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APPENDIX C

OPENING STATEMENT

The Honourable John H. Gomery,
Justice, Superior Court of Quebec

May 7, 2004

I. Introduction

By the present opening statement I am commencing the public proceedings of the Commission of Inquiry established by Order in Council P.C. 2004-110 which was promulgated on February 19, 2004 pursuant to Part I of the *Inquiries Act*.

According to the terms of reference which are contained in the Order in Council, the Commission is given a double mandate. The first requires the Commission to make a factual inquiry, to investigate and report on questions raised, directly or indirectly, by Chapters 3 and 4 of the November 2003 Report of the Auditor General of Canada, which, as you may recall, was tabled in the House of Commons on February 10, 2004. Chapters 3 and 4 deal with the sponsorship program and advertising activities of the Government of Canada, and the terms of reference go on to detail particular aspects of the sponsorship program and advertising activities which are to be examined, and conclude with a sub-paragraph giving the Commission a broad discretion to investigate any circumstances it considers relevant to fulfilling its mandate.

The second mandate calls upon the Commission to make recommendations to the Government of Canada, based upon its findings of fact, to prevent mismanagement of sponsorship programs and advertising activities in the future, taking into account certain initiatives announced by the Government on February 10, 2004 which are enumerated in the terms of reference, a copy of which you will find attached as Appendix I to the written text of this opening statement.

This Inquiry has arisen as a result of the significant concerns raised in the Report of the Auditor General to the House of Commons with respect to the sponsorship program and advertising activities of the Government of Canada. According to her Report, there were failures of internal control systems, a lack of appropriate documentation justifying material expenditures of public money, the payment of large sums of money to private parties with no apparent value being received in return, a systematic disregard of the applicable rules including those contained in the *Financial Administration Act*, a lack of competition in the selection of advertising agencies, and a general bypassing of Parliament.

These are serious issues, which have been the subject of much debate in and out of the House of Commons and intense media attention. The hearings before the Public Accounts Committee of the House of Commons have

supplied important evidence, but have raised additional questions and concerns. The public is entitled to know what happened, and this Commission will look for the answers.

Let me say at once that although the Commission of Inquiry has been created by a decision of Cabinet, it has by law an almost complete independence of the Government of Canada. Its only obligations are to comply with the terms of reference, and to abide by the legal requirement to act fairly. As Commissioner, I have no preconceived notions as to the conclusions to which I will eventually come. In reaching those conclusions, I will be guided only by the evidence, documentation and representations presented to me in the course of our hearings. I will in no way be influenced by political considerations, and I will not tolerate any attempt by anyone to interfere with the work of the Commission, for political or other reasons.

The Commission will carry out its investigations and hearings separately from any others which may currently be ongoing. For example, the House of Commons Public Accounts Committee has been holding public as well as closed hearings for some time into activities and programs which are related to those referred to in the Commission's terms of reference. While the Commission intends to take into consideration the evidence, documents and other information provided by those hearings as part of its own factual review, it is independent of the Public Accounts Committee and is not involved in any way in its work.

The processes and procedures which will be followed by the Commission will be, of course, different from those used by the House of Commons Public Accounts Committee. For example, before the Committee, while a witness may have a lawyer present to advise him or her privately, the witness may not be asked questions for the record by the lawyer in question, and that lawyer is not permitted to cross-examine other witnesses who may give evidence which impacts upon his or her client's credibility or conduct. In effect, no person whose conduct or credibility may be impugned has the right to defend himself or herself other than through his or her direct testimony, if indeed that person is called as a witness. As you will see later, the

Commission's rules and procedures will provide safeguards in these matters, and it will be more thorough in its examination of the facts. While I will be conscious of the need for expedition, counsel will not be subject to arbitrary time limits. Further, through the process of questioning by Commission counsel, cross-examination by parties with standing and questioning by a witness' own counsel, I expect that relevant and material information will come to light.

Similarly, this Inquiry is neither connected to nor involved with ongoing police investigations, although it will seek to have access to relevant material resulting from such investigations to the extent it is not precluded, by law, from doing so, always taking care not to jeopardize any ongoing criminal investigation or criminal proceedings.

Let me now introduce myself and the persons who I have appointed to work for the Commission.

2. Composition and Schedule of the Commission of Inquiry

I am John Gomery, and have been a Justice of the Superior Court of Quebec for more than 21 years. My Chief Justice has relieved me from my assignments and responsibilities as a judge until this mandate has been completed. As of April 1st, 2004, I have resigned from the Copyright Board of Canada, of which I had been the Chairman as a part-time position for five years.

To handle the administrative needs of the Commission, I have appointed Ms. Sheila-Marie Cook as Executive Director and Secretary of the Commission. She is in the process of engaging such administrative staff as we require, always keeping in mind the most efficient use of public money. As to location of the Commission, the practical effect of the terms of reference requires that public hearings be held in Ottawa, where the programs and activities at issue were created and managed, and Montreal, where most contracts were awarded and funds distributed. Consequently, the Commission has set up premises and arranged hearing facilities in both cities. In Ottawa our premises are located at 222 Queen Street, and hearings will take place in the Conference Centre where we are at present. In Montreal the Commission

occupies offices in Suite 608, in the East Wing of the Guy-Favreau Complex, 200 René-Lévesque Boulevard West. In that same complex there is a Conference Centre where hearings will take place.

As Commission counsel, I will benefit from the advice and assistance of senior lawyers from both Quebec and Ontario. Mr. Bernard Roy, Q.C., has been appointed as lead Commission Counsel. Mr. Roy is a senior litigation partner of the Montreal office of Ogilvy Renault. He has extensive experience as counsel to other Commissions of Inquiry, and is knowledgeable about the complex operations of the Government of Canada. He will have the primary responsibility as lead Commission counsel for preparing the Commission's legal, research and investigative activities, and will, assisted by others, present evidence before it.

Mr. Neil Finkelstein has been appointed as Co-Counsel to the Commission. Mr. Finkelstein is a senior litigation partner based in the Toronto office of Blake, Cassels & Graydon. He is an experienced litigator with an impressive national reputation, and has recognized expertise in public law matters.

Mr. Guy Cournoyer has been appointed as Associate Commission Counsel. Mr. Cournoyer is a partner in the Montreal law firm of Shadley, Battista, and specializes in criminal law. He has had valuable experience as counsel to previous Commissions of Inquiry, being the Poitras Commission and the Arbour Commission.

Messrs. Roy, Finkelstein and Cournoyer will assist and guide the Commission throughout the Inquiry, in accordance with my directions, and will see to the orderly presentation of evidence. They have the primary responsibility for representing the public interest at the Inquiry, and for ensuring that all matters relevant to the terms of reference are brought to my attention.

Assisted by their legal staff, they are already hard at work in our partly-completed premises in Montreal, where the Commission has been located for several weeks, and where a massive documentation is being accumulated, organized and studied.

The presentation of evidence will be subject to *Rules of Procedure and Practice* a draft of which is attached as Appendix II. I invite interested parties to send comments on these draft Rules, in writing, to Counsel for the Commission not later than May 31st. It should be noted immediately that the normal procedure and practice in a civil or criminal trial will not apply to our investigation and hearings since this is not a trial, but rather an inquiry. For example, at the hearing of witnesses, Commission counsel may ask leading questions and have a discretion to refuse to call or present certain evidence. Their role is neutral, not adversarial. As Commissioner I may circumscribe the right to cross-examination.

The Commission has retained the services of Mr. Serge Roy to act as its Registrar and Court Clerk during its hearings.

Given the voluminous documentation and evidence that has to be organized and analysed, the need for research into legal questions that will inevitably arise, and to assist senior counsel, I have appointed additional attorneys to assist in the work of the Commission: they are Mr. Gregory Bordan, Ms. Charlotte Kanya-Forstner, Ms. Sophie Nunnelley, Mr. Simon Richard and Ms. Véronique Robert-Blanchard.

As investigators and forensic experts, the Commission has engaged the reputable firm of Kroll, Lindquist, Avey.

The Commission has retained the services of Mr. François Perreault of BDDS/Weber Shandwick as its communications advisor. He will be responsible for media relations and is well-known in that field. He is the only person who will speak on behalf of the Commission.

Now, let me make a few comments about our schedule.

Many people have asked me how long it will take for the Commission to complete its mandate. This is a difficult question to answer at this stage since we can only guess at how long the hearing of witnesses will be; much will depend upon the number of persons and organizations that will ask to participate, and the duration of the examination and cross-examination of

each of the many witnesses to be heard. At this moment in time we cannot even predict with accuracy how many witnesses will have relevant evidence to offer. The terms of reference do not impose a deadline for the submission of the Commission's report or reports, but directs us to act on an urgent basis and to conclude the work of the Commission as soon as reasonably possible. We intend to do that.

This having been said, to provide some sort of an idea of the estimated duration of the Inquiry, we have prepared a Tentative Schedule which is attached as Appendix III.

As you will see from that Appendix, the Commission will be receiving motions for standing during the month of May, which will be the subject of hearings in June. This will be followed by written submissions for funding in early July, which will be the subject of a decision to be handed down not later than July 19th. The rest of the summer of 2004 will be devoted to preparations for public hearings which will commence here in Ottawa on September 7, 2004. The public hearings will be in two phases; the first phase, IA, will deal with the creation, purpose and objectives of the sponsorship program, the means by which it was administered, and the extent to which it met the standards of good management. Phase IA is anticipated to last 80 days or so, and will occupy the Commission until the end of January 2005. Phase IB will consider where the sponsorship and advertising funds went, the extent to which there was value for money, and whether there was political influence and involvement. Phase IB will take place in Montreal and is expected to last until April 30, 2005. Closing submissions would be made in June 2005.

As the Tentative Schedule indicates, I propose to submit two Reports to the Governor in Council. The first would deal with the factual findings on the issues set out in paragraph (a) of the terms of reference, and should be submitted by November 1, 2005. A second Report, containing the recommendations required in accordance with paragraph (b) of the terms of reference, should be ready by December 15, 2005.

3. The Nature and Procedure of the Inquiry

The purpose of the Commission is not to conduct a trial or to express any conclusion regarding the civil or criminal liability of any person or organization. That limitation is expressly articulated in paragraph (k) of the terms of reference which I take the liberty of reading aloud, because of its importance:

(k) the Commissioner be directed to perform his duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings;

Accordingly, the Commission may not establish either criminal culpability or civil responsibility for sums of money lost or misspent, or damages; it does not have the capacity nor does it intend to do so. The Inquiry is an investigation into the issues and events referred to in the terms of reference. Its future findings of fact and statements of opinion will be unconnected to normal legal criteria, and will be intended to serve as the basis for the recommendations which I will be making as required by paragraph (b) of the terms of reference. It follows that there will be no legal consequences arising from the Commission's findings and Reports, and they will not be enforceable in, and will not bind either civil or criminal courts which might consider the same subject matters.

Nevertheless, although the Commission will not, and indeed cannot, express conclusions or recommendations in relation to the potential civil or criminal liability of anyone, it is part of its mandate to assess the evidence and to make findings of fact, such as findings with respect to the credibility of witnesses. According to s.13 of the *Inquiries Act*, which will be discussed in more detail later, I am entitled to draw conclusions as to whether there has been misconduct and who may be responsible for it. Such findings will be the focus of the Inquiry only to the extent that they are necessary to carry out the mandate in the terms of reference. In the course of the Inquiry's hearing process, evidence may emerge in support of a factual finding which,

broadly construed, might be perceived as adverse or unfavourable to the reputation of a person or organization. Given that possibility, it is of paramount importance that the Inquiry's process be scrupulously fair. With this in mind, the Commission intends to conduct its hearings in accordance with the following principles and procedures.

First, consistent with the generally accepted criteria for Commissions of Inquiry of this nature, all those with a direct and substantial interest in the proceedings, or having a clearly ascertainable interest or perspective that would enhance the work of the Commission, will be granted standing to participate appropriate to their interests. Parties wishing to participate are invited to apply for standing by way of a motion in writing on or before May 31, 2004. The motion should set out, giving reasons in support of its position:

- i. whether the person or organization seeks full or special standing, and for what portion of the Inquiry;
- ii. those areas and issues where the prospective party is directly and substantially affected, or where the party has a clearly ascertainable interest, or a perspective which would enhance the work of the Commission, and the reasons therefore; and
- iii. the specific scope of participation sought.

Applicants who have made written motions will be permitted to make oral submissions not exceeding 15 minutes at a public Standing Hearing which will take place here in Ottawa from June 21 - 23, 2004.

The Commission will recognize two types of standing, full standing or partial standing, depending upon the party's interest. Parties may be granted full or partial standing for all or a portion of Phases IA and IB of the Inquiry. Parties who obtain standing under sections I2 or I3 of the *Inquiries Act* will be granted full standing to the extent of their interests.

The participation of a party with full standing will include:

1. access to documents collected by the Commission subject to the *Rules of Procedure and Practice*;
2. advance notice of documents which are proposed to be introduced into evidence by Commission counsel;
3. advance provision of will-say statements, if any, relevant to the party's or witness' interest;
4. a seat at counsel table;
5. the opportunity to suggest witnesses to be called by Commission counsel, or an opportunity to apply for an order that a particular witness be summoned to appear;
6. the right to cross-examine witnesses on matters relevant to the basis upon which standing was granted; and
7. the right to make closing submissions.

Parties who are not granted full standing may, at my discretion, be granted partial standing, which will include any or all of the following:

1. numbers 1, 2, 3, 5 and 7 above; and
2. the opportunity to suggest areas for examination of a certain witness by Commission counsel, failing which, the opportunity to request leave to examine the witness on such areas.

Some of the principles for determining full or partial standing should be mentioned:

- there must be relevance to the issues described in the Order in Council;

- applicants may be granted standing only for those portions of the Inquiry that relate to their particular interest or perspective;
- to avoid repetition and unnecessary delay, I may decide to group certain applicants into coalitions where there are similar interests or perspectives, where there is no apparent conflict of interest, and where the relevant interest or perspective will be fully and fairly represented by a single grant of standing to the parties as a group.

Once standing has been determined, I am given authority by paragraph (h) of the terms of reference to recommend funding by the Government for the purposes of the factual investigation in paragraph (a) where, in my view, the party would not otherwise be able to participate. I invite parties, once they have been granted standing, to seek funding by motion in writing filed with the Commission on or before July 2, 2004. There will be no oral hearing with respect to funding, and my recommendations in accordance with paragraph (h) of the terms of reference will be made not later than July 16, 2004. To qualify for a funding recommendation, a party must demonstrate that it would not be able to participate in the Inquiry without funding, and must also present a satisfactory plan showing how it intends to use the funds and account for them. I will also take into consideration the party's:

- interest and proposed involvement in the Inquiry;
- established record of concern for and a demonstrated commitment to the interest it seeks to represent;
- special experience or expertise with respect to the Commission's mandate;
- explanation as to why no reasonable alternative means of funding is available to enable the party to participate.

At this stage of the proceedings, I do not intend to recommend payment for experts to be called by those with standing in Phase IA or IB. The primary responsibility for calling experts lies with Commission counsel, who

will be open to suggestions from parties as to the types and names of experts to be called. Experts called by Commission counsel will be paid by the Commission.

I shall not consider Phase II funding at the present time, although I may do so in the months to come.

Next, still on the issue of fairness, s. 13 of the *Inquiries Act* provides that no report may be made in relation to misconduct by any person without notice and an opportunity to be heard. s. 13 reads as follows:

13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

The content and dates of s. 13 notices, and the identity of the persons to whom such notices are sent, will be confidential. All persons who receive s. 13 notices will be granted full standing to the extent of their interest at the time they seek such standing.

The purpose of s. 13 of the *Inquiries Act* is to ensure that, where evidence may support a factual finding that may adversely affect a person's reputation, that person is granted procedural fairness. I intend to take a broad view of the meaning of "misconduct" for the purposes of s. 13 so that no person who may reasonably be expected to be adversely affected by a finding is denied a full opportunity to be heard. On this question I will be following the broad principles outlined in *Canada (A.G.) v. Canada Commission of Inquiry on Blood Systems*, [1997] S.C.R. 440. With respect to the scope of the term "misconduct", I will be guided by what was said in *The Report of the Walkerton Inquiry* at p. 160; Mr. Justice O'Connor said there, and I am paraphrasing his comments, that:

where the evidence might support a factual finding which, broadly construed, might be perceived as unfavourable or adverse to a person's reputation, including conduct that might

be described as careless or an oversight, it would be most fair to the person to provide notice. This was so the person would be put on notice, could avail himself or herself of procedural protections, and could respond. Upon receipt of notice, a person automatically gains limited standing for the purposes of that notice. This gives certain procedural protections to the person.

Accordingly, Commission counsel will send s. 13 notices to persons or organizations from time to time throughout this Inquiry when they reasonably anticipate at that time that the evidence could lead to a factual finding which may adversely affect a person's reputation. I recognize that s. 13 notices have been sent by other Commissions of Inquiry at the end of the public hearings. At that time, the notices can be more detailed and the parties may then wish to apply to have additional witnesses called. However, when notices are sent at the end of the public hearings, the recipient may have committed himself or herself in the way he or she conducted the evidence phase of the hearing. Therefore, in this Inquiry Commission counsel propose to send more generalized s. 13 notices as soon as they, in their judgment, reasonably anticipate that one is appropriate to enable recipients to respond earlier.

The draft *Rules of Procedure and Practice*, attached as Appendix II, are intended to ensure that the public hearings in Ottawa and Montreal into the factual matters raised in paragraph (a) of the terms of reference are conducted fairly. To summarize them, without going into all the details, they provide that:

- i. all parties and all witnesses have the right to counsel both at the Inquiry and at any pre-testimony interviews;
- ii. each party may cross-examine any witness on matters which are the basis for their grant of standing;
- iii. Commission counsel, who, I repeat, are neutral and non-partisan, will call and question witnesses. Any party may apply to the Commissioner for leave to have any witness called whom Commission counsel elects not to call;

- iv. each witness and party shall be provided with copies, in paper or electronic form, of documents, evidence, information and will-say statements, if any, which are relevant to the party's or witness' interest, to the extent it is appropriate to do so, together with the documents which Commission counsel expects to put to him or her in the course of his or her testimony, and will have the right to introduce their own documentary evidence;
- v. all hearings will be held in public, and will be televised, unless an application is granted for a publication ban or for a portion of the hearing to be held *in camera* in order to preserve the confidentiality of information or the identities of informants (including whistleblowers), witnesses or other persons;
- vi. parties are encouraged to provide to Commission counsel the names and addresses of all witnesses they feel ought to be heard, and to provide all relevant documents, at the earliest opportunity;
- vii. all witnesses are entitled to have counsel present, who may object to questions put to them;
- viii. although evidence may be presented that might not ordinarily be admissible in a court of law, I shall be mindful of the danger of admitting such evidence and, in particular, its possible effect on someone's reputation;
- ix. parties may make closing submissions only on matters relevant to the basis upon which standing was granted to them.

The hearings will be bilingual; witnesses and their counsel are entitled to speak either of Canada's official languages, and to be examined and cross-examined by counsel in the official language of their choice. Simultaneous translation services will be provided throughout. The Commission's written decisions and reports will be in both official languages.

4. The Commission's Mandate and the Issues List

The scope of the Commission's mandate is established by the terms of reference. I interpret these as directing me to perform two separate, but related, functions.

First, in what has been referred to as Phase I, paragraph (a) directs me to determine essentially how and why the sponsorship program and advertising activities considered in Chapters 3 and 4 of the Auditor General's November 2003 report to the House of Commons were created, implemented and managed, and where the money went. As already mentioned, Phase I will consist of public hearings in Ottawa and Montreal, culminating in a report which I hope to submit to the Governor in Council no later than November 1, 2005.

Second, paragraph (b) of the terms of reference directs me to make recommendations based upon my factual findings from Phase I about how to prevent future problems. This will be Phase II, during which I expect to commission papers from experts on various subjects and to hear or receive submissions from persons or organizations who have been granted standing in Phase II. In addition I propose to conduct some form of public hearings so as to receive the views of ordinary citizens. I hope to submit to the Governor in Council my second Report, containing recommendations, on December 15, 2005.

The issues to be considered in Phases IA and IB as I interpret the terms of reference, are set out in the following Issues Lists:

Issues List of Phase IA

1. the creation, purpose and objectives of the sponsorship program;
2. the role and responsibility of elected and non-elected public office holders and others in the Government and Parliament of Canada, including Crown entities (collectively the "Government of Canada"), as well as others outside the Government of Canada, in the creation of the sponsorship program, the selection of communications and advertising agencies (including the creation, purpose and objectives

of the advertising program), and the management of the sponsorship program and advertising activities of the Government of Canada (collectively the “activities”);

3. whether Parliament was bypassed and, if so, by whom and on what basis;
4. whether there was political influence involved in the activities and, if so, by whom, to what purpose, and to what effect;
5. whether any person or organization in the Government of Canada gained an advantage financially, politically or otherwise from the activities and, if so who, to what purpose, and to what effect;
6. whether the procedures, structures, reporting lines, systems for approvals and internal controls which were implemented by the Government of Canada, in the activities were sufficient and, if not, why not and to what purpose and effect. This will involve an assessment of the normal procedures, structures, reporting lines, systems for approvals and internal controls, or other potentially applicable standards, for procurement programs and selections of service providers for activities of a similar nature, and whether there were deviations in the activities from normal procedures, structures, reporting lines, systems for approvals and internal controls;
7. whether there was compliance with normally applicable rules, regulations, standards and guidelines, including the *Financial Administration Act* and other relevant instruments and, if not, in what manner was there non-compliance, and to what effect;
8. whether the culture and structure in the Government of Canada discouraged whistleblowing;
9. the path of the funds, including the approvals and procedures in relation thereto, within the Government of Canada to the point that these funds were disbursed to non-Government of Canada sources.

Issues List of Phase IB

1. the identity of those who received the sponsorship, communications and advertising funds, including any commissions or fees payable with respect to them, (hereinafter “the funds”) the purpose for which the funds were disbursed, and the extent of value for money received in return by the Government of Canada, the latter term as defined in the Issues List for Phase IA, item 2;
2. whether there was political influence on the distribution of the funds, including questions relating to whether there were direct or indirect political contributions or gifts made by recipients of the funds;
3. whether there were sufficient external monitoring and financial controls used by fund recipients described in I above; if not, why not and to what effect.

5. Conclusion

Without repeating what I have already said concerning the Tentative Schedule for the Commission of Inquiry as set out in Appendix III, a few additional remarks on the subject of the time needed to fulfil this mandate may be necessary.

Paragraph (1) of the terms of reference directs me to submit my reports on an “urgent” basis. I take this direction very seriously, being cognizant of the public outcry which accompanied the release of the Auditor General’s Report, which led to the establishment of this Commission. There have been calls from many quarters to begin public hearings promptly and to “get to the bottom of this” as soon as possible. I recognize these concerns, which are perfectly legitimate.

However, I am also cognizant of the fact that my mandate is extremely broad and complex. It will involve hearing from numerous witnesses, reviewing voluminous documentation, and considering a wide variety of evidence.

While I do not intend to track down every point, no matter how immaterial or remotely related, I also do not intend to carry out a superficial examination. The investigation must be thorough. This takes time. A too rapid approach might be construed on the one hand as superficial, intended to absolve certain parties of blame, or on the other hand, as negligent and intended to attach blame too readily. Obviously this must be avoided.

I am also well aware that this Inquiry may tarnish the reputations of some people. A person's reputation may be his or her most important possession. As I said before, I intend to ensure that every person or organization receives appropriate procedural fairness. That also takes time. No one should be railroaded.

Everyone wants answers quickly, and I shall attempt to provide these answers to the best of my ability as promptly as I can. However, to do that, the work of the Inquiry must also be thorough and fair to all concerned. The public interests of expedition, thoroughness and fairness must be balanced.

As I stated at the outset, I have no pre-conceived notions or understandings. I shall prepare my Reports based on the evidence. I intend to conduct the Inquiry based on the five principles to which I have already referred, namely independence, fairness, thoroughness, expedition and efficiency.

I will not express conclusions or recommendations in relation to civil or criminal liability, but I shall investigate and report on the facts to the full extent of my powers under the *Inquiries Act* and the terms of reference, and to make my recommendations accordingly. At the conclusion of my mandate, my hope is that the public will consider that the issues have received a full and fair examination.