

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

)
)
) *Scott C. Hutchison*
) *Brennagh Smith*
)
)
)

- and -

LARRY O'BRIEN

)
) *Michael D. Edelson*
) *W. Vincent Clifford*
) *Connie D'Angelo*
) *David M. Paciocco*
)
)
) HEARD: June 8 and 9, 2009

CUNNINGHAM A.C.J.

DECISION ON MOTION FOR DIRECTED VERDICT

OVERVIEW

[1] In this case, it is alleged that the accused Larry O'Brien, currently the Mayor of Ottawa, "did, having or pretending to have influence with the government of Canada, or with a Minister of the Government, directly or indirectly offer or agree to accept for himself a reward, benefit or advantage of any kind, to wit: the withdrawal of Terry Kilrea from the 2006 Ottawa Mayoral election, as consideration for his cooperation, assistance or exercise of influence in connection with the appointment of Terry Kilrea to an office with the National Parole Board . . . contrary to section 121(1)(d) of the *Criminal Code of Canada*."

[2] Further, it is alleged that Mr. O'Brien

“did solicit, recommend or negotiate with respect to an appointment to an office, to wit: an appointment for Terry Kilrea to the National Parole Board . . . in expectation of a direct or indirect ward, advantage or benefit, to wit: the withdrawal of Terry Kilrea from the 2006 Ottawa Mayoral Election, contrary to section 125(b) of the *Criminal Code of Canada*.”

[3] Mr. O'Brien, at the close of the Crown's case moved for a directed verdict of acquittal on both counts, on the basis that his alleged conduct in relation to the 2006 mayoral race is not captured by the *Criminal Code* provisions under which he has been charged.

[4] At the heart of this motion is the issue of the appropriate interpretation of ss. 121(1)(d) and 125(b) of the *Code*. The defence argues that Mr. O'Brien's alleged (1) acceptance of Mr. Kilrea's resignation from the 2006 mayoral race, in exchange for his cooperation in securing for Mr. Kilrea an appointment to the National Parole Board; and (2) negotiation with Mr. Kilrea with respect to an appointment to the National Parole Board, do not fall within the scope of these sections, properly interpreted.

FACTUAL BACKGROUND

[5] Terry Kilrea is a Sheriff's Officer with the Ministry of the Attorney General. After a number of years of active political involvement, Kilrea contested the 2003 Mayoral race, finishing second and capturing approximately 36 percent of the vote. Mr. Kilrea thereafter dedicated himself to the prospect of again running for Mayor in 2006. He formally registered in January 2006 and began his campaign.

[6] In July 2006, Larry O'Brien arranged to meet with Mr. Kilrea, as he had also decided to run for Mayor and, being that both candidates were right of centre on the political spectrum they

would likely have an overlapping support base. It is alleged that an arrangement was proposed at this meeting according to which Mr. Kilrea would withdraw from the mayoral race and Mr. O'Brien would exercise his influence to assist Mr. Kilrea in obtaining, in exchange, an appointment to the National Parole Board. Mr. O'Brien now stands charged with accepting an advantage or benefit as consideration for his assistance and influence with respect to Mr. Kilrea's appointment.

[7] I will first address the burden the defence must meet to succeed on this motion, and then turn to my interpretation, according to the accepted approach, of ss. 121(1)(d) and 125(b).

ANALYSIS

The test on a motion for a directed verdict

[8] The test for determining a motion for a directed verdict is the *Sheppard*¹ test as modified by the Supreme Court of Canada in *R. v. Arcuri*.² On such a motion, it is for the court to determine:

“Whether or not there is any evidence upon which a reasonable jury, properly instructed could return a verdict of guilty. The justice, in accordance with this principle,... is required to (reject the directed verdict motion) in any case where there is admissible evidence which could, if it were believed, result in a conviction.”

[9] It is therefore my responsibility to determine whether the Crown has put forward sufficient evidence with respect to each element of the offences charged, assuming the evidence is true and reliable. If there is some evidence, even circumstantial evidence, upon which a

¹ *United States v. Sheppard* (1976), 34 C.R.N.S. 207 (S.C.C.).

² [2001] S.C.C. 54 at para. 21.

reasonable trier of fact might convict Mr. O'Brien under ss. 121(1)(d) or 125(b) of the *Code*, a directed verdict of acquittal should not be granted.

[10] For the purposes of this motion, I will take the Crown's evidence at its highest. I recognize, however, that at this stage of the proceeding I must weigh the evidence only in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks me to draw. I must consider whether the evidence adduced is sufficient to permit me to conclude that the accused is guilty beyond a reasonable doubt. I will not, in determining the outcome of this motion, be weighing the totality of the evidence. It is well-established that on a motion for a directed verdict a trial judge may not weigh or draw inferences from the evidence, nor may he assess the credibility of witnesses.³ It will therefore be unnecessary at this stage for me to review the evidence in detail.

Parties' submissions

[11] The defence submits that it could not have been the intention of legislators to catch political advantage within the reach of s. 121(1)(d), and that a tracing of the legislative history reveals that the words "benefit" and "advantage" describe something of concrete value – a "profit" or tangible gain. For the drafters of s. 121(1)(d) to intend otherwise, the defence argues, would be to criminalize patronage appointments. The section so interpreted would criminalize Senate appointments to individuals being asked to give up nominations or indeed seats, in order to permit others a party deems more worthy to replace them. It would capture negotiations or arrangements resulting in representatives 'crossing the floor' to accept Cabinet positions. Simply put, the defence submits, the withdrawal of Terry Kilrea from the 2006 mayoralty race cannot amount to the reward, advantage or benefit required to support a criminal prosecution.

[12] Counsel for the Crown argues that the phrase “reward, advantage, or benefit of any kind” encompasses any sort of favour, promise or anything else that might be consideration in the sense of a personal benefit to the individual whose conduct is in question. The Crown submits that the fact that the benefit conferred may be purely political in nature is irrelevant. The gravamen of the offence, the Crown submits, is the proposed receipt of a personal advantage or benefit in exchange for the other’s cooperation or assistance. In the circumstances of this case, the Crown submits, the political advantage or benefit accruing to the accused O’Brien, was the withdrawal of Terry Kilrea from the 2006 mayoralty race which, the Crown theorizes, increased Mr. O’Brien’s chance of being elected mayor by eliminating the risk of splitting the right-wing vote between two candidates occupying this political space – himself and Mr. Kilrea.

[13] It is the Crown’s position that the meaning of the words “reward, advantage, or benefit of any kind” is clear and can be readily interpreted within the four corners of the *Code* as encompassing ‘diverse forms’ of benefits and advantages. An examination of the drafting history of s. 121(1), according to the Crown, supports this view, given the broad meaning of the term “advantage” in the section’s historical antecedents. The Crown also argues that Mr. O’Brien’s conduct strikes at the very purpose of both ss. 121(1)(d) and 125(b) to preserve both actual and apparent integrity on the part of government employees.

[14] With respect to the charge brought under s. 125(b), the defence raises the issue of whether or not a negotiating party under this section must be in a position to actually influence the making of the appointment. The defence submits that the terms “solicit” and “recommend” found in this subsection require that a person who participates in these activities actually be able

³ *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.).

to influence an appointment or resignation. The coupling of these terms with the word “negotiate” in s. 125(b) is an indication that Parliament had in mind only negotiations with persons in a position to actually effect such influence. The defence submits that because no evidence has been adduced that Mr. O’Brien had the authority to influence the appointment, a conviction under s. 125(b) is impossible.

[15] The Crown maintains that s. 125(b) is part of a comprehensive legislative scheme that seeks to protect the integrity of government appointments by specifically prohibiting the influencing of appointments or dealing in offices. Moreover, like s. 121(1)(d), s. 125(b) creates a ‘conduct offence’, such that the act of engaging in solicitation, recommendation or negotiation with respect to influencing government appointments, *without more*, is caught by the section.

[16] Do the words “advantage or benefit of any kind” capture political benefit? Is authority to influence government appointments required under s. 125(b)? Determining the appropriate meaning of the *Code* sections in issue on this motion necessitates resort to principles of statutory interpretation that have enjoyed a long history of debate and development in our courts. I turn now to the applicable principles.

Principles guiding interpretation of ss. 121(1)(d) and 125(b)

[17] Canadian courts have resoundingly supported a purposive and contextual approach to statutory interpretation. Legislative provisions 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.”⁴ This approach to statutory interpretation has been specifically

⁴ Elmer Driedger, *Construction of Statutes*, 2nd ed. (, 1983) at 87.

endorsed by the Supreme Court of Canada.⁵ Needless to say I am bound to approach my interpretation of ss. 121(1)(d) and 125(b) in this case according to this modern approach.

[18] Interpretation of statutory provisions in a purposive, contextual manner requires consideration of both the ordinary and grammatical meaning of the provision's language, and the legislative intent underlying the provision. Moreover, the consequences of any interpretation must be tested for compliance with established legal norms.⁶

[19] The starting point of any interpretive exercise therefore is, as the Crown suggests, to determine the ordinary meaning of the text of the provision in issue, which is presumed to reflect the legislature's intent in drafting it. To assist in this exercise, it may be appropriate to examine the language used in related provisions, and in the statute as a whole.⁷

[20] In addition to considering the ordinary meaning of a provision's language, the legislature's purpose in enacting the provision also weighs heavily in the interpretive exercise. Here, it is appropriate to consider the legislative history of the provision and related provisions, the purpose of the statute as a whole, and any relevant case law.⁸

[21] Guided by these principles, I will turn now to the interpretation of ss. 121(1)(d)(ii) and 125(b).

1. Does s. 121(1)(d) of the *Code*, properly interpreted, capture political advantage?

[22] Section 121(1) of the *Code* provides as follows:

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

⁵ See *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21.

⁶ See Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham, LexisNexis, 2008).

⁷ *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415.

⁸ *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.).

- (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, 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 he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies on him;
- (c) being an official or employee of the government, 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 directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him;
- (d) having or pretending to have influence with the government or with a minister of the government or an official demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance exercise of influence or an act or omission in connection with
 - (i) anything mentioned in subparagraph (a)(iii) or (iv), or
 - (ii) the appointment of any person, including himself to an office.
- (e) gives, offers or agrees to give or offer to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act of omission in connection with
 - (i) anything mentioned in subparagraph (a)(iii) or (iv), or
 - (ii) the appointment of any person, including himself to an office.
- (f) having made a tender to obtain a contract with the government
 - (i) gives, offers or agrees to give or offer to another person who has made a tender or to a member of his 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) demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender.

[23] The critical phrase in the interpretative dispute at hand is “a reward, advantage or benefit of any kind.” In *R. v. Greenwood*,⁹ however, Doherty J.A. quite quickly dealt with the word “reward” as connoting economic compensation for services rendered, applying the reasoning in *Doré v. Canada*,¹⁰ as approved in *R. v. Giguere*.¹¹ It is then left to me to determine the meaning of “advantage or benefit of any kind” within the context of s. 121(1)(d) and, based on my interpretation of this phrase, to determine whether or not the Crown has made out a *prima facie* case against Mr. O’Brien under this section.

[24] The phrase “advantage or benefit of any kind” is found in all subsections of s. 121(1) of the *Code*. The most authoritative jurisprudence as to the meaning of this phrase – the Ontario Court of Appeal’s judgment in *Greenwood* and the Supreme Court of Canada’s affirmation of this judgment in *R. v. Hinchey*¹² – deal with s. 121(1)(c) in particular. Doherty J.A. and L’Heureux-Dubé J.’s analysis of the phrase “advantage or benefit of any kind” in *Greenwood* and *Hinchey* respectively, is nonetheless instructive in interpreting the meaning of this phrase in s. 121(1)(d), as in my view, all subsections of s. 121(1) were enacted to further the same overriding purpose. This purpose informs the meaning of “advantage or benefit of any kind,” which is therefore consistent across all of s. 121(1) and between ss. 121(1)(c) and (d) in particular.

[25] The Ontario Court of Appeal in *Greenwood* analyzed the legislative purpose of s. 121(1)(c) and in particular the phrase “reward, advantage or benefit of any kind,” adopting the modern approach to statutory interpretation. The Supreme Court of Canada then supported the

⁹ (1991), 67 C.C.C. (3d) 435 (Ont. C.A.).

¹⁰ [1975] 1 S.C.R. 756 at 760.

¹¹ [1983] 2 S.C.R. 448.

¹² [1996] S.C.R. 1128.

approach taken in that case. It is therefore incumbent upon me to be guided by the approach taken in these two cases in interpreting “advantage or benefit of any kind” with respect to s. 121(1)(d)(ii) in this case.

(a) *Ordinary and grammatical meaning*

[26] The case law is in agreement that the ‘plain and ordinary meaning’ of the language of s. 121(1) offers little guidance as to its proper interpretation. Because the phrase “advantage or benefit of any kind” is contained in the section without qualification, interpretation based on the text alone would be expansive. Political advantage clearly falls within the literal meaning of the phrase “advantage or benefit of any kind.”

[27] In *Greenwood Doherty J.A.*, addressing s. 121(1)(c), concluded that the phrase “advantage or benefit of any kind” could not be interpreted literally, otherwise the unqualified words “advantage” and “benefit” could catch conduct that was never intended to be criminalized, such as offering or accepting complimentary cups of coffee or rides to work.

[28] In *Hinchey L’Heureux-Dubé J.* similarly acknowledged the expansive nature of this phrase. She stated that without further guidance in interpreting s. 121(1) by referring to the legislative intent behind the section, its scope would be unlimited. She stated that it was for the courts to narrow the broad language of s. 121(1) by adopting a purposive approach to interpretation of that section.

[29] Analysis of legislative intention to determine meaning is therefore especially necessary with respect to s. 121(1), given the limited utility of the ordinary meaning of the phrase “advantage or benefit of any kind” in determining its proper interpretation.

(b) *Legislative intent*

[30] The words “reward”, “advantage” or “benefit” in s. 121(1)(d) are supplemented by the words “of any kind.” An analysis of the phrase “of any kind” is instrumental in determining exactly what ‘kinds’ of advantages or benefits Parliament intended to be included within the scope of s. 121(1).

[31] In *Hinchey* L’Heureux-Dubé J. found that this phrase was added to include within the scope of s. 121(1)(c) benefits other than those of a strictly monetary nature. By adding this supplementary phrase, a variety of forms of advantage could be caught. L’Heureux-Dubé examined the French version of the section and found that “It indicates that what Parliament was truly intending by the section was to attract diverse forms of benefits. Thus, a government employee who receives a house at no cost is in the same position as one who happens to receive cash compensation.” As well, L’Heureux-Dubé J. considered the phrase “benefit of any kind” in the *Income Tax Act*. She quoted from *Pezzelato v. The Queen*¹³ with respect to this phrase as follows:

“It is designed to recognize the numerous and varied ways in which an employee may be remunerated for his or her services...”

[32] The defence argues that L’Heureux-Dubé J. meant by her reasoning to exclude the ‘kind’ of advantage or benefit in issue in this case – political advantage or benefit. I think a different interpretation of L’Heureux-Dubé J.’s meaning in *Hinchey* is appropriate.

[33] In my view, L’Heureux-Dubé J.’s comments reflect a concern with an over-inclusive interpretation of the *value* of the benefit or advantage captured by s. 121(1)(c). She states that a benefit caught by s. 121(1)(c) cannot be trivial, in response to concerns that an over-inclusive interpretation of the section would capture insignificant benefits such as a cup of coffee or a ride

¹³ 96 D.T.C. 1285 (T.C.C.).

to work. L'Heureux-Dubé interpreted the phrase "advantage or benefit of any kind" to exclude such trivial or nominal gifts, as it is unlikely that these are the kinds of 'benefits' that the legislature had in mind in drafting s. 121(1)(c). In essence, an "advantage or benefit of any kind" cannot be interpreted to mean a benefit or advantage of any *value*, however minimal (at paras. 52-64). It is clear then, that according to L'Heureux-Dubé J. diverse forms of advantage or benefit are not outside the scope of s. 121(1)(c). Rather, they are intended by Parliament to be properly within the reach of that provision.

[34] Doherty J.A. endorsed this view in *Greenwood*, where he stated that s. 121(1)(c) is not intended to make government employees "social pariahs," imposing unreasonable constraints on their lives outside their profession because of the criminalization of all inconsequential benefits conferred in social contexts or for social purposes. Such benefits are therefore excluded from the scope of s. 121(1)(c).

[35] The defence points to L'Heureux-Dubé J.'s statement that the advantage captured by s. 121(1)(c) must be "material *economic* advantage" [emphasis mine] to support its contention that political advantage is excluded under s. 121(1)(d). It appears from a more careful analysis of the passage in L'Heureux-Dubé J.'s analysis in which this statement is found that counsel for Mr. O'Brien's reliance on it is misplaced. In my view, the defence's interpretation of the statement is taken out of the context of the paragraph in which it is embedded.

[36] In using the language "material economic advantage" L'Heureux-Dubé J. quotes from the judgment of the Tax Court of Canada in *Hoefele v. the Queen*.¹⁴ She uses the pronouncement by the Tax Court that to be worthy of measurement under s. 121(1), a benefit must be a 'material economic advantage' as supporting her position that trivial advantages are not within the scope

of the section's application. L'Heureux-Dubé J. supports this description of the kind of advantage caught by s. 121(1) – '*material* economic advantage' [emphasis mine] – as an indication that the benefits caught by s. 121(1)(c) must be significant to the recipient and cannot be merely trivial.

[37] Accordingly, I disagree with the defence's interpretation of L'Heureux-Dubé J.'s comments in *Hinchey* as suggesting that it was Parliament's intention to exclude political advantage from the scope of s. 121(1)(c). I accept L'Heureux-Dubé J.'s interpretation of the broad construction of s. 121(1)(c) as indicative of Parliament's intention to include diverse forms of advantages or benefits within that section's scope.

[38] The question remains, is this interpretation supported by other evidence as to the legislative intent of Parliament in drafting s. 121(1)?

[39] Let me spend a moment considering the legislative history of this section. Without question, in its earliest iteration, the *Criminal Code* provisions of 1892 (s. 133, Frauds upon the Government) spoke of "any compensation, fee or reward," clearly connoting a financial or tangible benefit. This wording continued until *Criminal Code* amendments in 1953-54, although in 1927 the *Code* distinguished between "commission or reward" which without qualification was prohibited and a "gift, loan or promise" which was prohibited without a superior consent. In the 1953-54 amendments, a more significant change occurred in which the words, "reward, advantage or benefit" first appeared. As Doherty J.A. commented in *Greenwood*, "J.C. Martin is one of the principal architects in the 1953-54 amendments and the editor of Martin's Criminal Code observed... that the amendments were done 'with a view to greater clarity'." Martin does

¹⁴ 94 D.T.C. 1878 (T.C.C.).

not suggest in his annotation to the post-amendment *Code* that they effected any significant change in the substance of the legislation.¹⁵

[40] I agree with Doherty J.A.'s perspective on the 1953-54 amendments. The amendments do, however, indicate that the present phrase "commission, reward, advantage or benefit of any kind" can include a "gift, loan or promise." I am not certain how much clarity this change brought about, but I think it important to consider J.C. Martin's further observation: "While s. 121 (and before then ss. 158 and 133) had no corresponding section in the *English Draft Code*, it could be compared with s. 113 of the *English Draft Code* and to the *Corrupt Practices Act*."¹⁶ The *Corrupt Practices Act*, the Crown asserts, forms part of the legislative history of the present provision and indeed defines "advantage" in s. 7 as follows:

The expression "advantage" includes any office or dignity and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent or influence or pretended aid, vote, consent or influence and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

[41] Given this legislative history and the broad meaning given to the term "advantage," the Crown submits I should not adopt the restrictive interpretation proposed by the defence on this motion. The Crown urges that the word "advantage" has always been understood to include advantages such as "any aid" or "vote" and that it includes a promise not to contest an election.

[42] I agree with the Crown's position that the words "advantage" and "benefit" are to be interpreted broadly. Clearly, Parliament, given the legislative change in the 1953-54 *Criminal*

¹⁵ J.C. Martin, *The Criminal Code of Canada with Annotations and Notes* (Toronto: Cartwright & Sons Ltd., 1955) at 178.

¹⁶ *Ibid.*

Code, intended to clarify that within this particular subsection benefits or advantages other than those strictly monetary in nature were to be caught.

[43] I am therefore satisfied that the legislative history of s. 121(1)(d)(ii) supports an interpretation of that section as inclusive of diverse forms of advantages or benefits, specifically, those of a purely political nature.

(b) *Purpose of the statute/provision*

[44] In addition to the legislative history of s. 121(1)(d), I must also consider the substantive goals that Parliament had in mind in enacting that section. In doing so, it is necessary to consider the intent behind s. 121(1) in general, and the overriding goals of the *Code* and of the criminal law as a whole.

[45] Counsel for Mr. O'Brien argues that there are policy reasons for excluding political advantage from any interpretation of s. 121(1)(d), which inform our understanding of the legislative intent behind the section. Counsel argues that to include political advantage within the scope of s. 121(1)(d) would mean that the section captures political practices "that have long been engaged in within Canadian political institutions." If the offence of 'fraud on government' is extended to include conferring political advantage, according to the defence, the *Code* would be given "a reach that is out of keeping with long-standing political tradition." Parliament would not intend s. 121(1) to be interpreted in this manner.

[46] Madam Justice L'Heureux-Dubé discussed in some detail in *Hinchey* the legislative intent behind s. 121(1) of the *Code*. She disagreed with the reasoning of Cory J.A., who, writing for the minority, adopted the position that s. 121(1)(c) aims to prevent *actual corruption* on the part of government employees, and that there must therefore be actual misconduct for there to be damage to the government's integrity. L'Heureux-Dubé instead took the position that the section

not only aims to preserve the actual integrity of government, but also *the appearance of integrity*. It is not necessary, therefore, for a government employee to actually receive or confer a benefit or advantage in order for the elements of s. 121(1) to be satisfied. The exception to this interpretation, which L'Heureux-Dubé J. subsequently articulated in *R. c. Cogger*,¹⁷ is s. 121(1)(a), which, according to its more specific language, requires that the integrity of the government employee actually be compromised in a *quid pro quo* arrangement.

[47] L'Heureux-Dubé J. rationale behind her interpretation of s. 121(1) according to its purpose of preserving the appearance of government integrity is, in my view, a sound one. She explained at paragraphs 16-23 of her reasons, that because the public will not necessarily be able to determine for themselves whether or not a particular advantage or benefit is legitimate, the very appearance of dishonesty must be preserved in order for the integrity of government to be maintained. Even if no harm was actually intended by a gift or benefit, the injury to the government's reputation has already been done.

[48] Thus, conduct will only fall within the purview of s. 121(1)(d) if it is perceived by the Canadian public as blameworthy. This interpretation is consistent with the overall purpose of the criminal law, as discussed by Doherty J.A. in *Greenwood*, of preventing and failing that, punishing, blameworthy conduct that strikes at the fundamental values of the community. Doherty J.A. states, and I agree, that the criminal law is a "weapon of last resort" and is not to be used in a way that regulates conduct which the community views as innocent or morally neutral.

[49] In the context of s. 121(1)(d), conduct will be perceived as blameworthy where it gives rise to the appearance of dishonesty. A critical factor then, in determining whether or not the conduct in question in this case is caught by s. 121(1)(d) is the public's perception of Mr.

¹⁷ 1997 CarswellQue 621.

O'Brien's acceptance of Mr. Kilrea's withdrawal from the mayoral race in exchange for a promised National Parole Board appointment. The accuracy of public perception is irrelevant (it may be based purely on speculation and conjecture) as the perception itself, and not its factual foundation determines the criminality of the conduct.

[50] Counsel for Mr. O'Brien argues that there is a longstanding practice in Canadian political institutions of awarding government offices strategically to achieve political benefits. Counsel states that such practices as negotiating between politicians and political parties for members to "cross the floor" in exchange for Cabinet positions, appointing individuals to the Senate to enable them to give up party nominations, and permitting party leaders to vie for legislative positions or to remove political opponents, are practices that have "long been engaged in within Canadian political institutions."

[51] The Crown submits that the activity in issue in this case harms public confidence in the integrity of the public appointment process, a process that must be conducted in a fair, open and transparent manner. Perhaps the process is not, in reality, always fair and transparent; but, the Crown argues, this reality is not only besides the point, but also, as a rationale for excluding compromising conduct from the scope of s. 121(1)(d), injects into the interpretive analysis an element that runs contrary to the canons of construction.

[52] I agree with the Crown's position on this point. 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. I agree with the Crown that read in this context, the components of this particular section prohibit trading those things for personal advantages by those either in a position to influence decisions or by pretending to have influence. 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). The benefits or advantages referred to in this subsection are to be considered broadly in order to give it purpose.

[53] While certain commonplace patronage-based arrangements or appointments may be perceived as not properly the subject of criminalization under s. 121(1), this may not be true of other such arrangements and appointments, which despite being part of the ordinary course of government business, may nonetheless be viewed by a reasonable member of the public as inappropriate, and a negative reflection on the integrity of government officials. Although the court may, as counsel for Mr. O'Brien argues, take judicial notice that such political maneuverings are "not uncommon features of Canadian political life," if we are to adhere to the Supreme Court's pronouncement on the matter in *Hinchey*, it is not necessarily the case that maneuverings are not, and will not be perceived by the Canadian public as bringing the integrity of government into disrepute. The Crown submits that just because this activity is one of politics' dirty realities does not make it any less odious, indeed criminal. I agree with this submission. In short, just because it happens, doesn't necessarily make it acceptable and therefore excluded from the scope of s. 121(1)(d). This section must be interpreted in accordance with its legislative purpose of safeguarding integrity, both actual and apparent.

[54] I am certainly mindful of the necessity in interpreting statutory provisions of avoiding absurd or negative outcomes; the defence contends that an inclusive interpretation of s. 121(1)(d) produces such outcomes. I agree that it was likely never the intention of Parliament to make it a crime for a politician to offer a Senate appointment or a ministerial position as part of the cost of

inducing another politician to agree to cross the floor or vacate a seat or nomination. Such dealings are unlikely to impugn the integrity of government. Ultimately such matters will be decided with the ballot box. However, to categorically exclude the conferring of all kinds of political advantage in exchange for cooperation, assistance or influence, from the scope of s. 121(1)(d) is to exclude activity that may seriously compromise public perception of the honesty and integrity of public officials – a result which is itself absurd. Accordingly, I find that s. 121(1)(d) captures political advantage, and that Mr. O'Brien's alleged conduct in this case is properly within the scope of the subsection.

2. Does s. 125(b), properly interpreted, require actual authority to influence appointments?

[55] I turn now briefly to consideration of s. 125(b). Section 125(b) of the *Code* provides as follows:

125. Every one who

- (a) receives, agrees to receive, gives or procures to be given, directly or indirectly, a reward, advantage or benefit of any kind as consideration for cooperation, assistance or exercise of influence to secure the appointment of any person to an office,
- (b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from an office, in expectation of a direct or indirect reward, advantage or benefit, or
- (c) keeps without lawful authority, the proof of which lies on him, a place for transacting or negotiating any business relating to
 - (i) the filling of vacancies in offices,
 - (ii) the sale or purchase of offices, or
 - (iii) appointments to or resignations from offices,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

[56] This section prohibits solicitation, recommendation or negotiation with respect to an appointment in expectation of a direct or indirect reward, advantage or benefit. It is the Crown's position that this subsection captures the alleged conduct of the accused. Both Mr. O'Brien's

solicitation of and negotiation with respect to Mr. Kilrea's withdrawal from the mayoral race in exchange for a National Parole Board appointment, the Crown submits, were done in the expectation by Mr. O'Brien that he would benefit from this arrangement.

[57] Counsel for Mr. O'Brien argues that s. 125(b) does not capture negotiations where the parties do not have the actual authority to influence the public appointment process. Defence counsel submits that in this case, there is no evidence that Mr. O'Brien had the authority to secure for Mr. Kilrea an appointment to the National Parole Board.

[58] The issue before me with respect to this subsection is whether the acts of solicitation, recommendation or negotiation must involve someone in a position to influence either the appointment to or the resignation from an office. I am in complete agreement with the Crown that s. 125(b) of the *Code* has as yet received very little judicial consideration. However, the courts' interpretation of s. 163(c), the predecessor section to s. 125(b), in the two cases cited by the Crown in which this section was addressed, are instructive in determining the legislative intent behind the section.

(a) *Ordinary and grammatical meaning*

[59] Defence counsel submits that each of the independent acts of "soliciting", "recommending", and "negotiating" are all "engaged in with someone who is in a position to influence appointments to, or resignation from, offices." Counsel claims to rely on a "common sense" interpretation of these terms, but does not elaborate on what meaning this interpretation yield, except to state that it incorporates actual authority to influence appointments.

[60] In determining the ordinary meaning of the terms "solicit," "recommend" and "negotiate," therefore, it may be useful to examine dictionary definitions of the terms.

[61] The defence submits that Mr. O'Brien "negotiated with Mr. Kilrea with respect to Mr. Kilrea's appointment to an office." Black's Law Dictionary defines "negotiation" as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." The ordinary meaning of the word "negotiate" therefore encompasses an element of bargaining between two or more parties with the aim of achieving resolution or agreement.

[62] Certainly, it could be argued that the bargaining process is futile and pointless where neither party has the ability or resources to enforce a resultant agreement. However, it seems to me that capacity for enforcement is relevant to the end result of negotiation, and not to the negotiating process itself. There is no indication in the ordinary definition of the term "negotiate" that the parties must enter into and conduct negotiations only where each has the practical capability to follow through with respect to their relative 'bargaining chips'.

[63] Like "negotiate," the terms "solicit" and "recommend" relate to ongoing acts or processes, as opposed to outcomes. It seems inappropriate, therefore, based on an interpretation of the ordinary meaning of these terms, to import a requirement of actual capacity and authority to influence an appointment to or resignation from a public office into s. 125(b).

[64] However, as discussed above, the ordinary meaning of a word or phrase in a legislative context will only be authoritative when that 'plain meaning' is clear and unambiguous. Any ambiguity with respect to the intended meaning of a term or phrase must be settled according to consideration of other factors – association with other surrounding words or phrases and the statute as a whole, and considerations of legislative intent.

(b) *Legislative purpose*

[65] Madam Justice L'Heureux-Dubé stated in *Hinchey* that the entirety of ss. 119 to 125 represent “different methods by which the law attempts to deter conduct by persons dealing or employed by government,”¹⁸ lumping these sections together as aimed at the same overall purpose of preserving the integrity, and appearance of integrity of government. Independent confirmation by the courts of this overriding purpose of the provisions found in this section of the *Code* can be found in cases dealing with s. 122(3), which addresses fraud or breach of trust by a public officer.¹⁹

[66] The Crown submits with respect to s. 125(b) that “Efforts to trade in appointments – even by those who are actually impotent to act – are corrosive to public confidence in the integrity of government and are properly caught by the section.” I agree with this submission.

[67] L'Heureux-Dubé J.'s finding that with the exception of s. 121(1)(a), actual acceptance or transfer of a benefit under s. 121(1) of the *Code* is not necessary for the elements of the crime created by that subsection to be satisfied, is consistent with this overriding concern that government representatives must both act with, and appear to act with integrity. It follows that if safeguarding the conduct of government agents against the appearance of impropriety is also the intended purpose of s. 125(b), it is enough that an appointment to or resignation from a public office be negotiated, recommended, or solicited in the absence of actual ability, or even intention to follow through on the corrupt practice, in order for the appearance of government integrity to be compromised.

¹⁸ *Hinchey*, *supra* note 12 at para. 13.

¹⁹ *R. v. Vander Zalm*, 1992 CarswellBC 1914 at para. 12 (B.C.S.C.); *R. v. Power*, 82 C.C.C. (3d) 73 at para. 11 (N.S.C.A.).

[68] Clearly the aim of ss. 121(1)(d) and 125(b) is to preserve government integrity by protecting against the corruption of our democratic system. The appointment process occupies an important place in that system. Appointments to government offices such as the National Parole Board are not to be traded for political favour. They are appointments that must be made in a fair, open and transparent manner. To do otherwise is to do harm to the integrity of government.

[69] As I have earlier alluded to, the criminal law is not intended to capture innocent or morally neutral conduct. This section could never have been intended to catch pointless and impotent exchanges between individuals neither of whom had authority to make good on their part of a bargain. The example the Crown raises of three fraternity brothers making promises of future influence and assistance on one another's behalf comes to mind. However, in my view some exchanges wherein the parties lack the ability to produce what they offer will undermine the public's confidence in the neutrality of the appointment process simply by taking place. In these instances, the process of soliciting, negotiating, or recommending will be viewed as morally blameworthy and will jeopardize the integrity of government officials.

[70] Based on the foregoing, it is concluded that actual authority to influence an appointment is not a requisite element of ss. 125(b), properly interpreted.

CONCLUSION

[71] It cannot be said, therefore, that no evidence exists upon which a trier of fact might reasonably convict Mr. O'Brien of the offences found in ss. 121(1)(d)(ii) and 125(b) of the *Code*. The appropriate interpretation of these sections encompasses Mr. O'Brien's alleged conduct, and the Crown has adduced evidence to the effect that he engaged in the conduct alleged, and that the elements of the offences charged have been made out.

[72] In other words, [REDACTED] at the end of the day the Crown was able to prove beyond a reasonable doubt that Mr. O'Brien acted as charged; the offence under s. 12(1)(d)(ii) would be made out and a conviction entered. My task at this stage of the proceedings, however, is only to determine whether a reasonable jury, properly instructed, could (and I emphasize *could*) convict. The motion for a directed verdict of acquittal therefore, is dismissed.

J. Douglas Cunningham A.C.J.S.C.J.

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant

and –

LARRY O'BRIEN

Respondent

REASONS FOR JUDGMENT
