Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney

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SUBMISSIONS BY THE ATTORNEY GENERAL OF CANADA ON THE MOTION FOR CLARIFICATION BROUGHT BY THE RIGHT HONOURABLE BRIAN MULRONEY

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1. The Attorney General of Canada opposes the request by counsel for the Right Honourable Brian Mulroney for clarification and direction from the Commissioner with respect to his Ruling on Standards of Conduct.

2. The Attorney General submits that the Ruling of the Commissioner requires no such clarification.

3. The Attorney General further submits that, in his Request, counsel for Mr. Mulroney attempts to reargue the matter and makes assertions which either have previously been made in his written submissions filed, were made during the hearing of oral submissions, or which should properly have been made at that time.

4. The submission at paragraph 14 of the Request, that "the Commissioner provide the parties with some additional clarification on the questions of how and to what extent he intends to be 'informed' by the 'deficiencies in conduct' identified in the various federal statutes, in light of the Supreme Court decision in *Blood System Inquiry*" is in particular, an attempt to revisit submissions as to that decision which were thoroughly canvassed in written argument and during counsel's oral submissions and which were considered by the Commissioner in his Ruling, as, for example, at paragraph 24.

5. As has been stated by the Prince Edward Island Court of Appeal, it is not the purpose of such a motion to re-argue issues which have been fully canvassed.[1]

6. Part II of the Request, which is entitled "The Comparisons to the Iacobucci Internal Inquiry" is clearly an attempt to persuade the Commissioner that his references to that inquiry were inappropriate or ill-advised, and cannot reasonably be characterized as an attempt to seek clarification or direction as to an apparent ambiguity.

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[1] *Business Development Bank of Canada v. ABN AMRO Leasing,* 2003 PESCAD 21, at para. 6

7. The submission at paragraph 21, that if the Commissioner were to inform his views of appropriateness based on federal statutes, his findings would risk being viewed as tantamount to conclusions of non-compliance with or contravention of those statutes, is again a re-argument of a point both made by counsel in oral submissions and considered by the Commissioner in reaching his decision.

8. Similarly, the submission at paragraph 26 that the approach "may not be appropriate where a comprehensive standard already exists," echoes submissions already made by counsel to the effect that only the 1985 Ethics Code should properly be referred to in determining whether conduct was "appropriate."

9. The proposition at paragraphs 27 through 33 of the Request, that there is an inconsistency between the Commissioner's statements at paragraphs 43 and paragraph 44 of the Ruling, is simply not made out. At paragraph 43, the Commissioner notes that "the 1985 ethics code did not apply to members of parliament".

10. At paragraph 44 of the Ruling, the Commissioner notes that section 60 of the 1985 Ethics Code sets out a limitation period for Ministers of the Crown after departure from office. There is no inconsistency between the two statements and the suggestion that further clarification of paragraph 43 is needed is accordingly unsupported.

11. The submission at paragraph 42, that Mr. Mulroney's actions after he left office can only be relevant to the limited extent that they can help ascertain whether his conduct "as Prime Minister" was inappropriate or whether he was in compliance with the operative post-employment provisions of the 1985 Ethics Code, is a submission which was made by counsel and rejected by the

Commissioner in his Ruling, and again constitutes an attempt to reargue the matter.

12. The same may be said of the submission at paragraph 47 that Mr. Mulroney's personal conduct once he left office cannot be connected to the "good government of Canada" unless covered by the specific post employment provisions of the 1985 Ethics Code.

13. The proposition that only the specific post employment provisions of the Code could apply was articulated repeatedly in both counsel's written and oral submissions, and cannot now again be advanced under the guise of seeking "clarification and direction".

14. At paragraph 22 of his Ruling, the Commissioner in fact noted that:

> "Mr. Pratte said that I am to look to the 1985 Ethics Code when I answer Question 13, "Were there ethical rules or guidelines which related to those business and financial dealings?" He also contended that, in determining whether Mr. Mulroney's conduct was appropriate for purposes of Questions 11 and 12, I must consider only the 1985 Ethics Code, to the exclusion of all other laws, rules, or guidelines. Mr. Pratte asserted that the word "appropriate" can only be read to mean conformity and compliance with the operative provisions of the 1985 Ethics Code."

15. This is not a case in which reconsideration of a decision can be justified on the basis of a need to correct what would otherwise be a miscarriage of justice.

> "It is clear from the authorities that the court has a broad discretion to reconsider a decision before it has been entered as formal judgment. That discretion, however, is to be used sparingly. At its heart the discretion has as its purpose the correction of what would otherwise be a miscarriage of justice [...]"[2]

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[2] *Kemp v. Wittenberg,* [1999] B.C.J. No. 810 (S.C.), at para. 5; *R.L.G. v. R.G.G.,* 2006 BCSC 1299, at para. 13.

16. To permit such submissions to be considered at this point simply affords counsel for Mr. Mulroney a "second kick at the can" and is not required to clarify the Ruling.

17. The only remedy available to Mr. Mulroney would be to ask the Federal Court to judicially review the Commissioner's Ruling. A motion for clarification is not intended to be an alternative to an appeal or judicial review. [3]

18. The submission, at paragraph 50 that "in the case of his personal income taxes, for example, the proper authority would be the Canada Revenue Agency" again simply echoes the submissions which counsel for Mr. Mulroney has made previously and which have been fully considered by the Commissioner, as for example at paragraph 65 of the Ruling, at which the Commissioner states:

> "As I have noted earlier in these reasons, I understand fully that I may not draw conclusions about civil or criminal responsibility. However, to determine whether any particular conduct meets the standard set out above, I conclude that I may be informed by deficiencies in conduct that are identified in the *Parliament of Canada Act*, the *Financial Administration Act*, the *Income Tax Act*, the *Excise Tax Act*, and the *Criminal Code*, as they existed at the time of the events under investigation. I may also look to *Standing Orders of the House of Commons* Nos. 21 and 23(2). I understand Justice Cory's caution in the *Commission of Inquiry on the Blood System* against setting out any conclusions that are couched in the specific language of criminal culpability or civil liability. I will be informed by these statutes and standing orders, not for the purpose of assessing criminal or civil liability, but for the purpose of understanding what is considered to be inappropriate conduct."

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[3] *Ibid*

19. The submission of counsel for Mr. Mulroney at paragraph 52 of the Request, that the Commissioner clarify the extent to which he intends to examine Mr. Mulroney's conduct after he stepped down as Prime Minister, is answered in the Ruling and no further "clarification" is necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19 DAY OF MARCH 2009.

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