

**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**

**REQUEST FOR CLARIFICATION AND DIRECTION
RIGHT HONOURABLE BRIAN MULRONEY, P.C., C.C.**

1. The Right Honourable Brian Mulroney makes this Application, a Request for Clarification and Direction, pursuant to Rule 4 of the *Rules of Procedure and Practice*. The Application asks for clarification and direction from the Commissioner with respect to his Ruling on Standards of Conduct (“Ruling”).

2. On February 25, 2009, the Commissioner issued the Ruling in which he set out the standard of appropriateness that he would use to assess Mr. Mulroney’s business and financial dealings with Mr. Schreiber pursuant to the Terms of Reference set out in Order in Council P.C. 2008-1092.

3. We respectfully submit that certain aspects of the Ruling raise important new questions, including some related to the Commission’s jurisdiction and mandate. In order to avoid undue delay, Mr. Mulroney makes this Application seeking clarification on the Ruling and further direction from the Commissioner.

**I. The manner and extent to which the Commissioner can be
“informed” by federal statutes**

4. At paragraph 65 of the Ruling, the Commissioner concludes that he “may be informed by deficiencies in conduct that are identified in 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 under investigation.”

5. The Commissioner then adds, “I will be informed by these statutes...not for the purpose of assessing criminal or civil liability, but for the purpose of understanding what is considered to be inappropriate conduct.” The Ruling neither indicates what standard(s) could be drawn from those statutes, nor which specific provisions might be referenced.

6. The term “informed” is then broadened in paragraph 66, where the Commissioner offers the following quote from counsel for the Attorney General: “because one must [as a public office holder] observe the law, at a minimum one must necessarily consider what laws impact the day-to-day conduct of the public office holders involved.”

7. To the extent that counsel for the Attorney General was being quoted approvingly, as it would appear, these passages may be understood as suggesting that the Commissioner could be “informed” by the federal statutes in question in order to investigate and determine whether Mr. Mulrone y “observe[d] the law”.

8. As the Commissioner himself noted, however, the Supreme Court of Canada has clearly stated that public inquiries may not make findings of civil or criminal liability and should endeavour to avoid using language that is so equivocal that it appears to be a finding of civil or criminal liability. Justice Cory, in *Blood System Inquiry*, wrote:

...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. [emphasis added]

9. The Ruling, in our respectful submission, does not make clear that the standard being applied is not legally binding. Rather, the explicit reference to federal statutes, including the *Criminal Code*, necessarily invites the view that the Commissioner intends to apply those statutes in evaluating Mr. Mulrone y’s conduct.

10. This uncertainty seems to persist, in our respectful submission, where the Commissioner states at paragraph 64: “In carrying out my assessment of what was or was not appropriate, I will be informed by the 1985 Ethics Code and the 1988 *Guidance for Ministers.*” [emphasis added]

11. The Terms of Reference, in particular Question No. 13, direct the Commissioner to establish whether there were any ethical rules or guidelines which related to the business dealings and, if so, to determine whether they were followed. Question No. 13 does not specifically mention statutory rules or guidelines.

12. The Ruling confirms that the 1985 *Ethics Code* and the 1988 *Guidance to Ministers* are “relevant to Question 13”, and then sets out how the Commissioner intends to determine whether Mr. Mulroney’s conduct complied with both the 1985 *Ethics Code* and the 1988 *Guidance to Ministers* as required by the Terms of Reference.

13. The Commissioner therefore appears to use the term “inform”, in the context of the ethical rules and guidelines, as being effectively synonymous with “apply”. In the next paragraph, however, the Commissioner uses the term “inform”, now in the context of the federal statutory provisions, but states that it does not and cannot mean “apply”.

14. In view of the foregoing, we respectfully request that the Commissioner provide the parties with some additional clarification on the questions of how and to what extent he intends to be “informed” by the “deficiencies in conduct” identified in the various federal statutes in light of the Supreme Court decision in *Blood System Inquiry*.

II. The Comparisons to the Iacobucci Internal Inquiry

15. Throughout the Ruling the Commissioner makes reference to a number of similarities between the present Inquiry and the Internal Inquiry conducted by Commissioner Iacobucci into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin.

16. At paragraph 67, for example, the Commissioner states: “I note that Commissioner Iacobucci took the same approach, of being informed by internal policies, mandate, legislation, ministerial directions, and other like instruments in assessing whether the conduct at issue in the Internal Inquiry was deficient.”

17. It is respectfully submitted, however, that certain key differences exist between the two Inquiries that may warrant the Commissioner’s consideration. Chief among these,

and arguably the most important, is the fact that the Iacobucci Inquiry was an internal inquiry into systemic problems within certain governmental institutions.

18. This distinction is critical. In *Blood System Inquiry*, Justice Cory distinguished between broad inquiries into systemic problems and inquiries that concerned specific incidents and specific individuals whose findings “would inevitably reflect adversely on individuals...[and] be interpreted as findings of liability by some members of the public.”

19. In the case of the latter form of inquiry, Justice Cory observed that a “strict test” would be appropriate to ensure that the inquiry proceedings did not become viewed as being “tantamount to a preliminary inquiry into a specific crime”, or which could lead to findings of fact that would “determine responsibility in the eyes of the public.”

20. Commissioner Iacobucci concluded in his Inquiry that: “The individual officials whose actions were material to my mandate were employed with these institutions...[it] is neither necessary nor appropriate that I make findings concerning the actions of any individual Canadian official, and I have not done so.” [emphasis added]

21. Unlike the Iacobucci Inquiry, the present Inquiry is only concerned with the conduct of a single individual – Mr. Mulroney. If the Commissioner were to “inform” his views of appropriateness based on federal statutes, his findings would risk being viewed as tantamount to conclusions of non-compliance with or contravention of those statutes.

22. A second important distinction relates to the manner in which Commissioner Iacobucci was “informed” by federal legislation. As he explained: “the basic principles that emerge from legal sources including Canadian law...are helpful in informing my determination as to whether Canadian officials acted properly” [emphasis added]

23. In the present case, as noted above, the Commissioner stated: “I conclude that I may be informed by deficiencies in conduct that are identified in the *Parliament of Canada Act*, the *Financial Administration Act*, the *Income Tax Act*, the *Excise Tax Act* and, the *Criminal Code*.” [emphasis added]

24. The term “deficiencies in conduct”, particularly insofar as that term is applied to either the *Parliament of Canada Act* or the *Income Tax Act*, appears to be a direct reference to statutory offences. This would seem to be very different from merely being informed by certain “basic principles” that emerge from unspecified “legislation”.

25. Moreover, Commissioner Iacobucci did not have the benefit of a single comprehensive standard, as we do in this case with the 1985 *Ethics Code*. He was therefore forced to cobble together a standard using an amalgam of various sources including internal policies, mandates, legislation and ministerial directions.

26. While this approach may have been appropriate in the circumstances of an internal inquiry into systemic issues, we respectfully submit that it may not be appropriate where a comprehensive standard already exists and the inquiry is focused on specific allegations involving a single individual.

III. The manner and extent to which the 1985 *Ethics Code* applies to former public officials

27. At paragraph 43 of the Ruling, Commissioner Oliphant states: “If my consideration of ‘appropriate’ were confined to the 1985 *Ethics Code*, I would be precluded from consideration of Mr. Mulroney’s conduct after he stepped down as prime minister. Nothing in the Terms of Reference imposes such a limitation.”

28. We respectfully submit that this interpretation of the 1985 *Ethics Code* may not be entirely consistent with the views expressed elsewhere in the Ruling. At paragraph 44, for example, the Commissioner notes that the 1985 *Ethics Code* does contain provisions which continue to govern public office holders after they have left public office.

29. The specific example cited by the Commissioner, section 60, provides that former ministers of the Crown are prohibited from undertaking certain activities for a period of two years after they have left office. Section 60, however, is only one of many ‘post-employment’ provisions contained in the 1985 *Ethics Code*.

30. Part III of the 1985 *Ethics Code* contains various provisions designed to govern former public office holders. The stated purpose for these provisions, as set out in section 57, is to ensure that they “shall not act, after they leave public office, in such a manner as to take improper advantage of their previous public office.” [emphasis added]

31. While section 60 has a two year limitation period, others have no particular time constraints. Section 59, for example, states: “At no time shall a former public office holder act for or on behalf of any person, commercial entity, association or union in connection with any specific ongoing proceeding...to which the Government is a party.”

32. Moreover, the specific wording of section 57 is duplicated verbatim in Part I of the 1985 *Ethics Code*. Subsection 7(i), which sets out the governing principles, also states: “public office holders shall not act, after they leave public office, in such a manner as to take improper advantage of their previous office.” [emphasis added]

33. Therefore, subsection 7(i) and the provisions contained in Part III of the 1985 *Ethics Code* would seem to allow the Commissioner to consider various aspects of Mr. Mulroney’s conduct after he stepped down as Prime Minister. We therefore request that the Commissioner clarify what he intended to convey in paragraph 43 as set out above.

IV. The Ruling raises important new questions about the Commission’s mandate and jurisdiction

34. In addition to providing the standard of appropriateness that will be used to assess Mr. Mulroney’s business and financial dealings with Mr. Schreiber, the Ruling also sought to provide the Parties with a comprehensive interpretation of the Commission’s Terms of Reference.

35. The interpretation of the Terms of Reference contained in the Ruling, only the second offered by the Commissioner, raises important new questions about the scope of the Commission’s mandate and the limits on its jurisdiction. To that end, we respectfully request that the Commissioner clarify his views on these questions and related matters.

36. At paragraph 43, the Commissioner indicates that nothing in the Terms of Reference precludes him from considering Mr. Mulroney's conduct after he stepped down as Prime Minister. Then, at paragraph 44, the Commissioner notes that he is not limited to investigating matters to a two-year period after Mr. Mulroney left office.

37. In our submission, these two statements highlight the need for the Commissioner to set out the extent to which he intends, and the extent to which he has the jurisdiction, to examine Mr. Mulroney's conduct after he stepped down as prime minister and ceased to be a public office holder.

38. Subsection 2(1) of the *Inquiries Act* 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." [emphasis added]

39. The Commission's Terms of Reference specify that "any public inquiry should be a focused inquiry into specific matters of legitimate public interest", and, to that end, "the issue of public concern in this matter remains compliance with the constraints on holders of high public office." [emphasis added]

40. If this Inquiry is limited to matters connected with the "good government of Canada", the "public business thereof" and the "constraints on holders of high public office", it should be principally concerned with Mr. Mulroney's conduct while he was Prime Minister and conduct governed by the 1985 *Ethics Code* after he left office.

41. The Ruling, however, appears to go beyond these matters and extend the inquiry to an examination of Mr. Mulroney's personal conduct and private affairs after he left office. Thus the Ruling suggests, at least in part, that the Commissioner may examine whether Mr. Mulroney complied with the provisions of the *Income Tax Act*.

42. It is submitted that Mr. Mulroney's actions after he left office can only be relevant to the Inquiry's mandate to the limited extent that they can help ascertain whether: (a.) Mr. Mulroney's conduct as Prime Minister was inappropriate; and (b.) whether he was in compliance with the post-employment provisions of the 1985 *Ethics Code*.

43. The Commissioner's Ruling, however, may be taken to suggest that the Commission has the jurisdiction and mandate to evaluate Mr. Mulroney's conduct both while in office and after he left office against the same standard – a standard that was primarily established to govern ministers of the Crown and their ministerial conduct.

44. In that sense, the Ruling seems to imply that former public office holders are to be bound by the same rules, and should be held to the same level of public scrutiny, as they were while in office. This would, in our submission, improperly expand the ethical rules and guidelines beyond their intended scope.

45. As the Commissioner indicates in the Ruling, different ethical rules and standards apply to public office holders than apply to Members of Parliament. Moreover, there should be no question that different ethical rules and standards apply to private citizens than apply to either Members of Parliament or public office holders.

46. For the period when an individual is a public office holder – as that term is defined in the applicable ethical regime – it is entirely appropriate for that person to be held to the highest possible standard both in respect of their official conduct and personal conduct, as either could have an impact on the public perception of their office.

47. Once an individual has retired from public office, once he no longer has any official conduct or responsibilities, it would seem incongruous that his personal conduct or private affairs could be connected to the “good government of Canada” unless they are covered by the specific post-employment provisions of the 1985 *Ethics Code*.

48. Public officials forego much of their privacy while they hold public office, and to the limited extent outlined in the post-employment provisions contained in the 1985 *Ethics Code*. The latter provisions were clearly intended to govern the private conduct of former public office holders after they have left office and should be fully considered.

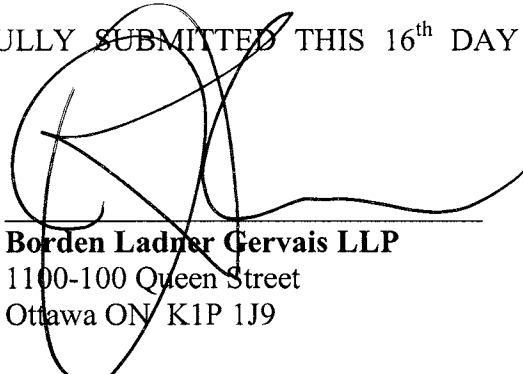
49. Mr. Mulroney accepts without reservation that while he was Prime Minister he had an obligation to maintain the highest standards of conduct. He further recognizes this Commission's jurisdiction to determine whether he, both during his time as Prime Minister and thereafter, failed to meet the applicable standards in the 1985 *Ethics Code*.

50. Mr. Mulroney also recognizes that, like every public citizen, he is bound by all the laws of Canada, and that any breach of those laws would be subject to the public enforcement mechanisms therein provided. In the case of his personal income taxes, for example, the proper authority would be the Canada Revenue Agency.

51. If the Commissioner intended to convey that Mr. Mulroney, by virtue of once having been Prime Minister, had forever foregone his right to privacy beyond that which is specifically mandated by the post-employment provisions of the 1985 *Ethics Code*, such an interpretation of the Terms of Reference would be erroneous.

52. For the reasons set out above, therefore, we would respectfully request that the Commissioner clarify the extent to which he intends to examine Mr. Mulroney's conduct after he stepped down as Prime Minister, and identify the standard against which such conduct, if any, would be assessed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF MARCH, 2009.



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