



RULING ON APPLICATION BY THE RIGHT HONOURABLE BRIAN MULRONEY FOR CLARIFICATION OF RULING ON STANDARDS OF CONDUCT

[1] This Commission of Inquiry was established to investigate and report upon certain allegations respecting business and financial dealings between Karlheinz Schreiber (“Mr. Schreiber”) and the Right Honourable Brian Mulroney (“Mr. Mulroney”).

[2] In the Terms of Reference set forth in the Order in Council establishing this Commission of Inquiry, a number of questions were posed that I am mandated to answer. Included in those questions are the following, both of which deal with the appropriateness, or otherwise, of the conduct of Mr. Mulroney:

11. Were these business and financial dealings appropriate considering the position of Mr. Mulroney as a current or former prime minister and Member of Parliament?
12. Was there appropriate disclosure and reporting of the dealings and payments?

[3] On February 25, 2009, having earlier heard submissions from counsel for Mr. Mulroney, the Attorney General of Canada, and Mr. Schreiber, I delivered a ruling (the “Standards Ruling”) in which I set forth the standard by which the appropriateness, or otherwise, of the conduct of Mr. Mulroney, as detailed in the questions above, will be assessed.

[4] I now have before me an application by Mr. Mulroney for clarification of certain aspects of the Standards Ruling.

[5] In essence, there are two aspects of the Standards Ruling that Mr. Pratte, counsel for Mr. Mulroney, says require clarification.

[6] The first of the two aspects is the period of time to which the standard I articulated in the Standards Ruling applies. Mr. Pratte asserts that application of the standard is confined to the

period of time during which Mr. Mulroney served as prime minister of Canada and the period defined by the *1985 Conflict of Interest and Post-Employment Code for Public Office Holders* (1985 Ethics Code).

[7] The second aspect of the Standards Ruling on which clarification is sought is whether I intend to make findings as to the appropriateness of conduct by referring to *Standing Orders of the House of Commons* Nos. 21 and 23(2) and to statutes, such as 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 being investigated. If I do not intend to make findings by referring to those statutes or standing orders, Mr. Pratte has asked that I clarify what I intend to derive from them.

[8] Mr. Vickery, counsel for the Attorney General of Canada, takes the position that no clarification of the Standards Ruling is required because there is no ambiguity in the ruling. Mr. Vickery asserts that the principles of finality and certainty must be recognized. Mr. Vickery submits that what Mr. Pratte is doing is arguing once again matters that were fully argued prior to my delivering the Standards Ruling.

[9] Mr. Auger, on behalf of Mr. Schreiber, endorses the position taken by counsel for the Attorney General of Canada.

[10] I am satisfied on the basis of the case law cited to me by Mr. Pratte that I have the jurisdiction to clarify the Standards Ruling. First, although there is a general rule against a tribunal revisiting a final decision that was properly before it and that was made in accordance with its enabling legislation, the application of the general rule must be more flexible and less formalistic in the context of a commission of inquiry.

[11] Here, the application of the principle of *functus officio* must be applied in the flexible, less formalistic manner described by the Supreme Court of Canada in *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 because there is no right of appeal of rulings such as my ruling on standards of conduct, although it can be attacked by way of an application for judicial review. See also the decision of the Federal Court of Appeal in *Vatanabadi v. Canada (Minister of Employment and Immigration)*, [1993] 2 FC 492.

[12] In deciding that I may revisit the Standards Ruling to clarify it, I am cognizant of the Terms of Reference which specifically authorize me to adopt any procedures and methods I consider expedient for the proper and efficient conduct of the Inquiry. Moreover, I note that the Standards Ruling is an interlocutory ruling as opposed to a final ruling. Also, I am of the view that no party to this Inquiry or the public interest will be prejudiced by my clarifying the Standards Ruling.

[13] When I use the term “revisit my ruling,” I do not mean to say, either explicitly or implicitly, that I am going to defend that ruling or to change it. What I am prepared to do, however, is to clarify it by responding to the questions raised by Mr. Pratte in his submission to me at the hearing of the application for clarification.

[14] There is, in my view, no lack of clarity in the standard I set for assessing the appropriateness, or otherwise, of Mr. Mulroney’s conduct in terms of his business and financial dealings with Mr. Schreiber and in terms of the reporting and disclosure of payments he may have received from Mr. Schreiber. The standard I set and how I intend to apply that standard are to be found at paragraphs 61 and 62 of the Standards Ruling.

[15] With respect to the first area of concern identified by Mr. Pratte, I have no interest in delving into the private life or private business affairs of Mr. Mulroney. My interest is restricted to those issues set forth in the Terms of Reference as established by the Governor in Council. As regards the timeframe, if there is evidence of conduct on the part of Mr. Mulroney that occurred after he left the high office of prime minister but that relates to the matters before me under the Terms of Reference, I will apply the standard set in the Standards Ruling for assessing that conduct.

[16] I turn now to a consideration of the second area of concern expressed by Mr. Pratte – namely, whether I intend to make findings as to the appropriateness, or otherwise, of Mr. Mulroney’s conduct by referring to various statutes as noted in the Standards Ruling.

[17] Depending on where the evidence leads me, I may, as indicated in the Standards Ruling, look to statutes for relevant information. Also, depending on the evidence before me, I may want to look at one or more statutes to ensure that, in writing my report, I avoid using the language of the statute or language that may lead members of the public to perceive that specific findings of criminal or civil liability have been made. This is in keeping with one of the basic principles

governing public inquiries in Canada as set forth in the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at paragraph 57 where Justice Cory said:

... a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that findings of criminal or civil liability have been made.

[18] I will, as noted in the Standards Ruling, use an objective test in assessing the conduct in question. Before I am in a position to determine if there has been a deficiency in conduct, I need first determine what, objectively, would be considered appropriate conduct in a given set of circumstances. To that end, I may look to the statutes, as set out at paragraph 65 of the Standards Ruling, to assist me in formulating what may be considered appropriate conduct.

[19] At paragraph 65 of the Standards Ruling, I used the expression “I may be informed by” in relation to how I might utilize certain statutes. At no time did I intend to inform myself through these statutes as to specific deficiencies in conduct that may lead one to infer that I am commenting on criminal or civil liability. My use of the term “inform” as to these statutes was in reference to their assisting me in identifying a level of appropriate conduct. One can only determine if there are deficiencies in conduct after one has determined the standard by which the conduct under scrutiny can be judged on any given set of facts.

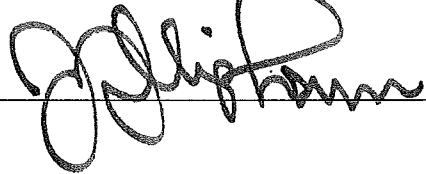
[20] By way of example, I know that it is not my role to conclude, or even comment on, whether specific sections of the *Income Tax Act* were violated. I am keenly aware that I am precluded from doing so. However, I am directed by the Terms of Reference to inquire and answer a question as to whether there was appropriate disclosure and reporting of any financial dealing. Depending on the evidence that comes before me, I may need to inform myself as what the *Income Tax Act* says about reporting and disclosure in order to be able to determine whether the reporting and disclosure was appropriate. My conclusions will be based on the facts to be established in the evidence to come.

[21] It is for further clarification of the issues highlighted above that I wish to specifically address the *Criminal Code of Canada*. While I referred to the *Criminal Code* in a direct quote

from section 5 (3) of the 1985 Ethics Code in paragraph 64 of the Standards Ruling and while I mentioned the *Criminal Code* again in paragraph 65 of the same ruling, I must state, upon reflection, that the *Criminal Code* is of little, if any, value in this endeavour. As a statute that proscribes, as opposed to prescribes, conduct, it appears to be of trifling value in assisting me in setting the standard for conduct in any given fact scenario.

[22] Subject to my observation in the preceding paragraph, I note that, although I have listed in the Standards Ruling a number of statutes and two standing orders of the House of Commons, by which I may inform myself, until I hear the evidence I cannot say which of them, if any, will be relevant to my determination of appropriateness. If there is a possibility that a finding of inappropriateness will be made, Mr. Mulroney will be given reasonable notice under section 13 of the *Inquiries Act*, and he shall have full opportunity to respond before any report is issued by me.

Signed at Ottawa, Ontario this ^{15th} day of April, 2009

A handwritten signature in black ink, appearing to read "J. Oliphant", written over a horizontal line.

Jeffrey James Oliphant
Commissioner