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January 26, 2009

Nancy Brooks

Commission Counsel

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

427 Laurier Avenue West, Suite 400

Ottawa, Ontario K1P 5W7

Dear Ms. Brooks:

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

The following are Mr. Schreiber's submissions in response to
Commissioner Oliphant's three questions posed to all counsel on January 7,
2009.

Question 1: The significance of section 5(3) of the 1985 Code

Section 5 of the *Conflict of Interest and Post-Employment Code for Public
Office Holders* (1985 Code) is consistent with and more support for Mr.
Schreiber's position as to the appropriate standards of conduct.

Although section 5 of the 1985 Code contains three subsections, it must be read as a whole. Section 5 makes it clear that the 1985 Code is a minimum standard of conduct. Section 5(1) states that the 1985 Code provides “direction” to “assist” public office holders in the “furtherance” of the principles of accountable government. Section 5(2) contemplates that public office holders may need to take “additional action” to prevent conflicts of interest. If the 1985 Code is a minimum standard, it does not follow, as argued by counsel for Mr. Mulroney, that the only standard of conduct expected is that set out in the 1985 Code.

It is submitted that the drafters of section 5(3) included reference to the *Criminal Code*, the *Canadian Human Rights Act*, the *Privacy Act*, the *Financial Administration Act* and the *Public Service Employment Act* because they reasonably anticipated overlap between conduct contemplated by this list of legislation and conduct contemplated by the 1985 Code. It is important to note that the list of legislation set out in section 5(3) is not exhaustive. The language used in section 5(3) is “such as” and, accordingly, the drafters left open the possible relevance of other legislation not listed. This could include, for example, the *Income Tax Act* and other rules and legislation already referred to by Mr. Schreiber and counsel for the Attorney General.

Another important observation is that section 6(2) of the 1985 Code uses similar structure and language as section 5(3). It is submitted that the reason for this is that the drafters contemplated overlap in conduct between the 1985 Code and the conflict of interest provisions of the *Senate and House of Commons Act*.

The drafters of the 1985 Code contemplated conduct so similar in nature to conduct contemplated by other legislation that they had to ensure that it was clear that compliance with the 1985 Code was not a complete answer in respect of compliance (or non-compliance) with that other legislation. In any event, it is submitted that it would be an unusual drafting technique to specifically state in

section 5(3) that compliance with the 1985 Code is not a “defence” at law to non-compliance with other legislation. Even if the purpose of section 5(3) was to foreclose “defences”, as suggested by Mr. Mulroney’s counsel, that is somewhat of a concession that the drafters of the 1985 Code contemplated conduct that may be captured by other legislation such as the *Criminal Code*, the *Financial Administration Act* and the other legislation referred to by Mr. Schreiber and counsel for the Attorney General of Canada.

Question 2: Is question 13 subsumed by questions 11 and 12 of the Terms of Reference?

It is submitted that question 13 operates separate and apart from questions 11 and 12 of the Terms of Reference. Question 13 does not overlap with questions 11 and 12. Question 13 does not subsume all possible standards contemplated by questions 11 and 12.

Question 13 is more narrow and focuses on “ethical rules or guidelines” whereas questions 11 and 12 require an examination of the more broad concept of “appropriate” conduct.

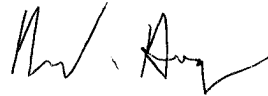
Question 3: Can a “fully informed fair minded reasonable Canadian” test be used in assessing appropriateness of conduct?

It is submitted that it is appropriate to consider an objective standard such as “what would a fully informed fair minded reasonable Canadian feel about the conduct”. This position is consistent with the position already taken by Mr. Schreiber in oral argument that the appropriate standards of conduct all relate to principles of “accountable and responsible government”. As stated on page 45 of “Guidance for Ministers” (Attorney General, Book of Documents, Tab E) “there is an obligation not simply to observe the law, but to act both in official and personal capacities in a manner so scrupulous that it will bear the closest public scrutiny”.

On page 45 of Guidance for Ministers it also states: “A practical test is to ask whether your conduct, or that of your staff, could cause embarrassment or be difficult to justify to the public, should it be raised in Parliament or reported in the press”. It is submitted that this is effectively a reasonable person test in that it articulates a test of whether the conduct would be hard to justify to the “public”. We submit that in this statement, the “public” is “fully informed fair minded reasonable Canadians”.

Public office holders are placed in their positions by “fully informed fair minded reasonable Canadians”. Accordingly, it would follow that the views of “reasonable” Canadians are relevant to the standards of conduct expected of public office holders.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Richard Auger', with a stylized flourish at the end.

Richard Auger