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Second Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney

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Independent Advisor into
the Allegations Respecting
Financial Dealings Between
Mr. Karlheinz Schreiber and
the Right Honourable Brian Mulroney

Gouvernement du Canada

Conseiller indépendant
concernant les allégations au sujet
des transactions financières entre
M. Karlheinz Schreiber et
le très honorable Brian Mulroney

April 4, 2008

The Right Honourable Stephen Harper
Prime Minister of Canada
80 Wellington Street
Ottawa, ON K1A 0A2

Dear Prime Minister,

On March 19, 2008, by Order in Council, you requested me to provide a report continuing a task first assigned by Order in Council of November 14, 2007, completed by my report given to you on January 9, 2008. I enclose the report which fully discharges the responsibilities I have undertaken in response to these two Orders in Council.

It has been an honour to be of service to Canada.

Yours sincerely,

David Johnston

1. INTRODUCTION

On January 9, 2008, I submitted to the Prime Minister, in discharge of the task that I had been assigned by order in council appointing me as his Independent Advisor, a report entitled *Report of the Independent Advisor into the Allegations Respecting Financial Dealings between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney* ("first report"). Mr. Schreiber had made certain allegations with respect to his financial dealings with Mr. Mulroney, including allegations made in an affidavit sworn by Mr. Schreiber on November 7, 2007. I had been asked to conduct an independent review of these allegations, which suggested that some of the dealings between Messrs. Mulroney and Schreiber might have taken place while Mr. Mulroney was still Prime Minister, and to make recommendations for an appropriate mandate for a public inquiry. I had also been asked to state whether I had determined that there is any *prima facie* evidence of criminal action, and if so to make recommendations as to how this determination should be dealt with and how it should affect the mandate and timing of a public inquiry.

In my first report, I stated that I had determined that there is no *prima facie* evidence of criminal action. I concluded that the purpose of any public inquiry must be to establish facts that remain unexamined, and in respect of which there is a legitimate public interest. I expressed the view that the public interest issue to which the allegations of financial dealings give rise is the integrity of Government, and whether there was a breach of the existing constraints on the activities of holders of high government office, or if not, whether there is a need for further constraints on former high office holders after they leave office. I recommended that if a public inquiry is held, it should be a focused inquiry into the allegations, with a mandate limited to answering the specific questions that I set out in my report. I concluded that an inquiry should not become a wide-ranging review of matters already addressed in the extensive investigation conducted by the RCMP, or an inquiry into facts that are already known.

My appointment as Independent Advisor occurred before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the "Ethics Committee") announced that it would hold hearings concerning Mr. Mulroney's

relationship with Mr. Schreiber and the cash payments that Mr. Mulroney received. The scope of the Committee's hearings was set out as follows in a motion adopted by the Committee:

> That in order to examine whether there were violations of ethical and code of conduct standards by any office holder, the Standing Committee on Access to Information, Privacy and Ethics review matters relating to the Mulroney Airbus settlement, including any and all new evidence, testimony and information not available at the time of settlement and including allegations relating to the Right Hon. Brian Mulroney made by Karlheinz Schreiber and, in particular, the handling of allegations by the present and past government including the circulation of relevant correspondence in the Privy Council Office and Prime Minister's Office; that Karlheinz Schreiber be called to be a witness before the committee without delay; and that the committee report to the House its findings, conclusions and recommendations thereon.[1]

When I submitted the first report on January 9, 2008 for a January 11, 2008 deadline, the Ethics Committee had heard certain witnesses, but had not yet completed its hearings. The Committee completed its examination of witnesses on February 25, 2008. On February 28, 2008, the Committee issued a one-page report advising that it had agreed to the recommendation "[t]hat the Government immediately initiate a formal public inquiry into the Mulroney - Schreiber affair."[2]

In making my recommendations in the first report concerning the appropriate mandate of a public inquiry, I took into account the evidence that had been given before the Committee by the time I prepared my report. I suggested that Government might wish to give further consideration to the appropriate mandate for an inquiry once the Ethics Committee had completed its work.

By order in council dated March 19, 2008, I was re-appointed as Independent Advisor to the Prime Minister with the mandate:

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[1] Minutes of Proceedings, *Standing Committee on Access to Information, Privacy and Ethics*, 2nd. Sess., 39th Parl. ("*Ethics Committee*"), Meeting No. 3, Thursday, November 22, 2007.

[2] *Ethics Committee*, Third Report.

> to submit to the Prime Minister as soon as practicable, but in any event by April 4, 2008, a report in both official languages setting out any further recommendations [I consider] advisable respecting the appropriate mandate for a public inquiry into the allegations set out in [my] report of January 9, 2008, based on a review of any further information [I consider] relevant, including information considered by the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

On March 26, 2008 I was advised by the Chair of the Ethics Committee that I would receive the full report of the Committee into what it has described as "the Mulroney-Schreiber Affair" shortly after the Committee's meeting scheduled for April 1, 2008. I received the report in the afternoon of April 2, 2008.[3] While the time available for me to review the report was short in light of my April 4 report deadline, I am satisfied that I have had an adequate opportunity to review it. I have done so, and I have taken it into account in formulating my recommendations. It recommends that an inquiry be established at the earliest possible date and that the Commissioner "be granted a broad mandate to inquire into the Mulroney-Schreiber Affair." It includes separate statements by each of the Government members of the Committee, the Bloc Québécois members and the New Democratic Party members.

In carrying out my further mandate, I have reviewed not only the Ethics Committee's report, but also the additional evidence given before the Ethics Committee and certain public commentary to which it gave rise, as well as several submissions that I received from Members of Parliament and members of the public. I also invited Mr. Mulroney and Mr. Schreiber and their counsel to provide me with any suggestions that they might have concerning the appropriate scope of an inquiry in light of this additional evidence.

Counsel for both Mr. Mulroney and Mr. Schreiber responded to this invitation; they each provided detailed reviews of the evidence given before the Ethics Committee and drew certain documents to my attention. Counsel for Mr. Schreiber put forward a series of additional questions that in his view a public inquiry should consider.

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[3] *Ethics Committee*, "The Mulroney-Schreiber Affair – Our Case for a Full Public Inquiry" (April 2008).

Counsel for Mr. Mulroney argued in his brief that there is no basis for holding a public inquiry into the financial dealings between Mr. Mulroney and Mr. Schreiber, and that to hold a public inquiry into these matters would not be in the public interest. He acknowledged, however, that it might be useful to consider (though not through a public inquiry) updating the standards and mechanisms that govern the conduct of holders of high public office after they leave their positions. My terms of reference as I understand them do not authorize me to recommend that a public inquiry not be conducted.

2. CONCLUSIONS AND RECOMMENDATIONS

A. Focus of an Inquiry

The additional material that I reviewed does not change the principal conclusions set out in my first report. I remain convinced that any public inquiry should be a focused inquiry into specific matters of legitimate public interest, suitable to analysis through the public inquiry instrument, rather than a further, extensive examination of matters already considered by others. As I stated in my first report, a public inquiry represents a significant expenditure of limited public resources. As I also noted in my first report, an inquiry cannot make findings of criminal or civil liability; other instruments exist to investigate this kind of wrongdoing. The principal purpose of a public inquiry is to provide recommendations for corrective action with respect to a significant matter of public interest. In my view, the issue of public concern in this matter remains compliance with the constraints on holders of high public office and the adequacy of the current constraints.

The Ethics Committee report contains a good summary of the evidence given before it, and highlights a number of discrepancies in various witnesses' accounts of various events, many of which I had myself noted. However, in my view the fact that these discrepancies exist does not by itself constitute an adequate reason to hold a wide-ranging public inquiry. While the Ethics Committee recommends a "full" public inquiry with a "broad mandate" – an inquiry substantially different than the inquiry proposed in my first report – the Committee does not define what that mandate should be, and provides no rationale for its recommendation other than the statement that "a politically

charged inquiry such as this should not be limited in scope." In my view the fact that the subject matter of an inquiry may be "politically charged" also provides no basis by itself for giving it a mandate that goes beyond matters of legitimate public concern appropriate for exploration through the mechanism of a public inquiry.

Apart from Mr. Schreiber, no witness who testified before the Ethics Committee since the first report was submitted claimed knowledge of any wrongdoing. To repeat what I said in the first report, any "new" facts – including those that emerge from the additional information that I have reviewed – do not now justify a wide-ranging, unfocused inquiry into all of the matters with which Mr. Schreiber's and Mr. Mulroney's names have been associated over many years, in many different contexts.

As I stated in that report,

> [t]he issue I have struggled with is whether and to what extent a public inquiry exploring these further details would be in the public interest, keeping in mind the purpose and constraints on such inquiries. The answer depends on what public interest is legitimately engaged by the exploration of these events. In my view, the public interest issue is the integrity of Government and whether there was a breach of constraints; and if not, whether there is a need for further constraints on former high office holders after they leave office.

No information has emerged since I wrote that report that alters my view on this issue.

B. Known Facts and Facts Requiring Exploration

In my first report, I set out certain facts that, based on the information then available to me, appeared to be known facts, as well as certain other facts that appeared not to have been fully explored. The additional information that I have reviewed changes these assessments in several respects. I set out below the manner in which and the extent to which these assessments have changed.

1. *GCI and Airbus*

In describing the facts that I understood to be "known" when I prepared the first report, I stated at page 7 that Airbus Industrie ("Airbus") was a client of

Government Consultants International Incorporated ("GCI"). Some of the further evidence given before the Ethics Committee is consistent with the understanding that there was a business relationship between Airbus and GCI.[4] However, Mr. Greg Alford, the former president of GCI, has now testified that Airbus was not a client of GCI and that GCI was not involved in the Airbus deal.[5] Whether Airbus was in fact a GCI client might therefore no longer be considered as "known."

Mr. Schreiber's counsel has suggested that an inquiry explore a whole series of questions in relation to Airbus. As I stated in the first report, in light of the extensive RCMP investigation in to the Airbus matter I consider it inappropriate that an inquiry should do so.

2. *The Bear Head Project*

I also stated at page 7 of the first report that the Mulroney Government cancelled a project aimed at establishing a light armoured vehicle facility in Cape Breton, Nova Scotia (the "Bear Head Project") in the early 1990s as a result of public opposition and an internal government review. Mr. Norman Spector's testimony before the Ethics Committee has raised questions about this point. He testified on February 5, 2008 that he was uncertain whether the Bear Head Project had ever been officially rejected by the federal government and stated that in 1997 or 1998 it may have still been under consideration.[6]

An article published on March 15, 2008 in *The Globe and Mail* attributes to Senator Lowell Murray, who had served as a minister in Mr. Mulroney's cabinet, the statement that Mr. Mulroney gave him a file on the Bear Head Project when Mr. Murray became head of the Atlantic Canada Opportunities Agency in 1987. The article also states that Mr. Murray spent 15 months trying to realize the project to persuade the

[4] Giorgio Pelossi testimony, *Ethics Committee*, Transcript No. 16 at 15 (PDF version).

[5] Greg Alford testimony, *Ethics Committee*, Transcript No. 15 at 9 (PDF version).

[6] Norman Spector testimony, *Ethics Committee*, Transcript No. 13 at 7, 8 (PDF version).

federal Government to sign an Understanding in Principle with Thyssen Industrie AG ("Thyssen").[7]

As a result of these disclosures, the status of the project at potentially relevant times might therefore be considered uncertain. In his submission, Mr. Schreiber's counsel emphasized the uncertainties that exist concerning the cancellation of the Bear Head Project. He also suggested that an inquiry should explore the conduct of a number of others whom he described as "Mr. Mulroney's associates" – Mr. Fred Doucet, Mr. Gerry Doucet, Mr. Frank Moores, Mr. Gary Ouellet and GCI – in relation to the Bear Head Project. I agree that the uncertainties about the status of the project might become of importance to the Commissioner during his or her work. However, any issues of legitimate public interest to which these matters give rise are captured by the list of 17 questions for the public inquiry identified in the first report. In my view to include the examination of the conduct of others in the terms of reference of an inquiry, as suggested by Mr. Schreiber's counsel, would unjustifiably expand the scope of an inquiry and take it well beyond the legitimate matters of public concern that should be its focus.

3. *Mulroney's Libel Suit*

My first report stated that in January 1997, a settlement was reached in Mr. Mulroney's libel suit against the Government of Canada in which the Government agreed to pay Mr. Mulroney's legal and other professional fees, which were assessed at $2.1 million. On February 5, 2008, Mr. Allan Rock, the Minister of Justice at the time the settlement was reached, testified before the Ethics Committee that the settlement had been motivated by the revelation that a member of the Royal Canadian Mounted Police had disclosed to a third party that Mr. Mulroney was named in the Swiss Letter of Request. According to Mr. Rock, the government made a strategic decision to settle the lawsuit on the basis that its defence would be compromised if this new fact emerged at trial.

[7] Daniel LeBlanc, "Bear Head revelation prompts demands for wider inquiry", *The Globe and Mail* (15 March 2008) at A10.

Mr. Rock also noted that he did not believe that a recommendation would have been made to settle the case on the same terms if Mr. Mulroney had disclosed the cash payments he received from Mr. Schreiber in his examination for discovery testimony.[8] I remain of the view that the settlement of Mr. Mulroney's libel suit is not directly pertinent to the focused inquiry that I recommend. As Mr. Rock's testimony appears to confirm, the settlement was fundamentally an acknowledgement by the Government and the RCMP that the letter of request sent to the Swiss authorities incorrectly stated that the RCMP had concluded that Mr. Mulroney had engaged in criminal activities. While Mr. Rock's testimony suggests a possible further consequence of the lack of disclosure of the cash payments – had the payments become public knowledge at that time and their rationale explained and evaluated, there might not have been a basis for the public inquiry under consideration now – it does not lead to the conclusion that for an inquiry to delve into the merits of the settlement would be in the public interest.

4. *The Meetings between Schreiber and Mulroney*

Following my first report, additional details also emerged before the Ethics Committee regarding the meetings between Messrs. Schreiber and Mulroney.

Mr. Fred Doucet testified on February 12, 2008. He explained that he had arranged two meetings between Messrs. Schreiber and Mulroney at Mr. Schreiber's request: (1) the meeting at a hotel at Mirabel Airport on August 27, 1993; and (2) the meeting at the Pierre Hotel in New York on December 8, 1994. Mr. Doucet testified that Mr. Schreiber had told him that he intended to propose at the Mirabel meeting to retain Mr. Mulroney's services in promoting military vehicles internationally.

Mr. Doucet also provided some details of the New York meeting, which he attended. He stated that the meeting was arranged at the Pierre Hotel on that date because Elmer MacKay's wedding reception was held there around the same time, and that Messrs. Schreiber and Mulroney were both guests at the event.

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[8] Allan Rock testimony, *Ethics Committee*, Transcript No. 13 at 15 (PDF version).

However, Mr. Elmer MacKay testified that he was in New York with his wife only to meet with Mr. Schreiber and his wife, Barbel.[9] When he referred to the appearance of Messrs. Mulroney and Doucet at the Schreibers' and MacKays' lunch in New York, Mr. MacKay stated, "[t]hey stayed briefly, and departed, I believe, for the airport."[10]

According to Mr. Doucet, at the New York meeting Mr. Mulroney reported to Mr. Schreiber on his consultancy work on behalf of Thyssen. Mr. Mulroney reported that this work included meeting with the Presidents of Russia and France as well as leaders in China. Although Mr. Doucet had no knowledge of what transpired at those meetings, he recalled that the names Yeltsin and Mitterand were mentioned. Mr. Doucet also testified that Mr. Schreiber appeared to be satisfied with Mr. Mulroney's report at the New York meeting. He explained that Mr. Schreiber gave Mr. Mulroney a legal size envelope and stated that it contained payment for services and expenses. Mr. Doucet had no other knowledge of what was contained in the envelope.

Mr. Schreiber, who previously testified on November 29, 2007 and December 4, 6 and 11, 2007, testified again on February 25, 2008 (after Mr. Mulroney's testimony on December 13, 2007), and denied that Mr. Mulroney gave a briefing on his work at the New York meeting. He stated that Mr. Mulroney's statement that a briefing was provided at the meeting was a "complete fabrication"[11] and that he "never got the report."[12] He reiterated his position that Mr. Mulroney performed no services in exchange for the cash payments.[13]

5. *Scope of the Retainer*

The 17 questions that could be answered by an inquiry that I listed in my first report included questions as to the nature and scope of any agreement between

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[9] Elmer MacKay testimony, *Ethics Committee*, Transcript No. 18 at 2 (PDF version).

[10] Note 9 above.

[11] Karlheinz Schreiber testimony, *Ethics Committee*, Transcript No. 18 at 11 (PDF version).

[12] Note 11 above at 24.

[13] Note 11 above at 24.

Messrs. Schreiber and Mulroney. In Schedule 3 of that report, I highlighted several contradictions in the evidence provided by Messrs. Schreiber and Mulroney concerning the scope of their retainer agreement. Since then, Mr. Alford and Mr. Doucet have provided information to the Ethics Committee as to their knowledge of the nature and scope of that retainer.

First, Mr. Alford, who was responsible for the Bear Head file while employed at GCI and was vice-president of Bear Head Industries in Ottawa from 1988 to 1996, testified on February 12, 2008 that he was not aware that Mr. Mulroney worked or lobbied on behalf of Thyssen or Bear Head Industries. He qualified this testimony, however, by stating that he had no knowledge of the international aspects of the Bear Head Project and was only familiar with its Canadian facets.[14]

Second, Mr. Doucet, who also testified on February 12, 2008, stated that he drafted a written statement of the mandate agreed to by Messrs. Schreiber and Mulroney, and presented it to Mr. Schreiber on February 4, 2000 in Ottawa. According to Mr. Doucet, Mr. Schreiber filled in the names of the companies responsible for the mandate and the fees to cover services and expenses associated with the agreement. He also explained that the document was not signed by the parties because it was only intended to "memorialize what had been done in the past."[15]

In his further testimony, Mr. Schreiber acknowledged that the handwriting on the statement of mandate prepared by Mr. Doucet appeared to be his own, but stated that one of the companies named on the document, Bitucan, no longer existed as at February 4, 2000, when the document was tabled. However, the statement of mandate related to services performed in 1993 and 1994, so that existence of the company in 2000 is not relevant. Mr. Schreiber also stated that even if they were still in existence, the companies had nothing to do with armoured cars.[16] He also testified that he was asked to

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[14] Greg Alford testimony, *Ethics Committee*, Transcript No. 15 at 10, 11, 13, 14 (PDF version).

[15] Fred Doucet testimony, *Ethics Committee*, Transcript No. 15 at 23 (PDF version).

[16] Note 11 above at 20.

sign the document, but refused.[17] During his testimony he stated that he would not "backdate."[18] Mr. Schreiber included a version of the statement of mandate – albeit a clean version without the handwritten additions – as an exhibit to an affidavit that he filed with the Ontario Superior Court.[19]

6. *The Cash Payments*

As I indicated in my first report, one of the questions that an inquiry could answer, directly and straightforwardly, is "What payments were made, when and how and why?" The uncertainty surrounding this question remains.

Mr. Doucet has now testified that at the February 4, 2000 meeting, Mr. Schreiber told him that the fee to cover Mr. Mulroney's services and expenses was set at $250,000 for a term of three years. Handwritten notations on the statement of mandate document also reflect the $250,000 figure. This evidence introduces a third account – in addition to the $300,000 and $225,000 figures mentioned by others – of the amount paid or to be paid by Mr. Schreiber to Mr. Mulroney for his services.[20]

Mr. Doucet could not explain why Mr. Schreiber wrote letters in 2007 stating that Mr. Doucet knew how much money Mr. Mulroney was paid, and that Mr. Schreiber would ask Mr. Doucet to refresh Mr. Mulroney's memory in that regard.[21]

Another fact that came to light during Mr. Schreiber's testimony on February 25, 2008 was that Mr. Schreiber did not declare the cash that he had withdrawn in Zurich, Switzerland (which he eventually paid to Mr. Mulroney) when he entered Canada, and later, the U.S. In his testimony, he stated that he was not aware that he had to declare cash over $10,000 at the border.[22]

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[17] Note 11 above at 17.

[18] Note 11 above at 20.

[19] Note 11 above at 16.

[20] Note 15 above at 16, 18, 20.

[21] Note 15 above at 18.

[22] Note 11 above at 14, 15.

Mr. Luc Lavoie testified on February 7, 2008. He stated that he first learned that Mr. Mulroney received money from Mr. Schreiber as a retainer to market military vehicles in the spring of 2000, when Mr. Mulroney told him that "[h]e had a retainer of tens of thousands of dollars in three cash payments, and the taxes had been paid."[23] Mr. Lavoie stated that he was not informed of the precise amount of the payments.

Once he learned of the payments, Mr. Lavoie stated, he discussed with Mr. Mulroney the possibility of publicly explaining the circumstances under which he received the money from Mr. Schreiber. Mr. Lavoie offered no explanation as to why this was not ultimately done.[24]

Mr. Lavoie told the Committee that his statements to the media, which specifically referred to Mr. Mulroney having received $300,000 in three installments of $100,000 from Mr. Schreiber, were erroneous. He explained that at the time he made them he did not have accurate information and had not previously discussed the amounts with Mr. Mulroney. He further explained that he came up with the $300,000 amount as a result of it being the figure "floating out there" in the media.[25]

Mr. Lavoie testified that Mr. Mulroney called to inform him that the payments actually consisted of three $75,000 payments and not three $100,000 payments. Mr. Lavoie suggested that he did not immediately correct his inaccurate statement to the media because in the media atmosphere prevailing at the time, it was preferable instead to allow Mr. Mulroney to testify before the Ethics Committee as to the actual amount paid.[26]

Mr. Schreiber had testified on December 6, 2007 that on July 26, 1993 $500,000 was transferred from the Frankfurt account to the newly set up Britan account. The Britan account, however, may have been set up at an earlier date. Mr. Schreiber stated that he made enquiries to the bank about setting up the Britan account around 10

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[23] Luc Lavoie testimony, *Ethics Committee*, Transcript No. 14 at 14 (PDF version).

[24] Note 23 above at 3.

[25] Note 23 above at 7.

[26] Note 23 above at 5.

days after the June 23, 1993 Harrington Lake meeting. This money, according to Mr. Schreiber, "was for Mr. Mulroney, related to Cape Breton, the project."[27] It is apparent, as I have indicated, that the amount actually paid to Mr. Mulroney is not a known fact.

7. *The Services Rendered*

As I stated in my first report, there existed, and still exists, public concern over the disclosure of the cash payments and the services rendered for the payments. Messrs. Mulroney and Doucet have both referred to meetings with Chinese leadership as part of the services performed for the payments.[28] In addition, Mr. Mulroney has cited meetings with U.S. leadership as part of the services he provided.[29] However, the identity of the individuals present at the meetings and the details of what transpired there have not been fully disclosed. In addition, neither Mr. Mulroney nor Mr. Doucet has provided any detail about the meetings that Mr. Doucet said took place with Messrs. Yeltsin and Mitterand.

As noted above, Mr. Schreiber maintained that Mr. Mulroney performed no services in exchange for the cash payments he received. Mr. Schreiber stated, "[t]here is no evidence of any services provided to this day, and I never even received a bill."[30]

8. *Schreiber's Correspondence with Government Officials*

Nothing disclosed in the Ethics Committee hearings changes my earlier comments on the issue of how Mr. Schreiber's correspondence with the Privy Council Office was handled.

C. Tax Reporting of Retainer Payments

In my January 9, 2008 report I outlined the explanation that Mr. Mulroney provided before the Ethics Committee regarding his tax reporting of the cash retainers

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[27] Karlheinz Schreiber testimony, *Ethics Committee*, Transcript No. 7 at 3 (PDF version).

[28] Right Hon. Brian Mulroney testimony, *Ethics Committee*, Transcript No. 10 at 4, 6, 8 (PDF version) ("*Mulroney*"); note 15 above at 15, 19.

[29] *Mulroney*, note 28 above at 4, 6, 8.

[30] Note 11 above at 11.

received from Mr. Schreiber. I have since obtained further information on the tax treatment of retainers, summarized below. In light of this information I have a number of additional observations on this subject, also set out below.

1. *Tax Treatment of Retainers*

I am advised that the general rule under paragraph 12(1)(a) of the *Income Tax Act* is that an amount received by a taxpayer in the course of a business that is on account of services not yet rendered must be included and reported in the taxpayer's income in the year it is received. However, the amount included in income may be eligible for a deductible reserve under paragraph 20(1)(m) depending on whether it is reasonably anticipated that services will have to be rendered in respect of the amount after the end of the year. The taxpayer will be eligible to claim a corresponding deduction of a reasonable amount in respect of services that will be rendered after the end of the year where the taxpayer is under a legal obligation to render services in the future in exchange for the payment. A taxpayer who claims a paragraph 20(1)(m) reserve must include the reserve in income in the following taxation year and may be entitled to another deduction of a reasonable amount for services that will be rendered after the end of that year. If, however, the taxpayer receives an amount that can be treated as his or her own without any further obligation to account for it, or if the taxpayer is entitled to keep the retainer regardless of whether or not the services will be rendered, no reserve will be available. In those circumstances, the entire amount of the retainer must be included in the taxpayer's income when it is received, without any deduction.

I am advised that, although this position is not free from doubt, an amount received by a taxpayer in trust and held separate and apart from his or her other assets would not be income to the taxpayer when the amount is received, on the basis that the amount remains the property of the payor and is not received by the taxpayer on account of services. I am also advised that the Canada Revenue Agency has an administrative policy regarding trust accounts maintained by lawyers that is consistent with this approach. The policy states that, for lawyers in practice,

> [w]ith the exception of advances which the lawyer is entitled to treat as his or her funds by specific agreement with the client and

> retainers which the lawyer is entitled to keep whether or not services are rendered or disbursements are made, advances received from a client for services to be rendered or disbursements to be made are considered to be trust funds and are not income at the time of receipt.

However, any funds that are transferred out of the trust account for the use and benefit of the lawyer must be included in his or her income at the time of the transfer under paragraph 12(1)(a) of the *Income Tax Act*. In addition, when the lawyer renders an account to the client, the amount billed will be considered income of the lawyer.

Finally, under Canadian tax law, a taxpayer may claim expenses in the year they are incurred even where the income related to those expenses will be earned in a future year. There does not, therefore, appear to be any tax incentive or other benefit supporting Mr. Mulroney's decision not to deduct the expenses he incurred in performing his consultancy services in his 1999 tax filing or in previous years.

2. *Further observations*

Although Mr. Mulroney explained that he reported the retainer payments as income for tax purposes in 1999, six and five years after he received them from Mr. Schreiber, it remains unclear for what year or years the amounts were declared as income. Before the Ethics Committee, Mr. Mulroney did not respond directly to questions about whether or why he filed a voluntary late disclosure of income. He stated, "The only thing left that's sacred in Canada is the secrecy of our tax returns."[31]

Mr. Mulroney unequivocally described Mr. Schreiber's payments as retainers for international consultancy services and explained that he declared the money as income for tax purposes and paid taxes on it in 1999. He further stated that some of the money was placed in his personal safe, while the balance was deposited in a safety deposit box in New York. Mr. Mulroney's counsel has provided confirmation that he has had a safety deposit box at a bank in New York at least since December 8, 1994.[32] Mr. Mulroney indicated that he spent approximately $40,000 of the retainer funds on

[31] *Mulroney*, note 28 above at 30.

[32] Letter from JP Morgan Chase Bank dated January 28, 2008.

legitimate expenses in executing his mandate. Mr. Mulroney also noted that he did not deduct those expenses from the retainer income he declared in his 1999 tax filing.[33] His counsel advised the Ethics Committee that Mr. Mulroney has nothing to add to the testimony he gave before the Committee in December 2007 concerning the disposition of the payments and no contemporaneous documents.[34]

Mr. Mulroney's treatment of the retainers is, at a minimum, unusual in light of ordinary business practice. I indicated in my first report that one of the questions that an inquiry should answer is whether there was appropriate disclosure and reporting of the payments. This question may lead to an exploration of these matters.

D. Questions to be Considered

I have considered whether, in light of the additional information that I reviewed, the questions that I set out in my first report are adequate to address these matters of legitimate public interest, or whether there are further questions that an inquiry might pursue. In my view the 17 questions that I listed remain the relevant questions for an inquiry into matters of legitimate public interest to answer.

E. Inquiry Procedure

Among the other subjects that I discussed in my first report was the procedure that any inquiry should follow. I stated that an inquiry should be cost-effective and efficient, and referred to the justifiable public concern that it not become "a 'circus of lawyers', that it be timely and that it produce results." I recommended that the terms of reference authorize the Commissioner to determine his or her own procedure and the manner in which the investigation and inquiry should be conducted.

I have reflected further on this recommendation. While I would not wish to tie the Commissioner's hands, and I maintain the recommendation that the Commissioner be authorized to determine his or her own procedure, this further reflection reinforces my view that the Commissioner should explore opportunities to

[33] *Mulroney*, note 28 above at 9, 13, 20, 25.

[34] Letter from Me Guy Pratte to the Ethics Committee dated February 22, 2008.

conduct portions of the investigation and inquiry in a more efficient manner than the court-like "traditional" Canadian public inquiry procedure would permit.

Other inquiries have done so. For example, the SARS Commission, the Ontario public inquiry recently conducted by the late Justice Archie Campbell, conducted most of its proceedings by way of confidential interviews.[35] The rules of practice and procedure of the federal Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, in which the Honourable John C. Major is Commissioner, provide for Commission counsel to present to the Commissioner a "Commission Dossier" – a statement of evidence, facts or conclusions together with the sources or basis for the evidence, facts or conclusions that Commission counsel proposes that the Commissioner adopt for purposes of the Commission's findings or conclusions.[36] The rules of procedure of the federal Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, in which the Honourable Frank Iacobucci is Commissioner, provide that to facilitate the expeditious conduct of the inquiry, inquiry counsel may prepare proposed findings for the Commissioner's consideration based on documents, interviews and the findings of other examinations, and that the Commissioner may, subject to section 13 of the *Inquiries Act*, adopt the proposed findings as his findings.[37]

I appreciate that, if the public interest warrants an inquiry, there are aspects of the allegations that would be its focus that should be fully ventilated in a public proceeding. However, there would also inevitably be subsidiary matters, and matters of context, that could be as effectively and more efficiently explored through alternate means such as those that other inquires have adopted. I recommend that the Commissioner fully explore this possibility.

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[35] See The Honourable Archie Campbell, The SARS Commission, Final Report, *Spring of Fear*, Vol. 2 (December 2006) at 16, online at www.sarscommission.ca/report/v2.html.

[36] See Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Rules of Procedure and Practice* (July 17, 2006), Rules 42-44, online at www.majorcomm.ca/en/rulesofprocedureandpractice/.

[37] See Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *General Rules of Procedure and Practice* (May 31, 2007), Rules 22-24, online at www.iacobucciinquiry.ca/en/rules-of-procedure/index.htm.

Whatever mode of proceeding the Commissioner decides to adopt, he or she should in my view use the subpoena powers available in an inquiry to require Mr. Schreiber to produce at the outset, and before he testifies, all of the documents in his possession, power or control that may be relevant to the full investigation of the matters to be examined, without holding anything back. Before the Ethics Committee, Mr. Schreiber at one point testified that he had produced "all of the information [he has] relevant to the study that's at hand."[38] However, he testified shortly afterwards that he had "more stuff" to provide "[w]hen the inquiry is on."[39] An inquiry should have all of Mr. Schreiber's documents when it begins its work; it should not be left to receive them in installments.

F. Parliamentary Privilege

In my first report, I suggested that one of the options that the Government might consider was an inquiry in which the Commissioner is instructed to consider the testimony already given before the Ethics Committee, working largely from that testimony but supplementing it as he or she considered necessary and appropriate. I understand that this suggestion prompted an expression of concern from Parliamentary Counsel that proceeding in this manner might infringe parliamentary privilege.

I will leave it to others to evaluate and address this concern as might be required in the course of a public inquiry. However, I do not understand that the doctrine of parliamentary privilege could operate to prevent me from taking into account information that emerged from evidence before the Ethics Committee in making recommendations concerning the appropriate scope of an inquiry. Nor do I understand that parliamentary privilege was raised as a barrier to my taking into account that information as part of the general body of publicly available information in executing my mandate. As set out above, my mandate specifically required that I review information considered by the House of Commons Standing Committee in formulating my recommendations. I have done what I was mandated to do.

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[38] Note 11 above at 21.

[39] Note 11 above at 22.