

MINUTES OF SPECIAL CONVOCATION

Thursday, 23rd January, 1992
9:30 a.m.

PRESENT:

The Treasurer (James M. Spence), Brennan, Campbell, Copeland, Curtis, Elliott, Epstein, Goudge, Graham, Hickey, Howie, Lamont, Lawrence, Lax, Murray, S. O'Connor, Palmer, Peters, Rock, Somerville, Stewart, Strosberg, Thom, Wardlaw, Weaver and Yachetti.

.....

.....

IN PUBLIC

.....

DISCIPLINE COMMITTEE

RE: ARNOLD SAUL HANDELMAN, Mississauga

Mr. Rock placed the matter before Convocation.

The reporter was sworn.

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

Convocation had before it the Report of the Discipline Committee dated 2nd January, 1992, together with an Affidavit of Service sworn 21st January, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail and by courier on 9th January, 1992 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Chair
Brendan O'Brien
Mrs. Netty Graham

In the matter of
The Law Society Act

Gavin MacKenzie
for the Society

and in the matter of
ARNOLD SAUL HANDELMAN
of the City
of Mississauga
a barrister and solicitor

Alan D. Gold
for the solicitor

Heard: November 19, 1991

23rd January, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 22, 1991, Complaint D102/91 was issued against Arnold Saul Handelman, alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced with Complaint D102a/91 which was issued on November 19, 1991, alleging that he was guilty of conduct unbecoming a barrister and solicitor.

The matter was heard in public on November 19, 1991, before this Committee composed of Philip M. Epstein, Chair, Brendan O'Brien, Q.C. and Mrs. Netty Graham. The Solicitor was not present at the hearing and was represented by Alan D. Gold. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

The following particulars of conduct unbecoming were admitted and found to have been established:

Complaint D102a/91

Coventry Park, Niagara

- 2(a) In relation to a condominium townhouse development project in Niagara Falls, Ontario, known as Coventry Park, he provided personal guarantees, on the letterhead of the stationery of his law firm, to fellow investors in the project in circumstances in which he knew or should have known that the investors would rely on him in his capacity as a solicitor in providing these guarantees;
- (b) In relation to the same project, he arranged for the postponement and discharge of mortgage security of fellow investors without obtaining authority from those investors and without informing them of the postponement and discharge of their mortgage security;
- (c) In relation to the same project, he breached an undertaking given to the solicitor for Coventry Park of Niagara Ltd. to discharge two mortgages.

Nellwood General Partnership, Woodstock

- (d) In relation to a condominium townhouse development project in Woodstock, Ontario, known as Nellwood General Partnership, he provided personal guarantees, on the letterhead of the stationery of his law firm, to fellow investors in the project in circumstances in which he knew or should have known that the investors would rely on him in his capacity as a solicitor in providing these guarantees;
- (e) In relation to the same project, he arranged for the postponement and discharge of mortgage security of fellow investors without obtaining authority from those investors;

23rd January, 1992

- (f) In relation to the same project, he used deposits received from purchasers for unrelated business purposes rather than holding them in trust as required by section 53 of the Condominium Act, R.S.O. 1980, ch. 84, as amended.

Evidence

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

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D102a/91 and is prepared to proceed with a hearing of this matter on November 19, 1991.

II. IN PUBLIC/IN CAMERA

2. The Solicitor will not object to this matter being heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D102a/91 and this agreed statement of facts with his counsel, Alan D. Gold. He does not contest, for the purposes of this hearing only, the allegations as hereinafter set out. The Solicitor also admits that the facts as hereinafter set out constitute conduct unbecoming a barrister and solicitor.

IV. FACTS

4. The Solicitor was called to the bar on March 19, 1970. From then until November 9, 1973, he was a sole practitioner. From November 9, 1973, to October 1, 1974, he was a partner in the firm of Richman, Berk & Handelman. On October 1, 1974, he commenced practice in partnership with Jerry Korman, in the firm Handelman & Korman. That partnership was dissolved effective October 31, 1989, as evidenced by a dissolution agreement and a letter of intent between Handelman and Korman dated August 2, 1990. After October 31, 1989, the Solicitor practised in a firm called Handelman & Associates.

5. The Solicitor made an assignment in bankruptcy on February 14, 1991, as a result of serious cash flow problems in several real estate development projects being developed, financed and managed by a number of companies partially or wholly owned by the Solicitor, his former partner Jerry Korman, and their spouses.

A. Coventry Park of Niagara Ltd. ("Coventry")
Particulars 2(a)-(c))

6. The Solicitor was approached by the President of Coventry to raise construction financing for the first phase of a townhouse development project.

7. The Solicitor negotiated with Coventry through the Solicitor's mortgage brokerage company, Homeland Funding Inc. ("Homeland").

8. Before the construction financing was arranged on September 7, 1988, a company in which the Solicitor's wife had a 50% interest, Oldboro Properties Ltd. ("Oldboro"), agreed to purchase from Coventry the remaining 7 of the 18 townhouses in phase one of the development and to purchase 102 townhouses in the second and third phases of the development.

23rd January, 1992

9. After construction of the 102 townhouses in phases two and three were completed, Oldboro assigned its interest to two other companies, Buckingham Estates Ltd. ("Buckingham") and Manor Place Estates Ltd. ("Manor Estates"), both of which were 50% owned by the Solicitor at the time.

10. The Solicitor, through Homeland, and Marshall Godfrey, a mortgage broker, solicited funds to finance construction from private mortgage investors. The funds were received by way of cheque payable to "Handelman & Korman in trust". Reporting letters were sent to the investors by the Solicitor on the letterhead of Handelman & Korman or Handelman & Associates. In the reporting letters, the Solicitor wrote that the investors' loans were secured by a first mortgage.

11. The resulting syndicated mortgages (which were at a rate of prime plus 5%) were to be temporary, until an institutional mortgage was obtained, at which time, (according to evidence provided to the Society by investors, which the Solicitor does not contest for the purposes of this hearing) the syndicated mortgage investors were to be paid out. Homeland raised \$3,871,285 from the syndicated mortgage investors. Three mortgages were registered on title on June 15, 1989, in the name of Newbank Group Ltd. ("Newbank"), a company owned by the Solicitor, and of which the Solicitor is the president. The mortgages were in the amounts of \$5,100,000, \$765,000, and \$175,000.

12. Between June and October, 1989, the Solicitor wrote to the investors on his law firm's stationery. In some of these letters the Solicitor said that his firm, Handelman & Korman, would guarantee the loans.

13. In September, 1989, the Solicitor, on behalf of Oldboro, and solicitors acting for Coventry, negotiated a \$4,896,000 construction mortgage with Canada Trust. This mortgage, too, was guaranteed by the Solicitor. To the Solicitor's knowledge, it was registered as a first mortgage, and postponement agreements signed on behalf of Newbank in relation to two of the syndicated mortgages were registered contemporaneously. The third syndicated mortgage, which was in the amount of \$765,000 was discharged by the Solicitor. The Solicitor acknowledges that the Society has credible evidence that he did not obtain authority from the mortgage investors either to postpone or to discharge their mortgage their mortgage security, and the Solicitor does not contest this conclusion for the purpose of this hearing.

14. Approximately \$3,000,000 of the principal, together with interest has been repaid to Canada Trust and not to the private mortgage investors.

15. In connection with first phase townhouses sold by Coventry, the Solicitor provided Coventry's solicitor with an undertaking to discharge two mortgages to Newbank on June 27, 1990. He has failed to discharge these mortgages.

B. Nellwood General Partnership ("Nellwood"), Woodstock
Particulars 2(d)-(f)

16. During the same period, the Solicitor became involved in a similar townhouse development project in Woodstock. The Solicitor was approached by a real estate agent who had sold many of the Coventry townhouses, and the Solicitor's company, Oldboro, agreed to purchase 95 completed townhouses. The agreement of purchase and sale was dated February 10, 1989. A condition of the agreement was that Oldboro would arrange construction mortgage financing for the project. Ultimately, a company owned by the Solicitor, Greatland Development Inc. ("Greatland") became the registered owner of the property.

17. On August 10, 1989, a syndicated mortgage in the amount of \$5,662,500 was registered against title as a second mortgage. Many of the mortgage investors were the same people who invested in the Coventry project. The funds were, again, solicited through Homeland. Again, each mortgage investment was guaranteed by the Solicitor's firm, Handelman & Korman, or by the Solicitor.

23rd January, 1992

18. As in the case of the Coventry project (according to evidence provided to the Society by investors, which the Solicitor does not contest for the purpose of this hearing), the investors were assured that their investment would be paid out when institutional mortgage financing was obtained.

19. On April 25, 1990, a \$4,750,000 first mortgage from Greatland to Canada Trust was registered on title. The Solicitor guaranteed the mortgage. The syndicated mortgage was postponed by the Solicitor. The Solicitor takes the position that the terms of the guarantees authorized such postponements under the circumstances, but the Solicitor acknowledges that the Society has credible evidence that he did not obtain authority from the mortgage investors to postpone their mortgage security, and he does not contest this conclusion for the purpose of this hearing.

20. The Ontario New Home Warranty Program ("ONHWP") took the position that deposit insurance in the amount of \$1,900,000 (95 units @ \$20,000) was required.

21. To fulfill this requirement, the Solicitor arranged for a letter of credit with the Canadian Imperial Bank of Commerce. To secure the letter of credit, the Solicitor provided the CIBC with at least \$280,000 of remaining postdated purchasers' deposit cheques and a mortgage in the amount of \$1,620,000.

22. The CIBC required that its mortgage be in second position behind Canada Trust before funds could be advanced. The Solicitor takes the position that the terms of the guarantees authorized such postponements under the circumstances, but the Solicitor again postponed the Newbank mortgage so that the CIBC mortgage had priority over it. The Solicitor acknowledges that the Society has credible evidence that he did not obtain authority from the mortgage investors to postpone their mortgage security, and he does not contest this conclusion for the purpose of this hearing.

23. On August 17, 1990, the project was declared and registered as Oxford Condominium Corporation No. 23. At the time of the transfer, Greatland still owed the Nellwood General Partnership approximately \$800,000. It was agreed that the Nellwood General partnership would be paid \$325,000 from the Canada Trust mortgage advance and that the remaining \$475,000 would be registered as a third mortgage subsequent to the Canada Trust first and the CIBC second mortgages.

24. To place the \$450,000 mortgage in third position, the syndicated Newbank mortgage had to be postponed once again, to its fourth and present position. The Solicitor takes the position that the terms of the guarantees authorized such postponements under the circumstances, but the Solicitor acknowledges that the Society has credible evidence that he did not obtain authority from the mortgage investors to postpone their mortgage security, and he does not contest this conclusion for the purpose of this hearing.

25. The townhouses were sold through Foxwood Trail Estates Ltd. ("Foxwood"), a company owned by the Solicitor. The purchasers' deposits, in excess of \$1,500,000, were not held in trust by the Solicitor as required by section 53 of the Condominium Act. The funds were invested by the Solicitor in other private, unrelated, businesses. The Solicitor, in essence, realized the profits from the Nellwood project in advance of the closing of the sales. The Solicitor has taken the position that Foxwood was not required to hold the funds in trust; however, for the purpose of this hearing, the Solicitor does not contest the conclusion that he used the deposits received from purchasers for unrelated business purposes prior to the time that the ONHWP insurance was put in place rather than holding them in trust as required by section 53 of the Condominium Act.

23rd January, 1992

C. Application of Mortgage Funds (Particular 2(g))

26. On November 16, 1989, the first construction advance in relation to the Coventry (Niagara Falls) project was made. It was in the amount of approximately \$3,000,000, approximately \$2,150,000 of which was disbursed to the Solicitor.

27. On the same day, \$1,383,000 of funds invested by members of the Coventry syndicate, were transferred by the Solicitor to assist in financing the Nellwood (Woodstock) project.

28. Shortly before the date of the transfer, the Solicitor approached Marshall Godfrey, an employee of Homeland, to request a list of investors whose funds could be transferred from the Niagara Falls project to the Woodstock project instead of paying out all of the investors pro rata. Mr. Godfrey, who was related to many of the investors, provided a list of investors who in his view would not complain if their funds were transferred. Neither the Solicitor nor Godfrey sought the investors' authority before or after the funds were transferred; it is the Solicitor's position that he understood that Godfrey obtained the necessary consent from investors, but Godfrey has told the Law Society that he understood that the Solicitor would communicate with the investors. Many investors did not learn of the transfer until the Solicitor made his assignment in bankruptcy in February, 1991. Two investors learned of the transfer from the Society's auditor.

D. Filing False Forms 2(Particular 2(h))

29. In his Form 2 for the fiscal year ended January 31, 1990, the Solicitor falsely swore that he had not held or controlled, either directly or indirectly through a corporation, mortgages in trust for other persons.

V. PRIOR DISCIPLINE RECORD

30. The Solicitor was suspended by Convocation on June 20, 1980, for six months as a result of a finding that he had acted in circumstances in which he had a conflict of interest.

VI. PENALTY

31. The Society submits that the appropriate penalty in the circumstances of this case is disbarment. The position of the Solicitor is that he has not been practising law for several months and does not intend to do so in future and therefore the Solicitor consents to disbarment.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the said Arnold Saul Handelman be disbarred.

REASONS FOR RECOMMENDATION

The Committee has found the particulars of conduct unbecoming a barrister and solicitor have been established and that the allegations were very serious. In light of these serious findings and the previous discipline record of the Solicitor, the Committee finds that there is no alternative but to recommend disbarment of the Solicitor. It is to be noted that the Solicitor, for the purposes of this hearing, accepted the admissions of fact and does not contest the recommendation for disbarment and, in fact, consents to same.

23rd January, 1992

Arnold Saul Handelman was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of January, 1992

"P. Epstein"
Philip M. Epstein, Q.C., Chair

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

Mr. MacKenzie informed Convocation that the Society had received a letter from Mr. Handelman's counsel indicating that he would not be appearing.

The Report was adopted.

It was moved by Mr. Rock, seconded by Mr. Howie that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

Carried

The solicitor was disbarred.

Counsel retired.

.....

RE: DAVID HARRIS, Toronto

The matter was stood down.

.....

RE: LEE EDWARD WARD, Carleton Place

Mr. Rock placed the matter before Convocation.

Mr. Wardlaw, Ms. Peters and Ms. Graham withdrew and did not participate.

The reporter was sworn.

Ms. Christina Budweth appeared for the Society. Mr. Ward appeared on his own behalf.

A request for an adjournment of 3 to 6 months was made by Mr. Ward in order to obtain a psychiatric assessment.

The Society's counsel opposed the request regarding the length of the adjournment and asked that the matter be adjourned to the next discipline Convocation peremptory to the solicitor.

23rd January, 1992

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

It was moved by Mr. Rock, seconded by Mr. Strosberg that the matter be put over to the next Special Convocation on March 26th, 1992 and that the staff write to Mr. Ward and his counsel and inform them that the matter would be peremptory and they should have any psychiatric or other evidence available by that time.

Carried

It was moved by Mr. Yachetti, seconded by Ms. Peters that the matter be adjourned to the April Special Convocation and that the staff write to Mr. Ward and his counsel and inform them that the matter would be peremptory and they should have any psychiatric or other evidence available by that time.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and solicitor retired.

.....

RESUMPTION OF DAVID HARRIS MATTER

Mr. Rock placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society. The solicitor appeared on his own behalf.

The solicitor requested an adjournment as Mr. Manning whom the solicitor had retained could not be present.

Mr. MacKenzie opposed the adjournment as the matter was peremptory from December 6th, 1991 and therefore should proceed.

Counsel and the solicitor took questions from the Bench.

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

It was moved by Mr. Rock, seconded by Ms. Weaver that the matter proceed that day at 2:00 p.m.

Withdrawn

It was moved by Ms. Weaver, seconded by Ms. Elliott that the solicitor be advised that Convocation would proceed de novo at 2:00 p.m.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

The matter was stood down until 2:00 p.m.

.....

CONVOCATION ADJOURNED FOR A SHORT RECESS

.....

CONVOCATION RESUMED IN PUBLIC

.....

23rd January, 1992

RE: GORDON WILLIAM WINSOR, North York

Mr. Rock placed the matter before Convocation.

The reporter was sworn.

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

Mr. Lockwood requested an adjournment on consent to the next Special Convocation.

The adjournment was requested as a result of the short notice given by the solicitor's counsel that he intended to raise objections to the Report and to call viva voce evidence.

Counsel for the solicitor advised that he did not oppose the members of the original Committee participating.

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

It was moved by Mr. Rock, seconded by Ms. Lax that the adjournment be granted.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to put the matter over to March 26th, 1992.

Counsel and solicitor retired.

.....

RE: ERNEST ROVET, Toronto

Mr. Yachetti placed the matter before Convocation.

Ms. Peters and Messrs. Thom, Howie and Rock withdrew and did not participate.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society and Mr. John Laskin appeared for the solicitor who was present.

Mr. Campbell raised the issue of his participation as his partner Mr. Lenczner had acted for Mr. Rovet previously. Neither Mr. Laskin nor Mr. MacKenzie had objections.

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

Mr. Campbell withdrew from Convocation.

It was moved by Mr. Strosberg, and failed for want of a seconder that Mr. Campbell be permitted to participate.

It was moved by Mr. Somerville, seconded by Mr. Wardlaw that Mr. Campbell not participate.

Carried

Counsel, the solicitor, the reporter and the public were recalled.

23rd January, 1992

Mr. Campbell was informed of the decision and withdrew from Convocation.

Mr. Laskin as a preliminary matter referred to a letter dated January 17th, 1992 from Mr. Copeland to the Secretary a copy of which had been given to him by the Society's counsel and indicated he had some concerns about the letter.

Mr. Copeland withdrew from Convocation.

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

Mr. Yachetti read Mr. Copeland's letter addressed to the Secretary.

It was moved by Ms. Curtis, seconded by Ms. Lax that Mr. Copeland be afforded an opportunity to make submissions prior to the vote on the Somerville motion.

Lost

It was moved by Mr. Epstein, seconded by Mr. Yachetti that Mr. Copeland be heard on completion of the Rovet matter.

Carried

It was moved by Mr. Somerville, seconded by Mr. Wardlaw that Mr. Copeland not participate.

Carried

It was moved by Mr. Yachetti, and failed for want of a seconder that Ms. Curtis be excluded.

Counsel, the solicitor, the reporter and the public were recalled and the Treasurer announced the decision that Mr. Copeland would not be participating.

Convocation had before it the Report of the Discipline Committee dated 13th November, 1991, together with an Affidavit of Service sworn 3rd December, 1991 by R. Foppiano that he had effected service on the solicitor by registered mail and courier on 14th November, 1991 (marked Exhibit 1) and Acknowledgement, Declaration and Consent executed by the solicitor (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
Stuart Thom, Q.C.
Samuel Lerner, Q.C.

In the matter of
The Law Society Act

Gavin MacKenzie
for the Society

and in the matter of
ERNEST ROVET
of the City
of Toronto
a barrister and solicitor

Alan Lenczner
for the solicitor

Heard: October 1, 1991

23rd January, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 8, 1991, Complaint D116/91 was issued against Ernest Rovet, alleging that he was guilty of professional misconduct.

The hearing was heard in public on October 1, 1991, before this Committee composed of Kenneth E. Howie, Q.C., Chair, Stuart Thom, Q.C. and Samuel Lerner, Q.C. The Solicitor appeared at the hearing and was represented by Alan Lenczner, Q.C. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D116/91

- 2(a) In written submissions to the Canada Labour Relations Board, he knowingly made false representations about facts material to the case before the Board. Reference is made to rule 10 of the Rules of Professional Conduct and commentary 2(b), (e), (f), and (g) thereof;
- (b) In connection with the case referred to in particular (a), he assisted his client to prepare false documents in support of his false representations; and
- (c) From April 1989 to April 1991, he charged personal expenses as fees without the knowledge or consent of his partners or clients. Reference is made to rule 9 of the Rules of Professional Conduct and commentaries 1, 4, 5, and 8 thereof.

The following Agreed Statement of Facts was placed before the Committee.

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D116/91 and is prepared to proceed with a hearing of this matter on October 1, 1991.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor admits the particulars set forth in Complaint D116/91.

23rd January, 1992

IV. BACKGROUND FACTS

4. The Solicitor was a partner in Fogler, Rubinoff from April, 1989, until May, 1991, when he withdrew from the firm as a result of the disclosure of the incidents referred to in the complaint. He has not practised law since May, 1991, as he voluntarily has undertaken to the Society not to do so pending the hearing of the complaint.

5. The Solicitor has no prior discipline record.

V. FACTS RELEVANT TO THE COMPLAINT

6. On April 30, 1991, a lawyer who had recently been retained by a company which had formerly been represented by the Solicitor wrote to the Society's Senior Counsel-Discipline, Gavin MacKenzie, to inform the Society that the company (which the lawyer did not identify) was aware of apparently serious professional misconduct on the part of an Ontario lawyer (whom the lawyer also did not identify), but that the company would be willing to provide information to the Society about the matter only if it were to receive certain assurances that the identity of the company would not be disclosed to anyone other than those required to know for the purpose of the investigation. The lawyer added that it was his view and the view of two other senior members of the profession whom he had consulted that it was in the public interest that the matter be investigated and that the Society would not find out the details of the matter unless the company were to receive the assurances sought.

7. On May 1, 1991, Mr. MacKenzie replied to the lawyer's letter as follows:

Thank you for your letter of yesterday's date.

Based upon the summary of the Solicitor's alleged professional misconduct as set forth in the fourth paragraph of your letter, it is evident to me that you are quite right that the public interest requires that this matter be investigated by the Society. In light of your belief that the matter will not be reported to the Society unless your client is assured that the Society will endeavour to keep its identify confidential, I am pleased to co-operate in achieving that end.

Specifically, I can assure you as follows:

1. I will personally assume the responsibility of acting as the Society's counsel in relation to the matter until the matter is completed. Barring unforeseen circumstances, your client need not be concerned that another counsel appointed to act for the Society may not feel bound by any assurances which you receive from me.

2. In accordance with the Society's usual policy, during the investigative phase of the proceeding no information will be divulged about the investigation to anyone but the complainant and its counsel.

3. Should I decide upon the completion of the investigation to recommend that a complaint of professional misconduct be sworn and filed, I will draft the proposed complaint in such a way that your client is not identified.

4. If a complaint is authorized by the chair or a vice-chair of the discipline committee, I will endeavour to ensure that any statement of agreed facts or similar document which may become public and which is to be put before the discipline committee at the hearing of the complaint will not identify your client by name, but will rather identify your client by the use of a pseudonym. Similarly, I will endeavour to relate the material facts in any such document in such a way that your client is

23rd January, 1992

not identified indirectly. The statement of agreed facts will specify that the client has been identified pseudonymously, so that there can be no suggestion that the committee has been misled as to the true identity of the complainant. Whether it is possible to prepare such an agreed statement will of course be dependent upon the degree of co-operation of the solicitor and his or her counsel.

5. Whether or not the solicitor and defence counsel co-operate in this way, your client may be assured that its name will not be divulged by the Society pending the hearing. Should the recommendations of the special committee on discipline procedures (the Yachetti committee) as approved by Convocation be implemented by the time the complaint is filed and served, the name of the solicitor, the date scheduled for the hearing, and the complaint will be publicly available. As mentioned above, however, the complaint will not identify your client, and its anonymity will accordingly be maintained even if a journalist or a member of the public requests and obtains a copy of the complaint.

6. I am reluctant to undertake unreservedly at this juncture that I will necessarily request that the hearing be held in camera. I am concerned that an inference may erroneously be drawn that the Society is trying to conceal the functioning of its discipline process from public scrutiny for the purpose of protecting one of its members from adverse publicity. If we are able to secure the co-operation of the solicitor and his or her above, and we are able to be sure that your client will not be identified in a public hearing, I would prefer that the hearing be held in public. I will undertake, however, to request that the hearing be held in camera if it is necessary to do so to protect your client's anonymity.

7. Finally, I will undertake to ask the committee not to identify your client in any report which it may prepare as a result of the hearing.

I trust that this proposal meets with your approval.

I would be grateful if you would communicate your instructions to me as soon as possible.

Thank you for your co-operation."

8. In accordance with this arrangement, the company which the Solicitor represented has been identified in this agreed statement of facts as "A Company", and its officers and others who were involved in the matter have also been identified pseudonymously.

9. In early January, 1991, A Company learned that certain of its employees were considering joining a union. The company's president, B, spoke to several lawyers who specialize in the representation of employers in labour relations matters, most of whom informed him that there was little the company could do that would be effective in blocking the unionization of the employees.

10. One of the lawyers with whom B spoke was the Solicitor, who was not as pessimistic about the company's prospects of blocking the unionization attempt as were most of the other lawyers with whom B spoke.

11. B arranged to meet with the Solicitor, and they met for the first time on January 8, 1991. Another executive employed by A Company, C, was also in attendance. The Solicitor outlined the process of union certification under applicable legislation. He told B and C that the number of employees who would be included in the bargaining unit is a critical factor in the success of an organizational drive.

23rd January, 1992

12. The Solicitor also asked B and C whether A Company had any plans to increase the size of the company's work force, as that would affect the size of the bargaining unit and might have the effect of reducing the proportion of employees who supported the union.

13. B informed the Solicitor that the company's business had increased significantly in the autumn of 1990 and that an expansion of the work force was justifiable. The Solicitor said that he knew of a company, D Company, which was able to provide employees who were favourably disposed to the employer's interests in an organizational drive, on a contract basis, until the union organizing campaign was over. The fact that B was concerned about the possibility of disruption to the company's operations as a result of any work action that might be taken by its existing employees was an additional reason that B found attractive the Solicitor's suggestion that D Company be consulted. B instructed the Solicitor to arrange a meeting with a representative of D Company.

14. Two days later, on January 10, 1991, a representative of D Company met with the Solicitor and B. After preliminary discussions about how many additional employees were justifiable, the Solicitor left the meeting and A and D Company's representative negotiated an agreement in principle that day whereby A Company agreed to utilize the services of D Company and to employ a specified number of workers provided by D Company. The Solicitor was informed of the agreement in principle.

15. On January 17, 1991, the Solicitor met with representatives of A Company and D Company. At that time, the main terms of an agreement were worked out. The agreement called for a separate, confidential contract to be entered into between D Company and a numbered company owned by the principal shareholders of A Company. This separate contract provided for extra payments to be made to D Company. At the conclusion of the meeting the numbered company made an initial payment to D Company in the amount of \$125,000. The numbered company agreed to pay that sum to D Company each week until the certification application was concluded.

16. Over the next few days the Solicitor drafted the two contracts. The initial drafts of the contract between A Company and D Company, whereby the former agreed to employ certain workers of the latter, were dated December 14, 1990.

17. On January 23, 1991, the Solicitor met with representatives of A Company and D Company to deal with certain issues which had to be resolved before the contracts could be signed. During or after the meeting, the Solicitor and the others in attendance learned that the union had filed an application for certification the previous week. One effect of the filing of the application was to settle the bargaining unit for the purpose of determining support for the union as of the date of filing. As of the date of filing, there was an agreement in principle between A Company and D Company whereby the former would hire extra workers and the number of workers had been determined and were on standby, but none of them had yet started to work for A Company. A Company nevertheless decided, with the Solicitor's concurrence, to carry into effect the agreed upon strategy of employing workers provided through D Company and to submit that they should be treated as members of the unit and eligible to vote.

18. On or after January 23, 1991, the Solicitor prepared the two contracts in their final form. The contract between A Company and D Company was backdated to November 23, 1990, and its commencement date was specified as being January 1, 1991.

23rd January, 1992

19. In addition, at the request of B, correspondence between A Company and D Company was created. This correspondence purported to reflect negotiations between the two companies beginning in early October, 1990, which culminated in the November 23, 1990, contract. This correspondence was generated in draft form by a junior lawyer in the Solicitor's firm in consultation with B, to the Solicitor's knowledge. The junior lawyer gave the draft correspondence to the Solicitor, who then gave them to B and a representative of D Company, E. The letters were then typed on the letterheads of A Company and D Company, and copies were returned to the Solicitor.

20. In late February, 1991, B and E had a falling out, and B concluded that E would be a liability to A Company if called upon to testify. Another representative of D Company, F, was introduced to A Company. To the Solicitor's knowledge, new backdated contracts and correspondence were prepared and signed. This time F signed on behalf of D Company, as if he had been involved from the beginning.

21. As the certification process continued, A Company continued to make weekly payments in the amount of \$125,000 to D Company.

22. The Solicitor made his final written submission to the labour relations board in relation to the certification application in a letter dated March 11, 1991. The submission made was voluntary and not required. The statutory reply, which was required, was accurate and was filed. No contractual documents were appended to the voluntary submission. In his letter the Solicitor made the following representations which he knew to be false:

1. That negotiations between A Company and D Company began in October, 1990. (In fact negotiations began on January 10, 1991.); and
2. That the contract was made on November 23, 1990, and that the new workers were employed beginning on January 1, 1991. (In fact there was no agreement in principle until January 10, the terms of the contract were not agreed upon until after the date on which the certification application was filed, and the new workers were not paid for any work they did for A Company until at least January 23, 1991.)

23. The labour relations board granted the certification application. Shortly thereafter, representatives of A Company consulted with another lawyer, who, after consulting with other senior members of the bar, reported the matter to the Society and to the Solicitor's firm.

24. The Solicitor's firm thereupon reviewed the Solicitor's file. Because it appeared that several undocumented disbursements (payments to the Solicitor's American Express account) had been charged to A Company, the firm retained an accounting firm, Price Waterhouse, to review the Solicitor's fee billings from April, 1989, to April, 1991.

25. Price Waterhouse's examination in conjunction with a follow up review by the Society disclosed that the Solicitor charged numerous personal expenses to client files and arranged for the firm to pay these expenses.

26. The Solicitor accomplished this by giving his American Express and VISA receipts to his secretary and instructing her to attribute the expenses to specified files. The secretary then requisitioned firm cheques payable to American Express and VISA. The Solicitor charged client related expenses to the client as disbursements which were separately shown on the client's accounts. The Solicitor included personal expenses which he incurred in clients' fees and these amounts were not separately shown on the clients' accounts, which showed a gross amount as the firm's fee.

23rd January, 1992

27. The personal expenses which the Solicitor charged to clients as fees included such items as newspaper subscriptions, airplane tickets, automobile expenses, restaurant meals, drycleaning, hardware, baseball and theatre tickets, household items, landscaping, photographs, furniture, ski equipment, clothes, books and art. It is not possible to determine precisely the amount of personal expenses included by the Solicitor in client fee billings over the period during which the Solicitor was a partner in Fogler, Rubinoff (a period of two years), but the amount is in the range of approximately \$35,000. The Solicitor generally reduced the fee billings to accommodate the personal expenses so that he did not overcharge or double bill the client.

28. The Solicitor has co-operated fully in the Law Society's investigation, and voluntarily undertook not to practise pending the hearing of the complaint. He has not practised, pursuant to his undertaking, since May 11, 1991.

29. The Solicitor has read this agreed statement of facts in its entirety and has taken the advice of his counsel, Alan Lenczner, Q.C. before signing it.

DATED at Toronto this 1st day of October, 1991."

The Committee finds the Solicitor guilty of professional misconduct in respect of counts (a), (b) and (c) to paragraph 2 of the Complaint.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended from practice for a period of six months from an effective date of June 1, 1991.

REASONS FOR RECOMMENDATIONS

The evidence demonstrated that the Solicitor is an intelligent, experienced, wholly competent practitioner of many years experience, who enjoyed an enviable reputation within the legal community and with an apparently sound family relationship.

The character evidence led on his behalf uniformly makes these points:

- (a) The Solicitor has never been known to have engaged in unethical or improper activities, other than the conduct evident in these complaints.
- (b) His conduct in respect of the complaints appears to be an aberration, and the Committee is unanimously of the belief that the possibility of the conduct re-occurring is at least remote.

The Solicitor has engaged himself actively in community activities, to the obvious benefit of the public in general.

The position of the Law Society with respect to the penalty was that the individual complaints, for which the Solicitor has been found guilty, might call for a reprimand in Convocation but that the combination of the two significant acts of misconduct together require a more severe penalty.

The Law Society believes that there should be a suspension of six to twelve months.

23rd January, 1992

Counsel for the Solicitor takes the position that there should be a reprimand in Convocation as the appropriate penalty, but that if a suspension is required, it should be a maximum of six months.

It was argued strenuously, that the length of the suspension is relatively unimportant in comparison to the impact the complaints have already had and that he has already been seriously punished by the publicity associated with respect to his conduct.

It is obviously necessary for the Committee to consider two aspects in assessing any penalty.

- (a) The penalty must be sufficient to deter the Solicitor, and in this connection, the Committee is satisfied that the prospect of re-occurrence is at least remote. The Committee is not unmindful that these complaints represent the first and hopefully last brush of the solicitor with the disciplinary process.
- (b) The interest of the public in ensuring that the penalty fits the wrongdoing of the Solicitor. It should be clearly noted that the Committee was unanimously of the view that the conduct of the Solicitor was not such to require a penalty of disbarment or permission to resign.

The Solicitor voluntarily agreed to suspend practice as of May 1991, and has not engaged in practice since that time. It should be understood that this was done voluntarily and not at the request of the Law Society.

In all the circumstances, the Committee was unanimously of the view that a suspension for six months is an appropriate penalty in this case. Because the Solicitor has not practiced since May 1991, the Committee was further of the view that it would be in order to back date the suspension to June 1, 1991.

Ernest Rovet was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 26th day of March, 1971.

ALL OF WHICH is respectfully submitted

DATED this 13th day of November, 1991

"K.E. Howie"
Kenneth E. Howie, Q.C., Chair

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

It was moved by Mr. Yachetti, seconded by Ms. Weaver that the Recommendation to Penalty contained in the Report that is, that the solicitor be suspended for a period of six months effective June 1st, 1991, be adopted.

Mr. Laskin filed a Memorandum re: "Voluntary Undertaking" as Exhibit 2 together with a Joint Brief of Authorities and a Brief of Character Evidence.

Both counsel made submissions on the issue of penalty.

Counsel for the Society supported the recommended penalty of suspension of up to one year to start January 23rd.

23rd January, 1992

Mr. Laskin, counsel for the solicitor supported the recommended penalty of a 6 months suspension back dated to August 1st, 1991.

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

.....

CONVOCATION RECONVENED AT 2:10 P.M.

.....

PRESENT:

The Treasurer, Bragagnolo, Brennan, Curtis, Elliott, Epstein, Goudge, Graham, Hickey, Lamont, Lawrence, Lax, Murray, S. O'Connor, Palmer, Peters, Somerville, Strosberg, Wardlaw, Weaver and Yachetti.

.....

CONTINUATION OF THE ERNEST ROVET MATTER

Mr. Laskin continued with submissions on penalty.

Questions were taken from the Bench.

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

It was moved by Mr. Wardlaw, seconded by Ms. Lax that the solicitor be disbarred.

Lost

It was moved by Ms. Lax, seconded by Ms. Curtis that the solicitor be suspended for 3 years.

Lost

It was moved by Mr. Murray, seconded by Mr. Lamont that the solicitor be suspended for 12 months effective January 23rd, 1992.

Carried

It was moved by Mr. Yachetti, seconded by Mr. Epstein that the solicitor be suspended for 6 months effective January 23rd, 1992.

Not Put

Mr. Strosberg informed Convocation that he wished his dissent be noted.

Mr. Strosberg was of the view that Convocation ought not alter the recommendation of the discipline panel which heard the matter.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and solicitor retired.

.....

23rd January, 1992

RESUMPTION OF THE DAVID HARRIS MATTER

Mr. Rock spoke to the issue of referring the matter back to a Committee as in the circumstances the joint recommendation was not acceptable to Convocation.

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

It was moved by Mr. Rock, seconded by Mr. Yachetti that the matter be referred back to a committee for a rehearing.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and solicitor retired.

.....

CONVOCATION ADJOURNED AT 3:40 P.M.

.....

Confirmed in Convocation this *22nd* day of *February*, 1992.


Treasurer