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

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

I - INTRODUCTION

1. Pursuant to the Notice of Hearing issued by Commissioner Oliphant on November 12, 2008, and further to the submissions filed on behalf of the Attorney General of Canada and Mr. Karlheinz Schreiber, the following constitutes the brief reply submissions of the Rt. Hon. Brian Mulroney, P.C., C.C. on the issue of standards. More detailed submissions will be made at the oral hearing scheduled by the Commission to address this issue.

2. In our initial submissions, it was argued that the only ethical rules and guidelines that could potentially be considered by the Commissioner are those contained in the *Conflict of Interest and Post Employment Code for Public Office Holders* ("*1985 Ethics Code*") dated September 1985. With respect to the proper interpretation and application of the term "appropriate" as it appears in Question No. 11 and Question No. 12 of the Terms of Reference, it was submitted that the term could only be read to mean conformity and compliance with the operative provisions of the *1985 Ethics Code.*

3. The written submissions filed on behalf of Mr. Schreiber on December 5, 2008, however, proposed that the Commissioner's investigation should be "informed" by, *inter alia*, the *Income Tax Act*, the *Parliament of Canada Act*, the *1985 Ethics Code*, and the code of conduct of the Barreau du Québec.

4. Moreover, with respect to the meaning of the term "appropriate" as it appears in both Question No. 11 and Question No. 12 of the Terms of Reference, Mr. Schreiber's

counsel submitted that it "should include a determination of whether or not there was compliance with these conventions, guidelines, legislation and laws."

5. The written submissions filed on behalf of the Attorney General on December 10, 2008, approached the questions set out in the Notice of Hearing at a "conceptual level". To that end, counsel attempted to "lay out a general framework within which statements of opinion as to what is 'appropriate' may be considered."

6. More specifically, counsel for the Attorney General submitted that "the legislation, rules guidelines and jurisprudence which are applicable to the conduct of public office holders generally will help inform the Commissioner's views as to what constitutes 'appropriate' conduct for the purposes of this inquiry." [Emphasis added]

7. For the following reasons, the essentially identical approaches of Mr. Schreiber and the Attorney General of Canada are beyond this Commission's jurisdiction, would violate our client's procedural and constitutional rights and would amount to a breach of natural justice.

II – THE LAW

8. The Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, 151 D.L.R. (4th) 1 ("*Blood System Inquiry*"), held that "[a] public inquiry was never intended to be used as a means of finding criminal or civil liability." Justice Cory, writing for the Court, then added:

> No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural safeguards which prevail at trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability no only should not be made, they cannot be made.

9. Indeed, many of the procedural and constitutional protections afforded parties are absent from a public inquiry. Adopting the submissions of Karlheinz Schreiber and the Attorney General would violate our client's rights in this regard.

10. Moreover, this Commission's jurisdiction is specifically limited by its own Terms of Reference which expressly direct the Commissioner to perform his duties without

expressing any conclusion or recommendation regarding the civil or criminal liability of any person.

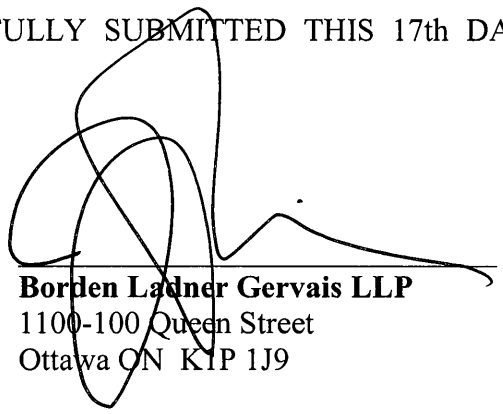
11. Where both the common law jurisprudence and the Terms of Reference explicitly prohibit the Commissioner from making findings of criminal or civil liability, it must follow that the term "appropriate" in Questions No. 11 and No. 12 cannot denote any jurisprudential or statutory standards of civil or criminal liability.

12. This proscription is not eluded by inviting the Commissioner to "inform" the meaning of the vague term "appropriate" by direct or indirect reference to myriad statutory provisions. Not only would so doing be in contravention of the Commission's mandate and jurisdiction, it would expose our client to an unknown standard of conduct, as it could be impossible to know in advance how the myriad statutory provisions referred to would be combined to arrive at a standard of "appropriateness".

III – CONCLUSION

13. Consequently, it is respectfully submitted that the term "appropriate" as used in the context of Question No. 11 and No. 12 of the Terms of Reference can only be read to mean conformity and compliance with the operative provisions of the *1985 Ethics Code*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF DECEMBER, 2008.



Borden Ladner Gervais LLP
1100-100 Queen Street
Ottawa ON K1P 1J9

Guy J. Pratte
Counsel for the Rt. Hon. Brian Mulroney