

Commission of Inquiry into Certain
Allegations Respecting Business and
Financial Dealings
Between Karlheinz Schreiber and
the Right Honourable Brian Mulroney



Commission d'enquête concernant les
allégations au sujet des transactions
financières et commerciales entre Karlheinz
Schreiber et
le très honorable Brian Mulroney

Commissioner

The Honourable Justice /
L'honorable juge
Jeffrey James Oliphant

Commissaire

Held at :

Bytown Pavillon
Victoria Hall
111 Sussex Drive
Ottawa, Ontario

Tenue à:

Pavillon Bytown
Sale Victoria
111, promenade Sussex
Ottawa (Ontario)

Tuesday, March 24, 2009

Mardi, le 24 mars 2009

Appearances/Comparutions

Mr. Richard Wolson	Lead Commission Counsel
Mr. Even Roitenberg	Co-Counsel
Ms. Nancy Brooks	
M ^e Guy J. Pratte	The Right Honourable Brian
Mr. Harvey Yarosky	Mulroney
Mr. François Grondin	
Mr. Jack Hughes	
Mr. Richard Auger	Mr. Karlheinz Schreiber
Mr. Paul B. Vickery	Attorney General of Canada
Mr. Yannick Landry	
Mr. Philippe Lacasse	

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DESCRIPTION

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Tuesday, March 24, 2009

3 at 9:29 a.m. / L'audience débute

4 mardi, le 24 mars 2009 à 9h29

5 THE COMMISSIONER: Mr. Wolson,
6 good morning.

7 --- OPENING STATEMENT BY/DÉCLARATION D'OUVERTURE
8 PAR MR. WOLSON:

9 MR. WOLSON, Q.C.: This morning
10 we're here to hear from Mr. Pratte who has an
11 application for clarification of the ruling that
12 you made on standards some weeks back, and he's
13 going to make a submission this morning. He will
14 lead off, followed by Mr. Vickery for the Attorney
15 General, and Mr. Auger then will make his
16 submission, in that order.

17 Commission counsel have no
18 submission to make. We didn't put a position
19 forward on the application the first time around
20 and we have no submission to make. I don't
21 believe that Mr. Houston is here this morning and
22 understandably so. He has indicated that he could
23 not be here.

24 And that said then, I'll call on
25 Mr. Pratte to make his application for

1 clarification.

2 THE COMMISSIONER: Certainly.

3 Mr. Pratte, good morning.

4 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. PRATTE:

5 MR. PRATTE: Before I start, Mr.

6 Commissioner, I have prepared a compendium of documents

7 that I might be referring you to and I don't know if

8 the Registrar's provided you a copy. He is about to do

9 that now. The parties have also been provided with it

10 ---

11 THE COMMISSIONER: Thank you.

12 MR. PRATTE: --- or are being
13 provided with it as we speak.

14 It contains very quickly, Mr.

15 Commissioner, a copy of your Ruling at Tab 1.

16 Tab 2 is the actual Request for
17 Clarification that we are here to deal with this
18 morning.

19 Your Terms of Reference, Tab 4.

20 The Post-Employment Code and then
21 at Tab 6, the Guidance for Ministers.

22 THE COMMISSIONER: Thank you.

23 MR. PRATTE: Mr. Commissioner, by
24 way of introduction, I have a few comments to
25 perhaps set the context for this application for

1 clarification and direction of your ruling issued
2 on February the 25th, 2009 concerning the
3 applicable standards and the scope of your mandate
4 as outlined in your Terms of Reference.

5 Now because, as you reminded us
6 last Friday, this is first and foremost a public
7 inquiry, it's important for me to state
8 unequivocally at the outset what this application
9 does not represent.

10 It is not an attempt to derail or
11 delay this Inquiry. On the contrary, it is
12 brought to facilitate and expedite the carrying
13 out of your Inquiry in our submission.

14 Mr. Mulroney, who served this
15 country with dedication for almost 10 years as
16 Prime Minister, has been the subject of attack and
17 innuendo for years; his interest is to get on with
18 this Inquiry and having it completed so that he
19 can get on with his life as well with his family.

20 Now, as much as he wants this, we
21 have the responsibility to do our part to ensure
22 that the Inquiry takes place within the bounds of
23 the law, your Terms of Reference and
24 jurisprudence, as we understand them.

25 We've been, as I referred to last

1 Friday, diligent in trying to bring this issue of
2 applicable standards in the terms of your mandate
3 which led ultimately to your ruling.

4 As you said in your ruling on the
5 25th of February, as well as at the oral argument
6 in January, it's important, in fact, crucial for
7 the parties no more so than for Mr. Mulroney that
8 the rules of the game be known before it starts so
9 that we can prepare adequately.

10 And, of course, where we use the
11 word "game" in just as a manner of speaking, it's
12 an important game as you know, Mr. Commissioner,
13 and that much more important that we know
14 precisely what we're getting into.

15 So, after very careful, urgent and
16 genuine consideration of your ruling, we felt --
17 and I say genuinely felt -- that it raised some
18 questions as to precisely the scope of this
19 Inquiry.

20 Now, we could have rushed out to
21 court as the Attorney General of Canada basically
22 tells you was our only option, but that option
23 would have likely been much more disruptive than
24 the one that we pursued and, in fact, was not
25 required because what we're seeking is a

1 clarification.

2 And I submit that the best way to
3 proceed was to ensure that we understood correctly
4 the import of your ruling. This is a Commission
5 of Inquiry. It is not a civil or criminal trial,
6 and there is more flexibility in its procedure.
7 It's set out in your very Terms of Reference.

8 And if you would, with me, turn to
9 Tab 4 where your Terms of Reference are contained,
10 and to sub-paragraph -- pages aren't numbered I
11 think but it's ---

12 THE COMMISSIONER: That's okay.

13 MR. PRATTE: --- the third page in
14 and second paragraph from the top which is the
15 second -- sorry, which is sub-paragraph (c), says
16 and I quote:

17 "You are authorized to adopt
18 any procedures and methods
19 that you consider expedient
20 for the proper and efficient
21 conduct of the Inquiry."

22 Now I say, Mr. Commissioner, that
23 seeking clarification -- we may be wrong in what
24 we're seeking to have clarified -- but seeking it,
25 in and of itself, is an appropriate and

1 efficacious manner because it's in your Terms of
2 Reference and because it is in complete conformity
3 with the general principles of administrative law.

4 Now, I'll deal very briefly with
5 Mr. Vickery's submissions at the end but I say to
6 you, without fear of contradiction, that there is
7 no valid legal objection whatsoever to a motion
8 for clarification anywhere but a *fortiori* in an
9 administrative law context.

10 In any event, we thought that it
11 was also fair to you to come back to you to the
12 extent that we had some questions arising.

13 I also want to be clear that this
14 application does not represent an attempt to
15 unduly limit the scope of your Inquiry. And I say
16 this in particular with regard to the matters I'll
17 discuss briefly relating to the possible
18 applications of certain statutes and the role they
19 might play in informing your decision.

20 Like any citizen, Mr. Mulroney is
21 of course subject to the general laws that apply
22 to Canadians. And if his conduct had been found
23 wanting in this regard in respect of any law, it
24 would have been subject to the appropriate
25 procedures and enforcement and to the public

1 process that attends those procedures.

2 And, indeed, his conduct has been
3 assessed in this regard many times in the past,
4 and as Professor Johnston himself noted in his
5 reports in 2008, even in light of Mr. Schreiber's
6 most recent accusations or those at least
7 contained in the November 7th affidavit, he found
8 no reason to reopen in particular the issues
9 relating to any alleged possible breach of
10 statutes including the *Criminal Code*.

11 Of course, we know he's never been
12 charged with any violation of any law. So the
13 request for clarification has nothing to do with
14 Mr. Mulroney's trying to avoid public scrutiny
15 from the public in respect of his compliance with
16 the laws of this country.

17 The issue is what ethical
18 standards apply, and at what time, and in respect
19 of what function he occupied.

20 Now, let me turn to what this
21 application is about. And, fundamentally, Mr.
22 Commissioner, and with the greatest of respect,
23 now we're fond as lawyers to use that expression
24 "de la galvauder" ---

25 THE COMMISSIONER: I know what it

1 means, Mr. Pratte.

2 MR. PRATTE: --- but I want to
3 tell you that I mean it. And there are two issues
4 that we should like your directions on.

5 The first one is the period of
6 time to which the standard that you've identified
7 specifically in paragraph 61 of your ruling as:

8 "Conduct that, objectively,
9 is so scrupulous that it can
10 bear the closest public
11 scrutiny."

12 To what period of time does that
13 standard apply? And I'll develop that in a
14 moment.

15 And the second main question is,
16 what is the content of that standard having regard in
17 particular to the import of the term "deficiencies in
18 conduct" identified in various statutes, which is
19 language that is found or closely paraphrased in
20 paragraph 65.

21 So those are the two issues that
22 we are here for and I say, of course, Mr.
23 Commissioner, that it's inevitable as I try to set
24 out the reasons for the questions that arise in
25 our minds that I make some reference to some of

1 the concepts we discussed in January in our
2 written submissions. That's just inevitable.

3 But I am going to focus on those
4 parts of your ruling which, with those concepts in
5 mind and what you said in your ruling, raises the
6 questions.

7 So let me turn to the first aspect
8 of the ruling, and what I submit to you is that we
9 need some clarification regarding the extent to
10 which you intend to inquire into Mr. Mulroney's
11 conduct after he left office and re-entered
12 private life and the standard you intend to use
13 for this purpose.

14 Now, there is a fundamental
15 distinction as a matter of principle -- let's
16 start with that -- between the scrutiny in respect
17 of the both private and public conduct of an
18 officeholder when that person or while that person
19 holds office and any standard that might apply
20 thereafter. And I submit that your ruling could
21 be read as suggesting that it is intended to be
22 applied -- or that you intend to apply the same
23 standard identified in paragraph 61 to both Mr.
24 Mulroney's conduct while he was Prime Minister and
25 after.

1 And just to give one instance of
2 why that question arises in our mind, you referred
3 at paragraph 44 of your ruling to the fact that
4 you found nothing in the Terms of Reference that
5 limited you to investigating the matters under
6 your purview -- or within your purview to the two-
7 year limitation period after he stepped down as
8 Prime Minister. We know that that period relates
9 to Section 60, I believe of the Code of Ethics.

10 I'll come back to that because I
11 may have been partly responsible for confusion if
12 there should be any confusion.

13 THE COMMISSIONER: Okay, that's
14 fine. I just noticed though a note that the Code
15 also talked about conduct at any time after.

16 MR. PRATTE: And I'm going to
17 focus on that directly, and that is perhaps where
18 my submissions were not as clear as they could
19 have been because I'm going to go to that
20 directly, Mr. Commissioner, to try to set up the
21 issue in our minds; and of course paragraph 621,
22 as I've already noted, is where you set out the
23 test.

24 Just before I get to the issue,
25 Mr. Commissioner, where I say, as I've indicated

1 in the Motion for Clarification in paragraph 42,
2 that you can look at events after he's left
3 office. I'm going to deal with that including
4 Section 57 in a moment.

5 THE COMMISSIONER: Part of the
6 problem here, Mr. Pratte -- I don't want to
7 interrupt you -- but part of the problem that I
8 have is this.

9 Everybody seated at the counsel
10 table knows a lot more about this than I do. I
11 don't know where the evidence is going to take me,
12 so it's difficult to say over what period of time.
13 And to that extent, and I don't mean to suggest
14 anything and I say this with all due respect to
15 your submission, and I do respect it and I respect
16 your right to make it, the Application for
17 Clarification may be premature. Maybe the issue
18 could be handled more efficaciously at another
19 time during the course of the Inquiry; maybe.

20 MR. PRATTE: I am going to touch
21 on both those points, Mr. Commissioner.

22 THE COMMISSIONER: Okay.

23 MR. PRATTE: And if you'll just
24 bear with me for a few minutes, I believe that you
25 will see my submissions as not constraining you to

1 draw a precise line in time. In other words,
2 allowing the evidence in light of the terms of
3 your mandate to give you greater precision, but
4 there is -- I'm not asking you to say "Today, as
5 of X-date, I can't look at those facts". And I'll
6 explain why that is in a moment, if you'll just --
7 -

8 THE COMMISSIONER: Well, you did
9 say would I be applying the standards after Mr.
10 Mulroney was no longer Prime Minister. That seems
11 to me to be a specific date.

12 MR. PRATTE: No.

13 THE COMMISSIONER: Okay.

14 MR. PRATTE: For this reason;
15 because I do concede -- let me deal with this
16 directly.

17 After Mr. Mulroney stopped to hold
18 the high office, and we are talking about the propriety
19 of the constraints of high officeholders, that is what
20 your mandate says in its Preamble; that's what really
21 is the main concern. There is, as you point out, a
22 standard that remains until the day he dies. That is
23 the principle enshrined in paragraph 7(i), the last
24 bullet of the Principles. Let's look at it.

25 THE COMMISSIONER: And I think it

1 appears again at 59.

2 MR. PRATTE: Well, let's look at
3 them, Mr. Commissioner, so I get the sections
4 correctly.

5 The Code is found at Tab 5.

6 THE COMMISSIONER: I have it in front
7 of me, 7(i). It's at page 3.

8 MR. PRATTE: That's right. And then
9 I want to make a distinction I was about to make, but
10 I'll come back to it in a second.

11 The subparagraphs 7(a) to (h)
12 plainly, in my respectful submission, concern the
13 duties of the officeholder whilst that person holds
14 that office, either as a minister or as a prime
15 minister.

16 Paragraph (i) says:

17 "Public officeholders shall not
18 act after they leave office in
19 such a manner as to take
20 improper advantage of the
21 previous office."

22 Which is language virtually identical
23 as is enshrined in Section 57, which describes the
24 object relative to the Post-Employment Code:

25 "Public officeholders shall not

1 act after they leave office in
2 such a manner as to take
3 improper advantage of the
4 previous office."

5 That's the principle that abides
6 after a person leaves office, and then you have the
7 more specific compliance measures including the
8 limitation periods that I've alluded to at Section 60.
9 So they're prohibitive ---

10 THE COMMISSIONER: Not for 59 (off
11 mic).

12 MR. PRATTE: Fifty-nine (59) is the
13 prohibition against doing certain things.

14 THE COMMISSIONER: At any time (off
15 mic) -- refers to former public officeholder.

16 MR. PRATTE: Right. And then there's
17 a limitation period.

18 THE COMMISSIONER: But not for 59.

19 MR. PRATTE: Well, I'm fine with
20 that.

21 THE COMMISSIONER: Yes.

22 MR. PRATTE: So the principle we are
23 talking about that is enshrined in 57.7(i) does not
24 impose a time limit.

25 So what I'm saying is this, Mr.

1 Commissioner. There is a standard -- the standard that
2 you have taken from the Guidance from Ministers, which
3 is also found in Section 7(b), that is "will bear the
4 closest public scrutiny", that standard, that 7(b):

5 "Public officeholders have an
6 obligation to act in a manner
7 that will bear the closest
8 public scrutiny."

9 Is language that is effectively identical to that which
10 we find in the Guidance for Ministers. I concede that
11 that test applies to Mr. Mulroney while he was Prime
12 Minister.

13 THE COMMISSIONER: I hope so. He's
14 the author of the test.

15 MR. PRATTE: Precisely. When he
16 leaves that office, he is not then free from an ethical
17 standard. My point is that the standard that applies
18 then is a different standard. It is that which is
19 enshrined in the principles at 7(i) and we find at 57
20 and 59, that I've referred you to.

21 And it makes total sense because the
22 standard that you have drawn and you rely on in the
23 Guidance from Ministers, if you look at the Guidance
24 from Ministers, it is plain that the intention there is
25 to have that standard apply whilst the people are

1 holding the office. It's guidance for ministers as
2 they perform their functions qua ministers.

3 When they step down in their office,
4 then they're not free but they cannot be bound by the
5 same high level of scrutiny which befell them
6 because they held office.

7 So the issue in our minds, what
8 with -- not clear in our minds -- was whether the
9 standard that you articulated in paragraph 61 was
10 the same standard that would apply after he left
11 office.

12 I did not mean to suggest that he
13 was free of any ethical standard because as you
14 point out, the principles in 7(i) and 57 and 59
15 clearly bind a former public officeholder and is
16 more -- it's actually a very stringent standard --
17 and it's something that binds him for the rest of
18 his life. And so when he returns to private life,
19 it's not as if there's nothing applying. There is
20 that and basically it says you should never take
21 advantage of your former public office. That is
22 the standard.

23 And, of course, he remains bound
24 by the general laws of this country that also
25 operate like for everybody as a constraint.

1 THE COMMISSIONER: Just by -- if
2 you're not to take advantage of your former
3 office, what does that say about a former
4 politician lobbying for an organization?

5 MR. PRATTE: Well, that is
6 constrained in the Code and is permitted, Mr.
7 Commissioner, within certain bounds pursuant to
8 the limitation period at Section 60, but it
9 doesn't -- the laws permit it if you register
10 properly and so on and there's the limitation
11 period at Section 60, but we'll see where the
12 facts take us, Mr. Commissioner.

13 THE COMMISSIONER: And that's my
14 point.

15 MR. PRATTE: But my point is also
16 you have a standard but, with the greatest of
17 respect, the Code -- and when you say Mr. Mulroney
18 knew the standard and you insist on that in your
19 ruling at several places ---

20 THE COMMISSIONER: Do you deny it?

21 MR. PRATTE: I do not.

22 THE COMMISSIONER: Okay.

23 MR. PRATTE: But the standard that
24 you're talking about is the standard that applies
25 in the Guidance for Ministers while he's a Prime

1 Minister. We'll see what happened, if anything,
2 while he was a Prime Minister ---

3 THE COMMISSIONER: And within the
4 two-year period.

5 MR. PRATTE: Well -- but as you
6 point -- but thereafter, he is bound by the post-
7 employment principles and compliance measures.

8 But that is not the same test, if
9 I can put it ---

10 THE COMMISSIONER: No, no. You've
11 made your point.

12 MR. PRATTE: Okay.

13 Now, I want to be clear though
14 before I set out what I say are the two questions
15 because that's -- we're seeking clarification.

16 I want to be very clear, sir, that
17 in terms of time limits, I've already dealt with
18 the fact that Section 57 doesn't impose a time
19 limit for the test that's set out therein but the
20 other reason there isn't a time limit, either on
21 terms of the relevance of the facts, is that it
22 may be that even in respect of the time he was in
23 office and bound by the standard you've enunciated
24 would bind a person whilst in office, the public
25 scrutiny test, maybe there are facts later on that

1 could tell you something about what happened when
2 he was Prime Minister. It could be circumstantial
3 evidence of what might have happened.

4 It's not because they arise three
5 years later that they may not be relevant to -- so
6 this is the second sense in which I certainly
7 accept that there might be subsequent facts that
8 have a bearing on whether or not he discharged the
9 highest public duty while he was a Prime Minister.

10 THE COMMISSIONER: Right. And
11 that's why I said this could be a little premature
12 and we may have to deal with it later.

13 MR. PRATTE: Precisely. But I
14 want you to be clear that I accept that as a
15 principle. Where we may have a discussion, if I
16 could call it that, is whether in the application
17 of whether or not those subsequent facts really
18 are relevant to the discharge of the duties, are
19 they or are they not, and in that case, I expect
20 that I may have submissions depending on what the
21 evidence is.

22 But the principle is I accept that
23 subsequent facts could be circumstantial evidence
24 of what might have happened at the time he was
25 Prime Minister.

1 Now, we may have a disagreement on
2 a case-by-case basis as to whether or not that
3 evidence is relevant or not but ---

4 THE COMMISSIONER: You and I don't
5 have any disagreements at all, Mr. Pratte.

6 MR. PRATTE: I didn't mean you, I
7 was looking at Mr. Wolson who's smiling at me.

8 THE COMMISSIONER: And he's
9 smiling back so I don't think he disagrees either.

10 MR. PRATTE: Well, note that down.
11 Note that down.

12 MR. WOLSON, Q.C.: Don't look
13 anywhere else.

14 MR. PRATTE: All right.

15 So I think I've made my point, Mr.
16 Commissioner, then and so the clarification that
17 we're seeking I've tried to sum up in a couple of
18 questions in light of our discussion.

19 The first is to what extent do you
20 intend to examine Mr. Mulroney's conduct after he
21 left office and, in particular -- that's the
22 second question; that may be the one that is the
23 most pertinent -- what standard would you use to
24 assess his conduct after he left office? This is
25 the discussion as to whether, yes, there's a

1 standard throughout but does it differ before and
2 after?

3 With that, Mr. Commissioner, I'd
4 move to my second point or request. This is the
5 issue now of the extent to which deficiency
6 identified in the statute may be relevant to
7 defining or delineating the standard.

8 Now, before I get to that
9 specifically, Mr. Commissioner, I've told you
10 before -- and we had actually a bit of an exchange
11 last week about it as well -- I told you before
12 that this is a unique public inquiry because it
13 concerns the conduct of a single person, but let
14 me be clear.

15 I don't mean by that that there's
16 no public interest as a result. Clearly, the
17 applicability and conformity with ethical
18 standards to high public officeholders is an issue
19 of public interest.

20 What I mean by stressing that fact
21 is that the issue of compliance with ethical
22 guidelines and how such compliance is assessed and
23 expressed becomes most acute.

24 So, yes, there's an issue of
25 public interest, conformity with the ethical

1 guidelines, but then how you assess it and how you
2 express whether or not there's been compliance is
3 a very sensitive area.

4 THE COMMISSIONER: And I sure
5 don't want to wander in the guidelines of the
6 *Criminal Code* to express anything.

7 MR. PRATTE: Well -- so let me
8 deal with this if I might, and let me say just
9 before I get there that this concern of, when
10 you're dealing with a single individual, not
11 expressing anything that might connote or be
12 tantamount in the public mind to some finding of
13 criminal civil liability, in my respectful
14 submission, is not -- when you have a single
15 individual whose conduct is at issue is not
16 alleviated or eliminated by the mere fact that the
17 report -- because of the terms of your mandate --
18 cannot find criminal civil liability. By that I
19 mean you can't just say, "Well I can't find civil
20 or criminal liability" but then use other language
21 which could only lead to that conclusion.

22 THE COMMISSIONER: That's perhaps
23 one of the reasons that one should look at the
24 *Criminal Code* to ensure that language used in a
25 report comes nowhere close to the language used in

1 the *Criminal Code* and, you know, I've said this to
2 you before. I am so sensitive about the
3 difference between an inquiry and a trial and the
4 need not to say anything that would implicitly or
5 explicitly indicate criminal activity even if
6 there were. It can't be commented upon in those
7 terms and I'm sensitive to that and will take
8 great care to avoid doing it, I assure you of
9 that.

10 MR. PRATTE: Let me just -- I'm
11 obviously grateful for that -- I don't dare call
12 it a clarification because you'd say you've been
13 telling me this several times -- but let me just
14 explain, very briefly, why the concerns -- the
15 concern arose in my mind.

16 And we might as well go to the heart
17 of it which is paragraphs 64 and 65 of your
18 Commissioner, to explain the best I can why this
19 ruling. And you say that, again, and you've been very
20 consistent in that:

21 "I understand fully that I may
22 not draw conclusions about
23 civil or criminal
24 responsibility. However, to
25 determine whether any

1 particular conduct meets the
2 standard set out above
3 [paragraph 61], I conclude
4 that I may be informed by
5 deficiencies in conduct that
6 are identified in the
7 *Parliament of Canada Act*, the
8 *Financial Administration Act*,
9 the *Income Tax Act*, the
10 *Excise Tax Act*, and the
11 *Criminal Code* as they existed
12 during the time of the events
13 under investigation. I may
14 also look to *Standing Orders*
15 *of the House of Commons*, Nos.
16 21 and 23(2)."

17 Now, the question in my mind --
18 and if you just give me a couple of minutes, Mr.
19 Commissioner, to explain the best I can why this
20 language gave us pause, it was because it appeared
21 -- one could read it as suggesting that the
22 contours of the ethical standards will be
23 delineated by reference to those statutes.

24 And, for example, just take 23.2
25 of the House of Commons Standing Orders and I pass

1 over the fact that the -- as you know, these are
2 only enforceable by the House of Commons, not by
3 any other -- not by any court.

4 But, for example, Section 23.2
5 refers -- actually it doesn't refer MPs or
6 officers, it refers to third parties trying to
7 bribe people. So a reference to that, and I don't
8 know how you might envisage it might be made, in
9 my respectful submission, would almost inevitably
10 connote if it is used to then say well that allows
11 me to derive this particular ethical standard.
12 There is an equation.

13 I'll come to perhaps what you
14 actually -- the other way you could use it which
15 would, in my respectful submission, would not go
16 there.

17 Similarly, the issue of income
18 tax, you don't identify any particular section
19 there but that's ---

20 THE COMMISSIONER: That's because
21 I don't know where the evidence is going to go.

22 MR. PRATTE: But with the greatest
23 of respect, Mr. Commissioner, if the evidence were
24 allowed to go to whether or not Mr. Mulroney
25 complied with the *Income Tax Act*, in my respectful

1 submission, that is not for you ---

2 THE COMMISSIONER: It's not mine.

3 MR. PRATTE: --- that is not for
4 you to gauge. And maybe I misunderstood that.

5 THE COMMISSIONER: Let me help you
6 out.

7 I understand, although I don't
8 know the details of it, that there is something to
9 do with income tax and disclosure and voluntary
10 disclosure, et cetera. I'm not an expert in
11 anything but for sure I'm not an expert in income
12 tax. If there is an issue and there is evidence
13 that is led that is admissible, I may well have to
14 be informed by a section or two of the *Income Tax*
15 *Act* as to how voluntary disclosure works so that I
16 have an understanding.

17 It's not to set a standard and
18 say, well, he didn't file tax so it must be a
19 failure to file and an offence. I have no
20 intention of doing that or going anywhere close.

21 MR. PRATTE: Well, Mr.
22 Commissioner, as I say, I'm the first one if I'm
23 wrong in the questions that arose in my mind,
24 fine. I'm not trying to persuade you to do what I
25 say it shouldn't be done, but when I read ---

1 THE COMMISSIONER: And you don't
2 have to because I won't do what shouldn't be done.

3 MR. PRATTE: But let's just take
4 the example that you gave me. I conclude I may
5 need -- you said, "I conclude I may be informed by
6 the deficiencies in conduct, included in various
7 statutes".

8 So let's take the example, the
9 *Income Tax Act*. It may be that there's some facts
10 around, for example the voluntary disclosure, that
11 would speak to the circumstantial evidence of the
12 propriety of any alleged transaction that occurred
13 while he was Prime Minister.

14 THE COMMISSIONER: I don't know.

15 MR. PRATTE: That's one of the
16 reasons I told you it might be relevant as
17 circumstantial evidence so that you're not
18 confined because the voluntary disclosure is made
19 in 2000 and say, "I can't look at it". No, no.
20 If it speaks to something that was relevant back
21 then ---

22 THE COMMISSIONER: It would be
23 called a continuing transaction, to use different
24 language.

25 MR. PRATTE: But where I say --

1 and this is where I'm seeking the clarification in
2 particular -- the issue of whether or not Mr.
3 Mulroney complied with the *Income Tax Act*, its
4 general principles or any specific provisions, and
5 whether if he didn't that might conclude -- that
6 might amount to an ethical failure, in my
7 respectful submission, is a conclusion you cannot
8 draw for the simple reason that in order to draw
9 such a conclusion, you'd have to say -- you would
10 have to say that he may not have complied with the
11 *Income Tax Act*, therefore there may be an ethical
12 failure.

13 That is the equation that, in my
14 respectful submission, you could not make. Now,
15 if you don't intend to go there but at least ---

16 THE COMMISSIONER: I can alleviate
17 your concern right now. That's not going to
18 happen.

19 MR. PRATTE: All right.

20 I guess, Mr. Commissioner, then,
21 my limited understanding -- because I read it in
22 English -- of paragraph 65, I just misunderstood
23 what you were trying to say because I was willing
24 to certainly concede that these other statutes
25 that you refer to may be relevant information in

1 the sense that they're out there as legal
2 constraints, some of them that apply to public
3 officeholders; for example, those I referred to in
4 the Guidance to Ministers. *Financial*
5 *Administration Act* obviously binds people while
6 they're running the government.

7 So it may be that you need and
8 want to have an idea of the passage, the
9 background of these laws because there are these
10 legal constraints, not because you want to
11 duplicate that process or insinuate yourself into
12 that process. Each and every one of those
13 statutes has enforcement mechanisms, public
14 enforcement mechanisms, and you can say rest
15 assured that those areas are covered by those
16 statutes.

17 The ethical guidelines, and I
18 guess that's my fundamental and last proposition,
19 conceptually they are not there to duplicate,
20 mimic the -- a guide to what the ethical conduct
21 is. The law controls Mr. Mulroney as a public
22 officeholder, or did, and then general laws
23 control his behaviour as a private citizen.

24 The ethical guidelines are
25 something in addition thereto and so my concern

1 was that I wasn't sure from this language that you
2 weren't suggesting that in fact the law could
3 influence or delineate the ethical duties.

4 In my respectful submission, those
5 are two distinct realms.

6 So the question then ---

7 THE COMMISSIONER: It's
8 interesting, you know, having heard you say what
9 you did that in the 1998 Guidance for Ministers,
10 again a document of which Mr. Mulroney claims
11 indirectly authorship, there is reference to the
12 fact that Ministers complying with that guide does
13 not mean that they do not have other obligations.

14 MR. PRATTE: Precisely. But nor
15 does it mean, with the greatest of respect, Mr.
16 Commissioner, that he will then say, "I will in
17 fact decide whether you've respected the law or
18 not". All that it's saying is, don't raise as a
19 defence that because you've complied with the Code
20 of Ethics, you can't have breached -- you might
21 not have breached the *Income Tax Act* or these
22 other statutes, there's absolutely nothing, in my
23 respectful submission, that indicates that the
24 Prime Minister as he then was, was trying to say,
25 "I'm going to be the arbiter of your conformity

1 with those legal norms". He's not entitled to do
2 that. He can't replace the police and do the
3 investigations of the *Criminal Code*. He can't
4 replace the Income Tax authorities and decide
5 whether or not somebody complies with them. Those
6 are -- all he's saying is, "Don't interpret
7 compliance with my guidelines", which is a
8 different set of standards -- as an excuse for
9 violating these other laws. You've got to do
10 both.

11 THE COMMISSIONER: What he's
12 saying is even if you comply with the Guide for
13 Ministers, it doesn't absolve you from complying
14 with the law. That's what it says.

15 MR. PRATTE: And, conversely, just
16 because you respect the laws doesn't mean you've
17 complied with ethical standards, which is what you
18 say.

19 But what that means though, with
20 the greatest of respect, is to each his own field,
21 the laws will take care of themselves. All of
22 these agencies have extensive powers, some of them
23 contain criminal provisions so you're going to be
24 subject to that, Minister, while you're my
25 Minister. I'm not going to decide whether you

1 violated the *Criminal Code* but I want you to know
2 that you're going to have to respect those.

3 And, secondly, I've also got
4 ethical rules that are distinct; that are
5 distinct. That's the point I'm trying to make.

6 All right. So then the last -- so
7 I said to you in the first point what the
8 questions were. I'm going to try and set them
9 out. Again, just for clarity's sake, given that
10 I'm asking for clarification, I should be at least
11 myself as clear as I can be to assist the
12 Commission.

13 So whether -- two questions in
14 respect particularly of paragraph 65. Whether by
15 paragraph 65 you intended in making findings by
16 reference to deficiencies of conduct referred to
17 in those statutes and if not what, if anything, do
18 you intend to draw from these statutes?

19 Again, as Me Yarosky reminds me,
20 it's the sentence in particular in paragraph 65
21 that gives birth to those questions when you say:

22 "I conclude I may be informed
23 by the deficiencies in the
24 misconduct".

25 Now, by way of conclusion, Mr.

1 Commissioner, I just want very briefly -- and I'll
2 listen very carefully to what Mr. Vickery has to
3 say ---

4 THE COMMISSIONER: I'll give you
5 an opportunity to respond rather than argue in a
6 vacuum, if you wish.

7 MR. PRATTE: Well fine, Mr.
8 Commissioner.

9 I just wanted to say that if this
10 is a genuine request for clarification in your
11 mind, there is no issue whatsoever with Mr.
12 Vickery's submissions because, clearly, you can
13 clarify something if you think it has to be either
14 one or two of the questions.

15 And other than that, I guess I'll
16 reserve my comments ---

17 THE COMMISSIONER: Sure.

18 MR. PRATTE: Thank you.

19 THE COMMISSIONER: Thanks.

20 Mr. Vickery?

21 MR. WOLSON, Q.C.: Just before,
22 Mr. Commissioner, we call on Mr. Vickery and other
23 parties to make submissions, I wonder if we could
24 have a brief recess this morning?

25 THE COMMISSIONER: Sure. How much

1 time do you need?

2 MR. WOLSON, Q.C.: Ten (10),
3 fifteen minutes? Fifteen (15) minutes would be
4 fine.

5 THE COMMISSIONER: Fifteen (15)?
6 All right.

7 MR. WOLSON, Q.C.: Thank you.

8 THE REGISTRAR: All rise.

9 --- Upon recessing at 10:11 a.m./

10 L'audience est suspendue à 10h11.

11 --- Upon resuming at 10:30 a.m./

12 L'audience est reprise à 10h30.

13 THE REGISTRAR: Please be seated.

14 THE COMMISSIONER: Mr. Vickery,
15 good morning.

16 --- SUBMISSIONS BY/ REPRÉSENTATIONS PAR MR.
17 VICKERY:

18 MR. VICKERY: Mr. Commissioner, I
19 would begin with the proposition that a motion for
20 clarification of a ruling is not of course an
21 occasion for the re-argument of issues already
22 canvassed prior to the ruling being made. And I
23 say that the principles of certainty and finality
24 require that unless there is a significant
25 ambiguity which touches on a material issue in the

1 ruling, that any temptation to elaborate the
2 matter or to provide further direction should
3 properly be resisted.

4 And I say that with recognition of
5 the fact that given that we are functioning as a
6 Commission of Inquiry under the *Inquiries Act*,
7 there is, as my friend has suggested, some
8 additional flexibility available to you but that
9 additional flexibility, in my submission, is not
10 intended to permit or prescribe a departure from
11 the principles which generally govern procedure.
12 And I say that it is important that the principles
13 of finality and certainty be recognized so as to
14 avoid any temptation to return in order to seek
15 clarification continually throughout the process.

16 In our submission, the appropriate
17 course, if Mr. Pratte remains dissatisfied with
18 what he perceives to be the impact of your ruling,
19 would be to seek judicial review of it and he has
20 chosen not to do that.

21 We say that it is particularly
22 important to resist any attempt to articulate
23 limits as to the receipt of evidence in the
24 abstract or in advance of particular evidence
25 being tendered before you, and you yourself have

1 commented on that during Mr. Pratte's submissions
2 this morning. Certainly, Mr. Pratte, if he
3 objects to the admission of any particular piece
4 of evidence during the course of the Inquiry, is
5 at liberty to make his objection in the usual
6 manner and to have his objection determined by you
7 at that point.

8 In our submissions, there are very
9 good reasons for adopting such a process because
10 it is only when the specifics of a particular line
11 of inquiry are known that the appropriate
12 balancing can occur and that you, as Commissioner,
13 will be in a position to make an appropriate
14 ruling with regard to receipt of that evidence.

15 In our submission, to attempt to
16 describe limits in the abstract or in general
17 terms prior to the receipt of the evidence is
18 neither necessary nor desirable.

19 Now, turning to the particulars of
20 my friend's submissions, it is, in our submission,
21 clear that fundamentally Mr. Pratte is seeking to
22 re-argue matters which he has placed before you
23 prior to this ruling being made.

24 His concern set out in his written
25 submission seeking clarification with regard to

1 the Blood System Inquiry case, for example, is a
2 concern which he thoroughly canvassed with you and
3 which all parties thoroughly canvassed in the
4 arguments that led to your ruling. And because
5 the principles stated in that case and others have
6 been thoroughly canvassed, we say that Mr. Pratte
7 can reasonably look to those principles in
8 understanding the limits of your ruling and that
9 it is not necessary that you provide any further
10 clarification of your ruling because it is in fact
11 rooted in the principles stated in the case law,
12 with which Mr. Pratte is, of course, intimately
13 familiar.

14 In the same way, his concerns that
15 your findings may risk being viewed as tantamount
16 to conclusions of non-compliance with, or
17 contravention of, particular statutes is a
18 proposition which he put to you repeatedly during
19 the argument of the original motion and it is
20 quite clear, in our submission, from your ruling,
21 and indeed your comments this morning, that you
22 are well aware of that risk and that your ruling
23 does not contemplate entry into that field.

24 Again, Mr. Pratte's arguments as
25 to the application of the operative provisions of

1 the 1985 Code of Conduct form the basis of his
2 argument before you in the first instance. His
3 repeated reference to them this morning can only,
4 in my submission, be characterized as re-argument
5 on a point that is clearly addressed and rejected,
6 in my submission, by your ruling.

7 The proposition that only the
8 specific operative post-employment provisions of
9 the Code can apply was certainly repeatedly made
10 by Mr. Pratte in argument. And the argument at
11 paragraph 50 of my friend's written submissions
12 which he repeated this morning, that in the case
13 of his personal income taxes, for example, the
14 proper authority would be the Canada Revenue
15 Agency, is a point which he addressed both in
16 written submissions and oral submissions before
17 you previously.

18 In his oral submissions, for
19 example, he used the phrase, "So let us leave to
20 these agencies the matter of conduct", and let us
21 deal with what, in my respectful submission, was
22 the intent of your mandate.

23 This is a point that he was at
24 some pains to make before you during his original
25 argument and certainly your ruling is clear, in my

1 submission, with regard to the position you
2 adopted on that submission. No further
3 clarification can be required on the point, in my
4 submission.

5 Indeed, we say that the base
6 proposition, which Mr. Pratte puts today, which is
7 that certain aspects of the ruling raise important
8 new questions, is in fact not made out.

9 There are no new questions raised,
10 in my submission, by Mr. Pratte's remarks to you
11 this morning. Rather he is simply asking for what
12 amounts to a second kick at the can, in my
13 submission.

14 In our submission, there is no
15 necessity for you to further address the question
16 of what standards can be drawn from the statutes
17 nor what specific provisions may be referenced.

18 First, because it is clear from
19 your ruling that it is not your intention to apply
20 the statutes but rather to be informed by them.

21 And, secondly, because it would
22 not be possible in advance of the evidence as you
23 yourself have remarked, to delineate with any
24 precision whatsoever which provisions of which
25 statutes might become of interest to you in

1 forming your opinion as to the conduct placed
2 before the Inquiry.

3 You have said in your ruling that
4 you will be informed not for the purpose of
5 assessing civil or criminal liability, but for the
6 purpose of understanding what is considered to be
7 an appropriate conduct.

8 And in our submission, that
9 proposition is sound and it requires no further
10 clarification.

11 My friend, in his written
12 submissions -- and he did not take you to them
13 this morning -- refers to Justice Iacobucci's
14 proposition in the Iacobucci Inquiry that the
15 basic principles that emerged from legal sources,
16 including Canadian law, are helpful in informing
17 determinations as to whether in the Iacobucci's
18 Inquiry's circumstance Canadian officials acted
19 properly.

20 And, in our submission, that is
21 precisely the point made in your ruling; and that
22 there is no suggestion in the ruling that you have
23 any intent to specifically apply such statutory
24 provisions in the context of the Inquiry.

25 Now, having said that, it's also

1 clear in our submission that Mr. Pratte's
2 proposition, which he states directly in his
3 written submissions that Justice Iacobucci did not
4 have the benefit of a single comprehensive statute
5 or standard whereas we do in the 1985 Code, is one
6 that you have expressly addressed in your ruling.
7 And, in my submission, Mr. Pratte is simply
8 incorrect in stating that proposition.

9 Mr. Pratte again, in his written
10 submissions, suggests that your ruling seeks to
11 provide the parties with a comprehensive
12 interpretation of the Terms of Reference and, in
13 my submission, he is again incorrect in suggesting
14 that. And I say that there is nothing in the
15 ruling which suggests that you were attempting a
16 comprehensive interpretation of the Terms of
17 Reference, you were simply addressing, in my
18 submission, the question of what standard of
19 conduct should properly apply.

20 Having said that, there is, in our
21 submission, no need whatsoever for any further
22 clarification of the statements made in your
23 ruling. The proposition that my friend has put to
24 you that there are two standards of conduct is, in
25 our submission, simply a recasting of his

1 submission to you that it is only the operative
2 provisions of the post-employment code which can
3 impact upon the question of appropriate conduct.

4 And in my submission, the
5 proposition that he puts is one which has clearly
6 been considered in your ruling. And what he seeks
7 today is simply a further elucidation of something
8 which is adequately addressed in your ruling and
9 need not be further addressed.

10 It is our submission that the
11 appropriate course at this point would be that my
12 friend's motion be dismissed and that should my
13 friend feel he is disadvantaged at some point as
14 the Inquiry proceeds, the matter can be dealt
15 with, as you yourself suggested, by means of the
16 normal process of objecting to the evidence, and
17 argument can be made as to the scope of the
18 Inquiry with reference to the particular evidence
19 which would then be in question.

20 Those are my submissions subject
21 to any questions you may have, Mr. Commissioner.

22 THE COMMISSIONER: Thank you, Mr.
23 Vickery, I have no questions. Thank you.

24 Mr. Auger?

25 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. AUGER:

1 MR. AUGER: Good morning, Mr.
2 Commissioner.

3 THE COMMISSIONER: Good morning.

4 MR. AUGER: I'll be very brief.
5 And Mr. Schreiber's position is that he adopts the
6 position of the Attorney General of Canada on this
7 motion.

8 Simply put, your ruling is clear.
9 There is no need to clarify, change or edit one
10 word or comma of your ruling. As a practical
11 matter you've said this morning, of course, it
12 depends on the evidence.

13 As a matter of fairness, Mr.
14 Pratte advanced in his argument that, of course,
15 we need to know the rules as we proceed. That has
16 certain limitations and this is one of them, that
17 you've defined in your extensive ruling what you
18 intend to do in the abstract. And as Mr. Vickery
19 points out, objections can be made in the course
20 of examinations.

21 And, indeed, at the end of the
22 exercise, when you're about to prepare your final
23 report, counsel will make submissions at that
24 point as well.

25 So for all of the reasons advanced

1 by Mr. Vickery, Mr. Schreiber too asks that Mr.
2 Mulroney's motion be dismissed.

3 Subject to any questions, those
4 are my submissions.

5 THE COMMISSIONER: Thank you very
6 much, I have no questions. Thank you.

7 Mr. Pratte, do you need a few
8 minutes to consider your response?

9 MR. PRATTE: No.

10 THE COMMISSIONER: No. All right.
11 Thank you.

12 --- REPLY BY/RÉPLIQUE PAR MR. PRATTE:

13 MR. PRATTE: Mr. Commissioner, let
14 me deal first with the point that I'm re-arguing
15 what I argued before.

16 By definition, a motion for
17 clarification ---

18 THE COMMISSIONER: You want to
19 argue that you're not re-arguing the points that
20 you made before? Do I have that straight?

21 MR. PRATTE: I'm not re-re-
22 rearguing. This is the point I want to make, Mr.
23 Commissioner.

24 THE COMMISSIONER: I fear regret I
25 gave you the chance to respond.

1 MR. PRATTE: Mr. Commissioner, by
2 definition, a genuine motion for clarification
3 must refer back to the original principles because
4 the clarification, not being a re-argument, must
5 be put in the context of trying to get greater
6 precision based on the same principles.

7 There is no way, in my respectful
8 submission, that a genuine request for
9 clarification will not have to go back to some of
10 the original principles argued, so exist --
11 logically, my friend's submission if it -- if no --
12 - if a person couldn't seek clarification -- let
13 me put this another way. If a person seeking
14 clarification were disabled -- disentitled from
15 referring to any of the original arguments, you
16 couldn't make the motion.

17 Second point, saying that it's --
18 will now be left to making the objections at the
19 hearing, let's think about that logic for a
20 moment, Commissioner.

21 You decided that it was important
22 to get the rules of the game set at the beginning,
23 i.e. let us not wait to find out what the rules
24 are during the hearing.

25 All we are seeking is to ensure we

1 understand what those rules are; that's what we're
2 seeking to clarify. That does not preclude, as we
3 discussed, that once we understand those rules, at
4 the appropriate time there may be a debate as to
5 what's relevant or not.

6 I think I've made it absolutely
7 clear this morning that I was not seeking to
8 preclude you from looking at relevant evidence or
9 having an artificial line in time, so I won't
10 repeat that.

11 One word about the Iacobucci
12 Inquiry. You've cited -- I'm sorry, Mr.
13 Commissioner, I didn't bring copies because I
14 wasn't sure that it would arise again -- but in
15 your ruling you did refer to this and I've
16 addressed that in my written submissions.

17 My friend, Mr. Vickery, took issue
18 with my saying in the written submissions that
19 there was a single -- there was not a single
20 standard set out there -- and if I could just get
21 the right references.

22 At paragraph 29, Mr. Commissioner,
23 of the Iacobucci -- this is where you -- page 341,
24 paragraph 29, this is where you draw -- drew the
25 reference in your reasons to Justice Iacobucci

1 referring to the principles of the *Charter*, et
2 cetera.

3 The point I was making is that
4 unlike in this case, he was not provided with a
5 standard -- a single standard from the other
6 sources. You have drawn the single standard
7 principally from the *Guidance for Ministers* and
8 the Code but principally the *Guidance for*
9 *Ministers*.

10 Justice Iacobucci says explicitly
11 at paragraph 30, just following the paragraph you
12 quoted or relied on.

13 He says this:

14 "Second, a further comment
15 concerning the source of
16 applicable standards or norms
17 is warranted. Many of the
18 standards or norms governing
19 Canadian officials will be
20 found in internal policies,
21 mandate, legislation,
22 Ministerial direction, and
23 other like instruments."

24 So rather than being able to find
25 an overarching principle such as you were able to

1 rely on, he's got that whole panoply of norms and
2 it's in that context that he makes a reference to
3 the *Charter*.

4 But I make two points in addition.
5 He never then in his report, as I read it, goes
6 back to refer to the *Charter* or any particular
7 statute when he finds conduct or when he tries to
8 -- the only thing he seems to be saying is, well,
9 the issue of torture, the possibility of torture,
10 which is obviously prohibited under the *Charter*,
11 these international treaties, should have affected
12 how these people applied the policies. But he
13 never, as I recall, says, well, section such-and-
14 such of a statute or particularly of a
15 constraining law -- of the *Charter*.

16 And of course he does not name
17 specific individuals when he judges their conduct;
18 he focuses on institutions.

19 And, lastly, a point on the cases
20 my friend -- he hasn't referred to them, Mr.
21 Commissioner -- but the cases he relies on to
22 constrain your authority, to try to provide
23 clarification if you feel that it is needed are,
24 in my respectful submission, of no assistance
25 whatsoever. He relies on three cases, none of

1 which have anything to do with administrative law
2 context.

3 One case, the business development
4 case, which is -- that's right, Court of Appeal
5 case arises from the determination of the priority
6 and the security and interest.

7 Here we are, we haven't even
8 started our hearings in an administrative context
9 before you, and he's quoting a decision in a civil
10 law context, civil liability, at an appellate
11 level; at the other end of the spectrum.

12 And then the second case is a case
13 -- the other two cases are from British Columbia,
14 and one is a reconsideration of factual findings
15 after a trial. And the court says, "Well, we're
16 not going to redo this now". And similarly the
17 other one is a family law case.

18 I'm just going to refer you, Mr.
19 Commissioner, and I'm not going to discuss them in
20 any detail but my friend Mr. Hughes will
21 distribute them.

22 There are three cases that if you
23 have any doubt as to your authority to reconsider
24 the wording by way of clarification, you might get
25 some comfort from. The first one is *Chandler*

1 from the Supreme Court of Canada.

2 Might as well hand them up
3 together, Mr. Hughes, please.

4 And I'll just tell you, Mr.
5 Commissioner, and in there they should be
6 underlined, the first case is a case, *Chandler*,
7 the Supreme Court of Canada, arising from the
8 proceedings of the Practice Review Board of the
9 Alberta Association of Architects. And,
10 basically, Mr. Commissioner, the Supreme Court
11 says that in an administrative law context, the
12 principles of *functus officio*, or finality as my
13 friend has referred to, must be interpreted and
14 applied flexibly. And in that case, not only did
15 they allow a clarification, they allow starting
16 the hearing again to make sure that the exercise
17 of jurisdiction is properly done because it had
18 been exceeded before.

19 In other words, they allow a much
20 more significant change than anything that I am
21 asking you this morning.

22 The next case -- I don't know if
23 you've got them in that order -- but is a case of
24 the Federal Court of Appeal, again in the
25 administrative law context. That's the *Vatanabadi*

1 case against -- okay, sorry. I thought I -- give
2 the other two? Thank you.

3 All right. If you just go to that
4 case, it's the *Vatanabadi* case, Federal Court of
5 Appeal, again in the administrative law context.
6 This is -- if you go to the second page, just a
7 head note which effectively copies what is in the
8 decision -- but the context, Mr. Commissioner, is
9 a refugee claim when first the refugee claim was
10 determined to be proper and then that
11 determination was changed and the context was
12 whether, well, can an administrative tribunal do
13 that? In other words, do 180 degrees, which I'm
14 sure you don't intend to do.

15 And here's what the Federal Court
16 of Appeal says -- and I'm not asking you to do, by
17 the way, more important.

18 If you go to the second page, Mr.
19 Commissioner, the second paragraph says, "The
20 Supreme Court of Canada" -- this is of the
21 Summary:

22 "The Supreme Court of Canada
23 has stated that the general
24 rule that final decisions of
25 an administrative tribunal

1 cannot be revisited because
2 the tribunal has changed its
3 mind was based on the policy
4 ground which favours finality
5 of proceedings rather than
6 the rule which was developed
7 with respect to formal
8 judgments of a court whose
9 decision was subject to full
10 appeal.
11 Application of the rule must
12 therefore be more flexible
13 with respect to decisions
14 about administrative
15 tribunals which are subject
16 to appeal only on a point of
17 law."

18 By the way, I point out here that
19 we don't have a right to appeal. We have an even
20 more limited remedy; judicial review.

21 "A policy which favours
22 finality of proceedings would
23 require that the tribunal
24 having only just started its
25 inquiry be allowed to correct

1 its obvious mistake. Such
2 policy would not be advanced
3 by insisting on continuation
4 down a path which all
5 concerned knew or admitted
6 was fatally flawed."

7 Now, in that case effectively,
8 they got the rules of the game wrong. The court
9 said knowing that, you can change your mind. All
10 I'm saying is, let's just make sure with our
11 motion of clarification that we understand the
12 rules and that they are right. I'm not saying
13 that you got them totally wrong but even if that
14 had been the case, the Supreme Court gives -- you
15 can correct that:

16 "The tribunal's ultimate
17 decision was subject to review
18 only on a point of law and since
19 it was manifest that such a
20 decision would be wrong in law,
21 if the error was not at once
22 corrected, a flexible and
23 pragmatic approach required that
24 such correction be effected
25 forthwith.

1 The Applicant would not suffer
2 any prejudice as a result of the
3 tribunal recognizing its mistake
4 and recommencing the inquiry *in*
5 *fortiori*, if you merely
6 clarify."

7 No one has said that there is a
8 prejudice to anybody if you judge that a
9 clarification of any kind is required and none
10 could ever be credibly argued that everyone
11 benefits if we're clear on what the mission is.

12 Those are my reply points, Mr.
13 Commissioner.

14 THE COMMISSIONER: Okay. You
15 don't want to refer to the other case?

16 MR. PRATTE: Well, the other case
17 is actually for ---

18 THE COMMISSIONER: Probably the
19 same thing over and over?

20 MR. PRATTE: Well, no. It just
21 says that in an interlocutory decision, a
22 *fortiori*, the principle of finality does apply and
23 we are in an interlocutory stage.

24 THE COMMISSIONER: Yes, okay.

25 MR. PRATTE: Thank you, Mr.

1 Commissioner, those are my reply points.

2 THE COMMISSIONER: All right.

3 Thank you.

4 Mr. Wolson, before we close for
5 the day, is there anything that you wish to add?

6 MR. WOLSON, Q.C.: No, sir, and I
7 understand that you are going to reserve on this
8 matter?

9 THE COMMISSIONER: Yes.

10 MR. WOLSON, Q.C.: And there is no
11 other formal business.

12 THE COMMISSIONER: All right.

13 If I didn't indicate earlier,
14 perhaps during the course of exchanges last
15 Friday, what I propose to do is consider the
16 submissions that I have heard this morning, arrive
17 at a decision as to how I will resolve the issues
18 raised, and deliver my ruling orally on Thursday
19 morning. And I do that because of my experience
20 earlier with written rulings as a result of the
21 process that must take place according to law,
22 which includes translation.

23 We would be waiting probably two
24 weeks at least to get the ruling into your hands
25 if I were to write rather than to deliver it

1 orally and, of course, we're scheduled to commence
2 the Inquiry on Monday morning next week at 9:30,
3 but I do need some time and I don't think that a
4 day-and-a-half is unreasonable to allow me to
5 resolve this.

6 So can I ask counsel, and I'm
7 prepared to accommodate you here in terms of your
8 convenience because I know that you have other
9 matters -- at least some of you do -- what would
10 be your preference for Thursday in terms of my
11 delivering the ruling; morning, afternoon, and if
12 morning, at what time? Do you just want to let me
13 know your preference?

14 Perhaps you could just confer
15 briefly with my counsel on that because I'm
16 prepared to accommodate you on this issue.

17 (SHORT PAUSE/COURTE PAUSE)

18 MR. WOLSON, Q.C.: All counsel
19 have indicated that 9:30 this coming Thursday
20 would be an appropriate time for them.

21 THE COMMISSIONER: All right. I
22 will do my very best then to have a ruling ready
23 to be delivered 9:30 on the morning of Thursday of
24 this week.

25 Thank you for your assistance this

1 morning, Counsel. I do appreciate it. Good
2 morning.

3 THE REGISTRAR: All rise.
4 Veuillez vous lever.

5 --- Upon adjourning at 11:21 a.m./

6 L'audience est ajournée à 11h21

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C E R T I F I C A T I O N

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I, Sean Prouse a certified court reporter in the
Province of Ontario, hereby certify the foregoing
pages to be an accurate transcription of my
notes/records to the best of my skill and ability,
and I so swear.

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Je, Sean Prouse, un sténographe officiel dans la
province de l'Ontario, certifie que les pages ci-
hautes sont une transcription conforme de mes
notes/enregistrements au meilleur de mes
capacités, et je le jure.

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Sean Prouse, CR

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