addition to the Solicitor's ongoing professional obligations, the Law Society specifically brought to the Solicitor's attention no later than December 1994 that it was inappropriate to rely on the bookkeeper wholly without also personally ensuring that his books and records were in order.

Particular 2(c) He breached his undertaking to the Law Society dated February 3, 1995 to provide full and complete responses to written requests from the Law Society within three weeks from the date of such requests by not providing a full and complete response to correspondence from the Law Society dated November 7, 1995.

12. The following chart sets out the Law Society's various communications with the Solicitor and his accountant, Mr. David Burkes, C.A., in furtherance of the Law Society's attempts to obtain up-to-date books and records from the Solicitor:

DATE	EVENT
July 5, 1994	The Law Society sent a letter to Mr. Burkes attaching a list of records required for the audit examination and confirming an appointment scheduled for July 28, 1994, to commence the audit (Document Book, Tab 6).
July 28, 1994	The Solicitor and Mr. Burkes met with the Law Society examiner. The examiner provided to the Solicitor a list of files and other documentation required for review. A further meeting was scheduled for August 30, 1994.
August 15, 1994	The Law Society sent a letter to Solicitor confirming the meeting on July 28, 1994, and reiterating the request for files and documentation. The Solicitor was advised to institute a trust receipts and disbursements journal, and was provided with the Society's pamphlet "Sections of the Regulation Respecting Books, Records and Accounts". The Solicitor was reminded to produce these records by August 30, the next scheduled meeting (Document Book, Tab 7).
August 25, 1994	The Solicitor left a message cancelling the meeting scheduled for August 30, 1994. He said that he was ill and would be out of the town for a couple of days. He asked to reschedule the meeting for two weeks hence (Document Book, Tab 7a).
August 26, 1994	The Law Society left a message for the Solicitor asking him to confirm a new hearing date (Document Book, Tab 7a). The Solicitor did not respond.
September 15, 1994	The Law Society left a message left for the Solicitor offering September 21, 1994 or any date in the week of September 26, 1994 to conduct the audit (Document Book, Tab 8). The Solicitor did not respond.
September 23, 1994	The Law Society sent a follow-up letter to the Solicitor, asking for a date to conduct the audit (Document Book, Tab 8a). The Solicitor did not respond.

October 12, 1994	The Law Society left a message for Mr. Burkes (Document Book, Tab 8b).
October 13, 1994	Mr. Burkes agreed to contact the Solicitor to advance matters (Document Book, Tab 8b). The Solicitor did not respond.
October 18, 1994	The Law Society left a message for the Solicitor, requesting a response and advising that if a response was not forthcoming, the matter would be referred to the Discipline Committee (Document Book, Tab 8c).
October 19, 1994	The Solicitor responded by voice mail. He confirmed that he had received the Law Society's earlier message and would call back (Document Book, Tab 8d). The Solicitor did not return the call.
October 20, 1994	The Law Society left a message for the Solicitor suggesting the dates of October 24, 27, 31 or November 2 to conduct the audit. The Solicitor was asked to respond and confirm a date (Document Book, Tab 8e). The Solicitor did not respond.
November 21, 1994	The Law Society left a message for the Solicitor reminding him that the Law Society was still awaiting his reply, and that if a reply was not given, the matter would be referred to the Discipline Committee. The Solicitor was offered November 28, 1994, as a date to proceed with the audit (Document Book, Tab 8f). The Solicitor did not respond.
January 16, 1995	The Law Society left a message for the Solicitor confirming a meeting for January 20, 1995. The Solicitor was asked to confirm his availability (Document Book, Tab 8g).

January 19, 1995	The Solicitor responded to the examiner to confirm the upcoming meeting. The Solicitor stated that he would not attend, but that Mr. Burkes would attend and assist the examiner. The examiner returned the Solicitor's call to remind him to provide to Mr. Burkes the files and documentation which had been requested by the examiner. The Solicitor said that he had already done so (Document Book, Tab 8h).
January 20, 1995	The examiner attended at Mr. Burkes' office and reviewed records provided by the Solicitor. However, the Solicitor's Trust cash receipts journal and trust cash disbursements journal had not been produced; additional records were not provided at this time (Document Book Tab 9).
January 24, 1995	The Law Society sent a registered letter to the Solicitor, reiterating that the audit could not be, and was not, completed on January 20, 1995 because certain documents had not been produced. A list of outstanding items was enclosed in the letter. The Solicitor was asked to reply (Document Book, Tab 10). The Solicitor did not respond.
February 1, 1995	The examiner contacted the Solicitor by phone. The Solicitor confirmed receipt of the registered letter and list of outstanding items. The examiner reiterated her request for a meeting to conduct the audit. The Solicitor agreed to contact Mr. Burkes and respond to the examiner (Document Book, Tab 11).
February 3, 1995	The Solicitor gave an Undertaking to the Law Society by which he undertook, among other matters, "to provide full and complete responses.....to any written requests from the Law Society within a time period of not more than three weeks from the date of the Law Society's written correspondence" (Document Book, Tab 12).

March 9, 1995	The examiner met with Solicitor and went over requirements for books and records. The Solicitor produced two blank books which he advised were purchased to institute trust and general cash receipts and disbursements journals. There were no entries in these books. Journal set-up was discussed. Additionally, the Solicitor was made aware of the status of the records which were reviewed and advised that they were unsatisfactory.
March 23, 1995	The Law Society sent a registered letter to the Solicitor providing complete, detailed, findings on all records produced to date. The examiner requested that the Solicitor re-construct records from January 1993 to May 1994, "and to current if any other activity has taken place in the trust account." The examiner requested that this be done by May 15, 1995, and asked that the Solicitor sign an undertaking to this effect. The Law Society's letter was signed for on March 27, 1995 (Document Book Tab 5). The Solicitor did not respond.
April 3, 1995	A follow-up message was left for the Solicitor inquiring about progress on March 23 requests (Document Book, Tab 13). The Solicitor did not respond.
April 20, 1995	The examiner left a telephone message for the Solicitor. The examiner subsequently spoke with the Solicitor. The Solicitor advised that he would sign the undertaking as requested (Document Book Tabs 14 & 15).
May 1, 1995	The Law Society received a letter from the Solicitor dated April 19, 1995. The Solicitor confirmed the telephone conversation of April 20, and provided a copy of the signed undertaking (Document Book - Tab 16) with certain conditions unilaterally amended: 1) the deadline changed from May 15 to May 30; 2) the Solicitor had deleted the statement that the undertaking could be used in discipline proceedings.
May 16, 1995	The examiner made a telephone call to the Solicitor and left a message regarding other matters. She also asked about the progress on the books and records and "asked that he confer with his accountant and advise if he will have reconstructed records ready by May 30" (Document Book Tab 17).

May 17, 1995	The Solicitor returned the call of May 16. He advised that he had spoken to Mr. Burkes and expected to have the requested information ready by June 7 (Document Book Tab 18).
May 30, 1995	The examiner spoke with the Solicitor. The status of his records was discussed, and he advised that there was still no progress. The Solicitor was advised that a report to Discipline was being prepared for his failure to maintain adequate books and records, but, despite this fact, he should continue to work with Mr. Burkes to get the records up to date as requested (Document Book Tab 19).
May 31, 1995	The examiner exchanged telephone messages with Mr. Burkes. He was prepared to begin work on the Solicitor's records however he wanted to meet with the Law Society examiner. A meeting was arranged for June 2, 1995 (Document Book Tab 20).
June 1, 1995	The examiner left a telephone message for the Solicitor. She advised him about the scheduled meeting with Mr. Burkes and requested that he attend and bring with him the journals which he had produced and undertaken to update in the meeting on March 9, 1995. The Solicitor was encouraged to attend the meeting personally (Document Book Tab 21). The Solicitor did not attend.

June 2, 1995	The examiner met with Mr. Burkes. Mr. Burkes advised that he did not believe that it would be a fruitful exercise to re-do the trust comparisons from January 1993 to May 1994, as the Solicitor's records during that period and forward were incomplete and the documentation required to accurately re-construct the records had not been created (i.e. there were no trust journals, client ledger cards were not complete, deposit slips were not detailed and general account records were also incomplete). Mr. Burkes advised that it would be difficult if not impossible to put together an accurate picture of the Solicitor's trust obligations during the referenced time frame. As a result, Mr. Burkes, advised that he would not be attempting to reconstruct the requested records.
June 8, 1995	The examiner telephoned the Solicitor. He was advised of the meeting with Mr. Burkes and Mr. Burkes' conclusions. The Solicitor was advised that, in light of Mr. Burkes' comments, the solution at this time will be for him to institute <u>all</u> records required by the Regulation effectively immediately. It was also requested that the Solicitor agree to co-signing controls on his trust account until Discipline matters were dealt with and some verification was made that he was maintaining proper books and records at that time. It was agreed that the Solicitor would contact the Law Society examiner on June 14, 1995 to set up an appointment to institute the co-signing and follow up (Document Book Tab 22). The Solicitor did not contact the Law Society.
September 11, 1995	The examiner met with the Solicitor to discuss his trust account shortages. A list of files was provided, and the Solicitor was asked to prepare a detailed report on the trust shortages. The Solicitor did not respond.
October 6, 1995	A message was left on the Solicitor's voice mail. The Law Society asked for a specific response to the trust shortgages by October 24, 1995. The Solicitor did not respond (Document Book, Tab 22a).

October 25, 1995	A follow-up message was left for the Solicitor (Document Book, Tab 23). The Solicitor did not respond.
November 7, 1995	The examiner sent a letter to the Solicitor following up a telephone message left on October 25, 1995. The letter asked the Solicitor to address all of the trust shortages on or before November 21, 1995, failing which the matter would be referred to the Discipline Committee (Document Book, Tab 24).
December 11, 1995	The Solicitor sent a letter advising that he would be providing a response to the November 7, 1995 letter (Document Book, Tab 25). The Solicitor did not set a time for his response.
January 18, 1996	The Solicitor provided a partial response to the examiner's November 7, 1995 letter (Document Book, Tab 26).
January 19, 1996	The examiner telephoned the Solicitor and left a message on his answering machine advising that his response was incomplete. The examiner requested a complete response (Document Book, Tab 27). The Solicitor did not reply.
March 18, 1996	The Law Society hand delivered a follow up letter to the Solicitor. The examiner strongly encouraged the Solicitor to reply to the audit inquiries. The examiner also requested that the Solicitor address new matters which had arisen (Document Book, Tab 28). The Solicitor did not reply. The examiner contacted the Mr. Burkes to set up an appointment to review documentation he had for the Solicitor (Document Book, Tab 29).
March 19, 1996	A follow up telephone message left for the Solicitor (Document Book, Tab 30).
March 20, 1996	A brief message was received from the Solicitor. The call was returned by the examiner. The examiner left a detailed telephone message informing him about a new issue which had arisen wherein a former client's new solicitor was trying to contact him to retrieve the client's file and the proceeds of a certain guaranteed investment certificate ("G.I.C.") (Document Book, Tab 31).

March 21, 1996	The examiner received a telephone message from the Solicitor regarding the status of the G.I.C.; the Solicitor advised that he would call again (Document Book, Tab 32).
March 22, 1996	The examiner left a detailed telephone message for the Solicitor advising that she had attended at Mr. Burkes' office and was in possession of some files and records (Document Book, Tab 33).
March 25, 1996	The Solicitor responded advising that he would provide a "lengthy, detailed response by the end of the week" (Document Book, Tab 34).
March 25, 1996	Following a lengthy conversation, it was agreed that the Solicitor would provide a written response as soon as possible. (Document Book - Tabs 35 and 36).
April 3, 1996	The Law Society sent a letter to Mr. Burkes confirming his participation and conclusions regarding the Solicitor's books and records. (Document Book, Tab 37)
April 3, 1996	The Law Society sent a letter to the Solicitor requesting a detailed response by April 15, 1996 (Document Book, Tab 38).
April 4, 1996	The Law Society received a telephone call from the Solicitor regarding the G.I.C. matter. (Document Book, Tab 39)
April 9, 1996	The examiner telephoned the Solicitor and confirmed receipt of his telephone message as well as the G.I.C. The examiner also advised the Solicitor that she had sent him a letter on April 3, and he should expect to receive it shortly (Document Book, Tab 40).
April 9, 1996	The examiner received a telephone message from the Solicitor advising that he was in the process of preparing a response to the examiner's letter of March 18, and would deliver it within the "next couple of days" (Document Book, Tab 41).
April 10, 1996	The Solicitor provided a partial response. The letter did not address the principal issues raised in the audit (Document Book, Tab 42).
April 15, 1996	The Solicitor provided a further letter which did not address the concerns raised by the audit (Document Book, Tab 43).

April 16, 1996	The Solicitor telephoned and left a message advising that he wanted confirmation of receipt of his two faxes and advised that he had not yet received the examiner's letter of April 3, 1996 (Document Book - Tab 44).
April 16, 1996	The examiner left a message on the Solicitor's voice mail advising that she had sent her April 3rd letter via ordinary and registered mail and had not received notification that either letter was undelivered. The examiner also confirmed the Solicitor's address on file and asked the Solicitor to provide a fax number so that the letter could be faxed to him (Document Book, Tab 45).
April 16, 1996	The Solicitor attended at the Law Society (unscheduled) and the examiner met with him. The examiner reiterated that the Law Society required full, detailed, written responses to all of the issues raised in the Law Society's letter of April 3, 1996. The examiner also asked that client files be provided for review. The examiner advised the Solicitor that she wished to complete and report this matter by April 30th, and would be completing her report at that time with or without his further submissions. The examiner's notes of this meeting are located at Document Book, Tab 45a.
May 20, 1996	Mr. Burke replied to the Law Society's letter to him of April 3, 1995. Mr. Burke stated that the Solicitor's books and records were insufficient "to determine the amounts of any shortages in any particular trust account or in the trust account in general." (Document Book, Tab 46).

13. To date, the Solicitor has not provided a complete response to the Law Society's letter of November 7, 1995, or any subsequent letter. As a result of the inadequate books and records provided by the Solicitor, the audit remains incomplete.

V. DISCIPLINE HISTORY

14. On December 12, 1995, the Solicitor was found guilty of professional misconduct for failing to serve two clients in a conscientious, diligent and efficient manner; failing to reply to the Law Society; breaching his Undertaking to the Law Society, dated February 3, 1995; and misleading the Law Society. On March 21, 1996, Convocation ordered that the Solicitor be suspended for a period of two months and pay costs fixed in the amount of $500. A copy of the Order of Convocation, dated March 21, 1996, and the Report and Decision of the Discipline Committee, dated March 4, 1996, are contained at Tab 47 of the Document Book.

DATED at Vaughan, this 16th day of February, 1998."

APPENDIX "A"

The following chart sets out the Solicitor's trust listings for the years in question. The amounts in brackets represent client ledger balances in an overdrawn position. Those overdrawn accounts marked with an asterisk are trust accounts with insufficient balances which the Solicitor states are attributable to Mr. Cooper. All other overdrawn trust accounts are attributed to the Solicitor.

CLIENT	BALANCE @ DEC. 31/92	BALANCE @ JAN. 31/94	BALANCE @ JAN. 31/95
Arreau - (Abreau)	$ 2.35	$ 2.35	$ 2.35
Brown	10.70	10.70	10.70
Cameron	200.00	200.00	200.00
Floyd	471.10	471.10	471.10
Harris	177.80	177.80	177.80
Johnson, D.	102.50	102.50	102.50
Reichelt*	500.00	500.00	500.00
Szkwyra*	(300.00)	(300.00)	(300.00)
Ching*	100.00	100.00	100.00
Clark	50.00	50.00	50.00
Charlton*	(963.00)	(963.00)	(963.00)
D. Philip*	(50.00)	(50.00)	(50.00)
Wise*	618.11	618.11	618.11
Wise*	1,254.87	-----	-------
Gist	(.08)	(.08)	(.08)
Skuyra	300.00	300.00	300.00
Kirdy	(33.00)	(33.00)	(33.00)
Upistaria	646.50	646.50	646.50
Garg*	(300.00)	(300.00)	(300.00)
Pearson	(1,000.00)	(1,000.00)	(1,000.00)
Potts	517.00	517.00	517.00
Elson	(2,457.03)	(2,457.03)	(2,457.03)
Mighty	(1.00)	(1.00)	(1.00)
Zimmer*	26.00	(7.00)	(7.00)
Heaps	575.00	-------	--------
Bulsara	(1,500.00)	(1,500.00)	(1,500.00)
Manning*	(70.00)	(70.00)	(70.00)
Sherham*	(585.85)	(585.85)	(585.85)

CLIENT	BALANCE @ DEC. 31/92	BALANCE @ JAN. 31/94	BALANCE @ JAN. 31/95
Park*	(1,000.00)	(1,000.00)	(1,000.00)
Manabaol	--------	1,711.57	1,711.57
Pengiliam	-------	80.49	80.49
Runs	-------	123.96	123.96
Brikker	-------	(91.60)	(91.60)
Sebeil (Sobol)	-------	2,711.56	2,711.56
Brown	------	--------	.02
Rugassa	-------	--------	(5.00)
Bank Charges to be replaced by Member	(50.00)	(85.00)	(85.00)
TOTAL NET	($2,758.03)	($ 119.92)	($ 124.90)
TOTAL AMOUNT OF TRUST SHORTAGE	$8,309.96	$ 8,443.56	$ 8,448.56

RECOMMENDATION AS TO PENALTY

The Committee recommends that Stanley Charles Ehrlich be suspended for a period of two and one half months.

REASONS FOR RECOMMENDATION

We are all of the view that we should accept the joint submissions, having heard from the Law Society and read the Agreed Statement of Facts and having heard extensive submissions from Mr. Ehrlich.

Mr. Ehrlich is forty-three years of age. He has three children. He has impressive academic credentials, including a Ph.D. in political science, and is presently pursuing in effect an S.J.D. in law, and just completing his thesis for his Master of Laws degree.

He was called to the Bar in 1985, and due to circumstances which he described at some length, became a sole practitioner in 1988. He maintained a large trust account, focusing in real estate, but by the early 1990's, given the turn of the market, he ventured into litigation which he practises today. The result being, that his practice, insofar as the management requirements are concerned, appears to be much scaled down, especially having regard to the fact that he did not have to maintain high levels of trust monies.

The heart of the matter with Mr. Ehrlich is that his practice is a mess. As a manager, he is an admitted failure. He no longer maintains a trust account, but having a litigation counsel practice mainly sustains trust monies through solicitors who refer him the work. He presents a litany of excuses as to why he is unable to manage his practice: incompetent bookkeepers; a bookkeeper who died; highly competent Law Society representatives from the Audit Department, one of whom went on maternity leave for six months; he was not trained adequately in the Bar Admission Course to manage a practice; and lastly, he shares this disability with many other sole practitioners, especially to the extent that he and they have relied on bookkeepers, on whom he totally relied, he says, in order to discharge his responsibilities to the Law Society.

Having said that, Mr. Ehrlich accepts the blame and the responsibility for whatever deficiencies are sustained in his practice. Whatever the reasons for these deficiencies, we are unanimous in the view that they are endemic to Mr. Ehrlich.

Mr. Ehrlich was disciplined by order of Convocation on March 21st, 1996 where he was found guilty of professional misconduct by a committee on December 12th 1995 for failing to serve two clients in a conscientious, diligent and efficient manner; failing to reply to the Law Society; breaching his undertaking to the Law Society dated February 3rd, 1995 and misleading the Law Society.

It is Mr. Stuart's view, and a view that we share, that the matters contained in the Complaint before us, D24/97, are a continuum of the problems that have beset this man and his practice since he established his own practice in 1988, and those problems came to the attention of the Law Society, both in an audit back then with respect to the previous discipline proceedings, and these discipline proceedings.

There is no allegation, nor is there any sense whatsoever that there is any dishonesty here, either by way of misappropriation or misapplication. There is simply a profound sense that Mr. Ehrlich is completely inept to manage a law practice at this point in time.

With respect to particular 2(a), the annual filings for 1992, 1993 and 1994 were all filed in early October of 1994. During that period, he failed to maintain sufficient money in trust balances and there were trust shortages, summarized in the Agreed Statement of Facts, in each of those years in the $8,000 range. With the exception of some bank errors in a minor amount of some $40, Mr. Ehrlich accepts the responsibility for those trust shortages.

The Law Society conducted an audit and found errors in record keeping, source documentation was not available together with these shortages. It was brought to the attention of the Solicitor by a letter in late March of 1995 and to date the Solicitor has not rectified these deficiencies, nor replaced the trust shortages.

With respect to particular 2(b), in failing to maintain the books and records as required, the deficiencies are clearly set out in paragraph 10 of the Agreed Statement of Facts and demonstrate that the required books were either not being maintained, or that there were sporadic entries or in some cases with respect to the fee book, for example, they were simply not produced.

The Society brought to the Solicitor's attention in the latter part of 1994 that it was inappropriate for him to rely on a bookkeeper wholly without ensuring that the books and records were in order.

With respect to particular 2(c) and the undertaking dated February 3rd, 1995, that was the subject matter of the previous discipline, but not on the same part of the undertaking. The Solicitor failed to respond to written requests from the Law Society within three weeks from the date of such request; and in particular not did provide a complete response to correspondence from the Law Society dated November 7, 1995. The lack of responsiveness is detailed in paragraph 12 of the Agreed Statement of Facts. The Solicitor has recently complied, in so far as it is possible for him to comply, with the November 7th, 1995 examiner's letter.

For all this, the Solicitor has given explanations and although he accepts responsibility, as a result of these inadequate books and the failure to bring them within compliance, the audit of the Society remains incomplete.

The panel at some point struggled with some of the representations because we could not see that they were necessarily advancing the Solicitor's position, nor the agreement in the Agreed Statement of Facts, and indeed caused some concern as to whether there was any true remorse. However, we are of the view that the Solicitor is sincere in what he says. He is simply totally inept as a manager and continues, we believe, to need substantial guidance and limits on his practice in order for him to continue in it.

A penalty of two and a half months suspension following a penalty of two months suspension, which was imposed in the previous discipline, in what for a sole practitioner is not only a relatively short period of time, but one which no doubt will take a tremendous toll on this man's livelihood. This is especially so in a person who is so motivated academically so as to pursue advanced education and, as he says, try to make a name for himself as an academic in certain areas. While we appreciate his definite leanings towards academia, we have no acceptance whatsoever of that being an excuse or reason for his inability to manage a practice. If anyone needed to go back to school regarding management, Mr. Ehrlich stands as the supreme example.

Having said all that, the Law Society is satisfied with the two and a half months under all the circumstances, and subject to the undertaking executed by Mr. Ehrlich and marked as exhibit 4 in these proceedings.

It is our view that the Society has stretched to accommodate Mr. Ehrlich's inability to manage his practice by providing undertakings which, in effect, require him to personally supervise and review the work of his bookkeeper (which he says he is totally unable to do or for which he is inadequately trained), but also to obtain the training with respect to the use of, and implementation of, a bookkeeping programme and to enrol, at his own expense, in an accounting course in the Bar Admission Course.

Given this man's academic accomplishments, we have little doubt that if he applies himself, he will have the capacity to manage a practice. We also have no doubt that if he doesn't in good faith pursue that knowledge, he will come back before us as one who we are going to have to consider in the context of a person who simply cannot manage their law practice.

Stanley Charles Ehrlich was called to the Bar on April 19, 1985.

ALL OF WHICH is respectfully submitted

DATED this 1st day of April , 1998

Ronald D. Manes, Chair

Mr. Stuart advised that on page 21, the 4th line of the second paragraph the words "in particular not did" should read "did not" and further that no words were missing.

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 1/2 months.

The solicitor made submissions in support of the recommended penalty and requested his suspension commence July lst, 1998.

Mr. Stuart made submissions in support of the recommended penalty together with the conditions set out in the undertaking given by the solicitor following his return to practice.

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

It was moved by Mr. Topp, seconded by Mr. Wright that the solicitor be suspended for a period of 2 l/2 months commencing July lst, 1998 unless the Secretary in writing, changes the date together with the conditions set out in the solicitor's undertaking.

Carried

Re: Peter Guy MARTIN - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp and Carter, Ms. Sachs and Ms. Angeles withdrew for this matter.

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

Ms. Braid made submissions that the solicitor was served in accordance with the Act and that the matter should proceed.

Convocation had before it the Report of the Discipline Committee dated 15th April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (filed as Exhibit l). 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

David W. Scott, Q.C., Chair
William D. T. Carter
Nora Angeles

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

PETER GUY MARTIN
of the City
of Toronto
a barrister and solicitor

Catherine Braid
for the Society

Not Represented
for the solicitor

Heard: February 3, 1998

28th May, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 4, 1997 Complaint D334/97 was issued against Peter Guy Martin alleging that he was guilty of professional misconduct.

The matter was heard in public on February 3, 1998 before this Committee composed of David W. Scott, Q.C., William D.T. Carter and Nora Angeles. The Solicitor did not attend the hearing, nor was he represented. Catherine Braid appeared on behalf of the Law Society.

DECISION

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

Complaint D334/97

2. a) He failed to reply to the Law Society regarding questions concerning borrowing monies from a client and practising while under suspension, despite letters dated July 4, 1997, July 25, 1997 and August 12, 1997; and

b) He breached an Order of Convocation, dated May 26, 1995, that he suspend his practice for failure to pay his Errors and Omissions Insurance Levy, by continuing to practise law throughout each of the following periods: June 1995, October 1995, November 1995, December 1995, January 1996, March 1966, April 1996 and May 1996.

Finding of Committee on the Allegations of Professional Misconduct

While the Solicitor did not appear, we were presented with a Document Book consisting of evidence said to relate to the allegations of practising under suspension. Lorraine Campbell of the Law Society staff testified in detail as to her investigation and the documents which she had before her at the time of the complaint. As appears from Tab 8 in the Document Book, the Solicitor was suspended administratively with effect on May 26, 1995 for failure to pay the Errors & Omissions levy. Ms. Campbell testified that the period of suspension continued from that date to May 13, 1996. It is clear that in this time period, the Solicitor engaged in the practice of law, specifically acting on behalf of two clients, Heshan De Silva and Lela Ali. He appeared before the Immigration Appeal Board in his capacity as a solicitor. Apparently he indicated to the Law Society that it was his view that he was not appearing in his capacity as a solicitor but rather as an immigration consultant. This is belied by the fact that he describes himself as Mr. De Silva's solicitor in a letter on his firm letterhead to the Immigration Appeal Board dated June 21, 1995 (see Tab 12). Furthermore, he communicated with the Citizenship and Immigration Department in Vegreville, Alberta, on his solicitor's letterhead (Tab 15) and did the same with his client (Tab 19). The Board communicated with him in his capacity as a solicitor (see for example Tab 21). The remaining documents in the Document Book make it clear that he appeared on behalf of Mr. De Silva at a number of hearings. Quite obviously he held himself out to the Board as a solicitor at a time when his right to practise as a solicitor was suspended.

Further, the evidence establishes quite clearly at Tabs 3, 4 and 5 of the Document Book that he failed to reply to the Law Society regarding questions relating to borrowing monies from a client and practising under suspension.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Peter Guy Martin be suspended for a period of one month commencing at the conclusion of any administrative suspension.

REASONS FOR RECOMMENDATION

Your Committee is of the view that the Solicitor in this case should not be required to face the full brunt of the impact of the misconduct associated with practising under suspension for reasons which are outlined hereunder. The Society urges upon your Committee that the rule of thumb is that the Solicitor should be suspended for a period of one month for each month that he has practised under suspension. This would amount to a suspension of eight months. It is the view of your Committee that in the particular circumstances, it would be unfair to impose this penalty, although indeed he quite clearly did practise while under suspension as appears from our recommendation with respect to misconduct. The circumstances we have in mind are outlined hereunder.

The Solicitor earlier faced a variety of allegations of professional misconduct by way of a complaint issued on December 16, 1996. These included allegations of failing to cooperate with the Law Society, failure to deposit retainer money, failure to account to a client, and failure to reply to the Law Society. They are the subject of a decision of a Committee chaired by Thomas J.P. Carey dated September 9, 1997. Based on recommendations of the Carey Committee, Convocation reprimanded the Solicitor on October 28, 1997. The findings of the Carey Committee included a reference to services rendered by the Solicitor to a client named Alain Dube. In point of fact, while the Carey Committee dealt with a number of transgressions related to the Solicitor for the period 1995 to 1996, these did not include practising under suspension, notwithstanding the fact that he was administratively suspended from May 26, 1995 to May 13, 1997. While he was charged with failure to account for monies in a transaction involving Dube, he was not charged with practising under suspension with respect to Dube, although he clearly might have been.

As pointed out, the Solicitor was reprimanded in Convocation on October 28, 1997. In the Reasons forming part of the Recommendation adopted by Convocation, Mr. Carey observed as follows:

> We have heard that the Solicitor, who was called in 1990 and is 35 years of age, got caught in the economic crunch that has hit many law practices. He found practising in these circumstances very difficulty. He had some personal difficulties in a relationship that ended and he lost the house that he'd been living in. His reaction, which is not all that uncommon unfortunately, in our profession, was to be paralysed into inertia, or in the words of his counsel, he "buried his head in the sand".

Mr. Carey went on to conclude that in view of his efforts to mend his ways, a reprimand in Convocation was appropriate. For all practical purposes, this period of his life was put behind him on October 28, 1997, when Convocation administered the reprimand.

Some eight days later, on November 5, 1997, the Solicitor was served with the complaint now before us which accuses him, *inter alia*, of practising under suspension in the same time frame as the earlier events. While it is true, as above-indicated, he was practising under suspension, the fact that these matters are now being dealt with sequentially rather than concurrently results in the Solicitor facing a continuum of discipline which is, in and of itself, a form of additional punishment.

An examination of the dates does not establish with perfect clarity whether, if the Law Society had proceeded with maximum diligence, the allegations of practising under suspension in this case might have been included in the earlier case.

It is alleged in the present case that he was practising under suspension in the period May 1995 to May 1996.

It is clear that the allegations with respect to Dube and the earlier matters arose in June 1995. In short, he might have been earlier charged with practising under suspension but was not. It would appear that the Law Society was apprised of the fact of practising under suspension insofar as the two clients in this case are concerned as at the 16th day of June, 1997, when Mr. Martin met with Lorraine Campbell (see Tab 2 of the Document Book). The very next day, June 17, 1997, Mr. Martin appeared before the Carey Committee. Obviously, that specific suspension allegation was not sufficiently ripe, in investigative terms, to be included at that time. Nonetheless, the overlap obviously has the effect of exacerbating the disciplinary mode which the Solicitor faces, a situation which could have been avoided if he had originally been charged with the obvious instance(s) of practising under suspension with respect to Dube.

For these reasons, and in order to give the Solicitor some breathing space and an opportunity to re-establish himself, we have concluded that the ordinary rule, that in the case of practising under suspension there should be a further suspension of one month for each month in which his practise continued ought to be varied to provide by way of penalty, in this case, for a suspension of one month.

ALL OF WHICH is respectfully submitted

Dated this 15th day of April, 1998

David W. Scott, Q.C.
Chair

Ms. Braid asked that the following amendments be made to the Report:

(1) page 2, 4th line - that the date "May 13, 1996" should read "May 13, 1997";

(2) page 4, 2nd last paragraph - that the date "May 13, 1996" should read "May 13, 1997".

There were no submissions.

It was moved by Mr. Wright, seconded by Mr. Murray that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month commencing at the conclusion of any administrative suspension.

It was moved by Mr. Wright, seconded by Mr. Murray that the recommended penalty be adopted.

Carried

Re: Michael Brian DELMAN - Ottawa

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Corbett 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 25th November, 1997, together with an Affidavit of Service sworn 15th December, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th December, 1997 (filed as 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

Robert C. Topp

In the matter of The Law Society Act and in the matter of	Dayna Simon, Student-at-Law for the Society
MICHAEL BRIAN DELMAN of the City of Ottawa a barrister and solicitor	Not Represented for the solicitor Heard: May 6, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 14, 1997 Complaint D50/97 was issued against Michael Brian Delman alleging that he was guilty of professional misconduct.

The matter was heard in public on May 6, 1997 before this Committee composed of Robert C. Topp sitting as a single Bencher. The Solicitor did not attend the hearing nor was he represented. Dayna Simon, Student-at-Law, appeared on behalf of the Law Society.

DECISION

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

Complaint D50/97

2. a) he failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, 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 consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D50/97 and is prepared to proceed with a hearing of this matter on May 6, 1997.

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 D50/97 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor is 45 years of age. The Solicitor was called to the Bar on April 16, 1980. The Solicitor has been suspended for non-payment of his errors and omissions levy since January 25, 1996. Prior to the Solicitor's suspension he practised as a sole practitioner.

5. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ended January 31, 1996, as required by s.16(2) of Regulation 708 under the Law Society Act.

6. By letter dated August 9, 1996, the Law Society advised the Solicitor that he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended January 31, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's August 9, 1996, letter is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, dated September 9, 1996, the Law Society advised the Solicitor that he had not taken the necessary steps to brings his filings up-to-date. The Solicitor was advised that failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. A Canada Post Acknowledgement of Receipt was signed for and stamped September 25, 1996. A copy of the Law Society's September 9, 1996, letter and the Acknowledgement of Receipt are attached as Exhibit "B" to this Agreed Statement of Facts.

8. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

9. The Solicitor does not have a discipline history.

DATED at Toronto, this 5th day of May, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be reprimanded in Convocation if he has filed his forms by the time this matter is considered by Convocation, failing which, that he be suspended for thirty days and thereafter month to month until his filings are completed in full.

REASONS FOR RECOMMENDATION

The Solicitor co-operated with the Society in that he agreed to a joint Statement of Fact and although he did not appear at the hearing, his co-operation allowed the hearing to proceed expeditiously.

Your Committee recommends the above penalty in order to obtain compliance with the financial reporting requirements.

Michael Brian Delman was called to the Bar on April 16, 1980.

ALL OF WHICH is respectfully submitted

DATED this 25th day of November, 1997

Robert C. Topp

There were no submissions.

It was moved by Mr. Carter, seconded by Mr. Murray that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if the solicitor had filed his forms, failing which, that he be suspended for 30 days and thereafter month to month until his filings were completed.

Mr. Corbett advised that the solicitor's filings were incomplete.

Mr. Corbett made submissions in support of the recommended penalty, the suspension to commence at the conclusion of the administrative suspension. He further asked that the following amendment be made to the Report:

- that the last line on page 2 be deleted - "7. By registered mail, dated September 9th, 1996, the Law Society advised the...".

It was moved by Mr. Carter, seconded by Mr. Murray that the solicitor be suspended for a period of 30 days and continue thereafter month to month until the filings were completed such suspension to commence upon the conclusion of the administrative suspension.

Carried

Re: Tibor Istvan BANKUTI - Mississauga

The Secretary placed the matter before Convocation.

Mr. Stuart 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 April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (filed as Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 30th April, 1998 (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

David W. Scott, Q.C., Chair
Daniel J. Murphy, Q.C.
Shirley O'Connor

In the matter of The Law Society Act and in the matter of	Glenn Stuart for the Society
TIBOR ISTVAN BANKUTI of the City of Mississauga a barrister and solicitor	Not Represented for the solicitor
	Heard: December 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 11, 1997 Complaint D211/97 was issued against Tibor Istvan Bankuti alleging that he was guilty of professional misconduct and conduct unbecoming a barrister and solicitor.

The matter was heard in public on December 16, 1997 before this Committee composed of David W. Scott, Q.C., Chair, Daniel J. Murphy, Q.C. and Shirley O'Connor. The Solicitor was represented by Richard Barrett during the pre-hearing negotiations, but attended and represented himself at the hearing. Glenn Stuart appeared on behalf of the Law Society.

DECISION

Complaint D211/97

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

2. a) on March 28, 1996, the Solicitor was convicted of the offence that he on or about the 10th day of September, 1995, at the City of Brampton, Ontario, did unlawfully commit an assault on Kim Bankuti, contrary to s. 266 of the *Criminal Code of Canada*; and,

b) on March 28, 1996, the Solicitor was convicted of the offence that he on or about the 10th day of September, 1995, at the City of Brampton, Ontario, did unlawfully commit an assault on Harold Keywan, contrary to s. 266 of the *Criminal Code of Canada.*

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

3. a) on or about April 12, 1996, the Solicitor borrowed the sum of $15,000 from his client Ms. Marilyn Foreman who is neither a lending institution nor a related person as defined by the *Income Tax Act*, contrary to the provisions of Rule 7 of the *Rules of Professional Conduct;* and

b) on or about May 9, 1996, the Solicitor borrowed the sum of $78,934, more or less, from his client Ms. Marilyn Foreman who is neither a lending institution nor a related person as defined by the *Income Tax Act*, contrary to the provisions of Rule 7 of the *Rules of Professional Conduct*;

Particular 2(c) was dismissed.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D211/97 and is prepared to proceed with a hearing of this matter on December 16-17, 1997.

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 D211/97 and this agreed statement of facts with his counsel, Richard Barrett, and admits the particulars and facts contained therein. The Solicitor also admits that the facts alleged in particulars 2(a) and 2(b) of the Complaint, supported by the facts as hereinafter stated, constitute conduct unbecoming a barrister and solicitor and that the facts alleged in particulars 3(a), (b) and (c) of the Complaint, supported by the facts as hereinafter stated, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1983. He did not practice law until 1996. In the interim, he engaged in other ventures, such as training horses and selling cars and real estate. In February 1996, the Solicitor completed the Bar Admission Course and was reinstated to good standing. He returned to practice in April 1996 as an associate at the firm of Ronka & Associates in Mississauga. The Solicitor was suspended for non-payment of his annual fee on September 27, 1996, and maintains that status to the present date.

Particular 2 (a) on March 28, 1996, the Solicitor was convicted of the offence that he on or about the 10th day of September, 1995, at the City of Brampton, Ontario, did unlawfully commit an assault on Kim Bankuti, contrary to s. 266 of the *Criminal Code of Canada*

(b) on March 28, 1996, the Solicitor was convicted of the offence that he on or about the 10th day of September, 1995, at the City of Brampton, Ontario, did unlawfully commit an assault on Harold Keywan, contrary to s. 266 of the *Criminal Code of Canada*

5. The Solicitor and Ms. Kim Bankuti were married for approximately eight years, during which time they had three children together. They separated in or about April 1995, at which time Ms. Bankuti moved out of the matrimonial home.

6. On September 10, 1995, at approximately 12:20 a.m., Ms. Bankuti and a male friend, Mr. Harold Keywan, were sitting in the kitchen at Ms. Bankuti's residence. The Solicitor states that he knew that Mr. Keywan was at the home and suspected that Ms. Bankuti and Mr. Keywan were romantically involved, a suspicion which, he further states, was confirmed subsequently. The Solicitor arrived at the residence and kicked open the locked front door. The Solicitor then proceeded into the kitchen, grabbed Ms. Bankuti and threw her onto the floor, causing her to bang her head.

7. The Solicitor then struck Mr. Keywan several times in the face with his fist and kicked Mr. Keywan's leg. As a result of this assault, Mr. Keywan received a cut over his right eye which required six stitches to close.

8. The police were contacted during these events and arrived at Ms. Bankuti's residence at approximately 12:28 a.m.. The Solicitor was arrested at that time and charged under the *Criminal Code*.

9. Shortly after this incident, the Solicitor voluntarily entered into anger therapy.

10. On March 28, 1996, the Solicitor pleaded guilty to two charges of assault, one with respect to each of Ms. Bankuti and Mr. Keywan. Two other charges were withdrawn by the Crown at that time. A certified copy of the information with respect to these charges is contained at Tab 1 of the Document Book. The Solicitor substantially agreed with the material facts read into the record at that time; a copy of the transcript of these proceedings is contained at Tab 2 of the Document Book.

11. The Solicitor was sentenced to twenty-one (21) days in jail, to be served intermittently, in addition to three days in pre-trial custody. The sentence was concurrent for both counts. The trial judge's reasons for sentence are contained at pages 8-9 of the transcript of the proceedings (Tab 2, Document Book).

12. The Solicitor is now on friendly terms with Ms. Bankuti and Mr. Keywan, who are now married, and believes they have now put the incident behind them.

Particular 3 (a) on or about April 12, 1996, the Solicitor borrowed the sum of $15,000 from his client Ms. Marilyn Foreman who is neither a lending institution nor a related person as defined by the *Income Tax Act*, contrary to the provisions of Rule 7 of the *Rules of Professional Conduct*

13. The Solicitor and Ms. Marilyn Foreman had been family friends through Mr. Bankuti's former mother-in-law since approximately 1990. Ms. Foreman, who separated from her spouse in 1993, has been unable to find work after the years she had spent raising her son (now nineteen), due to debilitating physical ailments and depression from which she suffers.

14. Ms. Foreman's spouse is an alcoholic and has been unable to maintain steady employment. As a result, Ms. Foreman did not pursue him for support when they separated as she did not believe he had the resources to pay support. She maintained herself on the income from an inheritance she had received from her parents.

15. In or about March 1996, at the instigation of his former mother-in-law, the Solicitor approached Ms. Foreman to discuss the possibility of preparing a separation agreement for her and commencing divorce proceedings. Noting that he was starting up his law practice, the Solicitor suggested to Ms. Foreman that he could act for her on these matters. The Solicitor assured Ms. Foreman that he would negotiate an arrangement which provided her with the appropriate support to which she was entitled.

16. Consequently, in March 1996, Ms. Foreman provided the Solicitor with a retainer in the amount of $1,500.00. Ms. Foreman states that she retained the Solicitor to prepare the separation agreement and commence divorce proceedings. The Solicitor states that this retainer related only to the preparation of the separation agreement, and that he was not retained by Ms. Foreman until later to commence divorce proceedings. The monetary retainer comprised two cheques in the amount of $750.00 each, paid on March 15 and March 29, 1996. No fee billing was ever provided to Ms. Foreman by the Solicitor for his services.

17. The Solicitor continued to act as Ms. Foreman's lawyer throughout the period from March through May 1996, until she retained new counsel on June 4, 1996.

18. All of the meetings between him and Ms. Foreman with relation to their legal consultations occurred either at his home or hers. Ms. Foreman did not attend at the Solicitor's office to meet him.

19. Ms. Foreman provided the Solicitor with all of her personal financial papers in early April 1996 so that he could review them and make a support proposal to her spouse. The Solicitor subsequently prepared a separation agreement for Ms. Foreman and her spouse (Tab 3, Document Book), which was signed on or about May 1, 1996, and witnessed by the Solicitor. The Solicitor at no time pursued divorce proceedings on behalf of Ms. Foreman.

20. Although the separation agreement provides for child and spousal support, Ms. Foreman did not receive any payments under the agreement as her spouse lost his job shortly after the agreement was signed.

21. During the course of their discussions in relation to the Solicitor's preparation of Ms. Foreman's separation agreement, the Solicitor asked Ms. Foreman to lend him $15,000.00 so that he could start up his law practice. After several discussions, Ms. Foreman agreed to lend the Solicitor the money because of the attractive rate of return and her complete trust that the Solicitor, as her lawyer and friend, would make the payments.

22. The Solicitor advised Ms. Foreman that the loan was to pay interest at a rate of 40% annually, so that it was a good investment for her, giving her a regular cash flow while protecting her capital. The loan also provided the Solicitor with start up capital for his law practice. Ms. Foreman would testify that the Solicitor persuaded her that the loan should be kept secret to avoid the Solicitor's former mother-in-law from intruding into their dealings. The Solicitor would testify that Ms. Foreman asked him to keep the loan secret to avoid the Solicitor's former mother-in-law from intruding into their dealings.

23. Ms. Foreman was required to cash in her mutual fund portfolio to obtain the funds necessary for the loan. She initially contacted her mutual fund representative in Barrie to obtain these funds, but, when the funds were not promptly forthcoming, the Solicitor took Ms. Foreman to an office of the mutual fund company in Brampton in an attempt to expedite the process. At that time, the Solicitor held himself out as Ms. Foreman's lawyer.

24. On April 12, 1996, Ms. Foreman provided the Solicitor with two bank drafts, dated April 12, 1996, totalling $14,800 (Tab 4, Document Book) and $200 in cash on or about April 12, 1996.

25. The Solicitor prepared a brief loan agreement with respect to the $15,000 which Ms. Foreman loaned him on April 12, 1996 (Tab 5, Document Book). This loan agreement was executed by the Solicitor and Ms. Foreman on April 15, 1996. The loan agreement, which had an effective rate of interest of 48% annually, provided as follows:

> I, Tibor I. Bankuti, in my capacity of a family friend, acknowledge the receipt of fifteen thousand dollars (15,000.00) from Marilyn Foreman and give my promise to repay the loan as follows:
>
> i) monthly payments of six hundred dollars ($600.00) on the first of each month commencing May 1, 1996 until April 1, 1998; and
>
> ii) one final balloon payment of fifteen thousand dollars ($15,000.00) due May 1, 1998.
>
> The parties agree that this loan shall at all times remain confidential and achieves the purpose of creating a monthly income for Marilyn Foreman while at the same time preserving her capital.

26. Ms. Foreman was a client and a friend of the Solicitor at the time the loan was advanced and the loan agreement was executed.

27. The Solicitor did not recommend that Ms. Foreman obtain independent legal advice in relation to this loan, and she did not receive such advice. The Solicitor did not provide Ms. Foreman with any security for this loan. The Solicitor states that no security was offered because the loan was made on the basis of Ms. Foreman's faith in him as a friend, even though Ms. Foreman knew at the time that he was impecunious; Ms. Foreman would testify that she did not obtain security as she had confidence in the Solicitor, as her lawyer and friend, and he promised in the strongest terms to repay her.

28. The Solicitor states that he advised Ms. Foreman that he could no longer act for her as a result of this loan. Ms. Foreman states that the Solicitor only indicated this to her only after she had committed her funds to the business venture described below.

29. Ms. Foreman understood from her discussions that the confidentiality clause was included in the loan agreement because she was a friend of the Solicitor's ex-wife and her mother, and the Solicitor did not want either of them to know of their dealings. The Solicitor would testify that Ms. Foreman asked him to keep the loan secret to avoid the Solicitor's former mother-in-law from intruding into their dealings. Ms. Foreman would testify that she at no time requested that their agreement be confidential, and she did not consider the issue until the written agreement was placed before her by the Solicitor.

30. The Solicitor used the loan from Ms. Foreman to pay support obligations to his ex-wife and consolidate his debts. The Solicitor made the payments due on May 1 and June 1, 1996, pursuant to the terms of the loan agreement, but did not make further payments. The Solicitor states that he was unable to make further payments after Ms. Foreman obtained a Mareva injunction freezing all of his assets.

Particular 2 (b) on or about May 9, 1996, the Solicitor borrowed the sum of $78,934, more or less, from his client Ms. Marilyn Foreman who is neither a lending institution nor a related person as defined by the *Income Tax Act*, contrary to the provisions of Rule 7 of the *Rules of Professional Conduct*

(c) in the alternative to particular 2(b), in the circumstance of a partnership or joint venture arrangement between the Solicitor and his client Ms. Marilyn Foreman which was entered on or about May 6, 1996,

i) the Solicitor acted in a conflict of interest by entering into the arrangement with his client and by representing the interests of both himself and his client without advising his client in writing of the nature of his conflict and either obtaining her informed written consent to his continuing to act or ensuring that she obtained Independent Legal Advice, contrary to the provisions of Rule 5 of the *Rules of Professional Conduct*; and,

ii) the Solicitor breached his fiduciary duty to Ms. Foreman by misapplying the proceeds of their partnership or joint venture to his own personal benefit

31. After the Solicitor had reviewed Ms. Foreman's financial documentation in April 1996, he advised Ms. Foreman that she did not have any tax write-offs and the low return on her capital (consisting principally of a mortgage on a cottage property and the equity in her home) was leaving her with a very limited income. To resolve this problem, the Solicitor suggested that Ms. Foreman enter into a business partnership with him to diversify her assets and improve her cash flow. A copy of a set of notes made by the Solicitor for Ms. Foreman to demonstrate the increase in her cash flow are located at Tab 6 of the Document Book.

32. The Solicitor subsequently proposed an arrangement to Ms. Foreman wherein she would take a mortgage against her home and invest the proceeds in a "partnership" with the Solicitor. At the time, her residence had an approximate value of $170,000, less an existing mortgage in the amount of $15,000. The Solicitor would control the investments of the "partnership". Initially, it was intended that the profits of the "partnership" would be split equally between Ms. Foreman and the Solicitor.

33. At the Solicitor's suggestion, Ms. Foreman applied for a loan of $115,000 from a mortgage broker, Foremost Financial Corporation, on April 24, 1996. A copy of her application is located at Tab 7, Document Book. The Solicitor had recommended that Ms. Foreman obtain this amount so that she would have approximately $100,000 available after the existing mortgage was discharged. This loan application was approved shortly thereafter.

34. The Solicitor retained David Purdon, a lawyer in Mississauga, on behalf of Ms. Foreman to prepare the mortgage documentation. With the exception of an estoppel certificate obtained by the Solicitor, the legal services in relation to this mortgage transaction were provided by Mr. Purdon. Mr. Purdon's account, dated May 9, 1996, to Ms. Foreman for his services in this transaction is located at Tab 8 of the Document Book.

35. Around the same time, the Solicitor prepared a document entitled "Guarantee, Assignment and Postponement" ("Agreement") which set out the agreement between Ms. Foreman and the Solicitor, who are identified in the Agreement as the "Lender" and "Guarantor", respectively, in the Agreement. The Agreement was executed by both parties on May 6, 1996. A copy of the Agreement is located at Tab 9 of the Document Book.

36. The Solicitor states that between the loan application on April 24, 1996, and the execution of the Agreement on May 6, 1996, he realized, having suggested to her that their arrangement risked a loss to her of up to $20,000, that Ms. Foreman could not afford to lose any of her capital. This change resulted from the fact that Ms. Foreman had arranged during this period to purchase a more expensive home. Furthermore, he realized that she required an income stream which a partnership arrangement would not provide to her. Accordingly, the original arrangement was no longer appropriate and the Solicitor sought to structure a loan arrangement between them in drafting the Agreement.

37. The Solicitor did not advise Ms. Foreman that their arrangement was to be a loan rather than a partnership until after the Agreement was signed; Ms. Foreman understood when she signed the Agreement that they were going into a joint business venture with the Solicitor. When she signed the Agreement, Ms. Foreman did not read the document but relied on the Solicitor's representations that they were entering a "partnership". Ms. Foreman would testify that the Solicitor represented to her, and she agreed, that most of their venture's funds would be placed in conservative investments, but, due to his expertise and knowledge of racehorses, a small amount of the funds would be invested in horses. The Solicitor would testify that he understood at all times that they had agreed to invest the monies primarily in racehorses in order to generate the necessary returns on investment.

38. The Solicitor did not recommend that Ms. Foreman obtain independent legal advice prior to entering the Agreement and advancing funds to the Solicitor. Ms. Foreman did not otherwise obtain such advice.

39. The Agreement provided that Ms. Foreman would loan $100,000.00 to a "partnership" between herself and the Solicitor for a ten year term. Given the terms of the Agreement and the fact that the "partnership" was wholly controlled by the Solicitor, this loan was effectively a loan to the Solicitor alone. The Agreement provided that Ms. Foreman would be paid 12.5% interest, annually, on her loan by monthly payments in the amount of $1,432.00. In fact, Ms. Foreman's actual rate of return was significantly less than this as she was paying 6.75% on her mortgage loan.

40. The Solicitor guaranteed the interest payments and the repayment of the principal of the loan under the Agreement. Due to the restructuring of their arrangement by the Solicitor, no provision was made for profit sharing. (No interest payments were made under the Agreement due to the breakdown in relations between Ms. Foreman and the Solicitor, described below in paragraphs 56 and 57.)

41. No security was provided for this loan. Ms. Foreman relied solely on her confidence in the Solicitor as her lawyer and friend and his promises to repay her. As partial security for the loan, Ms. Foreman anticipated that she would retain some control over the funds by way of either joint accounts or the holding of investments in both their names.

42. Although Ms. Foreman was aware that the Solicitor had had financial difficulties previously (he had gone bankrupt twice) and had learned that he had a propensity to gamble, she was assured by the Solicitor that the initial investments of, what she understood to be, their "partnership" would be secure. Ms. Foreman accepted this assurance without question. This assurance, from her lawyer and friend, assuaged her concerns about the Solicitor's history.

43. On May 7, 1996, the Solicitor and Mr. Purdon took the mortgage documents prepared by Mr. Purdon to Ms. Foreman and had her execute same in a local restaurant/tavern. The documents were not explained to Ms. Foreman as she could not read the documents at that time, although Mr. Purdon offered to explain them to her. Ms. Foreman states that she believed that the Solicitor would explain them to her; the Solicitor denies ever assuming that responsibility. Ms. Foreman did not read the documents before signing them. The mortgage was registered on May 9, 1996. A copy of the registered mortgage is located at Tab 10 of the Document Book.

44. The proceeds of the new mortgage were advanced to Ms. Foreman by Mr. Purdon on May 9, 1996. As reflected in Mr. Purdon's trust statement, the net proceeds totalled $98,958.15, being $115,000 less $13,680.00 to repay the prior mortgage, $1,861.85 in costs and disbursements, and $500.00 held back as a bonus to the lender. Therefore, even if fully repaid, this loan cost Ms. Foreman $2,361.85.

45. At the Solicitor's direction, Ms. Foreman did not deposit the mortgage proceeds in her personal account at the Toronto-Dominion Bank but opened a new account, Account #6733290, at the Hong Kong Bank of Canada. Ms. Foreman was the sole signatory on this account. As reflected in the account passbook (Tab 11, Document Book), the sum of $98,958.15 was deposited to the account upon its opening on May 9, 1996.

46. Immediately after Ms. Foreman opened the account, the Solicitor asked her to sign four bank drafts. Ms. Foreman signed the four bank drafts without examining them. The bank drafts were as follows:

Draft number and Document Book location	*Date*	*Payee*	*Amount*
223 (Tab 12)	May 9, 1996	Ontario Jockey Club	$25,000
224 (Tab 13)	May 9, 1996	Ontario Jockey Club	$20,000
225 (Tab 14)	May 9, 1996	Tibor I. Bankuti	$17,000
226 (Tab 15)	May 9, 1996	Tibor I. Bankuti	$8,000

47. Ms. Foreman understood that the funds would be held in both their names. When she signed the drafts, Ms. Foreman reminded the Solicitor that the funds of what she understood to be a partnership were to be held in both of their names. He indicated that she would need to be registered at the Ontario Jockey Club before she could hold assets in her name.

48. After she had provided the bank drafts to him, the Solicitor took Ms. Foreman to the race track to have her finger printed, which was a prerequisite to becoming a registered horse owner, and to look at possible horses to acquire. She understood, however, that any horse would be registered in both their names. Ms. Foreman trusted the judgment of the Solicitor as her lawyer and friend. The Solicitor did not register Ms. Foreman as owner of either horse or any other asset besides the Guaranteed Investment Certificate ("GIC").

49. In addition, on May 9, 1996, the Solicitor arranged for an additional $20,000 to be transferred into a GIC at the Hong Kong Bank, in the names of both Ms. Foreman and the Solicitor. The Solicitor states that this GIC was placed in both of their names in error and ought to have been in his name alone. The Solicitor used the GIC to secure a line of credit in his and Ms. Foreman's name; only the Solicitor has used this line of credit. It was also intended that this GIC would also secure a credit card for Ms. Foreman; she never obtained such a credit card.

50. The Solicitor retained copies of all the drafts and other documentation received from the bank, including the documentation relating to the GIC; Ms. Foreman did not retain copies of this material, and the Solicitor refused to provide copies to her subsequently.

51. At the Solicitor's request, Ms. Foreman advanced a further $5,934.15 to the Solicitor by cheque, dated May 17, 1996 (Tab 16, Document Book). This cheque was completed by the Solicitor and signed by Ms. Foreman at his request.

52. Thereafter, Ms. Foreman required $5,000.00 as a deposit on the purchase of a new home; however, by that time, her account #6733290 had a balance of only $3,000.00. The Solicitor had borrowed $3,000.00 from Ms. Foreman in April 1996. He notionally borrowed this sum from her again in May to repay his earlier indebtedness to her. This amount was, therefore, the balance in the account (and represented a further sum borrowed by the Solicitor although it remained in Ms. Foreman's possession). The Solicitor loaned Ms. Foreman $2,000.00 to enable her to pay the deposit, which she did on May 19, 1996 (Tab 16, Document Book). Ms. Foreman repaid $1,000.00 of this amount shortly thereafter when the Solicitor advised her that he needed to loan his brother the money.

53. Including all of the advances in May 1996, the Solicitor's borrowings from Ms. Foreman, drawn from the mortgage proceeds, totalled $98,934.15 and consumed the entirety of the funds advanced to Ms. Foreman under the mortgage against her home.

54. The Solicitor applied the $98,934.15 which Ms. Foreman had advanced to him as follows:

Expenditure	Approximate Amount
Repayment of gambling debts incurred in 1995	$22,000
Acquisition of "Polish Prediction", a race horse	$21,400
GIC purchased at Hong Kong Bank, in error, in names of the Solicitor and Ms. Foreman	$20,000
Acquisition of "Zarb's Go Gala", another race horse	$ 8,560
Gambling losses incurred in May 1996	$ 6,000
Repayment of miscellaneous debts	$5,000
Payment of arrears in child and spousal support	$4,500
Repayment to Ms. Foreman of earlier personal loan (see paragraph 52, above)	$3,000
Payment of utility arrears	$ 1,700
Payment of three or four months of arrears in car payments	$ 1,500
Payment of fees owing to Law Society	$ 1,500
Payment or rent arrears	$ 1,300
Loan to Ms. Foreman to enable her to make deposit on home purchase (less $1,000 repaid by Ms. Foreman)	$ 1,000

Subsequent Events

55. After discussing her dealings with the Solicitor with her brother, Ms. Foreman became concerned that the Solicitor had dissipated the loan proceeds and that she would not be able to recover her money. Consequently, Ms. Foreman made demands for repayment of the loans in late May 1996, through her brother.

56. Ms. Foreman retained other counsel in June 1996 and commenced litigation against the Solicitor that same month, including seeking, and obtaining, a Mareva injunction against him.

57. The Solicitor and Ms. Foreman have now settled the litigation between them. For a number of months, the Solicitor has been making payments pursuant to the terms of the minutes of settlement between them (Tab 17, Document Book).

V. DISCIPLINE HISTORY

58. The Solicitor has no discipline history.

DATED at Mississauga, this 15th day of December, 1997."

Finding of Committee on the Allegations of
Conduct Unbecoming and Professional Misconduct

The Agreed Statement of Facts tells the whole story in this unfortunate matter. Insofar as the complaint of conduct unbecoming a solicitor is concerned, Particulars 2(a) and (b) relate to two separate convictions for common assault involving the Solicitor's former wife and her friend. The assaults occurred a few short months after their separation and were obviously associated with a situation of marriage breakdown. The Solicitor responded appropriately, undertaking a course in anger therapy. After serving a short intermittent sentence the matter was closed. His relationship with his former wife and the third party, to whom she is now married, has been normalized. While regrettable and very unfortunate from the point of view of the two complainants, these assaults are not determinative of the issues before us. Nonetheless, they do amount to Conduct Unbecoming a Solicitor and we so find. We accordingly recommend that there be a finding of Conduct Unbecoming a Solicitor based upon Paragraphs 2(a) and 2(b) of the Complaint.

Particulars 3(a), (b) and (c) relate to allegations of professional misconduct arising out of the Solicitor's relationship with a Ms. Marilyn Foreman. Particular 3(a) alleges that the Solicitor borrowed the sum of $15,000 from Ms. Foreman, a client, contrary to the provisions of Rule 7 of the *Rules of Professional Misconduct*. Particulars 3(b) and (c), expressed in the alternative,. involve an allegation that the Solicitor borrowed $78,934 from his client Ms. Foreman contrary to Rule 7 of the *Rules of Professional Misconduct* or, in the alternative, that the Solicitor established a joint venture arrangement in which he acted in a situation of conflict, contrary to the provisions of Rule 5 of the *Rules of Professional Conduct* and further that he was in breach of his fiduciary duty to Ms. Foreman by misapplying the proceedings of their joint venture account for his own personal benefit.

The Agreed Statement of Fact is unambiguous insofar as the events are concerned. The Solicitor was retained in early 1996 to assist Ms. Foreman to negotiate a separation agreement with her husband. He did this in his capacity as a solicitor. In the course of so doing, and having examined her financial records, he learned that she had resources. He then negotiated a "loan" in the amount of $15,000 "so that he could start up his law practice." Thereafter, dressing the transaction up to suit his needs as a joint venture, he borrowed the further sum of $78,934 from Ms. Foreman. This transaction was facilitated by Ms. Foreman placing a mortgage on her home. While the proceeds were said to be for the purpose of a joint venture, no provision was made for Ms. Foreman's sharing in the benefits of the venture and all of the money, in the end consisting of some $98,958, was paid to the Solicitor and utilized for his own purposes. All of this was done without benefit of independent legal advice. There can be no doubt that the Solicitor is guilty under Paragraphs 2(a) and (b) and 3(a) and (b) of the Complaint of professional misconduct pursuant to the provisions of Rule 7 of the *Rules of Professional Conduct*. Particular 3(c) expressed as it is in the alternative to Particular (b) is dismissed.

RECOMMENDATION AS TO PENALTY

Adopting the Joint Submission of the Solicitor and the Society, it is recommended that the Solicitor, Tibor Istvan Bankuti, be permitted to resign his membership in the Society.

REASONS FOR RECOMMENDATION

While the Recommendation is supported by a Joint Submission, our reasons for considering it appropriate should be recorded.

Insofar as the offences under s.266 of the *Criminal Code of Canada*, which are the basis for the finding of Conduct Unbecoming a Solicitor are concerned, while the incidents are serious and attract appropriate condemnation, the Solicitor's behaviour is at least open to rational interpretation. He had recently suffered a breakdown of his marriage. He was still deeply involved emotionally with the woman who was soon to be his ex-wife. He found her in a situation, which he interpreted as compromising, with another man after they had separated. He acted out by pushing her to the floor and attacking her companion aggressively. There was physical injury suffered by her companion, although mercifully not serious. Anti-social behaviour undoubtedly, but not behaviour which, in and of itself, would attract the ultimate sanction in professional discipline proceedings.

The events involving Ms. Marilyn Foreman are somewhat different. While the Solicitor was called to the Bar in 1983, he did not commence practice until February 1996, having completed the Bar Admission Course anew and been re-instated in good standing. Obviously, Ms. Foreman, a family friend, was one of his first clients. She was vulnerable with an alcoholic spouse unable to support her and an income dependent on inheritance from her parents. The Solicitor undertook to act for her in her matrimonial difficulties. Having extracted a retainer from her and having examined her personal financial records, he made up his mind to utilize her resources in his own interest. He borrowed $15,000 for the stated purpose of starting up his law practice. It is unclear as to whether or not the Solicitor actually used the money for that purpose. The loan was made in some secrecy (at whose behest is unclear) since the Solicitor's former mother-in-law was a friend of the client. No independent legal advice was offered. Ms. Foreman was required to cash her mutual fund portfolio in order to fund the loan. While a loan agreement contemplating repayment was drawn and signed, no security was offered for the loan. Obviously Ms. Foreman trusted the Solicitor by virtue of their friendship and his office, precisely the reasons why the need for independent legal advice is so obvious.

The second loan, which is the subject of the balance of the Particulars in the Complaint, is even more troubling. It amounted to some $78,000 as it was originally negotiated. It is clear that the Solicitor utilized a form of subterfuge to mask what was essentially a loan. He created what had the appearance of a joint venture which he persuaded Ms. Foreman to pursue in order to increase her income. In order to facilitate this process, he persuaded her to place a mortgage on her home in the amount of $115,000, representing a major encumbrance on a property valued at $170,000. While said to be a "joint venture," it was accompanied by a form of guarantee in which Ms. Foreman was identified as the lender and the Solicitor as the guarantor. The Solicitor altered the partnership arrangement into a loan agreement after the agreement was signed, all the while making promises, quite obviously not intended to be kept, about the investments that would be made on Ms. Foreman's behalf. To make a long story short, far from providing Ms. Foreman with more appropriate income producing investments, the agreement resulted in some $98,958.15 of her resources being deposited in a new account with the Hong Kong Bank of Canada. Immediately after the deposit of the funds, Ms. Foreman was invited to sign drafts (documents which she did not examine), resulting in $45,000 being paid to the Ontario Jockey Club and $25,000 to the Solicitor. Ms. Foreman was clearly proceeding under the false impression that the product of the monies invested would be held in their joint names. None of the investments indeed where held in their joint names other than a line of credit secured by a GIC. In the event, the line of credit was used for the benefit of the Solicitor. Indeed, the transaction so striped Ms. Foreman of her disposable cash that she was required to borrow $2000 from the Solicitor (presumably her own money) in order to fund the deposit for the purchase of her new home. The bulk of the monies were used by the Solicitor for the repayment of gambling debts, the purchase of two racehorses, the payment of arrears of child and spousal support, personal debts and fees to the Law Society.

While this entire transaction was dressed up in the trappings of a joint venture partnership or, if one prefers, a loan, the form matters not. The operative fact is that the Solicitor took advantage of a woman who was vulnerable, utilized his relationship as a friend and solicitor to extract her savings from her and used the money, not in her interests as he represented that he would, but to indulge his horseracing hobby and pay off his debts. All of this was stage-managed by the Solicitor without independent legal advise. Furthermore, the Solicitor's conduct involves a breach of fiduciary relationship and amounts to dishonourable behaviour of a very obvious and offensive kind.

While the joint recommendation to afford the Solicitor permission to resign from the Society makes it unnecessary for the Committee to indulge in extensive debate about penalty, suffice to say that, in our opinion, having in mind the specific misconduct with which the solicitor is charged, a disposition by way of permission to resign is clearly indicated in all of the circumstances of the case.

ALL OF WHICH is respectfully submitted

Dated this 15th day of April, 1998

David W. Scott, Q.C., Chair

Mr. Stuart asked that the following amendment be made to the Report:

- page 2, 2nd paragraph should read "Particular 3(c) was dismissed" not 2(c).

There were no submissions.

It was moved by Mr. Carter, seconded by Mr. Murray that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be permitted to resign.

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

It was moved by Mr. Murray, seconded by Mr. Gottlieb that the solicitor be granted permission to resign.

Counsel, the reporter and the public withdrew.

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

It was moved by Mr. Swaye, seconded by Ms. Sachs that the solicitor be advised that there was a motion for an increased penalty.

Counsel, the reporter and the public were recalled.

Convocation asked for Mr. Stuart's submissions on what compelled the Society to recommend permission to resign and not disbarment.

Mr. Stuart submitted that the case range in this matter was between suspension and termination and based on the caselaw this matter did not warrant disbarment.

Counsel, the reporter and the public withdrew.

The Murray/Gottlieb motion that the solicitor be granted permission to resign was voted on and adopted.

The Topp/Crowe and Swaye/Sachs motions were not put.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that Convocation adopted the joint recommendation and findings of the Committee that the solicitor be given permission to resign.

The Treasurer withdrew from Convocation and Mr. Topp took the Chair as Acting Treasurer.

Re: Thomas Lyons DOCHERTY - Leamington

The Secretary placed the matter before Convocation.

Messrs. Swaye, Wilson and Cole and Ms. Backhouse withdrew for this matter.

Ms. Katherine Seymour 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 21st February, 1998, together with an Affidavit of Service sworn 3rd March, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 27th February, 1998 (filed as 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

Nancy L. Backhouse, Chair
Thomas E. Cole
Susan Elliott

In the matter of The Law Society Act and in the matter of	Kathryn Seymour for the Society
THOMAS LYONS DOCHERTY of the Town of Leamington a barrister and solicitor	Not Represented for the solicitor Heard: January 13, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 15, 1997 Complaint D144/97 was issued, and on July 31, 1997 Complaint D286/97 was issued, against Thomas Lyons Docherty alleging that he was guilty of professional misconduct.

The matter was heard in public on January 13, 1998 before this Committee composed of Nancy L. Backhouse, Chair, Susan Elliott and Thomas E. Cole. The Solicitor participated by teleconference. He was not represented by counsel. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

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

Complaint D144/97

2. a) He failed to honour his undertaking to the Discipline Committee to reimburse funds to his former client in the amount of $1,500.00 within the period prescribed by the Committee; and

b) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, 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.

Complaint D286/97

2. a) He failed to produce the books and records of his practice to the Law Society for the purposes of an audit pursuant to Regulation 708 of the Law Society Act, despite numerous requests that he do so.

Evidence

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

Re: D144/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D144/97 and is prepared to proceed with a hearing of this matter on July 15 and 16, 1997.

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 D144/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1964. He has been suspended for non-payment of his Errors and Omissions levy since May 26, 1995.

Particular 2a) He failed to honour his undertaking to the Discipline Committee to reimburse funds to his former client in the amount of $1,500.00 within the time prescribed by the Committee.

5. Frank D'Alimonte retained the Solicitor with respect to his matrimonial matter in or about November 1991. The Solicitor's services were subsequently terminated at which time the Solicitor rendered his account. The Solicitor's account was subject to an assessment in which the sum of $1,500.00 was to be paid by him to his client. The Solicitor failed to pay Mr. D'Alimonte the sum of $1,500.00. As a result, a formal complaint, D399/95, was issued against the Solicitor on January 15, 1996 charging him with professional misconduct. A copy of Complaint D399/95 is contained at Tab 1 of the Document Book.

6. By telephone conference on May 29, 1996, the Solicitor's discipline hearing concerning Complaint D399/95 was heard. The Committee made a finding of professional misconduct.

7. The Solicitor advised the Committee as follows:

> "...As far as Mr. D'Alimonte is concerned, it's clear from the correspondence I received from the Society that by merely paying him the $1500, which I now intend to do, I could have had this matter withdrawn as far as he was concerned and the Society's concerned, and that's of record from correspondence from the Society. About that, I have nothing to say. ...."

8. The Committee then inquired as to how long the Solicitor required to pay the said amount to his client. The Solicitor indicated that he needed thirty days. In consideration of the undertaking to pay his client the funds, the Solicitor received a reprimand in Committee. A copy of the transcript of the Decision of the Discipline Committee is contained at Tab 2 of the Document Book. The Solicitor did not pay Mr. D'Alimonte the sum of $1,500.00 within the thirty day period.

9. By letter dated May 31, 1996 (Tab 3, Document Book), the Law Society confirmed the Solicitor's undertaking to the Committee and requested that he remit the monies directly to Mr. D'Alimonte.

10. Mr. D'Alimonte did not receive the monies and by letter dated July 18, 1996 (Tab 4, Document Book), the Law Society wrote to the Solicitor requesting that he forward the amount of $1,500.00 within fourteen days to Mr. D'Alimonte. The Solicitor was advised that if he did not comply with his undertaking, the matter would be referred to the Chair and Vice-Chairs of the Discipline Committee.

11. To date, the Solicitor has not paid the sum of $1,500.00 to Frank D'Alimonte in accordance with his undertaking to the Discipline Committee of May 29, 1996.

Particular 2b) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996.

12. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 31, 1996, as required by S.16(2) of Regulation 708 under the *Law Society Act.*

13. By letter dated August 9, 1996 (Tab 5, Document Book), the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the *Law Society Act.* The Solicitor was advised the last filing received from him was for the period ended January 31, 1994. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. The Solicitor did not reply to this correspondence.

14. By registered mail, dated September 9, 1996 (Tab 6, Document Book), the Law Society advised the Solicitor he had not taken the necessary steps to brings his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the *Law Society Act* may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's registered letter was signed for and delivered on September 12, 1996. The Solicitor did not reply to this correspondence.

15. To date, the Solicitor has not provided the outstanding filing.

V. PRIOR DISCIPLINE

16. On May 29, 1996, the Solicitor was found guilty of professional misconduct for rendering an account to his client after his retainer was terminated, for breaching a court order requiring him to pay out monies held in trust and, for releasing the sum of $8,000.00 to his client contrary to written instructions. The Solicitor was reprimanded in Committee and provided a verbal Undertaking to the Committee that he would pay his client, F. D'Alimonte the sum of $1,500.00 within 30 days. The Solicitor was also ordered to pay costs in the sum of $1,500.00.

DATED at Windsor, this 2nd day of December, 1997."

Re: Complaint D286/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D286/97 and is prepared to proceed with a hearing of this matter on November 18 and November 19, 1997.

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 D286/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1964. He has been suspended for non-payment of his Errors and Omissions levy since May 26, 1995.

Particular 2a) He failed to produce the books and records of his practice to the Law Society for the purposes of an audit pursuant to Regulation 708 of the Law Society Act despite numerous requests that he do so.

5. In December, 1995, the Law Society conducted an audit of the books and records of the Solicitor. As a result of that audit, concerns arose with respect to a number of cheques written by the Solicitor on his trust account. As the complete books, records and client files were not available at the time of the audit, on December 4, 1995, the Society requested that the missing documents be produced and the Solicitor agreed to do so.

6. Production was not made and, on April 24, 1996 and April 25, 1996, the Society requested of the Solicitor that he produce specific books, records and client files. The Society followed-up with these requests by letter dated May 9, 1996, a copy of which is attached hereto as Exhibit 1.

7. The Society telephoned the Solicitor and spoke with him on May 17, 1996. At that time, an appointment for June 3, 1996 was confirmed. A copy of the telephone transaction record is attached hereto as Exhibit 2.

8. On May 30, 1996, the Society telephoned the Solicitor, who advised that he had not yet received the requested documents from his bookkeeper but would call June 3, 1996. A copy of the telephone transaction record is attached hereto as Exhibit 3.

9. The Solicitor did not contact the Society and, by letter dated July 29, 1996, the Society wrote to the Solicitor requiring he produce the information requested. The letter was sent by registered mail and, August 21, 1996, was returned marked "Unknown". Attached hereto as Exhibit 4 is a copy of the letter and envelope.

10. Consequently, on August 21, 1996, the Society telephoned the Solicitor, who provided a new address. The Solicitor also stated that he did not yet have the requested records. A copy of the July 29, 1996 letter was sent to the Solicitor at his new address. A copy of the telephone transaction record is attached hereto as Exhibit 5.

11. By letter dated September 5, 1996, the Solicitor wrote to the Law Society indicating he would be away from his office for the most of that month and, therefore, required further time to comply with the request for records. A copy of this letter is attached hereto as Exhibit 6.

12. On September 25, 1996, the Society telephoned the Solicitor and requested that he fax one particular document to the Society by the next morning. The Solicitor agreed to do so. A copy of the telephone transaction record is attached hereto as Exhibit 7.

13. The Solicitor did not fax the document as agreed and, on September 27, 1996, the Society again phoned the Solicitor and requested the document. The Solicitor responded that he was very busy but would fax it if he could. A copy of the telephone transaction record is attached hereto as Exhibit 8.

14. The Solicitor did not fax the requested document nor did he again communicate with the Law Society. Consequently, by letter dated May 8, 1997, and sent by registered and ordinary mail, the Society wrote to the Solicitor requiring he respond and produce his books and records. A copy of this letter and the acknowledgement of receipt card are attached hereto as Exhibit 9.

15. The Solicitor did not respond to that letter.

16. To date, the Solicitor has not produced the requested books and records.

V. PRIOR DISCIPLINE

17. On May 29, 1996, the Solicitor was found guilty of professional misconduct for rendering an account to his client after his retainer was terminated, for breaching a court order requiring him to pay out monies held in trust and, for releasing the sum of $8,000.00 to his client contrary to written instructions. The Solicitor was reprimanded in Committee and provided a verbal Undertaking to the Committee that he would pay his client, F. D'Alimonte the sum of $1,500.00 within 30 days. The Solicitor was also ordered to pay costs in the sum of $1,500.00.

DATED at Toronto, this 6th day of January, 1998."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Thomas Lyons Docherty be reprimanded in Convocation if he has complied with the following requirements by the date of Convocation, failing which, that he be suspended until he has complied:

1. completes his filing to the satisfaction of the Law Society;
2. produces his books and records to the satisfaction of the Law Society;
3. makes full payment to F. D'Alimonte in the sum of $1500 and to the Law Society in the sum of $1500; and
4. pays $800 into trust.

REASONS FOR RECOMMENDATION

The Solicitor failed to file, failed to produce his books and records and failed to reimburse his former client $1,500 or pay the Law Society $1,500 for costs. The recommended penalty was jointly submitted by the Law Society and the Solicitor. The Solicitor is seeking to administratively resign and is attempting to resolve all outstanding and filing issues. He had just made his filings at the time this matter was heard by the Committee. He did not make the required payments because he was unable to.

The Solicitor is no longer practising law and has been administratively suspended since 1995. Under the circumstances, the public interest is adequately protected by the recommended penalty.

The Solicitor has an estate matter which requires completion. As he is administratively suspended, he is unable to do this. Accordingly, the Law Society is urged to assist him in completing it to assist him in resigning.

Thomas Lyons Docherty was called to the Bar on April 10, 1964.

ALL OF WHICH is respectfully submitted

DATED this 21st day of February, 1998

Nancy L. Backhouse, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he complied with the conditions set out in the Report, failing which, he be suspended until he complied.

Ms. Seymour advised that the solicitor's filings had not been completed and the conditions had not been met. Submissions were made in support of the solicitor being suspended indefinitely until the conditions were met.

It was moved by Mr. Murray, seconded by Mr. Crowe that the solicitor be suspended for a period of 1 month definite and indefinitely thereafter until the solicitor complied with the conditions set out in the Report.

Carried

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:15 P.M.

PRESENT:

The Treasurer, Arnup, Backhouse, Bobesich, Carpenter-Gunn, Carter, Chahbar, Crowe, Gottlieb, MacKenzie, Murray, Swaye, Topp, Wilson and Wright.

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IN PUBLIC

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Re: Alan Stanley FRANKLIN - Toronto

The Secretary placed the matter before Convocation.

Ms. Sachs and Messrs. Gottlieb and Chahbar withdrew for this matter.

Mr. Stuart appeared for the Society and Mr. Barry Swadron appeared for the solicitor who was present.

Submissions were made by both counsel on a preliminary matter flowing from a motion to tender fresh evidence.

There were questions by the Treasurer and the Bench.

The Treasurer advised that Convocation would decide the case on the basis of the record before them.

Convocation had before it the Report of the Discipline Committee dated 2nd September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (filed as Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th May, 1998 (filed 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:

28th May, 1998

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Harriet E. Sachs, Chair
Gary L. Gottlieb, Q.C.
Abdul A. Chahbar

In the matter of The Law Society Act and in the matter of	Glenn Stuart for the Society
ALAN STANLEY FRANKLIN of the City of Toronto a barrister and solicitor	Not Represented for the solicitor
	Heard: May 14 and June 19, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Alan Stanley Franklin alleging that he was guilty of professional misconduct: Complaint D168/96 on June 20, 1996, Complaint D62/97 on February 14, 1997, and Complaint D104/97 on March 20, 1997.

The matter was heard on May 14 and June 19, 1997 by this Committee, composed of Harriet Sachs, Chair, Gary L. Gottlieb, Q.C. and Abdul Chahbar. The hearing proceeded in public with the medical evidence both documentary and *viva voce* received *in camera.* The Solicitor attended the hearing on both days and represented himself. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D168/96

2. a) He failed to reply to the Law Society regarding a complaint by Thomas Richmond;

b) he breached the terms of a personal Undertaking to his client, Thomas Richmond, and dated November 17, 1995, wherein the Solicitor agreed to return to his client, the sum of $30,000 which he was holding in trust for the purpose of a proposed loan, if that loan did not proceed for any reason whatsoever; and

c) he failed to produce his books and records contrary to Section 18 of Regulation 708 under the Law Society Act for the purpose of an audit by a Law Society representative.

Complaint D62/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, 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.

Complaint D104/97

2. a) He misappropriated the sum of $150,000 from funds provided to him in trust on behalf of his clients, Kingridge Investments Group and the companies controlled by the principals of that group, on or about February 24, 1995;

b) he sent misleading letters dated May 24, 1995 and June 3, 1995, to another solicitor, Sydney Valo, Q.C., wherein he advised that he was unable to release $75,000 from his trust account, for the closing of a real estate transaction as a result of Revenue Canada freezing his trust account when, in fact, the trust account was not frozen but the Solicitor had misappropriated the funds in question; and

c) he sent a misleading letter, dated August 2, 1995, to his client, Kingridge Investments Group, wherein he advised that he was unable to release $75,000 from his trust account for the closing of a real estate transaction as a result of Revenue Canada freezing his trust account when, in fact, the trust account was not frozen but the Solicitor had misappropriated the funds in question.

Evidence

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

Re: Complaint D168/96

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D168/96 and is prepared to proceed with a hearing of this matter on April 15 and 16, 1996.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D168/96 and admits the particulars contained therein as well as the facts contained in this agreed statement. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor is 44 years of age. He was called to the Bar on April 13, 1978, and practised as a sole practitioner at all relevant times. He has been suspended since December 31, 1995, for non-payment of his annual fees.

Particular 2(b) He breached the terms of a personal undertaking to his client, Thomas Richmond

5. On or about November 15, 1995, Mr. Thomas Richmond ("Richmond") contacted the Solicitor and retained him to assist in arranging a short term (15 days) loan in the sum of $300,000.00 (U.S.). A joint venture, represented by Richmond, required a loan of $300,000.00 (U.S.) so that amount could be deposited with an escrow title company, Schmitt Title and Escrow Company ("Schmitt Title") in Appleton, Wisconsin. Schmitt Title, as an authorized representative of the Chicago Title Corporation, would then hold and safeguard these funds until a letter of credit in the amount of $100,000,000.00 (U.S.) was issued by an offshore bank in favour of Richmond's business associates R.H. Marquardt and Steven Podell ("Podell") and was authenticated by a receiving bank in California.

6. It was agreed between Richmond's joint venture and Schmitt Title that if the letter of credit was not received and authenticated within ten banking days, the entire escrow deposit was to be refunded to the "sending bank" by Schmitt Title.

7. The Solicitor informed Richmond that he had a client who was interested in loaning the sum of $300,000.00 (U.S.), but the client required pre-payment of a loan fee totalling 10 percent of the loan, being the sum of $30,000.00 (U.S.). Richmond was not prepared initially to pre-pay the fee. Richmond was advised that the lenders would not proceed further with this transaction unless this money was provided as security. Richmond and the joint venture subsequently agreed to pre-pay this amount.

8. Immediately upon retaining the Solicitor, Richmond provided the escrow documentation to the Solicitor for his review. By letter dated November 17, 1995 (Document Book, Tab 1), the Solicitor asked Richmond to confirm certain further information regarding the transaction and to wire funds to the Solicitor's trust account in Toronto. The Solicitor advised Richmond that his clients would not take further action regarding the transaction until the Solicitor received the $30,000.00 fee.

9. The Solicitor assured Richmond that he would protect the funds in his trust account until the loan was advanced. Consequently, by letter dated November 17, 1995 (Document Book, Tab 2), the Solicitor provided the following Undertaking to induce Richmond to pre-pay the fee:

> *...this letter shall serve as my personal undertaking, as a lawyer duly authorized to practice law in the Province of Ontario, that if you wire to my trust account the sum of $30,000.00, I will hold such sum for the purpose of the proposed loan of $300,000.00, being the escrow deposit. This sum will be repaid to you forthwith in the event that the loan does not proceed for any reason whatsoever.*

10. In reliance on the Solicitor's undertaking, Richmond and his business associates provided the $30,000.00 to the Solicitor on November 22, 1995. Richmond and the Solicitor agreed that these funds would be released to the lenders as soon as the advance of the $300,000 loan was confirmed.

11. After receiving the funds from Richmond, Richmond ceased to have a direct involvement in the transaction. Lengthy negotiations took place between Podell, a New York lawyer, who represented himself as the main principal of the transaction, and his associate, Kent Densley, on the one hand and the lending group in Toronto on the other. The lending group consisted of Sheldon Esbin, a Toronto lawyer, and David Franklin, the Solicitor's brother.

12. As a result of these discussions, and investigations undertaken by the Solicitor, the Solicitor and the lending group concluded that there were significant risks in the transaction relating to the undetermined actual value of the Letter of Credit. The lenders proposed various solutions which would reasonably protect their interests, while, in the lenders' view, giving the joint venture group what they wanted. After discussions of these proposals, it appeared that all parties were near agreement on November 28, 1995. However, Podell advised the lenders on November 28, 1995, that he had borrowed funds from other lenders and that he was cancelling the transaction with the lenders arranged by the Solicitor.

13. Richmond telephoned the Solicitor several times between November 28, 1995, and December 5, 1995, and left messages for the Solicitor to call him. The Solicitor did not return the calls. On December 5, 1995, Richmond faxed a handwritten note to the Solicitor requesting the return of the $30,000 (Document Book, Tab 3). The Solicitor did not respond to either Richmond's fax or subsequent telephone calls by Richmond.

14. The Solicitor states that, when Podell terminated the negotiations with the lenders, he and the lenders suspected that Richmond, Podell and their joint venture may not have been acting in good faith in the loan transactions and may have been attempting to obtain the $300,000 improperly.

15. The Solicitor states that, due to his doubts as to the motivation of the joint venture, he called Podell on several occasions to determine if the transaction with the new lenders had closed. The Solicitor states that he believed that a failure by the joint venture to close the transaction would confirm his suspicions. No confirmation was provided by Podell in November or December 1995. The Solicitor states that he advised Podell that he would return the $30,000 if Podell provided written confirmation that the transaction closed. Podell advised the Solicitor that he was not entitled to such written confirmation.

16. On December 6, 1995, William Mournes ("Mournes"), another business associate of Richmond and the individual who had provided the $30,000, spoke with the Solicitor and requested the return of his funds. The Solicitor agreed to do so that day. The funds were not returned that day.

17. By facsimile transmission, dated December 7, 1995 (Document Book, Tab 4), Richmond again requested the Solicitor to return the funds to him pursuant to the Solicitor's undertaking.

18. The Solicitor refused to comply with his personal undertaking, stating in a letter dated December 7, 1995, to Richmond (Document Book, Tab 5) that *"[i]n light of the time and effort expended by the various lawyers throughout this transaction, and the fact that the lenders were ready, willing and able to provide the funds for the loan, via Imperial Bank, which method was accepted by Mr. Podell and Mr. Densley, (Mr. Podell subsequently advised that this method was not feasible) the lenders and lawyers have stated that they require $15,000.00 as total compensation for their efforts in this matter."* The Solicitor further advised in his correspondence that he would return $15,000 to Richmond upon his receipt of a release from Richmond.

19. By facsimile transmission dated December 7, 1995 (Document Book, Tab 6), to the Solicitor, Richmond demanded the immediate return of the $30,000.00 which the Solicitor *"...guaranteed as an attorney to safeguard"*. He notified the Solicitor that he would be immediately contacting the "Bar Association" in Toronto to lodge a complaint.

20. The Solicitor did not respond to Richmond's fax. Richmond then attempted to contact the Solicitor by telephone that evening, but the Solicitor refused to speak with him.

21. By facsimile transmission dated December 8, 1995 (Document Book, Tab 7), Richmond authorized the Solicitor to retain $5,000.00 if he returned the remaining $25,000.00 by wire transmission to banks in the United States by 12:00 noon that day. If the funds were not wired by that time, Richmond refused to permit any deduction from the $30,000. The Solicitor failed to wire the monies as directed. Rather, the following day, the Solicitor advised Podell that his bank had put a "hold" on the funds until December 14, 1995, but he assured Podell that he would wire the funds immediately at that time.

22. On the afternoon of December 9, 1995, Richmond contacted the Solicitor by telephone to demand the immediate return of the $30,000, and to advise the Solicitor that he was outraged by the Solicitor's conduct and intended to report the matter to the Law Society. The Solicitor indicated that it could become quite expensive and time consuming for Richmond to proceed with a complaint and that it would be easier for Richmond to settle with the Solicitor. The Solicitor advised that if Richmond complained he would cause the Solicitor a lot of grief for "a few bucks". Ultimately, the Solicitor agreed to return the funds, in full, when the bank removed its hold on them on December 14, 1995.

23. On December 14, 1995, the Solicitor advised Podell that the hold remained in place until December 15, 1995. Accordingly, the Solicitor did not return the funds to Richmond on December 14, 1995.

24. By facsimile transmission dated December 15, 1995 (Document Book, Tab 8), Richmond again requested that the Solicitor comply with his undertaking and directed him to wire the $30,000.00 held in trust to various U.S. banks, as directed, by 11:00 a.m. that morning. The Solicitor failed or refused to comply with Richmond's request. Later that day, the Solicitor advised Podell that the hold would remain in place until Monday, December 18, 1995.

25. On December 18, 1995, the Solicitor advised Podell that he was refusing to return any funds until the Law Society reviewed the matter.

Particular 2(a) He failed to reply to the Law Society regarding a complaint by Thomas Richmond.

26. By facsimile transmission dated December 19, 1995 (Document Book, Tab 9), Richmond complained to the Law Society of Upper Canada ("Society") regarding the Solicitor's conduct. By letter dated December 25, 1995 (Document Book, Tab 10), Podell also complained to the Law Society regarding the Solicitor's conduct in this matter.

27. By letter dated December 22, 1995 (Document Book, Tab 11), L. Kent Densley, another participant in the joint venture, advised Richmond that the Solicitor had informed him that the Solicitor was to be compensated by the lender, not the borrowers, in the transaction. He also stated that the Solicitor communicated to him on December 7, 1995, that he intended to "grab" $15,000 from Richmond because he felt Richmond was attempting to "scam" him.

28. On January 8, 1996, Jonathan Fedder ("Fedder"), a Staff Lawyer in the Complaints Department of the Society, had a telephone conversation with the Solicitor in which he instructed the Solicitor to return the monies belonging to Richmond. A copy of Fedder's handwritten telephone notes, with transcription, is contained at Tab 12 of the Document Book.

29. On January 10, 1996, Fedder had a further lengthy telephone conversation with the Solicitor in which he reiterated that he must return Richmond's money. The Solicitor set out in some detail his justification for his actions. A copy of Fedder's handwritten telephone notes, with transcription, is contained at Tab 13 of the Document Book.

30. By letter dated January 10, 1996 (Document Book, Tab 14), Fedder confirmed the Solicitor's information that he was holding $30,000.00 in his trust account with respect to the transaction. Fedder requested that, if by the time he received the letter the entire amount had not been repaid to Richmond, the Solicitor provided the Law Society with evidence that the full amount of the funds were being held in trust and explanations for both his failure to comply with his obligations in connection with the monies and why the bank put a "hold" on the funds as reported in the letter of complaint.

31. On January 30, 1996, Fedder requested that the Solicitor provide the Law Society with proof that the money was still in his trust account. The Solicitor did not reply. A copy of Fedder's handwritten telephone notes, with transcription, is contained at Tab 15 of the Document Book.

32. By registered letter dated February 7, 1996 (Document Book, Tab 16), Fedder requested a response to his correspondence of January 10, 1996 and his telephone inquiries of January 9, 10 and 30, 1996. As indicated by the Acknowledgement of Receipt Card, the letter was signed for on February 8, 1996, by the Solicitor. The Solicitor was reminded of Rule 13, Commentary 3 of the Rules of Professional Conduct which obliges lawyers to respond promptly to communications from the Society. The Solicitor was advised that if Fedder did not receive a written response within seven days then the matter would be referred to the Chair of the Discipline Committee for further instructions. The Solicitor did not reply to this letter.

33. Subsequently, in order to recover some of his money, Richmond agreed to provide the Solicitor with a release if he immediately repaid the sum of $15,000. By facsimile transmission, dated February 14, 1996 (Document Book, Tab 17), the Solicitor acknowledged the receipt of a draft release from Richmond. The Solicitor requested a couple of amendments, including that the following clause be contained in the release:

"[w]e further agree that this release shall constitute a withdrawal of the complaint made by Thomas Richmond against Alan Franklin to the Law Society of Upper Canada, and we agree to make no further complaints against him relating to any matter in existence to the date hereof."

The Solicitor also confirmed that, "*upon receipt of an originally signed release in the form specified, I will wire the funds to the requested bank account.*" Richmond agreed to the requested amendments.

34. Richmond provided the Solicitor with releases signed by himself, Podell and Mournes on or about February 15, 1996. A copy of the release signed by Richmond, which reflects the wording of all three releases, is contained at Tab 18 of the Document Book. The releases were conditional on immediate payment of $15,000 to Richmond by the Solicitor. The Solicitor made no payment to Richmond at that time. By facsimile dated February 20, 1996 (Document Book, Tab 19), Richmond confirmed to the Solicitor that he had received no funds from the Solicitor as of that time. Consequently, the releases were void as of that time.

35. In July 1996, further discussions took place between Mournes, Richmond and the Solicitor. As a result of these discussions, Richmond and Mournes attended at the Solicitor's office on July 30, 1996, and received $15,000 from the Solicitor. In consideration of this payment, full and final releases were signed.

36. The Solicitor states that, at their meeting on July 30, 1996, Richmond advised him that the lending group that had advanced the $300,000 still had not been repaid because the anticipated Letter of Credit had not yet been forwarded, although he was confident that it would be in the near future. The Law Society accepts that it will not offer any evidence to the contrary.

Particular 2(c) He failed to produce his books and records contrary to Section 18 of Regulation 708 under the *Law Society Act* for the purpose of an audit by a Law Society representative

37. By letter dated September 22, 1995 (Document Book, Tab 20), Mr. Caesar Ortepi ("Ortepi") complained to the Society regarding the Solicitor's failure to close two real estate transactions for which Ortepi had retained him. Ortepi expressed a concern that the closing funds, which the Solicitor advised had been frozen in his trust account by Revenue Canada, had been misused.

38. By letter dated October 12, 1995 (Document Book, Tab 21), Christine Schmidt ("Schmidt") a Staff Lawyer in the Complaints Department of the Society, asked the Solicitor to provide a response to Ortepi's letter of complaint.

39. As a trust shortage was involved, the matter was also referred to the Audit & Investigation Department on November 18, 1995, so that an audit could be conducted.

40. By letter dated November 19, 1995 (Document Book, Tab 22), the Solicitor provided Schmidt with a letter from Ortepi indicating that Ortepi was withdrawing his complaint.

41. By letter dated December 7, 1995 (Document Book, Tab 23), Schmidt confirmed receipt of the Solicitor's letter but, because the allegations involved a shortage in the Solicitor's trust account, reiterated her request for a full response to the concerns raised in her letter of October 12th was still required. The Solicitor did not provide a response.

42. On December 8, 1995, Mr. Andrew Cawse ("Cawse"), an Investigation Auditor with the Society, called the Solicitor to discuss the proposed audit. A meeting was arranged for December 21, 1995, to permit Cawse to review the Solicitor's client files and accounting records.

43. On December 13, 1995, the Solicitor called to cancel the meeting, which he understood to be on December 14th. The Solicitor confirmed that the meeting would take place, as originally scheduled, on December 21, 1995.

44. On December 20, 1995, the Solicitor called Cawse to cancel their meeting on December 21st as he again had another engagement. The meeting was subsequently rescheduled for January 4, 1996.

45. The Solicitor and Cawse met on January 4, 1996. The Solicitor refused to provide the requested documentation until the Law Society obtained waivers from his clients permitting the Society to access their files. He did not accept the Society's position that he has a professional and legal obligation to cooperate with the Society and that the Society is a repository of solicitor-client privilege.

46. By letter dated January 10, 1996 (Document Book, Tab 24), Cawse reviewed the chronology of their communications and confirmed to the Solicitor the Society's position that he had a professional and legal obligation to provide the requested records. After setting out the legal basis for the Society's position, Cawse reiterated the Society's request for the Solicitor's books and records. Cawse also advised that disciplinary proceedings could be initiated if the records were not produced by January 24, 1996. The Solicitor did not respond.

47. By letter dated January 29, 1996 (Document Book, Tab 25), Cawse sent the Solicitor a copy of his letter of January 24, 1996, and confirmed that disciplinary proceedings were being initiated. The Solicitor did not respond.

48. On August 22, 1996, Paul Sanderson ("Sanderson"), one of Ortepi's business partners, telephoned Cawse regarding the circumstances of Ortepi's complaint. He advised Cawse that the Solicitor had lied to himself and Ortepi regarding the resolution of their Complaint. In particular, he advised that the Solicitor had recently admitted to them orally that he had misappropriated their funds and used them to buy his own residence rather than to close their real estate transaction.

49. Sanderson subsequently sent Cawse a copy of his letter, dated August 22, 1996 (Document Book, Tab 26), and addressed to the Law Society's Compensation Fund, which confirmed the substance of his discussion with Cawse.

50. On August 23, 1996, and September 6, 1996, Cawse telephoned the Solicitor regarding Sanderson's complaint and left a message for the Solicitor to return the call. The Solicitor did not respond to either message.

51. By letter dated September 10, 1996 (Document Book, Tab 27), which was hand delivered to the Solicitor's office by Cawse, Cawse asked the Solicitor to contact him and then provide his books and records to the Society. The Solicitor did not respond to that letter.

52. As a condition of an adjournment of these discipline proceedings, the Solicitor provided his books and records to the Law Society in February 1997. The Solicitor has since co-operated with the Law Society.

V. DISCIPLINE HISTORY

53. The Solicitor was found guilty of professional misconduct on December 13, 1995, for failing to serve a client and for acting in a conflict of interest in a transaction where his spouse had a personal financial interest. A copy of the Complaint is contained at Tab 28 of the Document Book. He was reprimanded in Committee.

54. The Solicitor was found guilty of professional misconduct on March 10, 1993, for failing to cooperate with a Law Society representative attempting to audit his books and records. A copy of the Complaint is contained at Tab 29 of the Document Book. He was reprimanded in Committee and ordered to pay costs in the amount of $500.

55. The Solicitor was found guilty of professional misconduct on April 14, 1992, for failing to reply to the Law Society. A copy of the Complaint is contained at Tab 30 of the Document Book. He was reprimanded in Committee and ordered to pay costs in the amount of $500.00.

56. The Solicitor was found guilty of professional misconduct on January 8, 1992, for personally guaranteeing a document securing indebtedness, in which his client was involved as a borrower. A copy of the Complaint is contained at Tab 31 of the Document Book. On March 26, 1992, he was reprimanded in Convocation.

DATED at Toronto this 8th day of April, 1997."

Re: Complaints D62/97 and D104/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D104/97 and D62/97 and is prepared to proceed with a hearing of this matter on April 8-9, 1997.

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 Complaints D104/97 and D62/97 and this agreed statement of facts and admits the particulars and facts 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 44 years of age. He was called to the Bar on April 13, 1978, and practised as a sole practitioner at all relevant times. He has been suspended since December 31, 1995, for non-payment of his annual fees.

Complaint D104/97

Particular 2(a) he misappropriated the sum of $150,000 from funds provided to him in trust on behalf of his clients, Kingridge Investments Group and the companies controlled by the principals of that group, on or about February 24, 1995

5. At all relevant times, Mr. Michael Rice ("Rice") and Mr. Paul Sanderson ("Sanderson") were the principals of an investment group called Kingridge Investments ("Kingridge"). Kingridge and Mr. Caesar Ortepi ("Ortepi") held controlling interests in two companies, 1125133 Ontario Limited, which operated as Bradford Highlands Golf Club ("Bradford"), and Fairview Village Developments Limited ("Fairview"). Sanderson and Ortepi were the only directors of Bradford and Fairview.

6. Kingridge retained the Solicitor in early 1995 to act on behalf of Fairview in one real estate transaction and on behalf of Bradford in another real estate transaction in which the companies were purchasing property. The Solicitor and Rice, on behalf of Kingridge, agreed that the Solicitor would be remunerated for his services by a 1/16 share in a syndicated mortgage which was to be secured against the property acquired by Fairview as a second mortgage. Rice would testify that this agreement included the legal fees for both transactions; the Solicitor would testify that this agreement only applied to the fees for the Fairview transaction, and that there was no agreement with respect to the fees for the Bradford transaction.

Fairview Property

7. Fairview purchased the property at 700 Walkers Line, Burlington ("Fairview property"), from Ernst & Young, who were the court-appointed receivers for the property, under an agreement of purchase and sale, dated September 26, 1994. Although the agreement of purchase and sale named 795374 Ontario Limited, a wholly owned subsidiary of Fairview, as the purchaser, title was taken on closing in the name of Fairview.

8. The purchase and sale of the Fairview property closed on March 31, 1995. The original purchase price of $715,000 was increased to $726,000 ultimately as a result of extensions of the closing.

9. In anticipation of the transaction on the Fairview property closing on March 31, 1995, Ortepi delivered $150,000 to the Solicitor, in trust for the closing, on February 24, 1995. Rather than depositing these funds to his mixed trust account, the Solicitor deposited these funds to his general account the same day. Apart from this deposit, the Solicitor had less than $150.00 in his general account at the time. A copy of the relevant portion of his general ledger and his general account bank statement for this period are contained at Tab 1 of the Document Book.

10. The Solicitor was not authorized to deposit the $150,000 into his general account or otherwise use the funds for his own benefit. Furthermore, his clients were not aware that he had deposited the funds to his general account.

11. On the same day, February 24, 1995, the Solicitor withdrew the amount of $149,882.65 from his general account by a cheque, dated February 24, 1995, to the Canadian Imperial Bank of Commerce (Document Book, Tab 2). The Solicitor purchased two bank drafts with these funds and applied them to the purchase by his spouse of a matrimonial residence.

12. On February 24, 1995, the Solicitor's wife purchased a matrimonial residence for a purchase price of $510,000. A copy of the registered transfer for this transaction is contained at Tab 3 of the Document Book.

13. The Solicitor states that he had previously received $150,000 from his spouse to be invested, and, subsequently, to be applied by him to his spouse's purchase of a matrimonial home. However, he lost these funds in a speculative investment. He subsequently misappropriated the Kingridge funds to enable him to replace the lost funds for his spouse's purchase of the residence.

14. The purchase of the Fairview property closed on March 31, 1995. On that date, the principals of Kingridge provided the Solicitor with a further $650,000 to permit him to close the transaction. These funds were deposited to the Solicitor's trust account on the same day. The deposit slip is contained at Tab 4 of the Document Book; the Solicitor's trust receipt and disbursement listing is contained at Tab 5 of the Document Book.

15. As revealed by the Solicitor's reporting letter, dated April 11, 1995, to Fairview (Document Book, Tab 6) and the Statement of Adjustments for the transaction (Document Book, Tab 7), $664,166.78 was due on closing after crediting the purchasers for $45,000 in deposits and $16,833.22 on account of outstanding realty taxes. The certified cheque which was paid from the Solicitor's trust account on closing is at Tab 8 of the Document Book.

16. Due to the Solicitor's misappropriation of the $150,000, there were insufficient funds in his trust account on March 31, 1995, to close the transaction, as reflected in the bank statement for his trust account (Document Book, Tab 9). To rectify this shortfall, and to enable him to close the transaction, the Solicitor transferred $14,166.78 from his general account to his trust account. This transfer is reflected on the Solicitor's general ledger for this transaction (Document Book, Tab 10).

17. A second mortgage in the amount of $720,000 was registered against the Fairview property on the closing of the purchase on March 31, 1995 (Document Book, Tab 11), as security for an advance of $400,000. A one-sixteenth (1/16) share in this syndicated mortgage, with a corresponding value of $25,000, was held by Focus Technology Inc. ("Focus"). Focus was wholly owned by the Solicitor, and this interest represented the agreed remuneration due to the Solicitor for his legal services. A bonus of $20,000 was payable on each share of the mortgage, in lieu of interest, when the mortgage came due on December 1, 1996.

18. The Solicitor confirmed in his reporting letter to his clients on the purchase of the Fairview property (Document Book, Tab 12) that he had received $800,000 from them prior to the closing of that transaction. As he confirmed in that letter, the Solicitor had been instructed to apply the balance which remained after closing the purchase of the Fairview property to the credit of the transaction involving Bradford. This balance ought to have amounted to approximately $105,000.

19. Fairview received a Notice of Assessment, dated June 29, 1995 (Document Book, Tab 13), from the City of Burlington which confirmed that the land transfer tax of approximately $9,400 due on the purchase of the Fairview property, which the Solicitor was to have paid on the closing in March 1995, remained outstanding. The cheque which the Solicitor had provided to the Ministry on closing had been returned "NSF" because he had inadequate funds in his trust account as a result of his misappropriation.

Bradford Transaction

20. Bradford had agreed to purchase a golf course property ("Bradford property") from Islington Investments for a price of $2,025,000. Sydney Valo, Q.C. ("Valo"), acted for the vendors on the transaction. The transaction was scheduled to close on May 31, 1995. Due to the Solicitor's misappropriation of the funds provided on behalf of Kingridge, there were not adequate funds available on that date to close the transaction.

Complaint D104/97

Particular 2(b) he sent misleading letters, dated May 24, 1995, and June 3, 1995, to another solicitor, Sydney Valo, Q.C., wherein he advised that he was unable to release $75,000 from his trust account, for the closing of a real estate transaction as a result of Revenue Canada freezing his trust account when, in fact, the trust account was not frozen but the Solicitor had misappropriated the funds in question; and

Particular 2(c) he sent a misleading letter, dated August 2, 1995, to his client, Kingridge Investments Group, wherein he advised that he was unable to release $75,000 from his trust account, for the closing of a real estate transaction as a result of Revenue Canada freezing his trust account when, in fact, the trust account was not frozen but the Solicitor had misappropriated the funds in question.

21. By letter dated May 24, 1995 (Document Book, Tab 14), the Solicitor advised Valo that he was unable to access the funds necessary for closing the transaction:

> [t]his letter is to confirm that I am holding the sum of $75,000 in my trust account from my clients, which sum is to be delivered to your clients as part of the closing funds in this transaction. These funds are being held as a further deposit for your clients' benefit, and will be forwarded to you as soon as possible. As discussed, there is a hold on my accounts because of Revenue Canada, and I must satisfy them that no moneys in my trust account are for my benefit.

This letter was false. At the time, Revenue Canada had not frozen the Solicitor's trust account, and the sum of $75,000 had been removed by the Solicitor from the trust account.

22. When he was unable to close the transaction as scheduled, the Solicitor orally advised Kingridge that he had been unable to release the funds from his trust account because Revenue Canada had mistakenly frozen the account. The Solicitor did not advise his clients that he had previously removed the funds from his trust account.

23. By letter dated June 3, 1995 (Document Book, Tab 15), the Solicitor again advised Valo that the $75,000 required for closing the transaction was frozen in his trust account but that he would forward the money when the freeze was lifted. This letter was also false. Revenue Canada still had not frozen the Solicitor's trust account, and the sum of $75,000 had been removed by the Solicitor from the trust account.

24. In the absence of the funds misappropriated by the Solicitor, Kingridge had to arrange for an increased vendor take back mortgage, in the amount of $50,000, and provide additional funds to cover the balance due on closing and the additional $9,797.55 incurred as a result of the delayed closing. The Solicitor consequently closed the transaction for Kingridge on July 25, 1995. A copy of the registered transfer, dated July 25, 1995, is contained at Tab 16 of the Document Book.

25. By letter dated August 2, 1995 (Document Book, Tab 17), the Solicitor confirmed to Kingridge

> that as a result of the actions of Revenue Canada in freezing my trust, because of concerns regarding the ownership of certain sums in the account, the moneys held by me in trust to complete the purchase of the lands from Islington Investments could not be released for closing.

The Solicitor agreed to forward replacement funds to Kingridge by August 11, 1995, and also agreed to reimburse Kingridge for any costs incurred as a result of the inability to close.

26. As indicated previously, the Solicitor's statements that Revenue Canada had frozen his trust account and that he still held the funds in trust were false at all material times.

Subsequent Developments

27. Due to their concerns with the propriety of the Solicitor's handling of their funds in the two transactions, the principals of Kingridge terminated the Solicitor's retainer in September 1995.

28. The Solicitor had tendered a cheque to the Ministry of Finance for the land transfer tax on the purchase of the Bradford property at closing. By letter dated September 29, 1995 (Document Book, Tab 19), Bradford was advised by the Ministry of Finance that the cheque had been returned as "NSF" and served with a Notice of Assessment for taxes owing of approximately $31,000. There were no funds available to cover this cheque due to the Solicitor's misappropriation.

29. Fairview received notice, dated October 13, 1995, from the City of Burlington (Document Book, Tab 18) that the City was commencing proceedings to sell the Fairview property for tax arrears. These tax arrears, in the amount of approximately $17,000, were to have been paid on the closing of the Fairview transaction; however, these funds had not been paid because the Solicitor had inadequate funds in his trust account as a result of his misappropriation. The arrears were paid ultimately by Fairview, through its new solicitors, when a new second mortgage was registered in December 1996.

30. In the summer of 1996, at a meeting to discuss the return of the Kingridge funds, the Solicitor admitted to Ortepi and Rice, for the first time, that he had misappropriated the $150,000.

31. The Solicitor subsequently reassigned his interest in the second mortgage on the Fairview property to the principals of Kingridge. The Solicitor states that this assignment was made as partial restitution of the sums misappropriated. Rice states that this interest was assigned as a cancellation, or repayment, of legal fees due to the Solicitor as a consequence of his actions and did not constitute restitution of any part of the misappropriated sum.

32. In addition to the sum of $14,166.78 which was repaid in the course of the closing of the purchase of the Bradford, the Solicitor has made restitution to Kingridge of the following amounts:

- $10,000, paid to Kingridge Investments on August 14, 1995; and,
- $40,000, paid to 1125133 Ontario Ltd. (Bradford) on October 2, 1995.

Complaint D62/97

Particular 2(a) He failed to file with the Law Society within six months of the termination of his fiscal year ended January 31, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the Solicitor in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act.*

33. The Solicitor's fiscal year end is January 31. The Solicitor last filed for his fiscal year ending January 31, 1995. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 31, 1996, as required by s. 16(2) of Regulation 708 under the *Law Society Act.*

34. By letter dated August 9, 1996 (Document Book, Tab 20), the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the *Law Society Act.* The Solicitor was advised the last filing received from him was for the period ended January 31, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made.

35. By registered mail, dated September 9, 1996 (Document Book, Tab 21), the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised that failure to comply with section 16 of Regulation 708 of the *Law Society Act* may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's registered letter was signed for and delivered on September 11, 1996. The Solicitor did not reply to this correspondence.

36. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

37. Complaint D168/96 was sworn against the Solicitor on June 20, 1996, alleging that he breached his undertaking, failed to reply to the Law Society and failed to provide his books and records to the Law Society. That Complaint is scheduled to be heard at the same time as these Complaints.

38. The Solicitor was found guilty of professional misconduct on December 13, 1995, for failing to serve a client and for acting in a conflict of interest in a transaction where his spouse had a personal financial interest. A copy of the Complaint is contained at Tab 22 of the Document Book. He was reprimanded in Committee.

39. The Solicitor was found guilty of professional misconduct on March 10, 1993, for failing to cooperate with a Law Society representative attempting to audit his books and records. A copy of the Complaint is contained at Tab 23 of the Document Book. He was reprimanded in Committee and ordered to pay costs in the amount of $500.

40. The Solicitor was found guilty of professional misconduct on April 14, 1992, for failing to reply to the Law Society. A copy of the Complaint is contained at Tab 24 of the Document Book. He was reprimanded in Committee and ordered to pay costs in the amount of $500.00.

41. The Solicitor was found guilty of professional misconduct on January 8, 1992, for personally guaranteeing a document securing indebtedness, in which his client was involved as a borrower. On March 26, 1992, he was reprimanded in Convocation. A copy of the Report and Decision of the Discipline Committee, and Order of Convocation, is contained at Tab 25 of the Document Book.

DATED at Toronto, this 8th day of April, 1997."

RECOMMENDATION AS TO PENALTY

The majority of the Committee recommend that Alan Stanley Franklin be disbarred.

REASONS FOR RECOMMENDATION

Members of our profession are entrusted with large sums of money on a regular basis. When that trust is betrayed, it is appropriate that we react in a way that signals to the public and to other members of the profession that that betrayal is fundamental and will not be countenanced. For that reason, solicitors who misappropriate funds are disbarred unless exceptional circumstances exist.

The Solicitor in this case has submitted that by virtue of certain psychiatric evidence which was heard in camera (and which is summarized in an Addendum to these Reasons) exceptional circumstances do exist which would justify us recommending to Convocation that he be granted permission to resign.

The evidence heard in camera by this Committee served to provide us with more insight into why the Solicitor did what he did. What it did not do was persuade us that the Solicitor should not be disbarred.

The Solicitor has not made restitution. The funds misappropriated by the Solicitor were used by him to allow his wife to purchase a house for his family. The Solicitor stated before us that he and his family were still living in this house, that there was sufficient equity in the house to more than make full restitution, and that he had come to the realization a few weeks before appearing before us that it would be appropriate for him to insist that the house be sold.

In spite of this, the Solicitor appeared before us having taken no concrete steps that would allow us to believe that his intentions were genuine to fully compensate the client whose funds he had misappropriated. No agent had been contacted and no steps had been taken to list the house for sale.

There was an issue before us as to how much restitution the Solicitor had made. The amount misappropriated was $150,000. The Society takes the position that of this, $64,166.78 had been paid back -- leaving an amount owing of approximately $85,000.

The misappropriation occurred in the context of a real estate transaction. The Solicitor's agreed upon remuneration for acting on this transaction was 1/16th share in a second mortgage which was registered against the property concerned. The Solicitor's share in this mortgage had a value of $25,000 with a bonus payable on the due date of the mortgage of $20,000 -- a sum designed to be a payment in lieu of interest.

The Solicitor re-assigned his interest in the second mortgage to the client whose funds he had misappropriated after he admitted the misappropriation to them.

The Solicitor takes the position that this assignment should be considered as partial restitution of the sums misappropriated, thereby, according to the Solicitor, reducing the sum owing by $45,000 to $40,000. The client takes the position that this interest was assigned as a cancellation of the legal fees due to the Solicitor, which fees he had become disentitled to by virtue of his actions.

Even if the Solicitor's position is accepted, which this Committee has some difficulty with, the amount that remains owing to the client is at least $40,000 -- an amount which we view as substantial.

Other factors taken into account by this Committee in reaching its decision were the Solicitor's previous discipline history, the lack of any evidence which would point to the Solicitor ever having done anything to contribute to his community and what appeared to us to be a disturbing lack of appreciation of the misconduct inherent in Complaint D168/96.

It was the Solicitor's position before us that he was entitled to breach his undertaking because of his belief that Richmond and Podell (the Complainants) had not been acting in good faith. He states that in the end his position was vindicated because the Complainants paid him $15,000 of the $30,000 he had refused to release in breach of his undertaking and further, that they signed full releases. This occurred in July of 1996. This Committee noted that this proposal was first made in February of 1996. At that time, the Solicitor had agreed to return $15,000 of the $30,000 to Richmond if Richmond provided him with a complete release that included a clause providing that the release was to constitute a withdrawal of the complaint that Richmond had made to the Law Society. Richmond agreed. Still, the Solicitor did not send the $15,000 as promised. When questioned as to why not by the Committee, the Solicitor stated that he still felt he was entitled to wait and see if the Complainants were acting in good faith. If he was able to prove they were not, the Solicitor felt that he might have been able to hold on to the full $30,000.

In this Committee's opinion, the Solicitor's continued insistence before us that notwithstanding undertakings, agreements and Law Society involvement, he was entitled to act as he saw fit in holding back monies pointed to a disturbing and continuing lack of appreciation of the ethics and integrity required of anyone practising law.

Alan Stanley Franklin was called to the Bar on April 13, 1978.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of September, 1997

Harriet Sachs, Chair

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IN CAMERA

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IN PUBLIC

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DISSENT

I share the conclusion of the majority that the Solicitor should not be allowed to continue as a member of the legal profession, but I dissent as to the appropriate penalty to be imposed.

The Solicitor represented himself before the Committee, while the Law Society was ably represented by counsel. It is not fair to say that the Solicitor had the right to retain counsel for the hearing, when as a matter of reality his financial circumstances did not permit him to avail himself of that right. The Solicitor did a poor job in representing himself. It is high time that duty counsel be made available to solicitors at the Discipline Hearing level.

While the Solicitor indicated he had consulted counsel prior to the hearing, had able counsel prepared and presented the Solicitor's case, the facts would have been properly martialled and permission to resign may well have been the result. On the basis of the Solicitor's self-representation, I cannot arrive at that conclusion.

On the other hand, I cannot conclude that disbarment is appropriate, notwithstanding the Solicitor's grave misconduct and previous discipline history. The uncontradicted psychiatric evidence, both by letter and viva voce, indicated a pre-existing and still continuing personality disorder, and the Solicitor's vulnerability to making inappropriate professional decisions. It was also indicated that the Solicitor, a sole practitioner earning a perpetually marginal income, suffered from numerous family problems (matrimonial, sick children, progressive Alzheimer's disease of one of his parents, and the ultimate death of both), as well as career and financial difficulties.

While the Solicitor's psychological and other problems may not excuse his behaviour, they certainly mitigate the penalty to be imposed. Human beings do not operate in a vacuum; behaviour and judgement are often affected by overwhelming personal circumstances. In addition, the solicitor is contrite and has made substantial partial restitution.

Where termination of a solicitor's membership in the Society is appropriate, Convocation has traditionally chosen between disbarment and permission to resign, disbarment being the ultimate penalty, and permission to resign being a softer, gentler approach allowing a solicitor to resign without total disgrace.

In the case at hand, the professional guillotine of disbarment is not appropriate. Disbarment may be fitting for out and out scoundrels, but the present solicitor was not a malevolent thief; there were mitigating psychological and personal circumstances. On the other hand, permission to resign would not indicate strongly enough the Society's disapproval of the serious misconduct herein.

I therefore recommend that the Solicitor be instructed to resign. Justice requires not only the meting out of punishment, but also the exercise of compassion, and in this case the Solicitor should be allowed to retain some semblance of honour to serve as a foundation on which he can continue to effect his rehabilitation.

Should the Solicitor's instructed resignation not be tendered forthwith, then he should be disbarred.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of September, 1997

Gary L. Gottlieb, Q.C.

There were no submissions.

It was moved by Mr. MacKenzie, seconded by Mr. Crowe that the Report be adopted.

Carried

The majority recommended penalty was that the solicitor be disbarred.

Mr. Swadron made submissions in support of the solicitor being permitted to resign.

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

Mr. Swadron made submissions in reply.

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

It was moved by Mr. Murray, seconded by Mr. Carter that the solicitor be disbarred.

Carried

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

Re: Richard D'Arcy HARLOW - Vaughan

The Secretary placed the matter before Convocation.

Ms. Angeles withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 12th December, 1997, together with an Affidavit of Service sworn 2nd January, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th December, 1997 (filed as Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 5th January, 1998 (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

Tamara Stomp, Chair
Thomas E. Cole
Nora Angeles

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

RICHARD D'ARCY HARLOW
of the City
of Vaughan
a barrister and solicitor

Rhonda Cohen
for the Society

Charles C. Mark, Q.C.
for the solicitor

Heard: August 27, 1996

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June ll, 1996 Complaint D143/96 was issued against Richard D'Arcy Harlow alleging that he was guilty of professional misconduct or in the alternative, conduct unbecoming a barrister and solicitor.

The matter was heard in public on August 27, 1996 before this Committee composed of Tamara Stomp, Chair, Thomas E. Cole and Nora Angeles. The Solicitor attended the hearing and was represented by Charles C. Mark, Q.C. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

The following particular was found to have been established:

Complaint D143/96

2. a) He failed to comply with the Income Tax Act, R.S.C., 1952, Chapter 148, as amended, by failing to report income earned in the amount of $75,217.00 in connection with accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D143/96 and is prepared to proceed with a hearing of this matter on August 27-28, 1996.

II. IN PUBLIC/IN CAMERA

2. The Solicitor will be bringing an application, pursuant to Section 9 of the Statutory Powers Procedure Act, to have this matter heard in camera. The Law Society will be opposing the application.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D143/96 and this agreed statement of facts with his counsel, Charles C. Mark, Q.C., and admits the particulars and facts contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional conduct.

IV. FACTS

Background

4. The Solicitor was called to the Bar on March 21, 1975, and is 49 years old. He was at all relevant times a sole practitioner in Toronto.

5. On March 22, 1994, the Law Society received a letter of complaint from the Solicitor's ex-wife, Yolande Harlow-Bitton (Document Book, Tab 1). The letter raised a number of complaints against the Solicitor, most of which related to the matrimonial litigation between Ms. Harlow-Bitton and the Solicitor.

6. After its review of the complaints, and some correspondence with the Solicitor and his counsel, the Law Society concluded that all but one of the allegations made against the Solicitor by Ms. Harlow-Bitton were either unfounded or outside the jurisdiction of the Law Society. The remaining allegation was that the Solicitor had failed to disclose certain income to Revenue Canada, this being the subject-matter of this Complaint.

7. It was alleged by Ms. Harlow-Bitton that the Solicitor had failed to disclose income on certain of his tax returns to reduce his reported income and thereby justify his default on support payments to a previous ex-wife. A copy of the judgment, dated October 16, 1985, of the Honourable Mr. Justice Osborne determining the family law issues between the Solicitor and his first wife (Document Book, Tab 2) was provided by ms. Harlow-Bitton. The Solicitor denies that his former liability to his first wife was a factor in the non-reporting of income.

Particular 2 (a) he failed to comply with the Income Tax Act, R.S.C., 1952, Chapter 148, as amended, by failed to report income earned in the amount of $75,217.00 in connection with accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991.

8. Nesel Fast Freight Incorporated ("Nesel") was a client of the Solicitor from at least early 1987 until the present time.

9. In the period from December 1987 to January 1991, the Solicitor suppressed his receipt of fee income from Nesel in a total amount of $75,217.00 by not recording the accounts as having been rendered in his accounts receivable ledger and not depositing the monies received from the client in his firm account. In addition, the Solicitor did not report this amount on his income tax returns during the period.

10. The total suppressed income of $75,217.00 was comprised of the following amounts:

(i) fees in the amount of $3,025 charged in two monthly accounts during the fiscal year ending February 29, 1988;

(ii) fees in the amount of $13,582 charged in twelve monthly accounts during the fiscal year ending February 28, 1989;

(iii) fees in the amount of $22,960 charged in twelve monthly accounts during the fiscal year ending February 28, 1990; and

(iv) fees in the amount of $35,650 charged in twelve monthly accounts during the fiscal year ending February 28, 1991.

11. The Solicitor stopped suppressing his receipt of these fees at the beginning of 1991. The Solicitor did so because he realized that the irregularity of suppressing revenue would be compounded if he also failed to remit GST on those amounts, as he was then obliged to do.

12. In his response to correspondence from the Law Society regarding this matter, the Solicitor, through his counsel, admitted the alleged misconduct. A copy of the letter, dated November 24, 1994, from Charles C. Mark, Q.C., to the Law Society is contained at Tab 3 of the Document Book.

13. By letter, dated December 12, 1994, (Document Book, Tab 4) the Solicitor advised Revenue Canada that it had come to his attention that he had earned income in the 1988, 1989, 1990 and 1991 taxation years which had not been reported on his returns. He further advised that he was having his accountant prepare amended returns for those years.

14. By letter, dated January 20, 1995, (Document Book, Tab 5) the Solicitor's accountant, Alexander Murray, filed amended tax returns for the four years in question. Mr. Murray also indicated that the Solicitor was requesting that all penalties and interest be waived in accordance with Revenue Canada's voluntary disclosure/fairness rules.

15. Subsequently, the Law Society asked Mr. Harlow to explain why he had not disclosed all of his income in the four tax years in question. By letter, dated February 28, 1995 (Document Book, Tab 6) the Solicitor responded to this inquiry. The Solicitor advised that he had decided to suppress this portion of his income as a result of the influence of his then-spouse, Ms. Harlow-Bitton.

16. The Solicitor has not been charged with an offence under the Income Tax Act for his failure to disclose this income on his original tax returns. He has not been fined or assessed any penalties.

VI. DISCIPLINE HISTORY

17. On January 5, 1995, Complaint D353/94 was sworn against the Solicitor on the basis of his failure to make his annual filings for the year ending January 31, 1994. The Complaint was withdrawn and converted to an invitation to attend upon the Solicitor giving an undertaking to file in the future within the prescribed time period.

DATED at Toronto this 14th day of August, 1996."

FINDING OF THE COMMITTEE

At the hearing of this matter, there were essentially three matters to be decided. They are as follows:

1. IN CAMERA MOTION

At the outset, the Member brought a motion to have this hearing held in camera. Without minimizing the breadth of the argument, but put concisely, the Member submitted that the hearing should be in camera because the allegation came to the attention of the Law Society through the complaint of his estranged wife. The Member sought to rely on the body of law, concluding that marital confidences cannot be disclosed, to keep the hearing of this matter in camera. This was notwithstanding that the allegations were admitted so that the issue was not the finding but the penalty.

This Committee dismissed the motion and proceeded with the hearing in public. Thomas Cole, on behalf of the Committee, wrote the decision on the motion. These reasons are set out in the attachment hereto.

2. FINDING OF CONDUCT UNBECOMING VS. PROFESSIONAL MISCONDUCT

The initial complaint of D143/96 was amended on consent, as per an agreement signed by the parties which was filed as an Exhibit. In that agreement, the Member withdrew his admission that the conduct constituted professional misconduct and instead admitted that it was conduct unbecoming. The Complaint now provides "in the alternative". We were called upon to decide the appropriate characterization of the behaviour complained of.

Neither professional misconduct nor conduct unbecoming are defined in the Law Society Act. However, it is generally accepted that professional misconduct characterizes behaviour that is in relation to the Member's professional practice and conduct unbecoming is behaviour unrelated to the practice of law.

In this case, there is a distinction without a difference as the behaviour falls into both realms. The Member failed to report earned income on his tax returns filed between 1988 and 1991. This income was earned as professional fees with accounts properly rendered to the client. The accounts were not posted in the receivable ledger nor was the money received deposited in the firm's account.

The Committee makes a finding of both professional misconduct, and in the alternative, of conduct unbecoming. We note that such a dual finding is not without precedent. For example, we were referred to Convocation's decision of October 16, 1970 in the matter of Samuel Ciglen against whom a finding of both professional misconduct and conduct unbecoming was made for what appears to be the single count of attracting a "conviction of having conspired to wilfully evade payment of tax by suppressing taxable income".

3. PENALTY

The Member failed to disclose income in the sum of $75,217.00 received as a result of 38 separate accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991. The money was not recorded in the accounts receivable ledger and not deposited in the firm's account. The Member did not report the income on his tax return.

This matter came to light because the estranged wife of the Member complained to the Law Society of the Member's conduct in this regard and in relation to her separation from him. The Member replied to the Law Society through his counsel, giving complete disclosure and indicating that he had "made four incorrect income tax returns and that he is going to re-file and pay what he must pay". We were provided with copies of letters sent to Revenue Canada by the Member and his accountant, and they are neutral in tone as to the culpability. However in the letter of February 28, 1995 from the Member to the Law Society, the Member took full responsibility for "this suppression of income". However he blamed it on "money demands and manipulations by a spouse", the same spouse that brought the matter to the attention of the Law Society in the first place.

The Member has never been charged with any offence contrary to the Income Tax Act or any other Act as a result of this behaviour. His affairs with Revenue Canada have been put in order. There was a suggestion that the Member dealt with this matter as he knew that GST would be reported by the client eventually, but this Committee does not really accept that as the reason. The reality is that the Member did not deal with it until after his estranged wife disclosed it to the Law Society. He did the greatest amount of damage control by voluntarily contacting Revenue Canad and thereby probably avoided income tax evasion charges. Nonetheless his actions constitute contrition, and to use the words of the Member's counsel, "imperfect" as it was.

Ten character reference letters were filed on behalf of the Member and they are all positive. However some of them do not even mention knowledge of the Law Society proceedings or the particulars of it. Indeed, the letter from Nesel Fast Freight Inc., from whom the suppressed money was received, mentions nothing of the matter. One letter from a personal and professional acquaintance opinions that "the Law Society owes Richard an apology for its part in furthering this matter". However at least three of the letters refer to the Member's estranged wife in unflattering terms. A former law associate states that the Member's offending actions "were carried out while he was under the extreme duress and influence of a most difficult marital situation".

Although this may be accepted as the personal circumstances of the Member at the time of the suppression of the income, we have no evidence before us that the marital situation was any more difficult than suffered by others labouring under the same constraints. There is no medical evidence before us.

The Society's counsel has suggested that a three month suspension is appropriate and the Member's counsel has urged us to consider non-publication i.e. a reprimand in Committee.

We were referred to a number of cases on penalty. The range is from reprimand in Convocation to disbarment. Of particular note is "Convocation's decision of April 25, 1991 in the matter of Victor Leo Maloney where a three month suspension was substituted for the Committee's recommendation of a reprimand. In that matter the Member was convicted of four charges of making false or deceptive statements in his income tax returns for 4 separate years. The total unreported income was approximately $83,000.00 There was medical evidence of an obsessive compulsive personality disorder.

The object of any exercise in discipline proceedings is to protect the public. In this matter no member of the public was directly hurt, unless, of course, it si said that failing to pay taxes to the government hurts the general populace at large. However, at the Member's actions, the integrity of the profession was. As was said in the English Court of Appeal decision in Bolton v. Law Society "the need (is) to maintain among members of the public a well-founded confidence that any solicitor whom they intrust will be a person of unquestionable integrity, probity and trustworthiness".

There are many aggravating factors in this matter but there are also strong mitigating factors. This Committee has decided to recommend a penalty of 30 days suspension and $1,000.00 in costs.

The Committee noted that the Agreed Statement of Facts refers to an Invitation to Attend. As this does not properly constitute a discipline history we have not taken it into account in making our recommendation.

Richard D'Arcy Harlow was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 12th day of December, 1997

Tamara Stomp, Chair

28th May, 1998

IN THE MATTER OF the Law Society
AND IN THE MATTER OF Richard D'Arcy Harlow

REASONS OF THE DISCIPLINE COMMITTEE
ON THE IN CAMERA MOTION

At the commencement of this hearing and subsequent to the reception in evidence of the Agreed Statement of Facts, Counsel for the Solicitor moved before the panel that the matter be heard in-camera. The panel heard argument from Mr. Mark, Counsel for the Solicitor, and from Ms. R. Cohen, Counsel for the Law Society, and at the completion of the hearing of argument, the panel ruled that the hearing would be held in public. The hearing was concluded in public and it was indicated to Counsel that written reasons for holding the hearing in public would be given.

Counsel for the Solicitor moved, by application pursuant to section 9 of the Statutory Powers Procedure Act, to have this matter heard in-camera on the basis that the panel should exercise its discretion, having regard to the provisions of paragraph 9(l)(b), because the complaint was brought to the attention of the Law Society by the Solicitor's spouse as a result of information passing between them. Mr. Mark argued that spousal communications should be privileged, and that the panel, having regard to this circumstance, should protect spousal communications by holding the hearing in-camera. It is accepted by the panel that the communications between the Solicitor and his spouse were intimate, financial and personal. The issue to be determined by the panel is whether having regard to the circumstances that the desirability of avoiding disclosure thereof in the interests of any person affected or, in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public.

By the Agreed Statement of Facts, the Solicitor acknowledged that in the period from December 1987 to January 1991 he suppressed his receipt of fee income from Nesel in the total amount of $75,217.00 by not recording the accounts as having been rendered in his accounts receivable ledger and not depositing the monies received from the client in his firm account. In addition, the Solicitor did not report this amount on his income tax returns during the period. The Solicitor, in his response to correspondence from the Law Society regarding this matter, through his Counsel, admitted the alleged misconduct. The Solicitor, when asked by the Law Society to explain why he had not disclosed all of his income in the four years in question, by correspondence dated February 28, 1995, advised that he had decided to suppress this portion of his income as a result of the influence of his then spouse, Ms. Harlow-Bitten, who brought the matter to the attention of the Law Society in a letter of complaint dated March 22, 1994. It was argued by Mr. Mark that the evidence of the Solicitor's misconduct brought to the attention of the Law Society of Upper Canada by his spouse from the information obtained during the marriage should be regarded by the panel as justification for not having the hearing in public. The panel was referred to several cases and other authorities and in particular, Slavutych vs. Baker (1975) D.L.R. (3d) 224, Duchess of Argyll v. Duke of Argyll [1967] 1 CH. 302. The panel was also referred to Wigmore on Evidence Vol. 9, pages 642-646 and also had regard to the Evidence Act R.S.O. 1990 c. E 23.

The House of Lords decision in Rumping v. Direction of Public Prosecutions, per Lord Morris of Borth-Y-Gest, held that "a survey of the authorities and of the statutory provisions leads me to the view that there has never been a rule at common law that no evidence may be given by anyone as to communications made between husband and wife during marriage. There has, however, been a recognition of the feeling or public sentiment that in ordinary circumstances it is seemly that the confidences of married life should be respected and protected. That recognition found expression as one of the various reasons which were assigned for the old general rule as to the incompetence of husbands and wives as witnesses."

The case of the Duchess of Argyll v. Duke of Argyll [1967] 1 Ch. 302 was a case involving a breach of marital confidences which were sought to be enjoined by court action. In reviewing the law involving privilege Ungoed-Thomas, J. said "these cases, in my view, indicate (1) that a contract or obligation of confidence need not be expressed but can be implied; (2) that a breach of confidence or trust or faith can arise independently of any right of property or contract other, of course, then any contract which the imparting of the confidences in the relevant circumstances may itself create; (3) that the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.

Now I turn to the confidences between husband and wife during marriage. Marriage is, of course, far more than mere legal contract and legal relationship, and even legal status; but it includes legal contract and relationship. If, for the court's protection of confidence and, contrary to my view, the confidence must arise out of a contractual or property relationship, marriage does not lack its contract. It is basically a contract to be and, according to our Christian conception of marriage, to live as man and wife. It has been said that the legal consideration of marriage - that is the promise to become and to remain man and wife - is the highest legal consideration which there is. And there could hardly be anything more intimate or confidential than is involved in that relationship, or than in the mutual trust and confidences which are shared between husband and wife. The confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed. To express it is superfluous; it is clear to the least intelligent. So it seems to me that confidences between husband and wife during marriage are not excluded from the court's protection by the criteria appearing in the cases to which I have referred. But, nevertheless, are there other considerations which should deny them that protection?"

Mr. Justice Ungoed-Thomas continues his review of the law and refers to the case of Rumping v. Director of Public Prosecutions when the House of Lords dealt with the question of intercepted communication between husband and wife as being admissible and he indicates "the House of Lords directed their observations to the admissibility of such evidence in legal proceedings, and not to the different question whether, otherwise than for the purpose of such evidence, communications were subject to the protection of the law. This, I think, appears from the speech of Lord Morris with which the majority of the Lords agreed. He said "it was contended that it was and is a rule of the common law applying both in civil and criminal cases that all communications made between husband and wife during marriage was inadmissible in evidence. It was submitted that the rule applies with equal force to communication intended by one spouse for the other though never received." Then he said "these contentions involve the further contention, which now calls for inquiry, that at common law there were two separate rules: that apart from what I may call the general common law rule that one spouse was incompetent to given evidence concerning the other, there was a separate and distinct rule that no person at all could give any evidence of any communications between spouse. "My Lords, though authority is not lacking which pronounces the general rule that at common law husbands and wives were not allowed to give evidence for or against each other, I can find no authority in support of the suggested separate and distinct rule." These remarks are clearly limited to the admissibility of the communications in evidence and not to their protection where no question of admitting in evidence arises." The issue facing the panel was not whether or not to admit communications passing between spouses into evidence but, having regard to the fact that the communications had taken place between spouses, these communications should be protected or privileged from public scrutiny, by holding the hearing in-camera.

In the case of Slavutych vs. Baker (1975) 55 D.L.R. (3d) 224 Mr. Justice Spence delivered the judgment of the Supreme Court of Canada. This is a case in which material facts came to the attention of a University as a result of a request for a confidential assessment. Mr. Justice Spence said "I would, therefore, be of the opinion that considering this matter only an evidentiary one and under the doctrine of privilege as so ably considered in Wigmore the confidential document should have been ruled inadmissible. Any charge based thereon would, therefore, have failed.

I am, however, of the opinion, as was Sinclair, J. A., that this is not to be considered as a matter of the application of the doctrine of privilege in the light of evidence but rather, in view of the circumstance to which I have already referred, that the document came into being and the confidence was attached thereto by the proper officers of the University of Alberta, to wit, the head of the Department of Slavonic Languages. As I pointed out, the document is headed "Confidential" and the directions for the submission thereof request that it be forwarded in a "sealed envelope marked confidential". Moreover, the appellant stated, and he was not contradicted, that he was informed by Dr. Schwaarschmidt, the head of the department, that the information received would be kept strictly confidential until the tenure committee met and then the sheet would be destroyed.

Sinclair, J. A., quoted Lord Denning, M. R., in Seager v. Copydex, Ltd., (1967) 2 All E. R. 415 at p. 417, who, in turn had adopted the statement of Roxburgh, J. in Terrapine Ltd. v. Builders' Supply Co. (Hayes) Ltd., et all., (196) R.P.C. 128 at p. 130, as follows:

"As I understand it, the essence of this branch of the Law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."

I am of the opinion that is a sound statement of the doctrine as to revelation of confidential communications when it deals with the actions of those who are parties to the confidence. The fact that the particular statement was made in reference to a commercial situation was, as pointed out, by Sinclair, J.A., no reason why it should be confined to such situation and, indeed, Argyll v. Argyll [1967] Ch. 302, a decision of Ungoed-Thomas, J., shows that it may be applied to very personal situations in that case confidential revelations by a wife to her husband during coverture. The doctrine was applied by Turner, J., in Bell v. University of Auckland, (1969) N.Z.L.R. 1029, when that was being considered was an attempt by the plaintiff to obtain production from the defendant of certain notes and recommendations given to the defendant by persons whom the plaintiff had designated as appropriate sources from whom confidential information might be obtained. As will be seen, some of the circumstances bear a marked resemblance to the present case. Here, it is the very party who instigated the communication in confidence and stressed its confidentiality who desires to not produce it but to use as a basis for a charge of misconduct justifying dismissal. I quote from the judgment of Turner, J., at p. 1026:

Here the parties to the present action have solemnly agreed before the action that the documents which are now in question should be brought into existence upon the solemn undertaking of both of them that the plaintiff will not be entitled to see the documents.

One of those two parties was the plaintiff, and it was the plaintiff who sought the right to see the documents. In the present case, the solemn undertaking was made between the university, acting through the head of the department, and the appellant, and it is the university which seeks to use the document.

After this reference to Argyll v. Argyll, supra, Sinclair, J. A., continued [at p. 81]:

I believe the equitable principle of breach of confidence has a role to play in the present appeal. It seems to me that when tenure procedure with respect to a candidate is initiated there comes into existence, within the University of Alberta, some thing which I will call, for want of a better term, an umbrella of confidence. The protection afforded by this umbrella extends to all within the institution who have a legitimate interest in the tenure proceedings. The nature of that shelter is such that confidential communications, made in good faith, ought not to be used to the prejudice of their maker as a member of the university community. That being so, had the tenure form sheet been submitted by the appellant in good faith, it should not have been used as part of his dismissal proceedings.

With respect, I agree exactly with that statement and believe that it puts the matter accurately and succinctly."

Following the panel advising the solicitor that the matter would not be dealt with in-camera and subsequent to the hearing being completed, the case of Canadian Javelin Ltd. vs. Sparling et al, a decision of the Trial Division of the Federal Court per Mr. Justice Gibson, reported in 4 B.L.R., page 154, was considered. This case dealt with an application for an interlocutory injunction after an inspector seized documents of the corporation for the purposes of investigation, and those documents were shown by the inspector to other administrative agencies investigating the corporation. It was argued that there was a breach of confidence but a disclosure to persons having a proper interest in the disclosure. In dismissing the application the court determined that the principal issues were, firstly, whether with respect to voluntary disclosures of confidential communications the equitable doctrine of confidence was applicable, and secondly, if such equitable doctrine applied, whether the reasoning in the decision of the House of Lords in Amer. Cyanamid Co. v. Ethicon Ltd. should be followed by the Court to change the judicial basis upon which interim injunctions had previously been granted or refused. The Court held that with respect to the first issue, the equitable doctrine of confidence does not apply in cases of crime, fraud, or misdeeds whether actually committed or in contemplation, provided that the disclosure at issue is made to one who has a proper interest to receive the information.

In the matter before this panel, the Solicitor has admitted his misdeeds and the Law Society of Upper Canada has a proper interest to receive information with respect to the Solicitor's misdeeds. The panel adopts the decision of the cases referred to herein and in particular, finds that the equitable doctrine of confidence does not apply in this case considering the Solicitor's misdeeds. It is the panel's opinion that a review of the present law indicates that there is a discretion of an equitable nature to be exercised by the panel, having regard to all the circumstances and the nature of the communication. Because of the Agreed Statement of Facts and the admitted misconduct of the Solicitor, the panel finds that the hearing be held in public.

Thomas E. Cole

Ms. Seymour asked that the Society's Factum be amended as follows:

(1) Page 5 of the Society's Factum, paragraph 12, 3rd line - the word "partum" should be "partem"

(2) Page 9 of the Society's Factum, paragraph 25(c) - the word "on-lawyer" should be "non-lawyer"

Mr. Mark made submissions on the motion that the matter should be heard in camera.

Ms. Seymour was opposed.

Mr. Mark made further submissions in reply that the confidential information regarding the solicitor's wife be suppressed.

There were questions from the Bench.

Counsel, the solicitor, the reporter and the public withdrew to discuss the motion.

Counsel, the solicitor, the reporter and the public were recalled and advised that the motion was denied.

Convocation advised counsel that it would reserve its decision on whether the report should be adopted and inform counsel of its decision in writing.

CONVOCATION ROSE AT 5:00 P.M.

Confirmed in Convocation this 26 day of June, 1998

Harvey T. Strosberg

Treasurer