S.C.C. File No. 37506

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

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PART I: OVERVIEW AND STATEMENT AS TO FACTS

1. The Respondent accepts the Appellant's facts subject to the following overview, additions and clarifications.

I OVERVIEW

2. The Appellant, Bruce Carson, was tried on an Indictment alleging that:

> between the 1st day of June 2010 and the 30th day of March 2011, at the City of Ottawa in the said East Region, to wit, 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, 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*."[1] (emphasis added)

3. The charge related to the Appellant's conduct with a private company called H2O Professionals Inc. ("H2O"). H2O was in the business of selling water treatment systems and had been attempting to sell its products to First Nation Bands, without success. After being introduced to the principals of H2O through his then girlfriend, Michele McPherson, the Appellant represented to the principals of H2O that he had influence with government officials and could use that influence to assist the company with selling its product to First Nations Bands. In exchange for his exercise of influence, the Appellant demanded a benefit. The demand was that H2O agree to provide the Appellant's girlfriend with a percentage of anticipated future sales of H2O's water treatment systems to First Nations Bands. On the basis of the Appellant's representations the parties negotiated an agreement in accordance with the Appellant's demand. The Appellant conceded all of these elements of the offence at trial.

4. The Appellant argued that his conduct was not captured by ss. 121(1)(d) of the *Code.* That section incorporates by express reference through ss. 121(1)(d)(i), ss. 121(1)(a)(iii) which states that the impugned *conduct* be in connection with "the transaction of business with or any matter of business relating to the government". The Appellant's position was that the phrase any matter of business relating to the government required a narrow interpretation, restricted to commercial business dealings with the government. Thus the only contested issue at trial was whether the Appellant's *conduct* was "in connection with a matter of business relating to the Government of Canada". The issue boiled down to an exercise in statutory interpretation.

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[1] *Indictment,* Appellant's Record Tab 1E, at 105.

5. In Reasons for judgment dated November 17, 2015, Warkentin J. of the Ontario Court of Justice acquitted the Appellant at trial after concluding that the phrase should be interpreted narrowly and restricted to a direct business or commercial connection with the government. After holding that no such connection existed she said:

> …one cannot engage in "the transaction of business with or any matter of business relating to the government" nor damage the integrity of the government when the **government is not the entity with which business must be conducted in order to achieve the benefit sought**.[2] (emphasis added)

6. The Crown appealed against the acquittal on the primary ground that the trial judge erred by applying an erroneous and over-narrow interpretation of the phrase "any matter of business relating to the government". The Crown also argued that the trial judge erred in law by not giving any legal effect to an important piece of documentary evidence that was filed on consent of both parties at trial and undermined the trial judge's factual conclusions. The majority of Court of Appeal for Ontario agreed with the Crown's primary ground and allowed the Crown's appeal on that basis. Writing for the majority, Pardu J.A. held that:

> Confining an interpretation of the phrase "any matter of business relating to the government" to transactions to which government is a party would fail to capture the mischief to which s. 121(1)(d) is directed.
>
> …
>
> 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.[3]

The majority considered it unnecessary to deal with the Crown's second ground but observed in passing that they saw no error. The Appellant's acquittal was substituted with a verdict of guilt and the matter remitted back to the trial judge for sentencing. Simmons J., dissenting, would have dismissed the Crown's appeal. The Appellant relies on the dissenting reasons of Simmons J. and argues that the decision of the majority reflects a misunderstanding of the trial judge's reasons because the trial judge "did not equate any matter of business relating to the government to actual transactions to which the government is a party".[4] He also argues that the majority erred in its interpretation of s. 121(1)(a)(iii) because of its reference to the concluding language

[2] *R. v. Carson*, 2015 ONCA 7127, Appellant's Record Tab 1A, at 41-49 (hereinafter, "*Trial Judgment*").
[3] *Judgment of the Court of Appeal for Ontario*, Appellant's Record Tab 1C, at 64-66, 71-73 (hereinafter, "*Court of Appeal Decision*").
[4] Appellant's Factum at para. 38.

in s. 121(1)(a).[5] According to the Appellant, these alleged errors led the majority to overturn his acquittal. He asks that his acquittal be restored on the basis that the trial judge correctly concluded that since INAC could have no involvement or approval authority in the procurement his conduct was not in connection with any matter of business relating to the government.

7. The Respondent's position is that the majority's decision to allow the appeal on the basis that the trial judge erred in her interpretation is correct. Section 121(1)(d) of the *Code* criminalizes conduct. The conduct at issue here is influence peddling. The Appellant's undisputed conduct was intentional, morally blameworthy, and compromised government integrity and the appearance of government integrity, the very type of harm the section was intended to prevent. The factual findings made by the trial judge compelled a verdict of guilt. In acquitting the Appellant, the trial judge committed legal error by misinterpreting and misapplying the offence creating provision. After careful consideration, the majority of the Court of Appeal determined that the correct interpretation of the section properly captured the Appellant's conduct. This appeal should be dismissed.

II RELEVANT FACTS

i) The Appellant

8. It was undisputed that the Appellant represented to H2O that he had influence with the government and that he demanded a benefit from H2O in exchange for using his purported influence with government officials to facilitate sales of H2O's water treatment products to First Nation bands. In 2010, the Appellant negotiated a contract with H2O, which provided for commissions to be paid to his then girlfriend on all sales by H2O of water treatment systems to First Nation Bands. An amended version of the contract appointed his girlfriend as H2O's "exclusive agent for the purpose of representing the company in all matters relating to the sale of Water Purification Products to First Nation bands, <u>including dealing with the Government of Canada</u> relating to the sale of Water Purification Products to First Nation Bands.

[5] Appellant's Factum at paras. 11-12, 37, 39.

(ii) Michele McPherson

9. Michele McPherson and the Appellant met in February 2010 and the two of them began a romantic relationship. Ms. McPherson introduced the Appellant to the principals of H2O in the spring or summer of 2010.[6] She testified that H2O was mostly focused on getting in on a *pilot project* through INAC so that the company could generate sales with First Nations Bands. Nobody from H2O had any information about how to get to a pilot project. As far as the value of the potential contracts that H2O hoped to obtain with the Appellant's government influence, she described the possibilities as "endless".

(iii) H20 Professionals Inc.: Mr. Hill and Mr. Kaszap

10. Nicholas Kaszap and Patrick Hill were co-owners of H2O. The focus of H2O's business was residential point-of-use water treatment systems. Point-of-use water treatment systems are typically marketed to private home owners for the purpose of purifying water for use in the home. H2O had unsuccessfully attempted to sell their water treatment systems to First Nations Bands in the past. Mr. Kaszap testified that prior to the Appellant's involvement, there were many meetings and phone calls in 2009, but no sales because it was "*quite complicated*" and there was "*a lot of red tape*". He *believed* that although Band Council would do the purchasing, it was INAC who allocated the funding.[7]

11. In due course, the principals had a meeting with the Appellant at the Chateau Laurier Hotel in Ottawa. During that meeting the Appellant told them that he could help their business by making some important calls in order to connect them with the right people to **push through their water treatment products to First Nations Bands**. Mr. Kaszap testified that the Appellant said he "*could help us in doing that … and that … he was … really doing this for Michelle*". The Appellant told them that he could "*make some important calls*" for them and get them "*in front of the right people*" and "*push it through*".[8] Mr. Hill testified that the meetings with INAC would *not* have happened without the Appellant's assistance.[9] H2O also gave a cheque to the Appellant in the amount of $5000.00.[10]

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[6] *Trial Judgment*, Appellant's Record at paras. 18-23; Transcript From Preliminary Inquiry dated June 2, 2014 (Day 1, Evidence of Nicholas Kaszap, pages (64-118) Respondent's Record Volume I, Tab 1, pp. 1 – 55 at 7-10. (hereinafter "*Evidence of Kaszap*"); Transcript From Preliminary Inquiry dated June 2, 2014 (Day 2, Evidence of Patrick Hill, Pages 2-67) Respondent's Record Volume I, Tab 2, 56 – 123at 62-69 (hereinafter "*Evidence of Hill*").
[7] *Evidence of Kaszap*, Respondent's Record Volume I, Tab 1 at 6.
[8] *Evidence of Kaszap*, Respondent's Record Volume I, Tab 1 at 35-37.
[9] *Evidence of Hill*, Respondent's Record Volume I, Tab 2, 56 – 123at 68.
[10] **SCJ Exhibit 1** (Preliminary Hearing Exhibit 11), Copy of $5000.00 Cheque dated December 6, 2010 to Bruce

(iv) The Appellant Demands a Benefit

12. On August 31, 2010 Kaszap and Hill were asked to attend a meeting with McPherson and the Appellant at the Chateau Laurier. At that meeting the Appellant provided copies of a contract that his lawyer prepared, appointing McPherson as the exclusive agent for sales of H2O point-of-use water treatment systems to First Nations Bands. A term of the contract was that MacPherson would receive 20% commission of all sales of point-of-use systems to First Nations Bands, including future servicing costs.[11] The contract would kick in if and when the "pilot project began".[12] Notably, in February 2011, McPherson's contract was amended to include commissions on sales to First Nations whether the purchase was made by First Nations or by the government on behalf of First Nations and the commission rate was reduced to 15%.[13]

13. Mr. Kaszap testified that the Appellant said that if the contract was not signed then "nothing would be done and that we would all move our separate ways". After some initial reluctance, and at Hill's urging, Kaszap signed the contract. He testified that he was very upset. He also testified that he discussed the potential for contracts with the Appellant and that it was estimated to be in the "*millions*".[14] The plan was to establish a *pilot project* and ultimately contract with as many bands as possible. Hill also testified that H2O approached Bands about participating in a *pilot project*. He too felt there was potential for several millions of dollars in sales. It was his understanding that there "**would have to be an approval through INAC and First Nations to start a pilot project**".[15]

(v) INAC and Government Officials

14. The Appellant directed efforts at the Office of the Prime Minister, John Duncan (Minister of INAC), Gail Mitchell (Director General of Community Infrastructure at INAC); Garry Best (Director of Infrastructure Operations at INAC); and Lysane Bolduc, (Senior Infrastructure

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Carson from H2O, Respondent's Record Volume I, Tab 4 at 126 – 127.
[11] **SCJ Exhibit 1** (Preliminary Hearing Exhibit 5), Agreement dated August 31, 2010, Respondent's Record Volume I, Tab 5 at 128 – 131.
[12] *Evidence of Kaszap,* Respondent's Record Volume I, Tab 1 at 12-15; *Evidence of Hill,* Respondent's Record Volume I, Tab 2, 56 – 123at 76-80, 112.
[13] **SCJ Exhibit 1** (Preliminary Hearing Exhibit 7), Amended Agreement dated February 2012, Respondent's Record Volume I, Tab 6 at 132 – 140; *Evidence of Hill,* Respondent's Record Volume I, Tab 2, 56 – 123at 76.
[14] *Evidence of Kaszap,* Respondent's Record Volume I, Tab 1 at 13-14, 20, 39-44.
[15] *Evidence of Hill,* Respondent's Record Volume I, Tab 2, 56 – 123at 69, 97-98.

Engineer at INAC).[16] Gail Mitchell was the Director General of Community Infrastructure at INAC since August, 2008. Her branch was responsible for providing approximately one billion dollars in program and policy advice on a program that was focused on supporting approximately 600 First Nations across Canada and their delivery of infrastructure such as *water*, *waste water*, schools, housing, roads, etc. She reported to the Assistant Deputy Minister who in turn reported to the Minister. She recognized the Appellant's name from having worked with him in 2007 and agreed to meet with him and H2O.[17]

15. Garry Best was the Infrastructure Operations Director for INAC in the Operations Branch of the Regional Operations sector along with Lysane Bolduc. His main role was to oversee the implementation of the *capital facilities maintenance program*. Ms. Mitchell asked him to meet with the Appellant. His evidence was clear that the Appellant was seeking a competitive business advantage for H2O, which he considered inappropriate.[18]

16. Lysane Bolduc was an expert in water and waste water treatment. She began as a senior engineer at INAC in September 2010 with Gary Best as her supervisor. She attended a meeting with the Appellant and H2O at the request of Mr. Best. She had concerns about the suitability of H2O's system and prepared a report for her superiors.[19] She had two subsequent meetings with the Appellant in which she reiterated INAC's funding processes for water and wastewater management systems.[20]

(vi) Two Funding Streams Through INAC

17. There were two funding streams available to First Nations Bands through INAC. Stream one was an operating and maintenance budget provided annually for Bands to spend as they saw fit. Expenditures from that stream involved little to no government oversight with one significant exception: water and waste water systems.[21] Stream two funds were for the purpose of capital investments proposals. These funds were provided to First Nations Bands on an *ad*

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[16] *Trial Judgment*, Appellant's Record at paras. 27-29; *Evidence of Kaszap,* Respondent's Record Volume I, Tab 1 at 22-24; *Evidence of Hill,* Respondent's Record Volume I, Tab 2, 56 – 123at 84-91, 98-99, 101-104.
[17] Evidence of Gail Mitchell, Preliminary Hearing, Day Three, June 3, 2014, Appellant's Record, Tab 3B at 14-138. 141-144 (hereinafter "*Evidence of Mitchell*").
[18] Evidence of Gary Best, Preliminary Hearing, Day Three, June 3, 2014, Appellant's Record, Tab 3B at 167-187 (hereinafter "*Evidence of Best*").
[19] Evidence of Lysane Bolduc, Preliminary Hearing, Day Two, June 2, 2014 Appellant's Record Tab 3A, at 111-129 (hereinafter "*Evidence of Bolduc*").
[20] *Evidence of Bolduc*, Appellant's Record Tab 3A at 117-128.
[21] *Trial Judgment,* Appellant's Record Tab 1A at para. 32 [trial judge appears to have ignored this fact].

hoc basis, determined by *priority*, *need* and *risk levels*. Pilot projects were funded through this stream. Point-of-use water treatment systems would *typically* be funded through stream one, however if purchased as part of a pilot project they would be funded through stream two.[22]

(vii) The Protocol for Decentralized Water

18. The Protocol for Decentralized Water (hereinafter the "Protocol") was filed as an exhibit at trial, on consent. It is a government document, developed by INAC in 2009, that governed funding of point-of-use water treatment systems, including the kind H2O was selling.[23] The Protocol was put in place "to set minimum standards and codes that must be followed for the **design, construction, operation, and maintenance of on-site water and wastewater systems that are to be *funded in whole or in part by INAC***". The Protocol did not apply to "privately-owned or individually-managed on-site water or wastewater systems". To *qualify* for INAC funding proposed on-site water systems had to adhere to the requirements set out in the Protocol. Compliance with the Protocol was monitored by INAC Regional offices via annual inspection reports that First Nations Bands were required to submit to INAC in order to remain eligible for government funding of a point-of-use water system.[24]

19. Some key aspects of the Protocol include:

- At the feasibility stage, decision-makers identify the level of service appropriate for a particular community. Thus, during the execution of any feasibility study for water or wastewater services in First Nations communities for which any part of project funding is provided by Indian and Northern Affairs Canada (INAC), the selection process outlined in the INAC reference document entitled: *Corporate Manual System* (CMS) must be followed.

- The CMS sets out the parameters to be considered in identifying and approving funding for an appropriate and viable level of service for water or wastewater services, from relatively simple and inexpensive on-site systems to more complex and expensive centralised (piped) systems…

- The standards set out by the Protocol (for the design, installation, and ongoing operations and maintenance of on-site installations) must be adhered to in order for a group or groups of on-site systems to qualify for INAC funding. To qualify for funding from INAC, on-site systems must be band managed. A band-managed system is one that is managed and operated by a band, by a band-owned utility, or by a *qualified* third party operating under contract to the band.

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[22] *Evidence of Bolduc*, Appellant's Record Tab 3A, at 122-126.
[23] *Evidence of Mitchell*, Appellant's Record, Tab 3B 153-154.
[24] **SCJ Exhibit 6** Protocol for Decentralized Water and Waste Water Systems In First Nations Communities, Respondent's Record Volume I, Tab 8 at 267 – 324.

- The Protocol and its requirements applies to band-managed on-site water or wastewater systems or groups of systems for which installation and ongoing operations and maintenance are to be funded in whole or in part by INAC…[25]

20. The relevance of the Protocol became a point of contention during the Crown's reply submissions which in turn prompted discussion about Ms. Mitchell being called to provide additional testimony about it.[26] The trial judge ultimately ruled that Ms. Mitchel could not testify because it was too late in the proceedings. Although the Protocol was not put to the INAC witnesses when they testified at the preliminary hearing, all three INAC witnesses were aware of it and referred to it in their testimony. The Appellant was also aware of the Protocol. Indeed, he referred to it in email correspondence with Shawn Atleo of the AFN dated September 16, 2010:

> On the water initiative, we had a very good meeting with Gail Mitchell and staff on Tuesday. **The government has decided to fund the systems that the guys you met are involved with**. **Government actually has developed a funding protocol**, so we can meet or chat tomorrow afternoon about possible sites and access if that is possible.[27] (emphasis added)

21. Appellant's counsel submitted that additional testimony about the Protocol was "really not necessary" because the Protocol itself was "pretty clear". Counsel specifically referred the court to Appendix M of the Protocol and submitted that the Protocol did not "change anything" because "the whole responsibility for ensuring compliance with [the] Protocol lies with the First Nations bands". He further submitted that:

> …it's up to the First Nations bands to decide whether they wish to purchase these units and to of course satisfy themselves that the units comply with the Protocol. Again, INAC does not get involved with anything, and that evidence has been clear up and down throughout the preliminary hearing, the evidence that INAC […] is not involved in the procurement. So I don't know that we need anything more than that.
>
> …
>
> yeah, it was specifically addressed briefly by Ms. Mitchell, and she said nothing about any requirement to – for INAC to give approval to these devices".[28]

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[25] **SCJ Exhibit 6** Protocol for Decentralized Water and Waste Water Systems In First Nations Communities, Respondent's Record Volume I, Tab 8 at 267 – 324.
[26] Proceedings at Trial, September 15, 2015, Appellant's Record Tab 3C at 255-271.
[27] Proceedings at Trial, September 14, 2015 Appellant's Record Tab 3Cat 247-248.
[28] Proceedings at Trial, September 14, 2015, Appellant's Record, Tab 3C at 263-268.

22. The Crown submitted that "the Protocol speaks for itself" and that "it's set out in very simple language in terms of who does what and why we have the Protocol". The Crown referred the trial judge to relevant parts of the Protocol and provided specific references to it from the testimony and emails that were part of the trial record. The trial judge, however, did not give any legal effect to the Protocol when she acquitted the Appellant. She said:

> The Crown's argument that the Protocol for Decentralized Water demonstrated that there was funding that came through INAC for the type 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.
>
> 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.[29]

The trial judge then 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".[30]

(viii) Pilot Projects

23. Regardless of any dispute about the extent of INAC involvement with a Band's purchase of water treatment systems from their annual operating funding (i.e. stream one) the evidence was clear that funding for pilot projects came from stream two and had a greater degree of INAC involvement. There was evidence of more than one pilot project being discussed and the Appellant was vying for H2O to be a vendor for such a project.[31] The following are some examples of his efforts:

- In September 2010, the Appellant arranged a meeting at the INAC offices in Gatineau. Gail Mitchell, Gary Best, and Lysane Bolduc were among the attendees. Kaszap testified that the purpose of the meeting was to "figure out how to go about getting water treatment systems installed on First nations, and to know … where the money was and how to have access … getting that … and to show … the heads of INAC what we could offer for water treatment options". According to Kaszap, the Appellant asked how "can we move forward and there was talk of doing a pilot project to do on one First nation, and go from there".[32]

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[29] *Trial Judgment*, Appellant's Record Tab 1A at paras. 93-94.
[30] *Trial Judgment*, Appellant's Record Tab 1A at para. 97
[31] Appellant's Factum at paras. 28-31.
[32] *Evidence of Kaszap*, Respondent's Record Volume I, Tab 1 at 17-18, 41.

- Following that meeting the Appellant sent an email to indicating that **the government had decided to fund systems like the H2O water system and had developed a funding protocol for such systems**.[33]

- Toward the end of September 2010, the Appellant arranged another meeting with officials from INAC in an effort to identify Bands in need of water treatment systems.[34] Gary Best testified that he was uncomfortable because the Appellant was improperly attempting to gain a business advantage for H2O by *having INAC identify* what Bands should be *targeted*.[35]

- In early December 2010 the Appellant arranged another meeting with H2O representatives and INAC officials to discuss **INAC's funding mechanisms**. He was told at that meeting that INAC's Regional Offices were responsible for *prioritizing First Nations projects that were eligible* for INAC funding. Lysane Bolduc discussed this meeting in an internal email, dated December 10, 2010 in which she also expressed concerns about the suitability of H20's water treatment systems.

- Ms. Bolduc told the Appellant that **INAC headquarters could consider a pilot project** and that if a pilot project was pursued in partnership with a Province then INAC headquarters would be "closely" involved as *both funder and approver* of the project. Decisions would be made "collaboratively" with all project partners. Her evidence was clear that H2O was trying to get in on *that* project.[36]

- Between January and March 2011, the Appellant met with Cabinet Minister John Duncan (then Minister of INAC) and Cabinet Minister Peter Kent (then Minister of the Environment) as well as their staff to discuss *means by which H2Os water treatment systems could be funded and placed in First Nations communities*.[37]

- In early February 2011, the Appellant wrote to Gail Mitchell about *setting up a pilot project* with the Bay of Quinte Mohawk First Nation.[38] Ms. Mitchell referred this idea to Gary Best and Lysane Bolduc. Ms. Bolduc sent an email to the Appellant on February 17, 2011 reiterating INAC's role and proper procedure. The email noted that a pilot project team was currently *in the process of preparing* a list of potential technologies and vendors. Vendors selected for evaluation through pilot-testing would be chosen by the project team through a tendering process on the basis of technical merit and anticipated life-cycle cost. She also indicated that H2O might be on the list of *potential vendors invited to bid* on that pilot-project.[39]

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[33] *Evidence of Mitchell,* Appellant's Record, Tab 3B at 153-155.
[34] *Trial Judgment* Appellant's Record Tab 1A at para. 27(h).
[35] *Evidence of Best,* Appellant's Record, Tab 3B at 171-177.
[36] *Trial Judgment,* Appellant's Record, Tab 1A at paras. 41-43.
[37] **SCJ Exhibit 4** (Preliminary Hearing Exhibit 10), Transcript of Appellant's Statement, Respondent's Record Volume I, Tab 7 at 141 – 266.
[38] *Ibid* at paras. 42-43.
[39] *Trial Judgment,* Appellant's Record, Tab 1A at paras. 41-45.

- Apparently not satisfied with being advised that H2O might be on the list of *potential vendors invited to bid*, the Appellant wrote to Stephanie Machel (then Chief of Staff for Cabinet Minister Peter Kent) on March 1, 2011. This is what he said:

> *INAC won't push any systems* at all when dealing with the Bands and that mid-spring there will be a report that "the drinking water issue on reserves has actually become worse since we formed the government and Prentice announced clean water as a priority so we thought to try and break this *bureaucratic knot* that is holding up the process on this matter we get *Ministers Kent and Duncan together with Atleo and a provider of this system* to see what we can do to *push the bureaucrats into some form of action* before this Report is released.[40]

24. The Appellant was experienced and sophisticated with high level government. He understood that INAC "controlled" the funding allocation process. He also knew that for a variety of reasons, First Nations Bands were either reluctant or unable to purchase point-of-use water systems with their annual stream one funding. The millions of dollars in future sales that the Appellant spoke of with Hill and Kaszap was contingent on H2O being a pre-arranged vendor, or at the very least a pre-qualified contender on the list of potential vendors. This is evident by the nature of the numerous email communications that the Appellant sent.[41]

(ix) Level of Connectedness to Government

25. The trial judge acknowledged that the government is involved in the business of monitoring and developing programs to address water and wastewater systems on First Nations reserves:

> Water and wastewater systems challenges facing First Nations communities are addressed by a number of parties. The Federal Government, through Aboriginal Affairs and Northern Development Canada (formerly Indian and Northern Affairs Canada), provides funding for certain types of water services and infrastructures to First Nations communities. More recently, the Federal Government enacted the *Safe Drinking Water for First Nations Act*. The Assembly of First Nations' Environmental Stewardship Unit assists First Nations in improving their access to safe and sufficient water supplies. Health Canada works to ensure that drinking water quality monitoring programs are in place; provides wastewater programming and monitors and provides advice on drinking water quality to First Nations communities.

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[40] **SCJ Exhibit 3** (Preliminary Hearing Exhibit 3) Email dated March 1, 2011 Respondent's Record, Volume II, Tab 9N at 366 – 369.

[41] **SCJ Exhibit 3**, (Preliminary Hearing Exhibit 3) Emails, Respondent's Record Volume II, September 14, 2010, Tab 9A at pp. 325 – 329; October 18, 2010, Tab 9B at 330 – 332; October 19, 2010, Tab 9C at 333 – 335; November 16, 2010, Tab 9D at 336 – 339; November 18, 2010, Tab 9E at 340 – 342; December 10, 2010, Tab 9F at 343 – 345; January 15, 2011, Tab 9G at 346 – 349; February 7, 2011, Tab 9H at 350 – 351; February 7, 2011, Tab 9I at 352 – 353; February 9, 2011, Tab 9J at 354 – 356; February 9, 2011, Tab 9K at 357 – 358; February 17, 2011, Tab 9L at 359 – 361; February 28, 2011, Tab 9M at 362 – 365; March 1, 2011, Tab 9N at 366 – 369; March 16, 2011, Tab 9O 370 – 373.

…

> Ms. Mitchell testified that in 2009 a protocol was put in place that set out the **conditions in which communities could use departmental funding with small point-of-use water treatment systems** to be managed by the Band centrally. She stated that Bands could use their annual funding to pay for those types of systems.
>
> Ms. Bolduc appears to have been referencing this Protocol for Decentralized Water in her email to INAC colleagues on December 10, 2010.
>
> Mr. Carson, in his September 16, 2010 email to the CEO of the AFN commented on the government having developed a funding protocol.[42]

26. The trial judge also acknowledged that INAC performed an approval role for capital investment proposals based on priority, need and risk levels. This included pilot projects. The funding for approved capital investment proposals came from stream two:

> The second stream of funding is for capital investments such as building new or conducting major renovations to existing facilities. This stream of funding is allocated based upon priority, need and risk levels. Proposals from First Nations communities are submitted to INAC which then considers each proposal in relation to the needs and proposals submitted by other First Nations communities. **If approved, the proposal is placed in a queue with other proposals of this nature to be awarded when funds from this stream are available**.[43]

27. The trial judge also noted that in early February 2011, Mr. Carson wrote to Ms. Mitchell about the possibility of setting up a pilot project with the Bay of Quinte Mohawk First Nation for between 50 and 100 homes on the reservation.[44] The Appellant wrote to both government officials and the AFN as part of his efforts to "push" his way through the government bureaucracy and gain a competitive advantage for H2O.[45]

28. The Appellant was charged in 2012 after an RCMP investigation was requested.[46] The request was made soon after the Appellant sent an email, dated March 1, 2011, to Ms. Stephanie Machel, the Chief of Staff of then Cabinet Minister Peter Kent, Minister of the Environment. The Appellant wrote:

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[42] *Trial Judgment,* Appellant's Record at paras. 4, 48-50.
[43] *Trial Judgment,* Appellant's Record at para. 33.
[44] *Trial Judgment,* Appellant's Record at para. 42.
[45] **SCJ Exhibit 5**, AFN Emails (Preliminary Hearing Exhibit 5), Respondent's Record Volume II, October 8, 2010 Tab 10A at 374 – 376; November 29, 2010, Tab 10B at 377 – 379; January 22, 2011, Tab 10C at 380 – 385; January 24, 2011, Tab 10D at 386 – 387; March 15, 2011, Tab 10E at 388 – 392.
[46] **SCJ Exhibit 1** (Preliminary Hearing Exhibit 1), Letter from Raymond Novak of the Office of the Prime Minister dated March 16, 2011 to RCMP Commissioner, Respondent's Record Volume I, Tab 3 at 124 – 125.

Just one more thing - when I met with Minister Kent we discussed a matter I have been working on for some time-that is clean drinking water on reservations drinking water and waste water seem to be of great interest to him **I have been working with** Shawn Atleo-National Chief of the AFN and **INAC to try to implement their new policy wherein point of use water purification systems are eligible for govt funding-these systems which are installed in the individual houses are cheaper than municipal systems and immediately effective but nothing has moved on this as officials at INAC won't push any systems at all when dealing with Bands**-the result is that mid spring there will be a Report that actually the drinking water issue on reserves has actually become worse since we formed the govt and Prentice announced clean water as a priority so we thought to try and **break this bureaucratic knot** that is holding up progress on this matter **we get Ministers Kent and Duncan together with Atleo and a provider of this system to see what we can do to push the bureaucrats into some form of action** before this Report is released--bc[47]

[47] **SCJ Exhibit 3** (Preliminary Hearing Exhibit 3) Email dated March 1, 2011 Respondent's Record, Volume II, Tab 9N at 366 – 369.

PART II
OVERVIEW OF RESPONSE TO APPELLANT'S ISSUES

29. The Respondent frames the issue a little differently than the Appellant does:[48]

ISSUE 1: Should the phrase "any matter of business relating to the government" in s.121(1)(a)(iii) of the *Criminal Code*, be interpreted narrowly?

No. Parliament intended that s.121(1)(a)(iii) be interpreted broadly in order to preserve government integrity and the appearance of government integrity. It would be inimical to Parliament's intent to interpret the section in a manner that allows the conduct proscribed in s. 121(1)(d) to occur in *any* situation that involves, or is connected to *any* type of government decision making.

[48] *Appellant's Factum*, para.33.

PART III: STATEMENT OF ARGUMENT

I INTRODUCTION

30. This appeal concerns the interpretation of the phrase "any matter of business relating to the government" or or "un sujet d'affaires ayant trait au gouvernement" in s. 121(1)(a)(iii) of the *Code* as adopted by reference in s. 121(1)(d)(i).[49]

31. It is convenient to consider the phrase at issue in two Parts, "Part 1" and "Part 2". Part 1 reaches conduct in connection with *the transaction of business with the government*. Part 2 reaches *any matter of business relating to the government*. ("any matter") Here are the two linguistic versions of the definition in this divided form:

	"in connection with"	**« concernant »**
Part 1	**The transaction of business with the government**	**Soit la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernment**
Part 2	**any matter of business relating to the government**	**un sujet d'affaires ayant trait au gouvernement.**

32. The trial judge's interpretation ignores the fact that s. 121(1)(a)(iii) contemplates two different types of circumstances. Part I addresses business transactions in the commercial sense in that it involves conduct by an accused that is in connection with **a transaction of business with the government**. Part II is not so restricted in that it involves conduct by an accused that is in connection with **any matter of business relating to the government**.

(i) Interplay Across s.121 Offences

33. The decisions of this Court's in *R. v. Giguère, R. v. Hinchey,* and *R. v. Cogger* were considered by the trial judge and are instructive. There is a dearth of jurisprudence dealing with the specific offence involved here, but the cases are helpful because they set out Parliament's purpose and intent in crafting the s. 121 regime and compare and contrast the interplay across the various sections.[50] In *Giguère*, for example, the accused were charged with conspiracy offences, under both 121(1)(a) and s.121(1)(d). The matters in dispute were not related to the phrase "the

[49] *Court of Appeal Judgment*, Appellant's Record, Tab 1C, para. 4.
[50] *R. v. Giguère* 1983 2 S.C.R. 448; *R. v. Hinchey,* [1996] 3 S.C.R. 1128; *R. v. Cogger,* [1997] 2 S.C.R. 845.

transaction of business with or any matter of business relating to the government". The disagreement related to factual and corresponding interpretive issues over the conduct proscribed in 121(1)(d), none of which are at issue in the present case.[51]

34. A handful of lower court decisions have also dealt with various sections under s. 121 of the *Code*.[52] All of them reflect judicial agreement about the importance of protecting the government integrity and the appearance of government integrity and the need to respect Parliament's purpose and intent in crafting an interrelated scheme of offences to deter all forms of government corruption and the appearance of government:

> For the public, who is the ultimate beneficiary of honest government, it is not so easy to sort out which benefits are legitimate and which are laden with a sinister motivation. Moreover, it is inefficient for a government to be paralyzed by rumour and innuendo while an inquiry is made into the motivation behind a certain benefit or advantage conferred on an official. What Parliament is saying through this provision is that the damage sought to be prevented is actually done once the benefit is conferred, and not after an *ex post facto* analysis which demonstrates that no harm was intended. It is from the point of the conferral of the benefit forward that the appearance of integrity has been slighted.[53]

(ii) Offences Involving the Phrase at Issue

35. There are a number of *different* provisions in the scheme of offences created by s. 121. The phrase at issue in this case appears in three of the offence-creating provisions of ss. 121(1) of the *Code* and applies to the *conduct* of the following categories of individuals:

- ss. **121(1)(a)** – Those who seek to bribe government officials or, being government officials, demand or accept bribes, whether or not the official is, in fact, able to do what is proposed as consideration for the bribe.
- ss. **121(1)(d)** – Those who, having or pretending to have influence with the government or a minister or official thereof, seek to peddle that influence [the conduct at issue in this case].
- ss. **121(1)(e)** – Those who seek to bribe ministers or officials of government.[54]

These offences are impacted by the interpretation of the phrase "any matter of business relating to the government**"**.

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[51] *R. v. Giguère, supra* .
[52] *R. v. Greenwood* (1991), 67 C.C.C. (3d) 435 (Ont. C.A.); *R. v. Pilarinos* 2002 BCSC 1267; *R. v. Cleary* (1992), 115 N.S.R. (2d) 336 (N.S. Co. Ct.); *R. v. O'Brien*, [2009] O.J. 5817 (SCJ); *R. v. Serré* 2012 ONSC 3672.
[53] *R. v. Hinchey*, *supra* at para. 18.
[54] *Criminal Code of Canada* R.S.C. 1985, c. C-46, s. 121; 2007, c. 13, s. 5.

(iii) The Appellant's Position in the Courts Below

36. The Appellant argues that the trial judge's interpretation was correct. He contends that the majority of the Court of Appeal *misunderstood* her references to *R. v. Hinchey*. Even though the trial judge expressly noted that *Hinchey* was useful in her interpretive analysis the Appellant asserts that she did *not* rely on it.[55] As reflected in the passage below, *Hinchey* did play an important role in the trial judge's decision to interpret the phrase narrowly:

> Justice L'Heureux-Dubé held that the French text of s. 121(1)(c) implies that the person giving a commission, reward, advantage or benefit of any kind "must be conducting *business dealings*, or have business relations with the government". She accepted this narrower meaning and concluded at paragraph 51 that "the proper interpretation of this term is the narrow one, whereby *only where persons are in the process of having commercial dealings with the government at the time of the offence is the conduct trapped under the section.*" (as emphasized by trial judge's)[56]

37. The Appellant also asserts that the trial judge did not conclude that the government had to be a party to a decision to purchase in order for Part II of the phrase at issue to apply.[57] The record suggests otherwise:

> <u>*The Appellant's Position at Court of Appeal*</u>
> The learned trial judge correctly concluded from the evidence before her that, since INAC could have no involvement in the procurement of the devices from H2O, Mr. Carson's assistance could not engage "the transaction of business with or any matter of business relating to the government".
>
> …
>
> Justice Warkentin, following the rationale in *Hinchey*, correctly 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.[58]
>
> …
>
> <u>*The Appellant's Position at Trial*</u>
> It was the position of the Defence that in pursuing business connections with the government, the phrase in s. 121(1)(d) "transaction of business with or any matter of business relating to the government" must be restricted to actual commercial business dealings with the government.

[55] *Appellant's factum* at paras. 43-44.
[56] *Trial Judgment*, Appellant's Record, Tab 1A at para. 74.
[57] Appellant's Factum at paras. 46, 54.
[58] *R. v. Carson*, Respondent's Factum, Respondent's Record Volume II, Tab 11 (pages 1 – 14) 393 - 406 at paras. 2, 26.

> The Defence submitted that business dealings with entities outside the government that may receive funding from the government do not fall within this section of the *Criminal Code*.[59]
>
> …
>
> Counsel for the Defence submitted that a common sense approach to the interpretation of s. 121(1)(d) requires the Court to consider the phrase "the transaction of business with or any matter of business relating to the government" narrowly. He argued that the common sense wording of this section implies that there had to be some form of direct involvement by the government in the decision making of whether or not to purchase the water treatment systems in question.
>
> Counsel for the Defence argued that without that direct involvement, there was no "transaction of business with or any matter of business relating to the government" and Mr. Carson should be acquitted.[60]

II The Court of Appeal for Ontario Correctly Determined That the Trial Judge Erred

(i) Over-Narrow Interpretation of s. 121(1)(a)(iii) of Code

38. The trial judge's error was occasioned by a misreading or misuse of jurisprudence from this court and the position advanced by the Appellant. Her narrow interpretation of "any matter of business relating to the government" was tainted by the "transaction of business" language and she appears to have restricted the meaning of "business," as used in the phrase, to matters of commerce.[61] This led to her failure to give effect to the intentionally broad language employed by Parliament in the expression "<u>any</u> <u>matter</u> of business <u>relating</u> to the government" [emphasis added]. The majority of the Court of Appeal was correct in finding that the trial judge erred in her interpretation of "a transaction of business with or any matter of business with the government".[62]

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[59] *Trial Judgment*, Appellant's Record, Tab 1A at paras. 58-59.
[60] *Trial Judgment*, Appellant's Record, Tab 1A at paras. 65-66.
[61] *Trial Judgment*, Appellant's Record, Tab 1A at paras. 71-74.
[62] *Court of Appeal Decision*, Appellant's Record, Tab 1C at paras. 31-36.

(ii) Misuse of Hinchey

39. After reviewing relevant principles of statutory interpretation, the trial judge reviewed select passages from *Hinchey* wherein Madam Justice L'Heureux-Dubé concluded that the word "dealings" in s.121(1)(c) should be interpreted narrowly.[63] Then trial judge adopted that analysis and applied a narrow interpretation to the phrase at issue here. Her reasoning was tainted by concerns in *Hinchey* that do not arise in s.121(1)(iii). For example:

- Section 121(1)(*c*) *is* a different section of the *Code* and targets a different evil. A *quid pro quo* arrangement is not a required element of the offence under that section.[64]
- On the surface s. 121(1)(c) had a potentially unlimited application. The minority reasons of Cory J. were premised upon the fact that absent a stricter interpretation of both the *actus reus* and *mens rea*, innocent conduct could be rendered criminal. Here, there is no fear of trapping innocent actions.[65]
- In the related s. 121(1) (*b*), the wider term "dealings of any kind" is used as opposed to s.121(1)(c) which merely employs the term "dealings". It is reasonable to assume that Parliament deliberately chose to omit the additional words "of any kind" and in doing so, intended to ascribe a narrower meaning to "dealings" in s. 121(1) (*c*).[66]

(iii) Misapplication of Cogger

40. The trial judge also made reference to *R. v. Cogger*, which involved a charge under s.121(1)(a)(ii). She observed that the section included the same language as s. 121(1)(d) (i.e. having accepted a benefit or advantage in consideration for cooperating, assisting, or exercising influence "in connection with a matter of business relating to the government"). She correctly noted that both sections make reference to s. 121(1)(a)(iii) and that the difference between the two sections is that s. 121(1)(a)(ii) applies to **government officials** who commit a fraud against the government whereas subsection s.121(1)(d) applies to **anyone "having or pretending to have influence with the government"**. She noted that in either scenario, for an accused to be found guilty he or she must have engaged in "the transaction of business with or any matter of business relating to the government".[67] The trial judge did not make any reference to the facts in *Cogger*, nor did she make any reference to the court's discussion of *Hinchey*, which explained the differences between s. 121(1)(c) and s. 121(1)(a)(ii).[68]

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[63] *R. v. Hinchey*, *supra* at para. 18.
[64] *R. v. Cogger*, *supra* at para. 20, 24.
[65] *Court of Appeal Decision*, Appellant's Record Tab 1C, at paras. 33-35.
[66] *R. v. Hinchey*, *supra* at para 49.
[67] *Trial Judgment*, Appellant's Record at para. 76.
[68] *Trial Judgment*, Appellant's Record at para. 75-76.

41. In *Cogger*, the accused had been acting and was being paid as a lawyer for a number of companies to make representations to various levels of government on behalf of a principal shareholder. After his appointment to the Senate, the accused continued to make representations to various levels of government on behalf of the principal shareholder for the purpose of obtaining grants. Similar to the Appellant, he was very effective in having ministers and senior officials meet in order to "advance" his client's business, but the meetings never had the expected success, and no grants were ever awarded. He was acquitted at trial and the Crown's appeal to the Court of Appeal was dismissed. On appeal to this court Madam Justice L'Heureux-Dubé, writing for a unanimous court, allowed the Crown's appeal from acquittal and ordered a new trial. Notably, in the course of her analysis Madam Justice L'Heureux-Dubé made specific reference to her decision in *Hinchey* and explained how and why the involved sections were different in scope and operation.[69]

42. In paragraph 76, of her reasons after quoting from Cogger, the trial judge said:

> On the facts of both *Cogger* and this case, for the accused to be found guilty <u>he must have engaged in</u> 'the transaction of business with or any matter of business relating to the government.'[70] (Emphasis added)

By including the words "he must have engaged in", the trial judge appears to have arbitrarily imposed an *additional conduct requirement* where none exists. In terms of the Appellant's conduct, the *actus reus* of the offence requires only that the Appellant demand, accept, offer to accept, or agree to accept a reward, advantage or benefit of any kind. The *other relevant circumstances*, including the element of connectedness of the contemplated cooperation, assistance, exercise of influence, or other act or omission with government business, *must be known to the accused*, but there is no requirement that an accused <u>actually engage</u> in the matter of business.[71] The trial judge therefore misapplied *Cogger,* which in any event dealt only with the *mens rea* of one of the s. 121(1) offences. Her eventual emphasis on the presence or absence of an actual vendor-purchaser relationship between the government and H2O was erroneous.[72]

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[69] *R. v. Cogger*, at paras.16-24; *R. v. Pilarinos* 2002 BCSC 1267 at paras. 188-194, 197-199, 226-228, 234-240.
[70] *Trial Judgment*, Appellant's Record, Tab 1A at para. 76.
[71] *R. v. Cogger*, *supra* at paras. 14-24; *Hinchey*, *supra* at paras. 8-9.
[72] *R. v. Cleary* (1992), 115 N.S.R. (2d) 336 (N.S. Co. Ct.).

III Principles of Statutory Interpretation

43. The trial judge's conclusion that Part II requires "actual commercial business dealings with the government" flows from her incorrect interpretation and is contrary to the spirit and intent of the section and overall legislative scheme. Her narrow interpretation conflicts with general drafting presumptions and maxims of statutory construction.[73] It is irreconcilable with the "modern approach" to statutory interpretation that this court has adopted on numerous occasions including in criminal cases: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[74] The trial judge accurately reviewed those principles but failed to correctly apply them to her interpretive analysis.

i) The Purpose and Intention of Parliament

44. The scheme and object of the Act and the intention of Parliament is to prevent the very sort of conduct that the trial judge found the Appellant engaged in, conduct which she described as otherwise "blameworthy".[75] In *R. v. Davies*, for example, this Court examined the extortion provision in s.305 (1) of the *Criminal Code*, in order to determine whether the extortion offence includes extortion of sexual favours. In concluding that extortion of sexual favours is a crime, the **Court examined the scope of the word "anything" in the extortion provision**. The Court undertook an analysis of the provision in accordance with modern principles of statutory

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[73] *R. v. Hinchey*, *supra* at paras. 11-18, 30, 34-36; *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 26-28; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 33; *R. v. Davis*, [1999] 3 S.C.R. 759 at para. 42; *R. v. O'Brien*, [2009] O.J. 5817 (SCJ) at paras. 17-20, 23-24, 38-53.

[74] R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, LexisNexis Canada, 2014), at pp. 70-72, 191-99. *Court of Appeal Decision*, Appellant's Record Tab 1C, at paras. 25-31.

[75] *R. v. O'Brien*, *supra* at paras. 68-69; *Trial Judgment*, Appellant's Record at paras. 95, 97. For insight into the legislative evolution, see for example: Hon. Mr. Casgrain address to Parliament upon 2nd reading of Bill No. 5, *An Act for the better prevention of fraud in relation to contracts involving the expenditure of public monies*, *House of Commons Debates*, 5th Parl, 1st Sess, Vol XIII, (March 2 1883) at 93-94; Hon. Sir John Thompson address to Parliament upon 2nd reading of Bill No. 172, *An Act respecting Frauds upon the Government*, *House of Commons Debates*, 7th Parl, 1st Sess, Vol 3 (September 18 1891) at 5751; Hon. A. Raynell Andreychuk and Hon. Fernand Robichaud address to Parliament upon 2nd reading of Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption*, , *Debates of the Senate*, 39th Parl, 1st Sess, Vol 143, Issue 95 (May 9 2007) at 2319-2320.

interpretation, **and found that the word** "anything" in the provision **suggested a broad interpretation, including sexual favours**.[76] The facts of this case illustrate that the result of her interpretation undermines Parliament's intent and runs afoul of past jurisprudence from this court.[77]

ii) Grammatical and Ordinary Sense of Words, Read Harmoniously

45. Parliament's intentional use of the word "any" reflects its desire to *not* restrict the diverse range of matters in which the government is involved with to the commercial context. Unlike the circumstances in *Hinchey*, no absurd consequence results from a broad application of the plain meaning of the word "any".[78] Indeed, the opposite is true. The term must certainly be broad enough to capture the facts as accepted by the trial judge in this case where INAC had the ability to make decisions to establish pilot projects to test water systems in certain First Nations communities and establish project parameters, even where, as the evidence indicated, the *procurement* of the water systems to be tested was the responsibility of the First Nations Bands. It would frustrate the intent of Parliament to shelter persons who engage in such conduct from the scope of the section.[79]

(iii) The concluding language in s. 121(1)(a)

46. Relying on the dissent of Simmons J., the Appellant argues at length that the majority erred by making reference to the concluding language in s. 121(1)(a). The Respondent makes three points in response to this complaint. First, there is nothing wrong with the majority looking at the broader regime under s. 121 of the *Code* to assist in its interpretive exercise. Second, s.121(1)(d) includes everyone "pretending to have influence". This language is functionally equivalent to the concluding language in s. 121(1)(a). It is very unlikely, if not impossible, that a person who pretended to have influence with a government official would succeed in getting that

[76] *R. v. Davis*, [1999] 3 S.C.R. 759 at paras. 41-56.
[77] *R. v. Giguère*, *supra at* para *10.*
[78] *R. v. Hinchey*, *supra* at paras. 36-37, 44-46, 48.
[79] *R. v. Hinchey*, *supra* at paras. 53-63; *R. v. O'Brien*, *supra* at paras. 26-37, 54, 64; *R. v. Davis*, *supra* at paras. 42-56.

government official to do or not do something. It follows that a person who pretends, but cannot in fact influence a matter of business relating to the government remains culpable under s.121(1)(d).

47. Third, s. 121(1)(d) is a conduct offence. Conduct offences, by definition, do not require the attainment of a particular result.[80] Even if INAC did not engage in procurement of water treatment devices under any circumstances, including special pilot projects, the Appellant's conduct would still be within the ambit of the section. The focus of the offence under s. 121(1)(d) is on the conduct of the alleged "influence peddler". What matters is that the Appellant represented to H2O that he could influence government decision making in its favour, and that he demanded a benefit to do so. It did not matter whether the intended result could be obtained.

48. The Appellant told the principals of H2O that he had influence with the government and agreed to sell them that influence in order to further the company's *business with First Nations Bands*. H2O acceded to the Appellant's demands with the hope of getting that advantage, an advantage that the Appellant said he could get for them through his government contacts. This is the gravamen of the offence. Even if the Appellant was genuinely mistaken or lying about his ability to do so, "a person who pretends to have influence is a person who pretends he could affect such a government decision".[81] The nature of the offence is such that it crystalized with the Appellant's conduct. His culpability was not contingent on anything else.

(iv) Additional Legislative Context: The Lobbying Act

49. The majority of the Court of Appeal considered the overlap between various types of conduct captured under s. 121(1)(d) of the *Code* and the provisions of the *Lobbying Act* (the "*Act*").[82] Pardu J.A noted that the Appellant was not in compliance with the *Act*, therefore finding it unnecessary to consider the effect of compliance with the *Act* on the scope of criminality defined in s. 121(1)(d) of the *Code*.[83] Nonetheless, after an analysis of the two regimes she observed that:

If the purpose of the s. 121(1)(d) prohibition is to bar the non-transparent exercise of

[80] *Hinchey*, s*upra* at para. 22.*Greenwood, supra*
[81] *R. v. Giguère supra* at p. 10; *Hinchey*, supra at para. 22.
[82] RSC 1985, c 44 (4th Supp.) as amended.
[83] *Court of Appeal Decision*, Appellant's Record, Tab 1C at para 52.

> influence, it may be that the two regimes can work harmoniously together. It may be in some cases that the transparency afforded by compliance with the reporting requirements of the Lobbying Act will mitigate the evils to which s. 121(1)(d) is directed.[84]

50. The Respondent submits that majority is correct in its observation. Parliament has struck a cohesive and complementary framework, broadly designed to maintain public confidence in the integrity of government. The purpose and scope of the two regimes work harmoniously within Parliament's overarching framework to uphold public confidence in the integrity of government. The Act seeks to ensure transparency in activities that are recognized as legitimate. The *Code* casts a wider net than the *Act* and targets conduct that goes beyond a mere failure to register and report. Thus, the two regimes are "not completely co-extensive."[85]

51. Insofar as the *Code* elements of "cooperation, assistance, exercise of influence or an act or omission" overlaps with "communicates" or "arranges a meeting" as expressed in the *Act,* jurisprudence from this court has previously such overlap to be permissible. As observed in *Hinchey*:

> …we should not be swayed by the fact that the underlying activity in this case, receiving a benefit or advantage, happens to be quite legal. Such is also the case in a number of criminal provisions. Nevertheless, the law recognizes that in certain circumstances perfectly legal activity can become criminal.[86]
>
> …
>
> Parliament has identified what it considers an evil against the public, has set out a legitimate objective, and has written a prohibition into the statute which restricts specific actions. In my view, this is a valid exercise of the criminal law power, and as such, the judiciary should not rewrite it to suit its own particular conception of what type of conduct can be considered criminal.[87]

52. Parliament was alive to the interplay between the two regimes. This is clear, for example, in the restriction on the application of s. 126 of the *Code* in s. 10.3(2) of the *Act*. [88] This awareness was best expressed through Bill C-15: *An Act to Amend the Lobbyists*

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[84] *Ibid.*
[85] *Court of Appeal Decision* at para 46.
[86] *Hinchey, supra* at para. 32-33
[87] *Hinchey* at para. 34
[88] 10.3 (1) The following individuals shall comply with the Code :
(a) an individual who is required to file a return under subsection 5(1); and
(b) an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1)
Non-application of section 126 of the *Criminal Code*
(2) Section 126 of the *Criminal Code* does not apply in respect of a contravention of subsection (1).

Registration Act.[89] In the 2003 amendments, Parliament addressed any interpretive concerns between the *Act* and prohibited conduct in s. 121(1)(d). Bill C-15 had several objectives, among which was to clarify and improve the language of the *Act*. The Library of Parliament Legislative Summary for Bill C-15 states:

> "Clause 1 replaces the phrase in the preamble "attempting to influence government" with the phrase "engaged in lobbying activities.**"** This change is reflected in other amendments in C-15, and is designed to resolve certain enforcement issues that have arisen from the wording of the current Act.
>
> The Act currently applies to every individual who for payment on behalf of a client undertakes to "communicate" with public office holders "in an attempt to influence" public decision-making. The phrase "in an attempt to influence" has given rise to interpretive and, therefore, enforcement problems. First, it requires that the Crown show evidence that the lobbyist intended to influence government – and, typically, intent is very difficult to prove. Also, the phrase presents problems because of its similarity to section 121 of the Criminal Code.
>
> ….
>
> The intention of Parliament in enacting the Act was not to make lobbying a criminal activity, but rather only to ensure that lobbyists should register, so that the public would be able to see who is lobbying what department on what issue. In practice, the Act has been interpreted to apply to a person who, for payment, communicates with a public office holder to discuss government business (i.e., legislation or awarding contracts). The new wording is thought to better reflect Parliament's original intent, and to resolve the enforcement difficulties with the Act. The change from "attempt to influence" to "communicate in respect of" is reflected in several other amendments.[90]

53. The change of language in the preamble from "attempting to influence government" to "engage in lobbying activities" reflects the harmonious relationship between the *Act* and the *Code.* The former seeks to regulate professional lobbying, while the latter punishes seeks to bar "the non-transparent exercise of influence". The current version simply requires the lobbyist to "communicate […] in respect of". By eliminating an intent to influence as an element of lobbying offences, Parliament responded to interpretive and enforcement concerns, distinguishing the scope of conduct targeted under the *Act* from criminalized influence peddling.[91]

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[89] S.C. 2003, c 10. Bill C:15, *Act to Amend the Lobbyists Registration Act*; *Court of Appeal Decision* at paras. 37-39.
[90] *Ibid.*
[91] The respondent also notes that when s. 121 of the *Code* was amended in 2007,[91] Parliament was provided an additional opportunity to address the interplay between influence peddling and the *Act*. Through these amendments, Canada's implementation of *the United Nations Convention against Corruption* expanded the scope of conduct captured under s. 121, clarifying that these offences can be committed "directly or indirectly". These changes signaled a strengthening of Canada's commitment to combating the insidious manifestations of corruption.

54. The majority of the Court of Appeal defined influence peddling as the "acceptance of a benefit in exchange for a promise to influence government."[92] The mischief addressed by s. 121(1)(d) is the selling of real or supposed influence with the government, in exchange for consideration. The non-transparent selling of influence can have serious negative consequences for the integrity and appearance of integrity of government. In *R v O'Brien,* Cunningham A.C.J. described the importance of public confidence underlying the purpose of s. 121(1)(d):

> […] Section 121(1)(d) is clearly aimed at preventing influence peddling in order to protect the public's confidence in the integrity and appearance of integrity of the government. […] In my view, if s. 121(1) is directed at preserving the appearance of government integrity, any offer of a benefit or advantage made by a person having or pretending to have influence with the government which, regardless of the nature of the benefit offered, would, from the perspective of an ordinary, reasonable member of society have the appearance of compromising the government's integrity, falls within the scope of s. 121(1)(d). […][93]

IV The Appellant's Interpretation Suffers From the Same Error the Trial Judge Made

55. Corruption can occur in a myriad of ways. The definition suggested by the Appellant suffers from the same error that the trial judge made in her interpretive analysis: it relies on *Hinchey* and seeks to restrict Part II of the phrase ("any matter of business relating to the government") by anchoring it to Part I ("transaction of business"). In *R. v. Serré*, for example, the Aitken J. observed that:

> Processing immigration files at CIC is government business. It also involves bestowing benefits on immigrants in the form of work permits, study permits, temporary resident status, and permanent resident status. There is no doubt that this essential element has been established for all counts under both of these sections.[94]

The Appellant's suggested interpretation falls short of capturing conduct that is harmful to government integrity and the appearance of government integrity, and would result in an under inclusion of conduct that Parliament intended to be caught by the section.

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[92] *Supra*, note 2 at para 35.
[93] (2009) 249 C.C.C. (3d) 399 (Ont. S.C.) at para 52. See also *R. v. Pilarinos*, *supra* at para. 4.
[94] *Supra*, at para 56.

V The Majority of the Court of Appeal Applied the Correct Interpretation

56. The majority of the Court of Appeal was correct in holding that the phrase "any matter of business relating to the government" was to be interpreted broadly:

> Section 121(1)(a)(iii) forbids agreements to exercise influence in connection with "the transaction of business with" the government or "any matter of business relating to the government". If the second phrase is to have meaning, it must go beyond the scope of the first phrase, which pertains to business transactions to which the government is a direct party.
>
> Section 121(1)(d) criminalizes the conduct of a person having… influence who accepts… a benefit… as consideration for exercise of influence. The gravamen of the offence under s. 121(1)(d) is the acceptance of a benefit in exchange for a promise to influence government, whether or not any transaction results. This is influence peddling.[95]

It follows that the trial judge's conclusions that "there simply was no government business" and that it therefore followed that "the integrity of the government was not in issue"[96] are legally flawed. The level of co-ordination and supervision by INAC in pilot projects, which the government would fund, constitutes "any matter of business relating to the government." It is submitted that even preliminary *decision making* by INAC about whether to *proceed* or how to prioritize pilot projects, even at a conceptual stage, fall squarely within the scope of this phrase.[97]

VI Failure to Give Legal Effect to the Protocol

57. The Respondent observes that while consideration of the Protocol is not strictly necessary to resolve the statutory interpretation issue, the trial judge's conclusion is incongruent with what the Protocol clearly states and it should not have been ignored in the circumstances. It was an important piece of evidence which further confirmed that INAC did not provide funds blindly, but in fact performed a gatekeeper or supervisory role and was responsible for "reviewing" and "approving" proposals.[98] It was referenced in the evidence of witnesses who testified at the preliminary hearing and by the Appellant. There was no dispute about its authenticity and it was properly before the court. The trial judge ought to have given legal effect to it.[99]

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[95] *Court of Appeal Decision*, Appellant's Record Tab 1C, at paras. 34-36.
[96] *Supra* at para. 95.
[97] *R. v. Pilarinos, supra* at paras. 15-17, 33-36.
[98] Proceedings at Trial, September 14, 2015, Appellant's Record, Tab 3C at p. 88.
[99] *R. v. J.M.H., supra* at paras. 31-32; *R. v. Rudge*, [2011] O.J. No. 5709 (C.A.), leave to appeal refused [2012] S.C.C.A. No. 64.

VII CONCLUSION

58. It cannot be gain said that the government is in the business of ensuring the quality of water for the safety of the consuming public, including First Nations communities.[100] The government has a duty of care to ensure that any water system that it funds meets basic health and safety standards. At a minimum, the *Appellant's conduct harms public confidence in the integrity of the process through which INAC determines its funding allocations for capital investments and special pilot projects on First Nations Reserves*. That process must be conducted in a fair, open and transparent manner. The trial judge herself seems to have appreciated that the Appellant's conduct gave rise to an appearance of dishonesty. The Appellant's conduct caused precisely the type of harm that Parliament intended s.121(1)(d)(i) to prevent. The majority decision of the Court of Appeal correctly overturned the Appellant's acquittal. This appeal should be dismissed.

PART IV: COSTS SUBMISSIONS

59. The Respondent makes no submissions respecting costs.

PART V: ORDER REQUESTED

60. It is respectfully requested that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

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Roger Shallow
Of Counsel for the Respondent

DATED at Toronto this 17th day of July, 2017.

[100] *Trial Judgment*, Appellant's Record, Tab 1A, paras. 3-5.

PART VI –TABLE OF AUTHORITIES

	Paragraph(s)
R. v Giguère 1983 2 S.C.R. 448.	33, 44, 48
R. v. Hinchey, [1996] 3 S.C.R. 1128.	33, 34, 36, 39, 40, 41, 42, 43, 45, 47, 51
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PART VII: STATUTES, LEGISLATION AND REGULATIONS

Criminal Code of Canada R.S.C. 1985, c. C-46, s. 121; 2007, c. 13, s. 5.	2, 4, 6, 7, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 46, 47, 49, 52, 54, 58
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Hansard: 2nd reading of Bill No. 5, *An Act for the better prevention of fraud in relation to contracts involving the expenditure of public monies*, *House of Commons Debates*, 5th Parl, 1st Sess, Vol XIII, (March 2 1883).	44
Hansard: 2nd reading of Bill No. 172, *An Act respecting Frauds upon the Government*, *House of Commons Debates*, 7th Parl, 1st Sess, Vol 3 (September 18 1891).	44
Hansard: 2nd reading of Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption, , Debates of the Senate*, 39th Parl, 1st Sess, Vol 143, Issue 95 (May 9 2007).	44
Texts and Articles R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, LexisNexis Canada, (2014).	43

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
>
> **(ii)** being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

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

> **(iii)** the transaction of business with or any matter of business relating to the government, or
>
> **(iv)** a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

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;

(b) having dealings of any kind with the government, directly or indirectly pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which the dealings take place, or to any member of the employee's or official's family, or to anyone for the benefit of the employee or official, with respect to those dealings, unless the person has the consent in writing of the head of the branch of government with which the dealings take place;

(c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official;

(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

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 fonctionnaire,
>
> (ii) soit, étant fonctionnaire, exige, accepte ou offre ou convient d'accepter de quelqu'un, pour lui-même ou pour une autre personne,

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 :

> (iii) soit la conclusion d'affaires avec le gouvernement ou un sujet d'affaires ayant trait au gouvernement,
>
> (iv) soit une réclamation contre Sa Majesté ou un avantage que Sa Majesté a l'autorité ou le droit d'accorder,

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;

b) traitant d'affaires avec le gouvernement, paye une commission ou une récompense, ou confère un avantage ou un bénéfice de quelque nature, directement ou indirectement, à un employé ou à un fonctionnaire du gouvernement avec lequel il traite, ou à un membre de sa famille ou à toute personne au profit de l'employé ou du fonctionnaire, à l'égard de ces affaires, à moins d'avoir obtenu le consentement écrit du chef de la division de gouvernement avec laquelle il traite;

c) pendant qu'il est fonctionnaire ou employé du gouvernement, exige, accepte ou offre ou convient d'accepter d'une personne qui a des relations d'affaires avec le gouvernement une

influence or an act or omission in connection with

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

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

(e) directly or indirectly gives or offers, or agrees to give or offer, to a minister of the government or an official, or to anyone for the benefit of a minister or an official, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence, or an act or omission, by that minister or official, in connection with

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

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

(f) having made a tender to obtain a contract with the government,

(i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or

(ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.

Contractor subscribing to election fund

(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes or gives, or agrees to subscribe or give, to any person any valuable consideration

(a) for the purpose of promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or

(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in

commission, une récompense, un avantage ou un bénéfice de quelque nature, directement ou indirectement, pour lui-même ou pour une autre personne, à moins d'avoir obtenu le consentement écrit du chef de la division de gouvernement qui l'emploie ou dont il est fonctionnaire;

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 :

(i) soit une chose mentionnée aux sous-alinéas a)(iii) ou (iv),

(ii) soit la nomination d'une personne, y compris lui-même, à une charge;

e) donne, offre ou convient de donner ou d'offrir, directement ou indirectement, à un ministre du gouvernement ou à un fonctionnaire ou à quiconque au profit d'un ministre ou d'un fonctionnaire, 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 du ministre ou du fonctionnaire concernant:

(i) soit une chose mentionnée aux sous-alinéas a)(iii) ou (iv),

(ii) soit la nomination d'une personne, y compris lui-même, à une charge;

f) ayant présenté une soumission en vue d'obtenir un contrat avec le gouvernement :

(i) soit donne, offre ou convient de donner ou d'offrir, directement ou indirectement, à une autre personne qui a présenté une soumission, à un membre de la famille de cette autre personne ou à quiconque au profit de cette autre personne, une récompense, un avantage ou un bénéfice de quelque nature en contrepartie du retrait de

Parliament or the legislature of a province. **Punishment** (3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.	la soumission de cette autre personne, (ii) soit exige, accepte ou offre ou convient d'accepter, directement ou indirectement, d'une autre personne qui a présenté une soumission, une récompense, un avantage ou un bénéfice de quelque nature, pour lui-même ou pour une autre personne, en contrepartie du retrait de sa propre soumission. **Entrepreneur qui souscrit à une caisse électorale** (2) Commet une infraction quiconque, afin d'obtenir ou de retenir un contrat avec le gouvernement, ou comme condition expresse ou tacite d'un tel contrat, directement ou indirectement souscrit, donne ou convient de souscrire ou de donner à une personne une contrepartie valable : a) soit en vue de favoriser l'élection d'un candidat ou d'un groupe ou d'une classe de candidats au Parlement ou à une législature provinciale; b) soit avec l'intention d'influencer ou d'affecter de quelque façon le résultat d'une élection tenue pour l'élection de membres du Parlement ou d'une législature provinciale. **Peine** (3) Quiconque commet une infraction prévue au présent article est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans.

Bill No. 5, *An Act for the better prevention of fraud in relation to contracts involving the expenditure of public monies*
Assented to May 25 1883

Bill No. 5, *An Act for the better prevention of fraud in relation to contracts involving the expenditure of public monies,* 2nd reading

House of Commons Debates, 5th Parl, 1st Sess, Vol XIII, (March 2 1883)

Hon. Mr. Casgrain at 93-94

FRAUD IN CONTRACTS INVOLVING EXPENDITURE OF PUBLIC MONEY.

Mr. CASGRAIN, in moving the second reading of Bill (No. 5) for the better prevention of fraud in relation to contracts involving the expenditure of public monies, said:

I desire, if possible, to remedy certain abuses which have crept into the politics of our country. There is, as I said before, a necessity for this measure or legislation of a similar character. The Government look with great hostility upon it, I fear. Instead of trying to help this measure which I think they should have taken into their own hands, they impeded it when brought up last Session, so that it could not reach the stage to which it has now come.

I renew the application I then made to put this matter into the hands of the Government, as *it* is one of public interest, not only with regard to the different officials dependent on the Government, but also in view of the fact that it is a safeguard to the Ministers themselves. I do not expect, however, that the hon. First Minister will have changed his mind on this matter, though, during the last Session, he intimated that some measure of this kind ought to be brought forward. He then expected, he said, to see a Bill presented in the English House of Commons and would await that measure in order to find in it some guide or principle to embody in our own law. In proposing this measure I an only repeat what I said on a similar occasion before, and I think that I may be allowed to quote from our debate on this subject what I said in moving for the second reading of this Bill. I then said:

"I do not know to what extent the legislation I propose will be able to put a stop to frauds of this kind. These frauds are of a kind that poison, that creep into the social body ; it is very difficult to reach them and more difficult to eradicate. Nevertheless, I deemed it my duty to introduce a Bill which, I think, will not only meet with the approbation of this House, but also the approval of the country. I would have wished to see the present Government take up this measure; I think they would be rendering a great service to the country by bringing down such a Bill. On the other hand, as on the first reading, I made the same proposal which was not accepted, I think I am fulfilling my duty as a member in introducing the Bill, which has three principal objects. Among others, in the first place, to prevent what are called middlemen or brokers from interfering with public contracts. We all know and unhappily it is *only* too true, that these brokers in order to lend their influence in favor of individuals exact what we call in French *petites douceurs.* I am of opinion that such a business is direct corruption.

That is why, by the first clause of the Bill, I propose making these different acts a misdemeanor, punishable as such upon conviction, before the ordinary Courts. The second object I have in view is to prevent tenderers in public contracts from withdrawing their tenders for certain considerations in order to help other tenderers, thus depriving the country of a profit, or unduly obliging it to pay considerable sums that might otherwise be saved**.** This kind of fraud is not provided against by our legislation. It is nevertheless provided against by the legislation of the Province of Quebec. I would mention in support of this statement, the case of public sales by the Sheriff. All the bidders are held to be independent one from another; to be bound each by his respective bid. When they form a ring to acquire a property at a low price, the sale is fraudulent and voided by the Courts of Justice. This legislation is based upon sound morality and upon true reason; it is made in order to prevent what might be called indirect stealing. All public contracts tainted with such fraud, should be declared void, ail such tenderers should be deprived of the right of obtaining or carrying on any contract with the Government. I will endeavor to introduce a clause in that direction, if, as I hope, the Bill comes before the Comrnittee of Whole. I moreover wish to protect public officers against attempts that might be made to captivate their kindness as to corrupt them in the execution of their duty, to punish those who make them other offers, gifts or promises of any kind, so as to induce them to declare the secrets of the public Departments. As these different acts are tainted with fraud it is necessary to suppress as far as possible such abuses. I therefore make a misdemeanor of such cases, and there ie not only a pecuniary penalty attached to these acts, on conviction, but moreover there is a brand of infamy, that is to say, an imprisonment, so that this infamous stain may deter ail those who might be tempted to corrupt a public officer, or commit any of these *offences.* Another clause contemplates preventing all public contractors or those wishing to become such, or those who are entrusted with the execution of a public contract, from contributing either directly, or indirectly, to general election funds or for political objects, from heavily subscribing, as examples have been seen, and guarding against a repetition of what has unhappily *already* occurred in the country."

Now that the Ontario and the General Elections are over, I hope my hon. friend opposite will not see much difficulty in agreeing to this clause of the Bill. I then continued:

"I do not think that too severe restrictions can be established, nor too exemplary punishment be inflicted upon those who

should attempt by this means to corrupt the electorate so I call such acts misdemeanors and I want them to be punished as such, and also punished by a fine or an imprisonment, at the discretion of the Court. I do not wish to dwell at any length upon the facts that have induced me to introduce this measure."

I do not desire at the present moment to give the names of the persons or the circumstances upon which I based this Bill. I know the position I occupy, with respect to a particular individual, is somewhat disparaging to myself, if I may use that expression. At any rate in bringing in this Bill I am aware that I am offending the feelings of come contractors, and some private individuals against whose acts the Bill is directed; but I have a public duty to perform which private feelings cannot be permitted to interfere with.
"I think that it has become absolutely necessary, and that in these, our times, this kind of corruption is extending aIl over America. Not only do we need such legislation in this country, but I also observe that even in the United States, since the introduction of my Bill, a like measure has been introduced in Congress, in order to protect public offices, and to prevent public contractors from unduly influencing these officers. With these remarks Mr. Speaker *I* make my motion.'"

Now, Sir, I hold in my hands a Bill presented to Congress to prohibit Federal officers and contractors from making and receiving assessments for contributions for political purposes. That legislation was needed in the United States as much as it is needed here **;** and I think that this Bill, imperfect though it may be, and though it cannot reach, in many instances, the guilty individual, is still urgently needed, in order that, if possible, such fraud, when discovered, may be punished. I would feel very much obliged to hon. members of this House, on both sides, if they would help me in carrying this Bill to its final stage, and in making it as perfect as possible. With these remarks, I move the second reading.

Bill No. 172, *An Act respecting Frauds upon the Government*
Assented to September 30 1891

Bill No. 172, *An Act respecting Frauds upon the Government,* 2nd reading
House of Commons Debates, 7th Parl, 1st Sess, Vol 3 (September 18 1891)

Hon. Sir John Thompson at 5751

Sir JOHN THOMPSON moved second reading of Bill (No. 172) respecting frauds on the Government.

Mr. MILLS (Bothwell): Will the Minister what what he hopes to accomplish by this Bill that he cannot accomplish with the law as it now stands?

Sir JOHN THOMPSON. The Bill proposes to go further than the existing statute, principally this particular: The present statute makes it an offence for a public officer to receive a gift for the purpose of inducing him to neglect any duty which he owes to the Government, or for the commission of any fraud on the Government. The statute, likewise, makes it an offence for a person to give, or offer a gift or gratuity for that purpose. The object of the present Bill is to make it an offence, likewise, for a public officer, under any circumstances, to receive a gift from a person dealing with the Government. Circumstances have occurred in which it would be impossible to prove that in the discharge of his duty the officer in any way was influenced by the gratuity. It has been so alleged, and in all probability would have been proved in the trial of any such case, that the duty had been faithfully discharged for the Government, that the contractor or person who offered the gift had not obtained an enhanced price in view of such consideration, and the Government had sustained no injury. Nevertheless, it is most desirable that such an evil should be stopped at its source, and that it should not be necessary, in order to make such an offence punishable, that we should have to prove injury and actual fraud committed, or even fraudulent intent. It is necessary that officers of the Government should be free from suspicion in regard to any such matters, and therefore the reception of gifts under such circumstances by such officers is made an offence by this Bill. This is the main distinction between this and the existing statute. If the House is prepared for it we can go on in Committee; if not we can simply take the second reading and go in Committee on Monday.

Motion agreed to, and Bill read the second time.

Bill C-48, ***An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption***
Assented to May 31 2007

Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption*, 2nd reading,
Debates of the Senate, 39th Parl, 1st Sess, Vol 143, Issue 95 (May 9 2007)

Hon. A. Raynell Andreychuk at 2319-2320

Hon. A. Raynell Andreychuk moved second reading of Bill C-48, to amend the Criminal Code in order to implement the United Nations Convention against Corruption.

She said: Honourable senators, I rise to speak to Bill C-48, to amend the Criminal Code in order to implement the United Nations Convention against Corruption.

Corruption, a serious criminal activity, presents challenges to all countries of the world. No country is exempt from corruption activities. It constitutes a serious problem in developing countries, where it creates an enormous obstacle to development and reconstruction efforts.

Canadian businesses face corruption in commercial operations. Institutions engaged in development and reconstruction projects confront it also.

The United Nations Convention against Corruption is the first comprehensive and global anti-corruption treaty. Canada has been a strong supporter of the convention since the beginning of the process. We took an active and leading role during the preparatory stages and the negotiation of the treaty. Since the convention was adopted by the UN General Assembly in October 2003, Canada has provided expertise and financial support to the UN secretariat and to other countries in order to encourage and assist them in ratifying and fully implementing the convention.

While the UN convention is the first comprehensive global instrument of its kind, Canada is already a state party to several regional and more specific treaties dealing with corruption. Canada has been a party to the Inter-American Convention against Corruption, under the auspices of the Organization of American States, since June 2000. We have also been a party to the United Nations Convention against Transnational Organized Crime, which deals with the transnational and organized crime aspects of corruption. As well, we have been a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions since 1998.

Since we ratified these international legal instruments, officials have been actively engaged in supporting them through monitoring activities and the delivery of assistance to other states parties that have requested it.

Canada's ratification of the United Nations Convention against Corruption will be an important and logical extension of its international commitments in the global fight against corruption.

When Canada signed the convention in May 2004, we indicated that we supported the convention, we intended to ratify it, and we intended to be bound by it. The government now wants to ratify it and send a strong signal to all countries of the world. Our message is that Canada recognizes the seriousness of corruption and that we stand united with our fellow member states of the United Nations in our commitment to deal with corruption as a global problem

Canada supports this convention not only because it will further the cause of assisting other countries in development and good governance, but also because the implementation of its provisions in those countries will help to ensure that development funds contributed by Canadian taxpayers and other donor countries will be used to the full benefit of the developing countries.

The UN Convention against Corruption criminalizes the bribery of domestic and foreign public officials, as well as persons working in the private sector, and of embezzlement in the public and private sectors.

State parties are also invited, but not required, to consider criminalizing trading in influence, abuse of functions and illicit enrichment by public officials.

Apart from the offence of illicit enrichment, which is not mandatory, the other offences established by the convention are, for the most part, already criminal offences in Canada. For example, the offence of bribery of domestic public officials is covered by a series of existing Criminal Code offences, including bribery of judges and members of the federal Parliament or a provincial legislature, section 119; bribery of police, court officers and anyone involved in the administration of the criminal law, section 120; bribery of government officials, section 121; bribery of municipal officials, section 123; and breach of trust, section 122.

With respect to private sector bribery, we have the offence of secret commissions — section 426 of the Criminal Code.

The offence of bribery of a foreign public official is found in the Corruption of Foreign Public Officials Act.

The offence of fraud — section 380 of the Criminal Code — applies to embezzlement in the public and private sectors, and the new offences of fraud against public money in the Financial Administration Act, which were enacted by the Federal Accountability Act, apply to embezzlement by public servants and by directors or employees of Crown corporations.

As required by the convention, we already have offences in place that cover both active and passive bribery. It is a crime to offer or give a bribe to a public official, and it is a crime for a public official to solicit, demand or accept a bribe.

Domestic anti-corruption standards in Canada are already in place to meet the requirements of the convention. However, there is need to make some technical legislative changes in order to comply fully with the requirements of the convention. This is what Bill C-48 is really all about.

Many of the offences of corruption in the Criminal Code come from the common law and were part of our law before the criminal law was first codified in 1892. The scope of some of our present offences must be expanded to fully conform to the convention.

The convention requires us to criminalize both direct bribery and bribery demanded or given through an intermediary. It also requires that we criminalize bribery where a benefit is demanded for, or given to, a third party. Some of the corruption offences in the Criminal Code already expressly meet these requirements, but not all of them. Case law has interpreted some of the offences that do not specifically provide for bribery through intermediaries and third parties as if they did. The proposed amendments will add the necessary words to these offences in order to ensure that our obligations will be met fully, consistently, and in every case.

The convention also applies a definition of ''public official'' that is broader than the definition of ''official'' as it reads in section 118 of the Criminal Code.

Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption*, 2nd reading,
Debates of the Senate, 39th Parl, 1st Sess, Vol 143, Issue 96 (May 10 2007)

Hon. A. Raynell Andreychuk at 2319-2320

Hon. A. Raynell Andreychuk: Honourable senators, I did start yesterday, hoping that His Honour's watch had not been repaired and that I would be able to finish. I assure honourable senators that I will not take 40 minutes. As honourable senators recall, Bill C-48 amends the Criminal Code in order to implement the United Nations Convention against Corruption. I enumerated the Criminal Code sections that already have some aspects of anti-corruption measures. I went on to indicate that this convention, by and large, follows what Canada has already in place but ensures fully that we are in compliance with the convention.

Honourable senators, these are only a few of the elements of the convention that require legislative action on our part. The convention mostly establishes requirements and sets standards that Canada already meets. Once this bill is passed, Canada will meet all the necessary requirements of the convention and will be in a position to become a party to the convention. We will then become a full member of the Conference of States Parties, which will monitor the implementation of the convention.

The convention sets minimum standards only. Our existing treaties, agreements and arrangements, especially with countries where we have a large volume of cases — for example, the United States, the United Kingdom and European countries — generally have higher standards. These bilateral agreements will remain in effect. The convention does ensure that all corruption offences are covered and it extends international cooperation within the scope of the convention to the states parties where no cooperative arrangements have existed until now.

Hon. Fernand Robichaud at 2319-2320

Hon. Fernand Robichaud: Honourable senators, I would like to present the position of the Official Opposition regarding Bill C-48. As Senator Andreychuk put it so well, Bill C-48 is an act to amend the Criminal Code in order to implement the United Nations Convention against Corruption.

Although Canada already meets many of the requirements of the convention, a few technical amendments are necessary to ensure the implementation of this international agreement and to enable us to apply it. The Criminal Code must be amended, first, to redefine the notion of "official" to include any individual "elected" to discharge a public office; second, to specify that corruption offences can be committed either directly or indirectly; and third, to grant the court the authority to seize or confiscate offence-related property.

Essentially, Bill C-48 amends the Criminal Code so that, in the event of corruption, we may deal with public officials more efficiently. As a member of the Official Opposition, I am very pleased to support this bill and, thus, work constructively on implementing this initiative, which aims to eliminate corruption among public office holders.