

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

**Hearing on Standards of  
Conduct**

**Audience sur les normes de  
conduite**

**Commissioner**

L'Honorable juge /  
The Honourable Justice  
Jeffrey James Oliphant

**Commissaire**

**Held at:**

Bytown Pavillion  
Victoria Hall  
111 Sussex Drive  
Ottawa, Ontario

Wednesday, January 7, 2009

**Tenue à :**

pavillion Bytown  
salle Victoria  
111, promenade Sussex  
Ottawa (Ontario)

le mercredi 7 janvier 2009

**Appearances/Comparutions**

Mr. Richard Wolson	Lead Commission Counsel
Ms. Nancy Brooks	Counsel
Mr. Evan Roitenberg	
Mr. Giuseppe Battista	
Mr. Gilles Brisson	Registrar
Mr. Guy J. Pratte	The Right Honourable Brian
Mr. Jack Hughes	Mulroney
Mr. Richard Auger	Mr. Karlheinz Schreiber
Mr. Paul B. Vickery	Attorney General of Canada
Mr. Yannick Landry	

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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Wednesday, January 7, 2009

3 at 9:00 a.m. / L'audience débute

4 mardi le 7 janvier 2009 à 9h00

5 THE REGISTRAR: All rise.

6 Veuillez vous lever.

7 --- OPENING STATEMENT BY/DÉCLARATION D'OUVERTURE

8 PAR MR. WOLSON:

9 MR. WOLSON: We have called this  
10 hearing this morning to deal with an important but  
11 very narrow issue.

12 The Terms of Reference in Order in  
13 Council require you to address a number of stated  
14 questions and address the standards of conduct as  
15 they relate to certain questions.

16 Of particular note this morning  
17 are three of those questions in paragraph A. They  
18 deal with the business and financial dealings  
19 between Mr. Schreiber and Mr. Mulroney.

20 Question 11, the first of those  
21 questions, is stated as follows:

22 "Were these business and  
23 financial dealings  
24 appropriate..." ---

25 And I emphasise that word for the

1 purposes of this morning.

2 "Were these business and  
3 financial dealings  
4 appropriate considering the  
5 position of Mr. Mulroney as a  
6 current or former Prime  
7 Minister and Member of  
8 Parliament?"

9 That's Question 11.

10 Question 12:

11 "Was there appropriate  
12 disclosure and reporting of  
13 the dealings and payments?"

14 Then Question 13 deals with the  
15 ethical rules and guidelines which related to  
16 these financial dealings and were they followed.

17 We have asked counsel this  
18 morning, Mr. Commissioner, counsel to the parties,  
19 to make written or we've asked them some time ago  
20 to make written submissions and this morning oral  
21 submissions as well on these issues as regards to  
22 Questions 11 and 12, the meaning of the word  
23 "appropriate", in particular, as it relates to the  
24 applicable norms and standards you should consider  
25 in interpreting whether Mr. Mulroney's conduct was

1 appropriate in the circumstances.

2 And then secondly, with regard to  
3 Question 13, what were the ethical rules and  
4 guidelines which related to these business and  
5 financial dealings. And in that regard, I'm sure  
6 that you'll hear much more as the evidence unfolds  
7 when we begin Part I on March the 30<sup>th</sup> of this  
8 year.

9 We have advised counsel for the  
10 parties that Commission counsel would not be  
11 making -- would not provide written submissions or  
12 be making submissions this morning. We do that in  
13 fairness with the comfort of knowing that other  
14 Commission counsel in other commissions have  
15 adopted similar positions that we have today.

16 The order of submissions this  
17 morning is before you; Mr. Vickery assisted by Mr.  
18 Landry and Mr. Lacasse will speak for the Attorney  
19 General. He will speak first. Mr. Auger for Mr.  
20 Schreiber will then speak; and then Mr. Pratte as  
21 assisted by Jack Hughes for Mr. Mulroney will then  
22 speak.

23 Mr. Houston, who is here, has  
24 advised and understandably so that he would not be  
25 making written submissions and does not wish to

1 speak on the issue this morning.

2 I can advise counsel, Mr.  
3 Commissioner, that we have received their written  
4 submissions and you have read each very carefully.  
5 The oral submissions today, I would suggest, are  
6 for the purpose of supplementing the written  
7 submissions. After each party has made their  
8 submission, there will be a brief reply in the  
9 same order that we have set out.

10 So with that in mind then, I'll  
11 call on Mr. Vickery for the Attorney General for  
12 Canada.

13 COMMISSIONER OLIPHANT: Thank you,  
14 Mr. Wolson.

15 Just a quick comment to all  
16 counsel to reinforce what Mr. Wolson said. I have  
17 read all of your submissions, more than once, and  
18 I have read the cases referred to in your  
19 submissions even where they were not included with  
20 the submissions; for example, *Dixon*, I've got --  
21 I've read all those cases. So you can rest  
22 assured that I'm familiar with the positions that  
23 I expect you'll be taking today.

24 Mr. Vickery, good morning.

25 MR. VICKERY: Good morning, Mr.

1 Commissioner.

2 --- SUBMISSIONS BY/REPRÉSENTATIONS PAR MR. VICKERY:

3 MR. VICKERY: To assist the  
4 Commission, we have prepared a Book of Authorities  
5 and Book of Documents. The Book of Authorities  
6 includes all of the authorities referred to by all  
7 of the parties and the Book of Documents  
8 references the documents referred to in the  
9 Attorney General's submissions. So I would pass  
10 those up.

11 COMMISSIONER OLIPHANT: Mr.  
12 Brisson.

13 MR. VICKERY: Mr. Commissioner,  
14 bearing in mind your comments with regard to the  
15 fact that you have reviewed the submissions and  
16 case law in detail, I will not be taking you  
17 through submissions in detail but rather will  
18 attempt to highlight the points that we believe  
19 are particularly pertinent.

20 COMMISSIONER OLIPHANT: I didn't  
21 make the comment to suggest in any way that I  
22 didn't want to hear from any counsel. I just want  
23 to assure you that I have read the submissions  
24 that you filed. I'd be happy to hear you; take  
25 all the time you need, okay?



1 MR. VICKERY: Thank you and for my  
2 part, I am confident that I can complete it within  
3 approximately 45 minutes.

4 COMMISSIONER OLIPHANT: That's  
5 fine. I won't hold you to that because I know how  
6 good or how bad lawyers are at estimated the  
7 length of time they are going to take.

8 MR. VICKERY: That's true.

9 Mr. Commissioner, in the Notice of  
10 Hearing with regard to standards of conduct, you  
11 requested our submissions essentially on two  
12 points as we understand it; the first point being  
13 whether there were ethical rules and guidelines  
14 which relate to the business and financial  
15 dealings that are before you; and the second point  
16 concerning the question of what "appropriate"  
17 means in the context of the Terms of Reference.  
18 So those are the two essential points that I would  
19 be discussing with you this morning.

20 In our submissions we deal with  
21 each of these questions and beginning at the end,  
22 if I might, you will note that in our conclusion  
23 at paragraph 42 of our submissions we make the  
24 point that a commission of inquiry under Part I of  
25 the *Inquiry's Act* is, of course, neither a

1 criminal trial nor a civil action for the  
2 determination of liability.

3 COMMISSIONER OLIPHANT: I think I  
4 indicated that in my opening statement earlier.  
5 I'm very sensitive to that fact.

6 MR. VICKERY: Absolutely, and I  
7 raise it only because in our submission that  
8 proposition is the baseline upon which our further  
9 submissions are based.

10 And it follows from that baseline,  
11 in our submission, that a commission cannot either  
12 establish criminal culpability or civil  
13 responsibility for damages and, of course, that's  
14 simply not within its remit.

15 A commission may, however, in our  
16 submission, make a finding of misconduct in  
17 accordance with the provisions of Section 13 of  
18 the Act and, as you are doubtless aware, the  
19 Supreme Court has addressed these issues primarily  
20 in the Blood Inquiry, the Krever Commission case,  
21 which we cite at paragraph 42 of our submissions.

22 I would like to begin by taking  
23 you briefly to that decision. It can be found in  
24 the Brief of Authorities at Tab 1(d).

25 COMMISSIONER OLIPHANT: All right.

1 I'm with you.

2 MR. VICKERY: Thank you,  
3 Commissioner.

4 That decision of course is with  
5 reference to the inquiry into the blood system in  
6 Canada and that inquiry was, of course, an inquiry  
7 instituted by Order in Council pursuant to Part I  
8 of the *Inquiries Act*, as was this Commission.

9 I would ask you to turn to  
10 paragraph 34 initially of the decision and that's  
11 at page 25.

12 COMMISSIONER OLIPHANT: I'm there.

13 MR. VICKERY: Thank you.

14 And paragraph 34 of course states  
15 the base proposition to which I have referred you.  
16 It indicates:

17 "A commission of inquiry is  
18 neither a criminal trial nor  
19 a civil action for the  
20 determination of liability.  
21 It cannot establish either  
22 criminal culpability or civil  
23 responsibility for damages.  
24 Rather, an inquiry is an  
25 investigation into an issue,

1 event or series of events."

2 And then, in my submission, rather  
3 importantly, it continues:

4 "The findings of a  
5 Commissioner relating to that  
6 investigation are simply  
7 findings of fact and  
8 statements of opinion reached  
9 by the Commissioner at the  
10 end of the inquiry. They are  
11 unconnected to normal legal  
12 criteria. They are based  
13 upon and flow from a  
14 procedure which is not bound  
15 by the evidentiary or  
16 procedural rules of a  
17 courtroom. There are no legal  
18 consequences attached to the  
19 determinations of a  
20 Commissioner."

21 And as I have previously  
22 indicated, Mr. Commissioner, in our view, it is  
23 that statement of general principle that should  
24 afford a baseline for our discussions this  
25 morning.

1                   It is also our submission that it  
2                   is because of this distinction between the roles  
3                   of a civil or criminal trial and that of a  
4                   Commission of Inquiry that the Terms of Reference  
5                   of Commissions created under Part I of the Act  
6                   routinely include provisions directing the  
7                   Commissioner to perform his or her duties without  
8                   expressing any conclusion or recommendation  
9                   regarding the civil or criminal liability of any  
10                  person or organization and, further, directing  
11                  that the Commissioner perform his or her duties  
12                  in such a way as to ensure that the conduct of the  
13                  Inquiry does not jeopardize any ongoing  
14                  investigation or criminal proceeding.

15                  As I say, in our submission, such  
16                  provisions in Terms of Reference are, by now, a  
17                  standard feature of virtually every Order in  
18                  Council creating a Part I Commission of Inquiry  
19                  and provisions to that effect are to be found, as  
20                  I understand it, as subparagraphs (l) and (m) of  
21                  the Terms of Reference creating this Inquiry.

22                  Now, in the Blood Inquiry case the  
23                  Supreme Court of Canada commented on what may  
24                  properly be included in the report of a  
25                  Commissioner, and I would ask you to turn in that

1 regard to paragraph 52 of the decision, at page  
2 37.

3 COMMISSIONER OLIPHANT: Yes, I'm  
4 there, thank you.

5 MR. VICKERY: Thank you.

6 At paragraph 52 the Court comments  
7 as follows:

8 "What then can Commissioners  
9 include in their report? The  
10 primary role, indeed the  
11 raison d'être of an inquiry  
12 investigating a matter is to  
13 make findings of fact.

14 In order to do so the  
15 Commissioner may have to  
16 assess and make findings as  
17 to the credibility of  
18 witnesses.

19 From the findings of fact the  
20 Commissioner may draw  
21 appropriate conclusions as to  
22 whether there has been  
23 misconduct and who appears to  
24 be responsible for it.

25 However, the conclusions of a

1 Commissioner should not  
2 duplicate the wording of the  
3 Code defining a specific  
4 offence. If this were done  
5 it could be taken that a  
6 Commissioner was finding a  
7 person guilty of a crime.  
8 This might well indicate that  
9 the Commission was, in  
10 reality, a criminal  
11 investigation carried out  
12 under the guise of a  
13 Commission of Inquiry.  
14 Similarly, Commissioners  
15 should endeavour to avoid  
16 making evaluations of their  
17 findings of fact in terms  
18 that are the same as those  
19 used by courts to express  
20 findings of civil liability.  
21 As well, efforts should be  
22 made to avoid language that  
23 is so equivocal that it  
24 appears to be a finding of  
25 civil or criminal liability."

1                   And finally, and again in my  
2 submission, somewhat importantly:

3                   "Despite these words of  
4 caution, however,  
5 Commissioners should not be  
6 expected to perform  
7 linguistic contortions to  
8 avoid language that might  
9 conceivable be interpreted as  
10 importing a legal finding."

11                   In our submission, Mr.  
12 Commissioner, paragraph 52 sets out with some  
13 degree of particularity a way forward for a  
14 Commission of Inquiry, and in our submission for  
15 this particular Commission of Inquiry, in terms of  
16 the phraseology which might eventually emerge from  
17 a report.

18                   In our submission, then, it is  
19 with these principles in mind that we should  
20 address the points raised in the Notice of Hearing  
21 on Standards of Conduct, as I have said, in  
22 paragraph 42 of our submissions, at page 16, we  
23 submit that the legislation rules, guidelines and  
24 jurisprudence which are applicable to the conduct  
25 of public office holders generally will, in our



1 submission, help to inform your views as to what  
2 constitutes appropriate conduct for the purposes  
3 of this Inquiry, even though you are not called  
4 upon or indeed permitted to make findings as to  
5 criminal liability or civil responsibility.

6 Having said that it is, in our  
7 submission, also clear and my friend, Mr. Pratte,  
8 raises this in his material, that the particular  
9 standards which may inform your conclusion as to  
10 whether conduct was or was not appropriate, must  
11 be standards which were in fact in place at the  
12 time of the conduct concerned.

13 The *Sinclair Stevens* case which is  
14 cited by my friend, Mr. Pratte, speaks to this  
15 requirement and I would ask to take you to it  
16 briefly. It's at Tab 2(b) of our Book of  
17 Authorities and specifically paragraph 42 of the  
18 decision is, in our submission, pertinent. That's  
19 at page 650 of the decision.

20 COMMISSIONER OLIPHANT: I'm with  
21 you.

22 MR. VICKERY: Thank you.

23 At paragraph 42 the Court  
24 indicates:

25 "I am of the opinion that the

1                   Plaintiff did not know the  
2                   standard he was to be judged  
3                   against as the definition of  
4                   "conflict of interest" was  
5                   not made known to him until  
6                   the report was given to him.  
7                   This is especially so when  
8                   Commissioner Parker was to  
9                   determine whether the  
10                  Plaintiff was in a real or  
11                  apparent conflict of interest  
12                  as defined by the *Mulroney*  
13                  Code and the letter from the  
14                  Prime Minister, dated  
15                  September 9<sup>th</sup>, 1985.  
16                  As well, it appears to me  
17                  that it would be unfair to  
18                  develop a standard at a point  
19                  in time after the conduct  
20                  being complained of has  
21                  occurred. I am of the view  
22                  that it was a breach of the  
23                  duty of procedural fairness  
24                  owed to the Plaintiff to set  
25                  a standard or definition of

1 conflict of interest by  
2 stating the definition for  
3 the first time in the report.  
4 In my view, the definition  
5 should have been stated in  
6 the various Conflict of  
7 Interest Guidelines or Code."

8 The Attorney General in fact  
9 subscribes to that view, Mr. Commissioner, that  
10 the Codes of Conduct -- the Standards of Conduct,  
11 rather, which are to be taken into account must be  
12 standards that were in existence at the time of  
13 the conduct concerned.

14 Now, going forward from that  
15 proposition, Mr. Commissioner, we say that since  
16 these submissions are being made in advance of any  
17 evidence being heard by you, they are necessarily  
18 approached at a conceptual level. And the  
19 question of whether a particular statute, rule or  
20 guideline will have application will depend upon  
21 the facts which you find during the court of the  
22 Inquiry.

23 And we say that that is quite  
24 compatible with the comments of the court made in  
25 the *Sinclair Stevens* case. What is important is

1           that the Standards of Conduct existed at the time  
2           of the conduct concerned. The question of whether  
3           a particular standard is applicable will  
4           necessarily depend on the nature of the conduct in  
5           question.

6                           COMMISSIONER OLIPHANT: I think  
7           it's important we have this hearing prior to my  
8           hearing evidence for a couple of reasons, and  
9           you've named one, and that is that it's required  
10          by law in accordance with the *Stevens* case.

11                           But I think as well, out of an  
12          abundance of fairness, counsel should know what  
13          the standard that I will be looking at is, in  
14          order to properly prepare to meet the case that  
15          needs to be met.

16                           I mean I'm sensitive to that fact  
17          and I think that it's only fair to counsel to know  
18          what the rules are before the game starts and not  
19          after it's completed.

20                           MR. VICKERY: I would quite agree  
21          with that proposition, Mr. Commissioner.

22                           And my comments as to the  
23          particular application of any specific standard of  
24          course, are simply to suggest that not every that  
25          not every potentially applicable standard will be

1 brought into play dependent on the evidence that  
2 emerges.

3 COMMISSIONER OLIPHANT: Of course.

4 MR. VICKERY: Now, it does appear,  
5 sir, that there is agreement among the parties  
6 apart, perhaps, from Mr. Doucet, that at a minimum  
7 the 1985 Conflict of Interest and Post-Employment  
8 Code for public officeholders would have  
9 application, and that Code may be found in our  
10 Book of Documents at Tab F and I would ask you to  
11 turn to that.

12 COMMISSIONER OLIPHANT: I think  
13 it's also in your submissions.

14 MR. VICKERY: It is in our  
15 submissions as well, yes.

16 COMMISSIONER OLIPHANT: I will  
17 (off microphone) -- Mr. Vickery.

18 MR. VICKERY: Thank you, sir. The  
19 podium is a little challenging with documents, I'm  
20 afraid.

21 There we go.

22 THE COMMISSIONER: Just take your  
23 time.

24 MR. VICKERY: Okay, thank you.  
25 We'll be all set. Thank you.

1 Now, we deal with the ---

2 THE COMMISSIONER: I'm sorry to  
3 interrupt, Mr. Vickery.

4 MR. VICKERY: Yes, of course.

5 COMMISSIONER OLIPHANT: But you  
6 said that there's agreement of counsel on this  
7 point. Does that include Mr. Auger?

8 MR. VICKERY: Yes.

9 COMMISSIONER OLIPHANT: All right.  
10 Thank you.

11 MR. VICKERY: Yes, as far as I'm  
12 aware, Mr. Doucet's counsel, Mr. Houston, of  
13 course has not filed submissions so I'm not aware  
14 of his position on it.

15 THE COMMISSIONER: His client  
16 probably wasn't affected by it in any event.

17 MR. VICKERY: Quite right.

18 Yes, dealing with the Code then,  
19 at paragraph 20 of our submissions, which is at  
20 page 9 of the submission, we point out, beginning  
21 of paragraph 20 over into paragraph 24, that it  
22 was of course former Prime Minister Mulroney  
23 himself who tabled the Code in the House of  
24 Commons on September 9<sup>th</sup>, 1985, and we have  
25 referenced in our submissions at paragraph 24 the

1 statement made by former Prime Minister Mulroney  
2 at the time of his tabling the Code.

3 COMMISSIONER OLIPHANT: That's at  
4 Tab 3 of your submission?

5 MR. VICKERY: Yes, it is, yes.

6 COMMISSIONER OLIPHANT: And then  
7 there is the letter that was written?

8 MR. VICKERY: The letter.

9 COMMISSIONER OLIPHANT: Yeah.

10 MR. VICKERY: And the letter, in  
11 fact, duplicates the statement made ---

12 COMMISSIONER OLIPHANT: Yes.

13 MR. VICKERY: --- before the House  
14 so that put together we do have a clear view of  
15 the proposition as put by Mr. Mulroney at that  
16 time. And just to pick that up briefly -- sorry,  
17 excuse me, Mr. Commissioner. I've just lost my  
18 tab reference for the moment.

19 COMMISSIONER OLIPHANT: Take your  
20 time.

21 MR. VICKERY: I'll take you to Tab  
22 D of the Book of Documents, which is the Mulroney  
23 letter tabled on September 9<sup>th</sup>, 1985 and simply  
24 take you to the first paragraph of that letter  
25 which reads:

1                   "Dear colleagues,  
2                   It is a great principle of  
3                   public administration, I  
4                   would even say an imperative,  
5                   that to function effectively  
6                   the government and the public  
7                   service of a democracy must  
8                   have the trust and confidence  
9                   of the public they serve. In  
10                  order to reinforce that trust  
11                  the government must be able  
12                  to provide competent  
13                  management and above all to  
14                  be guided by the highest  
15                  standards of conduct."

16                  And that was the statement made by  
17                  former Prime Minister Mulroney at the time of  
18                  tabling the Code of Conflict of Interest.

19                  COMMISSIONER OLIPHANT: And I take  
20                  it, without trying to put words in your mouth, Mr.  
21                  Vickery, that when Prime Minister Mulroney  
22                  referred to the government being guided by the  
23                  highest standards of conduct he meant all members  
24                  of the government?

25                  MR. VICKERY: That would be my



1 understanding, yes, Mr. Commissioner.

2 Now, the Code of Conduct that was  
3 tabled on September 9<sup>th</sup>, 1985 remained in effect  
4 until it was modified by then Prime Minister  
5 Chrétien in 1994, and a subsequent amendment  
6 occurred in 2003, but for our purposes we're  
7 dealing primarily with the Code as it existed,  
8 beginning on September 9<sup>th</sup>, 1985 in my submission.

9 Significantly, it's common ground  
10 that the Code had no statutory basis but  
11 nevertheless contained enforcement mechanisms and  
12 was structured much like a statute. We deal with  
13 that at paragraphs 21 and 26 of our submissions.

14 And we note at paragraph 25 that  
15 the Code was intended to apply to public  
16 officeholders, which were specifically defined as  
17 including a Minister of the Crown, and the Prime  
18 Minister, of course, is the first Minister of the  
19 Crown, not Members of Parliament, as I understand  
20 it. And the simple explanation for that, apart  
21 from the fact that it imposes a higher standard on  
22 a Minister of the Crown, would probably be that  
23 being a non-statutory instrument it could not be  
24 imposed on opposition Members of Parliament  
25 without a legislative base or vote.

1                   Now, at paragraph 27 of our  
2                   submissions we go to the Code itself, and I would  
3                   ask you to do that at this point. It's at Tab F,  
4                   as we've said.

5                   COMMISSIONER OLIPHANT: Are you  
6                   taking us to 57, that area?

7                   MR. VICKERY: First, I would like  
8                   to take you to section 4.

9                   COMMISSIONER OLIPHANT: Okay.

10                  (SHORT PAUSE/COURTE PAUSE)

11                  COMMISSIONER OLIPHANT: M'hm.

12                  MR. VICKERY: Section 4 sets out  
13                  the object of the Code.

14                  COMMISSIONER OLIPHANT: Yeah.

15                  MR. VICKERY: And reads:

16                               "The object of this Code is  
17                               to enhance public confidence  
18                               in the integrity of public  
19                               officeholders and the public  
20                               service."

21                  That's a general statement of the  
22                  object which, in my submission, certainly would  
23                  assist in your considerations.

24                  I would then ask you to look at  
25                  paragraph 7 -- section 7 rather -- of the Code,

1       which sets out, in our submission, certain  
2       organizing principles, as it were, of the Code.  
3       And specifically, section -- the preamble to  
4       section 7 indicates:

5                       "Every public officeholder  
6                       shall conform to the  
7                       following principles."

8                       So it's a directive statement  
9       using peremptory language "shall conform".

10                      Section 7(a) provides:

11                      "Public officeholders shall  
12                      perform their official duties  
13                      and arrange their private  
14                      affairs..."

15                      So both public and private conduct  
16       is governed;

17                      "...in such a manner that  
18                      public confidence and trust  
19                      in the integrity, objectivity  
20                      and impartiality of  
21                      government are conserved and  
22                      enhanced."

23                      So that's the first statement of  
24       principle, in our submission, that should govern  
25       the conduct of a public officeholder.

1 Section 7(b) provides:

2 "Public officeholders have an  
3 obligation to act in a manner  
4 that will bear the closest  
5 public scrutiny, an  
6 obligation that is not fully  
7 discharged by simply acting  
8 within the law."

9 So in our submission it's clear  
10 that the intention was that the obligation stated  
11 in 7(a) go beyond simple observance of the law of  
12 the land.

13 And then finally, in section 7(i),  
14 speaks to former officeholders and indicates:

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

21 Now, then beginning at paragraph  
22 30 of our submissions, Commissioner, and going  
23 through to paragraph 36, we detail a number of the  
24 specific provisions set out in the Code that may  
25 have application, depending upon the evidence

1       which you will hear. And I don't intend to review  
2       them in detail at this point but would note that  
3       they do include specific provisions for both  
4       former public officeholders and public  
5       officeholders anticipating departure from office.

6                   And in our submission, those  
7       provisions should and will inform your  
8       considerations in dealing with the question of  
9       whether conduct is appropriate within the meaning  
10      of the Terms of Reference.

11                   I would next take you, Mr.  
12      Commissioner, to the Guidance for Ministers  
13      document, which is at Tab E of the material and  
14      there are two versions produced; the first is  
15      dated in 1984 and the second to which I will refer  
16      is dated in 1988; that's the document at Tab E.

17                   And if you would turn first to the  
18      preface of the document, page one, the document  
19      indicates as follows:

20                            "This volume contains  
21                            information and advice for  
22                            Ministers on their duties and  
23                            responsibilities as Ministers  
24                            of the Crown. The Prime  
25                            Minister has asked that every

1                                   Minister should receive and  
2                                   be guided by this advice."

3                                   This is a document, of course,  
4                                   that is prepared by the Privy Council Office, the  
5                                   department of government having direct  
6                                   responsibility to support the Prime Minister.

7                                   I would ask that you turn to  
8                                   Chapter 5 of the document which is at page 45.  
9                                   And at page 45, Commissioner, you will see that  
10                                  the chapter is headed "Standards of Conduct" and  
11                                  under the heading, "High Expectations" the  
12                                  following statements are made:

13                                 "The fundamental principles  
14                                 applying to all public  
15                                 officers, and above all,  
16                                 Ministers, are long  
17                                 established. There is an  
18                                 obligation not simply to  
19                                 observe the law but to act  
20                                 both in official and personal  
21                                 capacities in a manner so  
22                                 scrupulous that it will bear  
23                                 the closest public scrutiny.  
24                                 Today ethical conduct is  
25                                 subject to more intense

1 public scrutiny than ever  
2 before. The public right of  
3 access to information reveals  
4 much more to be scrutinized  
5 across a wide-range of  
6 ministerial and government  
7 activities. In addition, the  
8 rules applying to ministerial  
9 conduct are becoming more and  
10 more detailed, complex and  
11 stricter than equivalent  
12 standards outside government.  
13 The appearance of unethical  
14 conduct of taking advantage  
15 of an official position or  
16 government facilities for  
17 personal convenience, of  
18 breaching a specific rule,  
19 perhaps inadvertently, any of  
20 these may affect the  
21 government's reputation for  
22 integrity and may lead to  
23 calls for a Minister's  
24 resignation even before the  
25 facts are established.

1 A practical test is to ask  
2 whether your conduct or that  
3 of your staff could cause any  
4 embarrassment or be difficult  
5 to justify to the public,  
6 should it be raised in  
7 Parliament or reported in the  
8 press.

9 The Prime Minister will hold  
10 Ministers personally  
11 accountable for acting in  
12 accordance with the spirit of  
13 the highest standards of  
14 conduct, as well as for  
15 complying with the letter of  
16 the government's rules."

17 Then further down the second page,  
18 Commissioner, under the heading V2, "Conflict of  
19 Interest" we read:

20 "You should ensure you are  
21 personally familiar and that  
22 you are and remain in  
23 compliance with the  
24 requirements of the Conflict  
25 of Interest and Post-



1                                   Employment Code for public  
2                                   officeholders."

3                                   COMMISSIONER OLIPHANT: In what  
4 year was this document produced, Mr. Vickery?

5                                   MR. VICKERY: Nineteen eighty-  
6 eight (1988), the version that's ---

7                                   COMMISSIONER OLIPHANT: Eighty-  
8 eight (88)

9                                   MR. VICKERY: Eighty-eight (88).

10                                  COMMISSIONER OLIPHANT: So that  
11 was during the tenure of the Mulroney government?

12                                  MR. VICKERY: That's correct, yes,  
13 and it is in fact a document prepared for that.

14                                  COMMISSIONER OLIPHANT: Did I read  
15 in your submission that the practice is that each  
16 incoming Prime Minister adds to or supplements the  
17 Guidance for Ministers?

18                                  MR. VICKERY: That certainly has  
19 been the case over the last some 20 years.

20                                  COMMISSIONER OLIPHANT: And that  
21 was the case with then Prime Minister Mulroney as  
22 well?

23                                  MR. VICKERY: That's correct.

24                                  Certainly the Code to which I  
25 previously referred you, tabled in 1985, was

1 explicitly said to be an attempt to further -- to  
2 make more rigorous the existing rules.

3 COMMISSIONER OLIPHANT: And that  
4 was a response to a study that had been done by  
5 Michael Starr and ---

6 MR. VICKERY: That's correct, yes.

7 COMMISSIONER OLIPHANT: Mitchell  
8 Sharp, I think.

9 MR. VICKERY: I believe that's  
10 correct. There's a reference in our materials to  
11 it specifically.

12 Yes, the 1983 Mitchell Sharp Task  
13 Force on Conflict of Interest led to Mr. Mulroney  
14 tabling the 1985 Code and the 1985 Code was both  
15 more detailed and more structured than any of its  
16 predecessors.

17 At paragraph 26 of our  
18 submissions, for example, we note that it  
19 contained enforcement mechanisms with regard to  
20 the post-employment regime. It had a much broader  
21 application covering almost all public  
22 officeholders. It was structured much like a  
23 statute, including language that compelled certain  
24 conduct. It contained nine principles which  
25 specifically delineated prohibited conduct and it

1 contained a failure to comply section which could  
2 -- stated that breach could result in discharge  
3 from office.

4 The Guidance to Ministers document  
5 in 1988, in our submission, was a document which  
6 built upon the 1985 Code of Conduct and was  
7 directed specifically to Ministers of the Crown.

8 Now, turning to the first part of  
9 our submissions, Commissioner, and I apologize for  
10 moving backwards through our submissions but it  
11 seemed to make the most sense at this point.

12 In the beginning, at paragraph 4  
13 of our submissions, we make reference to a number  
14 of statutory authorities which we say may have  
15 relevance to this Inquiry. The first three  
16 referred to are the *Parliament of Canada Act*, the  
17 *Financial Administration Act*, and of course, the  
18 *Criminal Code*. We say that all of these statutes  
19 create offences in regard to certain types of  
20 prohibited conduct, which broadly speaking, are in  
21 regard to the exchange of benefits for influence.

22 Taken together, it's our  
23 submission, that these statutes reflect society's  
24 disapproval of the particular types of conduct  
25 governed by them.

1                   In our submission, the statutes  
2                   utilize sanctions in an attempt to preserve the  
3                   integrity of our public institutions, including  
4                   Parliament itself.

5                   As I have previously submitted, of  
6                   course, this Inquiry is not mandated to make any  
7                   finding as to either criminal culpability or civil  
8                   liability. Nevertheless, it's our submission that  
9                   an understanding of what types of conduct are  
10                  subject to such sanctions may inform your view as  
11                  to whether particular conduct is appropriate in  
12                  the context of the Terms of Reference. This is a  
13                  point, of course, on which we part company with  
14                  Mr. Pratte and he will no doubt address Your  
15                  Honour.

16                  In our submission though it will  
17                  be of assistance to you in forming your opinions  
18                  following hearing evidence in this matter to  
19                  consider comments made by the courts in the course  
20                  of determining charges under the various statutes  
21                  to which we refer, particularly insofar as the  
22                  courts have spoken of the obligations placed  
23                  generally upon public officeholders.

24                  For example, we make  
25                  reference to the case of the *Queen and Hinchey*,

1       which is at Tab 1(a) of the material, and I would  
2       ask you to go to that in the casebook, the Brief  
3       of Authorities, yes, at Tab 1(a). It's a decision  
4       of the Supreme Court of Canada, Morgan Francis  
5       Hinchey and Her Majesty the Queen. I'd ask you to  
6       go to paragraph 13 of the decision, at page 15.

7                       The Court was dealing with a  
8       charge under section 121 of the *Criminal Code* in  
9       this case and speaking of the purpose of section  
10      121, specifically, beginning at paragraph 13, the  
11      Court indicated the following:

12                      "There is little doubt that  
13                      section 121 was enacted for  
14                      the important goal of  
15                      preserving the integrity of  
16                      government. This section of  
17                      the *Criminal Code* is one of  
18                      the myriad ways in which the  
19                      government seeks to achieve  
20                      this purpose. For example, a  
21                      glance at the surrounding  
22                      *Criminal Code*, sections 119  
23                      to 125 reveals different  
24                      methods by which there are  
25                      attempts to deter conduct by

1 persons dealing with or  
2 employed by government.  
3 Obviously, the *Criminal Code*  
4 is not the only method  
5 utilized. A variety of other  
6 statutes contain provisions  
7 which deal with corrupt or  
8 fraudulent practices while  
9 there are also conflict of  
10 interest and ethical  
11 guidelines to regulate  
12 behaviour.  
13 See for example the *Financial*  
14 *Administration Act*, sections  
15 80 and 81, the Conflict of  
16 Interest and Post-Employment  
17 Code for Public  
18 Officeholders, 1994, which is  
19 the further amendment that I  
20 spoke of to the 1985 Code."

21 Then continuing with paragraph 14  
22 of the decision:

23 "It is hardly necessary for  
24 me to expand on the  
25 importance of having a

1 government which demonstrates  
2 integrity. Suffice it to say  
3 that our democratic system  
4 would have great difficulty  
5 functioning efficiently if  
6 its integrity were as  
7 constantly in question.  
8 While this has not  
9 traditionally been a major  
10 problem in Canada, we are not  
11 immune to seeing officials  
12 fall from grace as a result  
13 of a violation of the  
14 important trust we place in  
15 their integrity. See for  
16 example the *Crown and Cooper*.  
17 I would merely add that the  
18 importance of preserving  
19 integrity in the government  
20 has arguably increased, given  
21 the need to maintain the  
22 public's confidence in  
23 government in an age where it  
24 continues to play an ever-  
25 increasing role in the

1                   quality of everyday people's  
2                   lives. As the U.S. Congress  
3                   has stated about its own  
4                   anti-corruption measures, the  
5                   necessity for maintaining  
6                   high ethical standards of  
7                   behaviour in the government  
8                   becomes greater as its  
9                   activities become more  
10                  complex and bring it into  
11                  closer and closer contact  
12                  with the private sector of  
13                  the nation's economy."

14                  Then continuing in paragraph 15:

15                  "It is quite accepted that  
16                  criminal law has a role to  
17                  play in this area.  
18                  Protecting the integrity of  
19                  government is crucial to the  
20                  proper functioning of a  
21                  democratic system. Criminal  
22                  law has a historic and well-  
23                  established role in helping  
24                  to preserve that integrity."

25                  And then, finally, paragraph 16:



1                   "Section 121 (1)(c) has a  
2                   special role to play in this  
3                   regard. This Court has  
4                   decided on several occasions  
5                   that the crucial purpose  
6                   encompassed by this section  
7                   is not merely to preserve the  
8                   integrity of government, but  
9                   to preserve the appearance of  
10                  the integrity as well."

11                  So we say that that statement of  
12                  principle, although it pertains directly to  
13                  Section 121 of the *Criminal Code* may be taken as  
14                  having a broader application in that it reflects  
15                  the view of society that the highest ethical  
16                  standards are required of public officeholders.

17                  Similarly, in the case of *Regina*  
18                  *and Bruneau*, the Court makes a similar comment.  
19                  It's at Tab 1(c), Mr. Commissioner, and I will ask  
20                  you to turn briefly to it, and specifically at  
21                  paragraph -- the last paragraph on page 103.

22                  And here we're dealing with a  
23                  charge under section 119 of the *Criminal Code*, and  
24                  Justice McClellan comments as follows, in the last  
25                  sentence of 103:

1                    "The responsibility of a  
2                    Member of Parliament to his  
3                    constituency and to the  
4                    nation requires a rigorous  
5                    standard of honesty and  
6                    behaviour, departure from  
7                    which should not be  
8                    tolerated. If in violation  
9                    of their responsibilities,  
10                   the services of Members of  
11                   Parliament can be bought,  
12                   then justice and freedom  
13                   cannot survive, nor can this  
14                   nation long survive as a  
15                   place where free men can  
16                   live."

17                   Again, as a statement of general  
18                   principle, we say that such comments can and  
19                   should assist you in determining the meaning of  
20                   the word "appropriate", as used in the Terms of  
21                   Reference.

22                   Mr. Commissioner, I would then  
23                   turn to paragraph 12 of our submissions, in which  
24                   we deal with the provisions of the Voluntary  
25                   Disclosure program of Canada Revenue Agency, and

1 with the effect of section -- and it's improperly  
2 cited I should say in our factum. It should read  
3 section 220 (3.1) of the *Income Tax Act*. It reads  
4 section 230 and that's simply a typographical  
5 error.

6 Section 220 (3.1) of the *Income*  
7 *Tax Act* which is reproduced in Annex A, permits  
8 the Minister of Revenue to waive penalties and  
9 interest in certain circumstances, and section 220  
10 is in fact the legislative underpinning upon which  
11 the Voluntary Disclosure program is based.

12 Section -- question, rather, 12 of  
13 the Terms of Reference calls upon the Commission  
14 to determine was there appropriate disclosure and  
15 reporting of the dealings and payments. In our  
16 submission, this question would necessarily  
17 encompass issues in regard to disclosure and  
18 reporting to Canada Revenue Agency, not for the  
19 purpose of determining any potential civil or  
20 criminal liability under that statute, but as part  
21 of the necessary context in determining whether  
22 the steps taken were appropriate, bearing in mind  
23 the universe of statutory and non-statutory rules,  
24 guidelines and prohibitions which govern the  
25 conduct of public officeholders and former public

1 office holders at the relevant times. So we say  
2 then that questions in relation to that matter are  
3 properly capable of informing your views as to  
4 whether the conduct concerned was appropriate.

5 That is the last point that I wish  
6 to make in-chief, and subject to any questions you  
7 may have at this point, those are the submissions  
8 of the Attorney General.

9 COMMISSIONER OLIPHANT: I have no  
10 questions. Thank you very much, Mr. Vickery.

11 MR. VICKERY: Thank you, Mr.  
12 Commissioner.

13 COMMISSIONER OLIPHANT: Mr. Auger,  
14 do you want a few minutes or are you ready to  
15 proceed? Anybody need a break? When I ask that  
16 question, I'm not suggesting that I need a break  
17 but -- nobody at the counsel table needs a break?  
18 Okay.

19 MR. AUGER: I'm ready to proceed.

20 COMMISSIONER OLIPHANT: Thank you.  
21 Be pleased to hear from you.

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

23 MR. AUGER: As a starting point,  
24 Mr. Commissioner, I too thank for Mr. Vickery for  
25 his excellent submissions because they

1 significantly reduce the submissions I had  
2 prepared for you, and the reason for that is that  
3 Mr. Schreiber joins the Attorney General today in  
4 its position before you in relation to the  
5 Standards of Conduct.

6 As you have seen in my written  
7 submissions, Mr. Schreiber joins the Attorney  
8 General in terms of the relevance and the extent  
9 to which you can be informed by the *Parliament of*  
10 *Canada Act*, the *Financial Administration Act*, the  
11 *Criminal Code*, the *Income Tax Act*, Canada Revenue  
12 Agency Voluntary Disclosure Program Rules, and the  
13 1985 Conflict of Interest Code.

14 And so I don't want to repeat  
15 what's in my written submissions or, indeed, what  
16 Mr. Vickery quite properly took you through but I  
17 do want to supplement a couple of points and the  
18 first one is in relation to the relevance of  
19 taxation standards. And the second point that I  
20 want to highlight as well that's contained in my  
21 written submissions, is in relation to the rules  
22 of the Quebec Bar.

23 And so the starting point is in  
24 terms of the taxation standards that may be  
25 relevant in this Inquiry, it's our submission that

1 many of the unanswered questions that you are  
2 mandated to explore can very well be answered by  
3 looking at taxation standards, and in particular  
4 the Voluntary Disclosure Program.

5 Obviously, it will depend on the  
6 facts as they unfold. But if, for example, Mr.  
7 Mulroney received cash in 1993 and 1994 from Mr.  
8 Schreiber there would have been a corresponding  
9 obligation to report all income to the Canada  
10 Revenue Agency, Revenue Canada at the time.

11 And so as Mr. Vickery pointed out,  
12 it's not a question of whether or not there's  
13 criminal or civil tax liability but in order to  
14 examine issues of credibility and the facts, the  
15 underlying facts about what happened, what was the  
16 purpose of receiving the cash, what was the nature  
17 of the contract.

18 And, again, it fully relates to  
19 your Terms of Reference, in terms of appropriate  
20 reporting, not whether or not there is tax evasion  
21 or other issues of liability.

22 But in our submission, looking at  
23 the voluntary disclosure program policy and indeed  
24 looking at any relevant documents where those  
25 facts presumably would be set out by Mr. Mulroney,

1 those issues could very well assist you in  
2 determining the facts.

3 Determining the facts about the  
4 nature of the discussions and the nature of the  
5 agreement, the nature of the services, because  
6 presumably, those facts are set out in a document  
7 and you know, as an experienced trial judge, that  
8 you can be informed and it would assist you to  
9 have documents to answer issues of credibility and  
10 to make ultimate findings of fact.

11 So that's the context as to why we  
12 submit it's important to look at taxation issues.  
13 But again, the focus is standards of conduct and  
14 Mr. Vickery took you through the provisions of the  
15 relevant *Income Tax Act* and the Voluntary  
16 Disclosure Program.

17 And the final point on taxation  
18 reporting relates to GST of course. And it's not  
19 fully set out in the submissions you've heard at  
20 this point but of course there's a corresponding  
21 GST legislation that you would want to have  
22 consideration of, if for example, there was  
23 federal tax issues that were triggered or indeed  
24 Quebec provincial sales tax provisions that would  
25 apply you would, of course, want to look at those

1 issues.

2 Again, in assessing the standards  
3 and the facts you would want to look at the  
4 legislation that applies to that particular  
5 component of taxation.

6 COMMISSIONER OLIPHANT: I think I  
7 know what you're referring to but I take it that  
8 what you are referring to is a potential  
9 obligation on Mr. Mulroney to charge GST on the  
10 fees?

11 MR. AUGER: Correct. So that  
12 would be another standard for you to consider in  
13 hearing all of the evidence, is the legislation  
14 that requires the collection and the remittance of  
15 GST, either by way of federal legislation or  
16 provincial legislation.

17 So it falls under the umbrella of  
18 standards of conduct in terms of taxation  
19 reporting and, in our submission, relates squarely  
20 to the question of whether or not there is  
21 appropriate reporting of any transaction.

22 But again, just to follow the  
23 question because it's a good one; it's not a  
24 question of whether or not it was the appropriate  
25 percentage of GST collected, it's not a question



1 or whether or not it was strict compliance for the  
2 purpose of concluding civil or criminal liability;  
3 it's a question of whether or not the facts have  
4 been demonstrated through the prism of those  
5 requirements.

6 So you can be informed by those  
7 requirements as long as you're not -- and it's  
8 clear from the outset, as you pointed out,  
9 embarking upon a criminal investigation so that  
10 the parties know what the rules are before we  
11 commence the hearings.

12 So it's a fine distinction and  
13 that's why we said in our materials that it's --  
14 the exercise is being informed by GST legislation,  
15 being informed by the *Income Tax Act* as opposed to  
16 making any ultimate conclusion about the nature of  
17 the GST itself.

18 Moving to the next point, we've  
19 touched on the written submission of -- possible  
20 and, again, all of this depends on the evidence as  
21 it unfolds, but the possible application of the  
22 Quebec Bar Rules. If Mr. Mulroney was a member of  
23 the Quebec Bar at the relevant times in question  
24 there may very well be some consideration to  
25 inform you about the Quebec Code of Ethics of

1 Advocates. And section .05.09 states:

2 "...and covers the issue of  
3 lawyers who hold public  
4 office".

5 And 3.05.09 states:

6 "That the advocate who  
7 occupies a public office must  
8 not (a) benefit from his  
9 office to obtain or attempt  
10 to obtain an advantage for  
11 himself or for a client when  
12 he knows or it is evident  
13 that such advantage is not in  
14 the public interest."

15 And 3.05.09(c) says that:

16 "The advocate who occupies a  
17 public office must not accept  
18 an advantage from any person  
19 when he knows or it is  
20 evident that advantage has  
21 been granted to him for the  
22 purpose of influencing his  
23 decision as a public  
24 employee."

25 Leaving aside the actual substance

1 of the rules or legislation, moving forward in the  
2 next part of my submissions I want to deal with  
3 some of the background and policy and law  
4 arguments that you might want to consider in  
5 making your determination of what standards of  
6 conduct apply.

7 Mr. Mulroney stated publicly, in  
8 November of 2007, that he wanted a full public  
9 inquiry to proceed and that he would participate  
10 fully with bells on.

11 We now see that in the written  
12 submissions filed by Mr. Mulroney that there  
13 should only be a very narrow focus. And the focus  
14 that Mr. Mulroney advocates is the outdated 1985  
15 Code of Conduct; that it should be limited to that  
16 document which is now some 23 years outdated.

17 In our submission, to adopt such a  
18 narrow approach would be contrary to the public  
19 interest and would not fulfill the purpose of this  
20 public inquiry.

21 As Your Honour well knows, the  
22 purpose of any public inquiry is to determine (a)  
23 the truth about what happened and (b) to make  
24 recommendations so that it can be prevented in the  
25 future and to assist the public going forward.

1                   COMMISSIONER OLIPHANT: But let's  
2 be clear on one thing, Mr. Auger. If I were  
3 sitting here in the capacity as a Superior Court  
4 Judge my jurisdiction would be inherent.

5                   Sitting as a Commissioner of an  
6 Inquiry, my jurisdiction is statutory and is  
7 limited by the instrument that created the  
8 Commission, namely the Order in Council.

9                   So whatever my innate sense of  
10 curiosity might be is totally irrelevant. I have  
11 to be guided by the jurisdiction given to me in  
12 the instrument creating the Commission and the  
13 points made in one of the cases put forward and I  
14 think it might be the *Stevens* case, that even  
15 where all counsel agree that a Commissioner has  
16 jurisdiction to deal with an issue, you can't vest  
17 jurisdiction by consent; it either exists or it  
18 doesn't.

19                  MR. AUGER: I agree entirely, Mr.  
20 Commissioner.

21                  But the point that I was making is  
22 that you certainly have jurisdiction under the  
23 *Inquiries Act* to (a) as a general purpose of the  
24 Inquiry is to -- it's a fact-finding mission.

25                  COMMISSIONER OLIPHANT: M'hm.

1 MR. AUGER: And two, to generate a  
2 report and make recommendations.

3 COMMISSIONER OLIPHANT: Oh  
4 absolutely.

5 MR. AUGER: And so that was the --  
6 I agree with your comments entirely, that your  
7 mandate and your jurisdiction is limited within  
8 the four corners of the Terms of Reference.

9 COMMISSIONER OLIPHANT: I must  
10 have misunderstood where you were going with your  
11 submission, Mr. Auger.

12 MR. AUGER: I was simply  
13 developing some of the background but it dovetails  
14 nicely with the next point, in terms of my  
15 comments about considering background.

16 And what we know about background  
17 is that Dr. Johnston is referred to specifically  
18 in the preamble of your Terms of Reference. And  
19 in my submission his comments provide useful  
20 background in making your determination today.

21 Mr. Mulroney's position expresses  
22 concern about you embarking upon an investigation  
23 of criminal or civil liability. And what's  
24 interesting about referring to Dr. Johnston's  
25 comments in this second report, the April report,

1 is that he was specifically asked, in reviewing  
2 the volumes of documents and evidence that he  
3 reviewed, as to whether or not there is any *prima*  
4 *facia* evidence of criminal activity. And Dr.  
5 Johnston, on page 4 of his second report concludes  
6 that the answer to that question is no.

7 So I point that out to simply make  
8 the point that by way of background Dr. Johnston's  
9 opinion, in his review of the material, is that  
10 there wasn't evidence of criminal activity and so  
11 that might be useful to you because in my  
12 submission the danger of you going off course in  
13 terms of the evidence or in terms of concerns  
14 about embarking upon an inappropriate  
15 investigation, the danger in that is remote.

16 Dr. Johnston also commented on  
17 page 4 of his report that counsel for Mr. Mulroney  
18 had submitted to Dr. Johnston that it might be  
19 useful to consider updating the standards and  
20 mechanisms that govern the conduct of holders of  
21 higher public office after they leave positions.

22 And so obviously as a practical  
23 matter, if this Inquiry is going to consider  
24 updating standards you would need to look at a  
25 myriad of standards that were in place at the time

1 and indeed that were subsequently replaced.

2 And so if the Commission is going  
3 to make recommendations about standards and  
4 whether or not they can be improved, in our  
5 submission, it would be necessary to look at not  
6 only a Code of Conduct from 23 years ago but to  
7 also look at its subsequent revisions and  
8 improvements through to and including materials  
9 that are generated to the present date.

10 COMMISSIONER OLIPHANT: Isn't that  
11 the purpose of Phase II of this Inquiry?

12 MR. AUGER: I think that's a  
13 component of Phase II, Mr. Commissioner, but in  
14 terms of today's exercise, I think before we get  
15 to Phase II you'll be hearing evidence, of course,  
16 and applying certain standards and we've been  
17 asked for submissions on standards that might be  
18 followed or applied or that may inform you through  
19 Phase I.

20 And it's our submission that it's  
21 something to keep in mind as we go through Phase I  
22 and indeed get into Phase II, is the whole issue  
23 of updating standards and whether or not it's  
24 necessary. It may or may not be, but presumably  
25 participants in Phase II would have the benefit of

1 (a) the evidence from Phase I and (b) the  
2 standards of conduct that are being applied in  
3 Phase I.

4 COMMISSIONER OLIPHANT: Okay.

5 MR. AUGER: And just to follow-up  
6 on your comment, as a final point on this issue,  
7 Dr. Johnston stated in his April report, on page  
8 4, and I quote:

9 "In my view, the issue of  
10 public concern in this matter  
11 remains compliance with the  
12 constraints on holders of  
13 high public office and the  
14 adequacy of the current  
15 constraints."

16 So again, in terms of the  
17 background and perhaps Dr. Johnston's work  
18 informing the Terms of Reference and therefore  
19 perhaps informing you in part, Dr. Johnston  
20 certainly had an interest in exploring the  
21 adequacy of current constraints and so that's why  
22 I follow through with the submission that it's not  
23 just in the public interest to look at the 1985  
24 Code of Ethics, it's got to be as a matter of  
25 practicalities and examination of as many



1 guidelines, rules, that might be relevant since  
2 that time.

3 Mr. Mulroney's materials also make  
4 the point that it would be unfair to apply  
5 standards that came into effect after the date of  
6 the conduct that you are examining.

7 And our position, as I've already  
8 alluded to, was that all of the rules and  
9 guidelines that we've referred to and we've  
10 adopted through Mr. Vickery's submissions really  
11 come down to one common principle. It's not just  
12 a question of looking at the date of a rule or  
13 guideline or looking at its title, all of these  
14 rules and guidelines come down to one common  
15 principle which is accountable and responsible  
16 government.

17 And our submission is that all of  
18 these principles of accountable and responsible  
19 government are not newly discovered, they are  
20 timeless principles that need to be considered in  
21 this Inquiry.

22 And this point was made recently,  
23 in September 2008, when the Federal Court  
24 dismissed Mr. Gagliano's judicial review of  
25 Justice Gomery's report on the Sponsorship

1 Inquiry.

2 As Your Honour, I expect knows,  
3 Mr. Gagliano had complained that Commissioner  
4 Gomery had applied standards of conduct that were  
5 not in effect at the time -- that were not in  
6 effect when Mr. Gagliano was a member -- sorry,  
7 was a minister of the department that had  
8 responsibility for the Sponsorship Program and at  
9 paragraph 128 -- I'm sorry, 129 of the Federal  
10 Court decision released in September of 2008 the  
11 Court said this:

12 "My second reason for  
13 rejecting the Applicant's  
14 argument based on the  
15 publication date of the  
16 documents is that the  
17 Commissioner states in an  
18 endnote on page 57 of his  
19 report that the principles  
20 contained in the document  
21 'apply to any era'. I agree  
22 completely. In other words,  
23 these principles of  
24 ministerial management do not  
25 change. They are timeless

1 and they exist and apply  
2 beyond the period during  
3 which the Applicant was  
4 Minister. That the document  
5 setting out the principles of  
6 ministerial and Cabinet  
7 responsibility were not  
8 published until after his  
9 term of minister is no shield  
10 to the Applicant. These  
11 principles were at the core  
12 of our system of government,  
13 responsible government, which  
14 is based on a responsibility  
15 and accountability of  
16 ministers. That these  
17 principles were the subject  
18 of publications in 2003 does  
19 not diminish in any way the  
20 duty incumbent on the  
21 Applicant to comply with them  
22 for they existed even during  
23 his reign as a minister a few  
24 years earlier.  
25 Referring back to the heading

1                   above, therefore, the  
2                   Commissioner did not violate  
3                   procedural fairness by  
4                   holding the Applicant  
5                   responsible on the basis of  
6                   government documents  
7                   published in 2003."

8                   So in our submission, as stated by  
9                   the Federal Court recently, it's not just a  
10                  question of referring to the dates of the conduct  
11                  in question and searching for a similar date on a  
12                  standard of conduct, at the end of the day all of  
13                  these rules and guidelines come down to one  
14                  principle which is responsible government.

15                  In our submission, that certainly  
16                  goes to the core of your Terms of Reference in  
17                  this Inquiry and that you can refer to any source  
18                  that may inform you about that principle.

19                  And, again, it's understood by all  
20                  parties that this is all under the umbrella that -  
21                  - and you pointed it out this morning that in no  
22                  way can you embark upon any form of criminal  
23                  investigation or any form of determination of  
24                  civil liability and so that's understood by all.

25                  But the issue is the application

1 of the general principle of responsible  
2 government, whether or not the conduct that you're  
3 examining or whether or not those guidelines and  
4 rules post-date the dealings between Mr. Mulroney  
5 and Mr. Schreiber.

6 Subject to any questions, Mr.  
7 Commissioner, those are the submissions I have at  
8 this point.

9 COMMISSIONER OLIPHANT: I have no  
10 questions. Thank you, Mr. Auger.

11 MR. AUGER: Thank you.

12 COMMISSIONER OLIPHANT: I think  
13 we'll take a 15-minute break at this point.

14 THE REGISTRAR: Order; all rise.

15 À l'ordre; veuillez vous lever.

16 --- Upon recessing at 10:16 a.m. /

17 L'audience est suspendue à 10h16

18 --- Upon resuming at 10:36 a.m. /

19 L'audience est reprise à 10h36

20 THE REGISTRAR: All rise. Please be  
21 seated.

22 COMMISSIONER OLIPHANT: Mr.  
23 Pratte, good morning.

24 ---SUBMISSION BY/REPRÉSENTATIONS PAR MR. PRATTE:

25 MR. PRATTE: Good morning, Mr.

1 Commissioner.

2 I'm going to try to cough my way  
3 through my submissions within the time allotted.

4 COMMISSIONER OLIPHANT: If you  
5 need a break just let me know, okay?

6 MR. PRATTE: If I'm on the floor  
7 that might be a good clue.

8 We have handed up to ---

9 COMMISSIONER OLIPHANT: It  
10 wouldn't be the first time I have floored counsel.

11 (LAUGHTER/RIRES)

12 MR. PRATTE: Mr. Commissioner, I  
13 think it might be easiest, because I intend to  
14 refer to a few excerpts of cases and statutes and  
15 there are two full cases that I might refer to,  
16 and if you have them just near you.

17 COMMISSIONER OLIPHANT: I do.

18 MR. PRATTE: They have been handed  
19 out to other counsel around nine this morning.

20 COMMISSIONER OLIPHANT: Okay. I'm  
21 familiar with the cases.

22 MR. PRATTE: Yes, and I'll come to  
23 them in due course and, obviously, Mr.  
24 Commissioner, I know you're familiar with them but  
25 it'll be important for the purposes of my

1       submissions to draw your particular attention to  
2       particular passages and as I do that I will be  
3       making some points that I hope will be of some  
4       assistance.

5                       Now, if I might start, Mr.  
6       Commissioner, with some introductory comments,  
7       really divided into two parts. One focuses on  
8       what I say is the narrow purpose of this Inquiry  
9       and then some remarks, general remarks, and I know  
10      that you're obviously familiar with some of the  
11      things I will say but this is a public hearing and  
12      in my respective submission it's important that  
13      Mr. Mulroney's position be understood, as well as  
14      I can make it understood.

15                      So my second point will have to do  
16      with the nature and impact of public inquiries in  
17      general by way of introduction, and then I'll move  
18      onto specific submissions amplifying what was in  
19      my written submissions but also responding as best  
20      I can to the submissions that were filed by others  
21      and were made to you today.

22                      So let me start, if I might, with  
23      my first major point, introductory point, which is  
24      what I say is the narrow purpose and relatively  
25      unique character of this Inquiry.

1                   This Inquiry, Mr. Commissioner, is  
2 really unlike most public inquiries which tend to  
3 examine systemic or institutional problems or the  
4 root causes of particular tragedies. And it  
5 doesn't involve either the misuse or abuse of  
6 public funds as such. It's focused on one  
7 individual, a former Prime Minister of Canada. It  
8 really is all about Mr. Mulroney and the  
9 allegations or questions raised about his conduct  
10 upon his leaving office more than 15 years ago.

11                   And I say, and I'll develop that a  
12 little later, but as a general approach that that  
13 is a reality that should guide the proper conduct  
14 and permissible scope of the Inquiry.

15                   Now, we know that the source and  
16 basis of the Inquiry or its genesis or the  
17 allegations made by Mr. Schreiber -- they are  
18 referred to in the preamble of your mandate.

19                   Mr. Auger has referred to Mr.  
20 Johnston in his conclusions in respect of possible  
21 criminal infractions and I'd like to make a  
22 comment about that.

23                   If the government had considered  
24 the allegations that were made by Mr. Schreiber  
25 enough to require their investigation as possible



1 criminal offences it would have been obliged, in  
2 my respectful submission, to remit them to the  
3 police for investigation in that context.

4 It certainly couldn't -- and I  
5 take both of my friends to agree with that  
6 proposition -- couldn't have invested a commission  
7 of inquiry as such to inquire for the purposes of  
8 discovering whether there was criminal activity.

9 So the government chose not, for  
10 whatever reason, but chose not to refer these  
11 matters to the police although we know -- and I'll  
12 refer to that later -- that earlier on some of the  
13 allegations anyway were investigated thoroughly,  
14 and I'll refer to that later.

15 Instead, we're left with what is  
16 or what has been called by Mr. Johnston and is  
17 referred to in your mandate, a focused Inquiry  
18 into specific matters of legitimate public  
19 interest. And in his view, and just by the bye at  
20 Tab 1 of page 2 of the Compendium you have the  
21 particular relevant excerpts from your mandate --  
22 in his view and I quote:

23 "The issue of public concern  
24 in this matter remains  
25 compliance with the

1 constraints, the constraints  
2 on the whole by public  
3 office."

4 The words used aren't compliance  
5 with the laws, or laws of general application, or  
6 applicable to all officeholders, high public  
7 officeholders, compliance with constraints.

8 Now the government, having  
9 determined that this was not a matter that  
10 required a criminal investigation still had,  
11 pursuant to Mr. Johnston's report, some questions  
12 that were left unanswered. And in essence I  
13 appreciate that the questions are more detailed  
14 than this but fundamentally I say, and I'll be  
15 submitting -- the fundamental questions is, what  
16 were the payments for and the payments that we  
17 know occurred, and did they violate the ethics  
18 code in force at the time? And if so, were they  
19 inappropriate in some sense.

20 Now that's my submission, and I  
21 say, fundamentally, that is the extent and the  
22 scope with reference to the relevant standards  
23 that you are called upon to determine.

24 I say this by way of introduction  
25 because I'll develop that, but that's really my

1 position. And I say therefore, in this context  
2 and in the circumstances of this matter, to so-  
3 called inform -- and I'll have specific  
4 submissions as to the vagaries of that term and  
5 the danger, slipshod way in which it's been used,  
6 to so-called inform the questions by consideration  
7 as to whether other crimes or statutory violations  
8 might have occurred would be tantamount, in any  
9 way you interpret that term, would be tantamount  
10 to conducting an improper and illegal inquiry.

11 I say, and I'll turn to that in  
12 the next few minutes, the only proper and  
13 legitimate views of the *Inquiries Act* and the  
14 unique circumstances of this case, focusing on one  
15 individual. We're not studying a systemic problem  
16 in the course of which incidental findings of  
17 misconduct have to be made.

18 COMMISSIONER OLIPHANT: This is  
19 not (off mic - 10:44:19)

20 MR. PRATTE: No.

21 Now let me turn then briefly to  
22 some further -- the second stage of my  
23 introductory remarks. Everyone agrees, Mr.  
24 Vickery made that point, that public inquiries  
25 cannot and are not civil or criminal trials. They

1 say that, in my respectful submission, but they do  
2 not draw the logical consequence that should  
3 follow. At paragraph 34 to which Mr. Vickery  
4 referred, I believe, and which is at Tab 2, page 7  
5 ---

6 COMMISSIONER OLIPHANT: Of what  
7 document?

8 MR. PRATTE: --- of my compendium  
9 and I didn't, Mr. Commissioner, put the whole of  
10 that decision in.

11 COMMISSIONER OLIPHANT: This is  
12 Justice Corey's ---

13 MR. PRATTE: It is, sir---

14 COMMISSIONER OLIPHANT: ---  
15 judgment on the Blood Inquiry?

16 MR. PRATTE: Yes.

17 COMMISSIONER OLIPHANT: Yeah.

18 MR. PRATTE: And there's one part  
19 of paragraph 34 referring to the fact at the  
20 beginning of the paragraph, these aren't criminal  
21 or civil actions but there's one sentence or two  
22 that, in my respectful submission, are critical.  
23 The fifth line, paragraph 34 -- well maybe I  
24 should start at the third line:

25 "The findings of the Commissioner

1 relating to that investigation are  
2 simply findings of fact and statements  
3 of opinion reached by the Commissioner  
4 at the end of the inquiry. They are  
5 unconnected, unconnected to a normal,  
6 legal criteria. They are based upon and  
7 flow from a procedure which is not bound  
8 by the evidentiary or procedural rules  
9 of a courtroom, there are no legal  
10 consequences..."

11 et cetera, et cetera.

12 The danger which, I will submit to  
13 you, Mr. Commissioner, is that whenever and in  
14 whatever way you have reference to a legal,  
15 criminal standard or other statutory standard, you  
16 are necessarily connecting facts to that standard,  
17 and either you apply it, which we know in law you  
18 cannot do, or the reference to it is so vague, in  
19 other words, if it's not that standard that you're  
20 really applying but you are informed by it in some  
21 general way, how could the person know, in 1993,  
22 what construction, that is not precisely what the  
23 statute says, but something that emerges from it  
24 and appears to you in 2009, was the applicable  
25 standard. And I -- one of the points I want to

1       make to you very forcefully, Mr. Commissioner, is  
2       that whilst the parties that have spoken before  
3       me, the Attorney General of Canada and Mr.  
4       Schreiber say, you can't apply those sections  
5       directly but you have reference to them from  
6       former review, they do not define what other  
7       standard, if it isn't the precise words of those  
8       provisions, what other standard would result from  
9       it. They make no such attempt. The closest we  
10      came to it was Mr. Auger saying, it all means  
11      responsible and accountable government. In my  
12      respectful submission, that is not helpful to you  
13      in these proceedings.

14                               Also under the same Tab 2, page  
15      12, Mr. Commissioner, at paragraph 57, you will  
16      recall that Justice Corey for the Court, summed up  
17      the principles that should govern inquiries under  
18      Part 1 of the *Inquiries Act*. And I won't read you  
19      sub a) and, yeah, sub a) i) and ii), but iii,  
20      which has to do with -- these aren't criminal  
21      trials, and so on, you've seen that, you know  
22      that, but the Court then says, at sub-paragraph a)  
23      III), Roman numeral III. It follows from sub i) and  
24      sub ii) above,

25                               "That the Commissioner should endeavour

1 to avoid setting out conclusions that  
2 are couched in the specific language of  
3 criminal culpability and civil  
4 liability, otherwise the public  
5 perception may be that specific findings  
6 of criminal and civil liability have  
7 been made."

8 There was also something that was  
9 picked up in the Starr case, as you'll recall, by  
10 Justice Lamer -- Chief Justice Lamer, I believe as  
11 he then may have been, I can't recall actually  
12 because it may be 1990, I think he may have just  
13 become Chief Justice.

14 Then the last point that I'd like  
15 to make before embarking on my detailed  
16 submissions, has to do with the impact of  
17 inquiries on reputations and I know that you are  
18 extremely sensitive to it, sir, but as I say,  
19 you've invited us to make those submissions in  
20 public and I have a few points to make briefly.

21 At paragraph 55, and I need not  
22 read it, you know it I'm sure extremely well, of  
23 the Blood Inquiry case, and again it's at Tab 2,  
24 page 12, the Supreme Court noted, and I quote the  
25 last two sentences of paragraph -- that paragraph

1           55:

2                           "For most a good reputation  
3                           is the most highly prized  
4                           attribute. It follows that  
5                           it is essential that  
6                           procedural fairness be  
7                           demonstrated in the hearings  
8                           of the Commission."

9                           It also follows, of course Mr.  
10                          Commissioner, as was said in the Stevens case,  
11                          that one of the key components of procedural  
12                          fairness is you ought to know at the time your  
13                          conduct occurred, what standard might apply to it,  
14                          whether that standard is not outdated or not, as  
15                          Mr. Auger puts it.

16                          I also refer, I'm not sure Mr.  
17                          Commissioner, whether I did in my written submissions  
18                          but at Tab 3 you have excerpts from the judgment of the  
19                          Federal Court in the *Pelletier v Canada*, that is the  
20                          challenge to certain findings against Mr. Pelletier  
21                          emerging from the Gomery Commission, and I will simply  
22                          note for your reference paragraphs 54 and 59, those are  
23                          found at Tab 3, page 16 and 17 of my compendium where  
24                          the Court in that case found that because of the impact  
25                          on reputations, a high standard procedural fairness was



1 required because and I note, sir, that that was in  
2 the context of a systemic inquiry.

3 COMMISSIONER OLIPHANT: One of  
4 which you are eminently familiar.

5 MR. PRATTE: Yes and I should --  
6 for fairness, so you know, that decision is under  
7 appeal but at the moment that is the applicable  
8 judgment.

9 Now, recognizing the potential  
10 impact in the Blood Inquiry case, the Krever  
11 Inquiry case, the Supreme Court noted that it  
12 might be helpful for Commissioners, in their  
13 reports, to note that they are not making findings  
14 of criminal and civil liability, that's paragraph  
15 54. But I still say, Mr. Commissioner, that let  
16 us not take the view that a mere statement of that  
17 kind does away with the dangers to reputation  
18 because the reality is that a judgment from a  
19 public commission of inquiry criticizing, perhaps  
20 rightly, sometimes incorrectly as so far the  
21 report of the Gomery Commission has been judged by  
22 the courts but a judgment is extraordinarily  
23 damaging -- in the context of this Inquiry. And I  
24 say this for a number of reasons that, in my  
25 respectful submissions, it is worthwhile reminding

1 ourselves of.

2 First of all, public inquiries,  
3 though they may not be civil and criminal trials,  
4 receive typically an amount of publicity that is  
5 unmatched. For one thing because they're  
6 proceedings as these are and will be, are  
7 televised. Criminals and civil trials of course  
8 are not in this country. Maybe they should be,  
9 but they're not.

10 And that means that not only  
11 people can watch that on CPAC or whatever, not  
12 that I'm advertising their services, but clips are  
13 played on the news; things we're not used to.

14 The second point is and those are  
15 practical realities that I should like you to keep  
16 in mind when we're talking about the fairness and  
17 the scope of this Inquiry.

18 Secondly, practically public  
19 inquiries often function as an alternative access  
20 to information process for the media. Documents  
21 typically are put in front of the public at some  
22 point or other. The media has access to them, as  
23 of course they should.

24 Most of the time those documents  
25 are not documents they could have obtained through

1 the normal channels of access to information  
2 because they have been subpoenaed. And some of  
3 those documents may be well addressed in the  
4 press, well before a witness ever addresses them,  
5 if they address them at all.

6 And so again that is a danger or a  
7 unique feature of public inquiries.

8 Thirdly, there are, if we're  
9 talking about reality, expectations, at least in  
10 some of the public, that some wrongdoing must be  
11 found; otherwise why would you create a commission  
12 of inquiry. They're rare. They can cost a fair  
13 amount of money and that gives, from a public's  
14 point of view, a bit of a momentum, an inertia,  
15 that may be difficult to resist.

16 And I know you're aware of that  
17 danger and I think the public needs to realize  
18 that that is the reality.

19 And fourthly, that is a special  
20 danger when you have a special individual -- one  
21 person, whoever that is, but in particular when we  
22 have a former prime minister. It's sort of the  
23 perfect storm and they're inherent dangers that we  
24 then must need to be aware, as I know you are.

25 Now I've been talking about

1       reputations. We all have reputations that we want  
2       to protect. But I say that lawyers, judges, we  
3       all want to be treated fairly but none of us, that  
4       is the reality, will either be treated as nicely  
5       or as harshly as Ministers of the Crown or a  
6       former prime minister.

7                    Their reputation, whoever they  
8       are, not only talking about my client, has a  
9       purchase on the public mind and emotions that most  
10      of us anyway who aren't public officials don't  
11      have.

12                   Now Mr. Mulroney, like most  
13      politicians, has his supporters and detractors but  
14      he has some achievements that at one point when  
15      we're farther down the road, I shall seek to  
16      remind the Commission of and the public of, that  
17      even his harshest critics would not challenge and  
18      they are part of the reputation interest here.

19                   Whether domestically with free-  
20      trade or the fight against apartheid, those are  
21      important considerations when we talk about the  
22      reality of the interest here.

23                   And also, Mr. Commissioner, I say  
24      that when we look at the reality of the situation,  
25      my friend Mr. Auger referred to the background of

1           this Commission of Inquiry.

2                                 We should remind ourselves that  
3 despite some 20 years of a series of  
4 investigations, some administrative, internal  
5 governmental and some criminal that had lasted  
6 close to a decade by the RCMP, there is not, there  
7 is not an iota of reliable evidence that has ever  
8 passed muster that Mr. Mulroney ever engaged in  
9 anything resembling criminal conduct or anything  
10 else illegal.

11                                Nevertheless, he's called upon  
12 more than 15 years after he left office and a few  
13 months shy of his 70<sup>th</sup> birthday to explain in  
14 conduct in relation to some unspecified  
15 allegations by Mr. Schreiber, and justify and I'll  
16 come to our subject for today, whether his conduct  
17 was appropriate.

18                                Now Mr. Schreiber's counsel and  
19 the Attorney General of Canada referred to a  
20 myriad legal, including criminal standards, as  
21 benchmark that should inform your conclusions.  
22 Though the need to concede, as I said before, that  
23 these cannot be applied directly; well I say they  
24 can't be applied indirectly either. And their  
25 submission -- I say involved because there is no

1 way to apply them or refer to them without  
2 effectively applying them -- They are wrong  
3 because we said the genesis of this Inquiry shows  
4 it was not the intention of this Inquiry and also  
5 wrong because in principle and in law they cannot  
6 do -- you cannot do what they would like you to  
7 do.

8 I can now move quickly through  
9 some of the principles that have been alluded to  
10 by other counsel, and I've mentioned myself and  
11 you have, sir. You know this is not a criminal or  
12 a civil trial. We know we're limited by your  
13 mandate. You yourself referred to the *Dixon* case  
14 and you know that based on the Blood Inquiry case,  
15 you have to be extremely careful to draft any  
16 conclusion of so-called misconduct that could not  
17 be interpreted as being effectively either finding  
18 of civil liability and/or criminal liability.

19 Now I want to make a point, I told  
20 you this was a fairly unique Inquiry because it  
21 was so focussed on one individual and you said  
22 yes, it's certainly unlike the Blood Inquiry and I  
23 want to develop that point for a few minutes.

24 It's true if one looks at all the  
25 jurisprudence, and particularly the Blood Inquiry

1 case but others as well, that the Supreme Court in  
2 particular has recognized some latitude in terms  
3 of findings of misconduct depending on what the  
4 primary focus of the Inquiry was.

5 So in the Blood Inquiry, for  
6 example, the Krever Inquiry, the Supreme Court  
7 concluded that since the main purpose of the  
8 Inquiry was really to try to figure out what was  
9 wrong with the administrative systems and the  
10 blood supply system, there had to be some latitude  
11 in making some factual findings of certain  
12 individuals that could be interpreted as being  
13 critical of their behaviour.

14 The Supreme Court noted at paragraph  
15 37 in particular in respect to this point, and I'll  
16 just read that. You don't need to refer to it as  
17 I'm sure you know it, but the Supreme Court noted,  
18 Justice Corey:

19 "Justice Krever recognised  
20 from the outset that his  
21 inquiry was not to be  
22 directed at investigating  
23 this conduct of individuals  
24 but rather was to be focused  
25 upon ensuring that there

1                               would be a safe, efficient,  
2                               effective blood system in  
3                               Canada."

4                               COMMISSIONER OLIPHANT: I think  
5                               you're (off microphone) this inquiry to any other,  
6                               probably the closest and you can respond to this  
7                               is the Gouge Inquiry, where the conduct of Doctor  
8                               Smith, the pathologist, was the subject of the  
9                               investigation.

10                              MR. PRATTE: Well, that is  
11                              possibly an apt comparison, so that is going to  
12                              take you as well to other precedents, the *Nelles*  
13                              and *Star* cases.

14                              COMMISSIONER OLIPHANT: Sure.

15                              MR. PRATTE: And I want to spend a  
16                              bit of time on those.

17                              COMMISSIONER OLIPHANT: Fine.

18                              MR. PRATTE: Let me say at the  
19                              outset too just to make sure that those cases  
20                              don't -- aren't thought irrelevant because they  
21                              were indirectly in the *Nelles* case, directly in  
22                              the *Starr* case, in the context of provincial  
23                              inquiries that were found therefore to be limited  
24                              in respect of -- invading the federal power of the  
25                              criminal law. But both those cases in general,



1           and then I'll turn to them, that clearly we're  
2           saying the problem with those inquiries in the  
3           *Nelles* case if the Commissioner were to name names  
4           it's coming close to a criminal investigation and  
5           a finding of guilt even if their exact words  
6           aren't used, which will be within the federal  
7           power; therefore, they're going to interpret his  
8           mandate more narrowly than Justice Grange had  
9           asked. You remember there was a stated case. And  
10          in *Starr* the Terms of Reference, as we'll see, had  
11          various questions in a way quite similar to yours,  
12          what were the dealings between Miss Starr, a named  
13          person, and various officials of the government,  
14          and then a paraphrase almost identical to one  
15          section of the Criminal Code -- I think it was  
16          Section 119 or 121, I can't recall.

17                           And the Supreme Court -- the Court  
18          of Appeal of Ontario in the *Nelles* case, in the  
19          Supreme Court in the *Starr* case said well, you  
20          can't go that far because that would be  
21          effectively taking upon yourself a criminal  
22          investigation that's federal. But underlying the  
23          concern and explicitly so in both those cases, the  
24          courts said, that's because not only you can't be  
25          in the business of prosecuting crimes because

1       you're a province but there are protections in  
2       those processes which are contained in the  
3       Criminal Code and now in the Charter of course and  
4       them too.

5                   And so I say that from that  
6       perspective and that rationale those cases are  
7       readily applicable to your situation. The Federal  
8       Government could not, under the guise of a public  
9       inquiry, say that look, we are the master of  
10      criminal -- of criminal law 9227 -- 9127 of the  
11      now *Constitution Act 1867* so we could instead of  
12      doing this by way of a normal criminal  
13      investigation and the Criminal Code and the  
14      productions of the Charter, we'll just have a  
15      public inquiry. No, no. The fundamental  
16      protections, including the right of the accused  
17      ultimately or the person who is the object of it  
18      to remain silent is a key component, which the  
19      Supreme Court noted in *Starr*.

20                   So, Mr. Commissioner, as I go  
21      through these I've handed you up the two cases  
22      with highlighted passages. It probably wouldn't  
23      be a useful use of your time and not even mine to  
24      go through one by one, but I say and partly in  
25      answer to your question that the court there made

1           it clear in *Nelles* that naming names in the  
2           context that could then be interpreted as meaning  
3           someone has committed a crime is just verboten.  
4           And that was made even more explicit in the *Starr*  
5           case. And as I say the *Starr* case is very close  
6           in fact to this because a) they were asked to  
7           investigate various dealings and then decide  
8           whether or not effectively section, as Justice  
9           Lamer found, section 121 of the Criminal Code had  
10          been violated. And he has a submission that I  
11          would like to leave you with in respect to that,  
12          Mr. Commissioner.

13                                In your Terms of Reference of  
14          course, there isn't a paraphrase equivalent to the  
15          Criminal Code or the *Financial Administration Act*  
16          or the *Parliament of Canada Act* or the *Income Tax*  
17          *Act* unlike *Starr*. Why is there not? Because  
18          those would have been all illegal. They would  
19          have been trying to do under the guise of a  
20          commission of inquiry, criminal or quasi-criminal  
21          inquiries.

22                                But what the Attorney General of  
23          Canada and Mr. Schreiber are doing is indirectly  
24          trying to incorporate into your Terms of Reference  
25          those provisions and that is what makes them and

1           those submissions obnoxious to the principles of  
2           the jurisprudence. They are incorporating by  
3           reference by inviting you to have your views  
4           informed by those provisions into the Terms of  
5           Reference and that is precisely what the Supreme  
6           Court said in *Starr* could not be done.

7                           COMMISSIONER OLIPHANT: What can  
8           be done?

9                           MR. PRATTE: Yes.

10                          COMMISSIONER OLIPHANT: Okay.

11                          MR. PRATTE: And I'm turning to  
12           that now.

13                          The rubric is Application of these  
14           Principles to this Inquiry. As someone has noted  
15           -- I think it was Mr. Vickery -- everyone agrees,  
16           and Mr. Mulroney agrees, that the standards, when  
17           we look at Question 13, that are in the purview of  
18           this Commission that is a non-legal standard is  
19           the 1985 Conflict of Interest and Post-Employment  
20           Code. So I say the answer to Question 13 is  
21           readily apparent and consistent with the  
22           jurisprudence and principles I've articulated.

23                          Your mandate itself makes some  
24           reference to ethical guidelines, and I'll refer to  
25           that a bit more precisely in a moment, but that is

1 the standard that you can apply and I forgot to  
2 mention, Mr. Commissioner, that in the Krever  
3 Commission, paragraph 62, and you might turn it  
4 up, sir. It's at Tab 2, paragraph 14 -- page 14.

5 COMMISSIONER OLIPHANT: Yeah, I'm  
6 there.

7 MR. PRATTE: The Supreme Court in  
8 that case when it was summarising the findings of  
9 the Federal Court of Appeal, I think at page 19 --  
10 paragraph 19 that's not there but noted the  
11 Federal Court of Appeal talked about a myriad of  
12 standards, moral, scientific, ethical and legal  
13 referring to what the Court of Appeal said. But  
14 when the Supreme Court comes at paragraph 62 to  
15 refer to what is acceptable, it says:  
16 "As the Court of Appeal pointed out, there are  
17 many different types of momentous standards,  
18 including moral, scientific, and professional  
19 ethical. To state that a person failed to do  
20 something that should have been done does not  
21 necessarily mean that they breached the criminal  
22 standard."

23 Well, if you're only referring to  
24 such standards that are not statutory or criminal,  
25 that's correct. And what I say that you're

1 mandated to do and can do is refer to a non-legal  
2 standard that's right there in front of us that  
3 govern conduct at that time. Those are the 1985  
4 Code that Mr. Vickery referred to at some length.

5 Now, we all agree on this. Where  
6 we disagree is whether you can go beyond that at  
7 looking at the environment of other provisions,  
8 all legal provisions, except for the Barreau du  
9 Québec I think invoked by Mr. Auger, and I'll have  
10 something to say about that.

11 But let me then divide and  
12 approach this in two ways: One saying that  
13 clearly, and if my friends agree with that, as I  
14 think they must, that you can't apply those legal  
15 standards directly and then I move to the issue of  
16 whether or not you can be informed by them.

17 In my -- in the Compendium, sir, I  
18 have, just for your reference, we can go through  
19 quickly -- outlined various provisions of most, if  
20 not all of the statutes my friends have referred  
21 to.

22 Tab 7, is a *Parliament of Canada*  
23 *Act*, Section 41(2) clearly makes that a violation  
24 of that section an offence.

25 The *Financial Administration Act*,

1 Section 80, again a violation of relevant  
2 provisions of the *Financial Administration Act*  
3 become an indictable offence. Section 81 follows.

4 The *Criminal Code of Canada*  
5 obviously self-evidently Section 121 is an  
6 offence.

7 The *Income Tax Act*, violation of  
8 the *Income Tax Act*, Section 239, that's an  
9 offence.

10 And in my -- Mr. Auger didn't  
11 refer to it directly, as I recall, orally but in  
12 his written submissions he says you should have  
13 regard for Export Control Legislation; that's Tab  
14 11. Again, a violation of the Export Control  
15 Legislation is an offence.

16 So looking at those, I'd say none  
17 of those you could apply directly because they  
18 would be in the nature -- it would be in the  
19 nature of a criminal investigation and findings of  
20 liability.

21 Now, what about the Barreau du  
22 Québec? First of all, surely those aren't just  
23 focused on high public officeholders. In any  
24 event, I say, Mr. Commissioner, that the federal  
25 government, in its Terms of Reference cannot

1 invest you with the jurisdiction, which is  
2 exclusively that of the province, which is to  
3 govern the professions.

4 If the Barreau du Québec wishes to  
5 investigate Mr. Mulroney's conduct in 1993, it and  
6 only it can do it.

7 There was reference in the written  
8 materials of the Attorney General to Standing  
9 Orders of Canada, there was no oral reference made  
10 to this today. Again though, in my respectful  
11 submissions, you could not seek to ascertain  
12 whether there was a violation of those Orders, and  
13 I'm talking about directly now, because -- and I  
14 haven't put this in, but as you will know from the  
15 *Vaid* case of the Supreme Court of Canada 2005, 1  
16 SCR 667 -- *Vaid, V-A-I-D*, a violation of Standing  
17 Order, in particular 23 that I think my friend,  
18 Mr. Vickery, referred to, is an issue of privilege  
19 and that is exclusively for the House to resolve  
20 and beyond the purview of the courts.

21 So I say that you can't apply them  
22 directly, but I also say that the Terms of  
23 Reference themselves and that explains why they  
24 were not referred to explicitly, certainly in your  
25 Terms of Reference, but the Terms of Reference



1       also give you at least some guidance and perhaps  
2       they weren't drafted always with the greatest  
3       felicity, but there's some guidance that ethical  
4       rules are really what they had in mind. By the  
5       use of the term "constraint" as opposed to  
6       "compliance with the laws" for example, in the  
7       preamble, but also Questions 13 and 14 that refer  
8       to ethical rules and guidelines. There isn't a  
9       word really in your Terms of Reference that would  
10      suggest that you can have any reference to  
11      statutes.

12                               And talk about inform, by  
13      suggesting that you should have resort or  
14      reference to ethical and guidelines in Questions  
15      13 and 14, I say that that is what we -- they had  
16      in mind when they asked you whether or not  
17      particular conduct was appropriate.

18                               And when you look more broadly  
19      beyond this phase, Mr. Commissioner, to Phase II,  
20      the recommendations you're asked to make is  
21      whether or not the ethical guidelines that were in  
22      place in 1985 were appropriate or are appropriate  
23      today. They're not asking you to suggest  
24      amendments to the *Parliament of Canada Act*, the  
25      *Income Tax Act*, or anything else; we're talking

1 about ethical rules.

2 So that is some indication. I  
3 don't say that it's absolute. It's some  
4 indication that that's what the government had in  
5 mind.

6 So let me turn finally then, to --  
7 if we start with the proposition that I say is  
8 unavoidable, that you can't apply those legal  
9 standards that have been referred to you directly,  
10 can you somehow be informed by them and still be  
11 within the four corners of the law in your  
12 statute.

13 The Oxford Dictionary defines the  
14 word or the term "informed" as meaning:

15 "To give form or formative  
16 principle to, hence to stamp,  
17 impress and imbue with some  
18 specific quality and  
19 attribute."

20 Now, in our context -- let me say  
21 that again.

22 "To give form or formative  
23 principle to, hence to stamp,  
24 impress or imbue with some  
25 specific quality or

1 attribute."

2 Now, in our context this would  
3 mean that a particular section of, say, the  
4 *Parliament of Canada Act* or the *Income Tax Act*  
5 would somehow imbue your definition of the word  
6 "appropriate" with a specific quality or  
7 attribute.

8 What else could that mean, except  
9 that if the statutory provision were not  
10 respected, you would find that the conduct issue  
11 was not appropriate. What else could that mean?  
12 And if the statutory provision is respected, that  
13 it would be appropriate. Isn't that doing  
14 indirectly while you can't do it directly. And if  
15 you were to say, well I'm not -- as I was saying  
16 before -- applying that language directly, I'm not  
17 really applying it, but I'm just informed by some  
18 looser understanding of it. Pray tell, how was  
19 Mr. Mulroney to know exactly how you'd come to  
20 that understanding in 1993?

21 There's a lot of ambiguity and  
22 equivocation with that word "informed". Mr. Auger  
23 said at one point in his submission, "Standards  
24 that may be applied" -- may be applied -- "refer  
25 to inform" -- so it's in a string like that.

1       Either you apply them, you refer to, or you're  
2       informed by them. He said that orally.

3                   Don't be seduced by that sloppy  
4       language, Mr. Commissioner. He said it's a fine  
5       distinction, I say it would be sophistry.

6                   And if you cannot have reference  
7       to those individually, i.e. be informed indirectly  
8       somehow, in some murky way, can you then, as Mr.  
9       Auger seems to have suggested, kind of mix them  
10      all together and draw some general principles?

11                   Well, I say you can't do that  
12      either. You can't just come up with some alchemy  
13      of putting these standards -- specific standards  
14      together and then somehow arrive at something  
15      which is no longer legal and acceptable, in my  
16      respectful submission.

17                   As you have at least intimated  
18      today, Mr. Commissioner, ---

19                   COMMISSIONER OLIPHANT: Go ahead.

20                   MR. PRATTE: As you at least  
21      intimated today, one of the principles at work  
22      here is that the standard that you'll apply ought  
23      to have been applicable at the time, and I say  
24      obviously, also objectively identifiable at the  
25      time -- objectively identifiable.

1                   One of the problems in the *Stevens*  
2 case, and Mr. Vickery read this, is that the  
3 standard that appeared to have been applied was  
4 not known at the time because, in that context, a  
5 conflict of interest definition had not been made  
6 explicit, and Commissioner Parker then came up  
7 with the definition.

8                   Well, in a way, that's what you're  
9 being invited to do now, to the extent that you're  
10 asked to inform your view of what "appropriate"  
11 means not only by the standards extent at the time  
12 but by some reference to a variety of statutory  
13 standards.

14                   You're asked to come up with some  
15 as yet, unarticulated, other standard than those  
16 precise standards, and as I noted at the outset,  
17 none of them have said, to us this means this.  
18 And this is not an issue, and I want to be very  
19 clear about this, because Mr. Vickery commenced  
20 his submissions by saying, "We're doing this at  
21 the conceptual level and we don't know exactly  
22 what the facts will reveal and what standard will  
23 apply".

24                   Let us be very careful with that  
25 submission. It is a different thing to identify

1 the range of the possible standards that can apply  
2 and then see whether they do apply when the facts  
3 emerge, than defining a new standard based on that  
4 universe of possible standards. And effectively,  
5 what you are being asked to do is to define a new  
6 standard, because all the other ones that have  
7 been proposed as a possible range of standards,  
8 you cannot apply directly at the end of the day.

9 So you've asked me, Commissioner,  
10 what can you do? You can do, in my respectful  
11 submission, what this inquiry was designed to do,  
12 not apply laws of general application.

13 And I note, in passing, that Mr.  
14 Vickery said, well, the standards at issue in 1985  
15 asked more than just compliance with the law.

16 So let us leave to these agencies,  
17 and specific mechanisms designed for that purpose,  
18 the enforcement of the general laws, whether it be  
19 the Parliament of Canada, the *Criminal Code*, the  
20 *Income Tax Act*, whether it's in its civil aspects  
21 or criminal aspects; let us leave those to the  
22 institutions and with the safeguards for those,  
23 and let us deal with what, in my respectful  
24 submission, was the intent of your mandate and the  
25 only thing that could be done in your mandate and

1 deal with those ethical guidelines.

2 Whether Mr. Auger and Mr.  
3 Schreiber consider them to be outdated is a matter  
4 for Phase 2 as you noted. Whether they applied to  
5 the circumstances of our case in 1993-94, that is  
6 the object of Phase One.

7 Finally, sir, I say this, that Mr.  
8 Mulronev is entitled to know now what standard  
9 will be considered, and he's entitled to know, as  
10 a public inquiry, neither a civil nor a criminal  
11 trial, that he will not be subjected to, or his  
12 behaviour will not be assessed directly,  
13 indirectly or in any other way, to legal norms  
14 that had other processes for their investigation  
15 and enforcement. Subject to your questions, Mr.  
16 Commissioner, those are my submissions.

17 COMMISSIONER OLIPHANT: I have a  
18 couple of questions, please.

19 Dealing with the issue of  
20 reputation and damage to reputation and taking  
21 care, I'm very familiar with that and I've assured  
22 you before that I'm sensitive to that fact, but  
23 the finding of facts do not necessarily imply  
24 damage to a reputation if the conduct itself has  
25 damaged the individual's reputation. Would you

1 agree or disagree with that proposition?

2 MR. PRATTE: Well, if I understand  
3 you correctly ---

4 COMMISSIONER OLIPHANT: And I'm  
5 not suggesting that's the case.

6 MR. PRATTE: No, no, no, I---

7 COMMISSIONER OLIPHANT: It's a  
8 hypothetical ---

9 MR. PRATTE: Mr. Commissioner, I  
10 don't read anything into your future intentions --  
11 -

12 COMMISSIONER OLIPHANT: I know  
13 that, but others might, so I want to make it  
14 clear.

15 MR. PRATTE: Fair enough. Of  
16 course Commissions of Inquiry, should the evidence  
17 and applicable standards when the facts are known  
18 warrants it, may make findings that will be  
19 damaging to a reputation. You are not precluded  
20 from making any findings ---

21 COMMISSIONER OLIPHANT: Based on  
22 the conduct itself.

23 MR. PRATTE: I totally agree with  
24 that.

25 COMMISSIONER OLIPHANT: Okay.



1 MR. PRATTE: And obviously, Mr.  
2 Commissioner, were you to find at the end of the  
3 day that Mr. -- that my client violated some  
4 provision of the Code, that may have an impact on  
5 his reputation but if you find that that's what  
6 you have to do, that's what you have to do. I'll  
7 have submission in due course ---

8 COMMISSIONER OLIPHANT: Of course.

9 MR. PRATTE: --- as to how that,  
10 whether that's so and how that should be made.

11 COMMISSIONER OLIPHANT: And making  
12 that kind of finding depends upon the evidence  
13 that's led.

14 MR. PRATTE: Indeed.

15 COMMISSIONER OLIPHANT: Okay.

16 Second question, dealing with the  
17 standards, and I've heard what you've had to say,  
18 don't be seduced into doing something indirectly  
19 which you can't do directly. Mr. Mulroney -- and  
20 I agree with that submission, is entitled to know  
21 what the standard was at the time. Let me ask you  
22 this: what if I were to say fine, I'll go along  
23 with that submission and have a look at what Mr.  
24 Mulroney understood to be the standard at the  
25 time, because he's articulated it.

1                   In the letter of September 9<sup>th</sup> of  
2                   1985 to all colleagues, he said that the  
3                   government had to be guided by the highest  
4                   standards of conduct. I take it the government  
5                   means members of the government. The highest  
6                   standards of conduct; that's a standard. In the  
7                   post -- in the Guidance for Ministers that was  
8                   published in 1988, which was during Prime Minister  
9                   Mulroney's tenure, it says this:

10                                 "There is an obligation not simply  
11                                 to observe the law but to act both  
12                                 in official and personal capacities  
13                                 in a manner so scrupulous that it  
14                                 will bear the closest public  
15                                 scrutiny."

16                                 That's a standard. Can I adopt  
17                                 those as being the standards to be applied here,  
18                                 when determining whether conduct is appropriate or  
19                                 not? Those are standards that he set, presumably.

20                                 MR. PRATTE: Well, let's be  
21                                 careful with the word "standards", Mr.  
22                                 Commissioner. Those were said in the context of,  
23                                 in particular in the letter, of introducing the  
24                                 Code.

25                                 COMMISSIONER OLIPHANT: M'hm.

1                   And he repeated it in the House.

2                   MR. PRATTE: Right. And so I say  
3 to you that the articulation of what that means,  
4 i.e., what are the highest standards, and what is  
5 in the Code is more than what the law required, as  
6 we will come to see. The articulation of what  
7 that meant, those codes were to define and you'll  
8 recall in section 7, that Mr. Vickery referred to,  
9 there are some general principles and then we have  
10 an articulation of those principles for the  
11 guidance of the ministers.

12                   So again in my respectful  
13 submission, and I'll submit to you at the end,  
14 certainly, what the Prime Minister of the day was  
15 saying is, we should be held to very high  
16 standards, and that is why I am now revising and  
17 upping the ante with those -- the *Code of Ethical*  
18 *Behaviour* and *Post Employment Code* which was  
19 significantly more, as you know, than what existed  
20 before.

21                   The raison d'être of these  
22 operative provisions was to make it clear what  
23 that high standards, or higher standards meant.  
24 Otherwise, it is so vague that it would have been  
25 unfair to those to who those will apply to be just

1           subjected to some general injunction of, we should  
2           be as scrupulously whatever in our behaviour, and  
3           indeed, in the Guide to Ministers, I believe it's  
4           section 5, in respect of really what we're  
5           concerned about, it refers directly back to that  
6           means you should comply with the Code, and that's  
7           at page -- section 5 --

8                           COMMISSIONER OLIPHANT: Chapter 5,  
9           page 4 ---

10                          MR. PRATTE: Thank you, sir. Yes,  
11           if you go to -- it's helpfully set out in Mr.  
12           Vickery's book of documents at Tab E, page 45.  
13           Then the reference to high standards and then V  
14           (2), page 46 -- or 5(2) -- is the articulation, in  
15           my respectful submission, of what that should  
16           mean.

17                          So conflict of interest and gifts  
18           then refers to Conflict of Interest and Post-  
19           Employment Code which is really what we're dealing  
20           about. The others, I don't believe, security and  
21           so on, would apply.

22                          So we have to be careful, Mr.  
23           Commissioner, that yes, these expressions of  
24           principles are important. I don't say they're  
25           not. But in this context what they meant at the

1 time is articulated much more precisely and thus  
2 much more fairly so that people then knew what you  
3 meant and you do not now have to divine.

4 And as the Commissioner in the  
5 *Parker* case did, to a degree, and that was --  
6 caused the problem -- you don't have to divine  
7 what the articulation for the government of the  
8 day meant. Now, ---

9 COMMISSIONER OLIPHANT: So that  
10 complying with the Code, the specific Code  
11 provisions, I think -- I want to try and just and  
12 understand you -- compliance with the Code  
13 provisions meets the highest possible standard of  
14 conduct?

15 MR. PRATTE: As it was understood  
16 at the time.

17 COMMISSIONER OLIPHANT: Yeah.

18 MR. PRATTE: Now, Phase II of  
19 course ---

20 COMMISSIONER OLIPHANT: Well  
21 that's ---

22 MR. PRATTE: --- you'll have  
23 expert evidence as to whether or not that should  
24 be -- but we're not going to have expert evidence,  
25 I'm assuming, in Phase I to tell us that that

1 ain't good enough because that's Phase II.

2 Phase II might -- then we might  
3 say, well, in 2009-2010 I'm told and the public  
4 has spoken, experts have spoken, you've understood  
5 -- you've taken all that in, and then you say,  
6 "Well, that may have been an appropriate  
7 articulation in 1988 or '85 as the government  
8 understood it at the time, but in this day and age  
9 a different articulation should obtain and that is  
10 what you're faced too about -- is about.

11 So I hope that is of some  
12 assistance.

13 COMMISSIONER OLIPHANT: Thank you.  
14 It is, thank you.

15 Mr. Wolson?

16 MR. PRATTE: I went so overtime.

17 COMMISSIONER OLIPHANT: I wasn't  
18 keeping track. I've given up doing that.

19 MR. WOLSON: Mr. Commissioner, we  
20 have made available to counsel the opportunity to  
21 make a reply. But before we do that perhaps we  
22 could take 15 minutes now.

23 COMMISSIONER OLIPHANT: Sure.  
24 Okay.

25 THE REGISTRAR: All rise; veuillez

1       vous lever.

2       --- Upon recessing at 11:34 a.m. /

3             L'audience est suspendue à 11h34

4       --- Upon resuming at 11:53 a.m. /

5             L'audience est reprise à 11h53

6                             THE REGISTRAR: All rise. Please  
7       be seated.

8       ---SUBMISSIONS BY THE COMMISSIONER/REPRÉSENTATIONS  
9       PAR LE COMMISSAIRE:

10                            COMMISSIONER OLIPHANT: I just  
11       need a moment here, counsel. Excuse me just for a  
12       sec.

13                            (SHORT PAUSE/COURTE PAUSE)

14                            Mr. Vickery, I just need a moment,  
15       if you'd like to take a seat for a moment, okay?

16                            First of all, I have an  
17       announcement to make with respect to the mandate  
18       of the Inquiry.

19                            As many of you in the room are  
20       aware, we had hoped to commence the factual part  
21       of this Inquiry on February the 9<sup>th</sup>. As a result  
22       of some technological problems that arose  
23       respecting the disclosure of documents, it was  
24       impossible for the Commission to begin that part  
25       of its work, as hoped, on February the 9<sup>th</sup>, with

1 the result that I authorized a change in the date  
2 for commencement to March the 30<sup>th</sup> of this year.

3 Needless to say, the time between  
4 the commencement date of March 30<sup>th</sup> and the date  
5 upon which the Commission was to complete its  
6 work, namely June the 12<sup>th</sup> of this year, became  
7 impossibly short.

8 I therefore sought from the  
9 government an extension of the mandate of the  
10 Inquiry and I have been advised that the extension  
11 I sought has been granted and the Inquiry's  
12 mandate will now terminate on December 31 of 2009,  
13 rather than June the 12<sup>th</sup>.

14 That does not change any of the  
15 dates, really, in the tentative schedule, it has  
16 been said, although there may be some changes on  
17 it with respect to Phase II. I'm hopeful that the  
18 work of the Commission, except for the writing of  
19 the report, will be completed prior to the end of  
20 June and the rest of the time will be taken up  
21 with my writing of the report.

22 That's my hope and we'll just see  
23 where things take us. But the important part of  
24 the announcement is that the mandate has been  
25 extended to December 31 rather than as originally



1 set.

2 Now, having considered, counsel,  
3 the submissions that have been made and I realize  
4 that the replies have not been given, there are  
5 some issues upon which I would seek your  
6 assistance.

7 And I say now, I'll raise the  
8 issues and I will leave it to you to determine  
9 whether you want to deal with the issues now, this  
10 afternoon, tomorrow, or in writing, depending on  
11 how difficult a problem I pose for you.

12 But the first issue upon which I  
13 would seek your views, and I mean each of your  
14 views -- I welcome them from all of you -- has to  
15 do with the Code of Conduct of 1985.

16 And specifically, and I raise this  
17 issue, Mr. Pratte, because you say the Code of  
18 Conduct is what governs here and you made your  
19 submission respecting other statutes, et cetera.

20 But section 5(3) of that Code says  
21 that:

22 "Conforming to this Code does  
23 not absolve public  
24 officeholders from conforming  
25 to any specific references to

1                   conduct contained in the  
2                   statutes governing their  
3                   particular department or  
4                   office and to the relevant  
5                   provisions of legislation of  
6                   more general application,  
7                   such as the *Criminal Code*,  
8                   the *Canadian Human Rights*  
9                   *Act*, the *Privacy Act*, the  
10                  *Financial Administration Act*,  
11                  and the *Public Service*  
12                  *Employment Act*."

13                   And the reason that I seek your  
14                  views, and I mean counsel's views, arises  
15                  particularly as a result of the words:

16                               "...does not absolve public  
17                               officeholders from conforming  
18                               to any specific references to  
19                               conduct contained in the  
20                               statutes..."

21                   Et cetera. That's the first  
22                  issue, okay?

23                   The second issue is this; the  
24                  Terms of Reference include the three questions to  
25                  which reference has been made today and I have a

1 submission before me that basically, Question 13  
2 is really the important question, that is:

3 "Where there are ethical  
4 rules or guidelines which  
5 related to these business and  
6 financial dealings and where  
7 they followed."

8 That's a submission that I had.

9 If that is so why then have Questions 11 and 12?  
10 If everything is subsumed by Question 13; that is,  
11 whether guidelines in place at the time were  
12 followed why do we have a specific question  
13 dealing with the appropriateness of the business  
14 and financial dealings considering the position of  
15 Mr. Mulroney as a current or former Prime Minister  
16 and; secondly, where there are appropriate  
17 disclosure and reporting of the dealings and  
18 payments?

19 So I'd ask for your assistance on  
20 that issue as well, so we have the two.

21 Now, I leave it to you, counsel,  
22 to decide how you wish to deal with the two issues  
23 that I have just raised. And I think what I will  
24 do is go in the order of proceedings, Mr. Vickery  
25 I'd like to hear from you first or would counsel

1           like to meet quickly amongst yourselves to discuss  
2           it?

3                           MR. VICKERY:  It would be  
4           preferable if counsel could meet briefly just to  
5           discuss whether any of us require further time.

6                           COMMISSIONER OLIPHANT:  Okay.

7                           MR. VICKERY:  I would simply like  
8           to know the position of my friends.

9                           COMMISSIONER OLIPHANT:  All right.  
10           Now, as I said, I'm open to your  
11           handling it any way you wish, now, this afternoon,  
12           tomorrow or in writing.  Why don't you just take a  
13           minute -- I won't adjourn -- and discuss this.

14                           MR. VICKERY:  Thank you.

15                           (SHORT PAUSE/COURTE PAUSE)

16                           MR. WOLSON:  Mr. Commissioner, if  
17           we could stand this matter down for about five  
18           minutes and reconvene.  I know that Mr. Pratte has  
19           some difficulties with tomorrow but there may be a  
20           solution and if you'll just give us 10 minutes?

21                           COMMISSIONER OLIPHANT:  I'll give  
22           you 10 and I might give you 15 because as you were  
23           conferring I just thought of another issue, and  
24           that is this.

25                           In terms of the appropriateness

1 and the standard by which the conduct should be  
2 judged, what are your views, counsel, of this  
3 suggestion that an objective standard be applied  
4 by my asking this question: What would the fully  
5 informed, fair-minded reasonable Canadian feel  
6 about the conduct in question and whether or not  
7 it was appropriate?

8 We'll adjourn for 10 minutes and  
9 if you need 15 that's fine with me as well.

10 THE REGISTRAR: Order; all rise.  
11 À l'ordre; veuillez vous lever.

12 --- Upon recessing at 12:03 p.m. /

13 L'audience est suspendue à 12h03

14 --- Upon resuming at 12:10 p.m. /

15 L'audience est reprise à 12h10

16 THE REGISTRAR: All rise. Please be  
17 seated.

18 COMMISSIONER OLIPHANT: Mr. Wolson?

19 MR. WOLSON: Mr. Commissioner,  
20 counsel have had the opportunity to discuss the matter  
21 and they would like to make brief submissions today but  
22 then take some time to reflect and prepare written  
23 submissions which they would undertake to get to you by  
24 the 26<sup>th</sup> of January.

25 COMMISSIONER OLIPHANT: All right.

1                   Is it proposed that everybody will  
2                   submit at the same time or is there going to be an  
3                   order of submitting of -- reply?

4                   THE REGISTRAR: Your microphone.

5                   COMMISSIONER OLIPHANT: Is it  
6                   proposed that everybody will simply submit his own  
7                   respective submissions or will there be an order  
8                   of submitting that will allow for replies? That's  
9                   the problem, of course, with written submissions  
10                  and it's done both ways as counsel know.

11                  MR. WOLSON: Please.

12                  MR. PRATTE: The questions that  
13                  the Commissioner has posed are obviously important  
14                  and I think it would be helpful, at least to us  
15                  and I'm assuming -- I'm hoping for the Commission  
16                  as well -- if there were a short period of time to  
17                  allow for reply if any is needed in writing. So  
18                  if they are filed by the 26<sup>th</sup> or if the  
19                  Commissioner would prefer the 23<sup>rd</sup> we could live  
20                  with that and then have a few days to allow for a  
21                  reply if they are required in writing.

22                  COMMISSIONER OLIPHANT: That's  
23                  fine; that's fine with me.

24                  MR. PRATTE: If that's okay, sir.

25                  COMMISSIONER OLIPHANT: You are

1 agreeable too, other counsel?

2 Yes, everybody agrees with that.

3 Thanks.

4 So get your -- it doesn't matter  
5 to me the 23<sup>rd</sup> or the 26<sup>th</sup>. I mean, I'm a captive  
6 audience here so whether it's the 23<sup>rd</sup> or the 26<sup>th</sup>  
7 matters not but get your submissions in on the  
8 date that's agreed upon. It was the 26<sup>th</sup>. I see  
9 no reason to change that and then you'll be  
10 allowed -- what do you need, a week to respond if  
11 a response is necessary?

12 MR. PRATTE: Yes, that would be  
13 fine with us.

14 COMMISSIONER OLIPHANT: Okay.

15 MR. WOLSON: It would be  
16 preferable, Mr. Commissioner, if we kept the 26<sup>th</sup>  
17 but had the -- that's a Monday -- and had the  
18 responses by the end of that week.

19 COMMISSIONER OLIPHANT: That would  
20 be the 30<sup>th</sup>.

21 MR. VICKERY: I wonder if we might  
22 -- follow a Monday. As it happens I'm before the  
23 court in British Columbia all week the week of the  
24 26<sup>th</sup>. So if I had that following week I could take  
25 a look at ---

1                   COMMISSIONER OLIPHANT: The way  
2 things have been going out there you might be  
3 digging yourself out of the snow to get back. I  
4 just spent two weeks there to get away from the  
5 snow in Ottawa. What a mistake.

6                   (LAUGHTER/RIRES)

7                   MR. WOLSON: If that then ---

8                   COMMISSIONER OLIPHANT: That's  
9 fine. We'll give it the week until the following  
10 -- the Monday following the 26<sup>th</sup>, okay.

11                   All right, responses, Mr. Vickery?

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

13                   MR. VICKERY: Thank you, Mr.  
14 Commissioner.

15                   I would begin by briefly replying  
16 to some of the submissions of my friend, Mr.  
17 Pratte in particular. And first, as a point of  
18 clarification, Mr. Pratte spoke of the 1985 Code  
19 as being the only source of standards of conduct  
20 but I take it from his remarks that he would  
21 concede that the 1988 Guidance to Ministers  
22 document is also capable of being directly  
23 applied. I'm assuming that that is the case and  
24 I'm sure my friend will advise me if it's not.

25                   Bearing that in mind, I would



1 submit that when one looks particularly at the  
2 standards of conduct as referenced at Chapter 5 of  
3 the Guidance to Ministers document which is at Tab  
4 E as I previously indicated, it is apparent as you  
5 yourself mentioned, that the obligation is not  
6 simply to observe the law but to act both in  
7 official and personal capacities in a manner so  
8 scrupulous that it will bear the closest public  
9 scrutiny and it follows from that formulation of  
10 the basic principle.

11 And my submission that to  
12 determine whether any particular conduct met the  
13 standard it is essential that one understand fully  
14 the infrastructure of laws which need be met to  
15 meet the first bar as it were, which is simply  
16 observing the law.

17 And because one must observe the  
18 law at a minimum one must necessarily consider  
19 what laws impact potentially on the day-to-day  
20 conduct of the public officeholders involved and  
21 in that sense I say that the various laws to which  
22 we've referred you will inform your views as to  
23 whether the conduct is appropriate in the meaning  
24 of the Terms of Reference.

25 With regard to my friend, Mr.

1 Pratte's, submission that one must look to the  
2 operative provisions of the Code rather than to  
3 the statements of principle, I would submit that  
4 it's important to note, again in the Guidance to  
5 Ministers document and at the top of page 46, that  
6 it is said that the Prime Minister will hold  
7 Ministers personally accountable for acting in  
8 accordance with the spirit of the highest  
9 standards of conduct, as well as for complying  
10 with the letter of the government's rules.

11 And I say that certainly if the  
12 Prime Minister is to hold Ministers personally  
13 accountable to that level then it follows that he  
14 himself would be accountable on the same basis,  
15 and that compliance with the spirit of the  
16 principles does indeed form the base standard of  
17 conduct to which you would have reference in  
18 reaching your opinions.

19 And further, I would submit on  
20 this point that it is indeed illogical to submit  
21 that an obligation would only exist if detailed in  
22 a specific operative section, given that we are by  
23 definition dealing with a non-legal standard.

24 The documents concerned, the Code  
25 and the Guidance to Ministers, are documents

1           tabled with the House of Commons by the Prime  
2           Minister and as we have said, they are not the  
3           subject of any voting mechanism, nor do they  
4           purport to be statutory in their nature; they are  
5           intended to be binding upon Minister's of the  
6           Crown and they contain various enforcement  
7           mechanisms. The primary mechanism of which, of  
8           course, is discharge from office as a Minister of  
9           the Crown.

10                                 In my submission, your formulation  
11           of the relevant standard of conduct must take  
12           account of the various guiding principles as a  
13           baseline and that it is not the case that a  
14           parsing of any particular operative guideline is  
15           sufficient to meet the standard of conduct set out  
16           in either the Code or the Guidance to Ministers.

17                                 Dealing with the questions that  
18           you have put to counsel, Commissioner, my initial  
19           response with regard to the first question, which  
20           deals with the effect of section 5(3) is that this  
21           is a further indication of the fact that the Code  
22           of Conduct is not intended to represent a fully  
23           comprehensive scheme for governing the conduct of  
24           public officeholders. Indeed, by its terms it  
25           specifically contemplates the existence of an

1 infrastructure, an underlying infrastructure of  
2 statutory authority which is also directly  
3 applicable to conduct.

4 So that to understand the universe  
5 of restrictions and constraints, to use my  
6 friend's word, within which a public officeholder  
7 conducts his business on a day-to-day basis one  
8 must have regard, both to the statutory  
9 infrastructure and the various non-legal standards  
10 concerned.

11 Dealing with your second question  
12 as to the significance of the Terms of Reference,  
13 having both questions, 11 and 12 and Question 13;  
14 my submission is that the questions in fact do  
15 operate separately.

16 And if we go to the Terms of  
17 Reference, it's my submission that just as a  
18 matter of grammatical construction, Questions 11  
19 and 12 operate at a broader level -- if I may put  
20 it that way -- than Question 13.

21 Question 11 asks whether the  
22 business and financial dealings were appropriate  
23 considering the position of Mr. Mulroney.

24 Question 12 then asks if there was  
25 appropriate disclosure and reporting, in a general

1 way. And then Question 13 asks whether there were  
2 in fact ethical rules or guidelines which related  
3 to these dealings.

4 In my submission, it would be --  
5 it's not the case, but it would be entirely  
6 possible that a dealing or reporting might be  
7 inappropriate even if there were no written rule  
8 or guideline that addressed the issue because of  
9 the basic legal principles that operate with  
10 regard to the conduct of public officeholders.  
11 And I've taken you to at least two of the cases  
12 that speak of the highest level of ethical conduct  
13 being required of public officeholders.

14 Were we in a position where we did  
15 not have the Code of Conduct those principles  
16 would remain operative and the question put by  
17 Questions 11 and 12 as to whether the conduct or  
18 the reporting was appropriate would still remain  
19 capable of being answered.

20 So that 13 zeros in on one aspect,  
21 in my submission, of the question and is not in  
22 any way intended to subsume all issues with regard  
23 to the appropriateness of the conduct concerned.

24 With regard to the final question  
25 that you posed, Commissioner, in my submission it

1 will require some significant review to determine  
2 whether the type of reasonable -- a person  
3 standard that you suggest is compatible with the  
4 nature of the mandate, it's something, quite  
5 frankly, that we would want to consider further.

6 In a way it way -- and this is an  
7 initial impression -- it may beg the question in  
8 the sense that the question would then arise,  
9 "Well, what does it mean to be fully informed?" so  
10 that the underlying debate, for example, between  
11 Mr. Pratte and myself, may then have to be  
12 resolved in order to determine what it is to be  
13 fully informed.

14 So it may not advance the  
15 situation, but if there is a certain  
16 attractiveness to the proposition that we would  
17 like to consider.

18 COMMISSIONER OLIPHANT: The  
19 problem, of course, with the proposal is that  
20 we're dealing with terms that are relative terms.

21 MR. VICKERY: Yes.

22 COMMISSIONER OLIPHANT: Fully  
23 informed compared to what; fair minded compared to  
24 whom, you know.

25 MR. VICKERY: Well, that's correct

1 and that's why I certainly have some hesitation  
2 about that.

3 COMMISSIONER OLIPHANT: Take the  
4 time you need.

5 MR. VICKERY: Thank you. Those  
6 are all my submissions on that point.

7 COMMISSIONER OLIPHANT: Thank you.  
8 Mr. Auger?

9 --- REPLY BY/RÉPLIQUE PAR MR. AUGER:

10 MR. AUGER: Thank you, Mr.  
11 Commissioner.

12 I just want to make one brief  
13 reply to Mr. Pratte's submissions.

14 There was a theme in his argument  
15 to the effect that -- or a question posed: How  
16 could a person know in 1993 or 1994 what the  
17 standards were?

18 And indeed, Mr. Pratte  
19 articulated: How could Mr. Mulroney have known  
20 what the standards were?

21 And I think -- by way of reply  
22 Your Honour had touched on this in one of your  
23 questions, in referring to the document -- I  
24 believe, the letter of Prime Minister Brian  
25 Mulroney, September 9<sup>th</sup>, 1985 at Tab D.

1                   The first paragraph of that  
2 document says the following:

3                   "It is a great principle of  
4 public administration -- I  
5 would even say an imperative,  
6 that to function effectively  
7 the government and the public  
8 service of a democracy must  
9 have the trust and confidence  
10 of the public they serve."

11                   So at the risk of repeating the  
12 point that I was initially making, at the end of  
13 the day the point is that the standards are an  
14 examination of good conduct and accountable  
15 conduct, and that's why I submit to you that the  
16 decision of the Federal Court and indeed the  
17 comments of Justice Gomery, that these principles  
18 of good government and accountable government  
19 apply to any era.

20                   And I apologize that the decision  
21 isn't filed. I'll file this with your counsel now  
22 and I'll certainly undertake to provide a copy to  
23 my friends.

24                   But in my submission that's  
25 exactly the reason why the Federal Court, in



1           September of 2008, adopted Justice Gomery's  
2           comments that you have to look at the overall  
3           principles and they go full circle back to 1985  
4           where Mr. Mulroney, in his own words, advanced  
5           those principles in the letter that you have  
6           before you.

7                           The other related point that I  
8           want to make, and it's frankly quite plain and  
9           simple, is that when you look at the Terms of  
10          Reference, the drafters of the -- two points; one,  
11          the drafters of the Terms of Reference did not, in  
12          any way, articulate a limitation to the 1985 Code  
13          of Conduct and; secondly, paragraph (1), the  
14          drafters of your Terms of Reference say:

15                           "Direct the Commissioner to  
16                           perform his duties without  
17                           expressing any conclusion or  
18                           recommendation regarding a civil  
19                           or criminal liability of any  
20                           person or organization."

21                           So the point is, paragraph (1) is  
22          contained in your Terms of Reference because in my  
23          submission, the drafters of the Terms of Reference  
24          anticipate that you may very well refer to, or be  
25          informed by the legislation, the rules and the

1 guidelines that the Attorney General and Mr.  
2 Schreiber today encourage you to consider.

3 That submission is consistent with  
4 what the Supreme Court of Canada said in the  
5 Krever -- I'm sorry, the Commission of Inquiry --  
6 Justice Krever's Commission of Inquiry in the  
7 Blood system said, because you had asked Mr.  
8 Pratte, "What can you do?"

9 And as you know from reading that  
10 decision, paragraph 52 talks about -- the first  
11 sentence is: "What then can Commissioners include  
12 in their reports?" and it goes on. I don't  
13 propose to read it because you're familiar with  
14 it, but there are two points. One is the Supreme  
15 Court of Canada says and cautions, I submit,  
16 against using language that does not duplicate the  
17 wording of the Code, and avoid making evaluations  
18 of findings that might be interpreted as  
19 expressing civil liability.

20 And the reason the Supreme Court  
21 of Canada says that, in my submission, is because  
22 the Supreme Court is acknowledging full well that  
23 a Commissioner like yourself a) is entitled to,  
24 and may very well fully refer to and be informed  
25 by, the *Income Tax Act*, the *Criminal Code* and the

1 various pieces of rules, regulations and  
2 guidelines that we've submitted today may apply.

3 And so in my submission that's the  
4 very purpose of that law. It's not to say ignore  
5 the legislation but to impose a safeguard because  
6 at the end of the day, obviously, there is an  
7 obligation to ensure procedural safeguards and  
8 fairness.

9 And then finally, Mr.  
10 Commissioner, in terms of the three new questions  
11 posed, I'm going to ask for your permission to  
12 defer the response to Questions 2 and 3 in the  
13 written submissions, because I'd like to consult  
14 with Mr. Greenspan and Mr. Schreiber about those  
15 questions.

16 But I can tell you in terms of  
17 Question 1, on the issue of section 5.3 of the  
18 1985 Code, my initial reaction is to adopt the  
19 submission of Mr. Vickery in that it's entirely  
20 consistent with the submissions you've heard  
21 today, that the other legislation that you're  
22 being asked to be informed by, is indeed subsumed  
23 in the 1985 Code that Mr. Mulroney himself submits  
24 you can adopt, or be informed by.

25 Thank you very much.

1                   COMMISSIONER OLIPHANT: Thank you,  
2 Mr. Auger.

3                   Mr. Pratte?

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

5                   MR. PRATTE: Thank you, sir.

6                   Let me first reply to the  
7 submissions of Messrs. Vickery and Auger, in  
8 answer to my own submissions, and then I'll deal  
9 briefly with the three questions that you asked  
10 and some of the comments that have been made by my  
11 friends in respect to that.

12                   The first point my friend Mr.  
13 Vickery made was that the 1985 Code was not all  
14 that was relevant. He referred to the Guidance to  
15 the Ministers but, in my respectful submission,  
16 sir, the guide to the Ministers refers back to the  
17 Code for dictating what Ministers really are bound  
18 by. The issue for example of the highest public  
19 scrutiny is also included in the Code.

20                   And I think reference was made as  
21 well, and this to a degree slips into one of your  
22 questions -- well, he seemed to be making -- I  
23 think he said obviously public scrutiny means  
24 reference to the infrastructure, the legal  
25 infrastructure that's out there.

1                   And I say, and I come back -- I  
2                   don't want to repeat in any detail, sir, but any  
3                   such reference indirectly is an attempt to import  
4                   into your mandate compliance with those statutes.

5                   And let me anticipate very  
6                   briefly. You also referred us to a provision or  
7                   to the provision that said that the compliance  
8                   with these Guidelines was not -- did not absolve  
9                   any Minister of complying with a long list of  
10                  other statutes.

11                  With the greatest of respect, Mr.  
12                  Commissioner, of course I may have more to say in  
13                  writing, but all that's saying is just because you  
14                  comply with the Guidelines does not afford a  
15                  defence to a criminal offence or to any other  
16                  statutes that's out there. It cannot be taken to  
17                  mean that the Prime Minister would then decide  
18                  whether or not one of his Ministers complied with  
19                  any provision of the *Criminal Code* or any other  
20                  statute.

21                  As I said at the outset, the Prime  
22                  Minister and the government might decide that  
23                  there's some concerns here and refer the matter to  
24                  the police. That's how you would deal with a  
25                  Minister who you might suspect didn't conform with

1           these other generally applicable provisions.

2                           Now my friend, Mr. Vickery, in his  
3           second point said, "Well, you can't just refer to  
4           the operative provisions". He's the one who told  
5           you that the Code was actually drafted like a  
6           statute, in his opening submissions, as indeed it  
7           is. Now, I don't say that there's some doubt as  
8           to how the operative provisions work. The  
9           principles may not be of assistance to you, but it  
10          is crystal clear, in my respectful submission,  
11          that the intention was to provide guidance to  
12          Ministers.

13                           The principles are set out as they  
14          might be in a statute, by way of preamble.  
15          Oftentimes we see that the purpose of the statute,  
16          section 1 of the statute is thus and so -- but  
17          ultimately, the Court and this Commission, in my  
18          respectful submission, is to interpret the  
19          intentions and the provisions by reference to the  
20          operative provisions.

21                           You may decide, as I alluded to  
22          earlier, that those operative provisions in Phase  
23          II are just not enough to comply with the  
24          objectives, and it is, in my respectful  
25          submission, an incorrect submission to say that

1           because they are not statutory standards the Code  
2           cannot be interpreted in a similar way.

3                           It doesn't become more loosy-  
4           goosy. The rules of the Law Society of Upper  
5           Canada, for example, or any bar or the rules that  
6           are not strictly laws must be interpreted by a  
7           reference to what they actually require rather  
8           than some loosy-goosy general principle.

9                           I think I may have addressed this  
10          -- he referred -- I think it's section 5(3)(i),  
11          the section that you referred to, Mr.  
12          Commissioner, in your first -- in one of the  
13          questions of the Code. He said, "Well, that's a  
14          further indication that you can go more broadly  
15          than simply the Code itself" and I've addressed  
16          that point. I just want to say though, sir, that  
17          he said -- well, Mr. Pratte keeps keeps referring  
18          to constraints or to limit the universe of things  
19          we can look at and exclude legal standards. That  
20          word is in your mandate, constraints. I didn't  
21          make it up.

22                           For Mr. Auger he was saying that  
23          -- he said one of my themes appeared to be that  
24          only the Guidelines can abide, and he was trying  
25          to persuade you that the public trust is a much

1 broader issue. The government of the day as such  
2 governments have from time to time, have tried to  
3 address that issue by, in the case of Mr.  
4 Mulroney, providing for those Guidelines. That is  
5 the articulation of what public trust means.

6 And going beyond that and trying  
7 to assess what this means, that most general of  
8 terms could mean to you or to me or to other  
9 people in 2009 and what were meant in 1993, beyond  
10 that in my respectful submission is such a vague  
11 expression that it would be -- it cannot be  
12 anything else but an individual and, thus,  
13 subjective assessment.

14 He said as well, and I'll ask you,  
15 Mr. Commissioner, to pull out the *Nelles* case.  
16 Mr. Auger said -- the two cases, you'll be happy  
17 to know that there is no limitation in terms of  
18 the assessment of misconduct of Mr. Mulroney's  
19 conduct and you note in particular paragraph (1)  
20 of your mandate that says you can't find any civil  
21 criminal liability, as if that meant that because  
22 you can't make that finding then you can go on to  
23 look at any other statute and people will  
24 understand that whilst you may be referring to it,  
25 it's okay.



1                   Now, I say to put it in the  
2 vernacular, that any such reference direct or  
3 indirect would contaminate the exercise. And I  
4 should like you to have reference to page 9 of the  
5 *Nelles* case. In the second paragraph, I don't  
6 know if it's sideline -- it's the second full  
7 paragraph, Mr. Commissioner, and you'll recall  
8 that the issue there is, could the Commissioner  
9 make specific findings and by some reference to a  
10 standard that really was effectively duplication  
11 of the criminal standard.

12                   The Court of Appeal said there:

13                   "Further, the fact that the  
14 findings or conclusions made  
15 by the Commissioner are not  
16 binding or final in future  
17 proceedings is not  
18 determinative but he will  
19 decide. What is important is  
20 that a finding or conclusion  
21 stated by the Commissioner  
22 would be considered by the  
23 public as a determination  
24 that might well be seriously  
25 prejudicial if a person named

1 by the Commissioner as  
2 responsible for the deaths in  
3 the circumstances were to  
4 face accusations and further  
5 proceedings. Of equal  
6 importance, if no charge is  
7 subsequently laid, a person  
8 found responsible by the  
9 Commissioner would have no  
10 recourse to clear his or her  
11 name."

12 It refers back to what I was  
13 telling you earlier in general principles, Mr.  
14 Commissioner. It's nice to put in your report  
15 that this is not a finding of criminal or civil  
16 liability but it's a very difficult injunction to  
17 implement and, in my submission, impossible to put  
18 in place as the *Nelles* case and the *Starr* case say  
19 if you have any reference to a criminal standard.  
20 If you have a reference to the ethical standard  
21 then, by definition, there is no transition or  
22 there is no transgression.

23 And, lastly, the *Starr* case which  
24 is the longer decision, I only want to note for  
25 your purposes at page 8 of 49 -- 8 of 49 which

1 sets out the mandate of the Commissioner in that  
2 case, Commissioner Justice Houlden. Just before  
3 it starts in the subparagraphs, Commissioner  
4 Oliphant, it says:

5 "And, therefore, pursuant to  
6 the *Public Inquiries Act*, a  
7 commission be issued  
8 appointing the Honourable  
9 Justice Lord Houlden who is  
10 without expression in the  
11 conclusion of law regarding  
12 civil and criminal  
13 responsibility."

14 Yet, the Supreme Court found in  
15 that case that, notwithstanding that, you could  
16 not then find certain dealings and then refer back  
17 to a standard with which they associated as a  
18 criminal standard and respect that injunction.  
19 It's just impossible to do and, in particular,  
20 when an individual's conduct is at stake.

21 Now, going back briefly to the  
22 three questions my friends have all addressed in a  
23 summary where I intend to just make a few comments  
24 and then supplement those initial reactions.

25 The first question that you

1 invited us to consider was whether or not, as I  
2 understood it, section 5(3) of the 1985 Code by  
3 reference to a variety of legal standards somehow,  
4 as I understood, could import within your  
5 jurisdiction the ability to look at those legal  
6 standards.

7 And as I already said, Mr.  
8 Commissioner, in my respectful submission the  
9 answer to that must be "no". The intention could  
10 not have been either in the Code or in your  
11 mandate to dispense with the protections, for  
12 example that a criminal trial would afford and  
13 allow you to refer to those sections and either  
14 apply them directly or indirectly. All that says  
15 is, "Come on, Ministers. I'm not giving you a  
16 licence here to violate criminal laws. I'm  
17 putting other standards and higher standards and  
18 those are the subject of this Inquiry".

19 It simply logically does not  
20 follow from the fact that a code creates ethical  
21 standards beyond all the other standards that are  
22 out there that by mere reference to that reality  
23 somehow they are all imported and the Prime  
24 Minister or a commissioner of an inquiry is  
25 empowered to make sure that not only ethical

1 standards are followed but other legal standards.

2 The second point is a reference in  
3 your Terms of Reference, questions 11, 12 and 13,  
4 and I think I made a comment that perhaps some of  
5 the provisions of the mandate are not drafted with  
6 the greatest facility but in any event, in my  
7 respectful submission, you can make them read  
8 purposefully in an appropriate way. Maybe  
9 question 13 or 13 should have been ahead of them  
10 and then you say, "What are the standards?" and  
11 maybe when you say, "Well, are they followed?"  
12 that amounts in effect to saying, "Well, it's  
13 appropriate or inappropriate". It would be odd to  
14 say that if it's not followed it's still  
15 appropriate and vice versa.

16 But otherwise, Mr. Commissioner,  
17 there is no getting away from the fact that if  
18 that wording in your terms in your mandate allows  
19 you to go beyond in the interpretation of  
20 appropriate, beyond the ethical code and either  
21 refer to the statutes, you have in my respectful  
22 submission, the problem that I have tried to  
23 persuade you of, and if it allows you to not refer  
24 to a legal standard but to some other non-legal  
25 standard.

1                   And your third question invites at  
2                   least a form of an answer to that question. I'll  
3                   deal with that in a minute. But otherwise, in my  
4                   respectful submission, you are put in a position  
5                   of defining in 2009 a standard which would be  
6                   extraordinarily difficult to ascertain. There is  
7                   just no getting away from that.

8                   And I come back to the fact, Mr.  
9                   Commissioner, that one of the oddest things about  
10                  the submissions made by Attorney General of this  
11                  country and Mr. Auger is that they are incapable  
12                  and/or unwilling to tell you specifically what  
13                  appropriate means to them. They are only in front  
14                  of you saying, "We're not giving you a definition.  
15                  We're not telling you what a Canadian would have  
16                  thought in 1993. We're just saying you can look  
17                  at those things and come up with your own  
18                  definition". That effectively is what they're  
19                  telling you. I say that is a clear violation of  
20                  the *Stevens* case.

21                  A third point, then, you say,  
22                  "Well, let's accept that an objective standard it  
23                  needs to obtain -- oh, just one last point on the  
24                  second" -- going back to the *Nelles* case, Mr.  
25                  Commissioner, the last paragraph of that case is -

1           - may be of assistance on this point of ambiguity  
2           in the Terms of Reference because you will recall,  
3           Mr. Commissioner, that in that case, the  
4           Commissioner was asking himself whether or not the  
5           mandate to put as much light as possible as to  
6           what the caused the deaths would entitle him to go  
7           as far as to name names, to put it in the  
8           vernacular. And so there was some ambiguity.

9                                He stated the case to the  
10           Divisional Court to interpret his mandate and in  
11           the substantive last paragraph -- last two  
12           paragraphs, the Court of Appeal said it was a  
13           problem inherent in terms of the Order in Council  
14           that the task of meeting the "need of the parents  
15           and the public as a whole to be informed of all  
16           available evidence" for examination of the matters  
17           to be inquired into and to

18                                "...ensure full public knowledge of  
19                                completeness of the matter referred to,  
20                                but to do so without expressing any  
21                                conclusion of law regarding civil or  
22                                criminal liability was of extreme  
23                                difficulty, at times approaching the  
24                                impossible. When such an impasse  
25                                arises, it should be resolved, in our

1                   opinion, by a course that best protects  
2                   the civil rights of the persons the  
3                   limitation was designed to protect.”

4                   So I say that if there’s an  
5                   ambiguity in your Terms of Reference, and I  
6                   suppose there must be some otherwise we wouldn’t  
7                   need this hearing. You need resolve it in a way  
8                   that ensures that no reference or use of any kind  
9                   be made of legal standards.

10                  So thirdly, then, back to the  
11                  objective standards issue and whether or not a  
12                  reasonably informed person ---

13                  COMMISSIONER OLIPHANT: Fully  
14                  informed.

15                  MR. PRATTE: Sorry, reasonably  
16                  fully informed person in Canada, how would they  
17                  feel effectively at the time, was this appropriate  
18                  or not was how I understood it.

19                  COMMISSIONER OLIPHANT: I say  
20                  that’s kind of the classic objective test, the  
21                  question that’s asked when an objective test is  
22                  being applied; cases where the court deals with  
23                  the difference between a subjective test and an  
24                  objective test.

25                  MR. PRATTE: Yes. Well, my answer



1 to that, sir, is in a way, twofold. Firstly, how  
2 one would assess what a reasonably informed person  
3 might have -- what that would have required as a  
4 reasonably, in 1993, beyond the guidelines and how  
5 one would assess that objectively without expert  
6 evidence on that subject, in my respectful  
7 submission, is a very difficult exercise.

8 But the second point is, if you  
9 want the best proxy for what the public thought  
10 they were entitled to in terms of public trust and  
11 public behaviour, look no further than what the  
12 government felt bound to do, the majority  
13 government, the elected officials of that country  
14 in 1985 tried to respond precisely to what it felt  
15 the public expected of politicians.

16 And I say that that is the most  
17 reliable objective standard at the time of what a  
18 reasonably informed person would expect of its  
19 elected officials and high public officeholders.  
20 Now, that as we alluded to, may change over time.  
21 It almost certainly does. It did before, maybe it  
22 will after.

23 Subject to your questions, Mr.  
24 Commissioner, that's as much assistance as I'm  
25 able to provide.

1                   COMMISSIONER OLIPHANT: Thank you.  
2                   All right, then. I've heard from  
3 all counsel. We have an agreement with respect to  
4 the written submissions on the issues that I  
5 raised.

6                   All that is left for me now is to  
7 thank counsel for your assistance this morning,  
8 and I hope that everybody is able to make it back  
9 to their office or home, as the weather is pretty  
10 snarly out there.

11                   Thank you very much.

12                   THE REGISTRAR: All rise; veuillez  
13 vous lever.

14                   --- Upon adjourning at 12:52 p.m./

15                   L'audience est ajournée à 12h52.

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

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.

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