

Auger Hollingsworth

Richard Auger

richard@ottawalawfirm.ca

Via email to inquiry.admin@oliphantcommission.ca

Via email to Nancy.Brooks@oliphantcommission.ca

December 5, 2008

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**

Further to your Notice of Hearing on Standards of Conduct dated November 12, 2008, the following is an outline of the oral submissions to be made on behalf of Mr. Schreiber on January 7-8, 2009:

1. It is submitted that the investigation of the issues set out in paragraph (a), questions 11, 12 and 13 should be informed by a number of considerations including lobbying rules and practices at the time, the *Income Tax Act*, the *Parliament of Canada Act*, the *Conflict of Interest Code* and the practice, conventions and Rules of the Quebec Bar. The meaning of "appropriate" standards of conduct should include a determination of whether or not there was compliance with these conventions, guidelines, legislation and laws.
2. For example, section 12(1)(a) of the *Income Tax Act* requires that an amount received by a taxpayer in the course of business that is on account of services not yet rendered must be included and reported in the taxpayer's income in the year it is received. Income tax not reported and not paid until more than five years after the monies were received is not in compliance with section 12(1)(a).

As well, the *Income Tax Act* provides that a taxpayer may claim expenses in the year they are incurred even where the income related to those expenses will be earned in a future year. Accordingly, this Commission will want to investigate issues relating to Mr. Mulroney's decision not to deduct from income the expenses he incurred.

3. The Voluntary Disclosure Program policies, rules and guidelines imposed by Revenue Canada between 1993 and 1998 (now "Canada Revenue Agency") will inform the Commissioner on issues of "appropriateness" and "standards of conduct". For example, Mr. Mulroney had to seek a waiver of penalties, interest and criminal prosecution under the Voluntary Disclosure Program. Revenue Canada's Voluntary Disclosure Program requires that all applicants declare that such a request is "voluntary" and not prompted by knowledge of any related investigation. Mr. Mulroney has stated that he declared the income when he did because Mr. Schreiber was arrested in relation to allegations of income tax evasion. In addition, at the time of the filing of the Voluntary Disclosure with Revenue Canada, Mr. Mulroney was aware of the allegations contained in the Letter of Request. The Voluntary Disclosure Program also requires a "complete" reporting of all unreported income, including all reasons explaining why the income was not previously reported. Such matters are relevant to the core of this Commission's entire mandate.
4. The evolution of Federal level ethics codes and conflict of interest rules has been complex. The formal process began in 1973 when "The Green Paper entitled "Members of Parliament and Conflict of Interest" was tabled in the House of Commons (published by Privy Council, sessional paper 301-4/61, dated July 1973). Although the Green Paper itself never became law, it may provide this Commission with a useful background for analyzing the spirit and intention of standards of conduct to follow.
5. Certain provisions of the *Parliament of Canada Act* may assist this Commission. For example, in 1993, subsection 41(1) of the *Parliament of Canada Act* prohibited any member of the House of Commons from receiving or agreeing to receive compensation for services rendered or to be rendered to anyone, "in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons or a committee of either House" or "for the purpose of influencing or attempting to influence any member of either House".

6. In 1985, Mr. Mulroney issued *The Conflict of Interest and Post-Employment Code for Public Office Holders* (“1985 Ethics Code”) (see *Debates*, September 9, 1985, pp. 6399-402).

The 1985 Code applied to Mr. Mulroney during his term as prime minister and remained in force until June 1994 when it was changed by Prime Minister Jean Chretien. Examples of some provisions of the *1985 Ethics Code* which may assist this Commission in determining applicable “ethical rules and guidelines” include:

-public office holders have an obligation to act in a manner that will bear the closest of public scrutiny, an obligation that is not fully discharged by simply acting within the law;

-public office holders shall not step out of their official roles to assist private entities or persons in their dealings with the Government where this would result in preferential treatment to any person;

-public office holders shall not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and responsibilities and that is not generally available to the public;

-public office holders shall not act, after they leave public office, in such a manner as to take improper advantage of their previous office.

7. In 1987, Mr. Justice W.D. Parker reported his findings as the Commissioner of the Inquiry into conflict of interest allegations against Sinclair Stevens. Justice Parker’s Report appears to be the only Commission of Inquiry which dealt with the interpretation of the federal *Conflict of Interest and Post-Employment Code for Public Office Holders*. It is acknowledged that in 2004 the Federal Court of Canada set aside Justice Parker’s Report on the grounds of procedural fairness because Mr. Stevens was not given an opportunity to respond to the definitions and conclusions before the Report was released. However, it is worth noting that Justice Parker’s findings and recommendations were in place during the relevant time period now being examined by Commissioner Oliphant in this Commission of Inquiry. Accordingly, it is worthy of consideration as to whether some of Justice Parker’s views would assist in, at least, informing “appropriate standards of conduct” during the 1990’s.

8. Mr. Mulroney has stated that he travelled internationally on behalf of Mr. Schreiber/Bear Head to solicit the sale of armoured vehicles. The Commission will want to investigate these circumstances in the context of export control laws and Government of Canada policy on international peace and security which, at the time, prohibited the sale of military equipment without specific authorization. The Commission will also want to consider Government guidelines such as *Guide to Canada's Export Controls*, January 1993 and April 1994, both published by Canada, Department of External Affairs and International Trade. As well, the then Department of Foreign Affairs and International Trade published other guidelines and reports dealing with norms and practices specifically in relation to the export of military goods from Canada.
9. *Standing Order 22* was adopted on February 3, 1986 (see *Debates*, November 4, 1985, pp. 8323-7; *Journals*, February 6, 1986, p. 1664; February 13, 1986, p. 1710.). This Standing Order required that foreign travel by Members of Parliament not paid for out of the Consolidated Revenue Fund had to be registered with the Clerk of the House. The trip itself and the sponsoring party had to be registered. Mr. Mulroney was a Member of Parliament until September 8, 1993. The application of this Standing Order will depend on the factual conclusions about whether or not any foreign travel occurred and, if so, when it occurred.
10. Mr. Mulroney was a member of the Barreau du Quebec during the period of time being investigated by this Commission. Accordingly, certain requirements and legislation governing members of the bar in Quebec may be relevant. A complete code of conduct is prescribed by *An Act Respecting the Barreau du Quebec*, R.S.Q., chapter B-1, *Professional Code*, R.S.Q., chapter C-26 and *the Code of Ethics of Advocates*, c.B-1, r.1. It is important to note that under Division I: 1.00.01, the Code of Ethics of Advocates, pursuant to section 87 of the Professional Code, applies "regardless of the context or manner in which he engages in his professional activities or the nature of his contractual relationship with the client."
11. Mr. Mulroney was a partner at Ogilvy Renault during some of the time period being investigated by this Commission. Accordingly, the complete partnership agreement and partnership rules and regulations may inform the "appropriateness" of issues relating to disclosure and reporting of the dealings and payments.
12. As a general comment, it is submitted that in determining whether the conduct at issue was "appropriate", it is submitted that a number of different sources define "appropriateness". For example, in *Canada (AG) v. Canada (Commission of Inquiry on the Blood System)* (1997), 151 D.L.R. (4th) 1 at para. 19 the Federal Court of Appeal concluded that the

“standard may be moral, legal, scientific, social or political” and that “a conclusion that someone breached his duty does not necessarily mean that the individual in question broke the law. It simply means that the individual failed to meet a standard proposed by the Commissioner.”

To date, no evidence has been heard and no documentary has been delivered by the Commission. Accordingly, Mr. Schreiber reserves his right to supplement his submissions in relation to standards of conduct depending on the evidence heard and the documents produced.

Yours very truly,



Richard Auger

cc. Robert Houston, Q.C.
Guy Pratte
Paul Vickery