

**IN THE MATTER OF THE COMMISSION OF INQUIRY INTO CERTAIN
ALLEGATIONS RESPECTING BUSINESS AND FINANCIAL DEALINGS
BETWEEN KARLHEINZ SCHREIBER AND THE RIGHT HONOURABLE
BRIAN MULRONEY**

**APPLICATION RECORD
Tuesday, May 19, 2009**

Edward L. Greenspan, Q.C. and
Vanessa V. Christie
GREENSPAN PARTNERS
144 King Street East
Toronto, ON M5C 1G8

Tel: (416) 366-3961
Fax: (416) 366-7994
email: egreenspan@144king.com

Richard Auger
AUGER HOLLINGSWORTH
1005-130 Albert Street
Ottawa, ON K1P 5G4

Tel: (613) 233-4529
Fax: (613) 822-5096
email: richard@ottawalawfirm.ca

TO: **Mr. Richard J. Wolson, Q.C.**
Lead Commission Counsel
427 Laurier Avenue West, Suite 400
Ottawa, ON K1P 5W7

Fax: (613) 995-0785

AND TO: **Mr. Guy J. Pratte**
Borden Ladner Gervais LLP
Barristers and Solicitors
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, ON K1Y 7Y2

Tel: (613) 787-3521
Fax: (613) 230-8842
email: gpratte@blgcanada.com

Counsel for the Rt. Hon. Brian Mulroney

AND TO: **Mr. Robert E. Houston, Q.C.**
Burke-Robertson
Barristers & Solicitors LLP
70 Gloucester Street
Ottawa, ON K2P 0A2

Tel: (613) 566-2058
Fax: (613) 235-4430
email: rhouston@burkerobertson.com

Counsel for Mr. Fred Doucet

AND TO: **Mr. Paul Vickery**
Director and Senior General Counsel
Department of Justice Canada
234 Wellington Street
East Tower, Room 1001
Ottawa, ON K1A 0H8

Counsel for the Attorney General of Canada

**IN THE MATTER OF THE COMMISSION OF INQUIRY INTO CERTAIN
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I N D E X

TAB No.

1. Letter dated March 3, 2008, to Edward L. Greenspan, Q.C. from
The Honourable Rob Nicholson;
2. Letter dated December 18, 2008, to The Honourable Robert Nicholson
from Edward L. Greenspan, Q.C.;
3. Letter dated February 4, 2009, to Edward L. Greenspan, Q.C. from
The Honourable Rob Nicholson;
4. Letter dated March 26, 2009, to the Honourable Robert Nicholson
from Edward L. Greenspan, Q.C.;
5. Letter dated April 16, 2009, to Edward L. Greenspan, Q.C. from
The Honourable Rob Nicholson.



Ottawa, Canada K1A 0H8

MAR 03 2008

Mr. Edward L. Greenspan, Q.C.
Greenspan Partners
Barristers
144 King Street East
Toronto, ON M5C 1G8

Dear Mr. Greenspan:

I am writing in response to your letters of February 19, 2008, March 2, 2008 and March 3, 2008. I understand that, in the event that the Supreme Court of Canada dismisses Mr. Schreiber's application for leave to appeal on March 6, 2008, you are requesting that I postpone Mr. Schreiber's surrender to allow him to testify before the public inquiry.

I do not agree with your submission that I am entitled to delay surrender indefinitely pursuant to s. 42 of the *Extradition Act*. Section 42 is not designed to deal with the issue of delay. Indeed, pursuant to s. 69 of the *Extradition Act*, your client is entitled to apply for a discharge if he is not surrendered within 45 days of the final decision of the Supreme Court of Canada in this matter.

However, given Mr. Schreiber's waiver of his rights under s. 69, I am satisfied that it would not be unjust or oppressive to Mr. Schreiber to delay his surrender for a period of time at his request, in order that he may testify before the "Mulroney-Schreiber" public inquiry.

Accordingly, I agree that, subject to any change in circumstances, Mr. Schreiber will not be surrendered until he has testified before the inquiry. I take note of your other submissions as articulated in your letter of February 19, 2008 and can advise that you will receive a response in due course.

Yours sincerely,

A handwritten signature in black ink that reads "Rob Nicholson". The signature is written in a cursive, flowing style.

The Honourable Rob Nicholson

Canada

GREENSPAN PARTNERS
BARRISTERS

144 King Street East, Toronto ON M5C 1G8
TEL 416-366-3961 FAX 416-366-7994

Edward L. Greenspan OC, LL.D., DCL*
Todd B. White BA, LL.B.
Julianna A. Greenspan AB, JD**
Vanessa V. Christie BA, LL.B.
David N. Tice BA, LL.B.
Rebecca La Flamme BA, LL.B.
Kelsey L. Sitar BA, LL.B.

VIA FAX and COURIER

December 18, 2008

The Honourable Robert Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Karlheinz Schreiber

As you know, I represent Karlheinz Schreiber, a Canadian citizen, in relation to his extradition to Germany on charges of tax evasion, fraud, breach of trust and bribery. I am writing to you pursuant to section 43 of the *Extradition Act* which permits submissions to be made on any ground relevant to your decision on the surrender of Mr. Schreiber. Section 43(2) provides that you may accept submissions after the expiry of 30 days following the date of committal in circumstances that you consider appropriate.

Specifically, I am writing to you to request that you confirm that Mr. Schreiber will remain in Canada, out of custody, until, at least, the end of the Part I Factual Inquiry portion of the Schreiber-Mulroney Inquiry.

Background

On February 19, 2008, I wrote to you requesting that you postpone the execution of the surrender order pending the completion of Mr. Schreiber's full participation in the upcoming public inquiry. [Submissions attached at Tab 1]

On February 26, 2008, the International Assistance Group responded, acknowledging receipt of those further submissions. As a result of the request for the Minister to delay surrender until after Mr. Schreiber's participation in the "Mulroney-Schreiber" inquiry, we were asked whether Mr. Schreiber would agree to waive the limitation period under s. 69 of the *Extradition Act* which requires the Minister to execute the surrender order within 45 days of the final decision on the matter. [Letter dated February 26, 2008, attached at Tab 2]

On March 2, 2008, we responded to the International Assistance Group and agreed to waive the time restrictions placed on the Minister of Justice to effect the surrender until after Mr. Schreiber's participation in the inquiry has been completed. [Letter dated March 2, 2008, attached at Tab 3]

Further, on March 2, 2008, we wrote to you requesting a response to the submissions dated February 19, 2008 and seeking a position as to whether the surrender order would be put on hold pending the decision on the further submissions and pending the public inquiry which at that point was scheduled to commence in April 2008. We also requested that you consider releasing Mr. Schreiber on bail pending his testimony at the public inquiry. [Letter dated March 2, 2008, attached at Tab 4]

On March 3, 2008, we wrote to you again seeking a position as to whether the surrender order would be put on hold pending the decision on the further submissions. [Letter dated March 3, 2008, attached at Tab 5] You responded that day, stating that given Mr. Schreiber's waiver of his rights under s. 69 of the Act, you were satisfied that it would not be unjust or oppressive to delay Mr. Schreiber's surrender, in order that he may testify before the "Mulroney-Schreiber" public inquiry. [Letter dated March 3, 2008, attached at Tab 6]

On March 4, 2008, we wrote to you requesting that you consider consenting to the release of Mr. Schreiber on bail pending his testimony at the public inquiry, in order that he be permitted to testify in an appropriate and dignified manner. Further, we suggested that pursuant to s. 42 of the Act, the Minister had the authority to affect Mr. Schreiber's release until he has testified before the public inquiry. [Letter dated March 4, 2008, attached at Tab 7]

On March 6, 2008 counsel for the International Assistance Group replied to our letter and stated that the Minister had not agreed to delay the Applicant's surrender pursuant to s. 42 of the Act, but instead relied on the Applicant's waiver of his right to seek a discharge pursuant to s. 69 of the Act to not execute the surrender order until Mr. Schreiber testifies before the public inquiry. Counsel for the International Assistance group refused to consent to bail. [Letter dated March 6, 2008, attached at Tab 8]

As previously stated in our submissions to you dated February 19, 2008, there is no question that your decision in relation to surrender is a political decision. This was affirmed by the Ontario Court of Appeal as recent as November 15, 2007 in this matter, where the court stated at paragraph 3: "The ultimate decision to surrender for extradition following committal for extradition is essentially a political decision".

Also as previously stated in our submissions to you dated February 19, 2008, there is no question that the decision to hold a public inquiry is a political decision. Indeed many of the decisions associated with the establishment of the public inquiry, including mandate, terms of reference, funding, scheduling, appointment of a Commissioner and Commission counsel are political decisions. Moreover, it is respectfully submitted that the decision to postpone the surrender of Mr. Schreiber so that he may properly appear before the public inquiry is a political decision.

I remind you that the Honourable Irwin Cotler, who made the original surrender decision on October 31, 2004, has made representations about the need to delay the extradition of Mr. Schreiber so that he can participate in the public inquiry. On November 27, 2007, the Honourable Irwin Cotler stated as follows in the House of Commons [Transcript of November 27, 2007 attached at Tab 9]:

...Mr. Schreiber will be a principal witness for the inquiry. Indeed, the inquiry cannot proceed without him.

Accordingly, if the truth is to be pursued and the ends of justice served, Mr. Schreiber must be present as necessary to testify. For that to happen, the Minister of Justice must exercise his authority pursuant to the Extradition Act and postpone Mr. Schreiber's extradition to Germany.

....Simply put, the minister must ensure that Mr. Schreiber is present so that the inquiry can proceed, and for that purpose he will have to postpone, not alter or cancel, the order of surrender.

...But we are not speaking here of a cameo appearance or a peripheral witness. We are speaking of the ongoing presence of a central witness whose presence is required not only for his own testimony but for cross-examination and for the attendance at the testimony of others, or, if need be, to reply, or re-examination sought.

Indeed, the minister's discretionary authority is not only one which he has a right to exercise under the Extradition Act but a duty to exercise, for Mr. Schreiber's presence in Canada may be necessary for four different contexts.

First, there is the public inquiry itself, which alone would suffice to require his presence. Second, there is a parliamentary hearing where his presence is required. Third, there is an investigative inquiry where his presence may be desirable. Finally, there is the appellate review process for which his presence is necessary.

...
Indeed, if the amendment is read in conjunction with the minister's superintending authority under the Extradition Act, and in particular articles 40 to 42 of that act, and if we were to aggregate the multiple proceedings in which Mr. Schreiber's presence is required, the postponement of that surrender should be seen not just as being discretionary but indeed as being obligatory.

* * *

As you know, section 42 of the *Extradition Act* states:

The Minister may amend a surrender order at any time before its execution.

Accordingly, you clearly have the power to amend the surrender order to ensure that Mr. Schreiber remain in Canada so that he may fully participate in the public inquiry. Further, you clearly have the power to amend the surrender order to ensure that Mr. Schreiber remain on bail in Canada during his participation in the public inquiry.

New Information from Commissioner

The Part I Factual Inquiry portion is now scheduled to commence on March 30, 2009. We have recently received a letter from Commission Counsel, Nancy Brooks, dated December 10, 2008, stating as follows:

I write to you regarding the availability of Mr. Schreiber for testimony at the hearing in the Part I Factual Inquiry, which is scheduled to commence on March 30, 2009.

The Commissioner directs that Mr. Schreiber be present to be examined by Commission counsel, then cross-examined and re-examined as contemplated by the draft Rules of Procedure and Practice. The Commissioner also directs that Mr. Schreiber remain available to be recalled as a witness through to the end of the Part I Factual Inquiry.

Please do not hesitate to contact me if you have any questions about this matter.

It is respectfully submitted to you that Commission Counsel has made it quite clear that Mr. Schreiber must be present in Canada until, at least, the end of the Part I Factual Inquiry which is tentatively scheduled to take approximately two months to complete. [Letter from Commission Counsel, attached at Tab 10]

I would further note that on April 16, 2008, Mr. Schreiber was granted bail pending the judicial review application. At that time, the Honourable Mr. Justice Doherty of the Court of Appeal for Ontario noted:

[6] Lastly, as explored with counsel in the course of oral submissions, I am troubled by the notion that the applicant should be in custody regardless of whether he is seeking judicial review of the Minister's decision. His custody is justifiable only as an incident of his surrender to Germany in accordance with Canada's international obligations. He is detained to facilitate his surrender. The respondent does not suggest that there is any other possible justification for his custody.

[7] The respondent has also acknowledged that it is currently not in the public interest to surrender the applicant to Germany pending his testimony in Canada at an upcoming public inquiry. Consequently, as matters now stand, and they could change, the applicant will not be surrendered to Germany for some time. If he is not going to be surrendered, I do not know how his custody can be justified as an incident to that surrender.

[8] The problem outlined above is to my knowledge unique to this case and it may be that some procedural and remedial ingenuity is necessary to meet the circumstances of this case. Custody should not, however, be a default position brought about by procedural or remedial deficiencies. Custody that cannot be justified on the grounds associated with custody in the extradition context may well engage *Charter* protections.

Justice Doherty did not require Mr. Schreiber to surrender into custody prior to the hearing of the judicial review. He added a condition to the bail which required "the applicant to surrender as directed by the court or a judge of the court." [Decision of Mr. Justice Doherty, attached at Tab 11]

Presently, Mr. Schreiber is released on bail pending your decision relating to our letter dated October 17, 2008. Pursuant to his recognizance of bail, Mr. Schreiber is required to surrender into custody within 48 hours of the receipt of your decision.

In my view, it would be totally contrary to the public interest (if not unprecedented) for a key witness such as Mr. Schreiber, in the context of a Federal Public Inquiry, to be expected to prepare for, instruct his own counsel, meet with and be interviewed by Commission counsel, review voluminous pages of documents and then testify publicly in a meaningful way, while in custody.

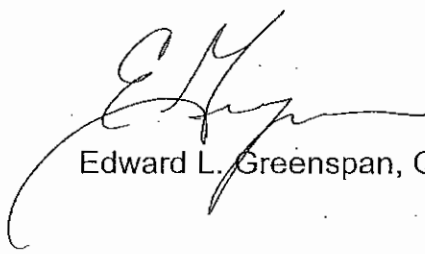
Conclusion

I respectfully request that you now confirm that Mr. Schreiber will not be surrendered, at least, until the end of the Part I Factual Inquiry as directed by the Commissioner.

Further, I respectfully request that you now confirm that Mr. Schreiber will remain on bail, at least until the end of the Part I Factual Inquiry, so that he may participate in the Inquiry in a dignified manner.

Yours sincerely,

GREENSPAN PARTNERS



Edward L. Greenspan, Q.C.

Minister of Justice
and Attorney General of Canada



Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Rob Nicholson, P.C., Q.C., M.P. / c.p., c.r., député
Ottawa, Canada K1A 0H8

FEB 04 2009

Mr. Edward L. Greenspan, Q.C.
Greenspan Partners
Barristers
144 King Street East
Toronto ON M5C 1G8

Dear Mr. Greenspan:

Re: *Federal Republic of Germany v. Karlheinz Schreiber*

I am writing in response to your letter of December 18, 2008, in which you have asked me to undertake to keep Mr. Schreiber in Canada and on bail for the duration of the Oliphant inquiry. As I indicated in my letter of March 3, 2008, "I agree that, subject to any change in circumstances, Mr. Schreiber will not be surrendered until he has testified before the inquiry". With respect to the issue of bail, that is a matter for the courts.

Yours truly,

A handwritten signature in black ink, appearing to be "Rob Nicholson", written over a horizontal line.

The Honourable Rob Nicholson

Canada

GREENSPAN PARTNERS
BARRISTERS

144 King Street East, Toronto ON M5C 1G8
TEL 416-366-3961 FAX 416-366-7994

Edward L. Greenspan QC, LL.D., D.C.L.
Todd B. White BA, LLB
Julianna A. Greenspan AB, JD**
Vanessa V. Christie BA, LLB
Rebecca La Flamme BA, LLB
Kelsey L. Sitar BA, LLB

VIA FAX and COURIER

March 26, 2009

The Honourable Robert Nicholson
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street, Room 2274
Ottawa, Ontario

Dear Mr. Minister:

Re: Federal Republic of Germany v. Karlheinz Schreiber

As you know, I represent Karlheinz Schreiber, a Canadian citizen, in relation to his extradition to Germany on charges of tax evasion, fraud, breach of trust and bribery. I am writing to you pursuant to section 43 of the *Extradition Act* which permits submissions to be made on any ground relevant to your decision on the surrender of Mr. Schreiber. Section 43(2) provides that you may accept submissions after the expiry of 30 days following the date of committal in circumstances that you consider appropriate.

Specifically, I am writing to you to request that you confirm that Mr. Schreiber will remain in Canada, out of custody, until, at least, the end of Part II of the upcoming Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney (the "Oliphant Commission").

The background relevant to this particular request is similar in nature to my request dated December 18, 2008 [copy attached at Tab 1] which requested that you confirm that Mr. Schreiber remain in Canada until the end of Part I of the Oliphant Commission. Accordingly, we repeat and rely upon the background submissions in my letter to you dated December 18, 2008.

You will recall that on February 4, 2009, you wrote to us, referring back to your letter of March 3, 2008 indicating that "...Mr. Schreiber will not be surrendered until he has testified before the inquiry". [copy attached at Tab 2] Your letter dated February 4, 2009 is wholly unresponsive to our request dated December 18, 2008. Your letter does not answer our question: whether you will confirm that Mr. Schreiber will remain in Canada, out of custody, until, at least, the end of the Part I Factual Inquiry portion of the Oliphant Commission.

Further, the circumstances have now changed, specifically, in relation to Part II of the Oliphant Commission, given that in February 2009, Mr. Schreiber was granted full standing as a party to Part II.

The further question now is whether you will confirm that Mr. Schreiber will remain in Canada, out of custody, until the end of Part II of the Inquiry portion of the Oliphant Commission. A letter confirming these two questions, in my view, would be helpful.

But, section 42 of the *Extradition Act* states:

The Minister may amend a surrender order at any time before its execution.

Accordingly, you clearly have the power to amend the surrender Order to ensure that Mr. Schreiber remain in Canada so that he may fully participate in the entirety of Part I and Part II of the Oliphant Commission. This would be in accordance with the Order that has made by Justice Oliphant, granting Mr. Schreiber full standing to both portions of the Commission. It would be consistent with the ruling of Justice Oliphant.

Further, you clearly have the power to support any application for bail that Mr. Schreiber may bring during his participation in Part I or Part II of the Oliphant Commission. And I would ask you to confirm your Department's consent to any such bail application, should it be necessary. (see Mr. Justice Doherty's comments below).

New Information from the Oliphant Commission

On February 3, 2009, we received the ruling of Commissioner Oliphant granting Mr. Schreiber "full standing as a party with respect to Part II (Policy Review)" [Commissioner Oliphant's Rulings on Standing for Part II are attached at Tab 3].

Commissioner Oliphant concluded that Mr. Schreiber be granted full standing as a party to Part II for the following four key reasons:

- a) Mr. Schreiber is so intrinsically involved in almost all, if not all, of the matters covered by the mandate of the Commission;
- b) There may be findings of misconduct against Mr. Schreiber and, accordingly, Mr. Schreiber may be directly and substantially

affected by the Policy Review and ought to be granted full standing for Part II ;

- c) Even if there are no findings of misconduct against Mr. Schreiber, there are consequences that may flow from the Policy Review in Part II that may have a serious impact on, or implicate, the interests of Mr. Schreiber; and
- d) Mr. Schreiber has a particular perspective with the issues pertaining to the manner in which the Prime Minister's correspondence is handled by the Prime Minister's Office and the Privy Council Office.

It is respectfully submitted that given Commissioner Oliphant's reasons for granting Mr. Schreiber full standing for Part II, it is essential to give effect to Justice Oliphant's ruling that Mr. Schreiber remain in Canada for Part II in order to fully participate and instruct counsel during Part II.

Moreover, it is important to note the following language of Commissioner Oliphant's ruling at paragraph 5:

...If such findings may be made, as submitted by Mr. Schreiber through counsel, it follows that Mr. Schreiber may be directly and substantially affected by the Policy Review and ought to be granted full standing as a party to Part II **so that he can fully participate with respect to the Policy Review** (emphasis added).

It is respectfully submitted that any steps to surrender Mr. Schreiber prior to, at least, the completion of Part II, would deny Mr. Schreiber's right to "fully participate" in Part II and would, therefore, frustrate the spirit and intention of Commissioner Oliphant's ruling.

Given Commissioner Oliphant's reasons and his ruling, to deprive the Oliphant Commission of Mr. Schreiber's presence and full participation during Part II would:

- a) interfere with the work, mandate and goals of the Oliphant Commission;
- b) deprive Mr. Schreiber of his right to procedural fairness and his right to be heard as a key participant with full standing in Part II; and

- c) undermine the public interest and public confidence in the final conclusions and final report of the Oliphant Commission.

It is important to note that Part II will focus on questions 14 through 17 of the Terms of Reference. Questions 15, 16 and 17 of the Terms of Reference specifically deal with: i) what steps were taken in processing Mr. Schreiber's correspondence to Prime Minister Harper of March 29, 2007; ii) why was the correspondence not passed on to Prime Minister Harper; and iii) should the Privy Council Office have adopted any different procedures in this case. It is clear that these questions directly relate to Mr. Schreiber. To refuse Mr. Schreiber's right to attend and fully participate in the investigation of these key questions would totally undermine the work and ultimate findings of the Oliphant Commission.

The Rules of Procedure and Practice of the Oliphant Commission set out the nature of the proceedings in relation to Part II [copy attached at Tab 4]. One aspect of the Rules of Procedure and Practice for Part II is that Commissioner Oliphant may allow persons with standing in Part II to participate in relation to the evidence of any expert panel. Indeed, on January 21, 2009, during the hearings for applications for standing for Part II, Commissioner Oliphant stated that persons with standing will be entitled to attend and participate in an expert's panel during Part II. Commissioner Oliphant stated that these participants with standing will "be entitled to question the experts on their findings". [Transcript of proceedings on January 21, 2009 attached at Tab 5] Accordingly, it is submitted that it is critical that Mr. Schreiber be entitled to, at a minimum, be present to participate in this aspect of Part II of the Oliphant Commission.

Finally, on April 16, 2008, Mr. Schreiber was granted bail pending the judicial review application. At that time, the Honourable Mr. Justice Doherty of the Court of Appeal for Ontario noted:

[6] Lastly, as explored with counsel in the course of oral submissions, I am troubled by the notion that the applicant should be in custody regardless of whether he is seeking judicial review of the Minister's decision. His custody is justifiable only as an incident of his surrender to Germany in accordance with Canada's international obligations. He is detained to facilitate his surrender. The respondent does not suggest that there is any other possible justification for his custody.

[7] The respondent has also acknowledged that it is currently not in the public interest to surrender the applicant to Germany pending his testimony in Canada at an upcoming public inquiry. Consequently, as matters now stand, and they could change, the applicant will not be surrendered to Germany for some time. If he is

not going to be surrendered, I do not know how his custody can be justified as an incident to that surrender.

[8] The problem outlined above is to my knowledge unique to this case and it may be that some procedural and remedial ingenuity is necessary to meet the circumstances of this case. Custody should not, however, be a default position brought about by procedural or remedial deficiencies. Custody that cannot be justified on the grounds associated with custody in the extradition context may well engage *Charter* protections.

Justice Doherty did not require Mr. Schreiber to surrender into custody prior to the hearing of the judicial review. He added a condition to the bail which required "the applicant to surrender as directed by the court or a judge of the court." [Decision of Mr. Justice Doherty, attached at Tab 6]

Presently, Mr. Schreiber is released on bail pending your decision relating to our letter dated October 17, 2008. Pursuant to his recognizance of bail, Mr. Schreiber is required to surrender into custody within 48 hours of the receipt of your decision.

It would be totally contrary to the public interest (if not unprecedented) for a key participant such as Mr. Schreiber, in the context of a Federal Public Inquiry, to be expected to prepare for, instruct his own counsel, communicate with Commission counsel, review voluminous pages of documents and then participate publicly in a meaningful way during Part II, while in custody.

Conclusion

I respectfully request that you now confirm that Mr. Schreiber will not be surrendered, at least, until the end of Part II of the Oliphant Commission.

Further, I respectfully request that you now confirm that your Department will be instructed to support any application for bail that Mr. Schreiber may bring, at least until the end of Part II, so that he may attend and meaningfully participate in the Oliphant Commission in a dignified manner.

Depending on your response to these two questions, we may be compelled to raise this issue with the Commission. Given that Part I of the Oliphant Commission begins on Monday, March 30, 2009, and given that Mr. Schreiber is expected to commence testifying on Tuesday, April 14, 2009, I must have an answer from you on or before Thursday, April 9, 2009.

Yours sincerely,

GREENSPAN PARTNERS



Edward L. Greenspan, Q.C.

Encls.

JL

Minister of Justice
and Attorney General of Canada



Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Rob Nicholson, P.C., Q.C., M.P. / c.p., c.r., député
Ottawa, Canada K1A 0H8

APR 16 2009

Mr. Edward L. Greenspan, Q.C.
Barrister
Greenspan Partners Barristers
144 King Street East
Toronto ON M5C 1G8

Dear Mr. Greenspan:

Thank you for your correspondence of March 26, 2009, concerning
Mr. Karlheinz Schreiber.

In your letter you request that Mr. Schreiber's surrender be delayed until the
conclusion of Part II of the Oliphant Inquiry. This is further to your letter dated
December 18, 2008, in which you asked for my commitment to keep Mr. Schreiber in
Canada and on bail for the duration of the Inquiry.

As previously indicated to you in my letters of March 3, 2008, and February 4, 2009,
Mr. Schreiber will not be surrendered until after he has testified before the Inquiry.
With regard to the issue of bail, I understand that Mr. Schreiber is currently on bail
and see no reason to address this matter further at this time.

Thank you again for writing.

Yours truly,

A handwritten signature in cursive script that reads "Rob Nicholson".

The Honourable Rob Nicholson

Canada