

**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**

**WRITTEN SUBMISSIONS ON STANDARDS
RT. HON. BRIAN MULRONEY, P.C., C.C.**

PART I - OVERVIEW

1. Pursuant to the Notice of Hearing issued on November 12, 2008, the following constitutes a brief outline of the submissions to be made on behalf of the Rt. Hon. Brian Mulroney with respect to the standard that the Commissioner should apply in determining certain matters set out in paragraph (a) of the Inquiry's Terms of Reference.

2. To that end, it is submitted on behalf of Mr. Mulroney 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.

3. Accordingly, 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 is submitted that this term can only be read to mean conformity and compliance with the operative provisions of the *1985 Ethics Code*.

PART II - BACKGROUND

4. The Commission was created pursuant to subsection 2(1) of the *Inquiries Act*, R.S. 1985, c. I-11), which states: "The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."

5. On June 12, 2008, pursuant to Order in Council P.C. 2008-1092, the Governor in Council issued the Terms of Reference which established this Commission to conduct an inquiry into certain allegations respecting business and financial dealings between Mr. Mulroney and Mr. Schreiber.

6. The preamble to the Inquiry's Terms of Reference expressly states that "any public inquiry should be a focused inquiry into specific matters of legitimate public interest", and that "the issue of public concern in this matter remains compliance with the constraints on holders of high public office."

7. Moreover, the Terms of Reference also make clear that only certain of the allegations that have been made by Mr. Schreiber about his business and financial dealings with Mr. Mulroney go beyond the private interests of the parties and raise legitimate issues of genuine public interest.

8. Finally, the Terms of Reference expressly direct the Commissioner to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person.

PART III – THE LAW

9. In *Dixon v. Canada (Commission of Inquiry into Somalia)*, 149 D.L.R. (4th) 269, the Federal Court of Appeal, per Justice Marceau, held that a public inquiry "depends for its existence entirely on the Governor in Council" and "I do not see how they can operate otherwise than within the parameters established by the Governor in Council."

10. In *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, 151 D.L.R. (4th) 1, ("*Blood System Inquiry*") the Supreme Court of Canada, per Justice Cory, summarized the main attributes of a public inquiry as follows:

(a) (i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;

(ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe;

(iii) it follows from (i) and (ii) above that a commissioner should avoid setting out conclusions that are couched in specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made...

(d) 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 such that the finding amounts to a conclusion of law pertaining to criminal or civil liability;

(e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry. [emphasis added]

11. In *Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 2116 (Q.L.), the Federal Court examined the conduct of the Parker Inquiry into the allegations concerning the conduct of the Hon. Sinclair Stevens. The issue in that case was whether the Inquiry had the jurisdiction to impose its own definition of “conflict of interest.”

12. Justice O’Keefe found that while the Parker Inquiry’s Terms of Reference expressly identified the *1985 Ethics Code* as the standard to be applied, the *1985 Ethics Code* did not define the term “conflict of interest”. In setting aside the Parker Inquiry report, and declaring it to be of no force or effect, Justice O’Keefe held:

I am of the opinion that the plaintiff did not know the standard he was to be judged against as the definition of conflict of interest was not made known to him until the Report was given to him. This is especially so when Commissioner Parker was to determine whether the plaintiff was in a real or apparent conflict of interest as defined by the Mulroney Code and the letter from the Prime Minister dated September 9, 1985.

As well, it appears to me that it would be unfair to develop a standard at a point in time after the conduct being complained of has occurred. I am of the view that it was a breach of the duty of procedural fairness owed to the plaintiff, to set a standard or definition of conflict of interest by stating the definition for the first time in the Report. In my view, the definition should have been stated in the various conflict of interest guidelines or code. [emphasis added]

PART IV - ANALYSIS

13. As previously noted, the Commission’s Terms of Reference expressly provide that the Inquiry should focus on “specific matters of legitimate public interest” and explicitly state that the public interest issue in the present case remains whether there was “compliance with the constraints on holders of high public office”.

14. It follows from the decision in *Blood System Inquiry* that the Commissioner can only find that there has been a failure to comply with a certain standard of conduct and must avoid any reference to any legally binding standard, as such a finding would inevitably amount to a conclusion of law pertaining to criminal or civil liability and violate the Terms of Reference. This is particularly so where the conduct of a single individual is to be assessed.

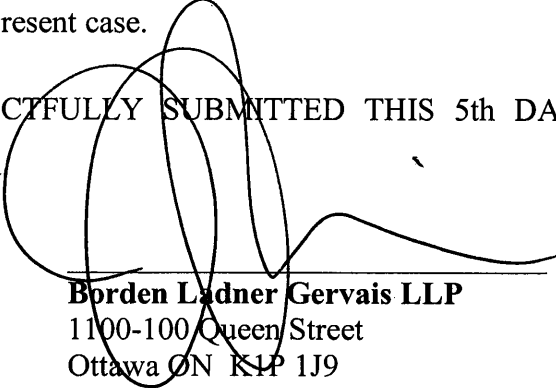
15. Further, the Federal Court in *Stevens* held that it would be unfair to develop a standard at a point in time after the conduct at issue has occurred. Therefore, the Commission cannot retroactively invest the term “appropriate” with a meaning that was not clearly known at the relevant time.

16. Thus, where the Terms of Reference ask whether certain conduct was “appropriate”, the standard of appropriateness must be a non-statutory ethical standard which applied at the time of the conduct in question. It is submitted that the *1985 Ethics Code* remains the only known public expression of an ethical standard which might have applied at the relevant time.

PART V - CONCLUSION

17. In order to conform with the dictates of the *Inquiries Act*, its Terms of Reference and the relevant jurisprudence, the Commission must limit its inquiry to those matters of legitimate public interest – namely those issues that are relevant to determining compliance with the *1985 Ethics Code* and the possible application of its operative provisions to the circumstances of the present case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th 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