IN THE MATTER OF ORDER IN COUNCIL P.C. 2008-1092, MADE PURSUANT TO PART I OF THE *INQUIRIES ACT*: COMMISSION OF INQUIRY INTO CERTAIN ALLEGATIONS RESPECTING BUSINESS AND FINANCIAL DEALINGS BETWEEN KARLHEINZ SCHREIBER AND THE RIGHT HONOURABLE BRIAN MULRONEY

SUPPLEMENTARY SUBMISSIONS ON STANDARDS
RT. HON. BRIAN MULRONEY, P.C., C.C.

I. INTRODUCTION

1. On January 7, 2009, at the conclusion of the hearing on standards, Commissioner Oliphant asked the parties to provide supplementary written submissions in response to the following three questions relating to the standards to be used in interpreting whether the business and financial dealings at issue in this Inquiry were "appropriate":

> (i.) What is the significance of section 5(3) of the 1985 *Conflict of Interest and Post-Employment Code for Public Office Holders* ("1985 *Ethics Code*") and, in particular, the language contained therein which stated that compliance with the 1985 *Ethics Code* "does not absolve public office holders from conforming to any specific references to conduct contained in the statutes"?
>
> (ii.) What is the purpose of Question No. 11 and No. 12 if, as had been submitted, the applicable standards of conduct are subsumed by the ethical rules and guidelines referred to in Question No. 13?
>
> (iii.) Can the Commissioner determine the meaning of the term "appropriate" by applying an "objective standard" and by asking the following question: "What would the fully-informed, fair-minded, reasonable Canadian feel about the conduct in question and whether or not it was appropriate?"

2. The following constitute the formal written submissions of the Rt. Hon. Brian Mulroney P.C., C.C. in response to these three questions.

II. SUBMISSIONS

(i.) Section 5(3) of the 1985 *Ethics Code*

3. Subsection 5(3) of the 1985 *Ethics Code* reads, in part, as follows: "Conforming to this Code does not absolve public office holders from conforming to any specific references to conduct contained in the statutes governing their particular department or office and to the relevant provisions of legislation of more general application such as the *Criminal Code*...[and] the *Financial Administration Act*..."

4. A plain reading of the language found in s.5(3) simply provides that merely complying with the express provisions of the 1985 *Ethics Code* will not serve as a defence or justification for any violation of the provisions found in any federal law of general application including, *inter alia*, the *Criminal Code* and/or the *Financial Administration Act*.

5. Put another way, if a public office holder were accused of having violated a particular provision found in the *Financial Administration Act*, that person would not be able to defend himself by simply demonstrating that his conduct was otherwise in compliance with the provisions of the 1985 *Ethics Code*. In fact, whether or not the public office holder complied with the 1985 *Ethics Code* would be completely irrelevant.

6. The underlying principle found in s.5(3), namely that compliance with the *1985 Ethics Code* should be considered separate and apart from compliance with the law, is also reflected in s.7(b), which states: "[P]ublic office holders have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law."

7. Taken together, s.5(3) and s.7(b) establish the more general proposition that compliance with the law will not necessarily mean compliance with the 1985 *Ethics Code* and, conversely, that compliance with the 1985 *Ethics Code* will not necessarily mean compliance with the law. This proposition further confirms Mr. Mulroney's submission that ethical and legal standards are distinct and independent standards which should be considered separately by the competent authorities.

8. Further, the interpretation of s.5(3) and s.7(b) proposed herein by Mr. Mulroney gives full meaning to the words of those subsections. Moreover, only his interpretation is consistent both with the clear jurisdictional constraints on public inquiries and the prohibition contained in this Commission's Terms of Reference to the effect that the Commissioner is not authorized to make any findings of civil or criminal liability. As Justice Cory, writing for the Supreme Court of Canada, noted in the *Blood Inquiry Case*: "a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one..."

9. The interpretation proffered by counsel for both the Attorney General of Canada and Mr. Schreiber to the effect that the language found in s.5(3) somehow incorporates by reference the operative provisions of various federal statutes listed therein by fusing together what they term as being the "statutory infrastructure" with the "various non-legal standards concerned" must therefore be rejected.

(ii.) <u>Purpose of Questions No. 11 and 12</u>

10. The second question raised by the Commissioner relates to the interplay between Questions No. 11, 12 and 13 of the Terms of Reference, in light of Mr. Mulroney's submission that the standards of conduct contemplated by Question No. 11 and 12 are effectively "subsumed" by the ethical rules and guidelines referenced in Question No. 13 and, in particular, the 1985 *Ethics Code*.

11. For the reasons previously outlined in our written and oral submissions, we conclude that where Questions No. 11 and 12 ask the Commissioner to determine whether the business and financial dealings – as well as the disclosure and reporting of the same – were "appropriate", he is being asked to determine whether they were consistent with the operative provisions of the 1985 *Ethics Code*.

12. The question asked by the Commissioner, and essentially echoed by both counsel for the Attorney General and Mr. Schreiber, is whether that interpretation would effectively render Question No. 13 redundant. In response, we note at the outset that the

Terms of Reference raise several drafting issues.[1] Indeed, it was the continued uncertainty surrounding the use of the term "appropriate" which ultimately necessitated a separate hearing on January 7, 2009.

13. We submit, therefore, that any consideration or interpretation of the Terms of Reference must recognize the fact that they are not free from ambiguity which is not surprising given that the questions posed in the Terms of Reference are a verbatim reproduction of the questions that were originally set out in Prof. David Johnston's first report – a document that was clearly never intended to be drafted as either a statutory or quasi-statutory instrument.

14. A related point is that some of the questions contained in the Terms of Reference, by their very nature, will be redundant depending on the evidence presented. For example, Question No. 4 will automatically become moot and Question No. 5 would necessarily become redundant if Question No. 2 is answered in the affirmative. Question No. 3, in turn, would become moot if the answer to Question No. 2 is negative.

15. Moreover, the order of the questions (the sequence in which they have been reproduced in the Terms of Reference) has contributed to the ongoing confusion. For the reasons set out below, it is our respectful submission that a more logical sequence would have been for the Governor in Council to place Question No. 13 before Questions No. 11 and No. 12.

16. If this alternate sequence were accepted, the Commissioner would first determine whether there were "ethical rules and guidelines which related to these business and financial dealings." Then, assuming there were, Questions No. 11 and 12 would allow him to determine whether the dealings were "appropriate" and appropriately disclosed in relation to whether or not they conformed to those ethical rules and guidelines.

17. In fact, from a practical standpoint, the Commissioner has already adopted this sequence by asking – and answering – the first part of Question No. 13 before answering

[1] For example, the preamble refers to "certain allegations" made by Mr. Schreiber without ever specifying what they are, nor which of these allegations are of sufficient public interest to warrant the consideration of this Commission.

either Question No. 11 and 12. On this point, we note that it is the unanimous opinion of the various parties that there are ethical rules and guidelines which apply to the business and financial dealings in question – those contained in the 1985 *Ethics Code*.

18. Irrespective of which sequence is used, we submit that the questions at issue are inherently redundant. It is difficult to contemplate that the Commissioner would conclude that the dealings were inappropriate if they complied with the 1985 *Ethics Code*[2], and it is inconceivable that the Commissioner would conclude that the dealings were "appropriate" if they failed to comply with the 1985 *Ethics Code*.

19. The interpretation of these questions advanced by the Attorney General and Mr. Schreiber necessarily leads to the conclusion that the business and financial dealings, as well as Mr. Mulroney's conduct, could be gauged in respect of two distinct non-legal standards – those set out in the 1985 *Ethics Code*, and a second distinct standard that is utterly undefined except for the reference to the vague term "appropriate".

20. Judging Mr. Mulroney's conduct retroactively against some vague and undefined standard would not only contravene the principles set out in *Stevens v. Canada (Attorney General)*, it would be totally inconsistent with the interpretation principle that where a complete code is provided to govern a certain subject matter, it ought not to be supplemented or varied by reference to extraneous considerations.

21. Finally, as Mr. Mulroney's submission in answer to the third question will demonstrate, an attempt to infuse the word "appropriate" with a different meaning than by reference to the 1985 *Ethics Code* is: (a.) unfair to Mr. Mulroney because it subjects him to a second standard of conduct that he could not have been aware of at the time; and (b.) it is inconsistent with the Commission's mandate in Part II of the Inquiry which recognizes that ethical rules must result from proper consultation and reflection.

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[2] The Commissioner could only reach that conclusion if he considered that the 1985 *Ethics Code* was not "sufficient" to cover the issues raised by the business and financial dealings. In reality, however, that is the central issue raised by Part II of the Inquiry, as is further discussed in answer to the third question posed by the Commissioner.

(iii.) Objective Standard – "Reasonable Canadian" Test

22. The final question asked by the Commissioner was intended to solicit counsel's views on the suggestion that an "objective standard" should be applied to determine what "appropriate" means in the context of Questions No. 11 and 12. The proposed standard would be established by asking: "What would the fully-informed, fair-minded, reasonable Canadian feel about the conduct in question and whether or not it was appropriate?"

23. First, this suggestion is problematic because it fails to establish a truly objective standard. An immediate concern is that the proposed "objective standard" is comprised of a number of subjective elements. Indeed, the Commissioner himself stated that "the problem, of course, with the proposal is that we're dealing with terms that are relative terms."

24. If we consider the specific example identified by counsel for the Attorney General, the proposed standard requires us to discern what a "fully-informed" Canadian would "feel" about the conduct at issue. We agree that it is altogether plausible, even probable, that the parties will disagree on the question of what it means to be "fully-informed" in the context of a public inquiry with a focussed mandate.

25. Moreover, relying on the principle established by Justice O'Keefe in the *Stevens* decision that the standard applied should have been known at the time the conduct at issue took place, we submit that we are actually being asked to determine retroactively what a "fully informed, fair-minded, reasonable Canadian" would have felt about the conduct in question and whether or not it was "appropriate" back in 1993 and/or 1994.

26. While counsel for Mr. Schreiber may attempt to argue that the underlying principles involved are "timeless", the factual reality is that the concepts of responsible and accountable governance have demonstrably evolved in the past fifteen years. The *Ethics Code* itself was revised, in some cases significantly, by subsequent governments in response to current events and the changing attitudes of society.

27. Secondly, the proposed standard does not answer the question that was before the Commissioner at the recent public hearing: What does the term "appropriate" mean? That

is because the proposed standard still includes the term "appropriate", without any explanation or elaboration which could help guide the upcoming proceedings.

28. As originally drafted, Question No. 11 asks the Commissioner to determine whether "these business and financial dealings were appropriate". The proposed standard shifts that analysis away from the Commissioner, asking instead whether a "fully-informed, fair-minded, reasonable Canadian" would conclude that the conduct at issue was "appropriate". Unfortunately, the term "appropriate" is not defined in either case.

29. Thirdly, it is also unclear whether the Commissioner expected that he would or even could come to a different conclusion than the hypothetical "reasonable Canadian" he envisioned, or whether the Commissioner intended the use of the "reasonable Canadian" analysis to superimpose an additional standard on top of the general standard of appropriateness. In the end, the "fully-informed Canadian" will be the Commissioner and what he "feels" will necessarily be both a subjective test and one which could not have been known to Mr. Mulroney at the time.

30. Finally, there is a fundamental inconsistency between the approach to "interpreting" the term "appropriate" implicit in the "reasonable Canadian" test and both the nature and evolution of ethical guidelines in Canada as well as the Commission's own mandate as set out in its Terms of Reference.

31. In Part II of the Inquiry, the Commissioner is asked whether the current guidelines are "sufficient". For this purpose, the Commissioner has engaged various experts and will hold hearings seeking the views of both the Canadian public and persons knowledgeable in the area of public governance.

32. At the end of this process, the Commissioner will make a determination about whether the current rules are sufficient and, if not, make recommendations with respect to how they can be improved as he considers "appropriate". It is manifest that any new rules he recommends will not emerge, nor should they, from simply divining what a "reasonable Canadian" would feel about the current rules.

33. Moreover, as the written and oral submissions of the Attorney General underscored, the 1985 *Ethics Code* was itself preceded by an earlier set of rules and was ultimately based on the *Report of the Task Force on Conflict of Interest* produced by the Hon. Michael Starr and the Hon. Mitchell Sharp – two men universally respected for their ethical rigour.

34. The 1985 *Ethics Code* was prepared and introduced after serious consideration by the duly elected Mulroney government, with an eye to what the Canadian public would expect from holders of public office. There is no surer guide to what the "fully-informed Canadian" would feel is appropriate, than what the majority of the elected representatives declare to be appropriate in the case of the conduct of public officials.

35. The 1985 *Ethics Code*, as promulgated by the duly elected majority government of the day, must therefore be said to constitute the most reliable and detailed articulation of what a reasonable well-informed Canadian would have considered to be "appropriate" at that time.

36. Further, when there are explicit standards governing ethical conduct, there is no need to seek a different source for identifying what is "appropriate". As an example, in cases involving professional negligence there is often reference to a "reasonable man". In practice, however, the ultimate standard used will be the rules and standards that govern the profession in question. Thus, a doctor will be judged against the rules, protocols and expert views applicable to his trade. That is precisely what the 1985 *Ethics Code* represents in respect of public office holders.

III. CONCLUSION

37. All parties to this Commission of Inquiry agree that there were detailed ethical rules governing the conduct at issue in 1993 and 1994 that were known to every public office holder. Any attempt, either directly or indirectly, to "inform" the term "appropriate" with any different meaning than that which is dictated by the thoughtful and thorough articulation of ethical standards contained in the 1985 *Ethics Code* inexorably subjects Mr. Mulroney to:

(a.) a standard he could not have been aware of at the time; and/or

(b.) a legal standard which is beyond the purview of this Commission.

38. The effect of the positions taken by the Attorney General and Mr. Schreiber is that the Commission is entitled to examine Mr. Mulroney's conduct against two additional distinct standards: (a.) any generally applicable laws; and (b) a "reasonably informed person" test. It is submitted that the Commission is expressly prohibited from considering legal standards, and the Commissioner is explicitly precluded from creating a different meaning to the term "appropriate" than what was known at the time and contained in the 1985 *Ethics Code*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF JANUARY, 2009.

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