

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

BRUCE CARSON

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

APPELLANT'S FACTUM

(Pursuant to s. 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview of Position of the Appellant

1. In this appeal, this Honourable Court is asked to determine what type of transaction is intended to be captured by the phrase “any matter of business relating to the government” in s. 121(1)(a)(iii) as adopted by s. 121(1)(d) of the *Criminal Code* in respect of the crime of Fraud on the Government.¹ Other than the decisions from the Courts below, there appears to be no jurisprudence interpreting the phrase.
2. The issue arises as a result of the Appellant, a former senior advisor to Prime Minister Stephen Harper, being charged with the offence under s. 121(1)(d) of the *Criminal Code* as a result of his activities on behalf of H2O Pros (“H2O”), a company in the business of selling point of use water purification devices. It was alleged, as

“a person having or pretending to have influence with the Government of Canada, or with a minister or an official of the Government of Canada, [he] did directly or indirectly demand, accept, or agree to accept for himself or Michele McPherson, a reward, advantage or benefit as consideration for cooperation, assistance, exercise of influence, or acts in connection with a matter of business relating to the Government of Canada contrary to Section 121(1)(d) of the *Criminal Code*.”²

3. The Appellant was acquitted at trial but a majority of the Court of Appeal for Ontario held that the trial judge erred in interpreting the phrase “a matter of business relating to the government” by confining it to transactions in which the government is a party. In a

¹ RSC 1985 c C-46.

² Indictment, *R v Carson*, Court File no. 13-20008, (including endorsement of Warkentin J. re *R v Carson*, 2015 ONSC 7127), Appellant’s Record, Tab 1E, at 105.

dissenting judgment, Simmons J.A. held that the trial judge correctly applied the phrase and did not restrict its application in the manner found by the majority.

4. It was not disputed that the Appellant was a person having influence with the Government of Canada, nor that he demanded a benefit for Michele McPherson (his girlfriend) as consideration for assistance to H2O in marketing their devices to First Nations Bands. The sole issue in the case was whether that assistance was “in connection with a matter of business relating to the Government of Canada” namely, Indian and Northern Affairs Canada (or “INAC”, as it was then called in 2010 and 2011) as opposed to seeking assistance from INAC in connection with a matter of business with First Nations Bands.
5. H2O was seeking to market their point of use water purification devices to First Nations Bands. The assistance the Appellant agreed to provide was in helping H2O determine how this could be done.
6. The evidence at trial was overwhelming that the government (INAC) had no control or approval role in the purchase of the water purification systems and that, rather, the First Nations Bands had complete autonomy in the use of their funds for such purchases. This autonomy extended to use of both self-generated funds and a lump sum annual payment to the First Nations Bands from INAC for infrastructure maintenance and minor procurement.
7. The trial judge, Warkentin J., did not confine the phrase “any matter of business relating to the government” to actual transactions to which the government is a party. As Simmons J.A. in dissent noted:

[T]he trial judge found that there was no matter of business relating to the government in this case because INAC did not have the authority to either approve or purchase H2O's water treatment systems. Had INAC had the authority to approve a transaction, the trial judge would have found that there was a "matter of business relating to the government", even though INAC was not a party to the transaction.³

8. In rejecting the Crown's submission that the phrase in question included what the Crown contended was a three way business relationship, the trial judge stated:

It would be incorrect to interpret s. 121(1)(d) so broadly as to include the three way business relationship contemplated by the Crown. While I am aware that the intent of the Crown in making this submission was not meant to be paternalistic, the effect of a finding that such a three way relationship exists with respect to funding would be, in my view, most unwelcome by First Nations communities. They have long asserted their right to autonomy and indeed this is enshrined in our Constitution and Charter of Rights and Freedoms.⁴

9. The majority of the Court of Appeal came to the contrary conclusion. It found that the trial judge erred in confining "any matter of business related to government" to actual transactions to which the government is a party and that this led her to err in concluding that the government had to be a party to the decision to purchase the devices for s. 121(1)(d) to apply.
10. It is the position of the Appellant that this is an erroneous understanding of the trial judgment. Although the trial judge rejected the Crown's position of a three way business relationship, she did not restrict the phrase in question to transactions to which the government is a party. In fact, she accepted that transactions in which the government

³ *R. v. Carson*, 2017 ONCA 142, at para 101, Appellant's Record, Tab 1C, at 88.

⁴ *R. v Carson*, 2015 ONSC 7127, at para 90, Appellant's Record, Tab 1A, at 22.

merely had approval authority would be within the ambit of s. 121(1)(d). At the conclusion of the judgment, Warkentin J. stated:

Had I found that INAC had the authority to either approve or purchase H2O's water treatment systems, beyond the provision of funding to First Nations, Mr. Carson's conduct would have been blameworthy and I would have found him guilty of the charge of committing a fraud on the government pursuant to s. 121(1)(d).⁵

11. It is also the Appellant's position that the majority in the Court of Appeal made a further fundamental error in their understanding of s. 121(1)(d) which led them to conclude that the Appellant was guilty of the offence. The error is adopting by reference a portion of s. 121(1)(a) which is not adopted by s. 121(1)(d). The only relevant part of paragraph (a) which is adopted by paragraph (d) is "anything mentioned in subparagraph (a)(iii)". The majority, however, also adopted the concluding phrase of paragraph (a) (which applies only to offences defined in that paragraph): "whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be".⁶

12. The dissenting judgment recognized the error at paragraph 104:

As I read s. 121(1)(a), the closing phrase is not an integral part of sub-paragraphs (iii) and (iv); rather, sub-paragraphs (iii) and (iv) stand alone. Section 121(1)(d)(i) refers specifically to subparagraphs (a)(iii) and (iv); it makes no mention of the closing phrase of s. 121(1)(a), or the remainder of that subsection⁷. In other words, the closing phrase is not part of the offence created by paragraph (d) and should not factor into an assessment of whether that offence has been committed.

⁵ *R. v Carson*, 2015 ONSC 7127, at para 97, Appellant's Record, Tab 1A, at 24.

⁶ *R. v Carson*, 2017 ONCA 142, at para 50, Appellant's Record, Tab 1C, at 72.

⁷ *R. v Carson*, 2017 ONCA 142, at para 104, Appellant's Record, Tab 1C, at 89.

13. Ultimately it is the Appellant's position that these two fundamental errors led the majority of the Court of Appeal for Ontario to overturn his acquittal, and that the trial judge correctly concluded from the evidence before her that, since INAC could have no involvement or approval authority in the procurement of the devices by the First Nations Bands from H2O, Mr. Carson's assistance could not engage "the transaction of business with or any matter of business relating to the government".
14. The acquittal should therefore be restored.

Relevant Legislative Enactment

15. This case concerns the proper interpretation of s. 121(1)(a)(iii) and s. 121(1)(d) of the *Criminal Code*, which state:

Frauds on the government	Fraudes envers le gouvernement
<p>121 (1) Every one commits an offence who</p> <p>(a) directly or indirectly</p> <p>(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or</p> <p>(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,</p> <p>a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(iii) the transaction of business with or any matter of business relating to the government, or</p> <p>(iv) a claim against Her Majesty or any</p>	<p>121 (1) Commet une infraction quiconque, selon le cas :</p> <p>a) directement ou indirectement :</p> <p>(i) soit donne, offre ou convient de donner ou d'offrir à un fonctionnaire ou à un membre de sa famille ou à toute personne au profit d'un fonctionnaire,</p> <p>(ii) soit, étant fonctionnaire, exige, accepte ou offre ou convient d'accepter de quelqu'un, pour lui-même ou pour une autre personne,</p> <p>un prêt, une récompense, un avantage ou un bénéfice de quelque nature que ce soit en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant :</p> <p>(iii) soit la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernement,</p>

<p>benefit that Her Majesty is authorized or is entitled to bestow,</p> <p>whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;</p> <p>[...]</p> <p>(d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(i) anything mentioned in subparagraph (a)(iii) or (iv), or</p> <p>(ii) the appointment of any person, including themselves, to an office;</p>	<p>(iv) soit une réclamation contre Sa Majesté ou un avantage que Sa Majesté a l'autorité ou le droit d'accorder,</p> <p>que, de fait, le fonctionnaire soit en mesure ou non de collaborer, d'aider, d'exercer une influence ou de faire ou omettre ce qui est projeté, selon le cas;</p> <p>[...]</p> <p>d) ayant ou prétendant avoir de l'influence auprès du gouvernement ou d'un ministre du gouvernement, ou d'un fonctionnaire, exige, accepte ou offre, ou convient d'accepter, directement ou indirectement, pour lui-même ou pour une autre personne, une récompense, un avantage ou un bénéfice de quelque nature en contrepartie d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant :</p> <p>(i) soit une chose mentionnée aux sous-alinéas a)(iii) ou (iv),</p> <p>(ii) soit la nomination d'une personne, y compris lui-même, à une charge;</p>
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Relevant Factual Background

16. On consent, the trial proceeded on the transcripts of the evidence called at the Preliminary Inquiry. In addition, the Crown introduced, also on consent, a document entitled *Protocol for Decentralized Water in First Nations Communities* ("Protocol") published by INAC on April 15, 2010. No witness was called to explain the document although there was some reference to it at the Preliminary Inquiry.

A. Carson Seeks Advice from AFN National Chief

17. The Appellant's first step in assisting H2O to obtain information about how to reach the First Nations Bands market was to contact the National Chief of the Assembly of First

Nations (“AFN”), Shawn Atleo, with whom the Appellant had an ongoing professional and social relationship. The Appellant arranged to meet with Chief Atleo and some of the senior officials of the AFN along with Patrick Hill, the principal of H2O. The result of this meeting was that the Appellant and Mr. Hill were advised to contact Gail Mitchell and Gary Best at INAC to find out if funding was available for the devices H2O wanted to sell.

18. The Appellant then emailed Ms. Mitchell at INAC to arrange such a meeting.⁸

B. Carson and H2O Principals Meet with INAC Officials

19. The first meeting took place at INAC offices in Gatineau on September 14, 2010. The Appellant attended the meeting with Mr. Hill as well as Mr. Kazsap and Mr. McMahon from H2O Pros. Ms. Mitchell and Mr. Best attended on behalf of INAC.⁹
20. Ms. Mitchell and Mr. Best testified that requests for such meetings were common on the part of vendors seeking advice on doing business with First Nations. Ms. Mitchell said she routinely meets with potential vendors to explain the process. The information was also publicly available on INAC’s website.¹⁰
21. At the meeting, Ms. Mitchell and Mr. Best explained that INAC was not involved in any procurement for First Nations Bands. Ms. Mitchell explained that there are two streams whereby INAC provides funding for First Nations infrastructure. The first stream is a

⁸ *R v Carson*, 2015 ONSC 7127 (Exhibit: SCJ Exhibit 3, Tab 2; Email string dated August 19 to 24, 2010), Appellant’s Record, Tab 4A, at 275.

⁹ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript from Preliminary Inquiry Volume 3 (June 4, 2014)) at 10-11, Appellant’s Record, Tab 3B, at 141-142.

¹⁰ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript From Preliminary Inquiry Volume 3 (June 4, 2014)) at 9, 29, 32, and 55, Appellant’s Record, Tab 3B, at 140, 160, 163, and 186.

lump sum annual payment to the First Nations Bands for infrastructure maintenance and minor procurement. The second is one time funding for major infrastructure projects which must be formally proposed and approved by INAC prior to funding being provided. Ms Mitchell described the two streams as follows:

One stream relates to the operation and maintenance of existing facilities, and that's typically that's provided on an annual basis. It's formula-driven, and by that I mean it would - it would, you know, be a calculation based on the size of the community, the inventory of assets, you know, the relative lifecycle of those assets, so that's one stream, and that's the bulk of the funding that would go out.

The other stream is for capital investments, so building new or major renovations of existing facilities, and that - that stream of funding is essentially allocated based on priority and need and risk levels. It's a limited pot, so we're essentially - the department is administering funding against need that's much higher than available money, so you have to rank things, you have to prioritise.

So that's essentially how the two streams of funding operate: one is formula-driven and kind of rolls out on an annual basis, is adjusted for inflation and so forth; and then the other one is more sporadic and smaller, you know, overall.¹¹

22. The point of use devices being marketed by H2O would be in the first category.

C. INAC Had No Involvement in the Procurement of the Devices

23. Any sale of the devices would have to be directly to the First Nations Bands. INAC would have no involvement in it. It would be up to the First Nations Bands whether to purchase the equipment using their own funds or the first stream lump sum payment.

Again, as explained by Ms. Mitchell:

¹¹ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript From Preliminary Inquiry Volume 3 (June 4, 2014)) at 7, Appellant's Record, Tab 3B, at 138.

If it's a smaller type of system that the community is contemplating, and it's a decentralised option, so it's, you know, wells or cisterns or other types of things that are not as costly, then the community has the option to use their operating and maintenance budget, and any fees that they may collect for the service delivery to the community members, to make procurements.

But in all cases the community itself is still undertaking the procurement. The funding is coming from the federal government, but we're not procuring it on their behalf, so they would have kind of those two choices.¹²

24. Ms Mitchell explained again:

Q. Okay, if we could deal with a hypothetical. Let's assume a band, that H2O had come to you, and they had secured a contract with a specific band, the band had agreed to purchase H2O water treatment systems. How would the funding mechanism flow for something like that?

A. The band would use their annual allocation, their operation and maintenance budget, and they would allocate those dollars, or any other revenue that they might have, to procure it. The department wouldn't get into a one-off of paying for those services.

Q. Okay, and the - the money that the - the sort of pool of money that the band would be tapping into to do that, who would supply that money?

A. That would be an annual allocation from the department, as I talked about, the formula-based funding at the beginning of the year, and that's - that would be their operating budget to manage their infrastructure.¹³

25. A further meeting with Ms. Mitchell, Mr. Best and Lyse Bolduc, another INAC official, occurred at the Appellant's request on December 14, 2010. The Appellant and Mr. Hill

¹² *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript From Preliminary Inquiry Volume 3 (June 4, 2014)) at 8-9, Appellant's Record, Tab 3B, at 139-140.

¹³ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript From Preliminary Inquiry Volume 3 (June 4, 2014)) at 16-17, Appellant's Record, Tab 3B, at 147-148.

both attended. They claimed to have obtained some First Nations Band resolutions and were asking about how to proceed with the funding. Ms. Mitchell again explained the funding process and that they would have to deal with the First Nations Bands. INAC was not involved in any decision to purchase the equipment. As Ms. Mitchell put it:

[W]e again explained how the process for procuring services worked, and again that process involves the band coming to a decision about how they want to allocate the funds that they've received, and we clarified that the department didn't actually do that procurement, so we, you know, suggested that they needed, if they wanted to sell their product to First Nations and communities, they had to enter into contracts with those.¹⁴

26. Following this meeting, Mr. Best and Ms. Bolduc had a telephone conference with the Appellant on February 17, 2011 where the Appellant explained H2O Pros had secured some First Nations Band resolutions to purchase equipment and again, the Appellant was advised of the funding mechanism. There was also some discussion about an eventual pilot project that was being considered by INAC together with the Ontario Ministry of the Environment but was still at the conception stage. H2O appeared interested in it, but were told again that ultimately it would be up to the First Nations Bands that participated in it whether to contract with any vendor¹⁵.
27. Despite repeated requests for further information, the message that was given throughout the contacts with the Appellant was that INAC has no involvement in the procurement of the devices H2O wished to sell to the First Nations Bands. It was entirely up to the First

¹⁴ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript from Preliminary Inquiry Volume 3 (June 4, 2014)) at 15, Appellant's Record, Tab 3B, at 146.

¹⁵ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript from Preliminary Inquiry Volume 2, (June 3, 2014)) at 87-89 and 94-97, Appellant's Record, Tab 3A, at 118-119 and 125-128; *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript from Preliminary Inquiry Volume 3 (June 4, 2014)) at 16, Appellant's Record, Tab 3B, at 147.

Nations Bands whether they wished to purchase using either their self-generated funds or the lump sum annual allotment provided by the government¹⁶.

D. Pilot Projects

28. At trial and in the Court of Appeal, the Crown argued that the Appellant's interest in developing a pilot project to test the systems and his attempt to promote them to the INAC officials could be considered a matter of business relating to the government. Neither the trial judge nor the Court of Appeal accepted that argument. The trial judge correctly noted that there were three distinct "pilot projects" referred to in the evidence.
29. The first was proposed early in the discussions by an official of the AFN and had to do with identifying several First Nations Bands with which to conduct a pilot project. On September 9, before the first meeting with INAC officials, National Chief Atleo wrote that his people were attempting to locate potential "Pilot Project" sites close to Ottawa.¹⁷ On October 8, Irving Leblanc of the AFN provided a short list of First Nations Bands for H2O to approach as "potential pilot projects".¹⁸ Roger Jones of the AFN then agreed to assist H2O in making connection with the identified First Nations Bands.¹⁹ All of this was done without any involvement by INAC.

¹⁶ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript from Preliminary Inquiry Volume 3 (June 4, 2014)) at 16, 24, 30, 32, 48 – 51 and 55, Appellant's Record, Tab 3B, at 147, 155, 161, 163, 179-182 and 186.

¹⁷ *R v Carson*, 2015 ONSC 7127 (Exhibit: SCJ Exhibit 5, Tab 3; Email string dated July 16 to September 19, 2010), Appellant's Record Tab 4B, at 279.

¹⁸ *R v Carson*, 2015 ONSC 7127 (Exhibit: SCJ Exhibit 3, Tab 7; Email string dated October 7 to 8, 2010), Appellant's Record, Tab 4C, at 282-283.

¹⁹ *R v Carson*, 2015 ONSC 7127 (Exhibit: SCJ Exhibit 3, Tab 9; Email string dated October 7 to 12, 2010), Appellant's Record, Tab 4D, at 285.

30. The second “pilot project” that was discussed further confused the concept. It arose when H2O finally received some positive reaction from the Bay of Quinte Mohawks. The proposal appears to have been that H2O would install their devices in 50 to 100 homes as a “Pilot Project”.²⁰ This does not appear to be the same Pilot Project that was being proposed by the AFN which involved the participation of several First Nations Bands. The trial judge found that there was no evidence that INAC would play any role in these two projects.²¹
31. The third pilot project mentioned in the evidence was the possible project involving INAC and the Ontario Ministry of the Environment. The trial judge, based on the evidence of Ms. Bolduc and Ms. Mitchell found that, at the relevant time, this was only at a conceptual stage. Ultimately the trial judge did not accept the Crown’s argument on this issue.²²
32. Both judgments at the Court of Appeal noted this evidence, but acknowledged that the trial judge did not accept the significance that the Crown asserted.²³

E. The Protocol

33. The Crown argued both at trial and in the Court of Appeal that the *Protocol* was evidence of INAC’s involvement in the intended transactions. The trial judge, however held:

²⁰ *R v Carson*, 2015 ONSC 7127 (Exhibit: SCJ Exhibit 3, Tab (26); Email string dated February 9, 2011), Appellant’s Record, Tab 4E, page 291.

²¹ *R. v. Carson*, 2017 ONCA 142, at para 10, Appellant’s Record, Tab 1C, at 56.

²² *R. v Carson*, 2015 ONSC 7127, at paras 39 to 45, Appellant’s Record, Tab 1A, at 11-13.

²³ *R. v. Carson*, 2017 ONCA 142, at paras 10-12 and 78, Appellant’s Record, Tab 1C, at 56-57, and 81.

[93] The Crown's argument that the Protocol for Decentralized Water demonstrated that there was funding that came through INAC for the types of water treatment systems marketed by H2O was not supported by the evidence of those who testified on behalf of INAC. This document was not put to any of them.

[94] It is not possible therefore to consider this Protocol for Decentralized Water in isolation without evidence from one of the INAC witnesses regarding how funding was provided under the Protocol for Decentralized Water; whether it applied to the type of point-of-use water treatment systems proposed by H2O and whether or not this Protocol for Decentralized Water had been part of the discussions between Mr. Carson and INAC.²⁴

34. In the Court of Appeal, the majority allowed the appeal on other grounds so declined to consider whether the trial judge erred in her assessment of the Protocol.²⁵ Simmons J.A. however, would have upheld the trial judge's reasons for rejecting it. She said:

[121] On appeal, the Crown attempts to formulate the trial judge's assessment of this evidence as some form of legal error. I reject this submission. Although the Protocol was before the court on consent, there was no agreement on what conclusions could or should be drawn from it.

[122] The trial judge considered the evidence relating to the Protocol and concluded that she could not give it the weight the Crown submitted it should have. I fail to see how this gives rise to a question of law alone affording the Crown a right of appeal.²⁶

F. Trial Decision

35. At trial, Warkentin J. held that a finding that direct business with First Nations Bands constituted a matter of business relating to the government would be viewed as unwelcome paternalism by First Nations communities, and by extension, would capture

²⁴ *R. v Carson*, 2015 ONSC 7127, at paras 93-94, Appellant's Record, Tab 1A, at 23.

²⁵ *R. v Carson*, 2017 ONCA 142, at para 51, Appellant's Record, Tab 1C, at 73.

²⁶ *R. v Carson*, 2017 ONCA 142, paras 121-122, Appellant's Record, Tab 1C, at 93.

all business with charities and corporations which receive government funding with terms and conditions attached. Warkentin J. held that the words “business relating to the government” ought not to be extended to business with entities which only receive funding from the government. Such business dealings do not impact on the integrity of the government. It was her opinion, however, that had the evidence been that INAC had some sort of approval authority over the point of use purchases, that the proposed transactions would constitute business “related to the government” even though the government was not a party to the transactions.²⁷

G. Decision of the Court of Appeal for Ontario

36. The majority of the Court of Appeal, after extensively reviewing the provisions of the *Lobbying Act*²⁸ and comparing them to s. 121(1)(d),²⁹ concluded that the trial judge erred “in confining ‘any matter of business relating to government’ to actual transactions to which the government is a party... [and] in concluding that the government had to be a party to the decision to purchase a water treatment system for s. 121(1)(d) to apply”³⁰. The comparison between the *Lobbying Act* and s. 121(1)(d) was made and relied on despite the majority’s finding that “a violation of the *Lobbying Act*, which is an offence under s. 14 of the Act, is not completely co-extensive with a violation of s. 121(1)(d) of the *Criminal Code*.”³¹

²⁷ *R. v Carson*, 2015 ONSC 7127, at para 97, Appellant’s Record, Tab 1A, at 23-24.

²⁸ RSC 1985 c 44 4th Supp.

R. v Carson, 2017 ONCA 142, at para 37-42, Appellant’s Record, Tab 1C, at 66-69.

²⁹ *Ibid.*, at para 43-46, Appellant’s Record, Tab 1C, at 69-71.

³⁰ *Ibid.*, at para 47, Appellant’s Record, Tab 1C, at 71.

³¹ *Ibid.*, at para 45, Appellant’s Record, Tab 1C, at 70

37. The majority went on to conclude that “the essence of the offence is acceptance of a benefit for exercise of influence”³² without regard to the purpose to which the exercise of influence is directed. They reached that conclusion by reading the concluding phrase in s. 121(1)(a) into s. 121(1)(d).
38. Simmons J.A., in dissent, disagreed that the trial judge misinterpreted s. 121(1)(d) or made any other error of law. In her view, the trial judge had found, simply, that the Crown had failed to prove that the Appellant’s conduct fell within the purview of the section. As noted above, in the view of Simmons J.A., the trial judge did not narrowly construe the term “business relating to the government”.³³ She simply found on the evidence that “there was no matter of business relating to the government in this case because INAC did not have the authority to either approve or purchase H2O’s water treatment systems”.³⁴ Simmons J.A. further noted that “[h]ad INAC had the authority to approve a transaction, the trial judge would have found that there was a “matter of business relating to the government”, even though INAC was not a party to the transaction”.³⁵
39. Simmons J.A. also held that the concluding phrase in s. 121(1)(a) – “whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed” – is not included in s. 121(1)(d) nor incorporated by reference.

³² *Ibid.*, at para 50, Appellant’s Record, Tab 1C, at 72.

³³ *Supra*, note 3.

³⁴ *Ibid.*

³⁵ *Ibid.*

Consequently that phrase plays no part in the interpretation of s. 121(1)(a)(iii) as incorporated by s. 121(1)(d).³⁶

PART II – QUESTIONS IN ISSUE

40. This appeal raises the following issue:

Does the phrase “any matter of business relating to the government” in s. 121(1)(a)(iii) as adopted by reference in s. 121(1)(d) of the *Criminal Code* include the sale of point of use water purification systems to First Nations Bands where the Bands have complete autonomy regarding the purchases and may, at their discretion, access their self-generated funds or lump sum discretionary annual funding provided by the government for infrastructure maintenance?

PART III – STATEMENT OF ARGUMENT

The Trial Judge’s assessment of the Protocol

41. The Protocol was introduced by the Crown on consent but, as noted above, there was almost no evidence before the Court to explain its significance, or how the document might apply to the devices in question. Although the document was before the Court on consent, there was clearly no agreement on what conclusions could be drawn from it³⁷. The trial judge referred to the meagre evidence on the record that refers to the Protocol and then found that the Crown’s reliance on it was not supported by the evidence since the document was not put to any of the witnesses who testified.³⁸ She further found that,

³⁶ *Ibid*, at paras 102-105, Appellant’s Record, Tab 1C, at 89.

³⁷ *R v Carson*, 2015 ONSC 7127 (Evidence: Transcript of Proceedings at Trial (September 15, 2015)), at 62:14 -67:31, Appellant’s Record, Tab 3C, at 256-261.

³⁸ *R. v Carson*, 2015 ONSC 7127, at paras 46 -50, Appellant’s Record, Tab 1A, at 13-14.

absent evidence as to whether and how the Protocol affected funding or whether it even applied to the H2O devices, she could not rely on it.³⁹

42. The trial judge considered all the evidence relating to the document and properly concluded that in the absence of explanatory evidence she could not accord it the weight that the Crown submitted it should have. In doing so, she was making a finding of fact which cannot be a basis for a Crown appeal.

The Errors in the Majority Judgment of the Court of Appeal

A. The Trial Judge did not Equate “Any matter of Business Relating to the Government” to Actual Transactions to Which the Government is a Party

43. The apparent root for this error is the majority of the Court of Appeal’s misunderstanding of the trial judge’s reference to *R v Hinchey*⁴⁰. At paragraph 17, Pardu J.A. for the majority in this case correctly noted that the trial judge considered *R. v. Hinchey* which dealt with the phrase “a person who has dealings with the government”. In *R. v. Hinchey*, dealing with the interpretation of s. 121(1)(c) of the *Criminal Code*, this Court held that that phrase should be “truly concerned with persons who at the time of the commission of the offence had specific or ongoing business dealings with the government”.⁴¹
44. The majority judgment in this case then reviewed the principles of statutory interpretation and the history of s. 121 and again, at paragraph 30, correctly noted that the trial judge referred to *R. v. Hinchey* as authority for the purpose of the section being to preserve the

³⁹ *R. v Carson*, 2015 ONSC 7127, at para 97, Appellant’s Record, Tab 1A, at 23-24.

⁴⁰ [1996] 3 S.C.R. 1128.

⁴¹ *Ibid.*, at para 48.

integrity of the government. Pardu J.A. then concludes this part of her analysis as follows:

[32] As explained above, the trial judge relied on *Hinchey*, a case that dealt with s. 121(1)(c), which makes it an offence for a government official to accept payments or gifts from a person who has “dealings” with the government. In interpreting the scope of the term “dealings”, the court recognized at para. 48 that almost everyone has dealings with the government, perhaps to apply for licences, file tax returns or obtain passports. As well, government employees, like all individuals, may receive personal gifts from time to time, quite unrelated to their work. In this context, to avoid criminalizing conduct beyond the scope targeted by the legislature L’Heureux-Dubé J. interpreted s. 121(1)(c) at para. 48 as “truly concerned with persons who at the time of the commission of the offence had specific or ongoing business dealings with the government and that the gift was such that it could have an effect on those dealings” (emphasis added).

[33] The same concerns do not arise in the context of s. 121(1)(d), which does not target government officials but rather individuals who either have or pretend to have influence with the government and who promise to attempt to influence government decisions in exchange for a benefit – monetary or otherwise.⁴²

45. The judgment then embarks on an analysis of the *Lobbying Act* and attempts to reconcile its provisions with s. 121 and concludes this analysis with the following statement:

In light of the purposes of s. 121, the context and the above textual analysis, the trial judge erred in confining “any matter of business related to government” to actual transactions to which the government is a party. This led her to err in concluding that the government had to be a party to the decision to purchase a water treatment system for s. 121(1)(d) to apply.⁴³

46. The trial judge *did not* rely on *R. v. Hinchey* and *did not* conclude that the government had to be a party to the decision to purchase the water treatment systems for s. 121(1)(d)

⁴² *R. v. Carson*, 2017 ONCA 142, at paras 32-33, Appellant’s Record, Tab 1C, at 64-65.

⁴³ *Ibid.*, at para 47, Appellant’s Record, Tab 1C, at 71.

to apply. Rather, after reviewing the principles of statutory interpretation, the trial judge stated:

In addition to the principles of statutory interpretation, there is case law that has considered the various components of s. 121(1). These cases are useful in interpreting Parliament's intent in enacting s. 121(1)(d).⁴⁴ (Emphasis added.)

47. She then reviewed *R v Hinchey*, *R v Cogger*⁴⁵, *R c Corbeil*⁴⁶, *R v Giguere*⁴⁷ and *R v O'Brien*⁴⁸. Warkentin J. then proceeded to her analysis and conclusions without any further reference to *R. v. Hinchey* or its interpretation of “dealings with the government”.

In her conclusions, she held that:

Had I found that INAC had the authority to either approve or purchase H2O's water treatment systems, beyond the provision of funding to First Nations, Mr. Carson's conduct would have been blameworthy and I would have found him guilty of the charge of committing a fraud on the government pursuant to s. 121(1)(d)⁴⁹.

48. It is submitted that “authority to approve” is clearly less than being “a party to the decision to purchase” the systems and falls well short of “business *with* the government”.

B. The Lobbying Act has no Application to the Meaning of “a matter of business relating to the government”

49. The attempt to reconcile the provisions of the *Lobbying Act* with the offence created by s. 121(1)(d) plays a significant role in the majority judgment. Yet, this exercise does little to

⁴⁴ *R. v Carson*, 2015 ONSC 7127, at para 70, Appellant's Record, Tab 1A, at 18.

⁴⁵ [1997] 2 S.C.R. 845.

⁴⁶ *R. c. Corbeil* (2009), J.E. 2010-189 (appeal allowed in part 2010 QCCA 1628), Appellant's Authorities at Tab 1.

⁴⁷ [1983] 2 S.C.R. 448.

⁴⁸ [2009] O.J. No. 5817, (2009), 249 C.C.C. (3d) 399 (Ont. S.C.), Appellant's Authorities at Tab 3.

⁴⁹ *R. v Carson*, 2015 ONSC 7127, at para 97, Appellant's Record, Tab 1A, at 49.

assist in deciding whether selling the water purification systems to First Nations Bands was a matter of business relating to the government.

50. The question of overlap of s. 5 of the *Lobbying Act* and s. 121(1)(d) was first raised in a question from the bench at the Court of Appeal. Neither party had raised it in their factums, but both subsequently filed supplemental written submissions. It was the Appellant's (Respondent at the Court of Appeal) position that if the *Lobbying Act* has any significance to the issue on the appeal, it is to illustrate the limits to concerns about government integrity in relation to the conduct covered by both provisions and supports the trial judge's conclusion that the phrase "a matter of business relating to the government" should not be extended to doing business with entities which merely receive funding from the government as that does not impact on the integrity of the government.
51. In the majority judgment, Pardu J.A. recognized that the actions of the Appellant would appear to have been perfectly acceptable under the *Lobbying Act* if he were a registered lobbyist, even if they involved actual business with the government. At paragraph 43, she sought to differentiate between the conduct covered by the *Act* and the *Code*.

[T]he legislative regime governing lobbying illustrates that an individual paid to lobby on behalf of a business may communicate with cabinet ministers and government officials about the development of any policy or program, the award of any grant, contribution of financial benefit, or the award of any contract by or on behalf of the government, or may simply arrange a meeting between a public office holder and any other person, and be caught by the reporting requirements of the Act. If that same person were a person of influence or a person who pretended to have influence, he or she might also be caught by s. 121(1)(d) of the Criminal Code by his or her agreement to undertake this task.⁵⁰

⁵⁰ *R. v. Carson*, 2017 ONCA 142, at para 43, Appellant's Record, Tab 1C, at 69.

52. This suggests that a registered lobbyist who happens to be a person with influence with the government would be guilty of the offence under s. 121(1)(d) by conducting normal lobbying activities. Since lobbyists generally hold themselves out to be persons with influence with government officials, such an analysis would criminalize the activities of most lobbyists. This cannot be.
53. The judgment goes on to identify differences between the *Lobbying Act* and the *Criminal Code*:

There are differences between the regulatory regime established by the *Lobbying Act* and the *Criminal Code* prohibition. The first is directed at regulation of professional lobbyists. The second is aimed at criminal influence peddling. The [Lobbying] Act's reporting requirements apply to persons paid to communicate with government. Section 121(1)(d) applies to persons having or pretending to have influence with government. A report must be filed under the Act when an individual undertakes to communicate with or arrange a meeting with a public office holder in respect of enumerated issues for payment. The prohibition in s. 121(1)(d) forbids acceptance of a benefit in exchange for "cooperation, assistance, exercise of influence or an act or omission" in connection with a matter of business relating to the government. Both provisions are triggered by the antecedent agreement – the undertaking to communicate in the case of the *Lobbying Act* and the acceptance of a benefit in exchange for the exercise of influence or assistance in s. 121(1)(d).⁵¹

54. It is the Appellant's respectful position that these differences do not solve the reconciliation question and certainly do not lead to the statement contained in the next paragraph⁵² that, in light of the analysis, the trial judge concluded that the government had to be a party to the decision to purchase the systems and therefore erred in her

⁵¹ *R. v. Carson*, 2017 ONCA 142, at para 46, Appellant's Record, Tab 1C, at 70-71.

⁵² *R. v. Carson*, 2017 ONCA 142, at para 47, Appellant's Record, Tab 1C, at 71

conclusion. In any event, as noted above, that was not the conclusion made by the trial judge.

C. The Closing Phrase of s. 121(1)(a) is Not Adopted by Reference in s. 121(1)(d)

55. At paragraph 50 the majority in the Court of Appeal held that, although the government did not make the decisions about the purchase of the water purification systems, the Appellant was nevertheless guilty of the offence charged by virtue of the closing phrase of s. 121(1)(a), rather than the controlling provision, s. 121(1)(d). The judgment states:

[T]he essence of the offence is acceptance of a benefit for exercise of influence. Section 121(1) provides that it matters not “whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed.”⁵³

56. As indicated above, s. 121(1)(a) states:

<p>121 (1) Every one commits an offence who</p> <p>(a) directly or indirectly</p> <p>(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or</p> <p>(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,</p> <p>a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(iii) the transaction of business with or any matter of business relating to the government, or</p>	<p>121 (1) Commet une infraction quiconque, selon le cas :</p> <p>a) directement ou indirectement :</p> <p>(i) soit donne, offre ou convient de donner ou d’offrir à un fonctionnaire ou à un membre de sa famille ou à toute personne au profit d’un fonctionnaire,</p> <p>(ii) soit, étant fonctionnaire, exige, accepte ou offre ou convient d’accepter de quelqu’un, pour lui-même ou pour une autre personne,</p> <p>un prêt, une récompense, un avantage ou un bénéfice de quelque nature que ce soit en considération d’une collaboration, d’une aide, d’un exercice d’influence ou d’un acte ou omission concernant :</p> <p>(iii) soit la conclusion d’affaires avec le</p>
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⁵³ R. v. Carson, 2017 ONCA 142, at para 50, Appellant’s Record, Tab 1C, at 73-74.

<p>(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,</p> <p>whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;</p>	<p>gouvernement ou un sujet d'affaires ayant trait au gouvernement,</p> <p>(iv) soit une réclamation contre Sa Majesté ou un avantage que Sa Majesté a l'autorité ou le droit d'accorder,</p> <p>que, de fait, le fonctionnaire soit en mesure ou non de collaborer, d'aider, d'exercer une influence ou de faire ou omettre ce qui est projeté, selon le cas;</p>
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57. By contrast, the object of the influence described in s. 121(1)(d) is:

<p>121 (1) Every one commits an offence who [...]</p> <p>(d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(i) anything mentioned in subparagraph (a)(iii) or (iv), or</p> <p>(ii) the appointment of any person, including themselves, to an office;</p>	<p>121 (1) Commet une infraction quiconque, selon le cas : [...]</p> <p>d) ayant ou prétendant avoir de l'influence auprès du gouvernement ou d'un ministre du gouvernement, ou d'un fonctionnaire, exige, accepte ou offre, ou convient d'accepter, directement ou indirectement, pour lui-même ou pour une autre personne, une récompense, un avantage ou un bénéfice de quelque nature en contrepartie d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant :</p> <p>(i) soit une chose mentionnée aux sous-alinéas a)(iii) ou (iv),</p> <p>(ii) soit la nomination d'une personne, y compris lui-même, à une charge;</p>
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58. S. 121(1)(d) does not itself contain any qualifying phrase such as the last phrase in s. 121(1)(a).

59. By their plain wording, paragraphs (a) and (d) of s. 121(1) define different offences. Paragraph (a) creates the offences of bribery either by offering a bribe to an official or an official demanding a bribe. Although the closing phrase removes the issue of whether the

objective of the bribe could be accomplished, it does not relieve the prosecution of having to prove that the purpose of the bribe was one of the matters mentioned in sub paragraphs (iii) and (iv) which include “any matter of business relating to the government”.

60. By contrast, paragraph (d) creates the offence commonly referred to as “influence peddling” and prohibits a person with real or pretended influence from accepting a benefit for the purpose of using influence in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office.

61. The proper reading of paragraph s. 121(1)(d) conveys that only the things mentioned in sub-paragraphs 121(1)(a)(iii) and (iv) are adopted, but not any of the remainder of the provision.

62. For her part, Simmons J.A., in her dissent, grasps this distinction in the following comment:

As I read s. 121(1)(a), the closing phrase is not an integral part of sub-paragraphs (iii) and (iv); rather, sub-paragraphs (iii) and (iv) stand alone. Section 121(1)(d)(i) refers specifically to subparagraphs (a)(iii) and (iv); it makes no mention of the closing phrase of s. 121(1)(a), or the remainder of that subsection.⁵⁴

63. The fact that s. 121(1)(d)(i) incorporates only s. 121(1)(a)(iii) and (iv) attracts the application of the doctrine of implied exclusion and the principle of strict construction of penal statutes. Had Parliament intended to include in s. 121(1)(d) the closing phrase of s.

⁵⁴ *R. v. Carson*, 2017 ONCA 142, at para 104, Appellant’s Record, Tab 1C, at 89.

121(1)(a), it would have expressly stated so. This is especially clear in the context of s. 121(1)(d) incorporating by reference other parts of s. 121(1)(a). The fact that Parliament did not expressly state strongly implies that Parliament did not intend to include the final phrase within the ambit of s. 121(1)(d).

64. The following statement on statutory interpretation from the canonical *Sullivan on the Construction of Statutes* should guide this Court’s analysis on the role of s. 121(1)(a):

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature’s failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it [in *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 31 (Ont. C.A.)], “legislative exclusion can be implied when an express reference is expected but absent”.⁵⁵

65. Although it is the Appellant’s position that s. 121(1)(d) is clear that only the words of s. 121(1)(a)(iii) and (iv) are adopted by reference, if it is perceived that there is an ambiguity in the scope of the incorporation by reference, such ambiguity must be resolved in favour of the Appellant. It is an axiom of our justice system that where ambiguity exists in criminal statutes, it ought to be resolved in favour of the accused⁵⁶.
66. What confirms the view that the final phrase in paragraph (a) is *not* adopted in paragraph (d) is that it cannot apply to sub-paragraph (d)(ii) since that sub-paragraph does not adopt any part of paragraph 121(1)(a). It makes no sense that paragraph (a) would apply to 121(1)(d)(i) but not 121(1)(d)(ii).

⁵⁵ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Lexis Nexis Canada Inc, 2014) at 8.90, Appellant’s Authorities, Tab 4.

⁵⁶ *R. v. McIntosh* [1995] 1 S.C.R. 686, at paras 38-39.

67. S. 121(1)(d) focuses on the improper exercise of influence in connection with the purposes mentioned in the two sub-paragraphs. The only adoption by reference in paragraph (d) is contained in sub-paragraph (i) which relates to the exercise of influence in connection with the matters set out in sub-paragraphs (a)(iii) and (iv), namely, business with or relating to the government or a claim against the government.
68. Sub-paragraph (d)(ii) relates to the exercise of influence in connection with government appointments and does not adopt any part of paragraph (a). The closing phrase in paragraph (a) cannot therefore apply to the exercise of influence in connection with government appointments. It is unrealistic to assume that Parliament would have intended, without specifically saying so, that inability to influence in the concluding phrase of paragraph (a) would apply to the exercise of influence in business transactions but not government appointments.
69. Furthermore, the concluding phrase in paragraph (a) refers to “the official” to which the paragraph is directed. In paragraph (d) the protagonist is not an official but a person with or pretending to have influence. The words in the concluding phrase of paragraph (a) simply do not fit in paragraph (d). This point was alluded to by Simmons J.A. in her dissent where she said:

[105] Further, if the closing phrase of s. 121(1)(a) were to be incorporated into s. 121(1)(d), it would have to be modified to fit the different context. While s. 121(1)(a) deals with bribes to officials and their families, s. 121(1)(d) deals with influencing officials or ministers. Thus, if the closing phrase were to apply in the context of s. 121(1)(d), it would have to read “whether or not, in fact, the official or Minister is able to cooperate...”.⁵⁷

⁵⁷ *R. v. Carson*, 2017 ONCA 142, at para 105, Appellant’s Record, Tab 1C, at 89.

The Meaning of “Any Matter of Business Relating to the Government”

A. The Trial Judge’s Approach

70. The majority in the Court of Appeal were mistakenly of the view that the trial judge, purportedly relying on *R v Hinchey*, held that the phrase was restricted to actual transactions to which the government is a party. In fact, the trial judge considered the sparse jurisprudence on s. 121(1) (none of which, she recognized, claimed to interpret the phrase in question in this case) only for guidance on the approach to the meaning of the phrase. This was recognized by Simmons J.A. in her dissent.
71. Warkentin J. accepted that the purpose of the section as determined in *R v Hinchey*, is the preservation of the integrity of the government. She also noted that the majority in *R v Hinchey* restricted the very broad term in the English version of the section, “dealings with the government”. In particular, Warkentin J. referred to the following portion of the majority judgment in *R v Hinchey*⁵⁸:

On a literal interpretation, it is difficult to find a person in modern society who does not have some form of dealings with the government. It cannot have been the intention of Parliament to encompass every person in Canada, and many living abroad, into the section. Given the important purpose of preserving integrity, it would appear to me that the section is not interested in regulating the ordinary dealings which go on between Canadians and the government, but is truly concerned with persons who at the time of the commission of the offence had specific or ongoing business dealings with the government and that the gift was such that it could have an effect on those dealings.⁵⁹

⁵⁸ *R. v Carson*, 2015 ONSC 7127, at para 71, Appellant’s Record, Tab 1A, at 18.

⁵⁹ *Supra* note 40, at para 48.

72. The trial judge recognized that in Mr. Carson's case before her, she was dealing with a different concept in the term "any matter of business relating to the government". That phrase, however, is arguably at least as broad as the phrase "dealings with the government". On a literal interpretation, it could include such things as the exercise of influence with a general contractor on behalf of a sub-contractor where the general contractor is submitting a proposal for a government contract. It could be considered business "relating to the government" but the government has no interest in the relations between the contractor and the sub and consequently those relations can have no effect on the integrity of government.
73. The concept of "any matter of business relating to the government" is clearly meant to encompass business matters beyond "the transaction of business with" the government. This was recognized by the trial judge, but she was not prepared to adopt the Crown's theory that mere funding by the government to be used at the discretion of the First Nations Bands gave rise to the application of the section. She expressed her concern about extending the phrase to cover matters that had no bearing on the integrity of government:

[90] It would be incorrect to interpret s. 121(1)(d) so broadly as to include the three-way business relationship contemplated by the Crown. While I am aware that the intent of the Crown in making this submission was not meant to be paternalistic, the effect of a finding that such a three way relationship exists with respect to funding would be, in my view, most unwelcome by First Nations communities. They have long asserted their right to autonomy and indeed this is enshrined in our Constitution and Charter of Rights and Freedoms.

[91] Taking this analogy beyond the funding of First Nations communities, one could not say that because the Federal Government funds various charities or provides financial aid to

certain corporate entities whose only involvement with the government is to accept the funding based upon certain terms and conditions of that funding, that individuals or corporations attempting to do business with those charities or corporations are in a three way partnership with the government and their actions are captured by s. 121(1)(d).⁶⁰

74. The Appellant was acquitted, not because the trial judge restricted the phrase to actual transactions to which the government is a party, but because the government had no interest in the business in question. The trial judge, however, noted that had the evidence established that the government had some supervisory role in the sale of the equipment, she would have found the Appellant guilty. She said:

Had I found that INAC had the authority to either approve or purchase H2O's water treatment systems, beyond the provision of funding to First Nations, Mr. Carson's conduct would have been blameworthy and I would have found him guilty of the charge of committing a fraud on the government pursuant to s. 121(1)(d).⁶¹

75. Ultimately the trial judge found, applying a purposive approach which recognized that the section was designed to protect the integrity of the government, that although the phrase in question encompassed matters beyond the transaction of business with the government, it did not extend to matters in which the government had no direct interest as such matters did not affect the integrity of the government. It is the Appellant's position that the trial judge was correct in her analysis.

B. Suggested Definition

76. As already mentioned, a common term for the offence under s. 121(1)(d) is influence peddling (the term may also apply to one of the offences under paragraph (a)). Assuming

⁶⁰ *R. v. Carson*, 2017 ONCA 142, at paras 90-91, Appellant's Record, Tab 1C, at 22.

⁶¹ *R. v. Carson*, 2017 ONCA 142, at para 97, Appellant's Record, Tab 1C, at 23-24.

that term accurately describes the offence, its essence is the purported use of influence for payment to obtain from an official or a minister some sort of preferred treatment by the government for the person paying in connection with some business transaction. That preferred treatment must be such that it affects the integrity of the government.⁶² The result to which the exercise of influence is directed must require the official to act or refrain from acting in connection with the transaction. The transaction must be one in which the government is not a party otherwise it would fall within a “transaction of business” with the government rather than “a matter of business relating to the government”, yet it must affect government integrity.

77. The trial judge did not attempt to definitively interpret the phrase “any matter of business relating to the government”. She held, however, that, although it went beyond transactions to which the government is a party, it did not extend to entities which merely receive funding from the government unless the government had some role in approving the transaction as such transactions do not affect the integrity of the government.
78. As noted in above, the term “any matter of business relating to the government” is extremely broad as is the term “dealings with the government” in s. 121(1)(c) which was dealt with in *R v Hinchey*. In defining the very general term used in section 121(1)(c) the majority of this Court in *R v Hinchey* has taken a common sense approach that addresses the harm the section is aimed at, namely those having commercial business dealings with the government trying to buy an advantage. In doing so, the Court expressed concern that the broad expression “dealings with the government” could capture all Canadians. After comparing the English and French texts and considering the purpose of the section and to

⁶² *Supra* note 40.

avoid an unreasonable expansion of the term, L'Hereux-Dube J.S.C.C. held that "dealings with the government" should be restricted to commercial dealings.

79. The same reasoning can be applied to the term "any matter of business with the government". This would not restrict it to transactions to which the government is a party, but will prevent the term being extended in the manner proposed by the Crown to business transactions with any entity which receives government funding with terms and conditions attached. Although the trial judge did not follow *R v Hinchey*, she effectively applied its rationale and correctly when she held that the words "any matter of business relating to the government" ought not to extend to business with entities which only receive funding from the government. Such business dealings do not impact on the integrity of the government.
80. It is suggested that an appropriate interpretation of the phrase is that it refers to matters of business in which the government is not a party, but depend on some government action or inaction, such as approval, assessment, funding for the specific transaction, enactment or amendment or refraining from enacting or amending some legislation or regulation to facilitate the transaction⁶³. It is the intended influence on such government action or inaction which undermines government integrity, or, to quote the majority in the Court of Appeal, "merit based independent government decision making".⁶⁴ Such an interpretation would capture the example used by the majority of obtaining preferential tax treatment

⁶³ See *R. v. Murphy*, [1980] B.C.J. No. 2076, Appellant's Authorities at Tab 2.

⁶⁴ *R. v. Carson*, 2017 ONCA 142, at para 30, Appellant's Record, Tab 1C, at 64.

for a manufacturer to the detriment of its competitors⁶⁵ but would not capture business with entities that simply receive funding from the government.

C. Conclusion

81. Using one's influence to assist in doing business with entities such as First Nations Bands, charitable institutions, start-up companies and others which receive government funding or subsidies and over which the government has no control, cannot affect the integrity of the government and should not attract prosecution under s. 121(1)(d) of the *Criminal Code*.

PART IV – SUBMISSIONS ON COSTS

82. The Appellant does not seek costs.

PART V – ORDER SOUGHT

83. The requests that the order of the Court of Appeal for Ontario be set aside and the acquittal be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2017.

Patrick McCann

Counsel for the Appellant

⁶⁵ *R. v. Carson*, 2017 ONCA 142, at para 31, Appellant's Record, Tab 1C, at 64.

PART VI – LIST OF AUTHORITIES

AUTHORITY	PARAS.
Legislative Enactments	
<u>Criminal Code, R.S.C. , 1985, c. C-46, s 121.</u> <u>Code criminel (L.R.C. (1985), ch. C-46), art 121.</u>	1,2, 9, 10,11, 12,15, 35, 36- 39, 40, 43, 44- 46, 49-53, 55- 70, 73-73, 76, 78, 81
<u>Lobbying Act, RSC 1985 c 44 4th Supp, preamble, s. 2, s 5, s 14.</u> <u>Loi sur le lobbying ,LRC 1985, ch 44 4e suppl, préambule, art 2, art 5, art 14.</u>	36, 45, 49, 50, 51, 53
Jurisprudence	
<u>R. v Hinchey, [1996] 3 SCR 1128.</u>	43,44 , 46, 47, 70, 78, 79
<u>R v Cogger, [1997] 2 R.C.S. 845.</u>	47
<i>R. c. Corbeil</i> (2009), J.E. 2010-189 J.E. 2010-189.	47
<u>Corbeil c. R., 2010 QCCA 1628.</u>	47
<u>R. v. Giguere, [1983] 2 SCR 448.</u>	47
<i>R v O'Brien</i> , (2009), 249 C.C.C. (3d) 399 (Ont. S.C.).	47
<u>R. v. McIntosh, [1995] 1 S.C.R. 686.</u>	65
<i>R. v. Murphy</i> , [1980] B.C.J. No. 2076.	80
Secondary Sources	
Sullivan, Ruth, <i>Sullivan on the Construction of Statutes</i> , 6th ed. (Markham: Lexis Nexis Canada Inc, 2014).	64

<u>Criminal Code, R.S.C. , 1985, c. C-46, s 121.</u>	<u>Code criminel (L.R.C. (1985), ch. C-46), art 121.</u>
Frauds on the government 121 (1) Every one commits an offence who (a) directly or indirectly (i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or	Fraudes envers le gouvernement 121 (1) Commet une infraction quiconque, selon le cas : a) directement ou indirectement : (i) soit donne, offre ou convient de donner ou d'offrir à un fonctionnaire ou à un membre de sa famille ou à toute personne au profit d'un

<p>(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,</p> <p>a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(iii) the transaction of business with or any matter of business relating to the government, or</p> <p>(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,</p> <p>whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;</p> <p>[...]</p> <p>(d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with</p> <p>(i) anything mentioned in subparagraph (a)(iii) or (iv), or</p> <p>(ii) the appointment of any person, including themselves, to an office;</p>	<p>fonctionnaire,</p> <p>(ii) soit, étant fonctionnaire, exige, accepte ou offre ou convient d'accepter de quelqu'un, pour lui-même ou pour une autre personne,</p> <p>un prêt, une récompense, un avantage ou un bénéfice de quelque nature que ce soit en considération d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou omission concernant :</p> <p>(iii) soit la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernement,</p> <p>(iv) soit une réclamation contre Sa Majesté ou un avantage que Sa Majesté a l'autorité ou le droit d'accorder,</p> <p>que, de fait, le fonctionnaire soit en mesure ou non de collaborer, d'aider, d'exercer une influence ou de faire ou omettre ce qui est projeté, selon le cas;</p> <p>[...]</p> <p>d) ayant ou prétendant avoir de l'influence auprès du gouvernement ou d'un ministre du gouvernement, ou d'un fonctionnaire, exige, accepte ou offre, ou convient d'accepter, directement ou indirectement, pour lui-même ou pour une autre personne, une récompense, un avantage ou un bénéfice de quelque nature en contrepartie d'une collaboration, d'une aide, d'un exercice d'influence ou d'un acte ou d'une omission concernant :</p> <p>(i) soit une chose mentionnée aux sous-alinéas a)(iii) ou (iv),</p> <p>(ii) soit la nomination d'une personne, y compris lui-même, à une charge;</p>
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<u>Lobbying Act, RSC 1985 c 44 4th Supp</u>	<u>Loi sur le lobbying ,LRC 1985, ch 44 4e suppl.</u>
Preamble	Préambule

<p>WHEREAS free and open access to government is an important matter of public interest;</p> <p>AND WHEREAS lobbying public office holders is a legitimate activity;</p> <p>AND WHEREAS it is desirable that public office holders and the public be able to know who is engaged in lobbying activities;</p> <p>AND WHEREAS a system for the registration of paid lobbyists should not impede free and open access to government;</p> <p>NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:</p>	<p>Vu l'intérêt public présenté par la liberté d'accès aux institutions de l'État;</p> <p>Vu la légitimité du lobbyisme auprès des titulaires d'une charge publique;</p> <p>Vu l'opportunité d'accorder aux titulaires d'une charge publique et au public la possibilité de savoir qui se livre à des activités de lobbyisme;</p> <p>Vu le fait que l'enregistrement des lobbyistes rémunérés ne doit pas faire obstacle à cette liberté d'accès,</p> <p>Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :</p>
<p>Definitions</p> <p>2 (1) In this Act, [...]</p> <p>organization includes</p> <p>(a) a business, trade, industry, professional or voluntary organization,</p> <p>(b) a trade union or labour organization,</p> <p>(c) a chamber of commerce or board of trade,</p> <p>(d) a partnership, trust, association, charitable society, coalition or interest group,</p> <p>(e) a government, other than the Government of Canada, and</p> <p>(f) a corporation without share capital incorporated to pursue, without financial gain to its members, objects of a national, provincial, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character or other similar objects; (organisation)</p>	<p>Définitions</p> <p>2 (1) Les définitions qui suivent s'appliquent à la présente loi.</p> <p>[...]</p> <p>organisation Organisation commerciale, industrielle, professionnelle, syndicale ou bénévole, chambre de commerce, société de personnes, fiducie, association, organisme de bienfaisance, coalition ou groupe d'intérêt, ainsi que tout gouvernement autre que celui du Canada. Y est en outre assimilée la personne morale sans capital-actions constituée afin de poursuivre, sans gain pécuniaire pour ses membres, des objets d'un caractère national, provincial, patriotique, religieux, philanthropique, charitable, scientifique, artistique, social, professionnel ou sportif, ou des objets analogues. (organization)</p>
<p>Registration of Lobbyists</p> <p>Consultant Lobbyists</p>	<p>Enregistrement des lobbyistes</p> <p>Lobbyistes-conseils</p>

<p>Requirement to file return</p> <p>5 (1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the “client”), undertakes to</p> <p>(a) communicate with a public office holder in respect of</p> <ul style="list-style-type: none"> (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons, (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament, (iii) the making or amendment of any regulation as defined in subsection 2(1) of the Statutory Instruments Act, (iv) the development or amendment of any policy or program of the Government of Canada, (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or <p>(b) arrange a meeting between a public office holder and any other person.</p> <p>Time limit for filing return</p> <p>(1.1) An individual shall file the return referred to in subsection (1) not later than 10 days after entering into the undertaking.</p>	<p>Déclaration obligatoire</p> <p>5 (1) Est tenue de fournir au commissaire, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe (2) toute personne (ci-après « lobbyiste-conseil ») qui, moyennant paiement, s’engage, auprès d’un client, d’une personne physique ou morale ou d’une organisation :</p> <p>a) à communiquer avec le titulaire d’une charge publique au sujet des mesures suivantes:</p> <ul style="list-style-type: none"> (i) l’élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député, (ii) le dépôt d’un projet de loi ou d’une résolution devant une chambre du Parlement, ou sa modification, son adoption ou son rejet par celle-ci, (iii) la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la Loi sur les textes réglementaires, (iv) l’élaboration ou la modification d’orientation ou de programmes fédéraux, (v) l’octroi de subventions, de contributions ou d’autres avantages financiers par Sa Majesté du chef du Canada ou en son nom, (vi) l’octroi de tout contrat par Sa Majesté du chef du Canada ou en son nom; <p>b) à ménager pour un tiers une entrevue avec le titulaire d’une charge publique.</p> <p>Délai de remise</p> <p>(1.1) Le lobbyiste-conseil fournit la déclaration visée au paragraphe (1) dans les dix jours suivant l’engagement.</p>
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Contents of return	Renseignements
<p>(2) The return shall set out the following information with respect to the undertaking:</p> <p>(a) the name and business address of the individual and, if applicable, the name and business address of the firm where the individual is engaged in business;</p> <p>(b) the name and business address of the client and the name and business address of any person or organization that, to the knowledge of the individual, controls or directs the activities of the client and has a direct interest in the outcome of the individual's activities on behalf of the client;</p> <p>(c) where the client is a corporation, the name and business address of each subsidiary of the corporation that, to the knowledge of the individual, has a direct interest in the outcome of the individual's activities on behalf of the client;</p> <p>(d) where the client is a corporation that is a subsidiary of any other corporation, the name and business address of that other corporation;</p> <p>(e) where the client is a coalition, the name and business address of each corporation or organization that is a member of the coalition;</p> <p>(e.1) the client is funded in whole or in part by a government or government agency, the name of the government or agency, as the case may be, and the amount of funding received;</p> <p>(f) particulars to identify the subject-matter in respect of which the individual undertakes to communicate with a public office holder or to arrange a meeting, and any other information respecting the subject-matter that is prescribed;</p> <p>(g) the fact that the undertaking does not provide for any payment that is in whole or in</p>	<p>(2) Le lobbyiste-conseil est tenu, dans sa déclaration, de fournir les renseignements suivants sur son engagement :</p> <p>a) son nom, l'adresse de son établissement ainsi que, le cas échéant, le nom de sa firme et l'adresse de son établissement;</p> <p>b) le nom de son client et l'adresse de son établissement ainsi que les nom et adresse de l'établissement de toute personne morale ou physique ou organisation qui, à sa connaissance, contrôle ou dirige les activités de ce client et qui est directement intéressée au résultat de ses activités au nom de ce client;</p> <p>c) si son client est une personne morale, le nom et l'adresse de l'établissement de chacune de ses filiales qui, à sa connaissance, est directement intéressée au résultat de ses activités au nom de ce client;</p> <p>d) si son client est une personne morale filiale d'une autre, le nom de cette dernière et l'adresse de son établissement;</p> <p>e) si son client est une coalition, le nom des personnes morales ou organisations qui la composent ainsi que l'adresse de leur établissement;</p> <p>e.1) dans le cas où le financement de son client provient en tout ou en partie d'un gouvernement ou d'un organisme public, le nom de celui-ci et le montant du financement;</p> <p>f) les renseignements — réglementaires et autres — utiles à la détermination de l'objet de l'engagement;</p> <p>g) le fait que l'engagement ne prévoit aucun paiement qui dépende, en tout ou en partie du résultat obtenu relativement aux mesures visées aux sous-alinéas (1)a)(i) à (vi) ou du fait</p>

<p>part contingent on the outcome of any matter described in subparagraphs (1)(a)(i) to (vi) or on the individual's success in arranging a meeting referred to in paragraph (1)(b);</p> <p>(h) particulars to identify any relevant legislative proposal, Bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;</p> <p>(h.1) if the individual is a former public officer holder, a description of the offices held, which of those offices, if any, qualified the individual as a designated public office holder and the date on which the individual last ceased to hold such a designated public office;</p> <p>(i) the name of any department or other governmental institution in which any public office holder with whom the individual communicates or expects to communicate in respect of any matter described in subparagraphs (1)(a)(i) to (vi) or with whom a meeting is, or is to be, arranged, is employed or serves;</p> <p>(j) if the individual undertakes to communicate with a public office holder in respect of any matter described in subparagraphs (1)(a)(i) to (vi), particulars to identify any communication technique that the individual uses or expects to use in connection with the communication with the public office holder, including any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion (in this Act referred to as "grass-roots communication"); and</p> <p>(k) such other information relating to the identity of the individual, the client, any person or organization referred to in paragraph (b), any subsidiary referred to in paragraph (c), the other corporation referred to in paragraph (d),</p>	<p>qu'il réussit à ménager l'entrevue visée à l'alinéa (1)b);</p> <p>h) les renseignements utiles à la détermination de la mesure — proposition législative, projet de loi, résolution, règlement, politique, programme, subvention, contribution, avantage financier, contrat — en cause;</p> <p>h.1) s'il est un ancien titulaire d'une charge publique, la désignation des postes qu'il a occupés, la mention de ceux, le cas échéant, qu'il a occupés à titre de titulaire d'une charge publique désignée et la date de cessation du dernier poste qu'il a occupé à ce titre;</p> <p>i) le nom du ministère ou de l'institution gouvernementale où exerce ses fonctions le titulaire d'une charge publique avec qui il communique ou compte communiquer au sujet d'une des mesures visées aux sous-alinéas (1)a)(i) à (vi) ou avec qui il prend ou compte prendre rendez-vous;</p> <p>j) les renseignements utiles à la détermination des moyens de communication qu'il utilise ou qu'il compte utiliser pour communiquer avec le titulaire d'une charge publique au sujet d'une des mesures visées aux sous-alinéas (1)a)(i) à (vi), notamment par un appel au grand public, directement ou au moyen d'un média à grande diffusion, pour persuader celui-ci de communiquer directement avec le titulaire d'une charge publique en vue de faire pression sur lui afin qu'il appuie un certain point de vue;</p> <p>k) tout autre renseignement réglementaire utile à son identification, à celle de son client, de toute personne morale ou physique ou organisation visée à l'alinéa b), de la filiale visée à l'alinéa c), de la personne morale visée à l'alinéa d), de tout membre d'une coalition visée à l'alinéa e), du ministère ou de l'institution visé à l'alinéa i).</p>
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<p>any member of a coalition referred to in paragraph (e) or any department or institution referred to in paragraph (i) as is prescribed.</p>	
<p>Offences and Punishment</p> <p>Contravention</p> <p>14 (1) Every individual who fails to file a return as required under subsection 5(1) or (3) or 7(1) or (4), or knowingly makes any false or misleading statement in any return or other document submitted to the Commissioner under this Act or in any response provided relative to information sent under subsection 9.1(1), whether in electronic or other form, is guilty of an offence and liable</p> <p>(a) on summary conviction, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding six months, or to both; and</p> <p>(b) on proceedings by way of indictment, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding two years, or to both.</p> <p>Other contraventions</p> <p>(2) Every individual who contravenes any provision of this Act — other than subsections 5(1) and (3), 7(1) and (4) and 10.3(1) — or the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding \$50,000.</p> <p>Limitation</p> <p>(3) Proceedings by way of summary conviction in respect of an offence under this section may be instituted at any time within but not later than five years after the day on which the Commissioner became aware of the subject-matter of the proceedings but, in any case, not later than ten years after the day on which the subject-matter of the proceedings arose.</p>	<p>Infractions et peines</p> <p>Infraction</p> <p>14 (1) Quiconque omet de fournir la déclaration prévue aux paragraphes 5(1) ou (3) ou 7(1) ou (4) ou donne sciemment, dans tout document — déclaration ou autre — transmis au commissaire, sous forme électronique ou autre, en application de la présente loi, ou dans toute réponse donnée relativement à l'information transmise en vertu du paragraphe 9.1(1), des renseignements faux ou trompeurs commet une infraction et encourt, sur déclaration de culpabilité :</p> <p>a) par procédure sommaire, une amende maximale de 50 000 \$ et un emprisonnement maximal de six mois, ou l'une de ces peines;</p> <p>b) par mise en accusation, une amende maximale de 200 000 \$ et un emprisonnement maximal de deux ans, ou l'une de ces peines.</p> <p>Autres infractions</p> <p>(2) Quiconque contrevient à toute disposition de la présente loi autre que les paragraphes 5(1) et (3), 7(1) et (4) et 10.3(1), ou aux règlements commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 50 000 \$.</p> <p>Prescription</p> <p>(3) Aucune poursuite par voie de procédure sommaire ne peut être engagée au titre du présent article plus de cinq ans après la date où le commissaire a eu connaissance des éléments constitutifs de l'infraction et, en tout état de cause, plus de dix ans après la date de la prétendue perpétration.</p>

