

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



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

Commissioner

The Honourable Justice /
L'honorable juge
Jeffrey James Oliphant

Commissaire

Held at :

Bytown Pavillon
Victoria Hall
111 Sussex Drive
Ottawa, Ontario

Tenue à:

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

Thursday, March 26, 2009

Jeudi, le 26 mars 2009

Appearances/Comparutions

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

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NO.

DESCRIPTION

PAGE NO

1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Thursday, March 26, 2009

3 at 9:32 a.m. / L'audience débute

4 jeudi, le 26 mars 2009 à 9h32

5 THE COMMISSIONER: Good morning,
6 counsel.

7 I am about to deliver my ruling on
8 Mr. Mulroney's application for clarification of
9 the ruling on standards of conduct, Subject always
10 to my right to edit. I intend to convert my oral
11 reasons into a written decision for counsel.

12 --- RULING BY/DÉCISION PAR COMMISSIONER OLIPHANT:

13 This Commission of Inquiry was
14 established to investigate and report upon certain
15 allegations respecting business and financial
16 dealings as between Karlheinz Schreiber, to whom I
17 will refer as "Mr. Schreiber", and the Right
18 Honourable Brian Mulroney, to whom I shall refer
19 as "Mr. Mulroney".

20 In the Terms of Reference set
21 forth in the Order-in-Council establishing the
22 Commission of Inquiry, a number of questions were
23 posed that I am mandated to answer. Included in
24 those questions are the following, both of which
25 deal with the appropriateness or otherwise of the

1 conduct of Mr. Mulroney.

2 Number 11: Were these business and
3 financial dealings appropriate considering the
4 position of Mr. Mulroney as a current or former
5 Prime Minister and Member of Parliament?

6 And Question 12: Was there
7 appropriate disclosure and reporting of the
8 dealings and payments?

9 On February 25, 2009, having
10 earlier heard submissions from counsel for Mr.
11 Mulroney, for the Attorney General of Canada, and
12 for Mr. Schreiber, I delivered a ruling to which I
13 shall refer as the "Standards Ruling" in which I
14 set forth the standard by which the
15 appropriateness or otherwise of the conduct of Mr.
16 Mulroney as referred to in the foregoing questions
17 will be assessed.

18 I now have before me an
19 application by Mr. Mulroney for clarification of
20 certain aspects of the Standards Ruling.
21 Essentially, there are two aspects of the
22 Standards Ruling that Mr. Pratte, counsel for Mr.
23 Mulroney, says require clarification.

24 The first of the two aspects is
25 the period of time to which the standard I

1 articulated in the Standards Ruling applies.

2 Mr. Pratte asserts that
3 application of the standard is confined to that
4 period of time when Mr. Mulroney served as Prime
5 Minister of Canada and the period defined by the
6 *1985 Ethics Code*.

7 The second aspect of the Standards
8 Ruling on which clarification is sought is whether
9 I intend to make findings as to the
10 appropriateness of conduct by referring to
11 Standing Orders of the House of Commons, Numbers
12 21 and 23(2), and to statutes such as the
13 *Parliament of Canada Act*, the *Financial*
14 *Administration Act*, the *Income Tax Act*, the *Excise*
15 *Tax Act* and the *Criminal Code* as they existed at
16 the time events being investigated occurred.

17 If I do not intend to make
18 findings by referring to those statutes or
19 standing orders, Mr. Pratte has asked that I
20 clarify what I intend to derive from them.

21 Mr. Vickery, counsel for the
22 Attorney General of Canada, takes the position
23 that no clarification of the Standards Ruling is
24 required because there is no ambiguity in that
25 ruling that needs to be clarified.

1 Mr. Vickery asserts that the
2 principals of finality and certainty must be
3 recognized. Mr. Vickery went on to submit that
4 what Mr. Pratte is doing is to argue once again
5 matters that were fully argued prior to my
6 delivering the Standards Ruling.

7 Mr. Auger, on behalf of Mr.
8 Schreiber, endorses the position taken by counsel
9 for the Attorney General of Canada.

10 I am satisfied, on the basis of
11 the case law cited to me by Mr. Pratte, that I
12 have the jurisdiction to clarify the Standards
13 Ruling.

14 First, while there is a general
15 ruling against a tribunal revisiting a final
16 decision that was properly before it and made in
17 accordance with its enabling legislation, the
18 application of the general rule must be more
19 flexible and less formalistic in the context of a
20 commission of inquiry.

21 Here, the application of the
22 principle of *functus officio* must be applied in
23 the flexible, less formalistic, manner as
24 described by the Supreme Court of Canada in
25 *Chandler v. Alberta Association of Architects*

1 because so far as my ruling on standards of
2 conduct is concerned, there is no right of appeal,
3 although the ruling can be attacked by way of an
4 application for a judicial review.

5 See also the decision of the
6 Federal Court of Canada in *Vatanabadi v. Canada*
7 (*Minister of Employment and Immigration*). In
8 deciding that I may visit the Standards Ruling to
9 clarify same, I am cognizant of the Terms of
10 Reference which specifically authorize me to adopt
11 any procedures and methods I consider expedient
12 for the proper and efficient conduct of the
13 Inquiry.

14 Moreover, I note that the
15 Standards Ruling is an interlocutory ruling as
16 opposed to a final ruling. Also, I am of the view
17 that no party to this Inquiry or the public
18 interest will be prejudiced by my clarifying the
19 Standards Ruling.

20 When I use the term "revisit my
21 ruling", I do not mean to say, either explicitly
22 or implicitly, that I am going to defend that
23 ruling or to change it. What I am prepared to do,
24 however, is to clarify the ruling by responding to
25 the questions raised by Mr. Pratte in his

1 submission to me at the hearing of the application
2 for clarification.

3 There is in my view no lack of
4 clarity in terms of the standard I set for
5 assessing the appropriateness or otherwise of Mr.
6 Mulroney's conduct in terms of his business and
7 financial dealings with Mr. Schreiber and in terms
8 of the reporting and disclosure of the payments he
9 may have received from Mr. Schreiber.

10 The standard I set and how I
11 intend to apply that standard are to be found at
12 paragraphs 61 and 62 of the Standards Ruling.

13 With respect to the first area of
14 concern identified by Mr. Pratte, I have no
15 interest in delving into the private life or
16 private business affairs of Mr. Mulroney. My
17 interest is restricted to those issues set forth
18 in the Terms of Reference as set by the Governor-
19 in-Council.

20 As regards the timeframe, if there
21 is evidence of conduct on the part of Mr. Mulroney
22 that occurred after he left the high office of
23 Prime Minister but which relate to the matters
24 before me under the Terms of Reference, I will
25 apply the standard that I set in the Standards

1 Ruling for assessing that conduct.

2 I turn now to a consideration of
3 the second area of concern expressed by Mr.
4 Pratte, namely, whether I intend to make findings
5 as to the appropriateness or otherwise of Mr.
6 Mulroney's conduct by referring to various
7 statutes as noted in the Standards Ruling.

8 Depending on where the evidence
9 leads me, I may, as indicated in the Standards
10 Ruling, look to statutes for relevant information.
11 Also, I may want to look at one or more statutes
12 depending on the evidence before me to ensure that
13 in writing my report, I avoid using the language
14 of the statute or language that may lead members
15 of the public to perceive that specific findings
16 of criminal or civil liability have been made.

17 This is in keeping with one of the
18 basic principles governing public inquiries in
19 Canada as set forth in the decision of the Supreme
20 Court of Canada in *Canada (Attorney General) v.*
21 *Canada (Commission of Inquiry on the Blood System)*
22 where, at paragraph 57, Justice Cory had this to
23 say, and I quote:

24 "A Commissioner should endeavour
25 to avoid setting out conclusions

1 that are couched in the specific
2 language of criminal culpability
3 or civil liability, otherwise
4 the public perception may be
5 that findings of criminal or
6 civil liability have been made."

7 I will -- that closes the quote.

8 I will, as noted in the Standards
9 Ruling, utilize an objective test in assessing the
10 conduct in question.

11 Before I am in a position to
12 determine if there has been a deficiency in
13 conduct, I need first determine what, objectively,
14 would be considered appropriate conduct in a given
15 set of circumstances. To that end, I may look to
16 the statutes as set out in paragraph 65 of the
17 Standards Ruling, to assist me in formulating what
18 may amount to appropriate conduct.

19 At paragraph 65 of the Standards
20 Ruling, I use the term, "inform myself" in
21 relation to how I might utilize certain statutes.
22 At no time did I intend myself through these
23 statutes as to specific deficiencies in conduct
24 that may lead one to infer that I am commenting on
25 criminal or civil liability.

1 My use of the term, "inform
2 myself" as to these statutes was to assist me in
3 identifying a level of appropriate conduct. One
4 can only determine if there are deficiencies in
5 conduct after one has determined the standard by
6 which the conduct under scrutiny can be judged on
7 any given set of facts.

8 By way of example, I know that it
9 is not my role to conclude or even comment on
10 whether or not specific sections of the *Income Tax*
11 *Act* were violated. I am keenly aware that I am
12 precluded from doing so. However, I am directed
13 by the Terms of Reference to inquire and answer a
14 question as to whether there was appropriate
15 disclosure and reporting of any financial dealing.

16 Depending on the evidence that
17 comes before me, I may need to inform myself as to
18 what the *Income Tax Act* says about reporting and
19 disclosure in order to be able to determine
20 whether the reporting and disclosure was
21 appropriate. My conclusions will be based on the
22 facts that will be established in the evidence to
23 come.

24 It is for further clarification of
25 the issues highlighted above, that I wish to

1 specifically address the *Criminal Code of Canada*.
2 While I referred to the *Criminal Code* in a direct
3 quotation from Section 5(3) of the 1985 Ethics
4 Code in paragraph 64 of the Standards Ruling and
5 while I mentioned the *Criminal Code* again in
6 paragraph 65 of the same ruling, upon reflection I
7 must state that the *Criminal Code* is of little, if
8 any, value in this endeavour as a statute that
9 proscribes as opposed to prescribes conduct, it
10 appears to be of trifling value in assisting me in
11 setting the standard for conduct in any given fact
12 scenario.

13 Subject to my observation in the
14 preceding paragraph, I note that although I have
15 listed in the Standards Ruling a number of
16 statutes and two *Standing Orders of the House of*
17 *Commons* by which I may inform myself, until I hear
18 the evidence, I cannot say which of any of them,
19 if any, will be relevant to my determination of
20 appropriateness. If there is any possibility that
21 a finding of inappropriateness will be made, Mr.
22 Mulroney will be given reasonable notice under
23 Section 13 of the *Inquiries Act* and he shall have
24 full opportunity to respond before any report is
25 issued by me.

1 That then, counsel, is my ruling
2 on the Application for Clarification. As I say, I
3 intend to convert the oral reasons that I have
4 just delivered into a written decision which will
5 be put onto the record and into the hands of
6 counsel as soon as the bureaucracy is finished
7 with my work.

8 Thank you for your assistance and
9 your attendance this morning, counsel.

10 Is there anything further for
11 today, Mr. Wolson?

12 MR. WOLSON: No, Mr. Commissioner.

13 We will start Monday, 9:30 in the
14 morning, and at that time I'll make a brief
15 opening statement and you will hear from two
16 witnesses; Monday morning, the Honourable William
17 McKnight; Monday afternoon, the Honourable Marc
18 Lalonde. And we will start at that time then.

19 THE COMMISSIONER: Would you care
20 at this time to disclose who the witnesses will be
21 that will be called for Tuesday?

22 MR. WOLSON: Yes. Tuesday
23 morning, Beth Moores; Tuesday afternoon, Derek
24 Burney.

25 According to your ruling last

1 Friday, at the end of Tuesday, providing we're
2 through the four witnesses that we'll call, we'll
3 stand adjourned until the 14th of April at which
4 time I will tell you that we'll start again and at
5 that point I'll call Mr. Schreiber.

6 THE COMMISSIONER: Just for the
7 record, Mr. Wolson, and for everybody's benefit
8 here, I think that I had indicated earlier my
9 intention, in terms of the working day, to break
10 during the lunch hour from 12:00 or 12:30 until
11 2:00. I understand that in order to accommodate
12 Mr. Burney for sure and perhaps Me. Lalonde, that
13 we will commence at 1:30 on Tuesday afternoon and
14 perhaps Monday afternoon. Can you confirm that?

15 MR. WOLSON: Well, Tuesday for
16 sure 1:30. I'm going to suggest that we do the
17 same on Monday only because it would be to
18 everyone's advantage if we were to finish those
19 four witnesses and not spill over to another day.
20 So perhaps -- I don't want to create new times but
21 perhaps 1:30 both days just to ensure that we
22 finish those four witnesses.

23 THE COMMISSIONER: All right.
24 Perhaps I would just quickly canvass. Is that
25 acceptable to other counsel? Mr. Auger?

1 MR. AUGER: Yes, Mr. Commissioner.

2 THE COMMISSIONER: Okay. Mr.

3 Pratte?

4 MR. PRATTE: Yes.

5 THE COMMISSIONER: Mr. Vickery?

6 Okay, well thanks very much for
7 coming this morning, counsel. And we'll adjourn
8 now until Monday morning at 9:30 and I'll see you
9 then. Have a nice weekend.

10 Good morning.

11 THE REGISTRAR: All rise.

12 Veuillez vous lever.

13 --- Upon adjourning at 9:50 a.m./

14 L'audience est ajournée à 9h50

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

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

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

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Sean Prouse, CR

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