RULING ON STANDARDS OF CONDUCT

INTRODUCTION

[1] By virtue of Order in Council 2008–1092 establishing this Commission of Inquiry and constituting its Terms of Reference, I have been given a mandate that requires me to answer the 17 questions set out in paragraph (a) of the Terms of Reference.

[2] Among the questions I am called upon to answer are the following three, which are pertinent for the purpose of this ruling:

> 11. Were these business and financial dealings appropriate considering the position of Mr. Mulroney as a current or former prime minister and Member of Parliament?
>
> 12. Was there appropriate disclosure and reporting of the dealings and payments?
>
> 13. Were there ethical rules or guidelines which related to these business and financial dealings? Were they followed?

[3] Before answering Questions 11 and 12, I must identify the norms and standards to be applied in interpreting whether the conduct under discussion was appropriate in the circumstances. Before answering Question 13, I must determine what those ethical rules or guidelines were.

[4] On November 12, 2008, the Commission issued a Notice of Hearing on Standards of Conduct, inviting the four parties to Part I of the Inquiry – the Factual Inquiry – to make submissions in relation to Questions 11, 12, and 13 of the Commission's Terms of Reference. The matters before me can be summarized as follows:

> 1. In relation to Questions 11 and 12, what are the applicable norms and standards in interpreting whether Mr. Mulroney's conduct was "appropriate" in the circumstances?

2. In relation to Question 13, what were the ethical rules and guidelines that were applicable to the business and financial dealings between Mr. Mulroney and Mr. Schreiber?

[5] The Attorney General of Canada (Attorney General), Mr. Schreiber, and Mr. Mulroney, through their counsel, filed written submissions in response to the Notice of Hearing. A public hearing was held on January 7, 2009, and oral submissions were heard. Although Mr. Houston, who represents Mr. Doucet, was present at the January 7 hearing, he chose not to make any submissions.

[6] I note that, as the hearings in Part I of the Inquiry are scheduled to commence on March 30, 2009, the submissions on the applicable norms and standards have been heard before any evidence has been heard by the Commission. That being the case, I must approach the issues at a conceptual level. Nonetheless, I think it important that, before I hear the evidence in the Factual Inquiry, all parties granted standing, particularly Mr. Mulroney, know by what standard the appropriateness of Mr. Mulroney's business and financial dealings, as well as the disclosure and reporting of those dealings and payments, will be assessed.

POSITIONS OF THE PARTIES

Position of the Attorney General of Canada

[7] Mr. Vickery, counsel for the Attorney General, prefaced his submissions by pointing out that a commission of inquiry under Part I of the *Inquiries Act* is neither a criminal trial nor a civil action, and this proposition forms the baseline on which the questions raised by the Commission must be addressed. He noted, however, that a commission may make a finding of misconduct in accordance with section 13 of the *Inquiries Act*.

[8] Briefly put, the position advanced by Mr. Vickery is that, even though I am not called upon or permitted to make findings as to criminal liability or civil responsibility,

the legislation, rules, guidelines, and jurisprudence that are applicable to the conduct of public office holders generally may be relied on to inform my views as to what constitutes appropriate conduct for the purposes of this Inquiry.

[9] Mr. Vickery stated that the particular standards that may inform my conclusion as to whether conduct was or was not appropriate must be standards that were in place at the time of the conduct concerned. Noting that the question of whether a particular statute, rule, or guideline will have application will depend on the facts I find during the course of the Inquiry, he referred me to the following legislation as being relevant: the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 41; the *Financial Administration Act*, R.S.C. 1985, c. F-11, ss. 80 and 81; the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 119, 121, and 122; and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 220(3.1). These statutes create offences regarding certain types of prohibited conduct. In Mr. Vickery's submission, taken together, these statutes, and the offences identified therein, reflect society's disapproval of the particular types of conduct governed by them. Mr. Vickery submitted that an understanding of what types of conduct are subject to sanctions may inform my view as to whether particular conduct is appropriate in the context of the Terms of Reference.

[10] In addition to these statutes, Mr. Vickery submitted that, in determining whether Mr. Mulroney conducted himself in a manner that can be described as appropriate in the context of Questions 11 and 12, I should also refer to, and be guided by, *Standing Orders of the House of Commons* Nos. 21 and 23(2) and the *1985 Conflict of Interest and Post-Employment Code for Public Office Holders* (1985 Ethics Code). The 1985 Ethics Code applied to public office holders, defined to include ministers of the Crown. Mr. Vickery submitted that a document entitled *Guidance for Ministers*, which was published by the Privy Council Office in October 1988 and circulated to all ministers by the Prime Minister, is also relevant.

[11] With respect to Question 12 of the Terms of Reference, Mr. Vickery referred me to s. 220(3.1) of the *Income Tax Act*, which is the legislative underpinning on which the Voluntary Disclosure Program is based and permits the minister of national revenue to

waive penalties and interest in certain circumstances. Question 12, which calls on me to determine whether there was appropriate disclosure and reporting of the dealings and payments, necessarily encompasses, in Mr. Vickery's submission, disclosure and reporting to the Canada Revenue Agency, not for the purpose of determining any civil or criminal liability under that statute, but as part of the necessary context in determining whether the steps taken by Mr. Mulroney were appropriate.

[12] The 1985 Ethics Code was tabled in the House of Commons by Mr. Mulroney on September 9, 1985. Mr. Vickery referred me to a statement made in the House of Commons by Prime Minister Mulroney and an open letter from him to members of parliament and senators on the same day. The first paragraph of that letter reads:

> Dear Colleagues: It is a great principle of public administration – I would even say an "imperative" – that to function effectively the government and the public service of a democracy must have the trust and confidence of the public they serve. In order to reinforce that trust, the government must be able to provide competent management and, above all, to be guided by the highest standards of conduct.

[13] This paragraph of the letter duplicates what was said by Mr. Mulroney at the outset of his remarks in the House of Commons when he tabled the 1985 Ethics Code: House of Commons, *Debates*, Official Report, First Session, Thirty-Third Parliament, 34 Elizabeth II, Volume V, 1985, at p. 6399.

[14] The 1985 Ethics Code contained enforcement mechanisms with regard to the post-employment regime and was structured much like a statute, including language that compelled certain conduct. Mr. Vickery noted that the 1985 Ethics Code remained in effect until it was modified by Prime Minister Chrétien in 1994. He submitted that the 1985 Ethics Code is relevant to inform whether the conduct referred to in Questions 11 and 12 was appropriate. Moreover, the 1985 Ethics Code and *Guidance for Ministers*, according to him, contain the ethical rules and guidelines that are relevant for the purposes of Question 13 of the Terms of Reference.

Position of Mr. Schreiber

[15] On behalf of Mr. Schreiber, Mr. Auger agreed with Mr. Vickery that, in determining whether Mr. Mulroney's conduct was appropriate, I should be guided by the various legislation in force at the relevant times. That legislation includes the *Income Tax Act*, the *Financial Administration Act*, and the *Parliament of Canada Act*. Mr. Auger also urged me to have regard to *Standing Order of the House of Commons No. 22*, the *Guides to Canada's Export Controls*, published in January 1993 and April 1994, and the 1985 Ethics Code as being relevant.

[16] Mr. Auger parted with Mr. Vickery, however, in relation to the 1985 Ethics Code. Whereas Mr. Vickery asserted that the 1985 Ethics Code is the only version that is relevant to Question 13, Mr. Auger stated that all versions of the ethics codes, up to the present time, should be considered because they share a common principle: they are all designed to protect and foster accountable and responsible government. Therefore, as I understand his submission, the standards are the same no matter what version of the ethics code are applied.

[17] Turning to Question 12 of the Terms of Reference, Mr. Auger submitted that taxation standards, and, in particular, the Voluntary Disclosure Program under the *Income Tax Act*, should be considered in determining whether there was appropriate disclosure and reporting of the dealings and payments. As well, I should consider obligations imposed by legislation dealing with the Goods and Services Tax in determining whether Mr. Mulroney's disclosure and reporting of the dealings and payments were appropriate. In this regard, Mr. Auger stated that, for the purpose of concluding whether there was civil or criminal liability, it is not a question of whether the appropriate percentage of GST was collected, or whether there was compliance with the *Excise Tax Act*. Rather, in his submission, I am to be informed by the relevant legislation in order to reach a determination whether the reporting and disclosure by Mr. Mulroney of the dealings and payments was appropriate.

[18] Finally, Mr. Auger argued that the practices, conventions, and rules governing lawyers called to the bar of the Province of Quebec ought to be considered by me in

determining what was appropriate. In his submission, if Mr. Mulroney was a member of the Quebec bar at the relevant times, certain rules and ethical obligations could be relevant to the determination of whether Mr. Mulroney's conduct was appropriate. He noted that a code of conduct is prescribed by *An Act Respecting the Barreau du Québec*, R.S.Q., c. C-26, and the *Code of Ethics of Advocates*, c. B-1, r.1.

Position of Mr. Mulroney

[19] In his submission on behalf of Mr. Mulroney, Mr. Pratte stated that, during the course of this Inquiry, it is the conduct of a single individual that is to be assessed. That individual is his client, Mr. Mulroney. Mr. Pratte submitted that my mandate as Commissioner is confined by the parameters as set forth in the Terms of Reference established by the Governor in Council. Like Mr. Vickery and Mr. Auger, he stressed that this Commission could make no finding of legal liability, be it criminal or civil.

[20] In his submission, Mr. Pratte took issue with the more expansive views expressed by both Mr. Vickery and Mr. Auger. He contended that the rules of procedural fairness require that Mr. Mulroney be apprised, from the outset, of the standard by which his conduct will be assessed. Like Mr. Vickery, he said that the applicable standard must be one that existed at the time the conduct in question occurred. However, he rejected the proposition put forward by Mr. Vickery and Mr. Auger that I should be informed by the conduct proscribed in legislation such as the *Criminal Code*, the *Financial Administration Act,* the *Income Tax Act*, or the *Parliament of Canada Act*. Mr. Pratte cautioned that, if I rely on such legislation to inform myself on what "appropriate" means, I will be doing indirectly what I cannot do directly, because I will be incorporating provisions from those statutes into the Terms of Reference.

[21] The applicable standard for all purposes, in Mr. Pratte's submission, can only be that as established by the 1985 Ethics Code. In answer to Mr. Auger's contention that I should be informed by the rules governing members of the Barreau du Québec, Mr. Pratte said that the federal government does not have the power to invest me with the

jurisdiction to apply the rules of the Barreau. In his submission, the rules applicable to the Barreau fall within provincial jurisdiction, and only the Barreau can investigate Mr. Mulroney's conduct under the rules. With respect to Standing Orders of the House of Commons, Mr. Pratte said that the House of Commons has exclusive jurisdiction to apply those orders. There is no reference to statutes or standing orders in the Terms of Reference and, therefore, I am not to be informed by what is contained in any standing order.

[22] Accordingly, Mr. Pratte said that I am to look to the 1985 Ethics Code when I answer Question 13, "Were there ethical rules or guidelines which related to those business and financial dealings?" He also contended that, in determining whether Mr. Mulroney's conduct was appropriate for purposes of Questions 11 and 12, I must consider only the 1985 Ethics Code, to the exclusion of all other laws, rules, or guidelines. Mr. Pratte asserted that the word "appropriate" can only be read to mean conformity and compliance with the operative provisions of the 1985 Ethics Code.

RELEVANT CASE LAW

[23] As the case law concerning public inquiries has evolved, certain principles have emerged.

[24] Cory J. had occasion to summarize what he referred to as "basic principles" governing public inquiries in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 57, where he stated:

> Perhaps the basic principles applicable to inquiries held pursuant to Part I of the Act may be summarized in an overly simplified manner in this way:
>
> (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 endeavour to avoid setting out conclusions that are couched in the 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.
>
> (b) a commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;
>
> (c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference;
>
> (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.

[25] For the purpose of this ruling – namely, to articulate the standard by which the conduct of Mr. Mulroney will be assessed – the two most important principles, in my view, are those dealing with the Inquiry's lack of authority to determine legal liability and the need to ensure procedural fairness in the conduct of the Inquiry.

[26] It is evident from the decision of Teitelbaum D.J. of the Federal Court of Canada in *Pelletier v. Canada (Attorney General)*, [2008] F.C.J. No. 1006; 2008 F.C. 803, that certain degrees of procedural fairness should be observed in a given case, depending on the nature of the Inquiry.

[27] The decision of the Federal Court of Appeal in *Dixon v. Canada (Governor in Council)*, [1997] 3 F.C. 169, was in relation to the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. The court's decision in that case is authority for the proposition, which I adopt and accept without reservation, that an Inquiry is an

agency of the Executive Branch of Government and, as such, must operate within the parameters established by the Governor in Council. That means that, as the Commissioner of this Inquiry, my jurisdiction is confined to responding to those questions and directions set forth in the Terms of Reference contained in Order in Council 2008–1092.

[28] The decision of O'Keefe J. of the Federal Court of Canada in *Stevens v. Canada (Attorney General)*, [2005] 2 F.C.R. 629, is instructive because it is authority for the proposition that the subject of an inquiry under the *Inquiries Act* is entitled to know the standard on which he or she is to be judged and that, to develop a standard after the impugned conduct has occurred, is a breach of procedural fairness.

[29] It will be remembered that, in *Stevens*, the plaintiff, Sinclair Stevens, sought a declaration to set aside the Report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens (the Parker Inquiry Report). The Parker Inquiry investigated allegations of conflict of interest on the part of Mr. Stevens while he was a cabinet minister. The person appointed to head the inquiry was Chief Justice Parker (Commissioner Parker). His mandate as Commissioner included, among other things, the power to inquire into and report on "whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985[.]"

[30] The 1985 Ethics Code implemented during the tenure of Mr. Mulroney as prime minister did not contain a definition of the term "conflict of interest." Commissioner Parker developed his own definition of that term but did not make it known to Mr. Sinclair until he released his report.

[31] At para. 42 of his judgment, O'Keefe J. said:

> 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 [page 651] 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.

[32] I endorse without reservation what O'Keefe J. had to say.

ANALYSIS AND CONCLUSIONS

[33] Unlike the situation faced by Commissioner Parker in *Stevens*, where the Commissioner's mandate was restricted to require him to look only at what he referred to as "the Mulroney Code" in determining whether Mr. Stevens had been in a conflict of interest, my mandate is not so restrictive.

[34] The Terms of Reference set forth in my mandate specifically require me, in Question 13, to investigate and report on whether there were ethical rules or guidelines that related to the business and financial transactions between Mr. Mulroney and Mr. Schreiber and, if so, whether they were followed. Bearing in mind that I have yet to hear evidence establishing the facts of the matters under investigation in this Inquiry, it would appear at this conceptual stage that the 1985 Ethics Code and the *Guidance for Ministers* are relevant to Question 13. Both set out ethical rules and guidelines that were applicable on June 24, 1993, the date on which Mr. Mulroney stepped down as prime minister.

[35] The objective of the 1985 Ethics Code, as set out in section 4, was to enhance public confidence in the integrity of public office holders and the public service. In furtherance of this goal, public office holders had an obligation to act in a manner that would bear the closest public scrutiny – an obligation that, as explained in section 7(b),

was not fully discharged by simply acting within the law. This principle was incorporated into the 1988 *Guidance for Ministers*, which provided:

> The Prime Minister establishes *standards of conduct for Ministers*, subject always to the basic requirements of the law. Ministers should recognize that the Prime Minister will hold them accountable for maintaining, and appearing to maintain, a standard of propriety in the conduct of public business stricter than required by law or expected in other occupations.[Emphasis in original.]

[36] The Terms of Reference, in Questions 11 and 12, respectively, require that I investigate and report on the following questions concerning the business and financial dealings as between Mr. Mulroney and Mr. Schreiber:

> 11. Were these business and financial dealings appropriate considering the position of Mr. Mulroney as a current or former prime minister and Member of Parliament?
>
> 12. Was there appropriate disclosure and reporting of the dealings and payments?

[37] I am unable to accede to Mr. Pratte's argument that what is "appropriate," as referred to in Questions 11 and 12, can only be assessed with reference to the 1985 Ethics Code. I take Mr. Pratte's point that Mr. Mulroney is the focus of the Inquiry. However, this Inquiry is ultimately concerned with the good government of Canada. Therefore, if I accepted an interpretation of my mandate that did not respond to the directives to me contained in the Terms of Reference, I would fail in carrying out my duty as Commissioner.

[38] Question 13 asks expressly whether there were ethical rules or guidelines that related to the business and financial transactions between Mr. Mulroney and Mr. Schreiber and, if so, whether they were followed. As noted above, I interpret Question 13's reference to ethical rules or guidelines to mean the 1985 Ethics Code and the *Guidance for Ministers*. To accept Mr. Pratte's submission would be tantamount to rendering meaningless Question 11 – whether Mr. Mulroney's business and financial dealings with Mr. Schreiber, if any, were appropriate, considering the position of Mr. Mulroney as a current or former prime minister and member of parliament.

[39] Also, if I were to accept Mr. Pratte's argument as referred to in the preceding paragraph, Question 12 – whether Mr. Mulroney acted appropriately in his disclosing and reporting of the dealings he may have had with Mr. Schreiber and of the payments that may have been made by Mr. Schreiber to Mr. Mulroney – would also be rendered redundant or meaningless. To put it another way, if I accepted Mr. Pratte's submission, Questions 11 and 12 would be effectively subsumed by Question 13.

[40] Questions 11 and 12 operate at a broader level than Question 13, with its express reference to ethical rules and guidelines. In my view, the Governor in Council did not intend that I confine my assessment respecting the appropriateness, or otherwise, of Mr. Mulroney's conduct to determining whether he had breached the 1985 Ethics Code. I think it would be accurate to conclude that conduct in breach of an applicable ethics code by a prime minister, former prime minister, or member of parliament is almost surely conduct that is capable of being described as inappropriate.

[41] However, the converse of that proposition cannot be true. Even if the conduct of a prime minister, a cabinet minister, or a member of parliament is not in breach of a code of ethics, it does not necessarily follow that the conduct is appropriate. For example, there may well be conduct that is not covered by the 1985 Ethics Code, yet which anyone would describe as inappropriate.

[42] There are two other reasons why "appropriate" in Questions 11 and 12 cannot be limited to the 1985 Ethics Code.

[43] First, by its express terms, the 1985 Ethics Code applies to public office holders, who are defined to include ministers of the Crown (section 2). The 1985 Ethics Code did not apply to members of parliament (section 2). Mr. Mulroney stepped down as prime minister on June 24, 1993, and sat as a member of parliament until the election in October 1993. 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. Indeed, an interpretation of this nature would be contrary to Question 11,

which expressly refers to Mr. Mulroney's position as a current or former prime minister *and* member of parliament.

[44] Second, section 60 of the 1985 Ethics Code sets out a limitation period for ministers of the Crown after departure from office. For a period of two years after leaving office, ministers are prohibited from undertaking the activities described in subsections 60 (a) through (c). Question 11 directs me to investigate and report on whether the business and financial dealings were appropriate considering Mr. Mulroney's position. Question 12 directs me to determine whether there was appropriate disclosure of the dealings and the payments. Nowhere in the Terms of Reference am I limited to investigating these matters to a two-year period after Mr. Mulroney stepped down as prime minister.

[45] Because of the degree of trust and confidence imposed by the people of Canada in the prime minister, cabinet ministers, and members of parliament, I believe they are entitled to expect the conduct of those holders of public office, whether in their official or personal capacity, to be exemplary.

[46] History has shown that successive prime ministers have brought in their own ethics codes. Without going into the complete record, it is sufficient to say that Prime Ministers Trudeau, Clark, Mulroney, Chrétien, Martin, and Harper all introduced codes of ethics.

[47] When he was prime minister, Mr. Mulroney wrote and spoke about what he expected of all members of parliament and senators in terms of conduct. In tabling the 1985 Ethics Code in the House of Commons on September 9, 1985, Prime Minister Mulroney, as he then was, said:

> It is a great principle of public administration – I could even say an imperative – that to function effectively the government and the public service of a democracy must have the trust and confidence of the public they serve. In order to reinforce that trust, the government must be able to provide competent management *and, above all, to be guided by the highest standards of conduct*. [Emphasis added.]

[48] On that same day, Prime Minister Mulroney wrote a letter to all members of parliament and senators in which he used virtually identical language. (See Attorney General's Book of Documents at Tab D.)

[49] In October 1988, during the tenure of Mr. Mulroney as prime minister, the Privy Council Office published a document entitled *Guidance for Ministers*. The preface of that document says that the prime minister has asked that every minister receive and be guided by the advice contained in the document.

[50] Presumably, then, what is contained in the *Guidance for Ministers* (the guide), and in particular in Part V of the guide, entitled "Standards of Conduct," can be taken to reflect the standards that Prime Minister Mulroney expected from ministers with regard to their conduct.

[51] At the outset, Part V of the *Guidance for Ministers* instructs ministers that their rigorous compliance with the full letter and spirit of these particular standards is of the utmost importance. Then, under the heading "High Expectations," we find the following statement at page 45:

> 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*. [Emphasis added.]

[52] Later, on the same page, the following advice is given to ministers:

> A practical test is to ask whether your conduct, or that of your staff, could cause any embarrassment or be difficult to justify to the public, should it be raised in Parliament or reported in the press.

[53] In my opinion, those two statements are indicative of the expectation Prime Minister Mulroney (as he then was) had respecting the standard of conduct to be maintained by him and by ministers serving in the cabinet of which he was the leader.

[54] In arriving at my conclusion about the standard by which the conduct of Mr. Mulroney is to be assessed, I have been guided by the work of other commissioners – in particular, the work of the Honourable Frank Iacobucci, Q.C., who was the commissioner of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin (Internal Inquiry).

[55] In the Internal Inquiry, Commissioner Iacobucci was directed by his Terms of Reference to determine whether the actions of Canadian officials were "deficient in the circumstances" and whether there were "deficiencies" in the actions taken by Canadian officials to provide consular services. Recognizing that the identification of the "applicable norms or standards" against which the actions were to be assessed was an "essential starting point in assessing whether the actions of Canadian officials were deficient in the circumstances," Commissioner Iacobucci called on participants and intervenors to submit written representations and oral submissions regarding those standards (Iacobucci Report at page 340).

[56] Commissioner Iacobucci noted that the standards he intended to apply were not legal standards. Nevertheless, he determined that "the basic principles that emerge from legal sources including Canadian law, the *Charter*, and various international instruments are helpful in informing my determination as to whether Canadian officials acted properly in the circumstances." He noted that many of the standards or norms governing Canadian officials were to be found in internal policies, mandate, legislation, ministerial directions, and similar instruments. He expressed the view that "the actions of Canadian officials should be characterized as deficient only if they fell short of the norms that would have been followed by a reasonable person placed in comparable circumstances" (Iacobucci Report at page 341). The standard he articulated is an objective one.

[57] Like Commissioner Iacobucci, I do not intend to apply legal standards in assessing whether the business and financial dealings Mr. Mulroney had with Mr. Schreiber, if any, were appropriate and whether there was appropriate disclosure and reporting of the alleged dealings and payments.

[58] As a judge, I apply an objective standard on a regular basis to assist me in determining issues that come before me. I see no reason why I ought not to employ an objective standard in determining the appropriateness or otherwise of what Mr. Mulroney did, or did not do, relative to his business and financial dealings with Mr. Schreiber and his disclosing and reporting of those dealings and payments.

[59] As Commissioner Iacobucci pointed out in his report, that objective standard must be one that was operative at the time the dealings and payments in question occurred, and not a new standard developed by hindsight.

[60] In assessing whether Mr. Mulroney's conduct or behaviour was appropriate, I will be guided by the standard that he himself set during his tenure as the holder of the highest elected office in Canada. It is noteworthy that at page 46 of *Guidance for Ministers*, it is stated that "the *Prime Minister will hold Ministers personally accountable* for acting in accordance with the spirit of the highest standards of conduct, as well as complying with the letter of the Government's rules" [emphasis in original]. As the person responsible for applying standards of ethics to his ministers while he was prime minister, Mr. Mulroney must be taken to understand fully what those standards were.

[61] I intend to determine, on an objective basis, whether Mr. Mulroney, in the business and financial dealings he had with Mr. Schreiber (if any) and in disclosing these dealings and payments (if any), conformed with the highest standards of conduct – conduct that, objectively, is so scrupulous that it can bear the closest possible scrutiny.

[62] A finding of inappropriateness will be made only if there is credible evidence that Mr. Mulroney acted in a manner that falls short of conduct that, objectively, is so scrupulous that it can bear the closest possible scrutiny. This is the standard that will apply to whatever business and financial dealings Mr. Mulroney may have had with Mr. Schreiber. Similarly, with respect to disclosure and reporting of the dealings and payments, I will not find that Mr. Mulroney has acted in a manner that is inappropriate unless evidence of a like nature is before me.

[63] I believe that this standard is one that reflects the importance to Canadian democracy of the office of prime minister, as well as the public trust reposed in the integrity, objectivity, and impartiality of public office holders. It is a standard familiar to Mr. Mulroney, one accepted by him in the 1985 Ethics Code and in the 1988 *Guidance for Ministers*. It is a standard that reflects the need, as noted by Mr. Mulroney in his September 9, 1985, letter, to reinforce the trust and confidence of the public in both the government and the public service. As he noted in his letter, in order to reinforce that trust and confidence, the government must be guided by the highest standards of conduct. *Guidance for Ministers* states that there is an obligation on ministers not simply to observe the law but to act in both official and personal capacities in a manner so scrupulous that it will bear the closest public scrutiny. One of the purposes of an Inquiry is to bring that public scrutiny to bear. If the Prime Minister intended to hold ministers personally accountable to that level, then it follows that he himself would be accountable on the same basis.

[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 G*uidance for Ministers*. However, I am mindful that even if the conduct of a prime minister, a cabinet minister, or a member of parliament is not in breach of a specific provision of a code of ethics, it does not necessarily follow that the conduct is appropriate. Section 5(3) of the 1985 Ethics Code is a further indication of the fact that the Code is not intended to represent a fully comprehensive scheme for governing the conduct of public office holders. Section 5(3) states: "Conforming to this Code does not absolve public office holders from conforming to any specific references to conduct contained in the statutes governing their department or office *and to the relevant provisions of legislation of more general application* such as the *Criminal Code*, the *Canadian Human Rights Act*, the *Privacy Act*, the *Financial Administration Act*, and the *Public Service Employment Act*" [emphasis added].

[65] As I have noted earlier in these reasons, I understand fully that I may not draw conclusions about civil or criminal responsibility. However, to determine whether any particular conduct meets the standard set out above, I conclude that I may be informed by deficiencies in conduct that are identified in the *Parliament of Canada Act*, the *Financial*

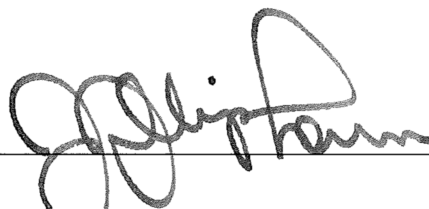
Administration Act, the *Income Tax Act*, the *Excise Tax Act*, and the *Criminal Code*, as they existed at the time of the events under investigation. I may also look to *Standing Orders of the House of Commons* Nos. 21 and 23(2). I understand Justice Cory's caution in the *Commission of Inquiry on the Blood System* against setting out any conclusions that are couched in the specific language of criminal culpability or civil liability. I will be informed by these statutes and standing orders, not for the purpose of assessing criminal or civil liability, but for the purpose of understanding what is considered to be inappropriate conduct.

[66] As Mr. Vickery stated in his submissions, "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."

[67] 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.

[68] I do not believe the Terms of Reference lead me to consider the rules applicable to members of the Barreau du Québec. While the Terms of Reference refer to Mr. Mulroney's position as a current or former prime minister and member of parliament, there is no reference to his position as a lawyer. This omission is to be expected, given that this is an Inquiry under the *Inquiries Act*, which is concerned with good government and public office.

Signed at Ottawa, Ontario, this 25th day of February, 2009.



Jeffrey James Oliphant

Commissioner