Law Society of Upper Canada Ontario Discipline Committee

IN THE MATTER OF the Law Society Act, AND IN THE MATTER OF Frank Radley Mott-Trille of the City of Brampton, a Barrister and Solicitor

G. MacKenzie, Chair; P. Copeland and H. Sealy

Heard: June 15, 1995, February 2 and 24, May 3, 10 and 11, June 3, 7 and 10 and December 13, 1996 Decision of the Committee: January 22, 1997 Decision of Convocation: October 21, 1997

1997 CanLII 915 (ON L.S.D.C.)

Summary:

Mott-Trille, Frank Radly Brampton, Ontario Age 65, Called to the Bar in 1954

Particulars of Complaint

Professional Misconduct

Misapplied approximately $35,000 from a client;

Misapplied approximately $89,131.13 from the estate of a client;

Misapplied approximately $65,000 from the estate of a client;

Misappropriated approximately $45,000 from the estate of a client by using funds to prepay fees on an unrelated matter;

Misapplied approximately $675,000 in trust funds belonging to a client;

Transferred $224,745,41 from his trust account to his general account for fees and disbursements prior to delivery of a fee billing;

Misapplied approximately $30,000 in trust funds held for two beneficiaries.

Convocation's Disposition (10/21/97)

Permission to resign, otherwise disbarment.*

* Note: The Member did not file his resignation within seven days and therefore was disbarred on October 29, 1997.

REPORT of the Discipline Committee

On July 29, 1993, Complaint D189/93 was issued against Frank Radley Mott-Trille alleging that he was guilty of professional misconduct.

On September 20, 1993 Complaint D246/93 was issued. On June 3, 1994 Complaint D180/94 was issued.

The matter was heard in public on June 15, 1995, February 2, February 24, May 3, May 10, May 11, June 3, June 7 and June 10, 1996 before a Discipline Hearing Panel (the "Panel") composed of Gavin MacKenzie (Chair), Paul Copeland, and Hope Sealy. Mr. Mott-Trille (the "Solicitor") was in attendance throughout the hearing and was represented by his counsel, Charles C. Mark, Q.C. Christina Budweth and Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D189/93

(a) On or about May 21, 1992, the Solicitor misapplied $35,000 more or less from his client Ruth Ramsbottom;

(b) On or about June 11, 1992, the Solicitor misapplied $89,131.13 more or less from the estate of Phyllis Winters;

(c) In or about August 1991, the Solicitor misapplied $65,000 more or less from the estate of Florence Antoniuk; and

(d) In or about September 1991, the Solicitor misappropriated $45,000 from the estate of Margaret Finlay by using these funds to pre-pay his fees on an unrelated matter.

Complaint D246/93

(a) During the period December 18, 1991 to January 19, 1992, the Solicitor misapplied $675,000 more or less from his trust account of funds belonging to his client, Jeannette Steed; and

(b) In the period November 4, 1991 to December 30, 1991, the Solicitor transferred $224,745.41 from his trust account to his general account representing fees and disbursements prior to the delivery of a fee billing as required by section 14(8)(c) of Regulation 708 under the Law Society Act.

Complaint D180/94

1997 CanLII 915 (ON L.S.D.C.)

(a) On or about December 9, 1988, the Solicitor misapplied $30,000.00 more or less, of funds to be held in trust for the benefit of Vera and Michael Giammarco.

REASONS

1. Background

The Panel admitted into evidence two lengthy agreed statements of fact and many documents. It also heard the viva voce evidence of approximately twenty witnesses including the Solicitor. In addition to hearing oral argument, the Panel considered written submissions that were delivered on certain issues both at the time of and after the completion of oral argument.

The Solicitor is 65 years of age. He was called to the bar in Great Britain (Gray's Inn) in 1953, and was called to the bar in Ontario in 1954. He was a Rhodes Scholar before he undertook a career in law.

The Solicitor's practice has included both "solicitors' work" and litigation. He has practised most recently in Brampton, in association with his daughter, Sarah Mott-Trille.

The Solicitor admitted particular (a) of Complaint D180/94 (misapplying $30,000 more or less of funds to be held in trust on behalf of Vera and Michael Giammarco), and in argument Mr. Mark conceded that the Solicitor breached section 14(8)(c) of Regulation 708 under the Law Society Act as alleged in particular (b) of Complaint D246/93 (transferring $224,745.41 from his trust account to his general account representing fees and disbursements prior to the delivery of a fee billing). Each of the other allegations in the Complaints as set forth above was contested.

In the reasons that follow the Panel has summarized the evidence relating to each particular in the Complaints, although it has considered the particulars in an order that is slightly different from the order in which they are set out in the Complaints.

Particular 2(a) of Complaint D246/93 - Alleged Misapplication of $675,000 belonging to Jeanette Steed.

The Law Society alleges in particular 2(a) of Complaint D246/93 that:

During the period December 18, 1991 to January 19, 1992, [the Solicitor] misapplied $675,000 more or less from his trust account of funds belonging to his client, Jeanette Steed.

(a) Agreed Statement of Facts

The evidence that the Panel received in relation to this Particular included the following paragraphs from the agreed statement of facts that was marked Exhibit 4 at the hearing:

1997 CanLII 915 (ON L.S.D.C.)

105. The Solicitor was retained by Jeanette Steed in April, 1989, concerning a matrimonial matter. Mrs. Steed is 70 years of age. Mrs. Steed and her husband had been married in 1950. There were three children of the marriage and Mrs. Steed never worked outside the home after her marriage.

106. At the time of her retainer of the Solicitor, Mrs. Steed had limited knowledge of financial matters. She received a housekeeping allowance from her husband and was not responsible for the investment of any of her own funds except a $60,000 bequest from her mother in 1983 which was invested in Canada Savings Bonds. [The parties agreed at the hearing that Mrs. Steed in fact received the $60,000 bequest from her father, who died approximately three months after her mother: Exhibit 8, paragraph 14.]

107. Mrs. Steed knew the Solicitor as a fellow member of the Jehovah's Witness faith. Although he belonged to a different congregation, Mrs. Steed and the Solicitor had met at Witness conventions. She had known him to be an elder in the church. He had attended to a divorce and marital settlement on behalf of one of her daughters.

108. At the time of Mrs. Steed's separation from her husband she was aware that as a result of an estate freeze, a trust had been created during the course of their marriage of which the beneficiaries were the Steed's three daughters and she was completely cut out. She was not aware then, nor is she to this date, fully aware of the placement of the various funds of the Trust. She was however, aware that he had substantial business assets and real estate holdings and provided sufficient particulars thereof for the purposes of her litigation.

109. During the course of Mrs. Steed's solicitor and client relationship with the Solicitor, she developed trust and confidence in him both as her solicitor and a fellow member of the Jehovah's Witness faith. Mrs. Steed socialized with the Solicitor to a limited extent, once spending the afternoon at his country home with one of her daughters and grandchildren. The Solicitor was invited to the second marriage of one of her daughters.

110. The principal issue between the Steeds resulting from their separation was Mrs. Steed's entitlement to any funds in the Steed Family Trust. Alan Poole was retained as co-counsel in the matter. The parties attended on a fully argued interim motion and were successful. There were protracted negotiations and the matter was eventually settled.

111. On November 4, 1991, the Solicitor received a settlement cheque in the amount of $1,357,000 payable to the Solicitor in trust. An additional $500,000 was received by way of cheque to create a trust for Mrs. Steed, the Jeanette Steed Trust. Mrs. Steed was to receive the benefit of the use of the income during

1997 CanLII 915 (ON L.S.D.C.)

her lifetime. The capital of the trust was to be preserved for the benefit of the Steeds' daughters.

112. At or about the time of the receipt of the settlement funds, Mrs. Steed and the Solicitor had discussions regarding the investment of her monies. Mrs. Steed asked the Solicitor for advice and assistance in investing this money and specified two criteria:

1. A certain percentage of the funds should be invested in blue chip or safe stocks; and

2. Mrs. Steed was aware that the Solicitor invested in mortgages on behalf of clients from time to time; as a result, Mrs. Steed instructed the Solicitor to invest in short term mortgages, "not more than two years".

113. The Solicitor reported to Mrs. Steed regarding the transfer of $200,000 to the Jones, Gable, brokerage firm, by letter dated November 20, 1991.

114. With respect to the remainder of the funds, Mrs. Steed advised the Solicitor that prior to investing in mortgages she wished him to call her and advise her of the essential elements of the investment. Mrs. Steed gave these instructions not because she anticipated having to veto any prospective investments but rather so that she would know the whereabouts of her funds.

115. On November 5, 1191, $1,200,247.50 of the funds were invested in T-Bills through the Royal Bank. The bills were cashed in November and December, 1991, and interest of $11,115.80 was credited to Mrs. Steed's trust account. The funds, totalling $1,368,115.80 were distributed as follows, as evidenced by the Solicitor's trust ledgers attached as Exhibit 43 to this agreed statement of facts:

Date Details Amount

Nov. 4/91 F. Mott-Trille - fees and disb. $ 144,601.57 Nov. 11/91 Humberview Motors - deposit for car 5,000.00 Nov. 13/91 Humberview Motors - purchase of car 36,054.45 Nov. 19/91 Jones, Gable - purchase of shares 200,000.00 Alan Poole - for billing 463.89 Dec. 13/91 Jeanette Steed 100,000.00 Dec. 16/91 F. Mott-Trille - fees and disb. 5,243.84 Dec. 18/91 Loan to Reid and Dhamalie 42,500.00 Dec. 30/91 F. Mott-Trille - fees and disb. 74,900.00 Dec. 31/91 Alan Poole - fee billing 382.53 Jan. 2/92 Loan to Steve and Fontini Lazaridis 50,000.00 Jan. 7/92 Advance to Reid/Dhamalie/Finlason re: $675,000 mortgage on 2019-2035 Davenport Rd., Toronto 60,000.00 Jan. 14/92 Advance to Reid/Dhamalie/Finlason re: $675,000 mortgage 5,308.00 Jan. 19/92 Final advance to Reid/Dhamalie/ Finlason re: $675,000 mortgage 567,192.00 Feb. 14/92 Loan to Bacus/Stavrou 8,245.95 Mar. 9/92 Loan to Ronald Hodgins 13,500.00 Mar. 24/92 New loan to Reid/Dhamalie 5,304.00 Apr. 3/92 Loan to Momm 12,119.39 May 15/92

1997 CanLII 915 (ON L.S.D.C.)

Loan to Stevenson 20,000.00 Loan to Ramsbottom 17,300.18 ————-
$1,368,115.80

116. Of the amounts set out in paragraph 100 above the following are the subject of complaints by Mrs. Steed and the Society:

Lazaridis mortgage $ 50,000.00 Reid/Dhamalie/Finlason mortgage 675,000.00 Loan to Ronald Hodgins 13,500.00 Loan to Reid/Dhamalie 5,304.00 Loan to Momm 12,119.39 Loan to Stevenson 20,000.00 Loan to Ramsbottom 17,300.18 ———— $793,223.57 ==========

117. Mrs. Steed only became aware of the Lazaridis mortgage investment when the Solicitor reported to her by letter dated January 6, 1992, a copy of which is attached as Exhibit 44 to this agreed statement of facts.

118. The Lazaridis mortgage was registered on a property at 5 Parkhurst Boulevard in Leaside. As at September 24, 1993, this property had an appraised value of $355,000. The Solicitor has provided an appraisal dated October 1, 1992 which values the property at $525,000.00. Mrs. Steed has instituted Power of Sale proceedings and the property is presently listed for sale for $349,000.00. Mrs. Steed's claim, under her mortgage, is approximately $38,600.00, inclusive of interest, to date. The Solicitor has advised, and the Society has no reason to question his information, that the present outstanding value of the first mortgage is $277,000.00.

119. Most payments on the Lazaridis loan came through the Solicitor to Mrs. Steed.

120. In or about March, 1992, the Solicitor advised Mrs. Steed of a potential investment in a medical building in Brantford. Mrs. Steed travelled with the Solicitor to Brantford to inspect the property and meet with the listing real estate agent. Mrs. Steed declined to make the investment.

121. By letter dated April 9, 1992, Mrs. Steed wrote to the Solicitor confirming that she did not wish to purchase the medical clinic in Brantford. She further instructed him not to make any more investments on her behalf and advised that in the future, she intended to attend to her own financial matters. She asked the Solicitor for an accounting of funds owing to her. A copy of Mrs. Steed's April 9, 1992 letter is attached as Exhibit 45 to this agreed statement of facts.

122. By letters dated April 10, 1992 which are collectively attached as Exhibit 46 to this agreed statement of facts, the Solicitor reported to Mrs. Steed about the payout of a loan made to Mrs. Steed's daughter, Anne, and her husband, Morrell Bacus.

123. The Solicitor reported to Mrs. Steed regarding a number of loan investments by letters all dated June 11, 1992. The first written report of the Reid/Dhamalie/Finlason mortgage is made to Mrs. Steed by way of the June 11, 1992 letter. Copies of the June

1997 CanLII 915 (ON L.S.D.C.)

11, 1992 letters are attached collectively as Exhibit 47 to this agreed statement of facts.

124. Both the Solicitor and Mrs. Steed will give evidence regarding paragraphs 109, 111, and 120 at the return of this matter before the Committee.

125. The Solicitor reported to Mrs. Steed regarding the Dhamalie mortgage by letter dated June 16, 1992, a copy of which is attached as Exhibit 48 to this agreed statement of facts. Mrs. Steed responded by letter dated June 19, 1992, a copy of which is attached as Exhibit 49 to this agreed statement of facts.

126. Mrs. Steed also wrote to the Solicitor regarding the calculations respecting repayment of the Bacus mortgage in response to the Solicitor's June 11, 1992 letter in that regard. The Solicitor responded by a letter of the same date. Both Mrs. Steed's and the Solicitor's letters of June 19, 1992 regarding the Bacus mortgage are attached collectively as Exhibit 50 to this agreed statement of facts.

127. Mrs. Steed received a notice of sale under mortgage respecting the Parkhurst property re the Lazaridis loan in early July 1992. Mrs. Steed faxed the Solicitor the Notice of Sale on July 10, 1992 under cover of letter of the same date, copies of which are attached as Exhibit 51.

128. On July 14, 1992, he responded to her inquiry for information on the situation by providing a cheque in the amount of $10,000 from Mr. Lazaridis as well as updated information on the status of the mortgage. A copy of the Solicitor's July 14, 1992 letter is attached as Exhibit 52 to this agreed statement of facts.

129. By letter dated July 14, 1992, which was personally delivered to her home, the Solicitor reported to Mrs. Steed respecting his representation of her to date. A copy of the Solicitor's July 14, 1992 letter is attached as Exhibit 53 to this agreed statement of facts. The Solicitor enclosed in this letter fee billings dated November 4, 1991 in the amount of $144,601.57 and December 30, 1991 in the amount of $74,500, copies of which are attached collectively as Exhibit 54 to this agreed statement of facts.

130. The Solicitor had, on November 4, 1991 and December 30, 1991 already withdrawn these amounts from trust without rendering the fee billing to Mrs. Steed.

131. On July 17, 1992, Mrs. Steed and her daughter, Margaret Pearson, met with the Solicitor to discuss the account delivered by the Solicitor on July 14, 1992. Mrs. Steed confirmed the essence of their conversation in the letter dated July 18, 1992, a copy of which, complete with handwritten notes made by Mrs. Steed pursuant to that meeting, is attached as Exhibit 55 to this agreement statement of facts.

1997 CanLII 915 (ON L.S.D.C.)

132. During the meeting of July 17, 1992, the Solicitor agreed to refund fees in the amount of $32,100 to Mrs. Steed.

133. The Solicitor did deliver a cheque in the amount of $32,100.00 to the Toronto-Dominion Bank where it was credited to the account of Mrs. Steed under cover of a letter dated July 30, 1992.

134. The Solicitor also reported further to Mrs. Steed by letter dated July 30, 1992, a copy of which is attached as Exhibit 56 to this agreed statement of facts. The letter contains handwritten notations in Margaret Pearson's handwriting made during a conversation between the two on August 11, 1992. ...

135. By letter dated August 13, 1992, the Solicitor ... assured Mrs. Steed "the mortgages are in good standing and you are protected". A copy of the Solicitor's August 13, 1992 letter is attached as Exhibit 57 to this agreed statement of facts.

136. By letter dated September 14, 1992, a copy of which is attached as Exhibit 58 to this agreed statement of facts, Mrs. Steed instructed the Solicitor to make arrangements for a repayment of the Lazaridis mortgage. By letter dated September 22, 1992, a copy of which is attached as Exhibit 59, the Solicitor made the demand for payment under cover of letter of same date and reported to Mrs. Steed enclosing a copy of the demand and a cheque in the amount of $500. The Solicitor has not commenced power of sale proceedings in respect of the Lazaridis loan. The Solicitor's explanation for his failure to do so is that he was not specifically requested to do so. Mrs. Steed received her last payment on the Lazaridis mortgage on October 28, 1992. A recent payment of $6,000 was made leaving a total of $36,500 plus interest owing on this indebtedness.

137. Mrs. Steed acknowledged the Solicitor's September 22, 1992 letter on the Lazaridis matter by letter dated September 26, 1992. The Solicitor corresponded with her further on October 9, 1992 in which letter he advised:

...Steve Lazaridis will be paying off your mortgage in full as soon as he obtains the commitment on the new first mortgage on the 15 Astley property.

The most recent information that I have on this is that this commitment letter should be available next week and shortly thereafter, your mortgage will be paid off in full.

138. Under cover of letter dated October 28, 1992, the Solicitor provided Mrs. Steed with a cheque in the amount of $16,875.00 representing a quarterly mortgage payment on the Reid/Dhamalie/Finlason mortgage.

139. By letter dated December 15, 1992, which was copied to Margaret Pearson, the Solicitor made a formal demand for payment

1997 CanLII 915 (ON L.S.D.C.)

on the Davenport Road property. A copy of this demand is attached as Exhibit 60 to this agreed statement of facts.

140. By letter dated January 3, 1993, Margaret Pearson wrote to the Solicitor demanding a further update on the Reid/Dhamalie matter. A copy of Margaret Pearson's January 3, 1993 letter is attached as Exhibit 61 to this agreed statement of facts.

141. During a telephone conversation with the Solicitor on January 7, 1993, Mrs. Pearson was advised that in regard to the Lazaridis loan, several of Mr. Lazaridis' brothers would be selling assets to pay back the loan to Mrs. Steed. In addition, Mrs. Pearson was advised by the Solicitor that Mr. Lazaridis had a large valuable home in Rosedale which has been listed for sale. The Solicitor advised Mrs. Pearson he expected Mrs. Steed would be repaid within one to two months, from the proceeds of the sale.

142. Under cover of letter dated January 12, 1993, a copy of which is attached as Exhibit 62 to this agreed statement of facts, the Solicitor provided Margaret Pearson with an appraisal report prepared for the Royal Bank of Canada respecting the Davenport Road properties. The Report estimated the market value of the properties to be $1,650,000.00. The appraisal was conditional upon the use of the property for its highest and best use that being a five-storey apartment building approved by the City of Toronto in July, 1991.

143. The Solicitor provided Mrs. Pearson and Mrs. Steed with a letter dated March 29, 1993 from Saddlebrook Construction Inc. Under cover of a letter dated April 3, 1993, the letter included estimates of development schedule for the property. A copy of the Saddlebrook March 29, 1993 letter is attached as Exhibit 63 to this agreed statement of facts.

144. The Solicitor advised Mrs. Steed that the Parkhurst Boulevard property had been listed for sale by letter dated June 10, 1993.

145. There is an existing first mortgage on two of the lots of 2019-2035 Davenport Road in the amount of $455,000 in favour of Security Trust Company which was registered on May 30, 1990.

146. The entire amount of the Reid/Dhamalie advance is still outstanding.

The following paragraphs from one of the agreed statements of fact that the Panel received in evidence are also relevant to this particular in the Complaints (among others):

5. Pan American Holdings Limited is an Ontario corporation controlled by Howard F. Finlason, the Solicitor's cousin. Pan American is in the business of real estate development and construction. Although the Solicitor has advised he has no financial interest in Pan American, he is a director and officer

1997 CanLII 915 (ON L.S.D.C.)

of that corporation as evidenced by the corporation's last Form 1 filing made on July 19, 1989. During the period September 1982 to present, the Solicitor's son-in-law, Vlado Dresar, had been president of the corporation.

6. Beginning as early as 1984, the Solicitor shared an office address and telephone number with Pan American Holdings Ltd. In January 1984, the Solicitor's letterhead indicated his address as Suite 1003, 111 Elizabeth Street, Toronto. The letterhead of Pan American Holdings Ltd. on or about that period of time shows the same address and telephone number as the Solicitor. Further, the letterhead of Pan American Holdings during the period 1989 through 1991 indicates the same address and telephone number, being 977-1850, as the Solicitor. It is understood that for about a year prior to the spring of 1992, Pan American rented a small office on the fifth floor at 111 Elizabeth Street, Toronto, directly from the landlord and although it was on the same floor as the Solicitor's office, it was not part of his office space. The Law Society's auditor's observations during his first attendance at the Solicitor's office in the fall of 1990 would confirm this. However, on the auditor's return visits, he noted that the name plate for Pan American had been placed outside the Solicitor's office door and further noted that the telephone on the Solicitor's desk had a button labelled "Pan American". Pan American did also have the telephone number 599-8884 in Toronto, and later its own telephone number in Brampton, 459-6132. This change in number is coincident with the Solicitor moving his office to Brampton. Pan American, from time to time, give Howard Finlason's home address as its office address. The Solicitor's explanation for the shared address and telephone number is that since Howard Finlason was not always in the office, and Pan American did not have a secretary, it was preferable to have mail delivered to an office where it would be dealt with in a timely way and telephone messages could be taken.

7. Howard Finlason is also President of W.H.F. Construction & Equipment Ltd., another of the Solicitor's clients. W.H.F. Construction was also involved in the Davenport Road project described below for certain aspects of construction. The Solicitor is named as both an officer and director of W.H.F. in both its Articles of Incorporation and its 1989 Form 1 filing. There have not been any subsequent Form 1 filings.

8. In 1989, Pan American became involved in a land assembly at 2019-2035 Davenport Road, Toronto on behalf of Reid/Dhamalie who were the owners of the property. Pan American helped to develop the property and had it rezoned. Pan American planned to construct a five story, fifty-five suite low cost apartment building on the property which they hoped would be purchased by City Home, a non-profit housing association for the City of Toronto. The project was, in fact, the subject of an Agreement of Purchase and Sale between Reid/Dhamalie and Finlason and the City of Toronto a copy of which, without schedules, is attached as Exhibit 1 to this agreed statement of facts. Also attached is a

1997 CanLII 915 (ON L.S.D.C.)

letter dated April 11, 1992 from City Home to Messrs. Reid/Dhamalie/Finlason. Title to the properties at 2019-2035 Davenport Road are held variously in the names of Reid/Dhamalie/Finlason, not Pan American. 2019 Davenport Road was purchased in December 1984 for $67,000. 2021 and 2025 Davenport Road were purchased in October 1990 for $325,000. 2019 and 2021-2025 Davenport road were encumbered with a first mortgage of $455,000 in favour of Security Trust and a second mortgage in the amount of $675,000 in favour of Jeanette Steed. The 2035 parcel is encumbered only by the same mortgage in the amount of $675,000 to Jeanette Steed as at December 8, 1992. Copies of the abstracts of title are attached collectively as Exhibit 2 to this agreed statement of facts.

9. As at September 30, 1989, the financial statements of Pan American show loans payable of approximately 1.4 million dollars. Most of these funds are owed to clients of the Solicitor's law practice. Financial statements also revealed that the liabilities of the company exceeded its assets by approximately $600,000."

(a) Viva Voce Evidence

Jeanette Steed testified that though she was a registered nurse prior to her marriage in 1950, she did not work outside the home thereafter.

She testified that her former husband, a civil engineer by training, became very successful after forming a large construction company engaged in building roads and bridges.

Mrs. Steed explained that during her marriage her husband had primary responsibility for the family's financial affairs.

Mrs. Steed testified that she became a member of the Jehovah's Witness faith in 1971, and that she knew the Solicitor to be an Elder of the Church.

Mrs. Steed testified that she first met the Solicitor regarding her separation from her husband in 1985, but made only one visit to his office at that time. She added that she did not go back to see the Solicitor again concerning the breakdown of her marriage until April, 1989. She wanted to be represented by someone of the same religious faith, she testified. She also testified that she continued to have confidence in the Solicitor as of the conclusion of her divorce proceeding.

Mrs. Steed testified that when the matrimonial litigation was settled (on November 4, 1991) she and the Solicitor met at the offices of Osler, Hoskin & Harcourt with two lawyers of that firm who were representing her husband. After that meeting she and the Solicitor went back to the Solicitor's office, she testified, and for about three-quarters of an hour discussed how the settlement funds would be invested. Only she and the Solicitor were present at this meeting.

1997 CanLII 915 (ON L.S.D.C.)

Mrs. Steed testified that during this discussion they agreed that $200,000 from the Steed Trust and $200,000 from the balance of the settlement funds would be put into blue chip stocks with the firm Jones Gable & Co. (a firm recommended by the Solicitor); that $100,000 would be put in her bank account at the Toronto Dominion Bank; that $42,000 would be spent on a new Oldsmobile car; and that the balance of the funds would be invested in mortgages and real estate. She added that the Solicitor told her that he was knowledgable about mortgages and real estate, and that she said that she would like to invest money in mortgages, anywhere between $50,000 and $200,000 but no more than $200,000 in any one mortgage, whether it was a first or a second.

Mrs. Steed also testified (as set forth also in paragraph 114 of the agreed statement of facts, above) that she advised the Solicitor that prior to investing in mortgages she wished him to call her and advise her of the essential elements of the investment. "Not that I might wish to veto it," she testified, "but I wished to know where my money was."

The chart included in paragraph 115 of the agreed statement of facts discloses that the $675,000 allegedly misapplied by the Solicitor was advanced to the borrowers between January 7 and January 19, 1992. Mrs. Steed testified that between January and March, 1992 she had no face-to-face meetings with the Solicitor, but that she telephoned him during that period. She testified that "at the end of December, the end of January, end of February and end of March, I kept asking Mr. Mott-Trille each time for a breakdown of my account. I could not understand why he was not giving me a breakdown of my account because I knew I should be getting one. And I said to him I want you to tell me where my money is. He said: 'yes, you have every right to know where your money is. I will get around to it.'"

Mrs. Steed testified that toward the end of March she travelled with the Solicitor to Brantford because he wanted her to look at a medical clinic that was for sale. On the way, she testified, the Solicitor told her "about some small loans he had made for me. He said they are safe. You don't need to worry, they are safe."

Mrs. Steed testified that she did not want to invest in the medical clinic in Brantford, and indeed decided at that time that she did not want any more of her money to go into any project that the Solicitor might suggest. The Solicitor had not asked her for her authority to make the additional mortgage investments that he had referred to during the trip to Brantford, and by that point she was losing confidence in him and wanted not to have any more to do with him. However, she testified, she did not confront the Solicitor about the fact that he had made the investments he told her about without her authority because he said that they were small investments and that they were safe.

1997 CanLII 915 (ON L.S.D.C.)

Mrs. Steed testified that not long after her trip with the Solicitor to Brantford, on April 9, 1992, she wrote to the Solicitor. Her letter reads as follows:

"Dear Frank:

First of all, I wish to thank you for all that you have done for me over the last four years.

As I wish to live a quiet, peaceful life the next 10, 20 or more years, I do not wish to be a money lender. Please do not negotiate any more first or second mortgages, and please do not renew any. As well, I do not wish to buy the medical clinic in Brantford. I do appreciate your thoughtfulness in considering me.

I do respect you and trust you implicitly. I do now wish to be in control of my own money.

I have a daughter and son-in-law who are bankers and from now on I shall ask their advice on my finances.

....

Please give me a breakdown of my account and please deposit the balance in my account #3300260 at Toronto-Dominion bank at Eglinton and Avenue Rd.

Looking forward to seeing you at Anne and Morrell's wedding.

Sincerely yours,

Jeanette Steed"

Mrs. Steed explained that at this point she was discussing everything with her daughter, Margaret Pearson, and was losing confidence in the Solicitor. "I wished to get rid of him and do it in a polite way. And I wanted to thank him for all that he had done ... and I said I respect you and trust you implicitly. Well, I wanted to be polite in getting rid of him."

Mrs. Steed testified that shortly thereafter she received a letter dated April 10, 1992 from the Solicitor reporting on a $315,000 loan from the Steed trust to Mrs. Steed's daughter Anne and her fiance Morrell Bacus. She testified that until her receipt of the Solicitor's April 10 letter she had received a report from the Solicitor about only one other loan, namely the January 2, 1992 loan to Steve and Fontini Lazaridis in the amount of $50,000. The Solicitor reported this loan to Mrs. Steed in a letter dated January 6, 1992. She testified that when she received the Solicitor's April 10, 1992 letter concerning the loan to her daughter and son-in-law to be she thought "how nice it was for him to send me this, why didn't he send me letters like this about the other loans he had made?"

Mrs. Steed testified that on June 15, 1992 she received a letter from the Solicitor dated June 11, 1992 in which the Solicitor

1997 CanLII 915 (ON L.S.D.C.)

informed her for the first time of the $675,000 loan to Reid/Dhamalie/Finlason, which was advanced in January 1992. With this letter the Solicitor enclosed a trust cheque in the amount of $33,750, which represented the April and July 1992 quarterly payments on the mortgage, which bore interest at 10% annually.

Mrs. Steed testified that when she got this letter (and other reporting letters that the Solicitor sent to her at about the same time) and "saw that $675,000 of my money was invested on some Davenport property, I felt heartsick. $675,000 is a major portion of my settlement, the settlement from my husband. I had asked that no more than $200,000 be put in one loan. So I was heartsick to think that $675,000 had gone into this loan on this Davenport property."

Mrs. Steed testified that her daughter Margaret and she "drove around to see this property, and when we looked at it we were shocked. It's three small buildings, one is a double house, three little buildings, and so much money went to people."

Mrs. Steed testified that on June 19 she sent a letter to the Solicitor that her daughter Margaret Pearson had helped her to write. Her letter reads, in part, as follows:

"My next concern is with the Reid/Dhamalie/Finlason mortgage. Quite simply - who are they?, and what are the terms and conditions of the mortgage? I would appreciate being provided with the same documentation as you provided me with, re the Lazaridis mortgage. That is, a copy of the mortgage(s), a copy of the insurance policy(ies), and their financial statement(s). I cannot understand why you have not informed me of this rather large investment much earlier.

Frank, I really would appreciate an answer to my concerns, very quickly, as they weigh heavily on my mind ..."

Mrs. Steed testified that she and her daughter Margaret Pearson met with the Solicitor at his office several weeks later. In addition to discussing the Solicitor's account, Mrs. Steed testified, she asked who Reid/Dhamalie/Finlason were, and that the Solicitor replied that they were three Jamaicans and that Howard Finlason was his (the Solicitor's) cousin. She testified that the Solicitor added that Reid and Dhamalie had a delivery service and that they did delivery work for the Solicitor.

Mrs. Steed testified that on July 18, 1992 she sent a letter to the Solicitor in which she confirmed an agreement reached at the meeting in the Solicitor's office, that he would forward to her copies of the mortgage documents on the Reid/Dhamalie/Finlason loan, showing the repayment schedule and expiry dates. She added that "as you know Frank, it is my wish to have these investments paid back to me, as soon as possible, as I wish to be in control of my own monies; therefore, the sooner these deals are finalized, the better."

1997 CanLII 915 (ON L.S.D.C.)

On July 30, 1992 the Solicitor wrote to Mrs. Steed and enclosed copies of the mortgages in question, together with certain information concerning the interest rates and quarterly payments.

Mrs. Steed testified that several months later she sought the assistance of her Minister, Ed Zabinsky, and that she and Mr. Zabinsky met with the Solicitor in his office on April 29, 1993. She testified that the Solicitor "said to me that he was sorry that he invested my money before he told me about it. He said this in front of my Minister, Mr. Ed Zabinsky, and also he said he was selling an apartment building that he had in Barrie and that at the end of May he would be able to pay me $200,000 towards the reduction of this Reid/Dhamalie/Finlason loan."

Mrs. Steed also testified that she asked the Solicitor to put this promise in writing but that he refused to do so.

Mrs. Steed testified that she offered the mortgage to the Solicitor, but that he said that he was unable financially to take it.

Mrs. Steed testified that the Solicitor never gave her the $200,000 that he promised her in the April 1993 meeting.

Mrs. Steed testified that in June 1993 she retained Lerner & Associates to commence a lawsuit against the Solicitor. She testified that the action was eventually settled. She added that she continues to hold mortgages on the Davenport properties, and that there is a receiver involved in the first mortgage. She testified that she recently had to pay taxes for two years in the amount of $15,000.

In cross-examination Mrs. Steed acknowledged that in her letters to the Solicitor she did not complain that the Solicitor had acted without her authorization in making the $675,000 loan. She also acknowledged that on her examination for discovery in the civil action that she brought against the Solicitor when she was asked about her meeting with the Solicitor at which the Solicitor's authority to invest on her behalf was discussed, she made no mention of there being a $200,000 limit on any single mortgage investment.

She also testified in cross-examination that as a result of the settlement of the law suit she received $225,000 in cash, including $150,000 from the Solicitor's daughters and $75,000 from the Lawyers' Professional Indemnity Company.

Mrs. Steed's daughter, Margaret Pearson, was also called as a witness by counsel for the Law Society. Ms Pearson testified that she has a degree from the University of Waterloo, from which she graduated with a major in environmental studies and a minor in business. Upon graduation, she testified, she was hired by the Royal Bank where she was employed for sixteen years. Her responsibilities at the Royal Bank, she testified, included both personnel and finance. She testified that since 1989 she has been

1997 CanLII 915 (ON L.S.D.C.)

employed by her father's company as Vice-President of Finance, in which capacity she oversees investments in connection with her father, among other responsibilities.

Ms Pearson testified that in April 1992, after her mother went to Brantford to see a medical clinic with the Solicitor, her mother called on her for help because she was befuddled. She testified that she assisted her mother to write the letter dated June 19, 1992 that is quoted above. She testified that they inquired about the Reid/Dhamalie/Finlason mortgage because they had never heard of that mortgage before they received the Solicitor's letter of June 11, 1992, which is also referred to above.

Ed Zabinsky was also called as a witness by the Law Society's counsel. He testified that he is a Minister in the Jehovah's Witness' church, and has been in full time service with the Watch Tower Society for 32 years. He added that from 1981 to 1993 he was the Minister in Jeanette Steed's Kingdom Hall.

Mr. Zabinsky testified that on April 29, 1993 at Mrs. Steed's request he attended a meeting with the Solicitor and Mrs. Steed at the Solicitor's office.

He testified that the meeting lasted approximately one hour, and that Mrs. Steed was very concerned as to the details of the $675,000 loan, and in getting the $675,000 back as soon as possible. He added that "she wanted to know why did he use the money without her knowledge because the agreement they had was that no investment was to be made until after she consented to it, after knowing all the details of the investment."

Mr. Zabinsky further testified that the Solicitor responded "I realize that I had to get your permission." Mr. Zabinsky also testified that the Solicitor "apologized several times during that conversation for not getting her permission to invest her money".

The Solicitor testified that after the settlement funds ($1,357,000 together with a further $500,000 to create the Jeanette Steed Trust) were received into his trust account on November 4, 1991, Mrs. Steed asked if the Solicitor could help her invest the funds and he said that he would. He testified that he explained to her that he knew nothing about "stocks and shares", but knew something about real estate, and that he recommended an investment advisor to her. He testified that Mrs. Steed decided that she wanted $200,000 of her own private funds together with $200,000 from the Trust to be invested in "stocks and shares".

The Solicitor further testified that Mrs. Steed gave him instructions to invest in his discretion in mortgages and loans and also "to go and see what I could find in real estate." The arrangement agreed upon was that if there was something that the Solicitor felt was suitable in real estate, he would then bring

1997 CanLII 915 (ON L.S.D.C.)

her into it so she could inspect it, "but I had full discretion as to the loans and mortgages".

The Solicitor testified that at the time (January 1992) he thought that the $675,000 mortgage loan to Reid, Dhamalie and Finlason on the Davenport Road properties was a suitable investment. He explained that Dexter Reid and Quincy Dhamalie were clients of his who had established a successful delivery business. He further explained that Reid and Dhamalie had been approached by the City of Toronto Planning Department, which wanted to get rid of the non-conforming garage use in the residential area in which the properties were located. He added that City Home, which invested in non-profit, low-cost housing, was interested in the site to build low-cost condominiums.

The Solicitor explained that the property had been re-zoned by lawyers who specialized in that type of work. The re-zoning was conditional upon City Home also purchasing 2035 Davenport Road, which was owned by a Mr . or Mrs. Carnevalli. He testified that that property was valued by the Royal Bank appraisers at $265,000, and that was the property upon which Mrs. Steed ultimately held a first mortgage.

The Carnevalli property had been purchased by Messrs. Reid, Dhamalie and Finlason for $325,000, the Solicitor testified. The Solicitor explained the $60,000 premium above the Royal Bank appraisal on the basis that the combined evaluation of the three properties premised upon re-zoning was double the combined appraisal of the properties separately based upon the previous zoning.

When asked whether he had any discussion with Mrs. Steed about the investment before the $675,000 was advanced the Solicitor responded, "I can't say before, but at about the time, yes ...".

The Solicitor testified that Mrs. Steed had a first mortgage on 2035 Davenport, a house that was purchased for $325,000, and that her mortgage was in the amount of $675,000. On the adjoining property Mrs. Steed had a second mortgage, he testified, which was subject to a prior first mortgage in the amount of $450,000.

The Solicitor testified that at the time the $675,000 was advanced there was an outstanding agreement of purchase and sale between Reid, Dhamalie and Finlason as vendors and City Home as purchasers. He testified that the sale was scheduled to close on April 1, 1992 (within less than three months after the $675,000 mortgage loan). The purchase price was $1,430,000, and the vendors were also to be paid all the architectural, engineering, environmental and development costs they incurred, which were estimated to be in the range of $300,000-$400,000. The Solicitor testified that he thought that the investment was a very good investment because although it was a conditional contract, City Home wanted to make sure it got into the property on April 1 to begin construction.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor testified that after Mrs. Steed's $675,000 mortgage was in place, the transaction did not close as scheduled because the Ministry of Housing was not given the funds by the Government of Ontario due to a moratorium affecting all low-cost housing. The Solicitor added that City Home "kept saying to us ... they had such a good position with the Government of Ontario that they felt confident that within three to six months they would still go ahead with the deal once the funding came". However, the Solicitor added, "when the three months or six months was up, the Government of Ontario had been plagued with a lot of complaints from all the low-cost housing people outside Metropolitan Toronto. So, at the next sitting Davenport nor anybody from Metropolitan Toronto had a chance. It was all spread around the Province of Ontario."

As a result, the Solicitor testified, Mrs. Steed's mortgage went into default. The Solicitor testified that thereafter Mrs. Steed engaged a lawyer and brought an action against him, which was settled on the basis that Mrs. Steed was paid $225,000 and "took over the property".

The Solicitor testified that the full discretion that he had to invest in mortgages was revoked only in April 1992 when Mrs. Steed wrote her letter dated April 9, 1992 in which she expected him not to negotiate any more first or second mortgages.

The Solicitor denied that Mrs. Steed had ever instructed him not to invest more than $200,000 in any single mortgage, and added that throughout his meetings with Mrs. Steed and on her examination for discovery in the civil proceeding she made no such suggestion. He agreed that she had instructed him that she did not want to invest in any mortgage with a term longer than two years.

The Solicitor testified that when he met with Mr. Zabinsky and Mrs. Steed on April 29, 1993 he did not apologize for investing Mrs. Steed's money without her permission, though he did apologize to her because his investment had not worked out as he had foreseen. He emphasized that if the deal had closed on April 1, 1992 there would have been absolutely no problem with the $675,000 mortgage, and that it was the Government's moratorium on funding for non-profit housing that killed the deal.

The Solicitor testified that though it is true that when he and Mrs. Steed went to Brantford he did not have the money in his trust account to invest in the medical clinic, he was still expecting the $675,000 to be repaid with interest the following month, and Mrs. Steed would have been investing only $300,000 in the medical clinic if she had authorized that investment.

The Solicitor also testified that Mrs. Steed never complained about the amount that the Solicitor had invested on her behalf in the Davenport Road project.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor acknowledged that though he reported in writing on the $50,000 Lazaridis mortgage in January 1992, "unfortunately, I did not report at the same time in writing on Davenport." The Solicitor explained that this was because he thought the transaction was going to close at the end of March anyway.

In cross-examination the Solicitor testified that by September 1989 the liabilities of Pan American Holdings exceeded its assets by approximately $600,000, and that much if not all of Pan American's debt was owed to other clients of the Solicitor's firm. He also testified that a large portion of that money was owing because he had invested client money in a Pan American project in Holland's Landing.

The Solicitor further testified that he had also invested client money in the Davenport Road project apart from the Ramsbottom, Winters Estate, Antoniuk Estate and Steed funds.

The Solicitor acknowledged that he was concerned about the clients who had a lot of money in the Holland's Landing project when it failed. He testified that Pan American developed both the Holland's Landing and Davenport Road projects, and borrowed money from the Solicitor's clients to develop both. He acknowledged that he hoped that his clients would get the development costs back out of the sale on Davenport. The Solicitor testified that Reid and Dhamalie were never principals of Pan American, but rather that only Mr. Finlason was a principal of Pan American. The Solicitor added that he was himself a member of the development team on the Holland's Landing project, and that the original idea was that everybody who worked on that development would become shareholders of Pan American and donate a third of their fees, and not be paid until the project was sold.

Counsel for the Solicitor called Mark Guslits, an employee of the Daniels Group, to testify. Mr. Guslits testified that his first contact with the Solicitor concerning the Davenport Road project occurred in the summer of 1993. He testified that the Daniels Group expressed interest in the possibility of acquiring the property on behalf of a non-profit group.

Mr. Guslits testified that the potential development foundered for two reasons: first, Alderman Betty Disero was able to arrange for the zoning necessary to convert the property into multiple residential use to be revoked; and second, upon the election of the Conservative Government in Ontario the project was officially cancelled along with every other non-profit project in the Province on June 8, 1995.

The Solicitor's counsel also called David Molyneaux as a witness. Mr. Molyneaux is an architect. He testified that his firm had been instructed by Pan American to prepare documents and undertake discussions with City Home. He testified that as of January 1992 the Davenport Road development "was a promising project".

1997 CanLII 915 (ON L.S.D.C.)

Mr. Molyneaux testified that he was told that his firm would be paid for its services out of the funds received on closing, which was expected to be in March or April of 1992. He later learned, however, that City Home was not going to complete the deal, presumably because the money was then not going to be available from the Ministry of Housing.

In cross-examination Mr. Molyneaux testified that his recollection was that it was close to the end of January 1992 when he was told that City Home would not be completing the project. He added that it was not presented to him as a fait accompli, though his assumption was that it might be a fait accompli because there was a great deal of "jitteryness" in the industry about the Ministry of Housing money at that particular time and from that time onwards.

The Panel is not satisfied on all the evidence that there was an agreement between Mrs. Steed and the Solicitor that the Solicitor's authority to invest in mortgages was limited to investing $200,000 in any single mortgage. The Panel accepts that as of early to mid-January 1992 when Mrs. Steed's $675,000 mortgage loan was advanced, the Solicitor had a reasonable expectation that the sale to City Home would be completed on April 1, 1992 and that if that occurred Mrs. Steed's mortgage would have been repaid with interest. Further, the Panel is not satisfied that at the April 1993 meeting that Mr. Zabinsky attended, the Solicitor apologized for not obtaining Mrs. Steed's instructions before advancing $675,000 of Mrs. Steed's money on the basis of mortgage security on the Davenport Road properties.

However, bearing in mind that the applicable standard of proof is that the Panel must be satisfied on cogent evidence of clear and convincing weight, the Panel is satisfied that before loaning money on the security of a mortgage on Mrs. Steed's behalf the Solicitor had a duty to communicate the amount and terms of the loan to Mrs. Steed. The Panel is also satisfied to the necessary degree of certainty on all the evidence that the Solicitor failed to do so.

The Solicitor acknowledged in paragraph 114 of the agreed statement of facts that Mrs. Steed advised him that prior to investing in mortgages she wished him to call her and advise her of the essential elements of the investment. Although it is clear both from the agreed statement of facts and from Mrs. Steed's evidence that she gave these instructions not because she anticipated having to veto any prospective investments but rather so that she would know the whereabouts of her funds, Mrs. Steed was nevertheless entitled to instruct the Solicitor not to carry through with a proposed mortgage investment if, after receiving the particulars of the investment, she was uncomfortable in doing so.

In the Panel's view, it is unlikely that Mrs. Steed would have required the Solicitor to inform her of any proposed purchase of

1997 CanLII 915 (ON L.S.D.C.)

real estate, without requiring similar information about any proposed mortgage loan — particularly if, as the Panel has found, no limitation was placed on the size of any such investments.

While it is true that Mrs. Steed was not a particularly sophisticated investor, there is little doubt that she was most interested in where her money was being invested.

Although the Committee is not satisfied that Mrs. Steed placed a $200,000 limit on individual mortgage investments, it accepts Mrs. Steed's evidence that she first learned of the $675,000 loan on June 15, 1992, five months after the funds were advanced, and six weeks after the scheduled closing of the sale of the properties to City Home.

In the Panel's view nothing in her April 9, 1992 letter is inconsistent with Mrs. Steed's evidence that, prior to that date, the Solicitor was authorized to invest in mortgage loans but only after informing her of the particulars. In her April 9, 1992 letter Mrs. Steed terminated the Solicitor's authority to negotiate any mortgages for her portfolio. Her expression of trust in the Solicitor must be considered in the context of the fact that she did not learn of the $675,000 mortgage investment that the Panel finds was unauthorized until almost two months after her April 9, 1992 letter.

The Panel was troubled not only by the Solicitor's failure to inform Mrs. Steed of the $675,000 investment before the funds were advanced, but also by the Solicitor's failure to inform her thereafter. It is apparent that the Solicitor reported in writing on both the Lazaridis mortgage, which was in the amount of $50,000, and on the loan to Mrs. Steed's daughter and prospective son-in-law, which was in the amount of $315,000, yet did not report on the $675,000 loan either in writing or (as the Panel has found) orally until June 11, 1992, approximately five months after the loan was advanced. The Panel accepts Mrs. Steed's evidence that during the trip to Brantford, though the Solicitor informed her "about some small loans he had made" and told her they were safe, he did not tell her that he had loaned $675,000 - a large portion of her funds - in the Davenport Road project. By the end of March, when the trip to Brantford took place, the Solicitor had known for some time that the City Home purchase would not be completed on April 1, and the Panel finds (in reliance in part upon Mr. Molyneaux's evidence) that it was at least doubtful that the necessary government funding to complete the transaction would be forthcoming. The inference the Panel draws from the Solicitor's failure to disclose the transaction to Mrs. Steed either before or for several months after the investment was made is that his decision to invest the $675,000 was influenced more by his desire to benefit the clients who had invested in the abortive Holland's Landing project than by a concern for the safety of Mrs. Steed's investment.

1997 CanLII 915 (ON L.S.D.C.)

The Panel accordingly finds that Particular 2(a) of Complaint D246/93 has been established and that the Solicitor misapplied $675,000 of funds belonging to his client Jeanette Steed.

Particular 2(b) of Complaint D246/93

Particular 2(b) of Complaint D246/93 reads as follows:

"In the period November 4, 1991 to December 30, 1991, [the Solicitor] transferred $224,745.41 from his trust account to his general account representing fees and disbursements prior to the delivery of a fee billing as required by section 14(8)(c) of Regulation 708 under the Law Society Act.

As mentioned above, Mr. Mark conceded in argument that the Solicitor had transferred funds from his trust account to his general account for fees and disbursements before delivering a fee billing as required by section 14(8)(c) of Regulation 708 under the Law Society Asct.

The Solicitor testified that Mrs. Steed and he had agreed on what fees would be paid out of the money that was coming to her. The Solicitor understood the agreement to have been that $135,000 would be paid out of the funds in trust to him for fees.

The Solicitor added that Mrs. Steed had previously asked him to hold off on taking his fees until her matrimonial dispute was either settled or tried, and that he accommodated her for a period of six or seven months. He added that when the settlement cheques were received from Osler, Hoskin & Harcourt in November 1991 Mrs. Steed told him he should be sure to take his fees out promptly because she appreciated his holding off on billing previously. He testified that he made out the account for $135,000 plus disbursements and GST and transferred that money to his general account, but did not send the account to Mrs. Steed. "I made a mistake," he testified. "I should have sent it out then. But she knew about it."

The Solicitor further testified that towards the end of December 1991 he received a further $74,900 from Mrs. Steed's ex-husband's lawyers in Nova Scotia, and that he made out another account at that time and transferred the funds to his general account, again without sending the account to Mrs. Steed.

The Solicitor further testified that when Mrs. Steed's daughter Mrs. Pearson became involved she and Mrs. Steed questioned the amount that had been paid to the Solicitor for fees. The Solicitor explained the disagreement on the basis of a misunderstanding concerning whether the Solicitor would be entitled to keep party-and-party costs in addition to the agreed upon fee. As the difference was approximately $60,000, the Solicitor testified, he and Mrs. Steed and Ms Pearson agreed to "split the difference", and he rebated $30,000 together with $2,100 for GST to Mrs. Steed. He prepared and delivered an

1997 CanLII 915 (ON L.S.D.C.)

account corresponding to this compromise agreement at that time, in July 1992.

Based upon the Solicitor's evidence and his counsel's concession during argument, the Panel finds that Particular 2(b) is made out in that the Solicitor transferred $224,745.41 from his trust account to his general account for fees and disbursements prior to the delivery of the fee billing as required by Section 14(8)(c) of Regulation 708 under the Law Society Act.

Complaint D189/93 - Particular 2(a) - Alleged Misapplication of $35,000 From Ruth Ramsbottom

The Law Society alleges in paragraph 2(a) of Complaint D189/93 that:

"on or about May 21, 1992 [the Solicitor] misapplied $35,000, more or less, from his client Ruth Ramsbottom"

(b) Agreed Statement of Facts

In one of the agreed statements of fact that the Panel admitted into evidence, the parties agreed as follows:

15. The Solicitor was retained by Floyd Ramsbottom in connection with a motor vehicle accident which occurred in January 1985. Mr. Ramsbottom died suddenly of a heart attack on March 21, 1991 during his sleep. The Solicitor continued the action on behalf of his wife, Ruth.

16. Ruth Ramsbottom is 56 years of age. She has only a grade ten education.

17. Mr. and Mrs Ramsbottom met the Solicitor when he became a co-owner of an apartment building at 114 Holland Street West, Bradford, Ontario, where the Ramsbottoms were the superintendents. During the course of their employment, the Ramsbottoms met the Solicitor on several occasions prior to their retainer of him to act in respect of the motor vehicle accident.

18. The Ramsbottom litigation settled on or about May 11, 1992. On May 21, 1992 the Solicitor deposited settlement funds of $167,482.71 into his mixed trust account. Of this amount $95,000 was disbursed to the firm of Osler, Hoskin & Harcourt to settle Go Transit's subrogated claim; and, $13,902.50 was taken by the Solicitor as fees. A further $239.91 was paid to Jeanette Steed as loan interest. This loan from Jeanette Steed was made on May 15, 1992 for the purpose of allowing the Solicitor to withdraw money for fees in the amount of $17,300.18 which he did on the same day, as evidenced by his client trust ledger attached as Exhibit 5 to this agreed statement of facts. The Solicitor took a further $11,902.60 on account of fees on May 21, 1992 and a further amount of $2,000 on June 2, 1992.

1997 CanLII 915 (ON L.S.D.C.)

19. The Solicitor did not seek Mrs. Ramsbottom's authority to borrow the funds referenced in paragraph 5 above to pay his fees, nor did he ever advise either Mrs Steed or Mrs. Ramsbottom of his intention to do so. In fact the Solicitor has never told Mrs. Ramsbottom of the loan from Mrs. Steed. The Solicitor also admits that he did not send Mrs. Ramsbottom an account for the monies withdrawn as fees although the Law Society auditor did find an original account in the Solicitor's file during the course of his audit, a copy of which is attached as Exhibit 6 to this agreed statement of facts.

20. The Solicitor advised Mrs. Ramsbottom by telephone on the 8th day of May, 1992 that the gross offer for her was $52,225.00 to settle her husband's litigation, that his fees in the matter would be approximately $12,000.00 and that would net her $40,000.00 or a little more, which terms she approved and authorized as evidenced by the Memorandum dated the 12th day of May, 1992 as Exhibit 7 and confirmed by reporting letter dated the 13th day of May, 1992, a copy of which is attached as Exhibit 8 to this agreed statement of facts.

21. The Solicitor disbursed $35,000 of the approximate $44,000 that remained of the settlement funds to other clients as follows:

May 21/92 Pan American Holdings $10,000.00 May 21/92 Transfer to W.H.F. Construction and Equipment Ltd. a/c 5,000.00 May 21/92 Transfer to W.H. F. Construction and Equipment Ltd. a/c (both amounts paid to company) 10,000.00 May 21/92 Transfer to Finlason/Reid/Dhamalie a/c (paid to Security Trust Company) 5,304.00 May 22/92 Transfer to Richard Facey a/c (paid to client) 4,696.00 ——— $35,000.00 ==========

22. All of the transfers are evidenced only by promissory notes, copies of which are attached collectively as Exhibit 9 to this agreed statement of facts.

23. The Solicitor reported to Mrs. Ramsbottom regarding the particulars of the settlement, Exhibit 8. He did not report to her about the advances, of funds set out in paragraph 7 above [reproduced at pages 12 to 13 above], he did, however, send the payments set out in paragraph 35 below under cover of various letters.

24. The Solicitor paid Mrs. Ramsbottom $6,040.22 shortly after receipt of the settlement funds and further amounts as detailed in paragraph 35 below.

25. The Solicitor and Mrs. Ramsbottom will both give evidence regarding the Solicitor's authority to make investments of Mrs. Ramsbottom's monies. Mrs. Ramsbottom will give evidence that she did not give the Solicitor authority to invest her funds. It would be Mrs. Ramsbottom's evidence and that of her son, Wayne Smith, that it was during a telephone conversation between Mr.

1997 CanLII 915 (ON L.S.D.C.)

Smith and the Solicitor during July 1992 that the Solicitor disclosed the fact of the "investments" being made.

26. Mrs. Ramsbottom retained counsel, Mr. Uukkivi in late November 1992, to secure the return of the remaining funds. Mr. Uukkivi wrote to the Solicitor by letter dated December 9, 1992 advising that he had been retained by Mrs. Ramsbottom requesting an accounting of all funds by the Solicitor on behalf of Mrs. Ramsbottom, among other things. A copy of Mr. Uukkivi's December 9, 1992 letter is attached as Exhibit 10 to this agreed statement of facts. The Solicitor responded by letter dated December 17, 1992 in which he enclosed a cheque in the amount of $1,000 payable to Mrs. Ramsbottom. The Solicitor did not address any of the issues raised in Mr. Uukkivi's December 9 letter; however, the Solicitor did explain some of the circumstances of the investments on the telephone.

27. Mr. Uukkivi wrote to the Solicitor again by letter dated January 11, 1993, a copy of which is attached as Exhibit 11 to this agreed statement of facts.

28. The Solicitor responded by letter dated January 15, 1993, under cover of which he enclosed the Ramsbottom accident file.

29. The Solicitor wrote to Mr. Uukkivi again on January 18, 1993 providing a somewhat more detailed review of Mrs. Ramsbottom's file. A copy of the Solicitor's January 18, 1993 letter is attached as Exhibit 12 to this agreed statement of facts.

30. Mr. Uukkivi responded by letter dated January 25, 1993, a copy of which is attached as Exhibit 13 to this agreed statement of facts. Mr. Uukkivi reiterated his request for information as to the current status of Mrs. Ramsbottom's funds.

31. Mr. Uukkivi wrote to the Solicitor again on January 27 and February 9, 1993. In these letters Mr. Uukkivi addressed the issue of a lack of formal accounting to Mrs. Ramsbottom. Copies of these letters are attached collectively as Exhibit 14 to this agreed statement of facts.

32. Mr. Uukkivi and the Solicitor spoke on February 19, 1993. During their conversation the Solicitor assured Mr. Uukkivi that he would provide the information sought in the previous correspondence in writing. The Solicitor offered to enclose in his letter of requiring a cheque in the amount of $2,000 by way of a payment to Mrs. Ramsbottom. The Solicitor indicated to Mr. Uukkivi that this information would be provided on February 22, 1993.

33. By letter dated February 23, 1993, the Solicitor provided Mr. Uukkivi with copies of the promissory notes evidencing the indebtedness as set out in paragraph 5 of the agreed statement of facts. The Solicitor wrote to Mr. Uukkivi again on April 28, 1993 by way of letter in which he enclosed a cheque in the amount of

1997 CanLII 915 (ON L.S.D.C.)

$4,430.00, a copy of both letters are attached collectively as Exhibit 15 to this agreed statement of facts.

34. By letter dated March 1, 1993, Mr. Uukkivi wrote to the Solicitor confirming their conversation and advising that the information had not been provided as promised. A copy of Mr. Uukkivi's March 1, 1993 letter is attached as Exhibit 16 to this agreed statement of facts.

35. The Solicitor has made payments to Mrs. Ramsbottom as follows:

May/June 1992 $6,040.22 July 16, 1992 478.50 July 20, 1992 1,000.00 August 4, 1992 1,000.00 August 19, 1992 1,200.00 September 16, 1992 1,000.00 September 30, 1992 1,000.00 October 7, 1992 4,000.00 December 17, 1992 1,000.00 February 23, 1993 2,000.00 April 29, 1993 4,430.00

The Solicitor characterizes the July 16, 1992 payment in the amount of $478.50 as a payment of two months interest on some of the monies advanced in paragraph 7.

36. By the Solicitor's own calculation, as at the April 29, 1993, there remained an amount outstanding to Mrs. Ramsbottom of $19,273.12.

37. Mrs. Ramsbottom commenced an action for repayment of the sums owed to her. Copies of the pleadings are attached collectively as Exhibit 17 to this agreed statement of facts.

38. Mrs. Ramsbottom owed her children money which she had borrowed from time to time to maintain herself. By February 1994 she owed $4,000 in rent to her landlord. Mrs. Ramsbottom's sole source of financial support is a disability pension of $760 per month. She cannot work both as a result of a heart attack she suffered in July 1991 and because of a progressive lung disease.

39. The litigation between the Solicitor and Mrs. Ramsbottom is now settled. The matter was settled on the basis of a $25,000.00 payment to Mrs. Ramsbottom in full settlement of her claim comprised of a principal amount of $18,000.00 with the remainder representing interests and costs. The Society accepts the fact that full restitution has been made to Mrs. Ramsbottom.

(b) Viva Voce Evidence

Ruth Ramsbottom testified that she has a grade ten education. After leaving school she worked at Davis Leather in Newmarket for eight years. She married in 1956 and had eight children. She and her husband divorced. She was married again, to Floyd Ramsbottom, in 1976.

Mrs. Ramsbottom and her second husband worked as superintendents at an apartment building on Holland Street in Bradford. They met the Solicitor there in 1980, when the Solicitor was involved in

1997 CanLII 915 (ON L.S.D.C.)

purchasing the apartment building on behalf of a syndicate of investors.

Floyd Ramsbottom was injured in a bus accident in 1985. Mr. and Mrs. Ramsbottom retained the Solicitor to pursue a claim for damages for personal injuries on their behalf. Mr. Rambottom died in March 1991, before the claim was resolved.

Mrs. Ramsbottom confirmed that in May 1992 the Solicitor informed her by telephone that he had received a settlement offer, and that after his fees of approximately $12,000 were deducted she would receive $40,000 or a little more if she accepted the offer. She also confirmed that she authorized the Solicitor to accept the settlement offer.

Mrs. Ramsbottom also testified that she told the Solicitor during the telephone conversation that she needed the money to pay bills and to pay back loans from her children. She added that she had no savings at the time. She arranged to attend at the Solicitor's office to sign documents in connection with the settlement.

A few days later, Mrs. Ramsbottom testified, her son Wayne Smith drove her to the Solicitor's office.

Mrs. Ramsbottom testified that after she signed the settlement documents she asked the Solicitor when she would be receiving the settlement funds, and that he told her it would be about ten to fourteen days. She added that he asked her whether she needed any money at the present time and she said she did. She testified that he asked her to give him a round figure, that she said she needed $5000 or more, and that he gave her a cheque for $6000. (As mentioned below, Mrs. Ramsbottom in fact received this cheque about three weeks later.)

Mrs. Ramsbottom testified that she owed money for rent and had lost her telephone because she had not paid telephone bills. She also testified that the cable television had been cut off, and that she had drugs to pay for. Her income at the time was $691 a month from the Canada Pension Plan.

Mrs. Ramsbottom testified that she understood that the balance would be sent to her as soon as the Solicitor received it. She testified that when she met with the Solicitor they had no discussion about obtaining a loan to pay the Solicitor's fee. She added that she is not familiar with what mortgages or promissory notes are.

Approximately three weeks later Mrs. Ramsbottom received a cheque in the amount of $6,040.22 under cover of a letter from the Solicitor dated June 2, 1992. Upon receiving this cheque, Mrs. Ramsbottom testified, she expected the balance would be sent to her as soon as the Solicitor received it.

1997 CanLII 915 (ON L.S.D.C.)

She testified that she had no other discussions with the Solicitor at any other time concerning what she wanted to do with the settlement funds.

Mrs. Ramsbottom testified that she had to phone "many, many times and actually nearly begged to have my money sent to me." Apart from the $6,040.22, she received money from the Solicitor "in bits and drabs". She testified that the Solicitor "would take his time in sending it and then I would have to have — my son would phone down".

Mrs. Ramsbottom testified that she did not receive all of her money back as a result of those telephone calls. In November 1992 she retained another lawyer, Indrek Uukkivi, who eventually commenced an action to recover Mrs. Ramsbottom's funds. Eventually, she testified, she received payment of all the funds owing to her.

On cross-examination Mrs. Ramsbottom denied that she knew that in addition to handling law suits the Solicitor also invested money for clients. She acknowledged that when she met with the Solicitor she did not say that she owed money to her children, but rather just that she owed money.

She denied that the plan at that time was to get an amount of money for her immediately, to pay her debts, and to leave the balance of the money invested so that she had a higher monthly amount to spend than she would have on her $691 pension.

Mrs. Ramsbottom acknowledged that in July, August and September she asked for further money - on two occasions to pay money owed to her daughter - and that the Solicitor complied with these requests. She testified that throughout this period "I was wondering why I wasn't getting my own money so I could divvy it out myself and use it for myself".

Mrs. Ramsbottom denied that she had agreed with the Solicitor that he would carry out an arrangement by which he would hold the balance of the insurance monies less the $6,000 and give her monthly interest payments to increase her income: "No, no, no. I wanted all my money at once and he told me as soon as it comes through, within the week to — ten to fourteen days, that I would receive it. I didn't expect to get it in little dribs and drabs."

Mrs. Ramsbottom denied discussing working out interest rates with the Solicitor when she was in his office.

Mrs. Ramsbottom's son, Wayne Smith, was also called by the Law Society's counsel to give evidence. He testified that in 1992 he lived next door to his mother in Newmarket. He was aware of his mother's financial situation at the time. She was $5000-$6,000 behind in her rent and owed about $900 to Bell Canada, which had disconnected her telephone service. She also owed a small amount to Mr. Smith himself, who had paid her cable bill so that she was able to watch television. Mr. Smith added that his mother used to

1997 CanLII 915 (ON L.S.D.C.)

eat supper at his home most of the time, and that his sister took her to the food bank a few times. Mr. Smith also testified that his mother has a bad heart condition and that, even after the law suit was settled, there were a few times when she did not even have any money to buy her medication.

Mr. Smith testified that on one occasion after the law suit was settled he went into his mother's house for a visit and she was crying at the table. When he asked her what was wrong she told him that she did not have any money. He asked about the money from the settlement and she said that she almost had to beg the Solicitor to get money, and that she had phoned and phoned and hadn't gotten any.

Mr. Smith testified that he accordingly took it upon himself to telephone the Solicitor and that the Solicitor sent her a cheque for $1,000 or $1,500.

When he was asked whether the Solicitor had provided any explanation for why he wasn't sending Mrs Ramsbottom's money as quickly as she wanted it, Mr. Smith responded that the Solicitor had just said that it was invested. Mr. Smith added that when he asked the Solicitor who had approved the investment, the Solicitor responded, "well, I took it in your mother's best interest".

Mr. Smith testified that he spoke to the Solicitor on four or five other occasions "to try and get my mother some money". Eventually, Mr. Smith testified he telephoned Mr. Uukkivi, a personal friend, and asked him as a favour to look into the problem.

On cross-examination Mr. Smith agreed that when he called the Solicitor he would ask for a certain amount of money that his mother needed to pay debts that were accumulating, and that he did not ask for the whole amount to be paid. He explained that neither he nor his mother had any idea how long it took for money to come in from the settlement of a law suit. He testified that he learned that the Solicitor had invested the money only during one particular telephone conversation with the Solicitor, at which time Mr. Smith asked why it was taking so long for the settlement money to come in. Mr. Smith testified that "that's when he told me that he had invested it in her best interests. When I got off the 'phone I asked my mother about that and she said she had no — she signed no papers or had no conversation about the money to be invested." Mr. Smith testified that it was as a result of this discussion that he sought Mr. Uukkivi's assistance.

The Solicitor testified that after Mr. Ramsbottom's claim was settled on the basis of a net payment to Mrs. Ramsbottom of $41,000, Mrs. Ramsbottom came into his office, and "I asked what she wanted, how much she wanted." He testified that Mrs. Ramsbottom said that she only needed $6,000. He added that Mrs. Ramsbottom had known that he had handled investments for people,

1997 CanLII 915 (ON L.S.D.C.)

and that she was concerned about getting sufficient income for the next year or two. He testified that they had a discussion about interest rates, that Mrs. Ramsbottom asked him to invest the money for her because she wanted income. Unfortunately, he added, it turned out that her children needed money, and he responded to several requests over the next few months that amounts ranging from $1,000 to $4,000 be paid to Mrs. Ramsbottom out of the invested funds (as particularized in paragraph 35 of the Agreed Statement of Facts above).

The Solicitor added that Mrs. Ramsbottom knew as a result of a discussion that he had with her that the persons and companies to whom her money was loaned (as listed in paragraph 21 in the Agreed Statement of Facts above) were clients of his. (These persons and companies included Pan American and Reid/Dhamalie/Finlason.)

The Solicitor testified that some of the investments flourished but others did not because they went into real estate investment at a time when real estate values were deteriorating.

When he was contacted by Mr. Uukkivi, the Solicitor testified, he told Mr. Uukkivi that the best he could possibly do was try to sort it out and pay about $1,000 a month. That was not satisfactory to Mr. Uukkivi, so he sued.

On cross examination the Solicitor acknowledged that his correspondence to Mrs. Ramsbottom at the relevant time does not confirm that he was instructed by her to invest any part of the settlement funds on her behalf, let alone confirm her authority to loan her funds to the particular borrowers involved, who were clients. He did not send her copies of the promissory notes that were the only security for the investments, and sent no reporting letter concerning the investment.

The litigation was settled on May 11, 1992, and the Solicitor deposited the settlement funds into his mixed trust account on May 21, 1992. As acknowledged in paragraphs 18 and 19 of the Agreed Statement of Facts, on May 15, 1992 the Solicitor arranged for his client Jeanette Steed to loan funds to Mrs. Ramsbottom, so that the Solicitor could withdraw money for fees in the amount of $17,300.18, which he did on the same day. He acknowledged that he did not seek Mrs. Ramsbottom's authority to borrow these funds to pay his fees, and he did not inform either Mrs. Steed or Mrs. Ramsbottom of his intention to do so at any time.

As set out in paragraph 21 of the agreed statement of facts, the Solicitor disbursed $35,000 of the approximately $44,000 that remained of the settlement funds to other clients on May 21. On cross-examination the Solicitor acknowledged that it was only on June 1, 1992 that he finally sent Mrs. Ramsbottom the $6,000 (in fact $6,040.22) that she had told him that she needed.

The essential issue that the Panel is called upon to determine is whether the Solicitor was authorized by Mrs. Ramsbottom to invest

1997 CanLII 915 (ON L.S.D.C.)

approximately $35,000 of the settlement funds by way of loans to other clients of the Solicitor. If he diverted Mrs. Ramsbottom's funds to the benefit of his other clients without Mrs. Ramsbottom's authority the complaint of misapplication will have been made out.

The Panel considered Mrs. Ramsbottom's testimony to be credible and convincing. The Panel also considered the documentation available from the Solicitor's file to be entirely consistent with the evidence of Mrs. Ramsbottom and Mr. Smith.

The Solicitor carefully documented Mrs. Ramsbottom's instructions to settle her husband's law suit, both in the form of a memorandum to file dated May 12, 1992 and in a letter to Mrs. Ramsbottom dated May 13, 1992. In the May 13 letter the Solicitor confirmed that it was on May 11, 1992 that Mrs. Ramsbottom attended at his office to sign a release.

In neither his memorandum to file dated May 12, 1992 (confirming instructions to settle received on May 8, 1992) nor in his letter of May 13, 1992 did the Solicitor make any reference to his having received instructions to invest any part of the settlement funds on Mrs. Ramsbottom's behalf. In the letter of May 13 he wrote that "I am advised that the settlement funds should be through within a week or two and I shall let you know as soon as I hear."

Again, when the Solicitor wrote to Mrs. Ramsbottom to provide her with a cheque for $6,040.22, approximately two weeks after he invested the balance of her funds, he made no reference to having received her instructions to invest the balance of the settlement funds on her behalf.

Nor are the alleged instructions to invest referred to in any other document either prior to or within at least several weeks after the funds were advanced to the Solicitor's other clients on May 21, 1992.

As Mr. Mark pointed out in argument, beginning on July 16, 1992 the Solicitor wrote to Mrs. Ramsbottom to forward monthly payments of interest. It would have been apparent to a client more sophisticated that Mrs. Ramsbottom that she was receiving interest on invested funds. It was by no means clear to the Panel that Mrs. Ramsbottom concluded from this correspondence that her money had been invested by the Solicitor. The Panel accepts Mr. Smith's evidence that it was only during the telephone conversation with the Solicitor some months after the original investments that he learned that the Solicitor had invested his mother's money, and that neither he nor his mother knew how long it took for funds from the settlement of a law suit to be paid.

The Panel also considered it highly improbable that Mrs. Ramsbottom, who had debts that were significant to her and who was having difficulty managing to pay for even the necessities of life would authorize her lawyer to invest funds that she needed

1997 CanLII 915 (ON L.S.D.C.)

to persons involved in a project that by May 1992 could only be considered speculative.

Mr. Mark submitted that in investing Mrs. Ramsbottom's funds the Solicitor was acting not as a lawyer but as a scrivener, that is, as an agent to whom property is entrusted by others for the purpose of lending it out at an interest payable to his principal. It follows, Mr. Mark contended, that even if the Panel is satisfied that the Solicitor invested the funds without Mrs. Ramsbottom's instructions, he cannot be found guilty of professional misconduct; rather, if anything, he is guilty of conduct unbecoming a barrister and solicitor.

The Panel rejects this argument. It is clear that Mrs. Ramsbottom regarded the Solicitor as her lawyer, and that it was in that capacity that he was retained to act on Mr. Ramsbottom's personal injury claim. The investment of the settlement funds, in the Panel's view, is properly regarded as part of a continuing solicitor-client relationship, rather than being outside the Solicitor's professional responsibilities. The Solicitor's letter of August 19, 1992 in which the Solicitor writes, on his law firm's letterhead, "I act on behalf of Mrs. Ramsbottom" is entirely consistent with this conclusion.

The Panel is accordingly satisfied, on the basis of evidence that it considers both cogent and of clear and convincing weight, that particular 2(a) in Complaint D189/93 has been made out.

2(b) Complaint D189/93 - Alleged Misapplication of $89,131.13 from Phyllis Winters Estate

Particular 2(b) of complaint D189/93 reads as follows:

"On or about June 11, 1992, [the Solicitor] misapplied $89,131.13 more or less from the estate of Phyllis Winters."

(a) Agreed Statement of Facts

In one of the Agreed Statements of Facts that the Panel admitted into evidence the parties agreed as follows:

40. Phyllis Winters died on May 9, 1992. The Solicitor was a co-executor and solicitor of her estate. Ralph Gibson, a fellow member of Ms. Winters' church, was named as the other co-executor.

41. Letters of probate were issued on May 29, 1992. The entire residue of Ms. Winters' estate was to be paid to the Watch Tower Bible & Tract Society of Canada. The Estate consisted mainly of bank accounts. On June 9, 1992, the proceeds of these accounts totalling $109,055.42 were deposited into the Solicitor's trust account. A bulk of these funds came from an account at Central Guaranty Company of Canada which the Solicitor requested by way of letter dated June 5, 1992 a copy of which is attached as Exhibit 18 to this agreed statement of facts.

1997 CanLII 915 (ON L.S.D.C.)

42. The Solicitor disbursed the bulk of the Estate's funds as follows, as is shown by the trust ledger account attached as Exhibit 19:

June 11/92 Transfer to Ronald Hodgins a/c $14,001.49 June 11/92 Transfer of Classic Delivery Services a/c 5,417.76 (Reid/Dhamalie) June 11/92 Transfer of Momm Electric a/c 12,348.32 June 11/92 Transfer to Classic Delivery Services a/c 33,750.00 (Reid/Dhamalie) (above transfers all paid to Jeanette Steed) June 11/92 Transfer to Family Home Improvements Ltd. a/c 20,000.00 (funds paid to F. Mott-Trille for fees & disbursements) June 12/92 Howard Finlason 3,613.56 ——— $89,131.13 ==========

43. The first three loan amounts set out above were actually paid to Jeanette Steed and represented repayment to her of loans to the same clients. The fourth payment to her of $33,750 represented the quarterly mortgage payment on the second mortgage she held on 2019-2035 Davenport Road, Toronto.

44. The $20,000 transfer to Family Home Improvements Ltd. ledger, (a client of the Solicitor) was paid to the Solicitor for fees and disbursements in the matter of Family Home Improvements Ltd. v. Copa et al. The Solicitor's position is that he felt that the loan was properly secured in that $30,000.00 had been paid into Court for the benefit of Family Home Improvements Ltd. (construction lien holdback). Attached collectively as Exhibit 20 to this agreed statement of facts are the Reasons for Decision of Master Clarke (2), and Authorization and Direction of Family Home Improvements and the Order of Master Clarke. The $30,000.00 was paid out of Court to Family Home Improvements Ltd. in March 1994 and the loan plus interest for a total of $25,465.66 was repaid in full on March 24, 1994 after a pending appeal was dealt with.

45. The Solicitor also took $5,000 in executor's fees and $8,579.23 in legal fees in June 1992. The Solicitor borrowed $3,000.00 from his co-executor, Ralph Gibson, whose evidence would be that the Solicitor advised him the money would be to pay probate fees. However, the probate fees were actually only $550.00 and the balance of the $3,000.00 was used to pay part of the Solicitor's fees. The Solicitor repaid Mr. Gibson the $3,000.00 by cheque under cover of letter dated June 10, 1992.

46. In June 1992, Mr. Gibson also received a payment of $5,000.00 representing executor's fees. A further payment of approximately $1,286.91, was made to Ralph Gibson on June 9, 1992 to reimburse him for expenses incurred in respect of Ms. Winters.

47. After the events regarding this estate came to light, the Watch Tower demanded the return of funds paid to Mr. Gibson from him. By letter dated March 3, 1993, the Watch Tower Society acknowledged Mr. Gibson's return of the cheque in the amount of $1,286.91 representing amounts incurred by him in relation to the administration of the estate. The Watch Tower Society is still seeking return of his executor's fees pretaken. The Solicitor takes the position that the $1,286.91 payment to Mr. Gibson was

1997 CanLII 915 (ON L.S.D.C.)

for a debt legitimately owed by the Estate. The [Law] Society would not offer any evidence to the contrary.

48. The Solicitor did not advise Mr. Gibson that it was improper to take executor's fees prior to the passing of accounts of the estate and Mr. Gibson would not have done so had he been provided with this advice by the Solicitor. The principles set out in Re Knoch (1982), 12 E.T.R. 162 were not followed.

49. During the Society's investigation of this matter, the Solicitor advised the Law Society's examiner that the Watch Tower Society was aware it was a beneficiary of the Estate through the co-executor, Ralph Gibson. The Watch Tower Society denies that this was the case. On October 28, 1992, the examiner spoke with the Watch Tower Society's Secretary-Treasurer, Andre F. Ramseyer. Mr. Ramseyer advised that the Watch Tower Society had no knowledge it was a beneficiary of the estate.

50. On November 3, 1992, the same examiner spoke with the co-executor of the Estate, Ralph Gibson. Mr. Gibson advised that he had no idea the Estate's funds were being loaned to other clients of the Solicitor's law practice. He assumed the funds had already been disbursed to the Watch Tower Society because the Solicitor was dealing with all legal matters of the Estate. The Solicitor did report to Mr. Gibson by letter dated June 9, 1992 forwarding a copy of the notice to creditors appearing in the Globe & Mail with distribution to be made after September 21, 1992.

51. The Watch Tower Society wrote to the Solicitor by letter dated November 6th, 1992 requesting the status of the Antoniuk, Finlay and Winters estates, a copy of the Watch Tower Society's November 6th, 1992 letter is attached as Exhibit 21 to this agreed statement of facts. The Solicitor provided the Winters file in its totality including the trust ledger to the Watch Tower Society on November 12, 1992.

52. The Solicitor provided an accounting to the Watch Tower Society on April 7, 1994, a copy of which is attached as Exhibit 22 to this agreed statement of facts. This was the only written accounting provided by the Solicitor.

53. The Momm loan of $12,384.21 (together with interest of $398.49) was paid and forwarded to the Watch Tower Society on November 10, 1992. In addition, a payment of $1,286.91 was made on March 1, 1993. A recent payment of $25,465 was made on March 24, 1994.

54. The Watch Tower Society maintains that it is owed $60,030.24 from the Winters Estate. The Solicitor disputes that at least $1,473.88 representing disbursements is owing. As well, the Solicitor disputes his obligation to repay the executor's fees taken. His position is set out in a letter to the Watch Tower Society dated April 20, 1994, a copy of which is attached as Exhibit 23 to this agreed statement of facts. The Solicitor corresponded further with the Watch Tower Society by letter dated

1997 CanLII 915 (ON L.S.D.C.)

June 7, 1994, a copy of which is attached as Exhibit 24 to this agreed statement of facts. The Watch Tower Society responded by letter dated June 11, 1994, a copy of which is attached as Exhibit 25 to this agreed statement of facts.

(b) Viva Voce Evidence

Andre Ramseyer testified that between 1980 and the end of 1994 he was employed as the Financial Comptroller and Secretary-Treasurer of the Watch Tower Society. The Watch Tower Society promotes the objectives of the Jehovah's Witness religion. Mr. Ramseyer testified that as Secretary-Treasurer his responsibilities included handling estates in which the Watch Tower Society was designated as a beneficiary.

During the fifteen years that he had these responsibilities, Mr. Ramseyer testified, he generally learned of bequests through the executor of the estate or the estate's solicitor. On some occasions he learned of the bequests from the Office of the Public Trustee. He was generally informed of such a bequest within a month of the testator's death, he testified.

Mr. Ramseyer testified that he has known the Solicitor for approximately 40 years. Although Mr. Ramseyer held a number of positions in foreign countries early in his career, he testified that he has had more contact (though not extensive contact) with the Solicitor since he (Mr. Ramseyer) returned to Canada 22 years ago. He testified that the Solicitor (who is also of the Jehovah's Witness faith) has been involved in approximately 20 to 24 estates over the last 20 years.

Mr. Ramseyer testified that though Phyllis Winters died on May 9, 1992, and letters probate were issued on May 29, 1992, he did not learn about the bequest to the Watch Tower Society in Mrs. Winters' will until October 28, 1992 (more than four months after the funds were transferred to the persons listed in paragraph 42 of the Agreed Statement of Facts, and after the executor's fees and legal fees specified in paragraph 45 of the Agreed Statement of Facts were paid to the Solicitor). Mr. Ramseyer testified that he learned of the bequest only when he received a telephone call from Daniel Pole (who was a lawyer associated with the Solicitor in practice at the time, and who had also done legal work for the Watch Tower Society) and William Edward of the Law Society.

Mr. Ramseyer also testified that the following day he received a telephone call from the Solicitor. The Solicitor told Mr. Ramseyer during this conversation that he should take note of the Winters estate, Mr. Ramseyer testified, and added that funds belonging to the estate had been invested in short term investments that would be coming due soon. Mr. Ramseyer testified that the Solicitor told him that he (the Solicitor) and Mr. Ralph Gibson were the co-executors of the estate and that the Watch Tower Society should have its funds before very long.

1997 CanLII 915 (ON L.S.D.C.)

Mr. Ramseyer also testified that when the Solicitor sent the letters probate to the Watch Tower Society with his notification that he was handling the estate, Mr. Ramseyer noticed that the letters probate were notarized by the Solicitor's associate, Mr. Pole. He added that Mr. Pole was not acting under the authority of the Watch Tower Society in dealing with the Winters estate.

Mr. Ramseyer testified that the Winters estate was very straightforward. The assets, which were valued at approximately $109,000, were in the form of three or four savings accounts in a bank and a couple of guaranteed investment certificates, and that these were transferred to the Solicitor's trust account.

Ralph Gibson, who was the Solicitor's co-executor, was also called as a witness by the Law Society's counsel. He is 66 years old, and was employed as a contractor prior to his retirement.

Mr. Gibson testified that he and Mrs. Winters were members of the same Jehovah's Witness congregation, and that he had known her for approximately twenty years prior to her death on May 9, 1992.

Mr. Gibson testified that he has known the Solicitor for approximately thirty years, and that almost thirty years ago Mr. Gibson was the executor of another estate for which the Solicitor did the necessary legal work. In that case, again, the Watch Tower Society was a beneficiary.

In the case of the Winters estate, Mr. Gibson testified, he and the Solicitor were co-executors, and the Solicitor also served as the estate's lawyer. Mr. Gibson testified that his own responsibilities, as discussed with the Solicitor, included going through Mrs. Winters' personal belongings, selling her furniture, and notifying her landlord of her death.

Mr. Gibson testified that under cover of a letter dated June 9, 1992 from the Solicitor he (Mr. Gibson) received a cheque that represented payment of executor's fees in the amount of $5,000 together with $286.91 to reimburse him for expenses. Mr. Gibson testified that he had not requested that his fees be paid at that time.

Mr. Gibson testified that he had no further involvement with the estate, and that he concluded that the estate had been wound up because his executor's fees had been paid.

Mr. Gibson testified that he had assumed that it was the Solicitor's responsibility to notify the Watch Tower Society of Mrs. Winters' bequest. Mr. Gibson added that he had no discussions with the Solicitor about how the estate funds were being handled, or about the estate funds being loaned to third parties. He first learned that funds from the estate had been loaned to other clients of the Solicitor's law practice in early November 1992, when William Edward of the Law Society informed Mr. Gibson of the loans.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor testified that his associate, Daniel Pole, had moved to the Toronto area from New Brunswick, where he had handled litigation for the Watch Tower Society. He further testified that Glen How, who was employed as senior counsel to the Watch Tower Society at the relevant time, had proposed that Mr. Pole handle all estates work for the Watch Tower Society in appreciation for the sacrifice that Mr. Pole had made in relocating to Ontario.

The Solicitor testified that Mr. Pole had notarized a copy of Ms Winters' will for the purpose of obtaining probate. The Solicitor explained that he could not notarize the document himself because he was an executor of the estate.

The Solicitor testified that he found it peculiar that Mr. Edward of the Law Society would communicate with Mr. Ramseyer to determine whether he was aware of the Winters estate, in view of the fact that Mr. Pole was familiar with it.

The Solicitor also testified that Mr. Gibson agreed to look after Ms Winters' apartment and to make funeral arrangements, while the Solicitor agreed to handle investments.

The Solicitor testified that not all of the persons to whom he loaned money on behalf of the Winters estate repaid those loans, and that the Solicitor's family raised enough money to write a certified cheque to the Watch Tower Society for approximately $51,000, which was eventually accepted in full and final settlement of the Watch Tower Society's claim against the Solicitor arising out of his handling of the Winters estate.

In cross-examination the Solicitor acknowledged that there were no creditors of Ms Winters' estate; no one responded to the advertisement for creditors that the Solicitor placed in the newspaper. He also acknowledged that he did not provide his co-executor, Mr. Gibson, with particulars of the loans that he made on the estate's behalf, though he testified that Mr. Gibson knew that estate funds were going to be invested. He testified that he thought that the Watch Tower Society would be paid more quickly than it in fact was.

Judy Kelly, who worked as the Solicitor's secretary for approximately 25 years, was also called as a witness by the Solicitor's counsel. She testified that she prepared a notarial certificate to be attached to a copy of Mrs. Winters' will that was admitted to probate; that she prepared the notarial certificate in Mr. Pole's name because the Solicitor was a co-executor and could not notarize the certificate; that she took the document into Mr. Pole's office with the original and asked him to sign the notarial copy because the Solicitor could not; that Mr. Pole flipped over to the notarial page and looked at it and said "Ah, yes, the Winters estate"; and that Mr. Pole signed the notarial copies and returned the documents to her.

1997 CanLII 915 (ON L.S.D.C.)

Daniel Pole was called by counsel for the Law Society in reply. He testified that he was called to the bar in 1987 in New Brunswick and 1991 in Ontario. When he moved to Ontario he practised in association with the Solicitor for approximately two years. His practice has, at all times, been primarily litigation, though when he was associated with the Solicitor he also handled the odd real estate deal or estate, he testified.

Mr. Pole testified that he handled litigation work for the Watch Tower Society while he was associated with the Solicitor. He was not having any discussions at about that time, he testified, about doing solicitor's work on estates in which the Watch Tower Society was named as a beneficiary. He was involved in two estates in which there were litigation issues, he added.

Mr. Pole testified that he first learned of the Winters estate in the fall of 1992 when he was approached by Mr. Edward of the Law Society and asked whether he would be willing to co-sign cheques written on the Solicitor's mixed trust account. He added that though he now understands that he signed a notarial certificate attached to a copy of Ms Winters' will, he had no memory of that at the time. He testified that Judy Kelly must be mistaken if she said that he recognized the Winters estate when he was asked to notarize the notarial certificate.

Mr. Pole testified that when he was approached by Mr. Edward in the fall of 1992 he and Mr. Edward telephoned Mr. Ramseyer, who said that he had not heard of the Winters estate (or the Antoniuk or Finlay estates, either). Mr. Pole added that he told the Solicitor in the parking lot that the Solicitor better do something, and that if he did not Mr. Pole would have to do something himself when he returned from a business trip approximately a week later. (This conversation explains the Solicitor's telephone call to Mr. Ramseyer on the following day, October 29, 1992.)

The Panel considered the fact that in her will Ms Winters conferred a very general power to invest on her co-executors. The Panel also accepts that the Solicitor and Mr. Gibson agreed upon a very natural division of labour that was based upon a model that they had adopted almost 30 years earlier when Mr. Gibson was an executor and the Solicitor was the estate lawyer for another estate. On this model, Mr. Gibson did the physical work of collecting and disposing of Ms Winters' furniture and personal property, while the Solicitor did the necessary legal work. On such a division of responsibility, the task of arranging for estate funds to be invested if necessary would no doubt have fallen to the Solicitor.

In the Panel's view, however, it does not follow that the Solicitor should be absolved of responsibility for informing his co-executor and the beneficiary of the estate, the Watch Tower Society, of the loans of estate funds that he made to other clients. The Solicitor's failure to inform Mr. Gibson of the

1997 CanLII 915 (ON L.S.D.C.)

investments is particularly surprising in light of the fact that he informed Mr. Gibson in writing that he had advertised for creditors, and even that he had paid two accounts that totalled less than $60.

The Panel accepts Mr. Pole's evidence that he was not seized of responsibility for the Winters estate on behalf of the Watch Tower Society. The fact that he signed the notarial certificate that accompanied the application for probate is in no way inconsistent with Mr. Pole's evidence on this point. It is clear from the evidence of the Solicitor and his secretary, Judy Kelly, that the reason Mr. Pole was asked to notarize the notarial copy of Mrs. Winters' will was that the Solicitor himself, as a co-executor, could not do so. The Panel does not consider Ms Kelly's evidence that Mr. Pole said words to the effect of "Ah, the Winters estate" when he was asked to sign the notarial certificate necessarily to be inconsistent with his evidence that he had no responsibility for the Winters estate on behalf of the Watch Tower Society, and did not remember this limited prior involvement with the estate when the estate was drawn to his attention several months later. If Ms Kelly inferred that Mr. Pole was familiar with the estate when he was asked to sign the notarial certificate, in the Panel's view her inference was mistaken.

The Panel accepts Mr. Ramseyer's evidence that he first learned of the Winters estate on October 28, 1992, and that the first communication that the Watch Tower Society received from the Solicitor concerning the estate was in the form of a telephone call from the Solicitor to Mr. Ramseyer the following day, October 29, 1992.

In light of the uncertain state of the Davenport Road project in which the Solicitor's other clients had invested, the Solicitor's investment of the Winters estate's funds in June 1992 can only be regarded as risky. What is lacking in the evidence led on behalf of the Solicitor is any explanation why the Winters estate's funds should have been invested at all, rather than being distributed to the beneficiary. Even if such an explanation had been forthcoming, the only plausible explanation for why the estate funds would be loaned to the persons listed in paragraph 42 of the Agreed Statement of Facts would be to benefit other clients of the Solicitor at the potential expense of the Winters estate and the Watch Tower Society.

Although he was a co-executor of the Winters estate, the estate's funds were not the Solicitor's to deal with as if they were his own. The Panel has concluded on the evidence that the Law Society has established to the necessary degree of certainty that the Solicitor is guilty of professional misconduct in that he misapplied $89,131.13 from the estate of Phyllis Winters as alleged in paragraph 2(b) of Complaint D189/93.

1997 CanLII 915 (ON L.S.D.C.)

Particular 2(c) of Complaint D189/93 - Alleged Misapplication of $65,000 from the Estate of Florence Antoniuk

Particular 2 (c) of Complaint D189/93 reads as follows:

"In or about August 1991, [the Solicitor] misapplied $65,000 more or less from the estate of Florence Antoniuk."

(a) Agreed Statement of Facts

In one of the Agreed Statements of Facts that the Panel admitted into evidence the parties agreed as follows:

55. The Solicitor acted for Florence Antoniuk in the preparation of her will dated April 15, 1991. He also acted for her on the sale of her home in the late spring of 1991. The sale proceeds of Mrs. Antoniuk's property amount to $252,880.96. The Solicitor invested $158,000 of these funds in loans to other clients of his law practice pursuant to a direction signed by Mrs. Antoniuk on May 28, 1991, a copy of which is attached as Exhibit 26 to this agreed statement of facts. The monies loaned were as follows:

(1) Dresar/Finlason $120,000.00 (2) Gaetano/Stevenson $30,000.00 (3) Vlado Dresar $8,000.00

The Law Society's position is that these loans were not properly secured. The Solicitor has produced a copy of an executed unregistered mortgage regarding the Dresar ($8,000.00) loan regarding a property at 960 Huntingwood Drive, Scarborough, a copy of which is attached as Exhibit 27 of this agreed statement of facts. The Solicitor's explanation for failing to register the mortgage is that this property was in the final stages of severance and sale. The Law Society does not accept this explanation.

56. The Dresar/Finlason loan proceeds were actually paid to Ella Stubbs in repayment to her of an earlier loan. Of the funds, loans to Gaetano/Stevenson, $16,708.84 was transferred to the Solicitor's general account for fees and disbursements. The money lent to Vlado Dresar ($8,000.00) was advanced on the security of a promissory note. These funds were paid to Pan American Holdings and were subsequently repaid.

57. Following her release from hospital in or about June, 1991, Mrs. Antoniuk resided in the home of Wendy and Edward Bober, a small two bedroom apartment 99 Tindall Avenue, until her death in that apartment on July 15, 1991 at the age of 80.

58. Prior to Mrs. Antoniuk's death, the Solicitor took $5,309.75 on account of fees for which he prepared three separate fee billings in the amounts of $160.50, $614.20 and $4,695.55. These accounts were for the preparation of Mrs. Antoniuk's Will, and the sale of her home. Copies of the fee billings are attached as Exhibit 28 to this agreed statement of facts.

1997 CanLII 915 (ON L.S.D.C.)

59. Under the terms of Mrs. Antoniuk's will, the Watch Tower Bible & Tract Society of Canada was to receive $40,000 and the Parkdale Congregation of Jehovah Witnesses $1,000. Mrs. Antoniuk's son, James Barber, was the residuary beneficiary. Under the terms of the will, Edward Bober and Agnes Hanna, both of whom were fellow members of the Jehovah Witnesses Kingdom Hall were appointed as co-executors.

60. Mrs. Antoniuk's son sought to contest Mrs. Antoniuk's testamentary capacity and specifically sought to overturn the charitable bequests made. Mr. Barber retained the counsel of Cass, Miller & Associates in this regard. The action to set aside the will was eventually discontinued. The Society does not allege any impropriety on the part of the Solicitor in the preparation of Mrs. Antoniuk's revised will.

61. During the period July 15, 1991 to September 30, 1992, the Solicitor's trust ledger account reveals the following transactions:

Receipts Payments

July 15/91 Trust account balance $ 74,571.21 July 25/91 Fees and disbursements $ 6,955.00 Aug. 1/91 Loan to Hazel Morris 15,000.00 Aug. 2/91 Loan to Hazel Morris 25,000.00 Agnes Hanna - Executor's fees 5,000.00 Aug. 16/91 Fees and disbursements 3,235.00 Aug. 21/91 Loan to Reid/Dhamalie/ Finlason 18,000.00 Aug. 26/91 Repayment of Morris loan 25,222.56 Aug. 29/91 Loan to Reid/Dhamalie/ Finlason 7,000.00 Aug. 28/91 Repayment of Morris loan 15,123.25 Sept. 12/91 Interest on loan to Pan American/Finlason 412.50 Sept. 25/91 Transfer to savings a/c 32,000.00 Nov. 24/91 Disbursements 1,579.66 Nov. 27/91 Transfer from savings a/c 25,000.00 Nov. 27/91 Cass Miller & Associates re: James Barber 25,000.00 Jan. 21/92 TD Bank - balance from Mrs. Antoniuk's bank a/c 6,408.77 Jan. 28/92 Edward Bober -Executor's fees 5,000.00 Feb. 5/92 Wendy Bober 1,020.00 May 7/92 Repayment of Gaetano/ Stevenson loan 31,499.16 Transfer from savings a/c 7,266.14 Cass Miller & Associates re: James Barber 40,000.00 June 1/92 Wendy Bober 2,429.92 June 16/92 Prospect Cemetery 877.00 Sept. 30/92 Repayment of Dresar loan 9,131.95 Partial repayment of Dresar/Finlason loan (P&I) 27,500.00 Cass Miller re: Barber 38,898.60 ———— ———— $224,565.26 $224,565.26

A copy of the trust ledger statement is attached as Exhibit 29.

62. Of the trust ledger set out the paragraph above, the following are disbursements of the estate funds made by the Solicitor which are the subject of this complaint:

Date Payee

Aug. 1/91 Hazel Morris $15,000.00 Aug. 2/91 Hazel Morris 25,000.00 Aug. 21/91 Transfer to Howard Finlason a/c re Reid/Dhamalie/ inlason (funds paid to Finlason) 18,000.00 Aug.

1997 CanLII 915 (ON L.S.D.C.)

29/91 Transfer to Howard Finlason a/c re Investments (funds paid to F. Mott-Trille re fees) 7,000.00 ——— $65,000.00

63. The two loans to Hazel Morris were repaid on or about August 28, 1991, approximately one month after the loan was made.

64. The Solicitor took additional amounts as fees and disbursements ($1,095.00 in probate fees) following Mrs. Antoniuk's death:

July 25, 1991 $ 6,955.00 August 16, 1991 3,235.00 ———- Total $10,190.00

The Solicitor has now provided copies of the accounts to the Law Society. Copies of these fee billings which were contained in the Solicitor's file but were not sent to the executor are attached as Exhibit 30.

65. The Solicitor paid executor fees in the amount of $5,000 to Edward Bober on January 28, 1991. Agnes Hanna was paid her executor fees in the amount or $5,000 on August 2, 1991. Neither executor has received any account or fee billing representing the amounts for fees the Solicitor has withdrawn from the Estate, other than those shown to them by the Solicitor during the meeting of January 6, 1992. The Watch Tower Society is seeking return of the executors' fees prematurely taken. Neither executor would have accepted the fees had the Solicitor advised that it was improper for them to do so. The Solicitor believed that both executors deserved compensation for all of their efforts on behalf of Mrs. Antoniuk and her estate. The Law Society does not contest this position.

66. The residuary beneficiary has received the following payments:

November 27, 1991 $ 25,000.00 May 7, 1992 40,000.00 September 30, 1992 38,898.60 ——— $ 103,898.60

67. Although two payments had been made from the estate in November 1991 and May 1992, Mr. Miller continued to press the Solicitor for details of the estate investments. By letter dated May 19, 1992, the Solicitor wrote to Mr. Miller providing him with some details of a series of loans that were assets of the Estate, a copy of that letter is attached as Exhibit 31 to this agreed statement of facts. By letter dated August 14, 1992, a copy of which is attached as Exhibit 32 to this agreed statement of facts, Mr. Miller sought further information from the Solicitor. The Solicitor did not respond to Mr. Miller's correspondence; accordingly, Mr. Miller wrote a letter of complaint to the Law Society. The Law Society corresponded with the Solicitor regarding this complaint. The Solicitor replied by letter dated September 30, 1992, a copy of which complete with enclosures is attached as Exhibit 33 to this agreed statement of facts. By letter of the same date he also replied to Mr. Miller,

1997 CanLII 915 (ON L.S.D.C.)

a copy of the Solicitor's letter to Mr. Miller is also attached as Exhibit 34.

68. During a telephone conversation between the Society's auditors and Mr. Bober on November 17, 1992, Mr. Bober was advised of the investments made by the Solicitor after Mrs. Antoniuk's death and indicated that he had no knowledge of the investments after her death. It was during this telephone conversation with the Society's auditor that the Bobers were first advised of the obligations of an executor, including the executor's obligation to first pay specific bequests over those to residuary beneficiaries. The Solicitor would testify that he advised the Society's Auditor that the reason he paid the residuary beneficiary prior to paying the specific bequests was because the executors wish to settle the threatened litigation concerning Mrs. Antoniuk's testamentary capacity. The Society Auditor would testify that he does not recall this conversation. The Auditor would further testify that the Solicitor may have provided this information. The Solicitor would testify that he specifically advised the Auditor about the three doctors' reports and the threatened litigation. The Society accepts that it could not offer any evidence to contradict the Solicitor's expected evidence as set out above in this paragraph.

69. Following discussions with the Society auditor, Mr. Bober contacted the Solicitor to request information about the status of the estate. The Solicitor responded by letter dated December 4, 1992 in which he enclosed an unsigned, typewritten statement setting out his position respecting his involvement in the Antoniuk estate. A copy of the Solicitor's December 4, 1992 letter complete with enclosure is attached as Exhibit 35 to this Agreed Statement of Facts.

70. The executors responded by letter dated December 18, 1992, a copy of which is attached as Exhibit 36 to this Agreed Statement of Facts in which they expressed concern about several statements made in the Solicitor's letter.

71. By letters dated December 28, 1992, copies of which are attached collectively as Exhibit 37 to this agreed statement of facts, the Watch Tower Society wrote to the executors to inquire about the status of the Antoniuk estate.

72. The executors and Wendy Bober met with the Solicitor in his home on or about January 6. During that meeting they discussed a number of statements set out in the Solicitor's Statement and the letter of response to the Law Society as well as to discuss the Watch Tower Society's December 28, 1992 letter. Specifically, the executors noted that contrary to the information set out on page two of the Solicitor's Statement to the Law Society, Mrs. Antoniuk's son had not visited her in the hospital. The Solicitor understood from the executors that the son had arranged for a psychiatrist to examine his mother in the hospital, as to her mental competency, from which he had assumed the son had visited

1997 CanLII 915 (ON L.S.D.C.)

Toronto. Further, on page five of the Solicitor's Statement, he stated that investments were made on behalf of the executors. The executors confirmed to the Solicitor that they were not consulted respecting any investments made prior to Mrs. Antoniuk's death nor did they receive any information regarding investments made following her death until the Solicitor's December 4, 1992 letter which also contained the typewritten summary purporting to be an accounting of the estate funds.

73. While both the executors realized the Solicitor had invested Mrs. Antoniuk's funds before she died and that there were delays in realizing these investments, they had no idea that the Solicitor had invested any of the estate funds after Mrs. Antoniuk's death. The Solicitor's position is that the executors knew that he was handling investments but admitted that they were not given any particulars of such investments. The executors understood that the Solicitor had made investments of Mrs. Antoniuk's monies prior to her death but were unaware of the dates of any investments following her death.

74. The Solicitor responded to the Watch Tower's December 28, 1992 letter to the executors by letter dated January 8, 1993, a copy of which is attached as Exhibit 38 to his agreed statement of facts.

75. The Solicitor provided Mr. Miller with an accounting, by letter dated April 17, 1994, refer to paragraph 77.

76. To date, the following loans made prior to Ms. Antoniuk's death are still outstanding:

Dresar/Finlason re Scarborough lot $124,792.42
Reid/Dhamalie/Finlason re 2019 and 2035 25,000.00 ———-
Davenport Rd. $149,792.42

77. The Solicitor has paid the Watch Tower Society the following amounts on account of their $40,000.00 interest in the estate:

March 2, 1993 $11,421.58 December 29, 1993 18,514.42 March 9, 1994 5,000.00 June 9, 1994 5,064.00 ——— Total $40,000.00

The specific bequest has been paid in full.

78. The Solicitor provided an accounting of the Antoniuk estate to the Watch Tower Society on April 7, 1994. The Solicitor copied Mr. Miller with the correspondence to the Watch Tower Society.

(b) Viva Voce Evidence

Andre Ramseyer, the Financial Comptroller and Secretary-Treasurer of the Watch Tower Society at the relevant time, who was responsible for estates in which bequests were made to the Watch Tower Society, testified that the Solicitor informed the Watch Tower Society of Mrs. Antoniuk's bequest very shortly after Mrs. Antoniuk's death on July 15, 1991. He added, however, that the

1997 CanLII 915 (ON L.S.D.C.)

Watch Tower Society heard nothing further from the Solicitor until Mr. Ramseyer wrote to enquire about the status of the estate in September 1992.

Two weeks later, Mr. Ramseyer testified, the Solicitor called him in response to Mr. Ramseyer's letter. The Solicitor mentioned during the conversation, Mr. Ramseyer testified, that he had paid the residual beneficiary James Barber (Mrs. Antoniuk's son) before paying the specific bequests in the amount of $40,000 and $1,000 to the Watch Tower Society and the Parkdale Congregation of Jehovah Witnesses respectively. The Solicitor explained that he did so as a result of pressure he was receiving from Mr. Barber's lawyer, Mr. Ramseyer testified. The Solicitor also asked Mr. Ramseyer to "back him up", Mr. Ramseyer testified.

Mr. Ramseyer testified that his reaction to the Solicitor's request was that the Solicitor could have let the Watch Tower Society know about the pressure he was under to make payments to the residuary beneficiary before the payments were in fact made.

William Edward, the Law Society auditor who was responsible for the investigation into complaints against the Solicitor, confirmed that the Watch Tower Society had been paid in full.

The Solicitor testified that on May 28, 1991 (a few weeks before her death) Mrs. Antoniuk signed an authorization and direction (which was received in evidence) whereby the Solicitor was authorized to invest the proceeds of the sale of Mrs. Antoniuk's house on her behalf in his absolute discretion.

He also pointed out that the $158,000 that was loaned to other clients of the Solicitor's law practice as referred to in paragraph 55 of the Agreed Statement of Facts were loaned pursuant to the unqualified authorization prior to Mrs. Antoniuk's's death.

The Solicitor testified that the executors of Mrs. Antoniuk's estate were actively involved in the sale of Mrs. Antoniuk's home and knew that Mrs. Antoniuk had given the Solicitor absolute authority to invest the proceeds of the sale. He added that the executors told him that he was doing a good job, and that he should "carry on". He acknowledged that though the specific bequests to the Watch Tower Society had been paid in full, the residuary beneficiary had not been paid in full even at the time of the hearing.

In cross-examination, the Solicitor acknowledged that the authority to invest passed to the executors upon Mrs. Antoniuk's death, and that the executors knew about the investments he made after Mrs. Antoniuk's's death. He added that "I thought the understanding was I would continue that on behalf of the estate until we settled it. I didn't tell them what the investments were. I thought I had that authority from the executors."

1997 CanLII 915 (ON L.S.D.C.)

Agnes Hanna was also called as a witness by the Solicitor's counsel. Mrs. Hanna was one of the co-executors of Mrs. Antoniuk's estate.

Prior to Mrs. Antoniuk's death Mrs. Hanna was involved in arranging for Mrs. Antoniuk's house to be sold. She testified that when Mrs. Antoniuk sold her house she gave the Solicitor full discretion over her investments, and told the Solicitor in Mrs. Hanna's presence "you do what you want".

Mrs. Hanna testified that though the will gave the executors complete discretion over investments, "the reason we had Mr. Mott-Trille is because we as executors were not legally minded as a lawyer would be so we hired a lawyer." She added that they did not have any discussion at that time about what was to be done in future with the money in Mrs. Antoniuk's estate.

Mrs. Hanna testified that on December 18, 1992 she and her co-executor wrote in a letter to the Solicitor that "the fact is we, executors were never asked, informed or otherwise consulted about estate investments made after Mrs. Antoniuk's death."

In her examination-in-chief Mrs. Hanna testified that she and her co-executor prepared this letter "out of fear". She explained that she was receiving calls from the Watch Tower Society in which it was suggested that the Solicitor was improperly withholding money, and that they felt they had to "put fear into him, too."

Mrs. Hanna testified in chief that the will gave the co-executors complete discretion and that they gave that discretion to the Solicitor. Mrs. Hanna testified that she and her co-executor wrote in their December 18, 1992 letter to the Solicitor that they were never "asked, informed or otherwise consulted about estate investments made after Mrs. Antoniuk's death" because they were told by the Watch Tower Society to put those words in the letter, and that those words were not true.

In cross-examination Mrs. Hanna acknowledged that she did not talk to the Solicitor about his making more investments after Mrs. Antoniuk's death. She also acknowledged that the statement in her letter of December 18, 1992 that the executors were never asked, informed or otherwise consulted about estate investments made after Mrs. Antoniuk's death, was true.

In re-examination Mrs. Hanna testified that under cover of a letter dated December 4, 1992 from the Solicitor to Mrs. Hanna and her co-executor, she received a schedule in which investments he made on behalf of Mrs. Antoniuk's estate were detailed. She also testified that she approved those investments.

The Panel considered the fact that in her will Mrs. Antoniuk conferred a broad power of investment on her co-executors, including a power to make investments that would otherwise not be proper for a trustee.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor was not a co-executor of the Antoniuk estate. The Panel accepts that the executors did not involve themselves in estate investments and that they acquiesced in the Solicitor's continuing to be responsible for the investment of estate funds after Mrs. Antoniuk's death.

The Panel does not give significant weight to the fact that Mrs. Hanna and her co-executor wrote to the Solicitor in December 1992 disavowing any knowledge of estate investments made after Mrs. Antoniuk's death. That letter was clearly self-protective and was influenced by what Mrs. Hanna had been told by a senior representative of the Watch Tower Society, an arm of the Jehovah's Witness faith that Mrs. Hanna shared with her co-executor, the Solicitor, and Mrs. Antoniuk herself. Nor does the Panel place significant weight on Mrs. Hanna's evidence in cross-examination that the statement made in the December 18, 1992 letter was true at the time it was made; this evidence was contradicted not only by her evidence-in-chief but also by her evidence in re-examination.

However, even on the Solicitor's own evidence he did not tell the co-executors what the investments were, though he "thought the understanding" was that he would continue to invest estate funds until the estate was settled.

The Solicitor invested estate funds in loans secured only by promissory notes to clients of his law practice including clients involved in the Davenport Road project. The loans to the persons listed in paragraph 62 of the Agreed Statement of Facts benefitted other clients of the Solicitor at the expense of the Antoniuk estate and its residual beneficiary, who still has not been paid what is due to him.

The Panel received no evidence that the executors of the estate were informed of these investments until December 1992, almost a year and a half after the investments were made. In the Panel's view, before making investments of this nature an estate's solicitor would require much more specific authority from the co-executors than the mere acquiescence of the executors, as in the present case. It is clear to the Panel that the executors were not informed of the Solicitor's relationship with the persons to whom the estate's funds were loaned, or the risk that the loans may not be repaid. In the Panel's view, the Solicitor mis-applied $65,000.00 from the estate of Florence Antoniuk, as alleged in particular 2(c) of complaint D189/93.

Particular 2(d) of Complaint D189/93 - Alleged Misappropriation of $45,000.00 from Estate of Margaret Finlay

Particular 2(d) of Complaint D189/93 reads as follows:

In or about September 1991, [the Solicitor] misappropriated $45,000 from the estate of Margaret Finlay by using these funds to pre-pay his fees on an unrelated matter.

1997 CanLII 915 (ON L.S.D.C.)

(a) Agreed Statement of Facts

In one of the Agreed Statements of Facts that the Panel admitted into evidence, the parties agreed as follows:

79. Margaret Finlay was a client of the Solicitor. In January 1987, at the age of 92, Miss Finlay gave the Solicitor general power of attorney. In June 1987, Miss Finlay entered a nursing home and the Solicitor rented out her home.

80. In October 1988, the Solicitor borrowed $100,000 from Robert Skelly secured by a mortgage on Miss Finlay's property. Some of the funds were used to pay off loans from other clients but $90,000 was loaned to Pan American for a purchase of an option on a unit in a senior's citizen condominium in Holland Landing that the company was building at the time. The Solicitor stated that Miss Finlay had selected a unit on the ground floor of the condominium complex in which she expected to reside. The Solicitor did not, however, prepare any documentation in connection with the alleged option.

81. Miss Finlay died on September 6, 1989. The Solicitor and Claude Werden were named as co-executors in the Will. Under the terms of Miss Finlay's Will after the payment of any debts and expenses the entire residue of the Estate was to be paid to the International Bible Students Association.

82. The main assets of the estate on the date of Miss Finlay's death were a property at 11 Horton Blvd., and the $90,000 loan to Pan American Holdings Ltd.. In September 1988, based on a market analysis, the Horton Blvd. Property ranged in value from $190,000 to $209,000. The Pan American loan remains outstanding and is unsecured.

83. In April 1990, the Solicitor borrowed $15,000 on behalf of the estate from another client, the estate of Norman Harvey Grigg; $7,500 of these funds were used to pay the Solicitor's fees; $6,937.60 of these funds were transferred to the Solicitor's general account to cover disbursements.

84. The Solicitor was appointed sole executor of the estate on July 31, 1991 after Mr. Werden renounced. The Solicitor did not obtain letters probate until August 8, 1991. The Solicitor informed the beneficiary about the bequests by letter dated August 22, 1991.

85. By letter dated August 22, 1991 the Solicitor advised the Watch Tower Society of its entitlement in the Finlay estate. The Solicitor wrote:

The Society ("International Bible Students Association of Canada") is the beneficiary under the last Will and Testament of the late Margaret E. Finlay. As soon as the house has been sold, I shall report to you.

1997 CanLII 915 (ON L.S.D.C.)

86. Miss Finlay's property was sold September 4, 1991 for $200,000. Out of the proceeds of this sale the Solicitor transferred $45,000 of these funds to his general account. The Solicitor did not report to the Watch Tower Society. The Solicitor removed $15,000.00 from trust on September 13, 1991. A further $30,000.00 was removed on September 25, 1991.

87. On September 29, 1992 the Watch Tower Society wrote to the Solicitor asking for a report on the Finlay and Antoniuk estates.

88. The Watch Tower Society was alerted to irregularities in the Finlay estate through a telephone communication from Bill Edward of the Law Society on October 28, 1991. Accordingly, the Watch Tower Society wrote to the Solicitor by letter dated November 6, 1991 asking for an accounting of the Antoniuk, Finlay and Winters estates. The Society wrote further to the Solicitor regarding the irregularities by letter dated November 10, 1992.

89. On November 17, 1992 the Solicitor met with Watch Tower officials. During this meeting he explained his difficulties and offered a draft trust proposal for its consideration and comment to retire the debt. Prior to the meeting the Solicitor had already turned over the entire Finlay estate file for the Watch Tower's examination.

90. The Solicitor's position regarding this was that the $45,000 was an interim loan on account of fee billings he had submitted to the Ontario Legal Aid Plan on behalf of another client, Christine Bard. The Solicitor maintains that the estate was to be reimbursed when the Ontario Legal Aid Plan paid his fee billing. The Solicitor did not, however, advise the Watch Tower Bible & Tract Society that their funds would be used in this way.

91. The Solicitor's daughter, Sarah Mott-Trille, was an associate in the law firm of W. Glen How & Associates between December 1986 and June 30, 1991. This firm is in house counsel for the Watch Tower Bible and Tract Society of Canada.

92. During the time of her association with W. Glen How & Associates, Sarah Mott-Trille assisted in co-ordinating child custody cases where religious/constitutional issues affected the families of Jehovah's Witnesses. As part of her responsibility Sarah Mott-Trille participated in making arrangements for counsel to represent Jehovah's Witnesses and the Watch Tower Society in custody disputes.

93. Christine Bard and her family contacted the Watch Tower Society for help with regard to a bitter custody/access dispute. Both the courts in Quebec and Ontario had jurisdiction in the matter to some extent. Christine Bard husband obtained an ex parte Order against her prohibiting her from removing the two children from the Provinces of Ontario and Quebec. After consultation with W. Glen How, Sarah Mott-Trille, on behalf of the Society, asked the Solicitor to take on the case and in fact urged him to do so because of the Watch Tower Society's interest

1997 CanLII 915 (ON L.S.D.C.)

in the principles involved. Ms Bard obtained a Legal Aid Certificate to finance the case. The Solicitor was fully aware of the fact that Ms Bard's case would be financed by Legal Aid. The Watch Tower Society did not undertake to pay the Solicitor's fees.

94. Prior to the trial, the Solicitor spoke to Glen How advising that he could no longer afford to act as requested without additional personnel and financial assistance for certain disbursements as the case had proved bigger than anticipated.

95. The Society provided significant assistance through personnel from its Ontario and Quebec offices. It bore the expenses of the airfare of Sarah Mott-Trille and a legal assistant, Richard Bozko, to travel to Montreal for preparation of witnesses. Sarah Mott-Trille acted as co-counsel on the 11 1/2 day trial and Richard Bozko was assigned to assist. The Society provided a vehicle to transport witnesses to the airport during the trial. Many witnesses stayed at the Solicitor's home throughout the trial, pursuant to Richard Bozko's request, as they could not afford a hotel.

96. In the end, Justice Coo ruled in favour of Ms Bard, giving her sole custody.

97. At the conclusion of the trial the solicitor reported to W. Glen How by letter dated July 8, 1991, a copy of which is attached as Exhibit 39 to this agreed statement of facts.

98. The Watch Tower Society did not reply to the Solicitor's July 8, 1991 letter.

99. When the initial Legal Aid account was submitted on July 5, 1991, it was capped at 250 hours and Legal Aid paid only $24,568.70. An appeal of Legal Aid's decision by the Solicitor by letter dated August 12, 1993 was successful and resulted in Legal Aid paying the second account of $40,837.22.

100. On December 4, 1992, the Solicitor received $27,594.43 from the Ontario Legal Aid Plan as partial payment of his fee billing on the Christine Bard matter. These funds were paid to the Watch Tower Bible & Tract Society on the same day. The Solicitor remitted a further $17,405.57 to the Society on September 3, 1993 as soon as he received the second payment from Legal Aid. The $45,000.00 was paid in full after the Legal Aid payment.

101. The Solicitor's position regarding the Finlay Estate is set out in a letter from him to Glen How of the Watch Tower Society dated April 22, 1994, a copy of that letter is attached as Exhibit 40 to this agreed statement of facts. The Law Society does not accept the Solicitor's explanations nor does the Society accept that the Solicitor's explanations provide sufficient excuse for his actions as to excuse his misconduct. The Law Society does accept that this is the evidence that the Solicitor would give.

1997 CanLII 915 (ON L.S.D.C.)

102. Mr. How responded to the Solicitor's April 22, 1994 letter by letter dated May 17, 1994 a copy of which is attached as Exhibit 41 to the agreed statement of facts.

103. The Solicitor provided the entire file including expenses, revenues and ledger cards to the Watch Tower Society in November 1992. He attended meetings reviewing the accounts. By letter dated February 17, 1994 a full accounting was forwarded to Glen How, such accounting being attached hereto as Exhibit 42. The Watch Tower Society has acknowledged receipt of this full accounting.

104. The Solicitor admits that the $90,000.00 payment to Pan American Holdings Limited is still owing to the Finlay Estate by Pan American."

(b) Viva Voce Evidence

Glen How was called as a witness by the Law Society's counsel. Mr. How is a lawyer who was called to the Bar in 1943. He testified that he has always practised "somewhat" in association with the Watch Tower Society, and that from 1984 to 1993 he was employed by the Watch Tower Society as its senior counsel.

Mr. How testified that the Solicitor's daughter, Sarah Mott-Trille, a lawyer, worked with him as a full-time volunteer at the time that the Bard-Legrove custody dispute came to the attention of the Watch Tower Society. At that time, he testified, the assistance of the Watch Tower Society had been sought in some 700 applications for custody in which one of the parties alleged that the Jehovah's Witness beliefs of his or her spouse were harmful to the children.

Mr. How testified that the Bard-Legrove case was brought to the Watch Tower Society's attention by a lawyer in Montreal. Mr. How testified that his original view was that the Watch Tower Society should provide advice but not become involved as counsel or co-counsel.

However, Mr. How testified, the Quebec courts ordered that Ontario (where Christine Bard resided) was the proper forum for the trial. Sarah Mott-Trille was very interested personally in the case, Mr. How testified, and had good arguments why the Watch Tower Society should become more involved in it. He suggested that Sarah talk to her father, the Solicitor, about the possibility of his acting as counsel. Ms Bard's husband came from a wealthy family that was prepared to spare no expense in litigating the issue of custody, Mr. How testified. As the case became more complex, he added, Sarah helped her father, as did a law clerk Richard Bozko, who worked with Mr. How and Ms Mott-Trille at the Watch Tower Society.

Mr. How testified that the Solicitor successfully represented Ms Bard at a trial before Justice Coo, in which Coo rendered judgement in Ms Bard's favour in July 1991.

1997 CanLII 915 (ON L.S.D.C.)

Mr. How testified that prior to the conclusion of the trial he had no discussion that he recalls with the Solicitor concerning financial pressures that the Solicitor was under. He added that because the Solicitor was acting on the basis of a Legal Aid certificate, in his view it would have been improper for the Watch Tower Society to give or offer him any more money.

Mr. How testified that in a letter dated July 8, 1991 (which the Panel received in evidence) the Solicitor wrote to him to commend the Watch Tower Society for the support that it provided to Ms Bard. In that letter the Solicitor wrote "the other side had two very capable lawyers acting on behalf of Richard Legrove (husband) throughout and without Sarah and Richard to assist me, the witnesses from Montreal could never have been prepared to the extent required for such a full scale trial." (emphasis added). The Solicitor made no suggestion in the letter that he was looking to the Watch Tower Society for financial assistance.

Mr. How further testified that he does not recall any conversation with the Solicitor during the following year concerning finances related to the Bard-Legrove trial. He added that in a letter dated January 5, 1994 that the Solicitor wrote to him the Solicitor acknowledged that he did not consult anyone with respect to the transfer of $45,000 from the Finlay estate to his general account in September 1991. Mr. How testified that the Watch Tower Society first learned of the Solicitor's transfer of the money to his general account, and his replacement of it when his Legal Aid accounts were paid, when William Edward of the Law Society drew the matter to Mr. How's attention in 1992. In his January 5, 1994 letter to Mr. How the Solicitor stated as follows

"Let me begin by apologizing once again to yourself and to the Society for being a cause of those problems. I regret that I did not consult or communicate more fully with regard to the postponement of the specific legacy in Antoniuk, the interim loan in Finlay to cover fees in the Legrove case pending payment by Legal Aid, and the short-term loan of Winters' funds pending a sale which aborted due to circumstances beyond my control. However, at the time of making those decisions, I felt they were appropriate and in retrospect wished that I had not made such decisions."

Mr. How took issue with the Solicitor's characterization of the transfer of $45,000 from the Finlay estate to his general account as an "interim loan"; "we don't make interim loans to ourselves with trust funds without getting some kind of authority from the person that is the beneficiary of the trust," Mr. How testified.

Andre Ramseyer, the Financial Comptroller and Secretary-Treasurer of the Watch Tower Society, who at the relevant time had responsibility for estates in which the Watch Tower Society was named as a beneficiary, testified that though it is customary for the Watch Tower Society to be notified by the executor or solicitor for an estate of a bequest within approximately a month

1997 CanLII 915 (ON L.S.D.C.)

of the testator's death, it learned of Miss Finlay's bequest only in August 1991, almost two years after her death. Even then, he added, the Watch Tower Society learned of the bequest not from the Solicitor (who was by then the sole executor of the estate, his co-executor having renounced the previous month), but by the Public Trustee's Office.

Mr. Ramseyer also testified that the Solicitor wrote to the Watch Tower Society on August 22, 1991 to notify it of the bequest. In the same letter (the relevant passage from which is quoted in paragraph 85 of the Agreed Statement of Facts, above) the Solicitor informed the Watch Tower Society that as soon as Miss Finlay's house was sold, he would report further.

Mr. Ramseyer further testified that though Miss Finlay's property was sold on September 4, 1991 (at which time the Solicitor transferred $45,000 of the proceeds to his general account) he received no further communication from the Solicitor prior to September 29, 1992, when Mr. Ramseyer wrote to the Solicitor to enquire about the status of the estate.

The Law Society auditor who was responsible for the investigation, William Edward, testified that he reviewed the Solicitor's file on the Finlay estate, and that nothing in that file indicated any relationship between Miss Finlay and the Bard-Legrove case.

The Solicitor testified that his co-executor, Mr. Werden, also worked with the Watch Tower Society, and that he notified Mr. Werden of Miss Finlay's death shortly after she died in September, 1989. He testified that he then wrote to the Watch Tower Society on August 22, 1991 at which time he informed the Society that it was a beneficiary under the will and that as soon as the house had been sold he would report to the Society further.

The Solicitor acknowledged that he received into his trust account the proceeds of sale of Miss Finlay's home on September 4, 1991, and that on September 13 and September 25 he removed $15,000 and $30,000 respectively and transferred the funds to his general account. The notation in his trust ledger for those removals identifies them as an interim loan pending payment by Legal Aid of his fees in the Bard-Legrove case.

The Solicitor further testified that the Watch Tower Society asked for a report of the sale in its letter dated September 29, 1992, and that before he answered that letter the Solicitor had a discussion with William Edward of the Law Society concerning the matter. The Solicitor testified that he explained to Mr. Edward that the Watch Tower Society had passed on the case to him to handle for the Society; that the fees that were being paid by Mr. Legrove, whose father was a Vice-President of the Royal Bank, were enormous, in the range of $400,000 to $500,000 for the case, whereas the Solicitor was on a legal aid certificate at $67 per hour; that Mr. How, the Solicitor's daughter Sara Mott-Trille,

1997 CanLII 915 (ON L.S.D.C.)

and a law clerk from the legal office of the Watch Tower Society "had come in to help me in the case, that they had been co-counsel with me at the trial"; and that Mr. How or his office was the one who gave the Solicitor instructions as part of a policy that the Watch Tower Society had for all these cases across Canada.

The Solicitor testified that during a subsequent telephone conversation Mr. Edward told him that Mr. How had told him that the Watch Tower Society had never referred the case to the Solicitor, that there appeared to be no relationship between the bequest in Miss Finlay's will and the Bard-Legrove case, and that the removal of the proceeds of the sale of Miss Finlay's house from the Solicitor's trust account to his general account appeared to be a misappropriation.

The Solicitor confirmed that on December 4 he received $27,594 from Legal Aid and that he paid that to the Watch Tower Society, and that on September 3, 1993 he received the balance of the $45,000 from Legal Aid and he paid that to the Watch Tower Society as well.

The Solicitor added that the policy of the Watch Tower Society was to intervene to protect the religious liberty of Jehovah's Witnesses in custody cases among other cases; that the Watch Tower Society wanted to ensure that they controlled all such cases in the interest of avoiding conflicting judgments throughout Canada; and that the Watch Tower Society in fact controlled the conduct of Ms. Bard's case. "My daughter controlled me", the Solicitor testified.

The Solicitor added that when his daughter asked him to take on the case he telephoned Mr. How, who told him that the custody dispute was being privately funded and that the Solicitor would get paid. In January, 1990, however, the Solicitor testified, he learned that Ms. Bard was on a Legal Aid certificate, whereupon he telephoned Mr. How who told him "don't worry, we'll look after you because this is one of our cases." "My daughter said the same thing," the Solicitor added.

In cross-examination the Solicitor testified that the Bard case put him under a severe financial hardship. He acknowledged that he never sought permission from anyone at the Watch Tower Society to "borrow" $45,000 from the Finlay estate pending payment of his legal aid account in the Bard matter, though he added that he attempted to call Mr. How, who was away, and that he did nothing further after that.

The Solicitor acknowledged that he had the opportunity to seek authority before withdrawing the money but he did not think it was necessary because he was an executor of the Finlay estate with the power and authority to invest, and also because he was "an agent/solicitor with liens and equitable set-offs; I thought I had a right to do what I did."

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor also testified that the Watch Tower Society was wearing all sorts of hats: "they were my principal solicitor, directing me in almost everything I did on Legrove, and they were also my client. ... I had no retainer from Christine Bard."

Mr. Mott-Trille conceded in cross-examination that he replaced the money he had removed from his trust account, representing part of the proceeds of the sale of Ms. Finlay's home, only after the Law Society began to investigate the matter.

Sarah Mott-Trille was also called as a witness by the Solicitor's counsel. She testified that when she discussed the case with Mr. How they agreed that the Watch Tower Society needed representation in Ontario to fight the case. She added that it was understood in all these cases that Jehovah's Witnesses who were involved in custody disputes in which it was suggested that their religious beliefs may be harmful to their children, would report the matter to the Watch Tower Society and take the Society's direction.

Ms Mott-Trille testified that she called her father and asked him on behalf of the Watch Tower Society to take on the case, emphasizing the importance of the Society's cross-country policy.

Ms Mott-Trille specifically disagreed with certain evidence given by Mr. How as summarized above. She testified that the case met the Society's religious criteria, and while there may have been a question of whether the Watch Tower Society would handle the case in-house or retain outside counsel there was no suggestion that the Society could not take the case on because of the volume of cases it was already handling. She testified that Mr. How's evidence that she kept pressuring him to take on the case "is not true".

Ms Mott-Trille testified that after the Solicitor was asked to take on the case to protect the Watch Tower Society's interest, it was agreed that the case would be a joint effort in which she, the Solicitor, and the law clerk would work as part of a team. The Solicitor would be "the Ontario lawyer under our direction," she testified. It was certainly understood, she added, that it was a Watch Tower Society case.

Ms Mott-Trille testified that no discussions took place concerning the confidentiality of communications with Ms. Bard. She explained that in the Jehovah's Witness faith, Bethel (the location of the Watch Tower Society's Canadian offices) "is God's presence on earth" and that "one must be submissive to Bethel". "When you follow Bethel's directions you're following God's directions," she testified.

Ms Mott-Trille added that it was always the Watch Tower Society who had authority to direct the conduct of the case and that local counsel had to follow the Society's direction or they would be removed. She also added that the Watch Tower Society exercised this control both before and during the trial.

1997 CanLII 915 (ON L.S.D.C.)

Laurel McBrine, who was also called as a witness by the Law Society's counsel, testified that she worked as the Solicitor's secretary three days a week in 1991, while also working approximately 1000 hours a year as a pioneer (volunteer) at Bethel.

Ms. McBrine testified that her work at Bethel for a period of about six months in 1991 was devoted almost exclusively to working on the Bard case under Sarah Mott-Trille's direction. She also testified that Mr. How attended office meetings concerning all of the cases in which the Watch Tower Society was involved at the time, including the Bard case.

The Solicitor's long term secretary, Judy Kelly, testified that from March 1991 Sarah Mott-Trille was in charge of the Bard case because it was a Watch Tower case, and that the Solicitor was assisting her on it.

Christine Bard was also called as a witness by the Solicitor's counsel. She testified that after Justice Tannenbaum in Quebec found, in May 1989, that the Quebec courts were without jurisdiction in the action she had commenced there, she spoke to her father, and that as a result of this conversation she got in touch with the Pincourt Congregation of Jehovah's Witnesses in Montreal. She further testified that she filled out a Watch Tower Society form that was sent to the Watch Tower Society at Bethel in Ontario, and that it was through the Watch Tower Society that she was given the Solicitor's name. She testified that she was told that the Solicitor took the Watch Tower Society's overflow.

Ms Bard testified that she did not have any words by which she engaged the Solicitor. After the trial, she testified, she got the files relating to the case from the Watch Tower Society.

In cross-examination, when Ms Bard was asked whether she would agree that the Solicitor was her lawyer in the custody case, she responded "the Watch Tower Society was my main - the people I went to. And I also had Frank [the Solicitor], Sarah [Mott-Trille] and Richard Bozko [the law clerk]. So I really had three lawyers." After agreeing that Mr. Bozko was not a lawyer, Ms Bard agreed with the suggestion that the Solicitor and Sarah Mott-Trille were her lawyers.

Finally, Ms Bard's father, Maurice Bard, was called as a witness by the Solicitor's counsel. He testified that after Justice Tannenbaum held that the Quebec courts did not have jurisdiction he (Mr. Bard) advised his daughter to call the presiding overseer of the Pincourt Congregation because the Watch Tower Society was handling the matter. He testified that in October 1989 the elders informed his daughter and him that the Watch Tower Society would be handling the case from then on in Ontario.

Mr. Bard also testified that when they had disagreements with the Solicitor they phoned the Watch Tower Society, which would get hold of the Solicitor and straighten the matter out. "It was just

1997 CanLII 915 (ON L.S.D.C.)

if you talk to Frank you were talking to the Watch Tower Society, if you were talking to the Watch Tower Society then you were talking to Frank," he testified. He added that "the Watch Tower Society was handling it, as far as I was concerned and as far as officially we had been informed by the elders in the congregation."

On behalf of the Solicitor, Mr. Mark emphasized that as the sole executor of Miss Finlay's estate (his fellow executor having renounced) the Solicitor was entitled to loan money to himself pursuant to the broad authority to invest in Miss Finlay's will. However imprudent it may have been for the Solicitor to have done so, Mr. Mark submitted, it should not be regarded as a misappropriation. Mr. Mark emphasized that the Watch Tower Society brought no proceedings to set aside the transaction or to claim interest from the date the funds were removed from the Solicitor's trust account to the date the Watch Tower Society was paid.

The Panel rejects the submission that the Solicitor was authorized by Miss Finlay's will to transfer $45,000 to his general account as an "interim loan" pending payment of his account by Legal Aid in the Bard-Legrove case. The Panel has concluded that the removal by the Solicitor of the funds from his trust account cannot reasonably be characterized as an investment. Apart from the Solicitor's self-serving notation in his trust ledger describing the removal as an "interim loan" his taking of the funds bears none of the hallmarks of an investment.

Apart from the description in the Solicitor's trust ledger the transaction was completely undocumented. The Watch Tower Society was not informed either orally or in writing of the transaction for more than a year after the Solicitor removed the funds. Indeed, the Solicitor did not even inform the Watch Tower Society that it was a beneficiary under Miss Finlay's will for almost two years after Miss Finlay's death (the Panel rejects any suggestion that a notice to his co-executor constituted notice to the Watch Tower Society). He finally informed the Watch Tower Society that it was the beneficiary of Miss Finlay's estate on August 22, 1991, only after the Watch Tower Society had independently learned of the bequest from the Public Trustee's Office.

In his August 22, 1991 letter the Solicitor promised to report to the Watch Tower Society as soon as Miss Finlay's house was sold. He did not disclose in his letter that the sale of Miss Finlay's house was imminent. After the property was sold on September 4, 1991, rather than reporting to the Watch Tower Society as promised, the Solicitor removed $45,000 from the proceeds of the sale from his trust account to his general account in two instalments (on September 13 and September 25, 1991). The Solicitor did not communicate further with the Watch Tower Society about the matter until after September 29, 1992, when Mr. Ramseyer on behalf of the Watch Tower Society wrote to the Solicitor to enquire about the status of the estate. The funds

1997 CanLII 915 (ON L.S.D.C.)

were not turned over to the Watch Tower Society until December 4, 1992 ($27,594.43) and September 3, 1993 ($17,405.57), after the Solicitor's Legal Aid accounts were paid.

The Solicitor's entire course of dealing with the funds, and particularly his failure to communicate with the Watch Tower Society concerning his intentions and actions, leads the Panel to conclude that the Solicitor was not acting in good faith when he removed the funds from his trust account, ostensibly pursuant to the power to invest in Miss Finlay's will and pursuant to the alleged equitable set-off or lien that he claimed a right to assert as a result of his retainer by the Watch Tower Society in the Bard-Legrove case.

An equally important reason for the Panel's rejection of Mr. Mark's submission that the removal of the funds by the Solicitor should be regarded as a loan made pursuant to the power to invest in Miss Finlay's will is that the Solicitor at no time either paid or intended to pay interest. Black's Law Dictionary (Revised 4th Edition) defines the term "invest" as follows:

"To loan money upon securities of a more or less permanent nature, or to place it in business interests or real estate, or otherwise lay it out, so that it may produce a revenue or income." (emphasis added)

Similarly, the term "investment" is defined as follows:

The placing of capital or laying out of money in a way intended to secure income or profit from its employment". (emphasis added)

A submission similar to that made on behalf of the Solicitor was made and rejected in the report of the Discipline Committee in the Black case (adopted by Convocation November 28, 1993). One of the particulars of professional misconduct alleged in that case was that Mr. Black had misappropriated $126,616.20 from an estate of which he was the sole executor and also solicitor. Mr. Black transferred the funds in question to his wife, his creditors, and himself. He prepared promissory notes evidencing the transfers of funds in question, which he characterized as loans made pursuant to the power to invest reposed in him as executor of the estate by the testator's will.

Mr. Black acknowledged that his conduct constituted a breach of rule 7 (borrowing from clients), but submitted through his counsel that it was not a misappropriation. The panel in the Black case disposed of the issue as follows:

"In determining that the Solicitor's conduct constituted misappropriation and not merely a breach of rule 7, the Committee was of the view that the Solicitor's assertion of an intention to repay when he took the funds for his own use was not, by itself, exculpatory. Misappropriations commonly begin with a professed intention to repay.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor contested a finding of misappropriation on the basis of his testimony that at the time he did not believe his conduct should be characterized as that of a solicitor taking client's funds. He testified that he thought that he was merely an executor borrowing from the estate and that this was permissible. On this basis, his counsel argued that the Solicitor lacked the necessary intention or mental element for a finding of misappropriation. Counsel argued that, if the Solicitor honestly believed that he was entitled to borrow the estate funds for his own purposes, this would negative a finding of misappropriation. Counsel submitted further that it was not sufficient for the Committee to conclude that the Solicitor ought to have known - or ought reasonably to have known - that his appropriation of the funds was improper.

The Society conceded that a finding of misappropriation required a finding that the Solicitor knew the taking was improper or was at least wilfully blind to its impropriety.

After reviewing the evidence, the Committee finds that the Solicitor knew or at least was wilfully blind to the fact that he was a solicitor improperly appropriating his client's funds for his own purposes. We particularly rely on the following basic facts:

(a) The funds taken clearly belonged to the estate. They were held by him in his separate capacity as executor.

(b) The Solicitor was solicitor to the estate. As solicitor he was acting for himself in his separate capacity as executor.

(c) The funds taken were being held in the Solicitor's mixed trust account.

(d) The promissory notes prepared at the time of taking provide for repayment by the Solicitor to the Solicitor as executor.

The Solicitor understood that the had complete control of the estate's funds. To quote his evidence:

"I thought I was borrowing from myself, really, and I thought I had the legal right to borrow from myself."

The Solicitor clearly acknowledged in evidence that borrowing from a client's funds held in trust would be wrong. Given this acknowledgement, the Committee is satisfied that the Solicitor either knew or was wilfully blind to the underlying reality of this circumstance: he was improperly taking a client's funds for his own purposes without the permission of anyone but himself.

In the Committee's view, where a solicitor to an estate who is also the executor, unilaterally takes for his own purposes estate funds, whether or not they are in his solicitor's trust account and whether or not he intends to return them, he is almost inevitably engaged in misappropriation. His complete control over

1997 CanLII 915 (ON L.S.D.C.)

the estate takes the situation beyond the scope of rule 7 and into the more serious realm of misappropriation of client's funds. The Committee finds it difficult to believe that any solicitor - and particularly one as experienced as Mr. Black - could think such conduct was permissible and it does not accept Mr. Black's testimony to that effect."

The Panel in the present case respectfully agrees with this reasoning and adopts and applies it to the circumstances of the present case. The Panel finds that the Solicitor either knew or was at least wilfully blind to the fact that he was taking funds for his own benefit to which he was not lawfully entitled.

Mr. Mark also developed a series of arguments arising out of the fact that in the Bard case the Solicitor was retained by the Watch Tower Society, which also controlled the conduct of Ms Bard's case. Mr. Mark submitted that the Watch Tower Society should be regarded as the Solicitor's client in the Bard case, and that the removal by the Solicitor from his trust account of $45,000 of the proceeds of sale of Miss Finlay's house should be regarded as the exercise by the Solicitor of a lien on an asset belonging to his client that was under the Solicitor's control. Mr. Mark observes that the Watch Tower Society had agreed to "take care of" the Solicitor, which in his submission at least implied that he would be compensated for his work and reimbursed for disbursements that he may incur.

In the Panel's view this argument must be rejected. By the time the Solicitor removed the funds in question from his trust account he was on a legal aid certificate that authorized him to represent Ms Bard in the custody dispute that was pending. Under section 23(1) of the Legal Aid Act, R.S.O. 1990, c. L.9, as amended, the Solicitor was bound not to "take or receive any payment or other benefit in respect of any professional services provided by him" except in accordance with the Legal Aid Act and the regulations thereto.

The Panel accepts that Ms Bard was entitled to cede to the Watch Tower Society her rights to instruct counsel and that the Watch Tower Society was entitled to provide legal assistance to Ms Bard in addition to the services of the Solicitor, whose accounts were to be paid by the Ontario Legal Aid Plan.

After he was retained on the legal aid certificate, however, the Solicitor was not entitled to derive any personal financial benefit from the Watch Tower Society or anyone else other than the Ontario Legal Aid Plan. He accordingly had no right to a solicitor's lien on funds belonging to the Watch Tower Society. (Even if he had such a lien, he could have exercised it without transferring the funds to his general account in any event.).

Mr. Mark also submitted that the Solicitor should be regarded as an agent of Mr. How and Sarah Mott-Trille, who were Ms Bard's principal solicitors. He relied on English authorities that

1997 CanLII 915 (ON L.S.D.C.)

established that an agent-solicitor may exercise a lien on funds belonging to her or his principal solicitor.

The Panel has concluded that this argument must fail for the same reason as must the argument that the Solicitor was entitled to exercise a solicitor's lien on funds belonging to the Watch Tower Society in its capacity as client. The Solicitor simply had no right to look to the Watch Tower Society for payment of his accounts. The Watch Tower Society was not indebted, at least financially, to the Solicitor. Even if he was an agent of the Watch Tower Society's lawyers, he had no right to remove from his trust account, for his own benefit, funds to which the Watch Tower Society was entitled.

Finally, Mr. Mark submits that the Solicitor was entitled to exercise a right of equitable set-off. Mr. Mark emphasizes that though to exercise a right of legal set-off there must be mutual debts, a right of equitable set-off may be exercised in certain circumstances (for example, where there has been an assignment of a debt) in the absence of mutuality: Hope v. Telford, [1987] 2 S.C.R. 193.

It is clear from Hope v. Telford, however, that in order for equitable set-off to be available there must at least be a claim by the person purporting to exercise the right of equitable set-off, for a money sum, whether it be liquidated or unliquidated: Hope v. Telford, supra, at page 206. In the present case the Solicitor had no claim against the Watch Tower Society for any sum of money, liquidated or unliquidated, at any relevant time.

Moreover, in order for a party to have a right of equitable set-off it must be unfair for the creditor to be paid its claim without allowing the debtor to raise an equity against the creditor in the form of the debtor's own claim, to the extent that it is well-founded: Hope v. Telford, supra, at page 214. In the present case, in the Panel's view, the Watch Tower Society was entitled to be paid the amount of Ms Finlay's bequest immediately upon the sale of Ms Finlay's home. The Solicitor was not entitled to raise any equity against the Watch Tower Society in the form of any claim that he may have had against it.

The Panel accepts that the Solicitor at no time intended to permanently deprive the Watch Tower Society of funds to which it was entitled. We accept the Solicitor's evidence that he at all times intended to pay the $45,000 back (albeit without interest) to the Watch Tower Society upon payment by the Ontario Legal Aid Plan of his accounts. As is clear from the Black case, supra, however, a finding that a lawyer intends to permanently deprive a person of funds to which the person is entitled is not an essential element of a finding of misappropriation.

Mr. Mark argued that even if the Panel were to find that the Solicitor had no right to remove the funds in question in fact, it should find that this particular is not established in any event on the ground that the Solicitor had no intention to

1997 CanLII 915 (ON L.S.D.C.)

misappropriate the funds. The Panel respectfully disagrees. On the basis of the Solicitor's conduct summarized above and particularly the Solicitor's non-disclosure of his actions to the Watch Tower Society, the Panel has concluded that the Solicitor intended at all material times to misappropriate the $45,000 in funds to which the Watch Tower Society was entitled.

Particular 2(a) of Complaint D180/94

Particular 2(a) of Complaint D180/94 reads as follows:

"On or about December 9, 1988, [the Solicitor] misapplied $30,000.00, more or less, of funds to be held in trust for the benefit of Vera and Michael Giammarco."

(a) Agreed Statement of Facts

As mentioned above, this Particular was admitted by the Solicitor. In one of the Agreed Statement of Facts that the Panel admitted into evidence, the parties agreed as follows:

5. Vera Giammarco, the client referred to in the complaint, is 52 years of age. Mrs. Giammarco had known the Solicitor for approximately 30 years both as a friend of the family and as her mother's solicitor before she retained him to act for her in her matrimonial matter.

6. Michael and Vera Giammarco were married in 1960. There were three children of the marriage. Over a period of years the Giammarco's marriage disintegrated to a point where the police were called to their home in or about August of 1987. Thereafter Mrs. Giammarco left the matrimonial home for a time taking with her the two daughters while the son remained with his father. By court order dated the 27th day of October, 1987, Mrs. Giammarco was granted exclusive possession of the upstairs of the matrimonial home subject to her husband having access to the use of the bathroom and kitchen facilities, interim custody of the child Esther, interim support for herself and Esther and a mutual restraining order. The Giammarco's resided separate and apart in the matrimonial home under these conditions until a further disintegration of their relationship resulted in a decision to sell the home. Mrs. Giammarco has never proceeded with the divorce because of her continuing efforts at and hopes for reconciliation.

7. The Solicitor acted for Mrs. Giammarco throughout the divorce and family law proceedings commencing in or about August, 1987, being Court File No. ND147651/87.

8. The Giammarco's matrimonial home was sold on or about September 12, 1988 with an anticipated closing of December 9, 1988.

9. There was serious dispute between the Giammarco's respecting the division of the proceeds of the sale. In particular, there

1997 CanLII 915 (ON L.S.D.C.)

was an outstanding issue of an alleged debt owed by Mr. Giammarco to his brother Mario which Mrs. Giammarco viewed as not genuine, as well as an issue of the responsibility for debts incurred by each of the Giammarco's during the period of their separation and especially concerning their daughter Simone's car loan. At the time of the execution of the Agreement of Purchase and Sale, the Giammarcos had agreed to an equal division of the net proceeds of the sale. Shortly before closing, Mr. Giammarco provided a list of his expenses totalling $28,633.34 (which included the disputed "family loans") which he insisted be paid out of the total proceeds (and not his share of such proceeds) and if this was not done, he would refuse to close. In order to save the deal and avoid further damages and legal costs, Mrs. Giammarco agreed to a holdback of her alleged share of about $30,000.00 which, together with the $28,633.44 above, would form the basis from which to work out a settlement or obtain a court order. After much discussion and negotiation, it was agreed that a sum of $28,633.44 of the sale proceeds would be paid to Mr. Giammarco's counsel, Jeffrey Eason, who would be responsible for the payment of the various debts. Mr. Eason's evidence would be that a further $30,000 was to be held in a separate interest bearing trust account pending a resolution of the arbitration of those joint debts at which time distribution of the funds would be made when the settlement to the funds had been determined. There was also an outstanding issue regarding division of pension entitlements, which it was hoped would be settled contemporaneously. These arrangements were confirmed in letters dated November 22 and 28, 1988, and December 1, 1988 from Mr. Eason to the Solicitor which are attached collectively as Exhibit 1 to this Agreed Statement of facts. The Application by Mrs. Giammarco against her husband and his brother Mario Giammarco with regard to Mario's interest in the matrimonial home was settled before Sirois, J. in late November. The issues remaining are set out in the Solicitor's letter to Mr. Eason dated January 24, 1989 (Exhibit 4).

10. The Solicitor received funds totalling $137,320.90 into his trust account from the sale of the Giammarco's matrimonial home. The funds were disbursed as follows:

Date Details Amount

Dec. 9/88 Vera Giammarco $ 68,570.90

Dec. 9/88 Frank Mott-Trille $ 1,500.00 (Re: Application Cost)

Dec. 9/88 Frank Mott-Trille $ 6,000.00 (Fees toward Divorce) Dec. 9/88 Frank Mott-Trille $ 1,250.00 (Fees and Disbursements toward Sale)

Dec. 9/88 Jeffrey Eason (In Trust) $ 28,633.44

Dec. 9/88 Steve Lazaridis $ 15,000.00

1997 CanLII 915 (ON L.S.D.C.)

Dec. 9/88 Pro-Line Automotive Ltd. $ 16,377.66 ——————— $ 137,332.00

The Solicitor's client trust ledger is attached as Exhibit 2 to this agreed statement of facts.

11. Pro-Line Automotive Ltd. was a client of the Solicitor. It is now no longer in business and has no assets. Steve Lazaridis is also a long-time client of the Solicitor.

12. The Solicitor did not seek Mr. Eason's authority to make the disbursal of funds to either Steve Lazaridis or Pro-Line Automotive Ltd., nor did he disclose the fact of the disbursal of funds to Mr. Eason.

13. By letter dated December 9, 1988, the Solicitor wrote to Mr. Eason reporting the transaction, a copy of which, complete with the cash flow is attached as Exhibit 3 to this agreed statement of facts. The Solicitor did not report the disbursal of funds to either Lazaridis or Pro-Line.

14. The Solicitor did have a conversation with Mrs. Giammarco regarding the funds to be held in trust. This discussion took place in the Solicitor's office at the end of December 1988. The Solicitor advised her that he could obtain a higher rate of return for the funds by investing them in mortgages than in having the money held in an interest-bearing trust account. Mrs. Giammarco specifically asked the Solicitor about access to the funds to which he replied that he would have to invest the money in at least a three to six month term deposit in order secure a good rate of return. Understanding that her funds would be invested only for this period of time, Mrs. Giammarco agreed to this course of action. Mrs. Giammarco was not advised that the person or entity to whom the funds were to be lent were also clients of the Solicitor's.

15. By letter dated January 24, 1989, a copy of which is attached as Exhibit 4 to this agreed statement of facts, the Solicitor corresponded with Mr. Eason regarding the $30,000 holdback.

16. The Solicitor and Mr. Eason had numerous telephone discussions, exchanged correspondence and held a joint meeting with the Giammarco's in the period up to the Spring of 1993 regarding the matter but no resolution of the issues between the parties was reached. The Solicitor and Mr. Eason both made concerted efforts to achieve a settlement in order to avoid the expense of returning to court, but the Giammarco's could not at any time agree on the daughter's car loan, the division of the husband's pension and the percentage split.

17. The matter did not progress until a letter of October 10, 1991 from the Solicitor to Mr. Eason, a copy of which is attached as Exhibit 5 to this agreed statement of facts. The Solicitor had still not revealed to Mr. Eason, nor did he ever subsequently reveal, that the funds were no longer in trust.

1997 CanLII 915 (ON L.S.D.C.)

18. Mr. Eason responded by letter dated October 17, 1991, a copy of which is attached as Exhibit 6 to this agreed statement of facts.

19. The Solicitor put a final proposal to Mr. Eason in a letter dated December 13, 1991, a copy of which is attached as Exhibit 7 to this agreed statement of facts. The matter was not settled and sometime thereafter Mr. Giammarco terminated Mr. Eason's retainer, and for a time, acted on his own behalf.

20. Subsequently, Mr. Giammarco retained H. David Ovenden to act for him on the resolution of the outstanding issues including the division of the funds held in trust. Mr. Ovenden began to correspond with the Solicitor on October 7, 1993 following a conversation between the two, a copy of Mr. Ovenden's October 7, 1993 letter is attached as Exhibit 8 to this agreed statement of facts. There were further letters from Mr. Ovenden to the Solicitor dated February 23, 1994, February 28, 1994, March 14, 1994, March 21, 1994, and March 28, 1994, copies of which are attached collectively as Exhibit 9 to this agreed statement of facts.

21. On March 30, 1994 the Solicitor and Mr. Ovenden spoke on the telephone, this prompted the letter from Mr. Ovenden of April 4, 1994, a copy of which is attached as Exhibit 10 to this agreed statement of facts. The Solicitor wrote to both Mrs. Giammarco and Mr. Ovenden by letters dated April 19, 1994, copies of which are attached collectively as Exhibit 11 to this agreed statement of facts.

22. Mr. Ovenden responded to the Solicitor's April 19, 1994 letter by letter dated May 6, 1994 a copy of which is attached as Exhibit 12 to this agreed statement of facts.

23. Mrs. Giammarco had moved to California in April of 1989 to live with her eldest daughter, Simone, who married a resident of that state. Prior to her departure, Mrs. Giammarco pressed the Solicitor to resolve the issues remaining between herself and her husband in order that the distribution of the funds could be finalized. The matters were not resolved.

24. After numerous telephone enquiries to the Solicitor regarding the status of the matter, Mrs. Giammarco wrote to the Solicitor asking for a resolution of the outstanding matters, a copy of Mrs. Giammarco's undated letter is attached as Exhibit 13 to the Agreed Statement of Facts. The Solicitor responded by letter dated April 17, 1989, in response to telephone discussions, a copy of which is attached as Exhibit 14 to this Agreed Statement of Facts and which enclosed a copy of his letter to Mr. Eason of the same date trying to reach a resolution. Mrs. Giammarco wrote to the Solicitor on a number of other occasions, copies of this correspondence is attached collectively as Exhibit 15 to this agreed statement of facts.

1997 CanLII 915 (ON L.S.D.C.)

25. Mrs. Giammarco estimates that during the period from April 1989 to May 1994, she or her daughters telephoned the Solicitor's office in excess of 100 times to determine the status of the matter. A large portion of the later calls were placed collect to the Solicitor's office. Mrs. Giammarco placed the collect calls because the Solicitor had not returned many of her earlier calls. Mrs. Giammarco had received a $50,000.00 settlement for personal injuries arising out of an automobile accident which included a miscarriage which resulted in a hysterectomy, chronic back and neck pain and migraines. While living in California during the above-stated period she used the settlement funds for ongoing expenses as she was no longer able to work. In the Spring of 1994, she advised the Solicitor that she had exhausted the settlement funds and that she was considering personal bankruptcy in the United States because of an inability to meet her ongoing living expenses. The Solicitor agreed to try to raise the $10,000.00 which she required to pay such sum on the account, provided it met with her husband's approval.

26. The Solicitor responded to some of Mrs. Giammarco's telephone calls, and although there was correspondence from the Solicitor's office to Mrs. Giammarco, copies of which are attached collectively as Exhibit 16 to this Agreed Statement of Facts, he did not report to her on the status of the "investments" made on her behalf until the April 19, 1994 letter.

(b) Viva Voce Evidence

The Law Society's counsel called Jeffrey Eason as a witness. Mr. Eason is a lawyer who was called to the Bar in 1977, and who practices in Georgetown. He testified that in October 1987 he was retained to act in a matrimonial proceeding for Michael Giammarco.

Mr. Eason testified that (as set out in paragraph 9 of the Agreed Statement of Facts quoted above) $30,000.00 was to be held in a separate interest-bearing trust account pending a resolution of the attribution of the parties' joint debts, at which time distribution of the funds would be made when the entitlement to the funds had been determined.

Mr. Eason further testified that during the time that he acted for Mr. Giammarco, the Solicitor did not at any time communicate with him, orally or in writing, to indicate that he intended to remove any portion of the $30,000 that was being held in trust. On the contrary, he testified, he and the Solicitor had numerous conversations in which they attempted to resolve the remaining issues and the disposition of the funds, and that during those discussions the monies in trust were often mentioned and interest on the monies in trust were discussed. The fact that the monies were in trust was the very basis of discussions between Mr. Eason and the Solicitor concerning the eventual resolution of the matrimonial file, Mr. Eason testified.

1997 CanLII 915 (ON L.S.D.C.)

Finally, Mr. Eason testified that during the entire period of his retainer by Mr. Giammarco, until his retainer was terminated in October 1992, there was never a settlement of the issue of whom was entitled to what portion of the $30,000.

The Solicitor testified that initially the parties agreed that from the proceeds of the sale of the Giammarco's house, $30,000 would go to Mr. Giammarco to pay off family loans and some of his expenses, and $30,000 would go to Mrs. Giammarco to pay off her family loans and their daughter Simone's car because Mr. Giammarco had promised that that would be paid off.

The Solicitor added that about a week before the closing, Mr. Giammarco took the position that he was not going to let his wife have that $30,000 out of the closing funds. The Solicitor testified that it was his view that all of that $30,000 should have gone to Mrs. Giammarco.

The Solicitor further testified that Mrs. Giammarco came to him in tears saying that her husband was not going to give her any more money for her daughter Simone's wedding because Simone did not get along with her father. The Solicitor testified that Mrs. Giammarco told him that her husband had refused to pay $3,000 for the wedding and that she undertook to the Solicitor that he could take the $3,000 out of her share if he would pay the amount. The Solicitor testified that on the basis of his undertaking he paid the $3,000 to Simone.

The Solicitor acknowledged that he did not discuss the payment with Mr. Eason because he knew that Mr. Giammarco would not agree. "I made a mistake", he testified.

Based upon the Solicitor's admission and the evidence summarized above, the Panel finds that particular 2 (a) of Complaint D180/94 has been made out, in that the Solicitor misapplied $30,000 of funds to be held in trust for the benefit of Vera and Michael Giammarco.

Summary

For these reasons, the Panel finds each of particulars 2 (a), (b), (c) and (d) of Complaint D189/93, particulars 2 (a) and (b) of Complaint D246/93, and particular 2 (a) of Complaint D180/94 to have been made out, and finds the Solicitor guilty of professional misconduct in respect of each of these particulars.

DATED at Toronto this 9th day of September, 1996.

_____ Gavin MacKenzie Chair

RECOMMENDATION AS TO PENALTY

The Panel recommends to Convocation that the Solicitor be given permission to resign his membership in the Law Society of Upper

1997 CanLII 915 (ON L.S.D.C.)

Canada if he requests such permission in Convocation when this matter is considered there.

The Panel further recommends that if the Solicitor elects not to request permission to resign his membership in the Law Society, he be disbarred.

Reasons for Recommendation

(a) Introduction

The Panel reconvened on December 13, 1996 for a full day to hear evidence in mitigation of penalty, and to consider the submissions of counsel.

We are grateful to all counsel for their considerable assistance, not only during the penalty phase of this hearing, but throughout the ten hearing days of this most difficult matter.

On behalf of the Solicitor, Mr. Mark submitted that the appropriate penalty would be a suspension of the Solicitor's right to practise. Mr. Mark informed the Panel (as did the Solicitor himself, in his viva voce evidence on December 13) that if Convocation were to permit the Solicitor to continue to practise after serving a period of suspension, the Solicitor would undertake not to practise in the fields of estates, real estate, loans, mortgages or investments.

The Panel received (as Exhibit 75) a written undertaking to this effect signed by the Solicitor and dated December 12, 1996. In that document the Solicitor also undertook (if permitted to continue to practise) to have trust funds deposited into trust accounts under the control of two lawyers with whom he proposes to share space, namely his daughter Sarah Mott-Trille and Colm Brannigan (the evidence of both of whom is summarized below); and to have all general account cheques co-signed by either Ms Mott-Trille or Mr. Brannigan.

As mentioned at page 2 of the Report and Decision of the Panel, the Solicitor is 65 years old. He was called to the Bar in Great Britain (Gray's Inn) in 1953, and was called to the Bar in Ontario in 1954. He was a Rhodes Scholar before he undertook a career in law.

The Solicitor's practice has included both "solicitors' work" and litigation. He has practised most recently in Brampton, in association with his daughter, Sarah Mott-Trille.

(b) Character Evidence

The Panel received considerable character evidence both viva voce and in letter form. Although we accept Ms Budweth's submission that at least some of the character evidence submitted in letter form should be given limited weight because it is apparent that the authors of certain of the letters did not appreciate the

1997 CanLII 915 (ON L.S.D.C.)

seriousness of the professional misconduct that the Panel has found established, the viva voce evidence that the Panel heard for the most part is not vulnerable to the same criticism. Each of the witnesses who testified swore that they had read the Report and Decision of the Panel, and were accordingly familiar with the Panel's findings.

Character evidence in mitigation of penalty in discipline proceedings is of course common, but in this case the Panel considered the evidence to be out of the ordinary, and was most favourably impressed by the many contributions that the Solicitor has made over the years to the well-being of both communities and individuals that he believed could benefit from his assistance.

For the benefit of Convocation, we have summarized below the character evidence of several of the witnesses who testified on the Solicitor's behalf.

1. The Right Honourable John N. Turner testified that he met the Solicitor on board the Moritania in 1949, when both he and the Solicitor were on their way to read law together as Rhodes Scholars at Oxford. Mr. Turner pointed out that the Solicitor believed in the value of community work even in his University days in that he helped disadvantaged people in East London, which Mr. Turner described as being "pretty rough in those days".

He and the Solicitor saw each other infrequently immediately after they completed their law studies, as Mr. Turner moved to Montreal and Mr. Mott-Trille to Toronto. They resumed their friendship in 1976, and have continued to be friends over the last 20 years. Mr. Turner testified that he believes that the Solicitor enjoys a favourable reputation in the community. He heard nothing negative about him until he learned of these disciplinary proceedings.

2. Peter Barnard testified that he first met the Solicitor 40 years ago, when Mr. Barnard was in high school in Oakville.

Mr. Barnard testified that the Solicitor has been a great counsel and help to him over those many years. He testified that the Solicitor encouraged him to go to graduate school in England (Mr. Barnard studied at Cambridge) and he accordingly considered meeting the Solicitor to be a major turning point in his life. Mr. Barnard is now the chairman of Ontario Hydro Technologies.

Mr. Barnard also testified that the Solicitor has been his personal lawyer for 30 years, and has represented him in real estate transactions and in estate planning. He added that the Solicitor was also very helpful to him in dealing with the aftermath of a plane crash that he was in.

Finally, Mr. Barnard testified that the Solicitor has an extraordinarily high reputation in the community, and that he could unquestionably be relied upon to carry out his undertaking

1997 CanLII 915 (ON L.S.D.C.)

to restrict his practice if Convocation were to permit him to continue to practise.

3. F.W. Watt, professor emeritus at the University of Toronto, testified that he met the Solicitor at Oxford in 1951. He remained close to the Solicitor after graduation, particularly during the next 20 years.

Professor Watt testified that the Solicitor assisted him in relation to several legal matters. He also testified that the Solicitor was a great support to him when Professor Watt and his wife separated, even though the Solicitor acted for Professor Watt's wife (who also testified on the Solicitor's behalf). Professor Watt testified that he was informed that he should obtain independent legal advice, but that because of his confidence in the Solicitor's fairness he elected not to do so.

Professor Watt testified that despite the findings of the Panel he does not think that the Solicitor is "a predator, someone out to exploit clients for his own benefit", but rather considers him to be fundamentally a good and decent man who cares about others, but who was trapped by his own errors, which were compounded by a severe downturn in the economy.

4. Professor Watt's ex-wife, June Watt, testified that she too has known the Solicitor since 1951. She testified that she and the Solicitor have known a number of people in common over the years, primarily professionals and academics. All have a high regard for the Solicitor, she testified.

Ms Watt also testified that when the Solicitor represented her when she and Professor Watt separated in 1969, trying to effect a reconciliation was the Solicitor's first objective, and when that did not work the Solicitor encouraged the parties to implement an agreement that they had tentatively worked out between themselves, an agreement that still works many years later.

5. Patricia Langdon testified that she worked as a legal secretary for Osler, Hoskin & Harcourt in the 1950s when the Solicitor articled there. Ms Langdon had attended the London School of Economics, and found that she had a rapport with many of the students. She thought particularly highly of the Solicitor, who she considered to be a wonderful young man. Ms Langdon testified that she and the Solicitor and their spouses kept in touch thereafter.

Ms Langdon's husband died in 1963. Osler, Hoskin & Harcourt offered to do the legal work required as a result of Ms Langdon's husband's death, which included most significantly a claim against what was then Trans-Canada Airlines. Ms Langdon preferred, however, to give the work to the Solicitor, who was than a younger lawyer for whom she had a high regard.

Ms Langdon testified that she has always been profoundly grateful to the Solicitor for his assistance and support during this most

1997 CanLII 915 (ON L.S.D.C.)

difficult time for her. The Solicitor not only settled the action against Trans-Canada Airlines on favourable terms, but managed to "keep it out of the press". She testified that he also "kindly made sure I wasn't left friendless". She testified that the Solicitor was good to her children, and particularly encouraged her daughter.

6. Marilyn Locke testified that she met the Solicitor in 1977 in the Shelburne Congregation of the Jehovah's Witnesses. The Solicitor became her lawyer and acted on her behalf and on behalf of other members of her family in real estate transactions and in the preparation of wills.

Ms Locke testified that she has often sought and relied upon the Solicitor's advice. When she was divorced and needed to work outside the home, he encouraged her to become a legal secretary. She took this advice, and now works as a legal secretary at McCarthy Tetrault.

Like Ms Langdon, Ms Locke testified that the Solicitor has also been kind to her children. She testified that she has two children who were qualified for programs for "gifted" children in school, but that she was worried about whether segregating them from the mainstream would be beneficial to them. She testified that when she sought the Solicitor's advice he took her son aside and said to him that because he had a gift he had a duty to use it to help others.

7. Stephen Fielder testified that the Solicitor hired him to work as a law clerk in 1971. Mr. Fielder further testified that although he told the Solicitor that he did not intend to work there for long because he intended to move back to the Province of Quebec, he remained in the Solicitor's employ for 12 years.

Mr. Fielder testified that the Solicitor had a busy practice, in which he was always available to help his fellow Jehovah's Witnesses. When he acted for other Jehovah's Witnesses on real estate deals he never charged them full tariff, Mr. Fielder testified, but rather gave them at least a 25% discount. Mr. Fielder also testified that the Solicitor often acted in hardship cases even though to do so was not cost effective for him.

Mr. Fielder testified that when the Solicitor learned, shortly after Mr. Fielder began working for him, that Mr. Fielder was living with his parents in Orangeville and commuting, the Solicitor invited Mr. Fielder to live in the Solicitor's own home. Mr. Fielder testified that he was "staggered" by the generosity of the Solicitor's offer, which he accepted. He lived with the Solicitor for a few months at that time, and at other times when he (Mr. Fielder) needed help. Mr. Fielder also testified that the Solicitor's home was also open to other people who needed help, and that the Solicitor always encouraged people to telephone him at home even in relation to matters that he was handling pro bono.

1997 CanLII 915 (ON L.S.D.C.)

Mr. Fielder observed that a great many clients talked to him about the personal interest that the Solicitor took in their legal matters, particularly in the family law field.

Mr. Fielder also testified that he attended court with the Solicitor on many occasions, and that the Solicitor was always treated with great respect and deference by both other counsel and judges.

Mr. Fielder testified that he is familiar with the Solicitor's general reputation in the community, both because he knows a number of lawyers who are acquainted with the Solicitor, and because he and the Solicitor belong to the same tennis club. He testified that all hold him in very high regard, and consider his family to be a model of Christian living.

Mr. Fielder also observed that the Solicitor has strong opinions, and that perhaps in part as a result of this people tend to have strong opinions of him, one way or the other. He added that the Solicitor is an intensely loyal friend, sometimes to a fault: he believes that the Solicitor's loyalty is sometimes misplaced, and that on occasion he has been loyal to people who do not deserve it. He cited Howard Finlason, the Solicitor's cousin (who figured prominently in certain of the findings of misconduct that the Panel has found established), as an example of the Solicitor's tendency to be loyal to those who may be undeserving of it.

8. Robert Edward Millar testified that he had know the Solicitor for 30 years as a fellow Jehovah's Witness. He testified that in this community the Solicitor "was a hero for disadvantaged people". He said that the Solicitor was not a "stop watch" lawyer, but rather that he gave freely of his time to those who approached him in need of his assistance. Mr. Millar testified that the Solicitor "is an immodest man, but not an immoral man".

9. Colm Brannigan testified that he was called to the bar in Ontario in 1983, and that he has practised in Brampton since then, except for a two year period during which he practised with Epstein, Cole in Toronto. His practice is primarily in the field of family law.

Mr. Brannigan testified that he now shares space in Brampton with several other lawyers, including Sarah Mott-Trille. He moved into the space in 1994, by which time the Solicitor had stopped practising pursuant to an undertaking that he had given to the Law Society.

Mr. Brannigan testified that the Solicitor occupies a spot in the library shared by the lawyers who practise in the office, but that he has no private quarters there in which to meet clients. He testified that the Solicitor is not practising law, but rather uses his spot in the library to work on the Law Society proceedings and on proceedings that have been brought against him by his Church.

1997 CanLII 915 (ON L.S.D.C.)

Mr. Brannigan testified that he has taken advantage of the Solicitor's presence in the office to ask for his practical opinion on issues that have arisen, for example, in custody and access matters, and has found the Solicitor's advice to be valuable, and the Solicitor to be an excellent resource.

Mr. Brannigan testified that though he does not consider himself to be a close friend of the Solicitor or his family, he has known him since 1990 when he and the Solicitor had a case together. Mr. Brannigan's client was "anti-Jehovah's Witnesses" in that case, because he considered the ruination of his marriage to be due to the fact that his wife had become a Jehovah's Witness. Mr. Brannigan was impressed with the Solicitor's ability to maintain his composure in a bitter and emotionally charged case.

Mr. Brannigan testified that the Solicitor still enjoys a good reputation in the legal community in Brampton, where there is much respect, affection and concern for him, even among people who are aware of the troubles that have resulted in these disciplinary proceedings.

Finally, Mr. Brannigan testified that if Convocation were to permit the Solicitor to continue to practise he (Mr. Brannigan) would be pleased to undertake the responsibilities referred to in the Solicitor's written undertaking (Exhibit 75, which is summarized at pages 93-94 above), an obligation he would not enter into lightly. Mr. Brannigan testified that he has read the Report and Decision of this Panel a number of times, and he is aware of the seriousness of the findings that the Panel has made. Nevertheless, he testified, he knows that the Solicitor has had an unblemished career for 40 years, and that though "this is a large blip" it is nevertheless a "blip" in an unblemished career.

10. Judy Kelly testified that she worked as the Solicitor's secretary from 1966 until he ceased practising in 1994.

Ms Kelly testified that the Solicitor has always been a very compassionate and caring person who was always going out of his way to do kind things for people, and especially people of his faith. His home was always open, she testified, both figuratively and literally; he was very approachable.

Ms Kelly also testified that the Solicitor was generous financially. Ms Kelly, who is herself a member of the Jehovah's Witness religion, testified that "sisters in our faith would come to him, and he would give them money because their husbands would not". She added that the Solicitor had loaned her money in times of need.

Ms Kelly testified that the Solicitor looked after dozens of adoptions over the years, and that people that she ran into at Jehovah's Witness conventions on may occasions expressed their gratitude to the Solicitor for giving them an opportunity to have (adopted) children.

1997 CanLII 915 (ON L.S.D.C.)

In conclusion, Ms Kelly testified that notwithstanding the findings that the Panel has made in its report she regards the Solicitor to be a man of integrity and honesty, and added that if she had felt otherwise at any time her conscience would not have allowed her to continue to work for him.

11. The Panel also heard the evidence of Michael Hill, a Solicitor in the United Kingdom, who testified by telephone. Mr. Hill has been practising law since 1970. He has frequently acted for the Watch Tower Society and for individual Jehovah's Witnesses in Europe and North America.

Mr. Hill testified that he has known of the Solicitor's reputation for approximately 20 years, as the Solicitor is known among lawyers who act for Jehovah's Witnesses as a lawyer who has developed particular expertise in custody and access cases involving Jehovah's Witnesses. He testified that the Solicitor has long been held in very high regard in the Jehovah's Witness community internationally as a person of great integrity and morality who is respected both academically and professionally. He testified that the Solicitor has made a substantial contribution to the Watch Tower Society. He cited the LeGrove case (which is referred to at length at pages 65 to 85 of the Panel's Report and Decision) as a case that has been circulated widely among lawyers who represent members of the Jehovah's Witness faith in custody and access cases. The case is regarded generally as a "forward stride" and has assisted Mr. Hill and other lawyers who practise in the field, he testified.

12. Frank Kisluk testified that he was qualified as a chartered accountant in 1969, and that he has been licenced as a trustee in bankruptcy since 1977.

Mr. Kisluk testified that in June 1994 the Solicitor approached him for advice concerning the re-organization of his affairs. With Mr. Kisluk's assistance, the Solicitor was able to structure a proposal which was designed to enable him to make full restitution to all clients who had lost money as a result of his acts. The proposal called for not only the Solicitor's own assets, but also substantial assets of other members of his family, to be made available to creditors.

Mr. Kisluk testified that it was apparent to him that the Solicitor was committed to making restitution, and indeed that he was "anxious to make this gesture".

Mr. Kisluk explained that the creditors' meetings were very heated, and were notable for "a lot of vitriol". He testified that there was always a level of antagonism from the Watch Tower Society, whose representatives suggested that the Solicitor was secreting assets. Mr. Kisluk added that he had seen no evidence that this was in fact the case.

Nevertheless, he testified, the creditors committee (which included a representative of the Watch Tower Society and two

1997 CanLII 915 (ON L.S.D.C.)

other members) recommended against the proposal (which Mr. Kisluk supported), and the proposal was defeated. The Solicitor was accordingly placed in bankruptcy. (The Solicitor hopes to be discharged from bankruptcy in January 1997.)

13. Sarah Mott-Trille testified that she decided to become a lawyer because of her admiration for her father and the way that he helped people. She testified that her father had always encouraged his children to use their talents to help people.

Ms Mott-Trille also testified that she chose to continue to use the surname Mott-Trille professionally after her marriage "essentially because of my father's reputation"; "I achieved a level of rapport with lawyers and judges because of his reputation". Ms Mott-Trille added that she still benefits from her father's reputation today, and that recently a judge said so to her in open court.

14. Doctor Rachel Mott-Trille, another daughter of the Solicitor, testified that she graduated with her M.D. degree from the University of Toronto in 1987 as the gold medallist in her class. She pursued graduate training in psychiatry thereafter, and became qualified to practise as a psychiatrist in 1992. She practises as a child psychiatrist, and is on the staff of Credit Valley Hospital as well as maintaining a private practice in that field.

She testified that in 1991 and 1992 it became apparent to her that her father was under great stress, as he had disappointed a lot of people and was "taking it hard". Dr. Mott-Trille testified that her father became depressed, and that she urged him to get professional help. However, her father did not agree with her, she testified, at that time, though ultimately he did obtain professional assistance at the end of 1993.

In the meantime, she testified, even his church seemed to turn against him, and his condition was exacerbated because he felt abandoned. She testified that he was diagnosed in late 1993 as having had a major depressive episode, and was treated with anti-depressant medications and psychotherapy for two and a half years or so. His condition was characterized by tearfulness and damaged self-esteem.

Dr. Mott-Trille testified that her father asked her and other members of the family about their assets, and that the family had a lot of meetings at which all agreed that they were keen to help the Solicitor however they could. She testified that she and her sisters went to the Watch Tower Society and met with the Watch Tower Society's two senior lawyers, Glen How and John Burns. She testified that she and her sisters "laid out our assets including family jewellery, and offered to come to terms". Dr. Mott-Trille expressed disappointment that Mr. How and Mr. Burns "weren't interested in anything but cold cash, and our assets were tied up and we needed time". She testified that she and her sisters

1997 CanLII 915 (ON L.S.D.C.)

followed up with a letter, but that the Watch Tower Society was not interested in attempting to resolve the matter in that way.

(c) The Solicitor's Evidence

The Solicitor himself also testified during the penalty phase of his hearing. He testified that he accepts and respects the findings made in the report and decision of the Panel. In relation to the Panel's finding that he had misapplied funds belonging to his client Ruth Ramsbottom (a finding made at page 43 of the Report) the Solicitor testified that: "I accept that criticism. I should have put it in writing."

In relation to the Panel's finding (at page 54 of the Report) that he misapplied $89,131.13 from the estate of Phyllis Winters, the Solicitor acknowledged the finding and testified that "it was a mistake".

In relation to the finding (at pages 64 to 65 of the Report) that the Solicitor misapplied $65,000 from the estate of Florence Antoniuk, the Solicitor testified: "I agree this should not have been done."

In relation to the finding (at pages 78 to 85 of the Report) that the Solicitor misappropriated $45,000 from the Watch Tower Society, the Solicitor testified that: "That finding has caused me a great deal of thought." He added that he had been embroiled in a conflict in his own religious institutions in which he had believed that he had been accused falsely of certain things. He testified that he should have followed up on a phone call that he had placed to Mr. How in which he had intended to seek Mr. How's authority to use funds to which the Watch Tower Society was entitled. "It shouldn't have happened," the Solicitor testified; "I should have organized it better, and confirmed it in writing." He added that he now believes that he "paid too much attention to the fray between us and too little to my legal obligations." He also testified that: "I acknowledge in retrospect a lack of good faith, but there were circumstances it must be considered in light of."

The Solicitor also testified that approximately $1,500,000 of his and his family's assets have been made available to his creditors. This included the proceeds of the sale of his matrimonial home, which had always been in his wife's name. It also included the proceeds of the sale of the "milk quota" for his dairy farm (the most valuable asset of a dairy farmer), for $175,000.

The Solicitor also testified that he collapsed his registered retirement savings plan, which was of the value of approximately $60,000. Approximately half of the RRSP was paid to Revenue Canada, and the balance was made available to investors who had lost money.

1997 CanLII 915 (ON L.S.D.C.)

The Solicitor testified that in 1989 his gross income was approximately $900,000, and that his net income was approximately $165,000 (his expenses included the salaries of several employees among other things). The following year, 1990, his income was reduced by about 50%, and his income in 1991 was reduced further. Between 1992 and 1994 (when he undertook not to practise pending the disposition of the disciplinary proceedings), the Solicitor testified, he had hardly any drawings "because I wrote off almost everything on income tax, to pay off people who made investments."

The Solicitor testified that his only income at present is his old age pension and Canada Pension Plan payments: "Today I am in bankruptcy and have no money."

In cross-examination, the Solicitor testified that the amount that is still owing to client investors and other creditors is about $1,500,000 including interest. He also testified that the $1,500,000 that has been paid from his and his family's assets does not include approximately $85,000 that was paid by the Lawyer's Professional Indemnity Company.

In response to a question from one of the members of the Panel the Solicitor acknowledged that at the time he made unauthorized use of clients' funds he needed money quickly.

(d) Reasons for Recommended Penalty

As mentioned above, the Panel was impressed by the sincere accolades bestowed upon the Solicitor by character witnesses from a broad spectrum of society. There is no doubt in our minds that the Solicitor has made an extraordinary contribution particularly to his church and to members of his faith, but also to other individuals whom he was positioned to help, over the course of a distinguished career.

This portrayal of the Solicitor as a kind, caring, and generous person is difficult to reconcile with the serious professional misconduct that the Panel has found established. The Solicitor misappropriated $45,000 from the Watch Tower Society, and misapplied a total of $890,000 of funds belonging to five clients (two estates, two individuals, and a husband and wife).

The Panel considered the misapplications in this case to be if anything more serious than the misappropriation from the Watch Tower Society. As pointed out at page 28 of the Report, the Panel has found that the Solicitor invested $675,000 of his client Jeannette Steed's funds (a substantial portion of the matrimonial settlement that she received from her husband) without his client's authority, a decision that was influenced more by his desire to benefit other clients who had invested in an abortive project than by a concern for the safety of Mrs. Steed's investment. The Panel also found that the Solicitor misapplied $35,000 belonging to his client Ruth Ramsbottom by diverting those funds to the benefit of other clients without Mrs.

1997 CanLII 915 (ON L.S.D.C.)

Ramsbottom's authority. The seriousness of this professional misconduct is aggravated by the fact that Mrs. Ramsbottom was an unsophisticated client who was in dire financial straits at the time, a point that she made to the Solicitor repeatedly (though not necessarily in every conversation) when she telephoned him "many times and actually nearly begged to have my money sent to me."

Mr. Mark submitted that because the Solicitor had a benevolent intention, he considered it proper to make what was his clients' decisions for them, and that though he should not have done that the findings of the Panel do not reflect what Mr. Mark characterized as a "criminal intent".

Particularly in light of the persuasive character evidence, the Panel accepts that both at the time of the misappropriations and misapplications and thereafter, the Solicitor genuinely hoped and expected (albeit with an optimism that was unjustified) that his clients would be reimbursed fully for their losses. The Panel accepts Mr. Mark's submission that the Solicitor did not have a "criminal intent".

We do not entirely accept the submission that the Solicitor's intent was "benevolent"; or, at least, we do not accept that the victims of his misconduct can in any sense be considered the objects of the Solicitor's intended benevolence. Rather, the Panel concludes that at a time in which he and other clients were in need of funds, the fundamental decency and generosity that had characterized his conduct throughout his career was, regrettably, compromised when he took advantage of his access to funds under his control that belonged to his clients.

We accept Mr. Fielder's insightful observation that the Solicitor's commendable loyalty was occasionally misplaced, and the implication that in making improper use of trust funds in his possession the Solicitor may well have been motivated by a desire to help others who either had lost or were in jeopardy of losing money even though at least some of those people may not have been deserving of the Solicitor's assistance. Although, viewed in this light, the Solicitor's misconduct is less serious than (for example) the misconduct of a lawyer who misappropriates clients funds to support an extravagant lifestyle, neither this explanation nor the Solicitor's sanguine hope that no one would ultimately lose money alters the fact that by misappropriating and misapplying almost $1,000,000 of client funds the Solicitor breached fundamentally his responsibilities as a lawyer.

The Panel was not entirely convinced that the Solicitor himself appreciated the seriousness of his misconduct. In his evidence in mitigation of penalty, while accepting and ostensibly respecting the findings of the Panel, the Solicitor characterized at least one of his misapplications as "a mistake", and in relation to the Panel's finding that he had invested Mrs. Ramsbottom's money without instructions stated: "I accept that criticism. I should

1997 CanLII 915 (ON L.S.D.C.)

have put it in writing". It is not the Solicitor's failure to obtain Mrs. Ramsbottom's instructions in writing, however, that formed the basis of the Panel's finding; rather, it was the Solicitor's failure to obtain Mrs. Ramsbottom's instructions at all.

The Panel is satisfied that the Solicitor has genuinely attempted to make good his client's losses, and that not only he but also members of his family have been required to divest assets in an attempt to do so. The Panel also accepts that the Solicitor has been required to live in financially straitened circumstances as a result. Although some of the payments that have been made have been the result of actual or threatened legal proceedings brought against him, the Panel nevertheless considers the Solicitor's desire to compensate his clients to be genuine.

It is of course well established that the appropriate penalty in cases involving the misappropriation of client funds, in the absence of exceptional extenuating circumstances, is disbarment. In the present case, as mentioned above, the Panel considered the numerous misapplications of client funds to be at least as serious as his misappropriation of $45,000.

In such cases as Milrod (report adopted by Convocation on January 30, 1986) and Cooper (report adopted by Convocation on May 23, 1991) the benchers have emphasized that in cases involving misappropriation disbarment is not a penalty that should be reserved for practitioners who are wholly without redeeming qualities. Nor is the protection of the public the only purpose served by a disbarment order in such circumstances; of at least equal importance is the necessity of maintaining the reputation of the profession in the eyes of the public. Members of the public are entitled to reassurance that in discharging its privilege of self government, the legal profession will unequivocally express the unacceptability of lawyers misusing clients' funds with the harshest penalty available, save when mitigating circumstances are such that well-informed members of the public would accept a departure from this general rule.

The Panel was referred in argument to a number of decisions, some of which resulted in lawyers being suspended despite findings of serious misconduct. The Panel does not consider any of these cases to be comparable to the present case. Cases such as Baum (reasons of Convocation dated September 28, 1995) in which the solicitor was suspended for 18 months for misappropriating a relatively small amount of money in a case involving other extenuating circumstances, did not involve (as does the present case) the repeated misapplication of substantial sums of money to which clients were entitled. Cases such as Ashbee (report adopted by Convocation September 26, 1996) and Warga (report adopted by Convocation April 21, 1994) involved neither the misappropriation nor the misapplication of client funds, but rather the failure of lawyers to conscientiously serve clients and comply with the

1997 CanLII 915 (ON L.S.D.C.)

requirements of rule 5 (conflict of interest), as well as other misconduct.

Although the Panel accepts that if the Solicitor were permitted to continue to practise he would honour the undertaking that he is willing to give to restrict his practice (and though the Panel of course accepts as well that both Sarah Mott-Trille and Colm Brannigan could be relied upon to discharge the responsibilities contemplated by the Solicitor's undertaking), we are of the view that the maintenance of public confidence in the profession requires Convocation to terminate the Solicitor's membership by reason of the seriousness of the misconduct that the Panel has found established. Nothing is more likely to bring discredit upon the legal profession than the misappropriation or other unauthorized use of clients' funds. The Solicitor's unauthorized use of his clients' funds in the present case was a complete abdication of his responsibilities as a lawyer.

In the vast majority of cases involving both the misappropriation and the misapplication of substantial amounts of client funds, evidence of prior good character would not in itself justify a recommendation that a Solicitor's membership be terminated by way of an order permitting the Solicitor to resign rather than by way of an order of disbarment. In the present case, however, the Panel considered the evidence that it received in mitigation of penalty on the Solicitor's behalf to be exceptional. Over the course of his entire career, the Solicitor has contributed selflessly and generously to the well-being of those whom he has been able to assist. Until he misused client funds in the incidents that gave rise to these proceedings, the Solicitor epitomized the tradition of public service in which the legal profession rightly takes pride. His contributions throughout his career, with the exception of the incidents of misconduct that the Panel has found established, have been commendable and exceptional, and the Panel believes that well-informed members of the public would accept that though Convocation's duty to the public requires it to terminate the Solicitor's right to practise law, to spare him the indignity of disbarment would entail no violation of Convocation's duty to the public.

The Panel accordingly recommends that the Solicitor be granted permission to resign in the event that he requests such permission when this matter is considered in Convocation. The Panel further recommends that, in the event the Solicitor elects not to request permission to resign, he be disbarred.

DATED at Toronto this 22nd day of January, 1997.

Gavin MacKenzie (Chair)

ORDER of Convocation

1997 CanLII 915 (ON L.S.D.C.)

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 22nd day of January, 1997, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Charles C. Mark, Q.C., wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Frank Radley Mott-Trille be granted permission to resign his membership in the said Society within seven days, failing which, that he be disbarred, and thereby be prohibited from acting or practising as a barrister and solicitor and from holding himself out as a barrister and solicitor.

DATED this 21st day of October, 1997.

"Acting Treasurer" "Secretary"

Note: The Member did not file his resignation within seven days and therefore was disbarred on October 29, 1997.

1997 CanLII 915 (ON L.S.D.C.)

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Preface to the Fifth Edition

The publishing of this fifth edition heralds a significant change in the editorial personnel of the casebook. The two founding editors, David Mullan and Stanley Sadinsky, as a result of retiring from active teaching at Queen's University, have decided to leave the editorial board. The remaining editors wish to record their deepest and sincerest gratitude to David and Stanley for both taking the initiative to create a remedies casebook and diligently seeing each of the last four editions through to publication. In addition to David and Stanley leaving the editorial board, Thomas Cromwell has also decided to withdraw from active editorship. Readers will know that Thomas was appointed to the bench of the Nova Scotia Court of Appeal, a task that has left him little time to continue editing his chapters of the book.

Jeff Berryman has assumed the general editorship, and he and Jamie Cassels and Stephen Waddams, two of the original editors, have been joined by Vaughan Black, Michael Pratt, and Kent Roach. We are glad to have such highly respected scholars in remedies join the editorial team. Vaughan has assumed control of chapters 3 and 4, vacated by Thomas Cromwell; Michael has direction over chapters 9 and 11, vacated by David Mullan and Stanley Sadinsky; and Kent takes over control of chapter 12, on Charter remedies. With new blood have come new ideas for the casebook.

David and Stanley envisaged a casebook that would act as a comprehensive resource tool, combining academic commentary, case reports, and detailed notes on the subject of remedies. Their conception was a casebook that could be adapted to the particular focus and interests of individual instructors. Thus, for an instructor who wished to focus only on equitable remedies, the material commencing at part II of the text would provide all that is necessary to ensure complete coverage of the area. The current editors remain true to that original vision. Our experience leads us to believe that most remedies courses taught in Canada combine elements of both common law and equitable remedies, although emphasis may vary as to whether interlocutory injunctions, Charter remedies, or damages for personal injury are covered. The choice is left to individual instructors, who will find in this casebook appropriate material to meet all particular needs.

The fifth edition of the casebook is evolutionary, rather than revolutionary, in its accommodation of new jurisprudence. We have avoided the temptation simply to expand the amount of materials to reflect recent cases, but have, by careful editing, consciously tried to reduce the size of the casebook, while maintaining its topical relevance and comprehensive coverage. In chapter 1, the Supreme Court of Canada's important treatment on punitive damages in *Whitten* has warranted extensive excerpts. In chapter 5, on personal injuries, much of the public policy material on approaches to compensation

been a member of that Court, I adopt this reasoning in principle. I am of the opinion that there is a burden upon the applicant to show to the Court that he has enough of a case—I am adopting Mr. Pepper's word "enough"—that when it comes to trial he will have a reasonable chance of success. Perhaps I am introducing a new term when I use the word reasonable. The cases often refer to a *prima facie* case, a fair *prima facie* case, a strong *prima facie* case, not a frivolous or vexatious case, a chance of success, a probability of success, a serious question to be tried, a substantial issue to be tried. These are only some of the many phrases that have been used in dealing with this matter.

While there are differences in degree in all of these phrases, I do not consider them to be substantially different. Each case must be considered on its own merits and then the discretion of the Court must be exercised. The exercise of a discretion by its nature is not an exact science. Different Judges may come to different conclusions, and provided that they have exercised their discretion within the jurisprudential framework, it is futile to quibble over the semantics of the words they may individually use. The *American Cyanamid* case sets standards that appear in their words to be more lenient than the words "*prima facie* case" or "probability of success." I am of the opinion that there is no serious difference. Surely a serious question to be tried equates to a *prima facie* case. The degree to which a Judge will consider the importance of the nature of the case in coming to his conclusion must be weighed with the knowledge of the other factors which he must consider, such as the question of harm to the parties and damages as an alternative, the balance of convenience to the parties and the need, if any, to maintain the *status quo*.

IRREPARABLE HARM

American Cyanamid places greater attention on the need for the applicant to show "irreparable harm" before being granted an interlocutory injunction. In addition, irreparable harm to the applicant must be weighed against the potential for irreparable harm to the defendant. Only when these are evenly balanced can the court look at the merits.

In *RJR-MacDonald*, [1994] 1 SCR 311, at 341 (see also chapter 12, "Charter Remedies"), the Supreme Court gave its approach to irreparable harm in the following terms:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that cannot be quantified in monetary terms or which either cannot be cured, usually because one party cannot collect damages from the other.

"Irreparable harm" requires the applicant to prove that damages, being the most common civil law remedy, are inadequate. However, we have seen that courts have never retreated from assessing damages, no matter how problematic their quantification. As the following extract suggests, inadequacy or irreparable harm is a question of degree: Owen M. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978), at 38 (footnotes omitted).

> I begin with the legacy of the property injunction—the view that in our legal system the relationship among remedies is hierarchical and that in this hierarchy the injunction is disfavoured, ranked low. This hierarchical relationship and the subordination of the injunction is, we recall, primarily the handiwork of the irreparable injury requirement. That

requirement makes the issuance of an injunction conditional upon a showing that the plaintiff has no alternative remedy that will adequately repair his injury. Operationally this means that as a general proposition the plaintiff is remitted to some remedy other than an injunction unless he can show that his noninjunctive remedies are inadequate.

There are, to be certain, ambiguities latent in the doctrine. For one thing, inadequacy is not a dichotomous quality, but rather permits of degree, and yet the degree required is never specified. It is not clear how inadequate—whether greatly or slightly—the alternative remedy must be before an entitlement to an injunction is established. Second, there is uncertainty as to which types of inadequacies are to count for the purpose of applying the test. What about the retrospective nature of the damage action, the interposition of the jury, or the future financial unresponsiveness of the defendant? From one standpoint—that of the plaintiff seeking the strongest safeguard of his rights—they are viewed as inadequacies; not so from a more disinterested perspective. Counting the retrospective nature of the damage award as an inadequacy would require a reordering of the hierarchy that would undermine the very doctrine being applied, for that defect is always present. The interposition of the jury also might not count as a defect because the Constitution requires it to be viewed as a virtue. And it might even be argued that the likely financial unresponsiveness of the defendant should not count, because it would strain institutional resources by placing an excessive front load on each individual injunctive lawsuit if an evidentiary inquiry into the present and future financial resources of the defendant were permitted. Third, ambiguities inhere in the irreparable injury requirement because it is not clear which alternative remedies must be shown to be inadequate before the injunction is available. Is it just the damage action or criminal prosecution, or is it also, as the Supreme Court has recently suggested, the criminal defense, *habeas corpus*, removal proceedings, change of venue, disciplinary proceedings, and even appellate review?

These ambiguities permit considerable manipulation of the doctrine. Yet I am concerned with the unmistakable general effect of the doctrine: it creates a remedial hierarchy and relegates the injunction to a subordinate place in that hierarchy. The inadequacy of alternative remedies must be demonstrated before the injunction can be utilized, but there is no reciprocal requirement on those alternative remedies. The plaintiff in a damage action or a criminal prosecution, for example, need not establish the inadequacy of the injunction before those remedies come available.

See also D. Rendleman, "The Inadequate Remedy at Law Prerequisite for an Injunction" (1981), 33 *U Fla. L Rev.* 346; Douglas Laycock, *The Death of the Irreparable Injury Rule* (Cary, NC: Oxford University Press, 1990); and Douglas Litchman, "Uncertainty and the Standard for Preliminary Relief" (2002), 70 *U Chicago L Rev.* 197.

In the following cases, what influence has inadequacy or irreparable harm had on the court's decision to grant or withhold an interlocutory injunction?

Mott-Trille v. Steed
(1996), 27 OR (3d) 486 (Gen. Div.)

DYSON J: This motion was brought by the plaintiff, Frank Mott-Trille, for an injunction to prevent the defendants from proceeding with a hearing to determine Mr. Mott-Trille's status within the religious group known as the Jehovah's Witnesses.

Background Facts

Mr. Mott-Trille has been both a lawyer and a Jehovah's Witness for approximately 40 years. Over the years, many of his clients have been members of the organization. For example, he has represented Jehovah's Witnesses in matrimonial disputes and in estate matters.

The defendant Watch Tower Bible and Tract Society of Canada ("Watch Tower Society") is an unincorporated association that runs the Jehovah's Witnesses. The defendants John Didur and André Ramseyer are two of the Watch Tower Society's administrators. The defendants W. Glen How, QC, and John Burns are its in-house counsel. The defendant Daryl Harris is the Circuit Overseer for the Jehovah's Witnesses in the area in which Mr. Mott-Trille resides. The defendants Douglas Fraser, Edward Morrison, and Charles Goodvin are members of the church who have been appointed to the "new Judicial Committee" to hear and consider allegations of theft against Mr. Mott-Trille.

In 1993, the Law Society of Upper Canada ("Law Society") launched an investigation into Mr. Mott-Trille's legal practice based on allegations of his misapplication and misappropriation of clients' funds. It is alleged that some members of the Jehovah's Witnesses and the Watch Tower Society itself were affected by Mr. Mott-Trille's mishandling of funds. During the course of its investigation, the Law Society spoke with and obtained information from a number of Jehovah's Witnesses, including Mr. How and Mr. Burns. In July 1994, Mr. Mott-Trille gave an undertaking to the Law Society not to practise law until the resolution of the disciplinary proceedings. The hearings before the Law Society began in June 1995 and are currently adjourned. It is anticipated that the Law Society hearing will resume and be completed within the next few months.

In 1994, the Watch Tower Society conducted its own investigation into whether Mr. Mott-Trille was in violation of any scriptural principles such as to warrant discipline. In April of that year, a Judicial Committee of the Watch Tower Society comprised of three members held a hearing on charges of "theft" against Mr. Mott-Trille. The church's Judicial Committee decided that Mr. Mott-Trille had committed theft and sentenced him to a reproof, which was subsequently changed to a disfellowship (a "disfellowship" is somewhat analogous to an excommunication in the Roman Catholic Church). Mr. Mott-Trille appealed this decision, according to the Watch Tower Society's procedure, to an Appeal Committee. On April 25, 1994, the Appeal Committee upheld the findings of the first Judicial Committee and the decision to disfellowship Mr. Mott-Trille.

Mr. Mott-Trille had a number of concerns regarding the conduct of the hearings before the Watch Tower Society's first Judicial Committee and the Appeal Committee. He contended that both committees breached the rules of natural justice in that they interviewed witnesses without him being present, limited his right to cross-examination, and prevented him from being represented by legal counsel. Mr. Mott-Trille asserted that the committees applied an incorrect definition of theft in that they had specifically found that he had no intention to steal, yet decided that he had committed theft. He further alleged that Mr. How and Mr. Burns had misrepresented and/or misled all of the tribunals, including the Law Society, with regard to the Jehovah's Witnesses' files carried by Mr. Mott-Trille and their relationship to the Watch Tower Society.

Because of these concerns, Mr. Mott-Trille appealed to the Governing Body of the Jehovah's Witnesses in New York in May 1994. He never heard back directly from the Governing Body. However, in January 1995, the Chair of the first Judicial Committee of the Watch Tower Society phoned Mr. Mott-Trille and informed him that they would be annulling the previous decisions and a new Judicial Committee would be appointed by the church to consider the same charges afresh.

In 1993, the defendant Jeanette Steed sued Mr. Mott-Trille for damages. In 1994, the defendant A.F. Danley also commenced an action against Mr. Mott-Trille. Both Ms. Steed and Mr. Danley were clients of Mr. Mott-Trille and are also Jehovah's Witnesses. These actions were both settled and full and final releases were separately signed on February 7, 1995, by Ms. Steed and August 30, 1995, by Mr. Danley. Both releases included an undertaking of confidentiality by Ms. Steed and Mr. Danley respectively.

The new Judicial Committee of the Watch Tower Society has pressed Mr. Mott-Trille to proceed with the hearing; the last scheduled date was November 9, 1995. In response, Mr. Mott-Trille has issued two statements of claim. The first statement of claim was issued on September 14, 1995 against the same defendants as the within action, except for Ms. Steed and Mr. Danley. As well, the members of the first Judicial Committee were named as defendants. In this action, Mr. Mott-Trille seeks damages and an injunction restraining the hearing of the church's new Judicial Committee until at least the completion of the Law Society disciplinary hearings. The second claim was issued on October 30, 1995. In the second action, Mr. Mott-Trille seeks a declaration that the decisions of the Watch Tower Society's original Judicial Committee and the Appeal Committee and the proceedings of the new Judicial Committee are void and have no legal effect due to breaches of natural justice, lack of jurisdiction and *functus officio*. Mr. Mott-Trille also seeks an injunction restraining the new Judicial Committee of the church from proceeding with any information obtained from Ms. Steed or Mr. Danley, which he claims would be in breach of their confidentiality agreements.

Mr. Mott-Trille subsequently brought this motion for an interim and/or permanent injunction to prevent the new Judicial Committee of the Watch Tower Society from conducting its hearings until the Law Society proceedings and Mr. Mott-Trille's civil actions have concluded. In this motion, Mr. Mott-Trille also requests a declaration that the proceedings of all the ecclesiastical tribunals, including the new Judicial Committee, are void *ab initio* for breaches of the principles of natural justice, bias, errors of law and lack of jurisdiction. Finally, Mr. Mott-Trille seeks an order requiring the production of all documents in the possession and control of the defendants arising

out of the matters dealt with by the church's first Judicial Committee, the Appeal Committee, and the second Judicial Committee.

I only propose to deal with the motion as it relates to the application for an interim injunction to enjoin the new Judicial Committee of the Watch Tower Society from conducting its hearings until the Law Society has concluded its proceedings, without prejudice to the plaintiff to reapply for further relief when such hearings have been completed.

Jurisdiction

Courts are justifiably reluctant to interfere with the internal affairs of domestic tribunals, particularly religious organizations such as the Watch Tower Society. However, courts in this province have intervened in the internal affairs of a church where the circumstances warrant. ...

Interlocutory Injunction

In *Yule Inc. v. Atlantic Pizza Delight Franchise* (1977), 17 OR (2d) 505 (Div. Ct.), the Divisional Court adopted the test for interim injunctions formulated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 (HL), and in so doing set down the criteria to be followed in this province. The first issue to be determined on a motion for interlocutory injunction is whether the moving party has presented evidence of a substantial question to be tried. This is a departure from the old rule requiring the moving party to establish a strong *prima facie* case. In *Yule*, Cory J recognized that in cases where there is conflicting affidavit evidence before the court, a determination of the existence of a *prima facie* case is unrealistic. A finding that a serious issue exists is sufficient. Once that determination is made, the court then considers whether the harm may be adequately compensated for by damages and which side the balance of convenience favours. In his review of the law, Cory J quoted from the reasons of the motions judge in the case before him at p. 507:

> The principles which emerge from the cases cited including *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 2 WLR 316, and *Bryanston Finance Ltd. v. de Vries (No. 2)*, [1976] 1 All ER 25, make it evident that on an application for an interlocutory injunction the rights of the parties arising out of their contractual relationship are not to be determined by the Court. It is sufficient if the applicant establishes that there is a substantial issue to be tried; that it has demonstrated a *prima facie* case, in the sense that the applicant has a legal right which it is attempting to protect pending trial; that the failure to grant the relief will result in a threatened harm to the applicant which may not be adequately compensable by way of damages and finally, that the preponderance of convenience must be in favour of the applicant if the application for injunctive relief is to succeed.

Adopting the test in *American Cyanamid*, *supra*, I find that it is clear that there are substantial issues to be tried in this action.

Irreparable Harm

In the case at bar, if the injunction is not granted, the second Judicial Committee of the Watch Tower Society will proceed, likely before the Law Society hearings have completed. Based on the information before the court, and without making a finding as to whether there has been prejudgment by the second Judicial Committee, it is entirely possible that Mr. Mott-Trille will be disfellowshipped by this second Judicial Committee of the church. There was much material put before the court as to the effect of a disfellowship on a member.

The defendants insist that Jehovah's Witnesses are free to interact with a disfellowshipped member in any manner they wish. It is argued that nothing prevents a member from speaking to the disfellowshipped person or giving evidence with respect to that person at a hearing. As a result, the defendants contend that Mr. Mott-Trille will not be impeded in presenting his case before the Law Society and will therefore not suffer any harm that cannot be compensated for by damages.

However, Mr. Mott-Trille has provided the court with contradictory and, in my opinion, convincing evidence in respect of how he might be impeded in communicating with and preparing witnesses for trial or the hearing before the Discipline Com-

> Therefore the members of the congregation will not associate with the disfellowshipped one, either in the Kingdom Hall or elsewhere. They will not converse with such one or show him recognition in any way. If the disfellowshipped person attempts to talk to others in the congregation, they should walk away from him. In this way he will feel the full import of his sin. ...
>
> When one ignores the disfellowshipping action and continues his association with the disfellowshipped person, then it shows a bad attitude toward Jehovah's laws. He, in effect, is showing that he upholds the offender and thinks Jehovah's righteous laws are of no account. ... Actually, the one who deliberately does not abide by the congregation's decision puts himself in line to be disfellowshipped for continuing to associate with such one. Since he is classified the same as the one disfellowshipped, "a sharer," then it is reasonable for the same action to be taken against this dissenter. He too can be cut off from Jehovah's favor and from his visible organization.
>
> *(The Watchtower, July 1, 1963)*
>
> The situation is different if the disfellowshipped or disassociated one is a relative living outside the immediate family circle and home. It might be possible to have almost no contact at all with the relative. Even if there were some family matters requiring contact, this certainly would be kept to a minimum, in line with the divine principle: "Quit mixing in company with anyone called brother that is a fornicator or a greedy person [or guilty of another gross sin], not even eating with such a man"—1 Corinthians 5:9-11.
>
> *(The Watchtower, April 15, 1988)*

In my view, it is entirely possible that Mr. Mott-Trille's ability to speak to Jehovah's Witnesses could be severely impaired upon being disfellowshipped and this would

have a significant negative impact on his defence before the Law Society. If a potential witness is a Jehovah's Witness and adheres to the dictates of the excerpts cited from the Watchtower as set out, Mr. Mott-Trille or his counsel might well find it impossible to determine what such witness's evidence might be in order to decide whether to call such witness. A person called to testify under such circumstances would be put in an extremely awkward position. Such a person would be caught between their sense of civic duty to fairly impart the facts that they know of the case and the strong belief in their faith, which dictates that they must separate themselves from the outcast member, or risk being contaminated themselves. Mr. Mott-Trille asserts that one person in particular who will be in such a position will be his daughter Sarah, who is an important witness in this case.

If an interim injunction is not granted, there is a very real possibility that Mr. Mott-Trille will be disfellowshipped before the conclusion of the Law Society hearings. As indicated, this could have a significant impact on Mr. Mott-Trille's ability to answer the charges against him at the Law Society.

Mr. Mott-Trille is fighting for the right to continue practising his profession before the Law Society. As indicated, this is a very important right, which the courts have recognized as worthy of protection: see Lee, *supra*; *Kane v. University of British Columbia*, [1980] 1 SCR 1105. In my opinion, Mr. Mott-Trille risks suffering irreparable harm to his ability to earn a livelihood if he is unable to fully and effectively present his case before the Discipline Committee of the Law Society by reason of being a disfellowed Jehovah's Witness.

Disposition

Accordingly, I grant an interim injunction, restraining the defendants from proceeding with the new Judicial Committee hearing of the Watch Tower Society until the Law Society hearings have concluded. It is my view that this order is the least intrusive to the Watch Tower Society's ability to conduct its own affairs, given the circumstances of the case. I make no decision at this time as to whether the breaches of natural justice and other improprieties alleged by Mr. Mott-Trille warrant more serious and permanent intervention by the courts. Mr. Mott-Trille's ability to protect his livelihood before the Law Society should not be hampered by any decision of the second Judicial Committee prior to the Law Society hearing. Mr. Mott-Trille is not a threat to the Watch Tower Society or to Jehovah's Witnesses in general; he can be disciplined as the organization sees fit after the outcome of the Law Society hearings, subject as I have said to Mr. Mott-Trille convincing a court to intervene further.

Motion granted.