ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MICHAEL DENNIS DUFFY

Before Justice Charles H. Vaillancourt
Heard on April 7-10, 13- 17, 20-24, 27-29, May 4-8, June 1-5, 8-12, 15-17,
August 12-14, 17-21, 24-25, November 19-20, 23, 25, 27, 30,
December 7-11, 14-18, 2015 and February 22-23, 2016
Reasons for Judgment released on April 21, 2016

Mark Holmes and Jason Neubauer ..... counsel for the Crown
Donald Bayne and Jon Doody ..... counsel for the accused Michael Dennis Duffy

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VAILLANCOURT J.:

[1] Michael Dennis Duffy entered pleas of not guilty to thirty-one criminal charges related to breach of trust allegations, fraudulent practices, and accepting a bribe. For the sake of expediency, the counts have been grouped into the various headings and I propose to deal with each specific category separately.

[2] Prior to embarking on a count by count analysis of this case, it is worthwhile to harken back to some basic principles that are at play in all criminal proceedings.

PRESUMPTION OF INNOCENCE

[3] I would like to relate an interesting encounter that I experienced near the commencement of this trial that demonstrates the difference between the legal presumption of innocence and the application of that presumption by many citizens.

[4] I was returning to the courthouse after a lunch break when I heard a man who was

soliciting funds from passersby say, "Sir, sir." I stopped and began to check out my monetary situation. However, the stranger did not ask me for a financial contribution. Instead, he asked me if I was connected with the Duffy trial. I advised him that I was. He then inquired whether I was counsel. I advised him that I was not but I did tell him that I was the judge hearing the case. Without missing a beat, my new found friend enthusiastically stated, "Throw him in jail."

[5] The aforementioned exchange highlights two important aspects of Senator Duffy's trial.

[6] Firstly, the scenario illustrates the public awareness and interest in these proceedings.

[7] Secondly and more importantly, the exchange draws attention to the overarching touchstone principle of criminal law in Canada, namely, that everyone is presumed innocent until the Crown proves them guilty beyond a reasonable doubt. Although, the stranger drew my attention to the principle, his enthusiastic response highlighted a contrary position to the presumption of innocence. I think it is fair to say that many people may share the belief that once someone is charged with a criminal offence they are guilty. This is not the law of the land.

[8] Chief Justice Dickson of the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C. J. No. 7 wrote about the presumption of innocence and s. 11(d) of the *Charter* commencing at paragraph 27:

> [27] Section 11(d) of the *Charter* constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out the provision again:
>
> > 11. Any person charged with an offence has the right
> >
> > …
> >
> > (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
>
> [28] To interpret the meaning of s. 11(d), it is important to adopt a purposive approach. As this Court has stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344:
>
> > The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
> >
> > In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger

> objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms ….
>
> To identify the underlying purpose of the *Charter* right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

[29] The principle of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other and social, psychological and economic harms. In light of the gravity of the consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

[30] The presumption of innocence has enjoyed longstanding recognition at common law. In the leading case, *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), Viscount Sankey wrote at pp. 481-482:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the *Woolmington* principle with approval (see, for example, *Manchuk v. The King*, [1938] S.C.R. 341, at p. 349; *R. v. City of Sault Ste Marie*, [1978] 2 S.C.R. 1299, at p. 1316).

PRINCIPLES RELATING TO THE ISSUE OF REASONABLE DOUBT, BURDEN OF PROOF AND CREDIBILITY

[9] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, Cory J. at paragraph 27 observed that:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo and Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[10] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at paragraphs 27 and 28, the Court noted that:

> [27] In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, [1988] 2 S.C.R. 345 at p. 357.
>
> [28] Ideally, the appropriate instructions on the issue of credibility should be given, not only during the main charge, but on the recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence by the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[11] Justice Iacobucci, writing for the majority, in *R. v. Starr*, [2000] 2 S.C.R. 144 noted at para. 242 that:

> In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something more than probable guilt is required, in order for the jury to convict. Both of these al-

ternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard approximately between these two standards.

APPROACHES TAKEN BY COUNSEL

[12] The Crown and the Defence have taken very different views in the presentation of their respective cases. The Crown's mantra is common sense, common sense, common sense. Meanwhile, Mr. Bayne's repeated battle cry is rules, rules, rules or alternatively, what rules? These competing views of the world will become apparent as each section of cases is examined.

CREDIBILITY ISSUES AS THEY RELATE TO SENATOR DUFFY

[13] The credibility of a witness is often critical in the determination of criminal charges and the case at bar is no exception to this proposition. Both Mr. Holmes and Mr. Neubauer made extensive comments in their oral presentations as well as their written material as to Senator Duffy's credibility.

[14] Mr. Bayne observed that his client testified in a fulsome, open, and expansive manner addressing every count and seeking to hide nothing. Furthermore, Mr. Bayne highlighted the fact that the Crown limited its questions to a few specific counts and did not challenge Senator Duffy's evidence on the great majority of the counts before the court.

[15] The cross-examination of Senator Duffy did cause me to pause. I agree with Mr. Bayne that the majority of the charges were not addressed in cross-examination. Of particular note, there was no cross-examination of Senator Duffy on the key charges involving Nigel Wright. The end result of the lack of cross-examination is that much of Senator Duffy's testimony is left unchallenged.

[16] I am aware that there is no rule that requires cross-examination of any witness. The decision to cross-examine a witness or conduct a limited and focused cross-examination or to not cross-examine a witness at all is within the complete discretion of counsel and there may be any number of strategic reasons why one option is chosen over another.

[17] Defence Counsel conceded that Senator Duffy presented himself as an emotional and passionate witness at times but asked the court to understand that this was Senator Duffy's first and only chance to put his position forward after years of wanting to do so.

[18] Mr. Bayne also reminded the court of the Crown's burden of proof in any criminal trial. Furthermore, he directed the court to the fact that *mens rea* is an essential element of every one of the charges facing Senator Duffy and that Senator Duffy's evidence alone provides the foundation to find him not guilty of all the charges. Hence, the issue of credibility takes on an enhanced importance in determining the eventual outcome of these proceedings.

[19] As I have already mentioned both Mr. Holmes and Mr. Neubauer took issue with

Senator Duffy's credibility and I intend to address some of their specific concerns at the outset.

[20] Mr. Holmes posed a number of questions for the court to ponder when assessing Senator Duffy's credibility. Was Senator Duffy a good listener? Did he supply answers to the questions that were asked [of him] to assist the process? Did he seem to have an agenda of his own? Was there any undue response to questions posed to him? Did he have a good memory of the events that he described? Did his evidence of events change over time? Did he seem to make it [the evidence] up as he went along?

[21] Mr. Holmes stated that Senator Duffy is a practiced public speaker and has for a long time relied on lines written for him. In fact, in his diary for January 6th, 2009, Senator Duffy jotted, "Check media lines with Corey Tenycke re: Pam and Mike." This was in reference to the brewing storm regarding the residency issue.

[22] The use of scribed lines also was prevalent as the "Nigel Wright Solution" unfolded. The PMO was producing the appropriate dialogue for not only Senator Duffy but for all of the major players in the scenario.

[23] I do not find that the use of scripted lines to deal with political fallout issues diminishes the credibility of Senator Duffy's evidence in this trial. Likewise, I do not find that Senator Duffy was a witness who was merely parroting a prewritten script as he gave his evidence.

[24] The Crown considered that the "prepackaged endorsement" of candidates during some of Senator Duffy's speaking engagement reflected adversely on Senator Duffy's overall credibility.

[25] I do not find that the practice of politicians spouting "for he's a jolly good fellow" endorsements for their fellow political colleagues triggers credibility concerns.

[26] Mr. Holmes pointed the court to a number of Senator Duffy's speaking engagements which he characterized as telling stories and jokes. It is interesting to observe that although Mr. Holmes concedes that there is not a principle of law that anyone who works in the field of entertainment is unworthy of belief he suggested that it was a factor to be considered.

[27] From the evidence, Senator Duffy seems to have been a very popular speaker and was much sought after to make speeches. It appears that Senator Duffy often used humour and stories to convey his message to his audience. I do not conclude that being an entertaining speaker impacts on Senator Duffy's credibility.

[28] The Crown pointed to the Senator's use of props as another factor that has an impact on his credibility. More specifically, it is alleged that a pamphlet on Cockrell House morphed into a scenario that showed that Senator Duffy was not particularly familiar with the circumstances surrounding Cockrell House.

[29] As I assessed Senator Duffy's evidence, I was not swayed by a prop or two.

[30] Mr. Holmes suggested that Senator Duffy has the ability "to sell" a story even if he, himself, does not believe in the truthfulness of that story. By way of example, Counsel referred the court to the incident regarding the television interview wherein Senator Duffy admitted that he was wrong about his housing claims and that he would be repaying them. Throughout the interview, Senator Duffy seemed happy and relaxed and in complete control of the situation.

[31] I agree that Senator Duffy delivered a polished television performance regarding the repayment scenario as scripted by the Prime Minister's Office. Considering his vast past experience in the media, this "performance" does not come as any great surprise. When assessing ultimate credibility, I take into account Senator Duffy's experience in the spotlight and his ability to deliver the message.

[32] The next area that caused Mr. Holmes concern focussed on Senator Duffy's tendency to exaggerate. As an example of this tendency, I was pointed to Senator Duffy's depiction of Prince Edward Island's virtues and attributes in terms that "there's nowhere else you want to be" but I was then reminded that in fact Senator Duffy's career path took him away from P.E.I.

[33] I attach no significance to this whatsoever. The fact that Senator Duffy pursued employment opportunities away from P.E.I. is a fact of life. Although, he may have physically left P.E.I. to work, Senator Duffy continued to maintain many contacts with his place of birth and he had already secured his retirement home in P.E.I. well in advance of his appointment to the Senate. As to the effusive nature of his praise for P.E.I., I agree that it did seem like a promotional advertisement for the Province. However, I do not find this to impact negatively on the issue of credibility.

[34] I do agree with Mr. Holmes' observation that Senator Duffy has a tendency to speak in terms of absolutes. I am not swayed by expressions of absolute certainty.

[35] Accordingly, when Senator Duffy proclaims that a Vancouver trip connected with Senate business had **absolutely** nothing to do about the impending birth of his grandchild, I am not convinced as to the complete accuracy of that statement.

[36] It must be kept in mind that the court does not have to accept all the evidence of any given witness. I can believe all of the evidence of a witness, some of the evidence of a witness, or none of the evidence of a witness.

[37] Another area that concerned Mr. Holmes regarding the issue of Senator Duffy's credibility was his tendency to drop in extraneous facts when answering questions. An example of this conduct involved the PMO's office spending a lot of money on photos.

[38] The fact that extraneous nuggets of information are introduced by a witness does not mean that those facts are untrue or that the witnesses' credibility is impacted in a nega-

tive way. Any extraneous evidence that has no bearing on the issues at trial is to be disregarded by the court. I am alive to the fact that a witness that throws extraneous points into the mix might be attempting to confuse the trier of fact and thus be deemed less credible.

[39] I do not find Senator Duffy's desire to enliven his testimony with the occasional extraneous fact detrimental to his credibility.

[40] I also was directed to the Senator's comment about Prime Minister Harper mistreating many individuals but when pressed to give examples, Senator Duffy was unable or unwilling to do so.

[41] I note this point but do not attach any significance to it. The Crown could have pressed this matter if they had wished but instead it was left in awkward silence.

[42] Mr. Holmes drew to my attention that Senator Duffy's evidence with respect to opinions held by certain parties regarding Professor Bulger's statements about Senator Duffy's right to sit in the Senate were inconsistent with the timeframe given by Senator Duffy.

[43] Mr. Holmes also provided an example where Senator Duffy was reckless when giving his evidence regarding Herbert Lacroix. This scenario resulted in a discourse on the technique used in broadcasting known as embroidery. The Crown stressed that Senator Duffy was aware of this technique from the days when he was in broadcasting. Embroidery is used to address a mistake or misstated fact by ignoring it thereby removing it from the equation and moving forward.

[44] Mr. Holmes quite rightly stated that embroidery may work in broadcasting but it is outrageous for a witness to do that [in] a criminal trial. I agree.

[45] Mr. Holmes suggested that Senator Duffy was prone to jumping to conclusions and stating authoritatively events that were far less clear than the evidence suggested. The example provided to support this point involved Senator Duffy being escorted into the Prime Minister's office while the Chief-of-Staff of the Armed Forces was made to wait in the outer office. Senator Duffy expressed his opinion that he thought this was rude. In cross-examination, Senator Duffy admitted that it was possible that the group awaiting an audience with the Prime Minister was waiting on another party to arrive.

[46] This situation has more to do with Senator Duffy's willingness to admit to the possibility of another possible interpretation of a particular situation than credibility.

[47] The aforementioned incident highlights the dangers associated with unnecessarily detailed evidence that has no real bearing on the issues at hand.

[48] The Crown highlighted what he perceived as a misstatement by Senator Duffy when Senator Duffy was holding up Exhibit 65 and stating that, "There's lots in this report that the Harper Government would never touch, including death with dignity." Mr. Holmes

noted that there was no mention to death with dignity in any of the recommendations of the report but conceded that there was a passing reference in the report that in terms of enhancing palliative care, some seniors find it more dignified to die in their homes. Mr. Holmes concluded that this evidence amounts to Senator Duffy conjuring up something that is unsupported and untrue and delivering it in a vigorous manner. I do not find that this perceived great divide impacts on Senator Duffy's credibility. We can leave the debate surrounding death with dignity and enhancing palliative care, some seniors find it more dignified to die in their homes, for another day.

[49] Mr. Holmes pointed out that Senator Duffy's evidence was internally inconsistent. He stressed that the juxtaposition between Senator Duffy's testimony that he merely skimmed the rules and his embracement of a very detailed and technical knowledge of the rules to afford him a defence to one of the charges should cause the court concern.

[50] Mr. Neubauer provided another example of a juxtaposition of two at-odds-propositions. He pointed out that Senator Duffy took the position that the rules surrounding the NCR expenses were vague but also maintained that he was eligible under the rules.

[51] When considering both of the preceding examples of internal inconsistency, one must be mindful that when the events were unfolding, Senator Duffy might have skimmed over certain written materials and considered that the rules were vague. However, once he was charged with the offences he is currently facing, he, perhaps with the assistance of his legal counsel, viewed the situation in a more defensive light. The credibility alarm is not triggered by the circumstances referred to by Crown Counsel.

[52] Mr. Holmes suggested that another example of internal inconsistency involved Senator Duffy's evidence in connection with a meeting with Gary Lunn in Ottawa. Mr. Lunn wanted Senator Duffy to visit an event in his riding with the purpose of enhancing Mr. Lunn's re-election chances. Senator Duffy had also testified that Mr. Lunn's earlier election had robo-calling aspects to it that had been orchestrated by a black operation unit within the Conservative Party. Senator Duffy became tongue-tied when the Crown asked him, "Why would you possibly help someone in their bid for re-election, knowing that they previously won a seat through election fraud?"

[53] I take it that the Crown is suggesting that if Senator Duffy was prepared to get involved in such political ugliness that it speaks to his credibility. I think that this is a valid point and a factor to keep in mind when assessing credibility.

[54] Mr. Neubauer highlighted the discrepancies between an email Senator Duffy forwarded to Senator Tkachuk dated February 7, 2013 and other evidence in the trial. The text of the email is as follows:

> David:
>
> After speaking to my lawyer, I now understand that the issue in question is not whether I own property in P.E.I.; but rather whether my principal residence is

there, thus entitling me to expenses for my home in Kanata.

If this is indeed the issue, then this is the first time a concern has been raised with me by anyone. I have been claiming these expenses routinely, as I was told I could do at the time of my swearing-in in 2009.

However, if there is anything improper about these expense claims, I want to correct it. I have no interest in claiming expenses to which I am not entitled.

Can we discuss this matter before you issue any media release naming me, as I believe we can resolve this expense issue without the need of an audit.

Sincerely,

Mike

[55] Mr. Neubauer pointed out that this email contradicts Senator Duffy's other evidence at trial, namely, that this is the first time a concern has been raised with him by anyone with respect to the housing claims. Mr. Neubauer then referenced discussions between Senator Duffy and Senator Tkachuk back in January of 2009 that dealt with housing claims.

[56] In fairness to Senator Duffy, it was he who raised concerns about his housing entitlements back in 2009 and it was his understanding from the discussions with Senator Tkachuk that he could and should claim for living expenses.

[57] I find that during the January 2009 discussions with Senator Tkachuk, Senator Duffy was not attempting to deceive him.

[58] Mr. Holmes suggests that Senator Duffy gave internally inconsistent evidence when he said that an income tax specialist in P.E.I. told him that he could not file his income taxes as a P.E.I. resident because it was illegal. When cross-examined, Senator Duffy denied that he used the word illegal.

[59] He did. However, I do not find this point particularly significant in the overall assessment of credibility.

[60] Mr. Holmes referred the court to a number of incidents where Senator Duffy's evidence was in conflict with other witnesses. I shall address these inconsistencies later in these reasons when I am dealing with the specific charges that relate to the various witnesses in question. (Dean Del Mastro; Andrew Saxton Jr.; Gerry Donohue; Mike Croskery; Troy DeSouza). However, I find that the weight of these alleged inconsistencies do not, at the end of the day, significantly impact the credibility of Senator Duffy's overall evidence.

[61] The Crown stated that Senator Duffy made misrepresentations to Sonia Makhlouf and others with respect to the Donohue contracts; to Senator Tkachuk at the time of his appointment regarding residency issues; and to the Prime Minister regarding his preference as

to his Province of Appointment.

[62] A closer examination of these issues will be discussed as they relate to specific charges. I can say at this time that the discussions surrounding which Province Senator Duffy would represent and what was the key determining factor in that decision does not impact adversely on the credibility of Senator Duffy. It would be expected that each party had reasons for their province of choice and in the end could rationalize the final decision.

[63] Mr. Holmes suggested the Senator Duffy refused to admit even the most obvious things. To illustrate this contention, the Crown referred to Senator Duffy's use of pre-signed travel forms as a deceptive practice. He highlighted the fact that Senator Duffy acknowledged that although the practice was poor it was not intended to be deceptive or misleading since it was not an uncommon practice and was done out of practicality and necessity. I do not find that this factor impacts negatively on Senator Duffy's credibility. I shall address the advisability of using pre-signed, blank travel forms later on in this judgment.

[64] The Crown drew the court's attention to the evidence of Senator Duffy as it pertained to whether Senator Duffy read all the background testimony with respect to the Special Senate Committee Report on aging. After some toing and froing Senator Duffy finally answered a rather straight forward question. This example of quasi-evasiveness, in and of itself, is not determinative of the issue of credibility. However, I am aware of this situation when I determine the issue of credibility.

[65] Mr. Holmes asked the court to consider whether or not the evidence given by Senator Duffy was reasonable. To illustrate this factor, I was referred to the cancellation of Senator Duffy's appearance at the Saanich Fair. Was the Senator's evidence surrounding his reaction to the cancellation reasonable? Should Senator Duffy been more proactive in seeking out an explanation as to why he was cancelled at the last second?

[66] I find that Senator Duffy's response to the situation was just as reasonable as any other potential response. Senator Duffy stated that, "Well I didn't think it was necessary [to telephone Mr. Lunn for an explanation of the last minute cancellation]. I could read between the lines."

[67] I acknowledge that Senator Duffy has some areas that require the court to be vigilant about when weighing his evidence. In addition to the specific issues regarding Senator Duffy's credibility, I must remind myself that he loved the run-on answer providing an inordinate amount of information, much of which was rather peripheral to the questions posed. He also admitted that his memory was not perfect. The truth of the matter is that this characteristic applies to everyone. He had several private agenda matters that he felt compelled to work into his testimony.

[68] This case provided me with ample opportunity to assess the credibility of Senator Duffy. He was on the stand for many hours.

[69] At the end of the day, I find that Senator Duffy is an overall credible witness. As I

address the various charges contained in the information, I shall keep in mind any concerns that I have noted herein regarding Senator Duffy's credibility and apply them to the particular fact situations.

GENERAL BACKGROUND OF SENATOR DUFFY

[70] Few accused persons have likely had more background information with respect to their lives put before a court. There has been a thorough examination of Senator Duffy's life. Senator Duffy's diaries and calendars outline many of his activities between 2009 and 2012. The Senator's finances were reviewed extensively by Mr. Grenon, a forensic accountant. In addition, Mr. Bayne explored many of Senator Duffy's life experiences in his examination-in-chief.

[71] Some of the salient points in Senator Duffy's life include:

- born May 27, 1946 on Prince Edward Island
- raised in Charlottetown, P.E.I.
- in 1962, while attending high school, became involved with a local television show featuring high school issues
- in 1963, left school and became a junior reporter with the Charlottetown Guardian
- in the summer of 1964, toured with a rock band, The Beavers
- went to Halifax, N.S. in the fall and read the news at CJCH-920
- after a few months went to work for CKDH in Amherst, N.S.
- in 1965 had a brief stint at CKOY in Ottawa, Ontario
- returned to CKDH in Amherst, N.S.
- in 1996, reporter and on-air person with CHNS-FM in Halifax, N.S.
- fall of 1967 went to Toronto, Ontario and covered Progressive Conservative Convention and Robert Stanfield's election as leader
- between 1969 - 1971 with CFCF in Montreal, Quebec
- married Nancy Mann 1970
- moved to Ottawa in 1971 as a City Hall reporter for CFRA and eventually assigned to cover Parliament Hill

- joined CBC in 1974
- 1979 divorced
- 1979 to 1988 experienced health and alcohol issues
- 1988 commenced employment with CTV
- 1998 met Heather Collins, a nurse, and married her in 1992
- Senator Duffy has had a rather long history of medical issues over the years and continues to deal with various conditions including: heart attacks and bypass surgery; type 2 diabetes; sleep apnea; ulcers; non-cancerous erosion of digestive tract; liver concerns; osteoarthritis; and diabetic retinopathy.
- The aforementioned medical conditions cause Senator Duffy to be involved with various medical specialists and he is required to take many medications in order to stabilize his health.

APPOINTMENT TO THE SENATE OF CANADA ON JANUARY 26, 2009

[72] Senator Duffy was appointed to the Senate of Canada having met the statutory provisions as set out in the *Constitution Act, 1867,* 30 & 31 Victoria, c. 3 (U.K.).

[73] **23.** The Qualifications of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years;

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Francalleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

[74] Mr. Holmes is of the view that even the most cursory examination of these constitutional prerequisites to being appointed and maintaining a position as a Senator reveals that property ownership and being a "resident" of the province of appointment are distinct. He relies on the testimony of Mark Audcent to assist him in arriving at this conclusion and observes at footnote 18 at page 19 of his written submissions that: "The Prime Minister's deeply flawed and incomplete understanding of the technical requirements to serve as a Senator also emerged during the testimony of Benjamin Perrin."

[75] It should be noted that this trial is not about whether Senator Duffy was/is legally qualified to be a Senator from P.E.I. This trial is focussed on whether or not the Crown has proven the criminal allegations against Senator Duffy that are contained in the information beyond a reasonable doubt.

THE SENATE AS AN INSTITUTION

[76] The trial of Senator Duffy has generated much attention from politicians, the media and the public at large regarding issues surrounding the abolishment of the Senate, making major or minor changes to the Senate or maintaining the status quo of the Senate. As interesting as these issues may be, they are not the subject matter before this court. Furthermore, the decisions surrounding these issues fall within the jurisdiction of the legislative branch of our democracy.

PRIMARY RESIDENCY CLAIM

[77] It is alleged that the accused (1) between the 22nd day of December, 2008 and the 6th day of March, 2013 at the City of Ottawa, in the East Region, being an official in the Senate of Canada , did commit a breach of trust in connection with the duties of his office by filing expense claims and/or residency declarations containing false or misleading information, contrary to section 122 of the *Criminal Code of Canada* and further (2) that he between the 22nd day of December, 2008, and the 6th day of March, 2013, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, exceeding $5000.00, by filing expense claims and/or residency declarations containing false or misleading information, contrary to section 380(1)(a) of the *Criminal Code of Canada*.

Crown's Position

[78] Mr. Holmes noted in his written submissions that with respect to the first two counts on the information that Senator Duffy created a fiction that he lived in Prince Edward Island and incurred additional costs to perform his duties in the Senate.

[79] He drew the court's attention to the fact that considerable time was devoted to the examination of the meaning given to "primary residence" and "secondary residence" and "designated residence" and "residence in the province for which you are appointed" and "NCR (National Capital Region) residence" and "provincial residence". Likewise, he alluded to the amount of time devoted to the issue of what it means to be a "resident" for the purpose of satisfying an individual's eligibility to serve in the Senate.

[80] Mr. Holmes stated that the concentration on definitions ignores the fact that the *per diem* expenses that were claimed by Senator Duffy and paid to him were designed to compensate him for the financial hardship associated with his presence in the NCR to perform his duties on Parliament Hill. Mr. Holmes maintains that if one were to leave aside all the background noise, the fact is that Senator Duffy did not incur any additional costs to work in the Senate and that he was not entitled to make his claims for *per diem* compensation.

[81] Crown Counsel contended that the analysis pertaining to counts 1 and 2 boils down to the simple question: **Where did Senator Duffy live?**

[82] The Crown theory in respect of these offences is based on the fact that Senator Duffy, a long-standing, habitual resident of Ottawa, was primarily resident in Ottawa in the period following his appointment to the Senate. He had resided in Ottawa since the 1970s. His connection with the Province of Ontario was revealed, not only by his whereabouts, but also by his driver's licence, passport, provincial health coverage and income tax filings that all portray him as a resident of Ontario. Mr. Holmes is of the opinion that Senator Duffy's designation of "10 Friendly Lane" in Cavendish as his "primary residence" is inaccurate, but benign. The completion of the annual Residency Declaration forms occasioned no payments and thus, standing alone, likely does not represent a criminal fraud.

[83] However, the Crown states that the *per diem* claims are an entirely different matter. The claims are found in Exhibit 2 and represent Senator Duffy's claims for compensatory payments in connection with the fiction that he had to venture from afar (in this case from P.E.I.) to come to Ottawa to discharge his Senate duties. It is alleged that as a consequence of his claim for reimbursement of expenses that were never incurred, Senator Duffy was unjustly and fraudulently enriched by approximately $20,000 per year over a period of more than four years. This annual stipend is designed to compensate members of the Senate for additional expenses incurred in connection with their time spent in the National Capital Region to fulfill their Parliamentary functions. With his primary residence in Ottawa – Kanata being a suburb of Ottawa, and most definitely not more than 100km from Parliament Hill – Senator Duffy was not eligible to receive these payments.

[84] Mr. Holmes states that Senator Duffy's motive in claiming the primary residence designation for his cottage in P.E.I. also fulfilled his desire to establish a link with that province to satisfy constitutional requirements to even serve in the Senate. He points out that the court heard evidence that Senator Duffy's appointment was decried as constitutionally invalid even before his swearing-in and even before he gave his oath that he was a resident of P.E.I. Mr. Holmes states that Senator Duffy was in reality the Senator from Kanata, Ontario

and this was the quandary that he faced when he was appointed to represent P.E.I.

What do we know about "residency"?

[85] Mr. Holmes relies heavily on Mark Audcent's testimony as it relates to the subject of residency. Mr. Audcent was the Clerk of The Senate and noted that:

(a) Residency is a question of fact;

(b) There are indicators that inform the determination of one's place of residence, including:

(i) Physical presence;

(ii) Domestic arrangement, meaning where your family lives;

(iii) Where you vote;

(iv) Where you declare yourself as "resident" for income tax purposes;

(v) Where you enjoy government services: drivers' licence, receipt of health care;

(vi) Where your business or work is located;

(vii) Where you do your banking;

(viii) Where you participate in recreational activities.

(c) He, and consequently other members of Senate administration, assumed that Senator Duffy satisfied the constitutional residency requirement;

(d) In relation to all Senators the issue of residence, for constitutional purposes, boiled down to whether the Senator's main residence was located in the province for which he/she was appointed;

(e) Senators were on travel status and entitled to compensation "if you're not from this region".

[86] Mr. Holmes reminded the court, that during his testimony, Mr. Audcent resisted a suggestion that the factors he cited in evaluating residence were his own "personal" indicators. He testified that the indicators that he cited were derived from the jurisprudence.

[87] The Crown filed *Income Tax Folio S5-F1-C1* titled "*Determining an Individual's Residence Status*" (Exhibit 112).The salient portions of this document are:

Provincial residence

1.2 Many of the comments in this Chapter apply to determinations of residence status for provincial, as well as federal tax purposes. Generally, an individual is subject to provincial tax on his or her worldwide income from all sources if the individual is resident in a particular province on December 31 of the particular tax year. An individual is considered to be resident in the province where he or she has significant residential ties.

1.3 In some cases, an individual will be considered to be resident in more than one province on December 31 of a particular tax year. This situation usually arises where an individual is physically residing in a province other than the province in which the individual ordinarily resides, on December 31 of the particular tax year. For example, an individual might be away from his or her usual home for a considerable length of time on a temporary job posting or in the course of obtaining a post-secondary education. An individual who is resident in more than one province on December 31 of a particular tax year will be considered to be resident only in the province in which the individual has the most significant residential ties, for purposes of computing his or her provincial tax payable.

Meaning of resident

1.5 The term resident is not defined in the Act, however, its meaning has been considered by the Courts. The leading decision on the meaning of resident is *Thomson v Minister of National Revenue*, [1946] SCR 209, 2 DTC 812. In this decision, Rand J. of Supreme Court of Canada held residence to be "a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with accessories in social relations, interests and conveniences at or in the place in question."

Meaning of ordinarily resident

1.6 In determining the residence status of an individual for purposes of the *Act*, it is also necessary to consider subsection 250(3), which provides that, in the *Act*, a reference to a person resident in Canada includes a person who is ordinarily resident in Canada. In *Thomson*, Estey J. held that, "one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives".

1.7 In the same decision, Rand J. stated that the expression ordinarily resident means, "residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application" Justice Rand also went on to say that, "ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstances, but also accompanied by a sense of transitoriness and of return." The

> meaning given to the expressions resident and ordinarily resident as stated by the Supreme Court of Canada in *Thomson*, have generally been accepted by the Courts.
>
> 1.8 To determine residence status, all of the relevant facts in each case must be considered, including residential ties with Canada and length of time, object, intention and continuity with respect to stays in Canada and abroad.
>
> 1.9 An individual who is ordinarily resident in Canada as described in 1.6-1.7 is considered to be factually resident in Canada. Where an individual is determined not to be factually resident in Canada, the individual may still be deemed to be resident in Canada for tax purposes by virtue of subsection 250(1) (see 1.30- 1 36). In certain situations, an individual who would otherwise be factually or deemed resident in Canada may be deemed not to be resident in Canada, pursuant to subsection 250(5) (see 1.37- 1 39).

[88] Mr. Holmes honed in on the fact that the evidence revealed that Senator Duffy maintained Ontario health coverage during the period up to January 2013 and only applied for health coverage in P.E.I. after the Senate insisted on confirmation that Senators had coverage in the provinces for which they were appointed. Indeed, the proof of residency that Internal Economy would ultimately request of all Senators was confined to driver's licence, provincial health coverage, residency asserted for purposes of income tax and a declaration of voting.

[89] The Crown takes no issue with Senator Duffy's claim for health coverage in Ontario since it accords with their position that Senator Duffy is and was a resident of Ontario throughout the period of time under review.

[90] The *Health Insurance Act*, R.S.O. 1990, c. H.6 and amendments thereto include the following sections:

> Right to insurance
>
> 11(1) Every person who is a resident of Ontario is entitled to become an insured person upon application therefor to the General Manager in accordance with this Act and the regulations.
>
> Establishing entitlement
>
> 11(2) It is the responsibility of every person to establish his or her entitlement to be, or to continue to be, an insured person. 1994, c. 17, s. 70

[91] Regulation 552 relating to the *Health Insurance Act* includes a definition for "primary place of residence" which is applicable from April 2009 forward and it reads as follows:

> "Primary place of residence" means the place with which a person has the greatest connection in terms of present and anticipated future living arrangements, the activities of daily living, family connections, financial connections and social connections, and for greater certainty a person only has one primary place of residence, no matter how many dwelling places he or she may have, inside or outside Ontario."

[92] Section 2.3(1) of Regulation 552 reads:

> An insured person shall surrender his or her health card to the General Manager upon ceasing to be a resident. O. Reg. 218/95, s. 1.

[93] Mr. Holmes noted that Senator Duffy testified that he became a resident of P.E.I. on the 22nd of December 2008 for all purposes. However, in addition to health coverage, Senator Duffy portrayed himself as a resident of Ontario for the purpose of income tax until the end of 2012 (See Exhibit 42, Tab 4A) although he testified that he sought to have his income tax paid in Prince Edward Island but his accountant "refused to do that as a professional, because he said that was illegal".

[94] The Crown also highlighted the fact that when Senator Duffy made application for a new passport in February 2012, he listed his "current home address" as the residence at 47 Morenz Terrace, Kanata, Ontario.

What do we know about the property in Cavendish?

[95] The Crown referred the court to Clifford Dollar's evidence with respect to his connection with 10 Friendly Lane. Mr. Dollar explained his role in the construction of the dwelling situate at 10 Friendly Lane. He testified about Senator Duffy's acquisition of the property. He advised that the property lacked a proper foundation and so it could not be used on a year round basis. From Mr. Dollar, we learned that the property was closed up around the end of October each year and reopened in the spring. Mr. Dollar said he would always see Senator Duffy in late April. The water was shut off, otherwise the "cold would take the pump in winter". Mr. Dollar stated that the closing routine involved shutting off the power. He said a new foundation was installed in 2013 [he was wrong about that, reliable evidence to the contrary, including Senator Duffy's diary shows that the cottage was levelled, insulated and was mounted on a foundation in 2012 – still three years after being described by Senator Duffy as his primary residence]. Mr. Dollar said that even after the foundation was added the water had to be turned off in the winter because the pipes ran through the ceiling and into the roof. In the off-season Mr. Dollar kept an eye on the property. He watched for any signs of break-ins and monitored the snow load on the roof. Quite apart from the lack of water, Mr. Dollar advised the court that the residence at 10 Friendly Lane was inaccessible during parts of the winter due to snow.

[96] Clifford Dollar's suggestion that Senator Duffy used 10 Friendly Lane from April through late October is supported by the entries in Senator Duffy's diary. The diary reveals

other travel to Charlottetown during the off season. However, during those times, since the property was largely inaccessible, Senator Duffy stayed in various hotels. Exhibit 7 reveals a pattern of actual use of 10 Friendly Lane, which showed Senator Duffy's arrival in the spring and a final departure, usually in the late summer or fall.

[97] Following the construction work in the summer of 2012, which added a foundation and new insulation, it appears as though 10 Friendly Lane was habitable during the colder weather, for at least short periods of time. Mr. Holmes noted that Senator Duffy's diary referred to an inside temperature of 16 degrees Celsius on 15 December 2012. I attach no particular significance to this fact since one would expect that the temperature had been set to a low level while no one was actually living in the dwelling. This issue was not developed in cross-examination.

[98] Mr. Holmes pointed out that regardless of the temperature there remained the issues of the water being turned off, the road being impassable and the cessation of other services. The police shut down their operation in September and garbage collection stopped at the end of October: see the entry of 31 October 2012 "last date for Island Waste Cottage pick up" [p.236].

[99] The Crown takes the position that prior to his appointment to the Senate, when Senator Duffy described himself as a resident of Ontario, Senator Duffy said he used the property at Cavendish on a seasonal basis and with the exception of three nights in December 2012 that's precisely how he used the property following his appointment.

[100] The Senate typically breaks in mid-December and suspends its sittings until February, about six weeks per year. The sitting schedule can be determined from Exhibit 66, entered in the course of Diane Pugliese's testimony. Mr. Holmes highlighted Senator Duffy's whereabouts during the winter breaks between 2009 and 2012. Overall he spent 14 days in P.E.I. during that period. The break period is more than 28 weeks. He did not make it back to P.E.I. at all during the 2010/2011 break. However, Mr. Holmes pointed out that Senator Duffy did spent 10 days in P.E.I. during the 2012 / 2013 break at a time when the Senate expense issue had attracted the attention of the media.

[101] Mr. Holmes combed the diaries of Senator Duffy and noted that the property at 10 Friendly Lane was consistently referred to as "the cottage" and that 47 Morenz was consistently referred to as "his home."

[102] Crown counsel rhetorically asks, "Why is this important?" Mr. Holmes points out that Senator Duffy relies on the directions he claims he received from Prime Minister Harper, from a memo prepared by Mr. McCreery, a staffer in Senator LeBreton's office, and Senator David Tkachuk to legitimize his entitlement to expense claims respecting the NCR. Mr. Holmes urges the court to carefully examine Senator Duffy's reliance on these directions and advice that was provided by the aforementioned persons regarding the whole residency issue.

[103] Mr. Holmes contends that at the very least these interactions certainly reveal that

Senator Duffy was alive to a problem. The Crown raises the issue of potential wilful blindness on the part of Senator Duffy as it relates to his constitutional eligibility to sit as a Senator from P.E.I. based on concerns related to residency issues. Mr. Holmes notes that Senator Duffy was alive to the issues from the outset.

[104] It must be born in mind that Senator Duffy initially expressed a preference to be appointed as an Independent Senator from Ontario and that Senator Duffy himself testified that he believed he was qualified to be appointed from Ontario.

[105] At the very least, Senator Duffy knew back in December of 2008 that he had to be a resident in the Province that he represented in the Senate.

[106] Mr. Holmes observed that during his preliminary discussions with Prime Minister Stephen Harper about his appointment to the Senate, the Prime Minister made it clear to Senator Duffy that he would be entering the Senate as a Conservative and that he would be representing the Province of Prince Edward Island. It would appear from the evidence that Prime Minister Harper seemed focused on the fact that Senator Duffy owned property in Prince Edward Island.

[107] Mr. Holmes takes the position that even if one were to accept Senator Duffy's recall of the content of the discussions as perfectly accurate, nowhere was there any suggestion that the Prime Minister discussed expense claims, particularly the Senator's eligibility for financial compensation in connection with the performance of his duties in Ottawa.

[108] Senator Duffy's appointment to the Senate was announced on 22 December 2008.

[109] Thereafter, Senator Duffy met with representatives of Senate Administration on 23 December 2008, including Mark Audcent, the Clerk of the Senate, who specifically instructed him about the need to maintain his residency status in the province for which he was appointed, namely, P.E.I. All of the representatives of the administration extended the invitation to approach them with any questions on a variety of topics. The letters from the head of Senate Finance and the acting head of Human Resources show a willingness to answer any questions, in a non-partisan and professional way, concerning entitlement to expenses.

[110] On 24 December 2008 an article appeared in Charlottetown's *The Guardian* written by Professor David Bulger. The article stated that Senator Duffy's appointment to the Senate was constitutionally invalid because Senator Duffy was not a resident of P.E.I.

[111] Within a few days of the Bulger article Senator Duffy travelled to P.E.I. He stayed at the Charlottetown Hotel. He obtained a P.E.I. drivers' license.

[112] Mr. Holmes seems intrigued as to how Senator Duffy obtained a P.E.I. driver's licence in early January 2009. Perhaps this mystery could have been resolved by cross-examining Senator Duffy about it.

[113] As a result of the Bulger article, a staffer in Senator LeBreton's office was con-

scripted to prepare a memo on the subject. Mr. Holmes takes the position that contrary to Senator Duffy's testimony, the McCreery memo dated 6 January 2009 provides anything but verification that his claim to being a P.E.I. resident is valid. The memo states that any Senator asserting a particular residence claim would most likely avoid any challenge from the Senate itself: "if they say they are a resident of province X and have a deed to prove it the other Honourable Members do not question this". Mr. Holmes contends that the McCreery memo only heightens concerns about the validity of Senator Duffy's claim of P.E.I. residency, it does not alleviate them.

[114] I find that the McCreery memo is open to be interpreted in the way Senator Duffy understood the residency issue.

[115] There is no evidence that Senator Duffy conferred with the Law Clerk of the Senate, Mr. Audcent, about the Bulger article.

[116] Mr. Holmes stated that: "We also know what Mr. Audcent would have said, had such a meeting occurred: residence is a question of fact. And based upon the indicators he identified during his testimony, it is inconceivable that, with awareness of all of the circumstances, Mr. Audcent would have identified Cavendish P.E.I. as Senator Duffy's residence."

[117] I am not prepared to consider that the aforementioned hypothetical conversation between Mr. Audcent and Senator Duffy would result in a specific opinion one way or the other. The fact of the matter is that there was no such conversation.

[118] On 7 January 2009 Senator Duffy, who at that point had not been sworn in, attended an orientation session. Mr. Holmes maintains that Senator Duffy was still doubtful and concerned about his residency status. In his testimony Senator Duffy said he was seeking "reassurance" from Senator Tkachuk (Evidence of Senator Duffy 16 December 2015, p.74). Whatever advice or information Senator Duffy elicited from Senator Tkachuk, it is clear from the Crown's perspective that it was prompted by false and misleading statements by Senator Duffy. There's no indication in the trial record that Senator Tkachuk knew about Senator Duffy's personal affairs. Senator Duffy testified that he and Senator Tkachuk were acquaintances (on the basis that he may have interviewed Senator Tkachuk once) (Evidence of Senator Duffy 16 Dec 2015, p.75).

[119] The entire exchange is captured in Senator Duffy's testimony from 16 December 2015, at pp. 74 to 79. Senator Duffy answered in the affirmative when Senator Tkachuk asked if Senator Duffy owned a house in P.E.I., paid for hydro, paid for gas, insurance and (property) taxes there. But the Crown urges that the information supplied by Senator Duffy was misleading, at the very least:

- The property at 10 Friendly Lane was not a house, it was a cottage
- The hydro was shut off
- The last shipment of propane was delivered in the fall when the cottage

was closed up

- Senator Duffy paid property taxes in P.E.I. as a non-resident.

[120] I do not take Senator Duffy's responses as misleading. It is impossible to assess accurately a conversation when one of the parties is not called to give evidence.

[121] On 16 December 2015 Senator Duffy described his conversation with Senator Tkachuk about *per diem* claims as follows at p.77:

> And I said, well what about *per diems*. I said I don't personally believe in *per diems*. He says you cannot, not claim what every other Senator claims because to do so would show some light between you and the other P.E.I. Senators and it would give some kind of edge or an opening for this professor to come back with this, what they believed was a politically motivated attack.

[122] Mr. Holmes states that to the extent Senator Duffy received any direction to claim *per diem* expenses, it is clear from his own account this is what occurred:

(a) Senator Duffy identified a problem regarding his residence;

(b) He obtained favourable advice based on misrepresenting and omitting salient facts about the Cavendish property; and

(c) That the need to claim *per diems* had more to do with Senator Duffy's portrayal of himself as a resident of P.E.I. – to maintain his constitutional eligibility - than the legitimacy of those claims.

[123] I do not agree with Mr. Holmes' characterization that Senator Duffy omitted or misrepresented the status of his Cavendish property.

[124] The Crown stated that Senator Duffy was able to overcome his personal opposition to making *per diem* expense claims and directed his staff to prepare the necessary documentation and submit same in order for him to receive *per diem* compensation.

[125] Mr. Holmes expressed the opinion that Senator Duffy, fearing that his claims might be denied, pre-signed blank claims forms certifying that the information was accurate and correct and in accordance with Senate policy.

[126] Undoubtedly, Senator Duffy did use pre-signed blank claim forms when claiming some of his per diem allotments. This issue will be dealt with in more detail later in this judgment. Suffice it to say at this point that I do not attach any sinister motive or design in this practice on the part of Senator Duffy.

[127] The Crown emphasized that Senator Duffy testified that he knew that Members of Parliament and Senators alike were entitled to compensatory payments to make up for the fact they have to travel to Parliament Hill to work.

[128] It is the Crown's position that Senator Duffy did not incur any additional expenses in connection with his work on Parliament Hill. He had worked on Parliament Hill for years before his appointment. His daily routine was largely unaltered following his appointment. He left the same residence in Kanata, drove to the same general location in Ottawa to work, and ate his meals at the same places. The sitting schedule of the Senate was typically three days per week.

[129] Furthermore, Mr. Holmes concludes that all the *per diem* claims made by Senator Duffy amount to criminal fraud and breach of trust.

Defence Position

[130] Mr. Bayne submits that counts 1 and 2 allege that Senator Michael Duffy committed breach of trust and fraud between December 22, 2008 and March 6, 2013 "by filing expense claims and/or residency declarations containing false or misleading information." He contends that the counts factually engage Senator Duffy's designation – under the existing provisions of the SARs (Senate Administrative Rules) and related policies, procedures and guidelines – "For the purposes of the Twenty-Second Report of the Standing Committee on Internal Economy, Budgets and Administration, adopted in the Senate June 18, 1998" of his "primary residence in the province or territory that I represent" (Prince Edward Island) and his related claims for "Living Expenses in the NCR." Furthermore, he submits that Senator Duffy committed no crime whatsoever – no fraud, no breach of trust – in making a designation (pursuant to the rules as he understood them and had them explained to him by Senate leaders) regarding primary residence "in the province or territory that [he] represent[ed]" and in claiming the related NCR living expense claims. Mr. Bayne asserts that the designation and living expense claims were validly made within the existing administrative Senate rules and practices. They were made in good faith and the belief that they were appropriate. They were in violation of no Senate rule or policy. They involved no deliberate deceit or "corrupt" purpose. They were made pursuant to and in reliance upon the express instructions of the Vice-Chair of the powerful and authoritative Internal Economy Committee. They were made openly to the appropriate Senate authority (Senate Finance) and were for all of the time period under consideration reviewed and verified as appropriate by that Senate authority. Accordingly, counsel urged the court to find that there was no fraud or breach of trust and the essential elements of these criminal offences have not been proved beyond reasonable doubt and that the evidence and law support a finding of not guilty on both counts.

Senator Duffy's Connection to P.E.I.

[131] When considering the issues surrounding residency, it is useful to consider Senator Duffy's connection with Prince Edward Island. His family has had roots in the Province for many years and he himself was born and raised in the Charlottetown area. After leaving high school, Senator Duffy pursued journalistic endeavours that eventually brought him to national prominence. This career path resulted in Senator Duffy having to leave his home province. However, he returned regularly to Prince Edward Island to visit friends and family. Senator Duffy advised the court that it was always his intention to return permanently to

Prince Edward Island once he retired from media journalism. With this goal in mind, he and his wife, Heather purchased the property at 10 Friendly Lane, Cavendish Beach, P.E.I. in 1998.

[132] Staff Sergeant Mark Todd Crowther of the RCMP described the Cavendish area as a resort municipality with a small permanent population (in 2011 the population was listed as 266) that swells to about 7500 during July and August necessitating a small seasonal satellite detachment at Cavendish Beach between June and September to handle the influx of people.

[133] The Duffy's current residence in the NCR is at 47 Morenz Terrace, Kanada, Ontario. This property was purchased in 2003.

[134] In anticipation of his appointment to the Senate representing P.E.I., Senator Duffy ended his career in journalism on December 22, 2008 and "became a resident of Prince Edward Island" at 10 Friendly Lane, Hunter River, RR2, P.E.I., C0A 1N0 and was issued a P.E.I. driving licence on January 2, 2009. (Exhibit 42, Tabs 1 and 2). As Senator Duffy put it in his testimony, I was a Prince Edward Islander and wanted to have a Prince Edward Island driver's licence. (Evidence of Senator Duffy, December 8, 2015, page 66, lines 7-9)

[135] Mr. Bayne noted that Senator Duffy maintained his Ontario Health Insurance Plan card to facilitate his treatment and care for his various health issues. In 2013, the Senate rules changed so that a provincial health card from one's home province was required.

Reliance by Senator Duffy on Representations and Opinions of Key Authoritative Officials

[136] Senator Duffy advised the court that he spoke with a number of individuals including: Stephen Harper, the Prime Minister of Canada; Senator Tkachuk, the Vice-chair and then Chair of the Internal Economy Committee (see Exhibit A, Tab 2, page 2-3 Governance: "The Committee is responsible for the good internal administration of the Senate"); Senator LeBreton, the Conservative Senate caucus leader and her constitutional assistant Christopher McCreery (confirmed by Exhibit A, Tab 19, dated January 6, 2009) regarding issues surrounding residency and that he relied on their opinions and statements with respect to the residency issue.

Prime Minister Stephen Harper

[137] Senator Duffy testified that he met Prime Minister Stephen Harper on December 8, 2008 (confirmed by Exhibit 76, the Duffy diary for December 2008) at which time the Prime Minister suggested to then Mr. Duffy that he (Duffy) should consider a P.E.I. Senate appointment. The Prime Minister and Mr. Duffy discussed Mr. Duffy's and his wife's intention to return permanently to P.E.I. once his journalism career ended and where he had owned his proposed permanent retirement home at 10 Friendly Lane for a full decade. The Prime Minister suggested that Mr. Duffy "speed up" the permanent move to the P.E.I. residence through the acceptance of an appointment – i.e. an appointment as a P.E.I. Senator would both require and effect a change in the status of the P.E.I. residence. Mr. Duffy said he would have to discuss and consider this with his wife Heather (Evidence of Senator Duffy, December 8, 2015

at pages 56-60).

[138] Senator Duffy further gave evidence that he again met Prime Minister Harper, this time at the Centre Block, on December 16, 2008 (again confirmed by Exhibit 76), to discuss the proposed Senate appointment. Mr. Duffy raised an issue of potential local political opposition to his appointment as he had been living in Ottawa as part of his journalism career, although he owned the residence at 10 Friendly Lane in P.E.I. and had intended to make it his permanent home when his journalism career ended. The Prime Minister replied, "They'll get over it," and went on to advise Mr. Duffy that accepting the appointment as a P.E.I. Senator simply "accelerated" or "speeded up" making the P.E.I. residence the permanent residence, since being sworn in as a Senator from P.E.I. made P.E.I. (10 Friendly Lane) the permanent and primary residence. The Prime Minister advised Senator Duffy that, upon appointment as a Senator from P.E.I., the effect would be "this is now your primary residence. This is – this is where you live and this is what you represent, the area you represent in the Senate of Canada" (Evidence of Senator Duffy December 8, 2015, page 63). Mr. Duffy would, on appointment, be representing the Province of P.E.I. (an important Constitutional and legal reality of "regional representation" by appointed Senators – see Exhibit A, Tab 15, at pages 20 & 25: "The system of regional representation in the Senate was one of the essential features of that body when it was created"), and his P.E.I. residence would thus, on appointment, become the permanent one just as Mr. Duffy and his wife had intended for a decade. (Evidence of Senator Duffy December 8, 2015, at pages 60-64)

[139] The Prime Minister's explicit advice was believed and relied upon reasonably by Mr. Duffy. This was not some minor bureaucratic official speaking but the Prime Minister of Canada. This advice made sense. If you are the Senator from P.E.I., representing P.E.I., your address in P.E.I. would now be your prime and permanent address. The advice of the Prime Minister was reinforced by the written and oral advice of Mr. Audcent, the Senate Law Clerk, to Mr. Duffy on December 23rd, 2008, that, owing to the requirements of the *Constitution Act, 1867* (See Exhibit A, Tab 1), the soon-to-be appointed P.E.I. Senator had a "duty to reside at all times in Prince Edward Island" (Exhibit A, Tab 12). The Prince Edward Island residence was of primary constitutional importance going forward (Evidence of Senator Duffy, December 8, 2015 at pages 64-66).

[140] Senator Duffy testified that on December 20th, 2008, he officially accepted the Prime Minister's offer of appointment as Senator from P.E.I. (confirmed by Exhibit 76). Mr. Duffy believed that based on the authoritative and inherently reasonable advice from the Prime Minister, that upon his appointment as a Senator from P.E.I., he represented P.E.I. and his P.E.I. residence at 10 Friendly Lane became his constitutionally required, and most important, now permanent residence and address. Appointment by the Prime Minister would transform his status from private citizen to Parliamentarian from P.E.I. and the status of his P.E.I. residence to that of constitutional and permanent residence.

[141] Mr. Bayne stressed that Senator Duffy's evidence about the aforementioned meetings was not contradicted. The Crown called no evidence, either from former Prime Minister Harper or from Ray Novak who was present at the December 8th meeting, to challenge or

contradict Senator Duffy's account of the meetings.

Senate Officials

[142] On December 22, 2008, the Prime Minister announced Mr. Duffy's Senate appointment and that of 17 others (confirmed by Exhibit 76) and on December 23rd, Mike Duffy met Senate officials (Senate Clerk Belisle, Law Clerk Audcent, Senate Finance Director Proulx and Acting HR Director Poulin) for a welcome and information session. The meeting was less than an hour long. Of relevance to Counts 1 & 2, Senator Duffy received a letter from the Senate Clerk advising him that the Clerk would be sending him "several documents." Senator Duffy's evidence confirmed that he later received a box of documents including the Senate Administrative Rules (SARs), the Attendance Policy and other documents. The Clerk's letter advised that "a short briefing" would follow from the Law Clerk and Directors of Finance and HR (See Exhibit A, Tab 12). The Law Clerk's letter and oral advice received December 23rd confirmed in writing the prime constitutional importance as of appointment – "as of the day of your summons" – of the P.E.I. residence at 10 Friendly Lane. Senator Duffy received a letter and 15 pages of documents from Ms. Poulin of HR (see Exhibit A, Tab 12 & 16). Then he received an eight-page-typed letter from Ms. Proulx along with typed documents (Guidelines and Policy and Entitlements). Ms. Proulx testified that she "went through" the eight page letter with Senator Duffy. The letter explained "Parliamentary functions" for which Senate resources may properly be used, sessional and Retiring Allowances (i.e. salary) and Dental, Health Care, Insurance, Travel Insurance, and Post-Retirement Insurance Plans, Death Gratuity, Marital Status Data, Annual Statement of Benefits, Railway Transportation, Travel Card, Telephone Services, Research and Office Expense Budget amounts, and Moving Expenses (Exhibit A Tab 15 A-H) (Evidence of Senator Duffy December 8, 2015 at pages 76-91).

[143] Mr. Bayne stated that there was no evidence whatsoever that any of the Senate officials at this brief December 23rd welcome meeting explained, defined, or qualified in any way the concept of "primary residence" for the purpose of claiming living expenses in the NCR. Senator Duffy was encouraged to seek advice if he had questions after reading all the materials and the coming volumes of materials from the Senate Clerk.

[144] Senator Duffy gave evidence that after this brief December 23rd welcome session there were no subsequent education or training sessions conducted by Senate administration for new Senators (despite their responsibility under the SARs, along with the Internal Economy Committee – see Exhibit A Tab 2 Governance p. 2-10 – for "the good administration of the Senate") on Senate rules, policies, guidelines, procedures or practices. The evidence reasonably supports the conclusion that there was little or no meaningful education or training of Senators (and is strongly confirmed by Exhibit A, Tab 20, the "Report on Internal Audits", that expressly identifies "poor communication" of policy to Senators and the need for "updates"). After the brief and summary 'welcome' meeting of December 23rd, there is no evidence from any source that Senators received any organized education or training from Senate administration, and only scant evidence about a non-mandatory, optional, half-day session for office staff of Senators (Evidence of Senator Duffy December 8, 2015 at pages 84-

55; Evidence of Senator Furey December 7, 2015 at pages 26 & 60).

Prime Minister's Office (PMO)

[145] Senator Duffy testified that on December 24th, 2008, *The Guardian* newspaper (Exhibit 77) published an article citing a University of Prince Edward Island professor's challenge to the constitutionality of Prime Minister Harper's appointment of Mr. Duffy as a P.E.I. Senator. Conceding that the constitutional standard for residence is not defined, the article queried whether Mr. Duffy spent enough time on the Island and stated that he had a duty going forward to make P.E.I. his 'main residence.' This article gravely concerned Senator Duffy and reinforced the notion that his P.E.I. residence was his residence of prime constitutional importance. Mr. Duffy immediately contacted Mr. Teneycke of the Prime Minister's Office (PMO) regarding the newspaper article and was advised that his P.E.I. residence at 10 Friendly Lane, the residence of prime constitutional importance, fully satisfied the constitutional residence requirement. 10 Friendly Lane was not only the primary residence of Mr. Duffy in the Province for which he was to be appointed, but was his only residence in P.E.I. The PMO assured him 10 Friendly Lane qualified and that he should ignore the article (Evidence of Senator Duffy December 8, 2015 pages 92-95).

Senator LeBreton, Senate Leader

[146] Senator Duffy pursued the residency issue further. On January 6, 2009 (confirmed in Exhibit 7), Senator Duffy testified that he attended the office of his Senate Leader and member of the Harper Cabinet, Marjorie LeBreton, to resolve the matter. When he explained his understanding that there was and could be no minimum time requirement to be spent at his residence at 10 Friendly Lane for it to be his primary residence in the Province for which he was to be appointed (because of the Senate attendance requirement in Ottawa and travel on Senate business), he was assured by Senator LeBreton that 10 Friendly Lane fully qualified and there was no such time requirement and *The Guardian* article was nothing but "politics" that he should ignore. He took this as being consistent with what he'd been advised by the Prime Minister on December 8th & 16th, 2008, that upon appointment, 10 Friendly Lane would be his Constitutionally primary and permanent residence, making him a P.E.I. resident. On the same date, January 6th, Mr. Duffy received from the Senate Leader and her constitutional advisor a written memorandum (Exhibit A Tab 19) advising that the P.E.I. property that he owned (10 Friendly Lane) qualified him as a P.E.I. resident even if he had lived "in Ottawa 99% of the time." The primary constitutional residence in the province of appointment was not dependent on the amount of time spent there (or the seasons or the relative value or a concept of "ordinarily inhabits") (Evidence of Senator Duffy December 8, 2015 pages 95-101).

Primary Residence Declaration

[147] The Primary Residence Declaration form that was signed by Senator Duffy is reproduced here. This document has been modified over the course of the last few years.

SENATE

PRIMARY RESIDENCE DECLARATION

I, the Honourable ……, member of the Senate for the province or territory of…...……, declare that my primary residence is more than 100 kilometres from Parliament Hill and that I therefore incur additional living expenses while I am in the National Capital Region to carry out my parliamentary functions.

For the purposes of the Twenty-Second Report of the Standing Senate Committee on Internal Economy, Budgets and Administration, adopted in the Senate June 18, 1998, the address of my primary residence in the province or territory that I represent is the following:

……
……..……
……..……
……..

The Honourable

……
(signature)

……
(date)

Application of Advice

[148] Mr. Bayne suggested that the Crown is seeking to assert a fine line distinction (splitting hairs?) that there was a conflation here of constitutional residence and primary residence for the purpose of living expense claims. However, it is argued that Senator Duffy is not a lawyer and that he sought and relied on the advice he received and was not provided any meaningful instruction from Senate administration. Mr. Bayne states that Senator Duffy honestly and reasonably understood, combining the information and advice received from the most authoritative sources – the Prime Minister, the PMO, the Senate Leader, her constitutional advisor – that 10 Friendly Lane, upon and by virtue of appointment, became and was, going forward, his permanent residence, his primary residence in the province of appointment, his residence of clearly primary constitutional importance, irrespective of the amount or percentage of time or seasons he spent there. And so, when on January 6, 2009, Michael Duffy (he had been by then – on December 22nd – announced as appointed but was not sworn in until January 26th, 2009) signed his first declaration on the provided Senate declaration designation form (Exhibit 1 Tab 1) affirming "The address of my primary residence in the province or territory that I represent is…10 Friendly Lane," he honestly and sincerely and reasonably believed that to be true. He had, as he testified, no fraudulent or corrupt intention to deceive the Senate and believed the declaration was both fully within the rules as

he understood them and consistent with the advice received from all authoritative sources he had consulted and relied upon.

[149] Mr. Bayne contends that, if Senator Duffy was confused and conflated constitutional residence with primary residence for living expense claims, that does not make out the deceitful and corrupt *mens rea* required for fraud or breach of trust. He was not alone in conflating and confusing the issues. Mr. Audcent addressed the McCreery memo (see evidence of Mark Audcent, April 8, 2015 pages 66-72 and April 9, 2015 pages 3-6), by stating that it, "just completely confuses the property qualification with the residency qualification" and is "incorrect from a legal point of view. … I would say it's confusing." … "Whether it is incorrect from a political point of view" Mr. Audcent could not say. Yet it was advice to Senator Duffy "coming from the office of the leader of the Senate for the Government of Canada." Mr. Audcent agreed the Senate leader was and would have been "an authority figure for a rookie Senator" – "absolutely."

[150] Mr. Duffy did in fact receive a box of materials (including the SARs) from Mr. Belisle's office. There was a considerable volume of material that Mr. Duffy skimmed and then, when he had questions about one particular matter – the primary residence declaration he had completed the day before on January 6, 2009 (Exhibit 1 Tab 1) – on January 7th he did as he had been told on December 23rd: he sought advice from an authority on the Senate rules, policies, procedures and practices, Senator Tkachuk, the Vice-Chair of the Committee responsible for "good internal administration of the Senate," the Internal Economy Committee. Senator Duffy testified that on January 7th, 2009, the Senate Tory caucus convened an afternoon orientation session (Exhibit 7, January 7, 2009). The Senate leader, Senator LeBreton, the senior Tory on the Internal Economy Committee, Senator Tkachuk (its vice-chair) and the Tory Whip explained the highly partisan nature of the Senate and the importance of attendance for votes in the Chamber (Evidence of Senator Duffy December 8, 2015 at pages 101-109).

Senator Tkachuk

[151] At the end of the January 7th caucus orientation session, Senator Duffy approached Senator Tkachuk directly, one-on-one. Senator Duffy testified that Senator Tkachuk was regarded in the Senate Tory caucus as the "guru" on Senate matters. Senator Duffy explained to Senator Tkachuk the history of *The Guardian* article, his owning a residence in P.E.I. on which he paid taxes, insurance and hydro as well as a residence in Ottawa and questioned whether he could or should claim the housing allowance for the NCR property. Senator Tkachuk informed Senator Duffy without hesitation that he (Duffy) was the Senator from P.E.I., that he (Duffy) had the expenses of 2 houses (the property taxes, insurance and hydro expenses of 2 houses) and that he (Duffy) should most definitely claim the NCR housing allowance as a P.E.I. Senator, exactly as other P.E.I. Senators claimed it. Senator Tkachuk advised Senator Duffy that it was important that he claim all expenses and allowances and not allow "any light" between himself and other P.E.I. Senators (as that would only fuel *The Guardian* article controversy). Senator Tkachuk advised Senator Duffy that the NCR living expense claims were essential for him to make as a Senator representing P.E.I. and that the

claims were entirely within the Senate rules and appropriate. Senator Tkachuk advised Senator Duffy that Senator Duffy was on "travel status" when in Ottawa/the NCR (Evidence of Senator Duffy December 9, 2015 pages 1-9; 12-13; 120 & 128) and that Senator Duffy's primary residence designation of 10 Friendly Lane was valid (page 4). When Senator Duffy explained that he personally did not believe in *per diem* claims, Senator Tkachuk told him that he must claim *per diems* as the failure to do so would only raise questions. Senator Tkachuk's advice was consistent with the prior advice received from the Prime Minister, the PMO (Mr. Teneycke), Senator LeBreton and Mr. McCreery. It was no secret to any of these authoritative people that Senator Duffy had been, prior to his appointment as a Senator from P.E.I., a long-time Ottawa resident (Evidence of Senator Duffy December 9, 2015, pages 6 & 14). They all had no hesitation in advising Senator Duffy that his primary and permanent residence on appointment was his P.E.I. residence and that his designations/declarations and related NCR living expense claims were valid, and "entirely within the rules" (Evidence of Senator Duffy December 8, 2015 pages 107-109; December 9, 2015 pages 1-9, 79, 116, 120, 126, 128).

[152] Not only is all of Senator Duffy's evidence about the specific advice given by Senator Tkachuk wholly uncontradicted (Senator Tkachuk was a listed Crown witness never called by the Crown in its case or as a reply witness), it is entirely consistent with Senator Tkachuk's reported public comments on December 3, 2012, set out at Exhibit 45B Tab 1: "Duffy's expenses are entirely within the rules"; "many Senators who own houses in Ottawa make similar claims for housing expenses" and then after staying here [Ottawa] "all winter long… they go home for the summer." "Your primary residence is what you say your primary residence is."

Senator Duffy's Conclusion Regarding Primary Residency

[153] Mr. Bayne maintains that Senator Duffy's reading of the SARs and the declaration form caused him to believe that his primary residence declaration in the province for which he was appointed was valid as were his related NCR living expense (accommodation and *per diem*) claims. There appeared to be no definition of or criteria for primary residence in the province of appointment in the Senate policies or the declaration form that such a declaration would violate. "I believed it was a valid designation and it was an essential designation in terms of my representing P.E.I. in the Senate of Canada" (Evidence Senator Duffy December 9, 2015 page 43). "They were all 100% valid. They were all 100% within the rules, and they still are" (page 54). Equally important, Senator Duffy had reasonably sought out an authoritative expert on Senate rules, policies, practices and procedures, had solicited that expert's advice on the very issue and had received unambiguous assurance that the primary residence and living expense claims were entirely within the rules and validly made. "I believed it was completely within the rules, um, I'd been told that by all of the experts, and I followed their advice" (page 43). Mr. Bayne pointed out that none of these experts (the Prime Minister, Mr. Teneycke, Mr. Novak, Senator LeBreton, Mr. McCreery, Senator Tkachuk) were called by the Crown to seek to refute in any way Senator Duffy's evidence. This advice-seeking was all done at the outset of Senator Duffy's Senate career, not later as an afterthought. Senator Duffy's conduct was honest and reasonable. He reasonably relied on all that he had been

told from the outset by all the authorities – the Prime Minister, the PMO, the Senate Leader and her assistant, the vice-Chair of Internal Economy. Their advice accorded with his own reading of the provisions of the SARs. He believed that his designation of primary residence was valid as were his living expense claims. Mr. Bayne concludes that the evidence makes out a strong case of most highly probable innocence, far beyond a reasonable doubt and that Senator Duffy had no intent to defraud or to deceive, no corrupt purpose. He did not have the *mens rea* for either fraud or breach of trust.

Senator Duffy's Efforts to Upgrade the Dwelling at 10 Friendly Lane

[154] Through Senator Duffy, detailed documentary evidence, (Exhibit 80), none of it effectively challenged by the Crown, was led of the almost $100,000 of his own money spent from his appointment in 2009 to upgrade and renovate 10 Friendly Lane. A real and significant investment was made in the P.E.I. residence. This evidence of action speaks louder than words. It is completely consistent with and confirms Senator Duffy's evidence that, from his 2009 appointment, 10 Friendly Lane became and was his permanent home (as he had intended since1998). Mr. Bayne advised the court that Senator Duffy did not sell the Kanata bungalow as that would only have required his renting another NCR residence or incurring Ottawa hotel costs daily (the "secondary residence in the NCR" required of Senators working in Ottawa). Mr. Bayne suggested that Senator Duffy could have done that and had he done so, almost assuredly these charges would not have been brought against him. His reasonable decision to retain the Kanata residence as his "NCR" residence, however, does not detract from the fact that 10 Friendly Lane was now, from appointment, his permanent residence, his primary residence in the Province that he represented, his residence of prime Constitutional importance as a newly appointed P.E.I. Senator (Evidence Senator Duffy December 9, 2015 at pages 56-78, 84-98).

[155] The uncontradicted evidence that Senator Duffy and his wife spent $98,292.49 of their own personal money to fund the extensive renovation of 10 Friendly Lane is also entirely inconsistent with an intent to defraud in order to gain what the evidence reveals was approximately $80,000 in living expenses over the next 4 fiscal years (2008-09; 2009-10; 2010-11; 2011-12). Mr. Bayne contents that it is simply unreasonable to believe that a fraudster, motivated to deceive in order to gain money, would spend a considerable sum of personal money (the evidence reveals the Duffys are not wealthy people nor do they live a lavish lifestyle) in order to effect a risky scheme to gain a relatively modest annual expense amount. This evidence is inconsistent with proof beyond reasonable doubt of the required *mens rea* for fraud or breach of trust, but is wholly consistent with the fact and belief of Senator Duffy that 10 Friendly Lane was his permanent and primary residence in the Province he now represented as a Senator.

[156] The extensive work on 10 Friendly Lane was done in 2 phases, starting in 2009 (planning and retention of contractors preceded the work) and completed in 2012. The work in 2009 made the residence an all-season one; the additional work in 2012 addressed foundation and site issues that the 2009 work had not fully resolved. Significantly, all of this work and all of this personal Duffy family money spent on 10 Friendly Lane was done before the

issue of living expenses ever first surfaced. This was not money spent and work done in a desperate and after-the-fact response to a live issue about the validity of primary residence and/or living expense claims. Mr. Bayne stresses how telling this fact is.

The Duffys' Financial State

[157] Further evidence inconsistent with and contrary to Senator Duffy having the criminal *mens rea* for fraud and/or breach of trust in respect of counts 1 and 2 exists with respect to the financial evidence and documents (see also Evidence of Senator Duffy December 9, 2015 pages 16-42).

[158] The Crown led the evidence of Mr. Grenon, a forensic accountant, in an effort to prove that Senator Duffy may have had a motive to commit monetary crimes as he and his wife allegedly "overspent" beyond their lawful means. The oral evidence of Mr. Grenon was in addition to his reports (Exhibits 52, 53 and 54). These reports are "preliminary" and significantly incomplete in terms of financial information. Exhibit 52 is such a "preliminary" report that states that, over the 4.5 year period between December 2008 and June 2013 and based upon "available information," Mr. Grenon "could not determine the source" of $139,784 in unknown deposits to Senator Duffy's bank account (page 2 of 86 of Exhibit 52). He could not determine the source of this $139,784, he said "because the information was not provided." He stated that he needed "additional information" about the sources of the deposits. Nevertheless, he offered evidence that, in its incomplete state, left the invidious (and speculative) innuendo that Senator Duffy had nefarious and unreported sources of income. This then fed the Crown argument (offered in paragraph 49 of the Crown's "Factum Regarding Admissibility of Expert Opinion") that Senator Duffy had a motive to seek to obtain illicit funds (the Exhibits 4 & 5 on the *voir dire* referred to in paragraph 49 are Exhibits 52 and 53 now being referenced). For the year 2011, Mr. Grenon in his oral evidence and the preliminary and incomplete Exhibit 52 stated that there was an unexplained difference of $71,703 between the deposits into Senator Duffy's account and the disposable income reported on his 2011 Income tax return. If, however, the $71,703 represented non-taxable deposits, "the unexplained difference may be reduced to zero" (page 7 of 86 of Exhibit 52). Finally, Exhibit 52 stated that on average Senator Duffy's bank account withdrawals exceeded his deposits and the shortfall was funded by a LOC account (a credit line at the bank) (page 4 of 84 of Exhibit 52).

[159] In Exhibit 53, Mr. Grenon summarized the full 6-year period between January 1, 2008 and December 31, 2013 of Senator Duffy's personal income tax and banking information, information that was, as in Exhibit 52, incomplete, so much so that Mr. Grenon cautioned that "**I reserve the right to modify the results of this analysis should additional documents or information be made available at a later date"** (page 2 of 14 of Exhibit 53). Mr. Grenon posited in Exhibit 53 that for this six-year period, he could not account for $159,477 in bank deposits when compared with Senator Duffy's reported taxable income during these years. While Mr. Grenon conceded that if the deposits represented funds not subject to taxation that would change his findings, there was yet again left, as with Exhibit 52, the insinuation of improper cash receipts by Senator Duffy (useful to the Crown in sug-

gesting diversion of Senate monies) and possibly even income tax fraud. (My emphasis)

[160] Mr. Bayne pointed out that there was no evidence whatsoever offered by Mr. Grenon, orally or in his Exhibit reports that Senator Duffy was ever, during the years of his detailed forensic investigation and analysis, in financial straits or was being pressed by any creditor (bank, credit card provider, tax department); that any foreclosure or bankruptcy proceedings were considered or commenced against Senator Duffy; that Senator Duffy experienced any difficulty at all in accessing lawful credit from his long-time bank, the RBC; or, significantly, that Senator Duffy ever resorted to anything but perfectly lawful credit (line of credit, mortgage funds – like the majority of Canadians) in order to fund the Duffy household.

[161] Indeed, the evidence given by Senator Duffy was entirely consistent with that given by Mr. Grenon with the exception that Senator Duffy's oral and documentary evidence filled in the missing (and critical) information lacking in the Grenon analysis. Senator Duffy testified that he never spent beyond his lawful means, that he was never in financial straits or being pressed by creditors, that his long-term relationship with the Royal bank (an experienced, professional, creditor with expertise in risk-assessment and credit-worthiness) afforded him ready, lawful credit if and when needed, that he was never in default to any creditor or unable to pay his bills, and that he routinely accessed a Royal Bank line of credit when he needed funds – and paid down the line later. Mr. Grenon conceded in cross-examination that the lawful use of debt appears to be extremely common among Canadians: the data reveal that 71% of Canadians finance their lifestyle with debt and over 40% of those use revolving lines of credit. Lawful use of debt is so normal in Canada as to show that Senator Duffy's limited and prudent use of debt is not an abnormal motivator of crime at all.

[162] The law governing motive was canvassed at length in the argument concerning the admissibility of Mr. Grenon's evidence. Courts should look for conduct "seriously tending" to establish motive, when "reasonably viewed" (*R. v. Barbour*, [1938] S.C.J. No. 26 at page 5) where Duff C.J. writes:

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But I think, with the greatest possible respect, it is rather important that the courts should not slip into the habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations of the parties.

[163] Motive is a question of fact for the trial judge and its weight will in each case turn on its own facts. The evidence of motive here is so negligible as to approach "proved absence of motive"; which is "an important fact in favour of the accused." (*R. v. Lewis*, [1979] S.J.C. No. 73 at pages 12-14). Mr. Bayne respectfully submits that the evidence of motive in this case, on these facts, being far from "seriously tending" to demonstrate criminal motive, has no probative inculpatory weight at all.

[164] At the top of page 12 in *Lewis*, Dickson, J. notes that, "Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury."

[165] Furthermore, Counsel suggests that Senator Duffy's evidence was complete in significant ways that Mr. Grenon's was not. Again, Senator Duffy gave his financial evidence in a reasonable, clear, straightforward, detailed manner. He provided important documentary evidence (Exhibits 78 & 79) that corroborated his oral evidence. In the six-year time period for which Mr. Grenon suggested $159,477 of unexplained bank deposits as compared with reported income of Senator Duffy, a total of $162,595.22 in non-taxable cash legacies was received by Mike and Heather Duffy. In addition, a total of $186,888.55 of tax-paid income (employment and pension) was received by Heather Duffy. These two amounts total $349,483.77 of monies received, none of which would be (or have to be) reported in Senator Duffy's income tax returns. Senator Duffy explained that he and his wife Heather freely transfer funds between their RBC accounts. The $159,477 of deposits has been fully explained. There was no nefarious acquisition of cash and absolutely no evidence in support of that proposition. All of the deposit monies are clearly lawful funds, lawfully received and deposited. The extensive documentary records in Exhibits 78 and 79 are unchallenged evidence.

[166] In respect of Mr. Grenon's evidence in Exhibit 52 that his incomplete information left him an unexplained difference in 2011 of $71,703 between Senator Duffy's RBC bank deposits and his reported disposable income, Exhibits 78 and 79, together with Senator Duffy's oral evidence demonstrate that in July, 2011 Senator Duffy received a non-taxable legacy in the amount of $55,595.22 and Heather Duffy's tax-paid income for that year brought another $21,824.10 into the Duffy family bank accounts, for a total of $77,419.32. Mr. Bayne suggests that Mr. Grenon's "unexplained difference," and the Crown's speculative insinuations and weak motive argument have been fully answered and refuted by uncontested evidence of lawful sources and deposits.

[167] An additional important fact is that, during the six-year period of Mr. Grenon's financial analysis, namely in 2009 and 2012, Senator and Mrs. Duffy incurred almost $100,000 in extraordinary expenses, the significant expense to renovate 10 Friendly Lane. Not surprisingly, they accessed bank credit to help with this home renovation project, not unlike many Canadians. This explained the increase in the line of bank credit and the paying it down with a re-mortgage of the Kanata bungalow. There is no true overspending beyond lawful means at all, no living of a lavish or extravagant life-style that has to be funded by crime. Instead, there was a costly and extensive home renovation that was lawfully funded and is now being paid off in regular, perfectly lawful mortgage payments which have never been missed. On top of this, there remains available equity in real estate (10 Friendly Lane is unencumbered) and not-insignificant investment assets (Exhibit 79) that further prove clearly that there is no financial distress whatsoever and never was. There was simply routine and lawful bank financing of a home project.

[168] Mr. Bayne emphatically proclaims that in an important way, this entire area of financial evidence – of alleged unexplained differences, of unsupported motive assertion – demonstrates the weakness of the Crown case on all 31 counts. The underlying theme of the Crown's case is that Senator Duffy was motivated to commit a series of fraudulent transactions because of financial duress and that he deposited mysterious amounts of money from unknown sources. Mr. Grenon's evidence put it thusly, at paragraph 63, "the inference that the impugned claims were part of a continued and deliberate effort by [Senator Duffy] to seek compensation to which he was not entitled." This is an unsubstantiated fiction and one that is contrary to the actual evidence. There is no probative evidence of this motive rationale at all. Mr. Bayne submits that based on all the evidence Senator Duffy never committed any crimes and never intended to commit any crimes.

Additional Evidence that Negates or Tends to Disprove Any Criminal Mens Rea for Fraud and Breach of Trust Respecting Counts 1 and 2

(i) Senator Duffy openly submitted all declarations and living expense claims to the appropriate authority (Senate Finance) for review and verification as appropriate within the SARs.

[169] Mr. Justice Belanger of the Ontario Court of Justice, in *R. v. Radwanski*, [2009] O.J. No. 617, found this practice relevant and probative in respect of fraud and breach of trust allegations. Senator Duffy did submit his declarations and living expense claims openly over the full four-year time period embraced by the information. He testified that he was willing, and the documentary evidence as well as evidence of Ms. Proulx and Ms. Bourgeon of Senate Finance confirms this, to answer any questions about his declarations and/or living expense claims and provide additional information if and when requested. The evidence is that he and his office were cooperative with such queries and requests (see Exhibit 6 Tab 6: Senator Duffy "is comfortable providing any further details for all travel or claims submitted"). All claims paid were verified by Senate officials as being within the rules. This pattern of conduct over many years of open submission of the declarations and living expense claims and cooperative response to any and all queries about them is inconsistent with an intention to deceive or defraud or for a corrupt purpose. The pattern of consistent verification of the expense claims (subject to routine corrections which Senate Financial officials testified were common to all Senators' expense claims) and primary residence declarations as being within the SARs provided a powerful feedback loop of re-assurance from one declaration to the next and one living expense claim to the next, that all declarations, having been reviewed by Senate Finance, were valid as were the submitted living expense claims.

(ii) Senator Duffy's Statements to Senate Finance

[170] Senator Duffy openly made frank statements or admissions of fact quite inconsistent with fraudulent or corrupt *mens rea* in the course of his cooperative dealings with Senate Finance, the very people, allegedly, he sought to defraud

[171] In his response to a Senate Finance inquiry about his signed declaration form and designation of 47 Morenz Terrace as his "Secondary Residence in the NCR" (Exhibit 1 Tab

4), Senator Duffy openly stated in his May 20, 2011 memo to France Lagacé that "our home for the past 7 years is located at 47 Morenz Terrace, (Kanata) K2K 3H2". Six days later, in an email to Ms. Lagacé (Exhibit 1, Tab 4), Senator Duffy advised that "I am usually in P.E.I. in July." It is contended that no one who believed that his claim of primary residence in the province he represented (10 Friendly Lane) was fraudulent, corrupt and prohibited by the rules and who was trying to deceive Senate Finance officials about such a fact, would make such statements to Senate Finance. The statements, to a person with a guilty mind and something to hide, would seriously risk Senate Finance inquiries that could expose the fraud (if there was one). That Senator Duffy made such statements openly and voluntarily to the very people the Crown asserts he was trying to defraud negatives fraudulent or corrupt *mens rea*, according to Mr. Bayne.

(iii) Exhibit 29- Wife's Travel Claim

[172] Similarly, in Exhibit 29, Senator Duffy submitted a travel claim for his wife Heather who, according to the submitted expense form, travelled (return) Ottawa to Charlottetown to "prepare opening of cottage." It is submitted that a person truly having a fraudulent and criminal *mens rea* concerning the designation of the P.E.I. residence as the primary residence would not risk such a statement to Senate Financial officials for obvious reasons.

(iv) Exhibit 22 - Payment of Income Tax in P.E.I.

[173] Exhibit 22 is a January 22-28, 2009, email trail from Senator Duffy to his Executive Assistant, Melanie Vos and to France Lagacé of Senate Finance. Senator Duffy's email asks Melanie to pass on his query to "the finance people" about where he should pay his taxes. His email states that although Senate Finance has previously advised him that "all of the other Senators paid their taxes in Ontario," Senator Duffy felt "I must pay P.E.I. taxes to reinforce my status as an islander." This voluntary statement, early in his Senate career in 2009, affirms and is consistent with Senator Duffy's concern to "reinforce" his P.E.I. status because of his appointment as a P.E.I. Senator which changed his status in his mind (and is consistent with the evidence of Mr. Audcent) – he was henceforth a P.E.I. resident with a primary residence in the province of his appointment at 10 Friendly Lane. This evidence is consistent with Senator Duffy's evidence that he believed this and had no criminal *mens rea* when he was making his declarations and living expense claims.

(v) Where did Senator Duffy stay in P.E.I. during the winter?

[174] Senator Duffy openly admitted (to Nigel Wright and others) that when he was in P.E.I. in the winter he stayed in a Charlottetown hotel room because he could not get into his residence on Friendly Lane. He paid for this accommodation personally. Mr. Bayne says that his freely given information is inconsistent with criminal intent to deceive and defraud as it would foreseeably raise questions about the time spent at 10 Friendly Lane.

(vi) Consistent Assertions As To No Wrongdoing

[175] Senator Duffy's made repeated and consistent assertions in his emails with Nigel

Wright, Ray Novak and Senator Tkachuk, and conversations that Senator Duffy would reasonably have regarded as confidential (within an inner, PMO/Senate leadership circle) that are inconsistent with *mens rea*, inconsistent with a guilty mind: "The rules have been followed… All within the rules" (Exhibit 45A Page 3 Email #6); "I have no interest in claiming expenses to which I am not entitled" (Email #39); "I did nothing wrong… If I take a dive when I am innocent I am totally at the mercy of the media the opposition, etc." (Email #198).

(vii) Exhibit 82 – the Senator Wallace Memo

[176] Mr. Bayne points out that Exhibit 82, the Senator Wallace memo, is documentary support that another Senator had exactly the same view of the SARs, and the "primary residence" declaration forms as Senator Duffy had and the validity of NCR expense claims. Such evidence is supportive (going to Senator Duffy's state of mind) of the proposition that Senator Duffy had no criminal *mens rea* making the declarations and expense claims. The same may validly be said of Nigel Wright's evidence that he assessed the SARs and concluded that Senator Duffy's declarations and living expense claims were likely all within the rules (Evidence of Nigel Wright; August 13, 2015). It appears that other intelligent, authoritative persons were of the same view as Senator Duffy – that his declarations and living expense claims were within the rules and thus in making these declarations and living claims, Senator Duffy had no criminal *mens rea*.

(viii) Circumstances Surrounding the Preparation of the Primary Residence Declaration

[177] Melanie Mercer Vos and Margaret Bourgeau were witnesses called by the Crown as part of the prosecution case. Ms. Vos, Senator Duffy's Executive Assistant, in Ottawa, testified that Ms. Bourgeau, a Financial Clerk in the Senate Finance Directorate, advised her (Ms. Vos) how to fill out the primary residence declaration form: "The first form I had to fill out, I was actually, I sought guidance from Senate Finance with Maggie, and she sat down with me and, and instructed me on how to fill out the form, and all subsequent years were, were based on the first form ever filled out" (Evidence of Melanie Mercer Vos June 8, 2015 page 130). This discussion, Ms. Vos testified took place in "our office on the 5th floor" (i.e. before the move to the 3rd floor, so "very early" in 2009) (page 135-136). In the discussion, Ms. Vos was told by Ms. Bourgeau, the Senate Finance official, that if Senator Duffy was appointed for P.E.I. and if he owned a residence there, then that was his primary residence for the purpose of the declaration and the declaration would be properly completed: "that's his primary residence," "that met the criteria, yes" (page 135-139). Ms. Bourgeau's advice to Ms. Vos confirmed Ms. Vos' own reading of the declaration form – "my primary residence in the province or territory that I represent" – and led Ms. Vos to be confident that Senator Duffy's declaration was valid: "I believed this declaration to be valid" (page 140). Ms. Vos further testified that she told Senator Duffy about this Senate Finance advice, assuring him the declaration was completed appropriately: "… I'm sure I indicated to him at this time, at that time, so that would've been in 2009, that this was the appropriate way to fill out the form" and was an "appropriate declaration of primary residence." (page141).

[178] Ms. Bourgeau testified in-chief that she recalled a meeting in Senator Duffy's of-

fice where she discussed "living accommodations in the NCR region, which is Ottawa" (Evidence of M. Bourgeau, June 12, 2015, pages 38 and 40), but she could not remember if she was asked her views about Senator Duffy's residence. "Q. Were you asked your views about his residence? A. I don't remember" (page 140). She testified that she did not assist Senator Duffy to complete the declaration form (page 141). Ms. Vos had not said that Ms. Bourgeau had helped Senator Duffy to complete the form, only that Ms. Bourgeau had discussed with Ms. Vos how properly to complete a valid declaration. Although, in chief, Ms. Bourgeau said that she could "not recall" discussing primary residence declarations with Ms. Vos (page 43), in cross-examination (June 12, 2015 at page 4) she conceded that "the issue about his [Senator Duffy's] residence" in fact "may have been" discussed with Ms. Vos. When Ms. Vos's evidence was put directly to Ms. Bourgeau, she agreed that it was "possible" that Ms. Vos was correct about the declaration form discussions, that she – Ms. Bourgeau – simply couldn't remember (page 8). Ms. Bourgeau first tried to recall these conversations 6.5 years after they had taken place, without notes or any aide memoire (page 1). Ms. Bourgeau indicated that she routinely dealt with six to thirty-five expense claims daily, involving fifty different Senators and could not recall all the conversations she had with all the different staff members of the Senators over the years (pages 1-5). Ms. Bourgeau said that she had a number of meetings with Ms. Vos ("maybe three or four" (page 6) concerning "questions" that Ms. Vos had about "certain things", but that she could not be certain what was discussed. Ms. Bourgeau's evidence of uncertainty and lack of accurate recall may be contrasted with the detailed recall and evidence of Ms. Vos.

[179] I find as a fact that Ms. Vos' testimony is more reliable than Ms. Bourgeau's on the matter before the court because Ms. Vos had only Senator Duffy to deal with whereas Ms. Bourgeau was dealing with many Senators and/or their staff members.

[180] This evidence, in sum, therefore, creates a reasonable basis on which to find that Senator Duffy was assured from the outset, from his very first primary residence declaration, that his declarations of 10 Friendly Lane as his primary residence in the province of his appointment were all valid and within the rules. Mr. Bayne stresses that such evidence powerfully negates proof of the required criminal *mens rea*.

Senator Duffy's Assertions

[181] Mr. Bayne guided the court to Senator Duffy's direct, straightforward, and firm evidence that "All of the claims I have made, whether for housing, travel, whatever, were all made openly, honestly and in complete good faith" (Evidence Senator Duffy December 9, 2015 page 45). Senator Duffy stated clearly that he "never" attempted to deceive the Senate or knowingly filed false living expense claims (page 83).

[182] Mr. Bayne reminded the court that Senator Duffy is presumed innocent and that the Crown must displace that presumption with evidence of a guilty mind beyond reasonable doubt. He asserted that based on all the evidence, Senator Duffy's lack of *mens rea* is a strong probability, but assuredly reasonably possible.

Actus Reus

[183] Counsel for Senator Duffy further noted that apart altogether from there being no proof beyond reasonable doubt of the *mens rea* required for fraud and breach of trust, and apart altogether from Senator Duffy's extensive and reliable oral and documentary evidence relating to *mens rea*, the Crown case on Counts 1 and 2 must fail because there is no proof beyond reasonable doubt of the *actus reus* of fraud or breach of trust, no proof beyond a reasonable doubt of a prohibited act of dishonesty or of a marked and substantial departure from the proven standards expected and accepted of similarly situated officials (Senators).

The Constitution Act 1867

[184] The relevant provisions of *The Constitution Act 1867* are set out at Tab 1 of Exhibit A: "The Qualifications of a Senator shall be as follows:…"(5) He shall be resident in the Province for which he is appointed." Mr. Bayne takes the position that the constitutional anchor for every Senator appointed from the Province of P.E.I. is her/his P.E.I. residence and that Senator Duffy had such a residence, his provincial (P.E.I.) residence at 10 Friendly Lane.

SARs Provisions

[185] Tab 2 of Exhibit A and Exhibit 20 set out the SARs provisions in, respectively, 2012 and 2009. They do not differ in respect of the provisions relating to Counts 1 and 2 except concerning a new and separate travel policy which replaced Chapter 4:03 of the 2009 version. The SARs "codify comprehensively the fundamental principles and rules governing the internal administration of the Senate and its allocation and use of resources." The SARs are the governing code for the administration of Senate resources such as living expenses.

[186] It is noteworthy that the SARs nowhere defines nor sets out any required criteria for the concept of "primary residence". Chapter 1:03 of the SARs deals with "Definitions". "National Capital Residence" means a residence established by a Senator within 100 km of Parliament Hill and is not his provincial residence. "Provincial residence means a Senator's residence in the province or territory for which the Senator is appointed" (page 1-10). Senator Duffy's residence at 10 Friendly Lane is thus validly his "provincial residence" in the province (P.E.I.) for which he was appointed, and is in fact his primary and only residence in the province of his appointment. These are the sole SARs definitions relating to residences, the governing code.

[187] Chapter 4:03: Travel Entitlements and Expenses of the SARs (2009 – Exhibit 20 Tab 1A) provides no definition or criteria for "primary residence." It states only (page 4-15) that: "A Senator whose provincial residence in the province or territory the Senator represents is more than 100 kilometers from Parliament Hill and who is within 100 kilometers of Parliament Hill for the purpose of carrying out the Senator's parliamentary functions is on travel status in the National Capital Region." Senator Duffy's "provincial residence in the province" he represents is more than 100 kilometers from Parliament Hill, and upon appointment he attended the Senate at Ottawa (within 100 kilometers of Parliament Hill) for

the purpose of carrying out his Parliamentary functions as a P.E.I. Senator. Mr. Bayne submits that upon his appointment as Senator from P.E.I., and with a provincial residence in P.E.I., Senator Duffy was on travel status when in Ottawa to do Senate business (just as Senator Tkachuk had authoritatively advised him). Certainly, the contrary has not been proved beyond reasonable doubt.

The Declaration/designation form(s) (Exhibit 1, Tabs 1-6)

[188] Each and every "primary residence declaration" signed by Senator Duffy during the time period set out in the information (Tabs 1-5) is expressly made "for the purpose(s) of the Twenty-Second Report of the Standing Committee on Internal Economy, Budgets and Administration, adopted in the Senate June 18, 1998" and asserts that "the address of my primary residence in the province or territory that I represent is the following: 10 Friendly Lane, Cavendish, P.E.I." Each and every declaration form signed by Senator Duffy is true and in compliance with the existing SARs and the forms created by the Standing Committee. There is no misrepresentation. The form provides that each Senator appointed from a distant Province (i.e. more than 100 kilometer from Parliament Hill) may designate/declare a "primary residence" (which has no required or defined criteria other than that it be in the Province of appointment and more than 100 kilometers from Parliament Hill). There is no prohibited act here, no violation of Senate rules and/or forms. The SARs and declaration forms created a designation system without limiting criteria – except that the primary residence so declared be "in the province or territory that I represent" and 100 kilometers from Parliament Hill. Senator Duffy's open declarations do not violate these limited criteria. There is no inculpatory evidence offered by the Crown of the normative standards of other Senators dealing with these rules and forms (missing "comparator" evidence that Justice Belanger found in *Radwanski*, [2009] O.J. No. 617, made it "impossible" to find a marked and substantial departure for breach of trust). Indeed, Mr. Bayne says that the only evidence before the Court relating to normative standards of other Senators dealing with these rules and forms is exculpatory.

The Twenty-Second Report of the Standing Committee on Internal Economy, June 18, 1998: (Exhibit A Tab 9 and Exhibit 20 Tab 3)

[189] The 22nd Report states the following: "*The Constitution Act 1867*, subsection 23(5) states that a Senator 'shall be resident in the Province for which he is appointed.' This means that Senators whose primary residence is more than 100 kilometers from Parliament Hill incur additional living expenses for which they should be reimbursed when they are in the National Capital Region." The Standing Committee, the important arbiter of the Senate rules and administration, has, 10 years before Senator Duffy's appointment, explicitly linked the concept of "primary residence" with the Constitutional requirement of provincial residence. There is no other definition of or criteria for primary residence. If that constitutionally required provincial residence is more than 100 kilometers from Parliament Hill (and because the Attendance Policy requires Senators to be in Ottawa for Senate Chamber work) then the Senator "should be reimbursed when they are in the National Capital Region." Thus, the forms which Senator Duffy completed (and every other Senator making such primary resi-

dence declarations, a majority of Senators) explicitly link the required declaration to this 22nd Report. These forms expressly require the designation of "the address of my primary residence in the province or territory that I represent." Senator Duffy never violated this criterion. Mr. Bayne submits that Senator Duffy committed no prohibited act, and demonstrated no marked and substantial departure from other Senators' primary residence declarations.

Evidence of Mark Audcent

[190] The Senate Law Clerk, Mark Audcent, was called as a Crown witness. He testified that in his "five minute" chat with Senator Duffy on December 23, 2008, he focused on required attendance in the Senate Chamber (page 41 Evidence of Mark Audcent, April 8, 2015) and the Constitutional importance of residence in the Province of appointment (page 42). He stated in his evidence that Constitutional residence has never been defined (page 43). He further gave evidence that the concepts of "primary" and "secondary" residence are not defined in the SARs nor are criteria created to limit or qualify these concepts (page 44). His evidence was that there is no required criterion of a minimum number of days that a senator must reside in their province (just "some time in the province" page 46) and that the particular provisions of each different statute set out the requirements for "residence" or "primary residence" for that statute, (page 46), depending on the particular statute's purpose and context.

[191] Mr. Audcent agreed that a person's appointment as a Senator changes his/her status from private citizen to Parliamentarian (page 48), and that the provincial residence upon appointment becomes the most constitutionally important (page 50-51), whereas the NCR residence is of no importance constitutionally (page 49 and 51). In respect of the 22nd Report of the Standing Committee, June 18, 1998, Mr. Audcent's evidence was that the Standing Committee, in its report, clearly linked/equated provincial residence with primary residence: "It's – it's clear to me that although they've used the word 'primary here', it's the same meaning as the word 'provincial' elsewhere, yes" (page 58). Mr. Audcent further agreed that the 22nd Report "clearly has linked Provincial Residence with being the primary residence" (page 59). The 22nd report was, Mr. Audcent testified, "the origin and foundational document" for this whole concept of "primary residence" (page 60).

[192] Mr. Audcent further agreed that the governing SARs provisions, having no definition and no criteria for the concept of "primary residence," required no minimum number of days per year of occupancy, no percentage of the year, no all-seasonal occupancy, no particular type of physical structure (page 95-96), no particular provincial health card or driver's license or location of payment of income tax filing as a pre-condition to a valid designation of primary residence (page 99). Mr. Audcent's evidence was that the 1998 22nd Report of the Standing Committee became the effective "policy of 1998" (page 86) and that that policy was reflected in the wording of the declaration/designation forms. Senator Duffy's designation of 10 Friendly Lane, his provincial residence in P.E.I. and his primary residence in P.E.I., as "my primary residence in the province or territory that I represent" is not prohibited by the provisions of the SARs, by the forms or by the "policy" of the 1998 Report. In fact, the designation is perfectly valid under and consistent with the SARs provisions, forms and

1998 policy.

Evidence of other Senate Guideline Documents

[193] The Senator's Living Expenses in the National Capital Region (NCR) Guidelines (Exhibit A Tab 4), given to Senator Duffy on December 23, 2008 by Ms. Proulx (Exhibit A Tab 15c) inform the Senator that in order validly to claim NCR living expenses the Senator "must file" a "declaration designating a primary residence in the province or territory represented by the Senator." A designation system is created, the designation of a "primary residence" which has no required definition or criteria other than that the designation residence be in the province of appointment. "Eligibility" is contingent on the "registered residence" (i.e. the one designated on the form and in the province of appointment) being more than 100 kilometers from Parliament Hill. The "secondary residence in the NCR" has as its sole criterion (where the claim is for private vs rented accommodation) "a proof of ownership." There is no criterion for the designation of a "secondary residence in the NCR" that it must not have been owned prior to appointment, nor any such requirement in the SARs, forms or 1998 "policy." Therefore, designating 47 Morenz Terrace as the secondary, NCR residence violated no policy, guidelines or form.

[194] The Senators' Living Expenses in the National Capital Region (NCR) Procedures (Exhibit A Tab 5) given by Ms. Proulx to Senator Duffy on December 23, 2008 (Exhibit A Tab 15C), like the Guidelines, advise the Senator that to make a valid living expense claim "Senators must file a Declaration of Primary and Secondary Residences form designating a primary residence in the province or territory they represent." There are no definitions or criterion limits qualifying the declaration or the concept of primary residence apart from it being in the province of appointment and more than 100 kilometers from Parliament Hill. For the "secondary residence in the NCR" the only required criterion is proof of ownership that must be filed yearly. Senator Duffy's designation of 10 Friendly Lane as his primary residence in the province of his appointment, being more than 100 kilometers from Parliament Hill and his claim for NCR secondary residence living expenses neither violated nor was prohibited by any provision of the SARs, the forms, the 1998 22nd Report policy, the instructive Guidelines or the Procedures.

[195] The Senators' Resource Guide (Exhibit A Tabs 7A-7F; Exhibit 16 Tab 4) provides, like the Guidelines and Procedures (see Exhibit A Tab 7A page IV-9) that, "To claim living expenses in the NCR, Senators must file and keep up to date, a Declaration of Primary and Secondary Residences form, which designates a primary residence in the province or territory represented by the Senator." Senators who are more than 100 kilometers from their designated primary residence when in Ottawa and who attend the Chamber in Ottawa for the purpose of carrying out their Parliamentary functions are eligible. Mr. Bayne states that Senator Duffy, upon appointment as Senator from P.E.I., clearly represented P.E.I., the province of his appointment, in Ottawa and attended the Senate in Ottawa to do just that. His prime Parliamentary and Constitutional function upon appointment was to represent P.E.I. His primary residence in the province of his appointment was validly designated as was the NCR secondary residence of which he proved the required ownership.

Evidence of Nicole Proulx

[196] Ms. Proulx was called by the Crown. She was the Director of Senate Finance. Although Ms. Proulx disagreed (Evidence of Nicole Proulx, April 27, 2015, page 13) with the findings of KPMG, the independent external auditor of the Senate Financial statements who reported on September 17, 2013 (Exhibit 68) to a finding of "significant deficiency" on the Senate's internal controls : "Senate expense claim policies related to housing allowances and travel expenses were not sufficiently detailed with respect to eligibility and documentation requirements…" she, nevertheless, agreed with the findings of the Deloitte Report (into Senate living expense claims policies and the living expense claims of Senator Duffy): "I agree that there were no definitions, or criterions to establish the primary residence at that time" (page 12). She confirmed this evidence again on April 28, 2005 (page 18-19): there are no SARs definitions of or criteria for primary or secondary residence. In her re-examination evidence to the Crown given November 20, 2015 (page 65), Ms. Proulx stated that "There were no indicators required" of a living expense claim based on a primary residence designation: "…at the time there were no indicators required for policy."

[197] Mr. Bayne contends that a policy having no indicators, relevant definitions or criteria other than that the designated primary residence must be in the province of appointment and more than 100 kilometers from Parliament Hill and that a designated secondary residence must be within 100 kilometers and, owned by the Senator (private accommodation) can hardly be violated by designations meeting those limited criteria. He concludes that there is no prohibited act, no violation of policy, no dishonest misrepresentation, no marked and substantial departure from the conduct set out as appropriate in the policy documents and evidence.

Evidence of Paul Belisle

[198] Mr. Belisle was the Senate Clerk at the time of Senator Duffy's appointment (responsible as "the head of the Senate administration" for the "good administration of the Senate": Exhibit A Tab 2 pages 2-9 and 2-10) and was present at the December 23, 2008, welcome session. He had only a "vague" recall of that session (Evidence of Mr. Belisle, June 5, 2015, pages 4, 8 & 9). He could not recall if the SARs had any definition or criteria for primary residence (page 12). He could not recall the wording of the declaration form (page 12) and did not know if he ever even saw the declaration form (pages 13-14).

Evidence of Speaker George Furey

[199] Senator Furey is the newly appointed Senate Speaker and a former Chair (2004-10) and Vice-Chair (2010-15) of the Internal Economy Committee.

[200] Mr. Bayne did not take kindly to Speaker Furey's evidence and respectfully submitted that Senator Furey gave unreasonable, simplistic evidence inconsistent with the clear provisions of the SARs; evidence that was internally inconsistent; evidence that revealed a lack of real knowledge both of policy and actual practice (especially given his formal title);

evidence that waffled and obfuscated rather than giving a direct answer; evidence that contained gratuitous personal opinion and evidence that unreasonably rejected the findings of independent, professional, external auditors.

[201] Mr. Bayne stressed that in respect of Counts 1 and 2, rather than accepting the findings of the Deloitte report and the KPMG report, both of which were consistent in their findings with, and corroborated by the 11th Report of the Standing Committee of which Senator Furey was part, Senator Furey stated that there was no need to define or establish criteria for the term "primary residence" as it appears in the declaration form because "I've always felt" that "it was self-explanatory" (Evidence of George Furey, December 7, 2005, page 37). Senator Furey's personal "feeling" is inconsistent with reason, with the independent, external audits of two separate professional audit firms and with the 22nd Report (1998) and the 11th Report (2010) of the Internal Economy Committee, his own Committee reports. Moreover, it pointedly ignores the express wording of the declaration form (Exhibit 1, Tabs 1-6) that requires that it be the "primary residence in the province or territory that I represent" and "more than 100 kilometers from Parliament Hill." Mr. Bayne asserts that the only thing "self-explanatory" about that is that the required criteria for "primary residence" are, one, that it be located in the province of appointment and, two, more than 100 kilometers from Parliament Hill. Beyond that, no definition or criteria are set out or are "self-explanatory."

[202] As set out in the next section, 'primary residence', 'principal residence' and 'residence' are terms that take the meanings assigned them by their respecting enabling statutes or regulations, and their meaning, definitions and required criteria differ widely from statute to statute. In the 11th Report (Exhibit A Tab 20), the Standing Committee of which Senator Furey was a part, finds and reports publicly that "some administrative policies were outdated, inadequate or non-existent" as well as "poorly communicated and/or not well understood by users" (page 3). The Deloitte and KPMG Reports, independent of each other and of the 11th Report, identify the living expense provisions as a policy that is, in the words of the 11th Report, "inadequate" or "non-existent." Deloitte reported (see pages 31-32 of Senator Furey's Evidence) that owing to a lack of clear definition and "criteria for determining primary residence" in the Senate policy documents, Deloitte could not find that Senator Duffy's primary residence declarations and NCR expense claims were (even administratively, much less criminally) inappropriate, the very purpose of the Deloitte mandate (Exhibit 67: "assess the appropriateness of related claims"). The Deloitte report was commissioned by Senator Furey's Standing Committee (see Exhibit 45B Tab 11) because it was in the "overarching public interest" to have "an independent external review and opinion" that would avoid Senators passing judgement on themselves and their own policies (exactly what Senator Furey purports to do) and that promotes "the public's trust and confidence in Parliament." Deloitte found the primary residence provisions to be inadequate and/or non-existent in terms of definition and meaningful criteria. Yet, Senator Furey rejects the independent, professional audit findings in favour of his personal, unreasonable "feeling." Similarly, he rejects the conclusion of KPMG, the professional auditor who reported to the Senate September 17th, 2013, that "a significant deficiency" existed in Senate controls, namely "Senate expense claim policies related to housing allowances and travel expenses were not sufficiently detailed with

respect to eligibility and documentation requirements." Like the Deloitte finding, this is an independent, professional finding of inadequate policy.

[203] Mr. Bayne states that in rejecting both Deloitte and KPMG, Senator Furey also ignores the finding of his own Committee relating to "outdated, inadequate or non-existent" Senate administrative policies and opts instead, unreasonably, for a personal "feeling." Senator Furey's "feeling" is also inconsistent with his own Committee's report in 1998 that explicitly linked primary residence with the provincial residence, a linkage that Mr. Audcent described as having "equated" the two: "the word 'primary' here, it's the same meaning as the word 'provincial' elsewhere." Mr. Bayne points out that, of course, Senator Furey's position that the term needs no definition or criteria as it is "self-explanatory" serves conveniently to absolve him of any responsibility for failing to ensure, as Chair of Internal Economy, "appropriate policies," his SARs duty (Exhibit A Tab 2 pages 2-3). In sum, the Defence submits that the evidence of Senator Furey does not assist the Crown in proving the *actus reus* of fraud or breach of trust but rather it embarrasses such a case.

[204] I am of the view that when Speaker Furey gave his evidence regarding the meaning of primary residence he was expressing his personal views. I do not view Speaker Furey's evidence as an attempt to absolve himself for any failure of his duty under SARs and to suggest otherwise is unfair.

Evidence of Other Statutory Provisions (Exhibit 9) Relating to Definitions of Residence

[205] The concepts of "residence", "primary residence" and "principal residence" are defined differently among different statutes in terms of their required criteria (or lack of criteria), depending upon the differing purposes and contexts of the statutes. Exhibit 9 demonstrates this and the evidence of Mr. Audcent is consistent with this proposition. For example:

- "permanent residency" under *IRPA* (*Immigration and Refugee Protection* Act) SC 2001, c 27, s 28 has a 730 day (within 5 years) physical presence requirement (Exhibit 9 Tab 1);

- "resident" for the P.E.I. *Adoption Act*, RSPEI 1988, c A-4, s 1 means "ordinarily resident in the Province" (Exhibit 9 Tab 2);

- "resident" for the P.E.I. *Highway Traffic Act*, RSPEI 1988, c H-5, s 14 means lives in PEI more than 120 days per year (unless attending school or working in the province) (Exhibit 9 Tab 3);

- For the P.E.I. *Lands Protection Act*, RSPEI 1988, c L-5, s 1 a "resident" is one who resides in PEI for 183 days or more per year (Exhibit 9 Tab 4) (see also Exhibit 9 Tab 8);

- "principal residence" for the P.E.I. *Real Property Act*, RSPEI 1988, c R-5, s 14 means real property occupied for more than 6 months (Exhibit 9 Tab 5);

- "residence" for the PEI *Securities Act,* RSPEI 1988, c L-5, s 1 includes permanent or temporary residence in a building (Exhibit 9 Tab 6);

- a "mobile home" is prescribed as a class of residential property under the Nova Scotia *Assessment Act, Residential and Resource Property Tax Assessment Regulations,* NS Reg 219/2004, c 23, s 8 (Exhibit 9 Tab 9).

Income Tax Act and Folio (Exhibit 111)

[206] The *Income Tax Act* graphically demonstrates the propositions set out above. The *Act* creates, like the SARs, a designation system (page 6/43). The *Income Tax Act* provides criteria for the designation of a "principal residence" (which affords a taxpayer a capital gains tax-free gain on sale). The criteria are ownership (page 2/43) and "ordinary inhabitation" (page 5/43) which means "even if a person inhabits a housing unit for only a short period of time in the year, this is sufficient for the housing unit to be considered "ordinarily inhabited." The "principal residence," to qualify, may be a house, apartment, cottage, mobile home, trailer or houseboat (page 5/43). "Principal residence," its definition and criteria, under the *Income Tax Act* differs markedly from the "principal residence" definition and criteria as set out above in the P.E.I. *Real Property Act* and is a function of the purpose and context of the *Act*.

Significance of Definitions or Lack of Same

[207] According to Mr. Bayne, the point is that there is no standard or "self-explanatory" universal meaning, definition, content or criteria for terms and concepts such as residence, primary residence, principal residence, and secondary residence. Meanings, definitions, content and criteria vary widely from statute to statute. Mr. Bayne concludes that primary residence is not, in law, a matter of "common sense" as the Crown asserted in its opening, nor could it be, since what appears subjectively to one person's common sense may appear to another to be nonsensical. It is up to the governing legislation or administrative rules to define and establish the required criteria for given concepts such as "primary" and/or "secondary" residence. The SARs and related guideline documents created only as the criteria for "primary residence," that that residence be in the province of appointment and more than 100 kilometers from Parliament Hill; for "secondary residence" they created only that it not be the provincial residence, that it be within 100 kilometers of Parliament Hill (in the NCR) and that it be owned (if private accommodation). Senator Duffy's designations and living expense claims violate none of these administrative provisions.

Subsequent change in policy and form(s)

[208] Commencing in April, 2013 and applicable in the 2013-14 fiscal year (see Exhibit 1 Tab 6), a period after the impugned residency declarations and expense claims, the policy of the 22nd Report was amended by that of the "Nineteenth Report of the Standing Committee" dated February 28, 2013. The declaration form pursuant to this Nineteenth Report now requires additional criteria to establish primary residence, namely the production of a driver's

license, health card and proof of location of filing one's income tax return (Exhibit 1 Tab 6), none of which had previously been required criteria. Mr. Bayne submits that the *ex post facto* addition/imposition of these 3 specific criteria or indicators of primary residence is cogent, explicit evidence that they were not previously required. That Senator Duffy (and other Senators) in previous years may not have had all these documents from the province of designated primary residence is irrelevant to the criteria that were then specifically required.

The 'new' Travel Policy (Exhibit A Tab 6)

[209] The Standing Committee on Internal Economy created the Senators' Travel Policy June 5, 2012. For the first time since the 22nd Report in 1998, some (albeit limited) content or definition was provided for the concept of primary residence: "Primary residence means the residence identified by the Senator as his/her main residence and is situated in the province or territory represented by the Senator" (page 5). Apart from the fact that this new policy post-dated the fiscal years under consideration (the 2012-13 fiscal year designation covered the period commencing April 1, 2012) and leaving aside for the moment the very serious issue of lack of proof of effective communication of this new policy and its provisions to Senators, Mr. Bayne submits that Senator Duffy's designations of primary residence all meet even the new definition. There is no doubt that upon appointment as a Senator from P.E.I. in 2009, the P.E.I. residence (10 Friendly Lane) was/is the residence of prime constitutional importance. Mr. Audcent's evidence confirms this. "Main" is not otherwise defined and means simply, therefore, most important. Senator Duffy's most important residence as a P.E.I. Senator was 10 Friendly Lane. It was his constitutional anchor as a Senator. Mr. Audcent stated that the NCR residence was of no importance constitutionally to a Senator. The travel policy also requires (as did the 1998 22nd Report and the Guidelines and Resource Guide) that the primary residence be "in the province or territory represented by the Senator." In the Defence submissions, 10 Friendly Lane fits both criteria. The Kanata bungalow fits neither.

Evidence of no marked and substantial departure from the standards of conduct of other Senators dealing with Senate rules and policies concerning primary residence declarations and NCR living expense claims

[210] Mr. Bayne says that the Crown has failed to adduce any cogent evidence that the vast majority of other Senators (most of whom did make such declarations and NCR living expense claims) consistently read, understood and applied the SARs and other guidelines documents differently from Senator Duffy to make their respective declarations and NCR expense claims or that they uniformly spent a certain amount of time in their provincial/permanent versus the NCR residence. Justice Belanger in *Radwanski, supra,* aptly noted that such an omission in the "comparator" evidence made it impossible to find a breach beyond reasonable doubt of the marked and substantial departure standard required for proof of the *actus reus* of breach of trust. The Defence submits that there is, however, evidence in the record of the trial that suggests just the opposite. Senator Duffy's understanding of the SARs and his primary residence designation and NCR living expense claims were not a marked departure from other Senators at all:

1. The amount or nature of his claims were not unusual among Senators: Exhibit 30 demonstrates that Senator Duffy's claims were entirely within the normal range among all Senators – 20% of Senators claim in greater amounts; in addition Ms. Proulx's evidence (April 28, 2015, pages 24-26) demonstrates that Senator Duffy's living expense claim amounts (and amounts for travel and office expenses) are not "inappropriate or out of line" with other Senators;

2. Exhibit 45A (the Chronological Emails) at page 3, in emails #6 and #7 demonstrate that the Chief of Staff to the Prime Minister, confronted with newspaper insinuations about Senator Duffy's living expense claims, looked into the matter and stated: "I am told that you have complied with all the applicable rules and that there would be several Senators with similar arrangements." The Chief of Staff gave evidence that he did his own analysis of the SARs concerning designation of primary residence and NCR living expense claims and concluded that Senator Duffy's designations and NCR expense claims, far from being a marked and substantial departure from appropriate conduct under the rules, were in fact most probably all within the existing rules: "he certainly had a case on the, on those rules about his principal residence being the one in Cavendish" (August 13, 2015 page 29);

3. Senator Tkachuk was Chair of the Internal Economy when, on December 3rd, 2012 (Exhibit 45B Tab 1) he is reported to have stated in response to the newspaper story about Senator Duffy's primary residence designation and related NCR living expense claims that Senate "Duffy's expenses are entirely within the rules." Senator Tkachuk, who would know, stated that many Senators who own homes in Ottawa make similar claims for housing expenses – "A lot of Senators stay here all winter long and then they go home for the summer." These publicly reported statements have never been refuted. There is no evidence adduced by the Crown to the contrary of these statements or demonstrating any marked and substantial departure;

4. It is entirely reasonable to conclude, given Senator Tkachuk's January 7, 2009 advice to Senator Duffy (that Senator Duffy's primary residence declarations were valid, that Senator Duffy was on travel status when in Ottawa as the Senator representing P.E.I., and that Senator Duffy's secondary/NCR living expenses claims were valid and within the rules), that such advice was given also to other Senators by Senator Tkachuk in his capacity as caucus "guru", dispensing advice. Amount of time spent was not for Senator Tkachuk a criterion for valid primary residence declaration within the SARs: "A lot of Senators stay here all winter long and then they go home for the summer." "Many senators who own homes in Ottawa make similar claims for housing expenses."

5. Exhibit 82 is a March 7, 2013 memo from Senator John Wallace to Senator Carolyn Stewart-Olsen, a member of the 3-person executive Steering Commit-

tee of the Standing Committee on Internal Economy. The memo contents speak eloquently to the proposition that Senator Duffy's primary residence declarations and NCR living expense claims were within the existing rules and not at all a marked and substantial departure from what they provide for all Senators. Exhibit 82 is evidence that other Senators, like John Wallace, understood the rules and the conduct pursuant to them, just as did Senator Duffy;

6. Exhibit A, Tab 20 (the 11th Report of the Standing Committee on Internal Economy) provides evidence that a "recurring issue" in the Senate was that "in certain instances, policies were poorly communicated and/or not well understood by users" (pages 2-3). "Users" included Senators; "living expenses were identified as a subject of the audit report. There is no cogent inculpatory evidence that the vast majority of Senators' conduct in respect of the SARs provisions and primary residence declarations/NCR expense claims differed markedly and substantially from Senator Duffy's; there is evidence in Exhibit A Tab 20, however, that a recurring issue that affected the entire Senate (all Senators) was not well understood policy. If policy is not well understood how can the conduct pursuant to it be held to any given standard?

[211] Mr. Bayne submits that the Crown has failed to prove, on all the evidence, either the *actus reus* or *mens rea* of fraud or breach of trust, beyond any reasonable doubt, and that Senator Duffy should be found not guilty of these criminal charges.

Conclusion

[212] I do not intend to repeat the very able arguments of counsel as part of my conclusions but rather highlight some of the more salient points.

[213] Senator Duffy has had a lifelong connection with his native Prince Edward Island and had a settled intention to make his residence at 10 Friendly Lane his permanent residence upon his retirement from broadcasting. Upon his appointment to the Senate as a Senator from P.E.I., Senator Duffy's long- term plan was moved forward and his permanent residence, his primary residence, his residence of primary constitutional importance was 10 Friendly Lane.

[214] However, with his appointment, issues surrounding his residency status and his right to even sit as a Senator from P.E.I. came to the fore. Senator Duffy did not ignore the gathering storm around his appointment. He immediately sought out reassurance about these issues and was assured that he did not have any valid concerns. I find that Senator Duffy honestly and reasonably believed and relied on the advice he received regarding his appointment and his primary residency and he acted upon it.

[215] Mr. Holmes suggested that I be very careful as to Senator Duffy's portrayal of the advice he received from various individuals. It would seem to me that I only have the straight forward evidence of Senator Duffy about the advice that he had received from vari-

ous people whom he had identified. Surely, if the Crown had wanted me to carefully examine this evidence, some of these advisors could have been called to lay a foundation for increased scrutiny.

[216] The controversy surrounding the issue of residency resulted in Mr. Mc Creery's preparing a memo dated January 6th, 2009. Senator Duffy was one of the recipients of this memo. I find this memo illustrates the confusion over the whole residency issue. Mr. Audcent, describes the document as legally incorrect but he couldn't say if it was correct from a political point of view.

[217] Although Mr. Holmes considered the completion of the declarations of primary residence by Senator Duffy to be inaccurate but benign, he took a much different view regarding the living expenses being claimed by Senator Duffy based on his inaccurate claim of primary residence.

[218] Mr. Holmes had no difficulty declaring Senator Duffy's primary residence to be in Kanata, Ontario assisted by Mr. Audcent's indicators and opinion as to what constitutes a primary residence and bolstered by the decision in *Thomson, supra,* which dealt with the meaning of ordinarily resident under the *Income Tax Act* and the definition of primary place of residence as defined under the *Health Insurance Act (Ont.).*

[219] It is interesting that Mr. Holmes was lured into the definition web regarding various definitions of residency when he was so critical of Mr. Bayne's dalliance with definitions.

[220] One must always keep in mind that when various statutes define terms that are residency related, such definitions are statute specific.

[221] The search for the meaning of primary residence here is hampered because there was in fact no definition in place at the time in the Senate Administration Rules.

[222] I suppose the closest we get to what a primary residence is in the primary declaration itself and it reads that "the address of my primary residence in the province or territory that I represent is the following: ……:"

[223] As the years have gone by, the number of documents that must accompany the primary declaration document has grown and references regarding secondary residences have been added and fleshed out. However, there does not appear to be any definition of primary residence.

[224] After reviewing the submissions and the facts in this case, I am not satisfied that the Crown has proven the guilt of Senator Duffy in relation to alleged fraudulent residency declarations and/or expense claims in connection thereto beyond a reasonable doubt and accordingly, and accordingly, Counts 1 and 2 are hereby dismissed.

EXPENSES RELATING TO TRAVEL EXPENSE CLAIMS – COUNTS 3 to 20

Crown's Position on Travel Expense Claims

[225] Mr. Holmes commenced his written submissions on travel expense claims by addressing some general principles and procedures that impact on the counts before the court.

Senate Administration Principles

[226] From the testimony at the trial and the review of various Senate policy instruments, Mr. Holmes observed that the following points emerge:

(i) "Parliamentary functions" are very broadly defined;

(ii) Partisan activity is expressly recognized as part of the work;

(iii) Senators enjoy wide latitude to travel and engage in other activities in the fulfillment of their parliamentary functions;

(iv) Senators have unilateral authority in the selection of contractors, assignment of tasks, and designation of projects;

(v) Hiring decisions are entirely within discretion of the Senators; and

(vi) There is a compensatory scheme in place in respect of costs associated with the discharge of "parliamentary functions".

[227] The Crown noted that the aforementioned principles have limitations and restrictions:

(i) There is an overriding expectation, indeed a "presumption" that Senators would behave honourably in respect of their administrative functions: Division 1:00, Chap. 1:02, s.4 (SARs, 2009, Exhibit 20, Tab 1 – A, p. 1-6);

(ii) No Senate resources can be used in respect of a Senator's "private business interests" or while "attending to one's private concerns";

(iii) While stated less explicitly, Senate resources cannot be used for non-Parliamentary partisan activity;

(iv) All travel costs and entitlements have to be reasonable. This is obvious in the case of Parliamentarians charged with upholding a public trust. It is also set out in Division 4; Chap 4.03, s. 10. [SARs, 2009, Exhibit 20, Tab 1-A, p.4-13] that says:

> "No person shall cause the Senate to pay or reimburse a cost under this chapter unless the cost was actually incurred, reasonable and author-

ized…;"

(v) There is an expectation that Senators will exhibit financial prudence in connection with travel. Once again, this is a self-evident principle given their overarching role to promote the public interest. It is set out in Division 4, Chap 4:03, s.19 [SARS, 2009, Exhibit 20, Tab 1-A, p. 4-16] as follows:

> "Subject to the need to fulfil their parliamentary functions and to obtain reasonable comfort and convenience, a person shall exercise due economy in the selection of travel options."

(vi) The existing policy framework declares it to be perfectly acceptable for a Senator to receive some incidental personal advantage in the course of discharging their parliamentary functions. The incidental personal use doctrine applies to benefits or advantages that are derivative or ancillary to the predominant or main purpose for which the cost is incurred. No other interpretation is possible without rendering the concept of "incidental use" meaningless. The further restriction on the applicability of this principle is that the incidental benefit cannot give rise to any additional costs to the Senate. Division 3:00, Chap 3:01, s.7 [SARs 2009, Exhibit 20, Tab 1-A, p.3-2] provides:

> "A person may use a Senate resource for personal purposes where such use is minor, customary and reasonable and does not give rise to a direct cost to the Senate or to a Senate expenditure".

[228] Mr. Holmes stated that while it is true that Senators enjoy a broad discretion; they do not enjoy limitless discretion. There also are limits imposed on the sort of expenses that are properly billed back to the Senate. There is a system of checks and balances imposing responsibilities on all parties, most notably the Senator himself or herself who has the most detailed and intimate knowledge of the underlying purpose of the expenses. Distilled to their essential components the processes are neither arduous nor complicated.

The use of pre-signed forms

[229] The Crown notes that the practice of relying on pre-signed forms reflects on personal integrity and therefore credibility. It is a "poor practice" according to Speaker George Furey. Mr. Holmes contends that each pre-signed claims form is a fraud in its own right. Senate Finance rely on the information contained in those forms. Maggie Bourgeau explained what a Senator's certification at the bottom of the form meant to her: it meant that the Senator had reviewed the contents of the form and agreed that the basis for the claim was correct and therefore, it was ready to be processed. The staff in Senate Finance rely on the Senator's certification. Mr. Holmes concludes that in the case of many (quite possibly most) of Senator Duffy's claims the Senate Finance staff was actively deceived.

[230] Although it is clear that Senator Duffy engaged in this practice with regularity, no one can say with any certainly which of the claims were pre-signed and whether any of the

pre-signed forms appear in Exhibit 6A. For this reason, Mr. Holmes contends that Senator Duffy is insulated from liability for the specific line by line entries included in the claims forms.

[231] The Crown takes the position that Senator Duffy's practice of pre-signing forms is unethical and undermines his oft-repeated assertion that he conducted himself openly, transparently and honestly.

[232] The travel expense claims forms read in part:

> "I certify that the foregoing expenditures have been incurred by me on parliamentary functions, as defined in the Senate Administrative Rules"
>
> and
>
> "I hereby certify that these charges are in accordance with the Senate Administrative Rules"

[233] The stated reason for Senator Duffy's reliance on pre-signed forms was a concern that he would exceed the 60 day deadline in filing his claim. Mr. Holmes questioned whether there is any basis in reality for Senator Duffy's concern about exceeding the 60 day limit for the filing of claims. There does not appear to be any period of time where Senator Duffy is away from Ottawa for 60 consecutive days. Furthermore, on the only occasion where Senator Duffy did exceed the 60 day time limit (in 2011), the claim was processed in the ordinary course.

[234] Melanie Mercer (Vos), Senator Duffy's Executive Assistant, said that she learned the practice of pre-certifying travel expense claims forms from Loren Cicchini and Gillian Rokosh. Both women worked for other Senators at the time and had not been asked to engage in any training on behalf of Senate administration. Ms. Cicchini agreed that on limited occasions she relied on pre-signed forms but even then ensured that the Senator verified the accuracy of the claim by double-checking it after the fact. Mr. Holmes concluded that, "One can only imagine that if Ms. Cicchini had provided counsel to Ms. Mercer in respect of the practice, she would also have included the part about the need to verify the accuracy of the claim with the Senator following [before its submission to Senate Finance]."

[235] I am not inclined to speculate on what Ms. Cicchini may have told Melanie Mercer (Vos).

[236] Ms. Rokosh denied using pre-signed claims forms.

[237] Mr. Holmes stated that Diane Scharf, Senator Duffy's replacement Executive Assistant, fully embraced the deceptive, unethical and illegal practice of relying upon pre-signed forms. Ms. Scharf said the practice was widespread, although did not specify how she knows this, and her work for Senator Duffy represented her first work in the Senate. Whether this is true or not, Mr. Holmes contends that it doesn't make the practice appropri-

ate. The use of pre-signed forms had the effect of eliminating any independent review by Senator Duffy of his claims, and it undermined efforts by finance officials to make sure the claims were appropriate. Quite naturally, Ms. Bourgeau relied on Senator Duffy's expense claims as having his attestation of accuracy and propriety when in most cases he hadn't signed off on the claims at all.

[238] I found Ms. Scharf to be a very credible, experienced and straight forward witness and not a witness who engages in deceptive, unethical or illegal practices.

[239] I also find that the use of pre-signed travel claims forms was not an uncommon practice on Parliament Hill.

[240] The argument might be made that the use of a pre-signed form has certain efficiency and convenience components and therefore meets the needs of individuals that travel with some frequency. Once the trip is completed, the receipts are forwarded to the preparer of the travel claims form for entry and then the documentation is submitted for payment. Regardless of how common the practice was, I agree that the use of pre-signed blank travel forms is not a good business practice. It increases the chance of errors being made and not being detected.

[241] I note that Senator Duffy did not restrict himself to just signing travel claims in blank. He also was in the habit of leaving signed, blank personal cheques with his Executive Assistants to facilitate the payment of his personal Senate-related charges that would arise from time to time during his absences from Parliament Hill. Again, this practice can be viewed as risky and ill-advised.

[242] However, I do not find that Senator Duffy possessed any sinister motive or design when he made use of signed blank travel claims. Nor do I consider Senator Duffy's use of them a negative reflection on his integrity or credibility.

Proof that Senator Duffy was directly responsible for the expense claims in Exhibit 6A

[243] The Crown expressed concern that given Senator Duffy's reliance on the "corrupt practice" of using pre-signed forms how can we be certain that he had a direct role to play in the claims in Exhibit 6A which are referred to in counts 3 to 20 in the information?

[244] Mr. Holmes created a chart that set out the documents that Senator Duffy had to have supplied to his Executive Assistants to support the claims that were made. In each case these are materials that only he would have received; boarding passes and gas receipts, for example.

[245] Melanie Mercer (Vos) and Diane Scharf both testified about the process by which they processed Senator Duffy's travel claims. Senator Duffy would leave the original supporting documents with them and they would determine the basis for his travel from information in the Senator's Lotus organizer to which they also had access. Senator Duffy likewise verified this process in his testimony.

THE CROWN'S OVERVIEW ON THE FIRST EIGHT TRAVEL CLAIMS (COUNTS 3 – 18)

[246] The following chart prepared by Crown Counsel shows the key characteristics of the first eight claims contained in Exhibit 6A. The tabs contained in Exhibit 6A contain claims forms and also the supporting documents that were submitted in connection with Senator Duffy's claims. As well, there are business records from McCord Travel that disclose when the travel was booked.

Claim # Count #	Date	Justification per claim	What diary says	What the evidence reveals	When the travel booked
T64-06754 [3/4]	19 June 2009	Peterborough "Speaking Engagement – Senate Business" $1234.20	PA "personal appearance?" "public appearance" reference to meeting "Kyung B. Lee" Korean Human Rights advocate who was actually at Devolin's event (chance encounter)	Party fundraisers, Peterborough later Lindsay	19 May 2009
T64-06755 [5/6]	21-26 June 2009	"series of speaking engagements – Senate business" $15,046.22	"John Duncan" "meet vets reps on pension"	One meeting with veterans' rights representatives??? during a six day trip where Duffy was engaged in partisan political activity; Party fundraiser in British Columbia	12 May 2009
T64-06774 [7/8]	5-8 Sept 2009	"Senate Business" $7,905.50	Meet Sean at 4 Seasons, attend Miranda's play at Jerico Playhouse. Only possible "hook" cancelled attendance at "Sananich Fair with Hon. Gary Lunn". Lunn says Duffy never attended although the event took place. "Gavin drives Heather and Janey to hike Grouse Mountain"	Family trip to B.C.	1 September 2009
T64-06798 [9/10]	2-3 July 2010	"Public business – meet local officials on broadcasting issues" $698.58	PA Cdn Kennell Club show and luncheon [otherwise no reference to support stipulated purpose of the trip]	Following loss of family pet, travel to dog show to look into a replacement?	Car trip, no flights booked, submitted invoice for gas
T64-09996 [11/12]	9-12 Dec 2010	"Senate Business -- Speaking engagement and meetings" $10,652.19	Mostly entries pertaining to birth of baby, visits in hospital: stipulated purpose of trip: fundraiser for Cockrell House. Diary suggests that at best he	Family trip to BC – travel coincides with C section, daughter Miranda gives birth [son = Colin?, partner = Sean?]	2 December 2010

			arrived late. Arrangements for his speaking engagement made 7-10 days prior to event. [DeSouza] The flight was also booked a week in advance around Miranda's due date: 1 Dec		
T64-18674 [13/14]	30 Dec 2011 to 5 Jan 2012	"Senate Business" $4464.06	Taxis and travel, celebrate New Years, 1 Jan: "hang out at Jane & Gavs", Jan 2 "haircut and shopping", Jan 3 lunch at Yacht club, Jan 4 "breakfast with kids" return to Ottawa	single lunch meeting (of dubious significance) in what was otherwise a family visit	8 November 2011
T64-20139 [15/16]	9/10 July 2012	"Medical appointment with specialist in Ottawa" $3025.78	Medical appointment Heather, MD SunTV interview Ezra Levant	Claim denied, then resubmitted as "community event"	5 July 2012
T64-20671 [17/18]	11-13 Sept 2012	"Speaking engagement – Senate business" $3,142.48	Speaking appearance – for which MD paid $10,000 + Heather Duffy medical appointments BOMA	Not senate business. Speaking engagement for which he received compensation through Mike Duffy Media Services Inc.	Contracted for speech in January 2012; travel booked 26 June 2012

Expenses relating to non-Parliamentary partisan activities (Counts 3 - 6)

[247] Mr. Holmes stated that the testimony heard in this trial clearly revealed that Senator Duffy was engaged in non-parliamentary partisan activities in respect of his travels on June 19th and 20th, 2009. The Crown's summary of the facts surrounding these charges is to be found after the reproduction of counts 3 and 4.

[248] Likewise, Mr. Holmes suggested that Senator Duffy's west coast travel from June 21st to 30th, 2009 was directed toward non-parliamentary partisan political activities. A Crown's summary of the facts surrounding these charges is to be found after the reproduction of counts 5 and 6.

[249] The Crown notes that in his testimony Senator Duffy agreed that given the minority government situation following the 2008 general election all candidates were effectively in "election mode". (See 17 December 2015 at pp. 74-75) Senator Duffy was clear that the principal reason that he was appointed to the Senate was to provide "third party validation" for the Prime Minister in his quest for a majority government. His job was to expand the base of the Conservative Party.

[250] Mr. Holmes concedes that the Senate is a partisan institution and that Senator Duffy is perfectly free to engage in partisan activity. However, he contends that it is inappropriate for a Senator to make a claim for certain expenses associated with that sort of activity. To support this position, Mr. Holmes makes reference to the introductory letter Senator Duffy received from Nicole Proulx wherein she wrote:

> "Senate resources may not be used for partisan matters that are non-parliamentary in nature such as nomination campaigns or election campaigns."

[251] Senator (now Speaker) George Furey was the Chair of the Internal Economy Committee from October 2004 until March 2010. In his testimony he distinguished, simply and effectively, the difference between parliamentary partisan activity (for example caucus activity, wherever undertaken) and non-parliamentary partisan activity (for example "working for the election of a Member of Parliament".) Senate resources may be used for the former; but not the latter.

[252] Mr. Holmes stressed that it would be inappropriate to dismiss Senator Furey's comments as a matter of his personal opinion. Crown Counsel pointed out that Senator Furey appeared in court as the embodiment of the Internal Economy Committee. I find that this characterization might be a bit of an overstatement.

[253] The scope of authority of that Committee is prescribed by law. In respect of the powers of the Internal Economy Committee the *Parliament of Canada Act* provides as follows:

> Exclusive authority
>
> **19.6** (1) The Committee has the exclusive authority to determine whether any previous, current or proposed use by a senator of any funds, goods, services or premises made available to that senator for the carrying out of parliamentary functions is or was proper, given the discharge of the parliamentary functions of senators, including whether any such use is or was proper having regard to the intent and purposes of the regulations made under subsection 19.5(1).
>
> Senator may apply
>
> (2) Any senator may apply to the Committee for an opinion with respect to any use by that senator of any funds, goods, services or premises referred to in subsection (1).

[254] The Crown takes the view that on the totality of the evidence it is reasonable to infer that Senator Duffy appreciated the difference between parliamentary and non-parliamentary partisan activity.

[255] Mr. Holmes suggests that the MPs and candidates who invited Senator Duffy to attend their events seemed to appreciate the difference. More than one referred to attendance at their event to be ancillary to other business that would have the Senator come to B.C. Mr. Duncan testified that Duffy's attendance would be contingent upon him "tying it to some other event on Vancouver Island". In describing how arrangements are made to secure guest speaker for events, Mr. Cannan spoke about the need to maximize a guest speaker's itinerary and stated that; "they don't come specifically for the EDA event". Michael Lauer who testified in respect of Senator Duffy's attendance at the fundraising event in the Yukon testified

that Senator Duffy attended at Senator Lang's invitation and was "already on the west coast on government business".

[256] It is proposed that this evidence is in perfect harmony with the testimony of Speaker George Furey who, in response to a question about attending a fund-raising event incidental to "legitimate travel for [a] parliamentary function" said: "If there was no expense incurred and it wasn't a primary purpose of the travel, it, it would be fine." (Transcript of Speaker Furey 7 December 2015 at p. 39)

[257] Senator Duffy's hotel costs were consistently paid by the EDAs for whom he appeared, begging the question: if the events were part of his parliamentary duties, why wouldn't Senator Duffy bill the accommodation costs back to the Senate as well? This might have been an excellent question to be put to Senator Duffy in cross-examination.

[258] Mr. Holmes pointed out that Senator Duffy said that he questioned Senator Tkachuk about his expenses in connection with his role to do the Prime Minister's bidding and broaden the base of the Conservative party in anticipation of the next general election. The Crown suggested that in effect, this discussion showed that Senator Duffy had questions about his expenses.

[259] It would seem to me that Senator Duffy sought clarification on this point and received certain advice that he acted upon.

[260] Mr. Holmes reminded the court that although Senator Duffy and other newly appointed Senators had been advised that representatives from Senate finance and HR were available to answer questions regarding expenses and other matters, Senator Duffy elected to approach Senator Tkachuk in an informal way, following a meeting. Senator Duffy's evidence on this discussion is as follows: (Transcript of Senator Duffy's Evidence on 9 December 2015)

> Well, he knew, as did the rest of the Senate Leadership, that Pam and I, and Patrick, and to a degree, Nancy Greene, had been recruited to try and expand the pool of accessible voters and provide third party validation for the Prime Minister in his quest to get a majority. And so, he said, "I know you're going to be on the road."
>
> And I said, "Well, how much of this is the party going to pay for, and how much of it is the Senate going to pay for?" And he said, "When you are on the road, you're doing public business. You're meeting with mayors, you're meeting with councillors, you're meeting with local officials, it's all under the rules, it's all – a Senator is always on. The Senate doesn't disappear during election times. The Senator is always a Senator. And whenever you're out in the public, you're on duty, and Senate resources are provided for that, because as it says in the SARs, partisan activity is an inherent and essential part of being a Senator.
>
> Q. So did that include partisan activities as well?

A. Yes. Except, for the only – the exceptions that are in the SARs, which are during a federal election campaign, during a nomination race, on behalf of a particular candidate, and you cannot donate public money to a Political Party.

[261] Mr. Holmes put forward the proposition that from the passage above, even assuming that the brief exchange almost seven years earlier unfolded just as Senator Duffy says it did, it is unclear that Senator Tkachuk knew precisely what question he was being asked to answer. The passage above begins with Senator Duffy's contention that Senator Tkachuk has some prior understanding of the nature of Senator Duffy's assignment from the Prime Minister. There's no reason to necessarily believe that Senator Duffy was in a position different from any other Senator. What is significant is that Senator Duffy knew that there was a problem passing his expenses for partisan "friend-raising" along to the Senate.

[262] Mr. Holmes suggests that on the basis of an informal chat (Senator Tkachuk was the Conservative leader on the Internal Economy Committee, but he was not providing any ruling or opinion in his formal capacity), in a highly partisan environment, Senator Tkachuk provided information that didn't differ from the position articulated by Speaker Furey in court. Yet, according to Senator Duffy, his inquiry concerning the apportionment of expenses between the Senate and the Conservative party prompted the response that all of the expenses were legitimately passed on to the Senate (and consequently the tax payers). Mr. Holmes submits that this answer is nonsense, particularly for someone like Senator Tkachuk who was himself a member of the Internal Economy Committee. It does not accord with the perspective advocated by Senate administration or Senator Furey.

[263] Furthermore, it is objectively unreasonable: essentially all expenses may be submitted for compensation because a "Senator is always on". Employing language referable to the legal concept of wilful blindness, Mr. Holmes maintains that Senator Duffy's suspicions could not possibly have been resolved by the brief, informal discussion with Senator Tkachuk. And Senator Duffy declined to pursue the matter further by conferring with representatives of Senate finance. Senator Tkachuk was not acting in an authoritative capacity, he was not acting independently and he was not fully and accurately informed. Whatever information Senator Tkachuk may have conveyed -- his message according to Senator Duffy was essentially "the sky's the limit" – that information proved to be erroneous. Senator Duffy would have grasped this fact when the expense claim for makeup was rejected as an inappropriate payment. At the very least, this would have made Senator Duffy aware of the need to reassess and clarify the information that he contends was originally provided by Senator Tkachuk.

[264] Mr Holmes appears to invite the court to embark on a speculative foray into the mind of Senator Tkachuk with respect to the preceding three paragraphs. I am not inclined to do so. The Crown was in the position to call Senator Tkachuk and lay a proper factual basis for his submissions.

Introduction to the examination of Counts 7 though 18

[265] As mentioned above, the Senate Administrative Rules draw a distinction between parliamentary business and personal business; Senate resources are specifically earmarked for the former, but not for the latter. This "work" versus "personal" dichotomy is something most people are familiar with. Senator Duffy testified that he was aware of the need to separate work and personal matters. We learned that in addition to fulfilling his Senate responsibilities, Senator Duffy was engaged as a paid speaker. He agreed that he couldn't use Senate resources in support of his private business affairs.

[266] The Crown contends that the expense claims referred to in counts seven through eighteen were personal in nature and not appropriate expense claims. Senator Duffy adopts the opposite position and contends that all of the travel expenses represented by those claims were for the discharge of parliamentary functions. The recurrent theme is that certain activities were undertaken by Senator Duffy to mask the true purpose of the travel. During the period in question, Senator Duffy lived in Ottawa, but he was appointed to represent P.E.I. Several of the impugned claims represent travel to British Columbia, inviting the obvious question: What is the Senator from P.E.I, doing in B.C.? Mr. Holmes says that the answer is obvious from the diary, Exhibit 7. Whatever else may be said about Senator Duffy, he is deeply committed to his grown children. Hence the trips to B.C. centre on significant family events: a daughter appearing in a play, the birth of a grandson, a Christmas vacation.

[267] The Crown continues, that an examination of the timing and sequence of events confirms this theory. In many cases Senator Duffy had already arranged the travel in question before lining up some unnecessary "work function" to pass the cost of the trip on to the Senate. As indicated above, the SARs authorize incidental personal use where no additional costs are borne by the Senate. The conduct in question represents a perversion of that rule. In Mr. Holmes' view, Senator Duffy calls the true purpose ancillary and attempts to imbue the travel with a sense of legitimacy.

[268] The Crown says that in respect of the each of the claims that follow it is important to ask: What was the actual purpose of the trip?

Defence Overview Regarding Travel Claims in Connection with Counts (3 – 18) and Counts (19 – 20)

[269] These counts relate to travel expense claims and allege fraud and/or breach of trust of the Senate by the filing of what is claimed to be false or misleading information in the expense claims.

[270] Mr. Bayne submits that the Crown has failed to prove beyond reasonable doubt, on all the evidence, the filing of false or misleading information as well as fraudulent and/or corrupt intention on the part of Senator Duffy. He maintains that there is no proof to the criminal law standard of either the *actus reus* or *mens rea* of the crimes alleged in these counts. Mr. Bayne states that there were no false or misleading statements and no statements were made knowingly with the intention to undertake a prohibited act. Further, counsel for Senator Duffy stated that there has been no proven marked and substantial departure from

the standards expected (and set out in the SARs) of other Senators regarding travel expenses nor demonstration beyond reasonable doubt of the "elevated" mental element of corrupt purpose. Finally, Mr. Bayne contends that all of Senator Duffy's travel related to these claims was validly within the express administrative provisions of the Senate Administrative Rules (the SARs), the comprehensive code governing use of Senate resources, and Senator Duffy believed such travel to be within the rules as he read them, understood them, and had them explained to him by Senate authorities and that the contrary has not been established beyond reasonable doubt by the Crown.

[271] Furthermore, Mr. Bayne maintains that in the case of every count alleged in counts 3 through 20, Senator Duffy's travel was, in whole or in part, for "parliamentary", "public" and/or "partisan" purpose as expressly defined in the SARs and made eligible under the SARs provisions for Senate resources. Parliamentary travel may properly be combined with personal. "Parliamentary functions" include partisan activities as an inherent and essential part. Both "parliamentary functions" and "public business" have been defined broadly, inclusively, in the SARs. "Partisan activities" have been limited by the SARs only to be prohibited during formal election writ periods. Family reunion and contacts are expressly prioritized in the Senate provisions as are a Senator's "discretion and latitude" in making travel decisions (and errors or excesses of discretion are not crimes unless extreme and committed with criminal *mens rea*). The travel expense claims forms themselves – the very ones particularized in these counts – all expressly make the test of appropriately expensed travel the definition of "parliamentary functions" as it is set out in the SARs, not that of some in-camera meeting of the Internal Economy Committee members, not that residing in the head and opinion of a Senate Finance administrative official. The expense forms all read "parliamentary functions as defined in the Senate Administrative Rules" (See Exhibit 39). Mr. Bayne submits that Senator Duffy did not even breach Senate administrative rules in respect of each of these counts, much less commit crimes, and there is a considerable difference between administrative fault and criminal fault.

[272] The Defence says that, when considering counts 3 – 20, it is useful to keep in mind the rules as contained in the SARs.

The SARs Travel Provisions

[273] The Senate Administrative Rules: (Exhibit A Tab 2; Exhibit 20):

(i) "The Senate Administrative Rules govern Senate administrative practice. … In the interests of good governance, the administrative rules codify comprehensively the fundamental principles and rules governing the internal administration of the Senate and its allocation and use of resources" (Exhibit A Tab 2, preface)(emphasis added); (emphasis added)

(ii) "The Senate Administrative Rules are based upon the principles set out in this chapter, which are recognized as fundamental to proper public admin-

istration and essential to the good administration of the Senate." (Exhibit A Tab 2 page 1-3, Exhibit 20 Tab 1A Page 1-5) (emphasis added);

(iii) "Every person who interprets and applies the Senate Administrative Rules shall do so in a way that respects and promotes the principles in this chapter" (Exhibit A Tab 2 page 1-3; Exhibit 20 Tab 1A page 1-5)(emphasis added);

(iv) "Every administrative policy and practice in the Senate shall respect and promote the principles in this chapter" (Exhibit A Tab 2 page 1-3; Exhibit 20 Tab 1A page 1-5) (emphasis added);

(v) "The following principles of parliamentary life apply in the administration of the Senate: … (b) partisan activities are an inherent and essential part of the parliamentary functions of a Senator" and "(c) a Senator is entitled to receive financial resources and administrative services to carry out the Senator's parliamentary functions" (Exhibit A Tab 2 page 1-3; Exhibit 20 Tab 1A page 1-5)(emphasis added);

(vi) The SARs define "parliamentary functions" as follows: "'parliamentary functions' means duties and activities related to the position of Senator, wherever performed, and includes public and official business and partisan matters, but does not include activities related to

(a) The election of a member of the House of Commons during an election under the *Canada Elections Act*; or
(b) The private business interests of a Senator or a member of a Senator's family or household" (Exhibit A Tab 2 page 1-10; Exhibit 20 Tab 1A page 1-13) (emphasis added);

(vii) The SARs define "public business" as follows: "public business means all business carried on by a Senator for public purposes, whether or not authorized by the Senate or Government of Canada, and includes official business, representative business, partisan business and related travel, but does not include attending to one's private concerns." (Exhibit A Tab 2 pages 1-10; Exhibit 20 Tab 1A page 1-13) (emphasis added);

(viii) "Senate resources shall be used for the Senate of Canada and, in particular, for one or more of the following purposes:

(a) the parliamentary functions of Senators (Exhibit A Tab 2 page 1-20; Exhibit 20 Tab 1A page 3-1) (emphasis added);

(ix) "Subject to the law and the Senate Administrative Rules, every Senator is entitled to equal resources for the carrying out of the Senator's parliamentary functions" (Exhibit A Tab 2 page 3-1; Exhibit 20 Tab 1A page 3-1) (emphasis added);

(x) "A person may use a Senate resource for personal purposes where such use is minor, customary and reasonable and does not give rise to a direct cost to the Senate or to a Senate expenditure" (Exhibit A Tab 2 page 3-2; Exhibit 20 Tab 1A page 3-2)(emphasis added);

(xi) "A member of the Senate is a Senator at all times, whether or not Parliament is in session or prorogued or dissolved" (Exhibit A Tab 2 page 3-3; Exhibit 20 Tab 1A page 3-3)(emphasis added);

(xii) "A Senator is entitled to 64 travel points per fiscal year for the combined travel of the Senator and the Senator's alternates" (Exhibit 20 Tab 1A page 4-10) (emphasis added);

(xiii) "…Senators and alternates may travel by business class" (Exhibit 20 Tab 1A page 4-13) (emphasis added).

[274] Mr. Bayne states that validly expensed Senate travel is governed by the SARs. The travel expense claims forms expressly make the provisions of SARs the test for validly expensed travel. The SARs provisions are the "comprehensive code" governing the allocation and use of Senate resources such as travel expense funds. The SARs themselves are based on "fundamental" and "essential" "principles of parliamentary life" that include that "partisan activities" are an "inherent and essential" part of the "parliamentary functions of a Senator," and that a Senator is "entitled" to Senate financial resources to carry out such partisan activities. The overriding principles informing the SARs, which must be interpreted and applied consistent with those principles (and Senate policy and practice must respect and promote those principles), are "inherent and essential," not peripheral or ancillary or secondary. Partisan activities, therefore, of a given Senator, are expressly made by the governing SARs an inherent and essential part of his/her parliamentary functions and is expressly "entitled", pursuant to the SARs, to Senate financial resources (travel expenses). Partisan activities, an inherent and essential part of a Senator's parliamentary functions, may be carried on anywhere in Canada, not just in Ottawa or the Senator's province of appointment; they may take place coast to coast to coast and are "entitled" to Senate financial resources. Partisan activities, public business, parliamentary functions that validly attract Senate financial resources can take place at any time, whether Parliament is in summer recess or Christmas recess. Partisan activities that "entitle" every Senator, not just Senator Duffy, to Senate financial resources, are limited by the SARs in only 2 ways:

a. They cannot take place "during an election under the *Canada Elections Act*"

b. They must be partisan activities and not actually "the private business interests" of a Senator or one of his family/household members.

[275] Mr. Bayne notes that if the Standing Committee on Internal Economy (or some senate administration official) intended any additional limitation(s) on "partisan activities" entitling access to Senate financial resources, it had a positive SARs duty to provide so expressly in the SARs not via personal, *in-camera* views or opinions of different members at different times. Ms. Proulx, in her evidence, called the *in-camera* views of the Committee their "inclination" as to what was "intended" (Evidence of Nicole Proulx, April 28, 2015, page 35). The impugned expense forms do not require compliance with *in-camera* "inclinations as to intention," only with the express provisions of the "Senate Administrative Rules." The SARs state that "the Committee is responsible for the good internal administration of the Senate" which "means a competent administration that is flexible, fair and transparent, with appropriate policies and programs." (Exhibit A Tab 2 page 2-3; Exhibit 20 Tab 1A page 2-3). Senate Administration has a similar SARs duty to make policies and forms for the "good administration of the Senate" (Exhibit A Tab 2 Page 2-10; Exhibit 20 Tab 1A page 2-10). Limitations to the express SARs provisions are neither "fair" nor "transparent" if held only as *in-camera* opinions or "inclinations" shared only with a few. Mr. Bayne says it should not be up to each individual Senator to "intuit" (contrary to Senator Furey's unreasonable evidence that "Senators have to fall back on their own intuitive sense") SARs provisions or limitations that are simply not there. "Appropriate policies" govern, and, in the case of travel expenses it is the express provisions of the SARs that govern, not the private *in-camera* opinions of Committee members or Senate Finance officials. Moreover, Senate Administration has a positive duty to "advise the Senator" in respect of any request to Senate administration (like a travel request for payment) that appears to be contrary to a "law, rule, policy or practice" (Exhibit A Tab 2 page 2-13; Exhibit 20 Tab 1A Page 2-13). Senator Duffy was never advised that any of his claims in counts 3 through 20 were contrary to the SARs or anything else. Just the opposite – all were verified and approved as appropriately within the SARs. None of Senator Duffy's travel claims violated the express SARs provisions regarding (or the defined limitations on) "partisan activities." Mr. Bayne asserts that no *actus reus* of fraud or breach of trust has been proven on the criminal standard (Evidence Speaker George Furey, December 7, 2015, p. 65).

[276] "Public business," according to the governing SARs provisions includes official business, representative (including regional) business and partisan business "and related travel." Public business is thus given a wide, inclusive definition by the SARs, and is expressly made a broad concept. As an aspect of "parliamentary functions," public business that validly entitles the use of Senate financial resources goes on at all times, whether Parliament is in session or not, whether at holiday times or not. Public business goes on everywhere in Canada, from the Yukon to P.E.I. The Crown witness, Mark Audcent, the Senate Law Clerk, described "public and official business" as it appears in the SARs in an effort to "be helpful to the Court" (Evidence of Mark Audcent, April 10, 2015 at pages 114-117): "…official business is a subset of public business and that public business is much wider";

public business "as defined, as far back as 1974, [is] very, very wide – ranging for a Senator." "Parliamentary functions were made to include public or official business. Now public or official business, as we have seen, public business is very wide-ranging and so Parliamentary functions… includes public business, so it's as large as public business and perhaps larger." Mr. Audcent's unchallenged evidence confirms the express provisions (and definitions) of the SARs – public business and parliamentary functions are very broad concepts indeed. Mr. Bayne states that Senator Duffy's travel expense claims never violated these SARs provisions.

[277] Mr. Bayne submits that Senator Duffy's expense claims encompassed by counts 3 through 20, all comply with the governing SARs provisions. All activities or business were partisan or public or both and the "related travel" was expensed within the express SARs provisions "entitling" such activities to Senate financial resources (travel expenses). There is no violation of the SARs, no breach of a SARs prohibition, no prohibited act of dishonesty or misrepresentation. No partisan activities occurred during a formal election period or represented the private business concerns of Senator Duffy or his family. If and where there was an aspect of personal family reunion it was combined with either or both public business and/or partisan activity not during a federal election. There is no *actus reus* of fraud or breach of trust proven at all, much less beyond a reasonable doubt. And, if the Crown alleges a marked and substantial departure from the standards of conduct expected of similarly situated officials, i.e. all other Senators, it must lead evidence in proof of that proposition, as Justice Belanger held in *Radwanski*, [2009] OJ No 617. There is no inculpatory "comparator" evidence (as Justice Belanger called it) of how other Senators interpreted and applied the "partisan activities" and "public business" provisions of the SARs that governed their legitimate access to Senate financial resources for travel. Indeed, the only evidence before the court is exculpatory: Exhibit 30 reveals that Senator Duffy's travel expenses (and his overall expenses) were well within the normal range for all Senators; Ms. Proulx, the Senate Finance Director, agreed in her evidence that she never claimed that Senator Duffy's expense claims were "inappropriate or out of line with the numbers… of other Senators" (Evidence of Nicole Proulx, April 28, 2015, pages 23-26). According to the Defence, there is no evidence as to the "partisan activity" or "public business" travel claims of other Senators. There is no evidence of the "representative business" travel claims of other Senators, especially those from smaller provinces or communities – like Senator Duffy – who attended funerals as part of their perceived and real "regional representation" duties made explicit by the Supreme Court. Mr. Bayne submits that there is no evidence of how other Senators combined personal with public business travel or how they dealt with cancellations beyond their control. There is no evidence upon which the Court can make a finding of "marked and substantial departure" and, absent such evidence, the Court cannot fill the gap with speculation. Absent such comparator evidence, it is "impossible" (in the word of Justice Belanger) to find the *actus reus* for breach of trust.

Additional Senate Instruments/Documents

[278] Additional Senate Instruments/documents:

(i) *Senators' Resource Guide* (Exhibit A Tab 7A pages IV-2 and IV-3): "Senators may travel at Senate expense to carry out their parliamentary functions within their region, to and from Ottawa and elsewhere in Canada" (emphasis added); "A travel claim must contain the full name of the travellers. … a complete itinerary, the date of travel and a description of all expenses claimed."

(ii) *Senators Travel Guidelines* (Exhibit A Tab 8 paragraph 22 and 15B): "Senators should forward their signed travel expense claims on the required form to the Finance Directorate no later than sixty (60) days after completion of their trip. The form must be duly completed, including purpose of the trip."

(iii) *Senators' Handbook on the Use of Senate Resources* (Exhibit A Tab 10 at page 6): "A basic principle is that Senate resources are to be used by Senators for carrying out their parliamentary functions. Parliamentary functions are defined in the Senate Administrative Rules as 'duties and activities related to the position of a Senator, wherever performed, including public and official business and partisan matters, but does not include activities related to the election of a member of the House of Commons or the private business interests of a Senator.' Senate resources may not be used for matters that are non-parliamentary such as nomination campaign or election campaigns. Further, the Senate Administration Rules expressly provide that a Senator may not charge payments to partisan organizations to the Senator's office budget." Senator Duffy testified (December 8, 2015 page 88-89) that he never used any of his office budget to make payments to any partisan organization; there is no evidence to the contrary. Senator Duffy's impugned travel claims involve no evidence of partisan activities during nomination or election campaigns, and no evidence of payments from his office budget to partisan organizations or charitable organizations, no evidence whatsoever of either.

(iv) *Orientation Guide for New Senators* (Exhibit A Tab 13 page 24): "Most Senators are members of a political party and, consequently, they play a role in supporting their party in its overall activities".

(v) *The Senate Today* (Exhibit A Tab 14 page 20): "there are still many ways for Senators to fulfill their regional responsibilities." "[T]he system of regional representations" is an "essential feature" of the Senate (page 25, quoting the Supreme Court of Canada).

(vi) *Companion Guide to the Senator's Attendance Policy* (Exhibit A Tab 17):

(a) " 'Public business' means all business carried on by a Senator for public purposes whether or not authorized by the Senate or the Government of Canada, and includes official business, representative business, partisan business and related travel, but does not include attending to one's private concerns." (page 2);

(b) "Senators can be engaged in 'public business' on both sitting and non-sitting days, as explained below:

(a) On non-siting days all activities carried out by a Senator in that official capacity, which are not related to the Senator's private (marital, family, social, etc.) concerns are considered 'public business' (page 5);

(c) "Public business: This includes activities such as:

(a) Attending a committee meeting while the Senate is not sitting;

(b) Meeting or speaking to various groups;

(c) Participating in the work of a parliamentary friendship group; or

(d) Participating in partisan activities" (Appendix A, p. 2).

[279] The Defence points out that these additional Senate documents do nothing to limit the expansive SARs definitions of "parliamentary functions" and "public business." If anything, documents such as *The Senate Today* and the *Companion Guide to Senator's Attendance Policy* illustrate and example the breadth of those concepts: "all activities," including regional representations in P.E.I., that are not of a marital, family or social nature are "public business" when carried out by a Senator acting (speaking, appearing or discussing matters) as a Senator. Mr. Bayne submits that all of Senator Duffy's public business activities within these counts fit the SARs definition as further explained in these documents. Furthermore, aside from adding "nomination campaigns" (the *Handbook*) to the limitation/prohibition provided in the SARs to validly expensed travel for partisan activities, these documents (*Orientation Guide*, *Companion Guide*) evidence the broad scope of the concept of "partisan activities"; "participating in partisan activities" is "public business." The SARs, which are the responsibility of the Internal Economy Committee, contain no definition of "partisan activities" despite making them a fundamental, inherent and essential part of Parliament life. The ordinary dictionary definition of "partisan" is "strong supporter of a party" (Concise Oxford English Dictionary). The SARs limit this concept of partisan activity in only 2 ways (Federal election periods; private business interests) to which the *Handbook* adds nomination campaigns and payments out of the office expense budget (not the 64-point travel expense system) to a partisan organization (such as party conventions – although the travel expense to the convention is allowed). The Defence says that there is absolutely no evidence that any of Senator Duffy's partisan activities reflected in counts 3-20 violate these limitations. There is no evidence of any other SARs limitations or prohibitions nor of any communication of additional limitations to Senator Duffy. Senator Duffy committed no *actus reus* of fraud or breach of trust in respect of these travel claims.

Ms. Proulx's Letter

[280] On December 23, 2008, Senator Duffy attended a brief "welcome" session with Senate officials (Exhibit A Tabs 12 and 15A). Ms. Proulx, the Senate Finance Director, gave Senator Duffy an 8-page letter the contents of which she went through with him. The letter asserted that "A basic principle is that Senate resources are to be used by Senators for carrying out their parliamentary functions" and that "the Senate Administrative Rules govern Senators in their use of Senate resources." The letter sets out the SARs definition of "parliamentary functions" (as including all activities related to the position of a Senator, public and official business and partisan matters but not during elections or the private business of the Senator). Ms. Proulx's letter sets out, in addition to the SARs proscription on partisan activities during an election period, the limitation of "nomination campaigns." But no other specific limitations. There is no evidence that Ms. Proulx explained at any time to Senator Duffy any further particular limitation to expensed partisan activity travel (because Mr. Bayne argues, there is none).

Mens Rea

[281] *Mens Rea*: In addition to failing to prove the *actus reus* for fraud or breach of trust regarding counts 3-20, the Defence submits that the Crown has failed to prove beyond reasonable doubt that Senator Duffy had the subjective criminal intent for those offences. There is no proof, as required, that Senator Duffy knew he was committing an act prohibited by the SARs in respect of his travel and related expense claims, an act of intentional deceit or dishonesty in making the travel claim (as opposed to an error in judgment or a poor administrative decision or a discretionary decision that might retrospectively be called into question – this is a criminal trial, not an administrative review by the Internal Economy Committee of administrative decisions made by a Senator). There is no proof, as required, of the "elevated" mental element of corrupt purpose. Mr. Bayne reminds the court and submits that:

1. Senator Duffy gave evidence. He testified that he read the SARs and understood them to say "just what it says" (Evidence of Senator Duffy, December 9, 2014, page 114). This is reasonable evidence, to take the SARs, which he has been told and which he understands are the governing rules for making valid travel expense claims, at face value, to trust that he could rely on exactly what they say. Every travel claim submitted bore that express proposition: "the foregoing expenses have been incurred by me on Parliamentary functions, as defined in the Senate Administrative Rules" (Exhibit 39). Those SARs can only be read as authorizing broadly defined "public business" and open-ended "partisan activities" (limited only by formal election periods) as being properly "parliamentary functions" which "entitle" (Exhibit A Tab 2 page 1-3, s. 3)(c)) every Senator to Senate financial resources. It was eminently reasonable for Senator Duffy to rely upon the provisions of the SARs themselves to inform his understanding of what travel he could validly expense.

2. Senator Duffy did more. The Crown led the evidence of Senator Furey, who testified that "if a Senator is uncertain whether he or she should be

making an expenditure," the SARs and *Handbook* encouraged Senators to "seek clarification" (Evidence of Senator Furey, December 7, 2015 pages 57-58). Senator Furey repeated this message, that should any Senator question "whether or not an expenditure should be submitted" he/she should "seek advice" from Internal Economy or Senate administration (page 60). Ms. Proulx gave similar evidence. In respect of living expense claims, Senator Duffy did seek clarification, further clarification to his reading of the SARs provisions, and he did it in respect of travel expenses as well. He sought out the appropriate authority, the Vice-chair of Internal Economy, Senator Tkachuk. Senator Duffy sought the advice of Senator Tkachuk in respect of travel expenses more than once: the first time was January 7th, 2009 (Evidence Senator Duffy December 9, 2015, page 112); another time was "when I got my first, um, invitation as it were, to a series of public events" (page 114); yet another time was "when we came to the 2011 election" (page 115). Senator Duffy did exactly as recommended.

3. The advice Senate Duffy received from Senator Tkachuk concerning travel claims was the following: that all partisan activities were properly expensed except for those during a formal election writ period or as part of a nomination campaign (Evidence Senator Duffy December 8, 2015 pages 87-88; December 9, 2015 pages 114-115); Senator Tkachuk never advised that partisan activities that could validly be expensed were limited otherwise than at federal elections or during nomination campaigns (nor did Nicole Proulx or France Lagacé or anyone in Senate Finance)(page 112-113); Senator Tkachuk never advised that partisan activities that "had any aspect of it of being a fundraising activity" were "precluded from being a valid partisan activity for Senate resources" (nor did Ms. Proulx, Ms. Lagacé or anyone else in Senate Finance)(page 113); Senator Tkachuk never provided (nor did anyone in Senate Finance) any different definition of "parliamentary functions" than the SARs themselves, or of "public business" (page 116); Senator Tkachuk (and Senate Finance) never advised that there was any prohibition on funeral travel as part of regional "representative business" prior to the new Travel Policy in 2012 (all of Senator Duffy's impugned funeral travel preceded that policy) (page 116-117); in fact, Senator Duffy testified, "we were… encouraged" to attended funerals in order that the Senate should "be seen to be active and part of people's lives" (page 117); Senator Tkachuk advised repeatedly in "several speeches" that a Senator was a Senator at all times, and so, properly expensed parliamentary functions (public, partisan and/or representative) went on at all times and everywhere (page 119); Senator Tkachuk advised Senator Duffy on January 7th, 2009, that the "purpose" field on the travel expense claim form was properly filled in merely as "Senate business" (page 132) – i.e. there was nothing deceptive or misrepresentative about such a generic description; Senator Tkachuk advised Senator Duffy "He said 'Trust me, every aspect of what we do here is

partisan'." (Evidence of Senator Duffy, December 8, 2015 pages 107-108).

4. Senator Duffy reasonably relied upon Senator Tkachuk's advice, as the latter was the "guru" for the Conservative Senate caucus on Senate policy and was the Vice-chair of Internal Economy; Senator Tkachuk was "an expert on all these rules" (page 119).

5. The evidence further is, from Senator Duffy, Senator Furey and others, that there never was any mandatory formal training on the Senate policies by Internal Economy or Senate administration, either on existing or even new policies. Senators were, unreasonably, left to their own devices – all 105 of them – to read and interpret policy as best they could, in good faith. One can reasonably foresee (though Internal Economy did not) this as a recipe for inconsistency, honest error, misunderstanding. That is exactly what the 11th Report found – poor communication, policy not well understood, "inconsistent application of policies… across Senators' offices" (Exhibit A Tab 20 pages 3 & 8). This is the context for all of Senator Duffy's impugned expense claims, not only his travel expense claims. Context is relevant to *mens rea*.

6. Senator Duffy's evidence as to the advice given by Senator Tkachuk regarding expensed parliamentary functions is uncontradicted. The Crown chose not to call Senator Tkachuk, either as part of its case or in reply to Senator Duffy's evidence concerning that advice.

7. Senator Duffy believed, reasonably on the basis of the explicit provisions of the SARs and the advice received from Senator Tkachuk (and the lack of any contrary advice from Senate Finance or any Senate training program), that all of the travel encompassed by counts 3-20 was properly expensed as parliamentary functions (public, partisan and/or representative activities or business). He did not have any fraudulent intention or any corrupt purpose in submitting his travel expense claims and made no knowing misrepresentations, no intentionally false or misleading statement of the "purpose" of the travel calculated to deceive the Senate. The contrary has not been proved beyond reasonable doubt (Evidence M. Duffy, December 11, 2015, pages 56-57).

No Evidence of Communication of New Travel Policy

[282] Chapter 4:03 of the governing SARs was replaced by the Senator's Travel Policy which came into force June 5, 2012. Mr. Bayne submits that there is no cogent evidence when this new policy was communicated to Senators. The 11th Report of the Standing Committee (Exhibit A Tab 20 pages 2-3) highlights the "recurring issue" of "poor communication" of Senate policy to "users," which included Senators. Senator Furey testified that he could offer, despite being the Vice-chair of Internal Economy, no evidence of when and how

the Travel Policy was communicated to Senators:

> Q. You mentioned the Travel policy that was, came into being on June 5, 2012, right?
>
> A. Correct.
>
> Q. Can you offer any direct evidence as to how and when it was communicated to Senators?
>
> A. If you're asking me, do I know of any particular Senator, who actually received a copy; I have no firsthand knowledge of that" (Evidence of Senator Furey, December 7, 2015 page 27).

Senator Furey added that there was in the Senate "no system in respect of mandatory training" for Senators and/or their staff in respect of new policy: "We have no mandatory training as yet, no" (page 60). This is despite the 11th Report's express identification in late 2010 of "The need for policy updates and improved communication and understanding of policies" (page 3) and the Report's even more pointed statement that "The Senate should ensure that new policy guidelines on travel and credit cards is properly communicated to all relevant stakeholders in the Senate" (page 5). This is the recommendation of the Standing Committee on Internal Economy itself, of which Senator Furey was a key part. This lack of training is further despite KPMG's identification on September 17th, 2013 (Exhibit 68) of the need to completely revise the training of Senators and their staff in respect of policy and expense claims, including "mandatory" training. This travel policy came "into force" at the end of the 2012 Senate sittings before the summer break. Senator Duffy testified that he only heard about this new policy for the first time in late September or October of 2012: "Sometime in the fall, when we came back" (Evidence of Senator Duffy, December 9, 2015 pages 121-125). The travel policy post-dates all of the impugned travel in counts 3 through 20 except for counts 15-18, travel on July 9, 2012 and September 12, 2012. But both of these travel events occurred during the summer recess of Parliament and both occurred before Senator Duffy first heard of the new policy. Senator Duffy never even heard about the policy (much less was educated or trained on its provisions and changes from or additions to prior SARs policy) until after all of the impugned travel events.

The Senators' Travel Policy

[283] The Senators' Travel Policy (Exhibit A Tab 6):

- **(i)** The policy "parliamentary functions" eligible for Senate financial resources in identical/verbatim terms to the SARs (page 5);
- **(ii)** The policy expressly provides that "parliamentary functions" can be carried out "in Ottawa", "in Senator's regions" and "other locations", and all may require travel (page 6);

(iii) The policy recognizes that because Senators may be separated from family members "family reunion travel" is "an important contributor to the health and well-being of Senators and their families" (page 6);

(iv) The following "Principles" were enunciated as being the "cornerstone" for the management of travel expenditures (page 6):

a. "Travellers [Senators] should have sufficient discretion an latitude to act in a fair and reasonable manner in determining travel arrangements that best respond to their needs and interests";

b. "Transparency and accountability: the consistent, fair and equitable application of policy and its practice is best achieved when an appropriate travel accountability framework and structure is in place" (page 6);

c. "travel policies are fair when they support the health, safety and well-being, in a travel context, of travellers [Senators] and their families" (page 6);

(v) Each Senator is allotted 64 travel points per fiscal year; unused points lapse and may not be carried forward (page 7);

(vi) "the intent of the 64-point Travel System is to fund travel incurred in the carrying out of Senators' parliamentary functions" (page 9);

(vii) The purpose of travel is a mandatory field on the Travel Expense Claim form. For confidentiality purposes, Senators may describe the travel purpose as "a very brief description (for example parliamentary functions or Senate work)" (page 9);

(viii) "…[S]enators typically take on a wide range of activities," and "many of these can be considered 'public business' but should be related to 'parliamentary functions'" (page 10);

(ix) "Senate-related travel" may be "combined with private business or personal travel" but additional private/personal expenses must not be charged. (page 10);

(x) Senators' air travel may be "business class" (page 11);

(xi) "When travellers [Senators] are required to change their travel plans due to circumstances beyond their control, any fees charged by the airline to rebook or cancel flights shall be reimbursed. Best efforts should be made to minimize such fees wherever possible, a justification may be required" (page 11); Cancellation and change fees are reimbursable

when incurred due to situations beyond the Senators' control" (page 17);

(xii) "All travel expense claims shall be verified by the Finance division...Finance verification shall include that all expenses claimed are in compliance with this policy…" (page 22);

(xiii) Under "Roles and Responsibilities," neither the Internal Economy Committee nor the Senate Finance Division is given responsibility for notification or mandatory training of Senators on the new policy; by contrast, the Committee (author of the policy) makes Senators "responsible for… familiarizing themselves.., with the provisions of this policy." (pages 22-24);

(xiv) An Appendix A, described as a "useful guide" for eligible travel expense funding, was attached at the back of this new Travel Policy, mainly in the form of a spreadsheet of boxes of examples of eligible and ineligible travel. Appendix A expressly introduced, for the first time, a new limitation on "parliamentary functions"/"partisan activities" that could be validly funded: "Speaking engagements or attendance at fundraising events other than those organized by the Senate." Appendix A also for the first time expressly limited funded funeral attendances to those of dignitaries, government officials, parliamentary colleagues or "other VIP's." Appendix A excluded paid speaking engagements from Senate travel funding (pages 26-28).

The 11th Report of the Internal Economy Committee

[284] The defence highlights that the 11th Report of the Internal Economy Committee identifies serious problems with the SARs provisions respecting validly expensed Senate travel, the broadly defined concept of parliamentary functions and the undefined term "partisan activities". The KPMG professional audit report to the Senate (Exhibit 68) corroborates and confirms those problems:

1. The Internal Economy Committee publicly identified a "recurring" issue with "outdated, inadequate or non-existent" policy (Exhibit A Tab 20 pages 2-3) and with policy that was "poorly communicated" to and/or "not well understood by" Senators (and their staff, as well as Senate Finance staff).

2. In particular, the Committee publicly adopted the findings of a professional audit that "the Senate should provide clearer guidance and criteria on which activities constitute a parliamentary function," in order to assist "Senators when preparing claims" and "Finance staff responsible for claims processing." (page 4);

3. Further particularizing the problem as it pertained to travel-related expenses

for parliamentary functions/partisan activities/public business, the Committee reported publicly that "Given the broad definition of parliamentary functions within the SARs, there is a risk that allowable expenditures in support of parliamentary functions and those which are ineligible may not be clearly understood by Senators"; and that "Although a definition of a parliamentary functions exists within the SARs, there is a lack of clear guidelines and criteria clarifying what activities constitute a parliamentary function. For example, there is no clear guidance made between partisan activities relating to Senate business (allowable expenses) and partisan activities on behalf of political parties which may not be eligible. This issue affects Finance staff responsible for processing claims as well as the level of understanding of the rules by Senators' offices and can lead to inconsistent interpretation and processing of reimbursements." (pages 8 & 10);

4. Even in September, 2013, more than a year after the Senators Travel Policy came "into force", KPMG noted that this problem persisted: "Senate expense claim policies related to … travel expenses were not sufficiently detailed with respect to eligibility." (Exhibit 68 Appendix B).

Lack of Clear Policy

[285] Mr. Bayne submits that if the policy governing valid recourse to Senate financial resources to fund Senators' travel is itself inadequate, and is poorly communicated to and not well understood by Senators, that is the responsibility of the Internal Economy Committee and Senate Administration. Individual Senators do not make or communicate policy. The policy governing Senate-financed travel lacked "clear guidelines and criteria" for what was and wasn't a properly expensed parliamentary function and/or partisan activity. Senator Duffy did not have criminal or corrupt *mens rea* in completing the travel he undertook and related expense claims, believing reasonably that the travel fell within the parameters of the SARs provisions that existed. According to the Standing Committee they were broad, poorly defined parameters that had few limits (both in terms of public business and partisan activities). The Crown must prove beyond reasonable doubt that Senator Duffy knowingly, intentionally violated these inadequate, poorly communicated policy provisions that lacked adequate criteria for discovering what was properly expensed. That onus never shifts. The Defence opines that when policy has been found to be so objectively lacking in criteria, proof of subjective criminal intention to breach that policy becomes difficult indeed. Policy may understandably be misunderstood by Senators in such a case, mistakes may be made, travel may be expensed in error that the Committee did not intend to be expensed but that the SARs seemed on their face to permit. None of that is criminal however. As set out in previous paragraphs, Senator Duffy's travel claims fell within the actual SARs provisions as they were written and constituted no *actus reus* of crime. Further, where a Senator in good faith tries to apply bad (inadequate, poorly communicated, criteria-lacking) policy, he/she can't be found criminally responsible if errors were made. Bad policy breeds bad practice. Bad policy predictably fosters mistakes. The Defence submits that there is no subjective fraudulent intent or corrupt purpose in trying to apply poorly worded policy and making, in someone's retro-

spective assessment, an error of interpretation or understanding.

Additional evidence of no criminal mens rea:

[286] The Defence relies on the following additional evidence to support their position that there is no criminal *mens rea:*

(i) *Openly Delivered*:

An important fact is that Senator Duffy submitted all the expense claims referred to in counts 3 through 20 openly (a fact found relevant by Justice Belanger in *Radwanski*). The expense claims were delivered over a period of 3½ years. They were openly delivered to the appropriate administrative authority, Senate Finance, for that authority's detailed inspection and review and for "verification" by that authority that each claim was validly made within the provisions of the governing SARs. Each and every claim received inspection and review and every one of the impugned claims was "verified" as being "in accordance with the Senate Administrative Rules."

Ms. Proulx expressly agreed that all travel expense claims were openly made to Senate Finance and received "verification" as being within the SARs (Evidence N. Proulx, April 27, 2015, p. 85). Senator Duffy was willing to answer any question or inquiry about these expense claims.

Exhibit 6, the 13 impugned travel claims, bears ample evidence in emails of the open, cooperative relationship between Senator Duffy's office and Senate Finance officials and the willingness to answer questions about the claims and provide further information whenever asked (see Exhibit 6, Tabs 1, 3, 4, 6, 7, 9,). Senator Duffy's E.A., Melanie Vos, expressed her forthright attitude to Senate Finance clerk Maggie Bourgeau: "If you have any questions, don't hesitate to contact me." (Exhibit 6, Tab 9). Senator Duffy's cooperative attitude is expressed in Exhibit 6, Tab 6: "He [Senator Duffy] is comfortable providing any further details for all travel or claims submitted." The offer is for "any further details" and "for all travel or claims submitted." The offer is made to the very authorizing directorate the Crown alleges that Senator Duffy was trying to defraud. This offer is not the conduct of a criminal fraudster seeking to deceive or hide information about his travel and related expense claims.

This is evidence highly inconsistent with criminal *mens rea*. Senator Duffy has nothing to hide and believes he has done nothing wrong. He believes, as he testified, that all of his travel claims were validly within the SARs as he read and understood them. His expressed position in Exhibit 6 is consistent with having no guilty mind and inconsistent with proof beyond a reasonable doubt of the subjective, knowing, dishonest intention for fraud

or the "elevated" concept of corrupt purpose for breach of trust. This pattern of open, cooperative dealings, with Senate Finance, not isolated but over many years, strongly evidences a lack of criminal *mens rea*. There was a powerful feedback loop of continuous "verification" by Senate Finance that each of the 13 claims was validly within the SARs in turn reinforcing Senator Duffy's ongoing belief that his travel expense claims were perfectly valid.

(ii) *No Financial Motive*

The Crown has expressly advanced the proposition that Senator Duffy was in dire financial straits and so was motivated to resort to unlawful means to commit a series of financial crimes, including making knowingly fraudulent travel expense claims, to get money. Apart from the fact that travel expenses did not put money in the Senator's pocket, they simply reimbursed actual expenses incurred by Senator Duffy. This suggested rationale for the alleged crimes has been soundly refuted as set out in the financial evidence. The evidence in fact shows that Senator Duffy was not in financial distress and he did not have to resort to crime to access funds. Senator Duffy accessed credit as he required from time to time from main stream financial institutions. He had no unexplained sources of bank deposits and no motive to resort to crime. This lack of motive, especially the one asserted by the Crown, is consistent with a lack of criminal *mens rea*.

(iii) *Significant Unused Travel Points/Value*

Senator Duffy is alleged to have fraudulently used his annual 64-point allotment of travel points to travel for personal reasons only, or prohibited partisan reasons (not for parliamentary, or public purposes). Yet Exhibit 26 (Mr. Grenon's analysis of 5+ years of Senator Duffy's 64-point travel: 2008-2013 reveals that Senator Duffy never once for any fiscal period used up all of his allotted travel points. In fact, he left unused for the period examined 106 total travel points or more than a year and a half of travel. Even if the first period (Exhibit 26, Tab B) is omitted from the calculation because it only covers a shortened fiscal year of 3 months (from Senator Duffy's January 2009 appointment to March 31, 2009), the total of unused points is 52.5, or just under a full year's worth of freely accessible travel points left unused. This evidence is inconsistent with someone trying fraudulently to squeeze travel value out of the Senate, as alleged. The points were allotted and there for the taking. It is obvious that a significant number of tickets worth great monetary value were not accessed by Senator Duffy. Using Mr. Grenon's numbers, the value of the 52.5 unused points would be $95,176.73. This is a significant amount of money for an alleged fraudster to leave on the table. While this in itself does not disprove fraudulent intent, it is more inconsistent with fraud than consistent with it. It is also con-

sistent with all the other evidence showing no criminal *mens rea*.

(iv) *No False or Padded Travel Expense Claims*

There is no evidence of false travel expenses. All travel was undertaken, all expenses were actually incurred. There is no evidence of "padding" or falsely enlarging the expenses claimed over those actually incurred. Such evidence would be a classic "badge of fraud" (as identified by the Ont. C.A. in *R. v. Milec*, [1996] O.J. No. 3437 (C.A.); the absence, of any such badge evidences non-criminal intent. All 13 expense claims (Exhibit 6 Tabs 1-13) represent real, genuine, incurred expenses for travel actually taken. There is no evidence to the contrary. Senator Duffy submitted accurate travel expense amounts. This pattern of submitting only genuinely incurred expense items is evidence of no criminal *mens rea*, not the contrary.

Pre-signing of Some Expense Claims Not Proof of Crime

[287] Mr. Bayne stated that having failed otherwise in respect of counts 3-20 to prove beyond a reasonable doubt the *actus reus* and/ or *mens rea* for fraud and breach of trust, the Crown will/may assert that the pre-signing of travel expense claims forms by Senator Duffy makes out the offences.

[288] Counsel contends that there are four compelling evidentiary reasons that this is not so:

1. While the majority but not all of Senator Duffy's 214 travel claims prepared by Melanie Vos were pre-signed (Evidence of Melanie Vos June 8, 2015, pp. 99-100), "a few" were not and Ms. Vos could not identify, of the 10 impugned travel claims that she prepared (Exh 6, Tabs 1-5, 7-11), which were and which were not pre-signed. "Very few" of Ms. Scharf's travel expense claims (Exhibit 6, Tab 6, 12 and 13) were pre-signed -most were not- and, she too, could not identify, of her 3 travel claims, which were pre-signed or not. Criminal courts cannot speculate or fill voids in the evidence with conjecture or guess work. The onus remains throughout on the Crown to prove with evidence and beyond reasonable doubt its case. If and where its case on a count relies on a pre-signed form, the Crown must specifically prove the pre-signing of that very form. This Honourable Court, on the state of the evidence, cannot find beyond a reasonable doubt in respect of any one of the 13 expense claims encompassed by counts 3-20 whether it was pre-signed or not. There is no evidence whether each individual impugned expense claim form was pre-signed. There is not proof beyond reasonable doubt of any alleged *actus reus* of pre-signing in respect of each individual count.

2. In any event, pre-signing the travel expense claim form, while arguably bad administrative practice (Senator Furey called it "poor practice": Evidence

George Furey December 7, 2015, p. 9) is not inherently a crime. As the Supreme Court in *R. v. Boulanger,* [2006] 2 S.C.R. 49 and Justice Belanger in *Radwanski, supra,* noted, there is a significant difference between poor administrative practice or administrative errors, even serious ones, and crimes. The Supreme Court "stressed the need for a meaningful distinction between administrative fault and criminal behaviour" because "the law does not lightly brand a person as a criminal." *(supra* at paras 43 and 52) Senator Duffy's pre-signing of forms was not a prohibited act of dishonesty as required by the Supreme Court in *R. v. Theroux*, [1993] 2 S.C.R. 5. He did it on the recommendation of his E.A. (to whom it was recommended by another senator's E.A.) and the representation that it was a common practice in Senators' offices in order to enable valid claims to be processed within the 60-day window. Pre-signing was not done to perpetrate a fraud on the Senate, not done to enable the payment of false or fraudulent claims. The act of pre-signing an otherwise valid expense claim is not the "prohibited *actus reus*" for fraud by *Theroux,* even though it may well represent poor administrative practice. In the unusual circumstances of this case, where pre-signing of forms was not done to effect false claims but to expedite the processing of valid ones, only in a tortured and technical sense could pre-signing be construed to be the *actus reus* of fraud. The distinction between administrative error or fault and true crime, stressed by the Supreme Court, recognizes that an administrative practice can be validly criticized as faulty, erroneous or "poor" without being tortured technically into the *actus reus* of a crime.

3. As well, pre-signing an expense claim form is not on the evidence proof of the required marked and substantial departure from the conduct expected of other Senators, the proof required for the *actus reus* of breach of trust. On the evidence before the Court, 50% of the Senators about whom the Court received evidence pre-signed their travel expense claims forms. Loren Cichini agreed as a Crown witness that both of her senators, Meighen and Buth, "routinely used pre-signed forms" for travel expense claims (evidence L. Cichini May 15, 2015 p. 24), and that this practice spanned almost 24 years, a significant period. In addition Ms. Cichini testified that she knew Diane Scharf and had heard that "this practice of using pre-signed expense claim forms was a routine practice on Parliament Hill" (p. 27).

   The evidence of Melanie Vos is that she was advised of this practice, as being an accepted and routine way of preparing travel expense claims in Senators' offices, by a more experienced E.A. whom Ms. Vos consulted. Ms. Vos may have been in error whether it was Ms. Cichini or Ms. Rokosh who advised her of this, but there was no doubt that the practice was not otherwise known to her as a new E.A. in the Senate, that she approached Ms. Cichini to learn the practises and procedures of how things were done in Senators' offices and that Ms. Cichini answered Ms. Vos's inquiries.

Ms. Cichini testified that there was, in her 24 years, no formal training by Senate Administration of Senators' staff that she was aware of, and so E.A.s learned from other more experienced E.A.s (Evidence of Ms. Cichini May 15, 2015 pp 4-6) and by consulting on occasion on their own initiative, Senate Finance staff. Ms. Cichini testified that Ms. Vos came to her with questions as to "how things work" and how to do things and that she helped Ms. Vos out: "people help each other out" (pp. 12-14). This was, Ms. Cichini testified, "a standard thing" (p. 12), that "We help each other out"(p.13) This was, Ms. Cichini testified, how she had learned as an E.A.: "When I came on I learned from one more experienced-well-yeah, one more experienced staff" whose name was "Monique" (p. 6). Learning from other, more experienced, E.A.'s was "standard practice to learn that way." (p. 10). There were no courses or training on travel expense claim form completion (p. 10). Ms. Cichini testified that Ms. Vos would drop by to her (Ms. Cichini's) office and even more often telephone with questions as to "How do you do this? How do you do that?" (p. 12). Ms. Cichini would answer Ms. Vos's questions. Ms. Cichini fairly conceded that while she did not specifically recall Ms. Vos asking about the travel expense form completion due to the 6½ years that had passed since these events, it was possible that that had been discussed. While not having been officially assigned to tutor Ms. Vos, Ms. Cichini agreed that Ms. Vos "came to me for -with questions-um- and I- and I offered, you know, I-I did help. I answered questions. I think I also -I believe I also took her around to meet other staff" (p. 34).

In any event, there is evidence before the court that three Senators (Meighen, Buth and Duffy) pre-signed travel expense claim forms and evidence that three other Senators (Furey, Eyton and Frum - the last two in respect of whom Ms. Rokosh gave evidence) did not. And there is other exculpatory evidence concerning all the other Senators in the Senate of Canada and whether or not they "routinely" used pre-signed forms: that is the evidence of the Crown witness Diane Scharf. Ms. Scharf was the most experienced E.A. who testified during this trial. She is a veteran of forty-two years on Parliament Hill, having served many MP's, two cabinet Ministers, two Prime Ministers and three Senators prior to Senator Duffy (Evidence of D. Scharf June 9, 2015, p.1). Ms. Scharf gave her evidence in a clear and straightforward manner. One might say that she was engagingly prim and proper. She testified in chief that the use of pre-signed expense claim forms was "a common practice on Parliament Hill at both the House of Commons and the Senate." Asked by the Crown if she discussed the practice of using pre-signed forms with Senator Duffy, Ms. Scharf replied, "No, there was no need to. It's such a common practice on Parliament Hill." (p.15)

The onus is on the Crown to prove, as the Supreme Court in *Boulanger,* 2006 SCC 32, [2006] 2 SCR 49 and Belanger, J. in *Radwanski* identified, a marked

and substantial departure from the standard of conduct expected and accepted as appropriate by others in the position of Senator. Justice Belanger found in *Radwanski* that "no evidence of any kind was called to show the frequency, location and amounts expended by other senior government officials at Mr. Radwanski's level for staff hospitality over comparable periods of time… Absent such comparators, however, it is impossible for me to assert that the hospitality claims made or approved by Mr. Radwanski are indicia of criminality, either as frauds or breaches of trust." In the case at bar, there is evidence of such comparators, and it is exculpatory, revealing at the very least that as many senators used pre-signed forms as did not and probably more. That is not a marked and substantial departure from the normative practice in Senators' offices, the practice that had grown up over many years to the point that it had become "routine." Accepted administrative practices that are not criminally motivated are not marked and substantial departures from the administrative practices that at least 50% of Senators followed as expected and accepted in the circumstances. Ordinary Canadians not infrequently use pre-signed cheques as a convenience, with those they trust, to authorize payments for amounts not yet precisely known but intended to be validly paid. Pre-signing without knowing in advance the final amount to be added to the face of the cheque may be considered by some to be unwise or poor practice, but it is a reality, and is not the marked and substantial departure constituting the criminal *actus reus* of breach of trust. Even lawyers and business people have been known in common experience to pre-sign cheques for amounts to be specified later, and those are not, by themselves, criminal acts. They are not frauds or breaches of trust on the payor bank.

Mr. Bayne contends that the administrative practices relating to expense claims prevalent in Senators' officers over decades have grown up because of the failures of the Internal Economy Committee and Senate Administration. Failures that led, in 2015, to public condemnation by the Auditor General of Canada and a call for independent oversight of Senate resources and expense claims. (See Evidence of George Furey December 7, 2015, p.67). There is no mandatory, formal training of new Senators or their staff upon appointment. There is no formal and mandatory training on new policy or updates on amendments to old. There is evidence (per Exhibit A tab 20) of "poor communication" of policy. There is no real or detailed oversight/auditing of travel expense claims (or service contracts and service providers) other than perfunctory checking of numbers and the acceptance of uninformative, generic travel "purpose" descriptions ("Senate business"). There is no detailed auditing of actual practices within Senators' offices. Pre-signing expense forms may be "poor" administrative practice but, on the evidence, it was "common" and "routine" practice, and went on for decades. In those circumstances, it is not and was not the *actus reus* of the crime of breach of trust.

4. Finally, pre-signing travel expense claims forms, to constitute either fraud or breach of trust, must involve proven *mens rea*, criminal *mens rea* proved beyond a reasonable doubt. On all the evidence, Senator Duffy was advised of this practice by his EA, who in turn learned of it from another E.A. It was not Senator Duffy's idea from the outset. Nor was it originally Ms. Vos's idea: "It hadn't even crossed my mind before hearing about it from the other E.A." (June 9, 2015, p. 13). It was represented to Senator Duffy as a valid and expedient way to ensure getting legitimate expense claims submitted within the 60 day window. Ms. Cicchini's evidence was that it worked that way with her 2 Senators for almost 24 years based on mutual trust (Evidence Ms. Cichini, May 15, 2015 p. 25) – trust on the part of her Senators that Ms. Cichini would validly include only the legitimate expenses they gave her receipts for, and trust on her part that they had incurred the expenses in fact and in respect of "Parliamentary functions." That is exactly the same basis on which pre-signed expense claims forms were used in Senator Duffy's office – Ms. Vos trusted that the claims she prepared were all legitimate expenses incurred and in relation to "parliamentary functions, as defined in the Senate Administrative Rules." In turn, Senator Duffy trusted Ms. Vos to complete the claims accurately with the expense information provided. Ms. Vos testified that she thought the practice, as explained to her, was "practical" and "efficient" and "there was nothing malicious" about it, that it wasn't "an issue" because "the other office was, was doing the same thing" (Evidence M. Vos, June 8, 2015 pp. 99-101); she did not have "any intent to defraud" Senate Finance (June 9, 2015, p. 17) and Senator Duffy never instructed Ms. Vos to falsify any expense claim (June 9, 2015, p. 27) or to keep the practice secret (p. 198). She testified that senator Duffy "trusted my work, and I trusted the information he was giving me." (June 8, 2015 p. 102). Ms. Vos and Senator Duffy took this to be a "common practice" (June 9, 2015 p. 12) that "must be okay" (p. 16)

   Senator Duffy's evidence was consistent with Ms. Vos'. He learned of the practice as one she in turn had learned about as being common in other Senate offices. He used it only to get his travel claims in on time as he was away from the office so frequently. He never instructed or intended the submission of false expenses, not actually incurred, or the submission of travel expenses except for those incurred that he believed honestly to be "in accordance with" the SARs and with "parliamentary functions" as he understood them to be "defined in the Senate Administrative Rules." Senator Duffy had no intent to defraud or deceive the Senate: he submitted travel expense claims he believed to be validly within the SARs. He pre-signed travel expense claim forms believing that it was a practice common and accepted among Senators-and, on the evidence it was. He had no "corrupt purpose" in pre-signing forms and did so only to expedite the submission of valid claims that he believed were valid. There is no proof beyond reasonable doubt of any criminal *mens rea*.

[289] Defence Counsel points out that a number of Senate witnesses gave evidence relevant to the travel expense counts 3-20:

Senator Duffy

[290] Senator Duffy's evidence is that he was, in addition to the conventional regional representative (for P.E.I.) role that all Senators play, assigned from the very outset - together with a number of other Senators appointed by Prime Minister Harper in 2 large appointment groups preceding the 2011 Federal election - an additional role "to expand the pool of accessible voters" (for the Prime Minister's party). (Evidence of M. Duffy, December 8, 2015, pp 67-71) This was clearly partisan activity and would require that Senator Duffy travel extensively. It was encouraged by the Prime Minister who sought to leverage Senator Duffy's national profile (and that of others appointed in these groups). Exhibit 83 is eloquent photographic evidence of the Prime Minister's encouragement and endorsement of Senator Duffy and his public role assigned from the outset. By June, 2009, only 6 months into his appointment, Senator Duffy was already in the words of the Prime Minister himself, one of the Prime Minister's "best, hardest working appointments ever!" In part, that is why Senator Duffy sought out Senator Tkachuk's authoritative advice as to the validity of travel claims based on partisan activities, including fundraisers- he knew he would be travelling. Senator Tkachuk's advice was that all such travel was properly expensed to the Senate under the definition of parliamentary functions, so long as it did not occur during elections or nomination campaigns. It was, Senator Tkachuk assured Senator Duffy, fully within the rules.

[291] Of note is that Senator Duffy's evidence as to each individual travel count (he gave detailed evidence as to all 13 travel events and the related expense claims) was not challenged in cross-examination at all, with only one exception, the travel incurred for the purpose of attending the Saanich Fair (counts 7 and 8). Senator Duffy's detailed evidence concerning each and every other count (counts 3-6 and 9 - 20) was not questioned and stands unchallenged by the Crown.

Mark Audcent:

[292] The Senate's Law Clerk testified that, although "partisan activities" were made by the governing SARs an "inherent and essential part of the parliamentary functions of a senator," there was no limiting definition of partisan activities and no restriction on their entitlement to access to Senate financial resources except during a federal election. (Evidence M. Audcent April 9, 2015 at pp 69-76). Mr. Audcent agreed that "politically partisan activities" were an essential part of Senators' parliamentary functions eligible for Senate resources (p. 77) and that the concept of partisan activities that could validly be expensed to the Senate was "pretty darn broad" (p. 104). He stated that "the Senate is inherently a partisan institution," meaning "politically partisan." (p. 77) Mr. Audcent agreed that partisan activities not at elections or as part of a nomination campaign were valid to be expensed to the Senate (p. 109). The only additional limitation of which Mr. Audcent was aware (he authored the original SARs) on the use of Senate resources for partisan activities was the payment of registration fees (out of the Senator's office budget) to party annual conventions (p. 82), although

the travel expense itself to annual political party conventions (as "partisan" an activity as there is) is properly expensed to the Senate (p. 102). Mr. Audcent gave evidence that a Senator could validly "combine private or family activities" travel with "public or official or partisan matters" (p. 85). And, he agreed that "parliamentary functions," , including "public" and "partisan" activities created "an immense range of travel-related activity that could properly be expensed to the Senate (p. 84) Significantly, Mr. Audcent agreed "absolutely" that events that Senators attend are not necessarily one-dimensional: "events are not wholly just partisan… there's public aspects." (p. 103). Mr. Audcent reviewed the provisions of other Senate documents (the orientation Guide, Travel Policy Guidelines, Senators' Resource Guide, Companion Guide to the Attendance Policy) and agreed that they did not further limit "the open-ended definition of partisan activity" in the SARs (pp. 118-119). In respect of the concept of "public business' set out in the SARs (and Companion Guide to the Attendance Policy) - as set out above in paragraph 53 - Mr. Audcent's evidence is that it is "very, very wide ranging for a Senator" in terms of the activities qualifying for Senate financial resources and thus validly expensed (April 10, 2015, pp. 114- 117). Mr. Audcent agreed that "regional responsibilities are an important part of the Parliamentary functions of a Senator (p. 20). Finally, Mr. Audcent stated that the 11th Report's identification of inadequate policy, poorly communicated and not well-understood policy and the need for clearer guidance on "partisan activities" eligible for Senate financial resources was a recognition of "real and serious problems" (pp. 12-19)

Nicole Proulx:

[293] Mr. Bayne submits that there is evidence before the court that could reasonably justify a factual finding that Ms. Proulx was a partisan witness, overly anxious to assist the police (with whose lead investigator she had developed an oddly personal email relationship) and unwilling to meet with the defence, making up excuses for being unavailable, while at the same time meeting frequently and whenever requested with the police and/or Crown. More important, Mr. Bayne contends that Ms. Proulx revealed herself, from the outset of her evidence, to be overly defensive of a defective Senate policy, practice and administrative oversight system for which, as Senate Finance Director, she bore real responsibility. In her interview with the Crown on April 19th, 2015, just before her own evidence commenced, but after the trial had begun and the media were reporting on it, Ms. Proulx expressed "concern" with how Senate "administration was being portrayed in court and the media" (p. 7). Mr. Bayne takes the position that this defensiveness manifested itself in some unreasonable and inconsistent evidence Ms. Proulx offered to the Court.

[294] On the one hand she argued (and much of her evidence was offered in the form of opinionated argument) that Senate policies and rules were clear, were not vague or complicated (April 27, 2015, p. 7), at least to her, yet on the other hand she conceded that the Deloitte report identified that living expense policy lacked adequate definitions, criteria and guidelines, and she agreed those were, in fact lacking. (April 27, 2015, pp. 11-12; November 20, 2015 p. 20) This was, as Mr. Audcent had testified, identification of a "real and serious" policy deficiency. Ms. Proulx further was forced to concede that the 11th Report of the Internal Economy Committee identified further serious Senate policy and practice deficiencies

(Exhibit A, Tab 22): some policies were inadequate, outdated or non-existent; the broad definition of "parliamentary functions" lacked adequate guidelines and/or criteria to enable Senators to make informed decisions about the eligibility of expenses related to parliamentary functions (including public business and partisan activities travel); the Senate needed to "provide clearer guidance and criteria on which activities constitute a parliamentary function" that validly attracted Senate financial resources. (November 20, 2015 at pp. 1-20; pp. 30-34) Mr. Bayne points out that these are serious deficiencies. They relate directly to access to Senate resources. These identified serious deficiencies powerfully make the point that Senate policy and rules, contrary to Ms. Proulx's self-serving opinion, were not clear and unambiguous, in important ways. Ms. Proulx attempted to expand the limitations on validly expensed "partisan activities." The Defence submits that her evidence in this regard was, again, unreasonable and in conflict with the governing SARs, the travel expense claim form and other senate guideline documents. Ms. Proulx tried to argue that "Not all the do's and don'ts are written down" (April 27, 2015, p. 22); yet the travel expense form expressly makes the written SARs the sole criterion for validly expensed travel – "parliamentary functions as defined in the Senate Administrative Rules" and "these charges are in accordance with the Senate Administrative Rules" (Exhibit 39). The expense form does not read "and some other unwritten do's and don'ts". Ms. Proulx pointed out that the Miscellaneous Expenditures Account Guidelines (Exhibit A, Tab 15 E p. 3) prohibited payments out of that $5,000 account (set aside out of office budget funds) "to charity or other fundraising events", but had to concede – "I totally agree with you" – that this was limited to payments out of that account (and there is no evidence of Senator Duffy doing this, ever), and did not deal with travel-related parliamentary functions/ partisan activities (Apr. 28, 2015, pp. 51-55).

[295] Mr. Bayne submits that Ms. Proulx then purported, in her effort to expand the limitations on partisan activities set out expressly in the SARs, to offer the court inadmissible double hearsay about an *in-camera* conversation allegedly dealing with "the intent of the Committee" regarding fundraising events generally. The alleged conversation occurred before Ms. Proulx even started in Senate Finance (i.e. before 1998 – before there were written SARs!); it did not, obviously, involve her; she could not remember when she was told of this alleged conversation; all she could say was that someone (a Benoit Tremblay whom the Crown never called) told her something someone had once told him *in-camera* – "It's *in-camera* means that it's, well it's not public information." Ms. Proulx could produce nothing in writing, no written document, in support of this inadmissible hearsay, no admissible evidence that the operative limitations on properly travel-expensed "partisan activities" as set out in the governing SARs were anything other than election periods and/or nomination campaigns: "I can't offer anything" (Apr. 28, 2015, pp. 55-64).

[296] Ms. Proulx's admissible evidence, on the other hand, was that there was no need, in order validly to access Senate financial resources, for any Senator to have to justify travel between the NCR and the primary residence in the province of appointment: "the trip between Ottawa and the primary residence of a Senator does not need to be justified to be reimbursed…" (Apr. 28, 2015, p. 16). This evidence relates to all of Senator Duffy's travel between P.E.I. and Ottawa (Counts 15 – 20).

[297] Ms. Proulx testified that the use by Senators in the "purpose" field of the Senate travel expense claim form of a generic phrase (like "Senate business" for example) was "perfectly valid"; that the Standing Committee had advised that that was an "acceptable" description of purpose. No further detail was required. Such a limited, generic description of travel purpose is not a "badge of fraud" or an indicator of deceit or misleading information. (Apr. 28, 2015, pp. 79-80).

[298] I disagree with Mr. Bayne's conclusion that Ms. Proulx was a partisan witness in these proceedings. I concede that she did not go out of her way to meet with defence counsel prior to her attendance in court. I also agree that she became defensive when the spotlight was focused on her former bailiwick, Senate Finance.

Senator Furey:

[299] Mr. Bayne points out that like Ms. Proulx, Senator Furey sought to expand the explicit limitation on expensed "partisan activities" set out in writing in the governing SARs. He says that like Ms. Proulx's, Senator Furey's efforts were unreasonable and inconsistent with the SARs and the travel expense claim form. Like Ms. Proulx, Senator Furey sought unreasonably to defend the existing defective Senate policy, practice and administrative oversight system because, as Chair and Vice-Chair of Internal Economy for many years, he bore responsibility for the existing defective system. Senator Furey testified that he rejected the findings of the independent external professional audits conducted by KPMG and Deloitte that identified respectively, inadequate detailing of eligibility contained in the living and travel expense policies and a lack of definition, guidelines and criteria in the living expense policy. These were findings that represented, as Mr. Audcent fairly stated, "real and serious problems" with policy and internal Senate administration, problems that, frankly, had already been identified by the Internal Economy Committee (of which Senator Furey was a leading part) in the 11th Report (Exhibit A, Tab 20). Senator Furey was untroubled by this contradiction. (Evidence Senator Furey, Dec. 7, 2015, pp. 31-32, 48-51; 57-66).

[300] Mr. Bayne reminds the court that instead, Senator Furey adopted the approach of Ms. Proulx, saying "Well …everything can't be written down." On that basis, he purported to attempt to add "fundraising or charitable fundraising" to the words expressly set out in the SARs as limiting expensable partisan activities. Senator Furey said, "we always considered it under the, under the rule", and that Senators should use their "own intuitive sense" of what is permissible under the SARs. That this is flatly contrary to the travel expense claim form and the SARs provisions themselves did not stop Senator Furey. The travel expense claim form does not say "these charges are in accordance with my intuitive sense of what the Senate Administrative Rules provide"; it says "Parliamentary functions as defined in the Senate Administrative Rules." One can only imagine the chaos of a system of rules founded on 105 different "intuitive senses" of what is expensable. Senator Furey suggested that the concept of expensable partisan activities was "so simple that you didn't need guidance on it." This, of course, was clearly contradictory to the public 11th Report of the Internal Economy Committee (Exhibit A, Tab 20 at pp. 3, 8, 10, 11) that Senate policy in the SARs provides "no clear guidance made between partisan activities relating to Senate business (allowable

expenses) and partisan activities on behalf of political parties which may not be eligible." Mr. Bayne submits that Senator Furey's evidence was incompatible with the report of his own committee. It was incompatible also with reason. Senator Furey couldn't even bring himself to agree with the 2015 report of the Auditor-General of Canada (December 7, 2015, pp. 57-66).

Paul Belisle:

[301] Mr. Belisle was the Senate Clerk when Senator Duffy was appointed in 2009; he was the Senate Clerk who convened the December 23, 2008 "welcome" meeting that he described as a "short briefing". Mr. Belisle, as Clerk, was "head of the Senate Administration" and was fixed by the SARs with responsibility to make "policies, guidelines and forms and establish procedures and practices for the good administration of the Senate." (Exhibit A, Tab 2, pp. 2-9, 2-10). Yet Mr. Belisle stated that it would be "too difficult" for him to review all Senate forms (including travel expense claim forms or primary residence declaration forms); that he couldn't recall the SARs provisions regarding "public business"; that he couldn't recall ever even seeing the primary residence declaration form (for which he was responsible). While, in fairness, allowance must be made for failing memory – Mr. Belisle had not been Clerk since August 2009 – Mr. Bayne contends that the evidence of Mr. Belisle did not advance the Crown case and instead left the impression of less than thoroughly efficient Senate Administration (as identified in so many independent audit reports, the 11th Report of Internal Economy, the 2015 Auditor General's Report). (Evidence of P. Belisle, June 5, 2015, pp. 6-9, 11-17).

Margaret Bourgeau:

[302] The Financial Clerk's evidence was that she was aware that Senators' E.A.'S "taught each other how the system worked", "how to complete forms, how their office worked, how they did things". The "more experienced" taught the "less experienced", "teaching or tutoring them in how to do things." In respect of travel expense claims, Ms. Bourgeau testified that a limited, generic description of travel purpose such as "Senate business" or "public business" was all that was required and that Senate Finance would not inquire behind that description before authorizing payment, unless there was some unusual additional representation that caused further inquiry. She agreed that a number of Senator Duffy's impugned travel claims (such as Exhibit 6, Tabs, 4, 6 and 7, for example) contained a greater description of purpose (more information) than was necessary, and that the addition of such additional information in some cases prompted further inquiry. She agreed that had Senator Duffy just set out "Senate business" in every claim "there would be no scrutiny whatsoever of the purpose" and that, therefore, "if a Senator is trying to defraud somebody or avoid oversight, the last thing he'd do is say – write all this extraneous material" (Evidence M. Bourgeau, June 12, 2015, pp. 11, l. 23; 47-48; June 15, 2015, p. 9).

[303] Ms. Bourgeau testified that, in the travel policy she discussed with Senator Duffy (and Ms. Vos) there was nothing in that policy that limited "parliamentary functions" or "partisan activities" or "public business" other than as expressly set out in the SARs. She further

explained that she never explained to Senator Duffy that travel is not eligible if it's for party activities (June 15, 2015, pp. 13-17).

[304] Ms. Bourgeau's evidence was that Senator Duffy's travel expense claims were not unusual from other Senators' travel claims; and Senator Duffy's would have "the same number of errors and mistakes as other Senators would submit." (June 12, 2015, p. 45; June 15, 2015, p. 18).

[305] Ms. Bourgeau agreed that "Senators can combine Senate business with a personal trip." (June 12, 105, p. 53).

Diane Pugliese:

[306] Ms. Pugliese, a Senate Attendance Project Officer, testified in respect of Exhibit 66, The Senators' Attendance Register, that the real significance of the Register was to ensure that the "21 leave days" were not exceeded (ie: avoidable absences from attendance in the Senate Chamber did not exceed 21 days). There was "less significance" and "less reliability" to the "Public Business" column (that Senators' staff might fill in) if there was no issue of exceeding 21 days. The first 2 columns (Senate sittings; Senators' Attendance in the Chamber) were the significant and reliable columns.

Melanie Mercer Vos:

[307] Ms. Vos testified that she was instructed by "Senate Finance" and "other executive assistants" that the purpose line of the travel expense form was properly filled out simply as "Senate business" or a like generic phrase. She testified that Senate Finance officials never instructed her that there was any limitation on "parliamentary functions", "partisan activities" and/or "public business" as set out in the SARs, restricting them so that attendance at funerals or fundraisers was not eligible for Senate financial resources. Ms. Vos's evidence was that it "was and is perfectly appropriate … to combine non-parliamentary with parliamentary travel." Ms. Vos testified that Senator Duffy never gave her any instruction to falsify any travel expense claim. Ms. Vos confirmed that Senator Duffy was an "extremely" hard worker, that he had regional responsibilities in PEI requiring his attendance there and that other parliamentarians emailed and called requesting Senator Duffy's attendance in their ridings for functions (Evidence Melanie Mercer Vos, June 8, 2015, p. 90; June 9, 2015, pp. 21, 25-27).

Diane Scharf:

[308] Ms. Scharf testified that "the Senate Finance Office instructed me to put "a generic phrase, like "Senate business" in the travel expense form purpose lines. Like Melanie Mercer Vos, there was no evidence that Ms. Scharf was ever instructed by Senator Duffy to falsify any aspect of any claim. Ms. Scharf completed three (3) travel claims (Exhibit 6, Tabs 6, 12 & 13) during her tenure as replacement E.A. (Evidence D. Scharf, June 10, 2015, pp. 38-40).

[309] In respect of Tab 6 of Exhibit 6 (Counts 13 & 14), Ms. Scharf's evidence was that

the budget is "a crucial piece of Government of Canada business" and that pre-budget consultations conducted by Parliamentarians with Canadians including business, financial and commercial leaders, were "very important" in informing the construction of that public business. This was she agreed "very much part of the public business that parliamentarians carry on" (June 10, 2015, pp. 38-40).

[310] In respect of Tab 12 of Exhibit 6 (Counts 19-20), Ms. Scharf testified that the IRB (Industrial Regional Benefits) Program was "an important Government of Canada program to create jobs and wealth in regions in Canada… especially in P.E.I." (June 10, 2015, p. 46).

[311] In respect of Exhibit 6, Tab 13 (Counts 19-20), Ms. Scharf testified that Senator Duffy discussed with Cecil Villiard the "crucial matter" of "300 fishermen out of work because of sewage in Charlottetown Harbour." This was an issue she had worked with Senator Duffy on in the office: people came from Charlottetown to Ottawa, "We had calls. We had emails. The men were desperate, they're out of work". (June 9, 2015, pp. 36-41).

[312] In respect of all of the travel claims she processed, Ms. Scharf's evidence was that there was no in depth oversight by Senate Finance of the purpose of the travel. (June 10, 2015, p. 47).

PARTISAN ACTIVITY

PETERBOROUGH ONTARIO and CAMBRAY ONTARIO

[313] It is alleged in Count 3 that the accused sometime after June 20th, 2009, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by filing travel expense claim T64-06754 containing false or misleading information contrary to section 380(1)(b) of the *Criminal Code of Canada* and further in Count 4 that he sometime after June 20th, 2009, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-06754 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[314] Mr. Holmes stated that the testimony in this trial clearly revealed that Senator Duffy was engaged in non-parliamentary partisan activities in respect of his travels on June 19th and 20th, 2009. He advised the court that Mr. Del Mastro MP had described the event in Peterborough as a fundraiser followed by a "couple of establishments" where he and Senator Duffy met some people.

[315] The Crown then advised the court that the next morning Senator Duffy addressed the "Breakfast with Barry" event hosted by Barry Devolin MP in Cambray with the express purpose of raising Mr. Devolin's political profile and to raise a small amount of money.

Defence Position

[316] Mr. Bayne noted that Senator Duffy gave evidence, confirmed by Exhibit 7, his diarized calendar, of an extremely busy June, 2009, the result of a "flurry" of requests from Prime Minister Harper and many MP's and Senators across the country who were, during caucus meetings, requesting that he make public appearances and speeches at events in their ridings and, in the case of the Prime Minister, at government policy events. So, in addition to his duties attending the Senate Chamber, and the Agriculture and Forestry Committee, and getting heart care and an MRI at the Ottawa Heart Institute and Montfort Hospital and attendance at Senate caucus, Atlantic caucus and National caucus and making public appearances in Moncton and Ottawa (the latter with Mayor Watson), Senator Duffy made a public appearance with the Prime Minister in Cambridge, Ont., on June 11th for the government's first quarterly update on the action plan designed to address the economic recession. The plan involved providing infrastructure funds to municipalities and groups. Exhibit 83 records that public appearance, which was televised. On June 12th Senator Duffy again made a public appearance with the Prime Minister in Summerside, P.E.I., returning the same day before driving that afternoon for a public appearance in Belleville, Ontario. From June 15 through 18, Senator Duffy attended the Official Language Committee, the Senate Chamber, the Forestry Committee, the National Caucus, The Rules Committee. On Friday, June 19, 2009, Senator Duffy drove with Dean Del Mastro to Peterborough for public appearances Friday night (19th) in Peterborough and Saturday morning (20th) in Cambray, Ont. Immediately following the Cambray event, Senator Duffy was driven to Pearson airport to fly to Ottawa, arriving at his NCR residence at approximately 5:45 p.m. Saturday evening. The next morning, Sunday the 21st, Senator Duffy left at 10:45 a.m. for a cross-continent trip involving numerous requested public appearances that ran continuously until July 1st, when he finally arrived home in P.E.I. Counts three and four allege fraud and breach of trust in respect of the airfare from Toronto to Ottawa, to get Senator Duffy home Saturday evening (the 20th) from the Peterborough events so he could leave Sunday morning to attend the public appearances across the country. (Exhibit 7; Evidence M. Duffy, Dec. 10, 2015, pp. 15-24, 30, 36).

[317] With respect to these counts, Senator Duffy was driven to Peterborough by Mr. Del Mastro, the Parliamentary Secretary to the Minister of Heritage and MP for that area. Senator Duffy was at the time trying to obtain federal funds to assist the Confederation Centre of the Arts in Charlottetown and Mr. Del Mastro had requested that Senator Duffy attend and speak at a public event in his riding, and was positioned in Heritage to be able to advance Senator Duffy's efforts on behalf of the arts in P.E.I.

[318] Senator Duffy made the public appearance Friday evening, as requested, at the Navy Club in Peterborough, and spoke on matters of public policy, the public business of the government: "All of it was really public, because it was talking about what the government's Economic Action Plan was and what it was doing". The event involved no aspect of personal or private business of Senator Duffy. Mr. Bayne conceded that there was an aspect of the event that was partisan, involving fundraising for Mr. Del Mastro, but Senator Duffy testified that events are not one-dimensional and that he played no direct role in any fundraising (other than his appearance as a draw). In addition to speaking about government of Canada poli-

cy (a significant and timely policy), Senator Duffy met a number of North Koreans, including the president of the Council of Human Rights in North Korea, the publisher and manager of the Canadian Korean Times, the president of the Korean Community Federation of Canada and the co-chair of the Korean Canadian Conservative support association. Senator Duffy obtained the business cards of the North Koreans (Exhibit 84).

[319] These people lobbied Senator Duffy, not in his personal capacity but as a Senator, "to encourage the Canadian Government to keep up the pressure" for greater human rights for the people of North Korea. In addition to speaking with the Korean members of the public about Canadian government action ("They wanted actions"), Senator Duffy also met in downtown Peterborough that night some labour union leaders and discussed their concerns. He then spent the night at a Best Western hotel in Peterborough.

[320] The impugned expense claim involved no accommodation charge and, obviously, no charge for transportation to Peterborough. It is made up, principally, of the flight cost back to Ottawa. The simple claim is set out at Exhibit 6, Tab 1 and involves 24 typed pages of material. It was openly submitted and "Approved for payment in accordance with Senate policies and regulations" by Senate Finance. Senator Duffy's office provided additional information requested by Senate Finance concerning a missing taxi receipt (Dec. 10, 2015), pp. 23-31).

[321] Mr. Del Mastro was called as a Crown witness. He confirmed Senator Duffy's evidence that he had requested that Senator Duffy make this public appearance and, in fact, that Senator Duffy was receiving at caucus "a number" of such requests from Parliamentarians that Senator Duffy travel to their ridings for public events. Mr. Del Mastro testified that the event had a fundraising aspect (little money was raised), but the "bigger objective" of the event was to connect as "a grassroots party" with people, hear what the people have to say, inform them what the government is doing ("keep people up to date"). Such events also hope to draw people (members of the Canadian public). Senator Duffy appeared, spoke publicly and communicated the government's message on "certainly the issues of the day". The event was public and media were invited. It was, Mr. Del Mastro testified, "a community event", open to the public beyond conservative party members. Mr. Del Mastro agreed that fundraisers have multiple characters, including expanding "the base of accessible voters." Members of the public did attend to hear Senator Duffy speak on public issues of the day: "students", "municipal representatives", "local factions", "local vets". The event was not private or personal to Senator Duffy. The event was not during a federal election, not part of a nomination campaign, not a party convention and involved no payment to the Conservative party or local EDA from Senator Duffy's office budget. Senator Duffy attended and spoke as a Senator, not in a personal capacity. He delivered a half hour speech and answered questions for another half hour.

[322] Mr. Del Mastro explained his understanding of the significant breadth of the concept of "public business": "we're told this in Caucus"; he said that "you're always a member of Parliament, always representing." (Evidence D. Del Mastro, May 8, 2015, pp. 1-9).

[323] Senator Duffy testified that on Saturday morning (the 20th) he made a public appearance and spoke at an event called "Breakfast with Barry". Barry Devolin was the Assistant Deputy Speaker of the House of Commons and the local MP for Cambray, Ontario. There were members of the Korean Canadian community there, as well (Mr. Devolin was "actively involved with the North Korea file"). Senator Duffy also met the Mayor of the City of Kawartha Lakes at the Devolin event, with whom he discussed the government's Economic Action Plan and during which Mayor Ric McGee and the City's Director of Emergency Services, David Guilbault, both "made a pitch" for infrastructure funds to address municipal water and sewer problems in their city. Mr. Bayne pointed out that this discussion with the municipal officials, like Senator Duffy's appearance and speech at the Cambray, Ontario event, involved Senator Duffy's parliamentary/Senatorial status, not his personal status or private business interests: "This discussion was with me as part of my official duties as a Senator." In addition, a retired Judge, now Chair of the Peterborough, Ont., chapter of CARP (retired persons association) lobbied Senator Duffy in his capacity as a Senator ("he was pushing very hard") for a treaty with the U.S. that would make provincial healthcare transportable to the U.S. (Evidence M. Duffy, Dec. 10, 2015, pp. 31-35).

[324] Mr. Devolin testified about the Cambray event. He testified that the main purpose ("First of all") of the event was to "bring members together"; the "principal objective was, as I say, was an end of the session report back what had been going on in Ottawa with respect to the members of my EDA"; "secondly", an effort was made to raise "you know a relatively small amount of money." Mr. Devolin requested that Senator Duffy attend as guest speaker. Senator Duffy did so. He attended and spoke in his capacity as a Senator, testified Mr. Devolin, and discussed "an Ottawa update", "events that have gone on in government, public issues, party issues" as well, possibly also the Economic Action Plan (Mr. Devolin couldn't recall clearly). Mr. Devolin estimated about 150 people attended. He agreed that meeting municipal officials about the Economic Action Plan funds would be "public business", as would Senator Duffy's meeting with representatives of human rights organizations and discussing their concerns, particularly where the Canada government had an interest. Mr. Devolin conceded that his "personal definition" of partisan activities was "different" from the SARs definition (limited only by formal elections) (Evidence B. Devolin, May 7, 2015, pp. 23-40).

[325] Mr. Bayne submits that the events of June 19 and 20 and related expense claim are "parliamentary functions", "public business" and/or "partisan activities/business/matters" all "as defined in" and "in accordance with" the SARs. There were public, non-partisan "parliamentary functions" and partisan "parliamentary functions" that took place on both the 19th and 20th. None of what took place was a personal matter or the private business interest of Senator Duffy. None of these events and activities occurred during an election or nomination campaign; none involved any payment out of Senator Duffy's office (or Miscellaneous Expenditures) budget. They were all "parliamentary functions" as described by the SARs and outside any SARs proscription. All the activity, being "parliamentary functions" (public business and partisan activities) was expressly "entitled" (Exhibit A, Tab 20, pp. 1-3) to Senate financial resources. Senator Duffy made no "false or misleading" representation relating

to expense claim T64-06754, and he did not for a moment believe he was making any false representation. He both believed this was a valid travel expense claim and it was, pursuant to the governing SARs. There is no proof of either the *actus reus* or *mens rea* of fraud or breach of trust.

Conclusion

[326] Mr. Holmes presented a very barebones summary of the Peterborough trip (fundraising, followed by a couple of establishments); and Cambray trip (raise political profile and raise a small amount of money).

[327] The evidence indicates that in addition to addressing the scheduled speaking engagements where he brought individuals up to date regarding what was going on in Ottawa, Senator Duffy met with members of the Korean community and discussed human rights issues; municipal officials and discussed infrastructure issues; and at least one municipal politician.

[328] I find that any fund raising efforts on the part of Senator Duffy were minimal.

[329] I find that Senator Duffy's trip to Peterborough and Cambray represented a balanced combination of public, non-partisan parliamentary functions and partisan parliamentary functions that fall within the valid expense provisions of the SARs.

[330] The Crown has not established the guilt of the accused beyond a reasonable doubt and accordingly, counts 3 and 4 are dismissed.

COMOX – VANCOUVER – PRINCE GEORGE – KILOMAT

[331] The accused stands charged that in Count 5 he sometime after the period between the 21st day of June, 2009, and the 26th day of June 2009, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of money, exceeding $5,000.00, by filing travel expense claim T64-06755 containing false or misleading information contrary to section 380(1)(a) of the *Criminal Code of Canada* and further that in Count 6 he sometime after the period between the 21st day of June, 2009, and the 26th day of June 2009, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-06755 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[332] The Crown contends that the purpose of Senator Duffy attending a series of events in British Columbia between June 21st and June 26th, 2009 was to participate in non-parliamentary partisan activities.

[333] Mr. Holmes indicated that John Duncan, MP said that there was considerable inter-

est in Senator Duffy and that he approached the Senator to attend his event in B.C. Mr. Duncan indicated that the event was designed to raise the party profile and fund raise.

[334] Mr. Ron Cannan, MP said the purpose of his event was to introduce "our members" to Senator Duffy and rally the troops, largely volunteers. Tickets were sold and some money was raised.

[335] Cathy McLeod, MP described her event as a fundraiser and an opportunity to get together with people from the riding. She advised the court that she had extended an informal invitation to Senator Duffy to attend her event.

Defence Position on Western Canada Trip

[336] Mr. Bayne notes that this travel claim (Exhibit 6, Tab 2) is 55 pages long and represents Senator Duffy's transcontinental travel from Ottawa through Vancouver to Comox/Courtenay, B.C., back to Vancouver, then to Prince George, then to Kelowna (via Kamloops) then to Kamloops, back through Vancouver to Whitehorse, then through Calgary and Toronto to Charlottetown – four provinces (or territories), twelve city stops, eleven days and ten nights. Senator Duffy never had a day off, including on the weekends. Because of his heart and other medical conditions, his wife, an experienced cardiac nurse, travelled with him as is expressly permitted in the SARs. Mrs. Duffy also monitors the many medications taken by Senator Duffy. The total cost, for both travellers, appears to be $14,334.60 (see amounts approved at pp. 5-6 of Tab 2). Senator Duffy's own portion totals $6,939.99 (p. 5). Mr. Bayne contents that this is a withering travel schedule even for a healthy young person; much more so for someone of Senator Duffy's age and with his health problems. This sojourn was not a personal vacation travel in any respect. All the travel was actually undertaken. All the expenses were actually incurred. There is no evidence of false or padded expenses. All expenses were submitted openly to Senate Finance and all were approved in accordance with the SARs. For the ten nights of this journey there was no claim for overnight hotel accommodation except on the gruelling Whitehorse – Calgary – Toronto – Charlottetown leg when the Duffy's had to stay overnight at the Toronto airport before a morning return to P.E.I. In the eleven days, a total of eight breakfasts, eight lunches and six dinners were claimed. This is in total for two travellers, not each. In other words, this travel claim T64-06755 was made up almost entirely of flight costs across and up and down the continent, coast to coast to coast. Mr. Bayne submits that there was no other reasonable way to undertake such business-related travel. This was not a holiday. It was not the personal or private business trip of Senator or Mrs. Duffy. It was travel to attend and speak on public policy issues at events and to groups, all requested by Parliamentarians and the groups, and all in Senator Duffy's official capacity as a Senator in the Parliament of Canada. Counsel states that the evidence shows, it was all parliamentary functions "as defined" in the SARs and "in accordance" with them.

[337] On Sunday, June 21st, 2009, Senator and Mrs. Duffy left their Ottawa residence at 10:45 a.m., flew to Vancouver and then on another flight to Vancouver Island where they rented a car and drove to Comox, arriving at 5:40 p.m. (8:40 p.m. Ottawa time). Senator

Duffy had been requested to come to speak in Comox at an event organized by John Duncan, Cabinet Minister and MP for the riding and by his EDA. Mr. Duncan made the request at caucus in late May or early June, 2009. Mr. Duncan said that Senator Duffy was lauded in caucus for travelling to and speaking at such events. The purpose of the event held on Monday the 22nd, Mr. Duncan testified, was to raise the party profile and to fundraise. He agreed that meeting people to expand the accessible voter base was an important aspect of such EDA activities. Mr. Duncan made the request, he said in chief, because Senator Duffy was a Senator whom people wanted to meet. Senator Duffy was the featured speaker at the event and spoke of "significant issues including armed forces pensions, RCMP pensions, lots of questions about a potential election and issues about the economy". These issues about which Senator Duffy spoke publicly in Comox were "all public policy issues", said Mr. Duncan.

[338] The Economic Action Plan provided funds to "many municipalities" and universities and colleges, who "got their sort of medium-term wish list filled at that time, and we renewed a lot of infrastructure", Mr. Duncan testified. Senator Duffy attended and spoke in his capacity as a Senator of the Parliament of Canada said Mr. Duncan, not in a personal capacity. The event was publicly advertised and the public was "welcome" said Mr. Duncan. Mr. Duncan agreed that Comox was the site of a large Canadian Forces base and had about 9000 military retirees in the area. There was, Mr. Duncan agreed, a "thorny issue" the government had with military vets and their pensions. Mr. Duncan arrived just before the event started and parked underground in order to "avoid" the veterans outside the event. The event was a lengthy one and Mr. Duncan left before Senator Duffy did. He said Senator Duffy stayed on and engaged with people in a circle of chairs. Mr. Duncan confirmed that this public event was not during an election or nomination campaign (Evidence J. Duncan, May 6, 2015, pp. 31-58).

[339] Senator Duffy testified that the Comox event had both partisan and non-partisan aspects. The non-partisan part (the principal involvement of Senator Duffy) involved his public speech and "meeting members of the public on public policy issues". Senator Duffy spoke with veterans for an hour in the lobby of the hotel where the Duncan EDA event was being held about "all of the various issues facing veterans: PTSD, problems with DVA, the claims aren't getting done fast enough, this whole bridging thing." Senator Duffy was at the event early (before 7:00 p.m.) and was speaking publicly and talking with the veterans and others for over 3 ½ hours to until about 10:30 p.m. Senator Duffy spoke with the vets about their issues with the government both before and after the EDA event and speech. All of these discussions, and the subject of his public speech, were, Senator Duffy testified "all public business" (Evidence M. Duffy, Dec. 10, 2015, pp. 39-46).

[340] Senator Duffy also met local mayors on the 22nd who raised issues of concern relating to the veterans' pension issues, relating to environmental concerns along the Pacific Coast of oil tanker traffic that would increase if crude was shipped, as the government proposed, by pipeline to be built from Alberta to the B.C. coast, and relating to the Economic Action Plan. Mayor Bates of Cumberland had a problem accessing infrastructure funding for his community on which he sought Senator's Duffy's help. These were all matters of public

policy and public business and Senator Duffy reasonably believed them to be so. None of them involved Senator Duffy's personal or private business matters. In addition, Senator Duffy on the 22nd spoke with other members of the public about the veterans' pension issue and the west coast fishery – see Exhibit 85 for the business cards of the mayors and members of the public who were in addition to all the veterans with whom Senator Duffy spoke. The activities of Senator Duffy in Comox were all "parliamentary functions" "as defined in" and "in accordance with" the SARs, and Senator Duffy believed them to be so (Dec. 10, 2015, pp. 47-50).

[341] On Tuesday, June 23rd, Senator and Mrs. Duffy flew to Vancouver, as Senator Duffy had a scheduled engagement on the 24th at the Fraser Institute, a non-partisan economic think tank dealing with public finances. Arriving at the hotel lobby in Vancouver (the hotel was paid by the Fraser Institute), Senator Duffy met for half an hour and was engaged by YMCA representatives (Exhibit 7) about how to access infrastructure funds. Senator Duffy gave the YMCA people a contact in Minister Baird's office to pursue their need for building renovations and upgrading. Senator and Mrs. Duffy then had dinner with their two children. This was the only time during the entire eleven-day period of Western Canada travel that they saw their children.

[342] On Wednesday, June 24th, Senator Duffy addressed the Fraser Institute. (Exhibit 7) The non-partisan nature and mission of the Fraser Institute is set out in Exhibit 86. The Institute conducts "Rigorous and Meticulous Research" into "the impact of markets and government interventions on the welfare of individuals". "Workshops and seminars" are organized as well as speeches from "influential policy figures". Senator Duffy was invited to attend the Institute, in his capacity as a Senator, to receive their economic message of concern and to convey it back to the government in Ottawa. Senator Duffy conveyed this message to Mr. Novak, Prime Minister Harper's close advisor. There was no personal or private business aspect of Senator Duffy's meeting with the Fraser Institute. It was all entirely public business and public economic policy, all a parliamentary function as described in the SARs (Dec. 10, 2015, pp. 50-55).

[343] On Thursday, June 25th, at 6:30 a.m. Senator and Mrs. Duffy left in a taxi to the Vancouver airport to travel to Prince George to attend numerous public events and make public appearances in person and by local media. On arrival in Prince George, Senator Duffy attended, at the request of Dick Harris, the local member of Parliament, a fundraising luncheon where Senator Duffy, as the feature speaker, spoke publicly on public policy, "mostly related to the Economic Action Plan". From the people in attendance there was great interest because the local lumber economy was threatened by a slowing US economy and people wanted to know from Senator Duffy what the government intended to do about this via the infrastructure spending. Although there was a fundraising aspect to this event, "that was never my concern", said Senator Duffy. The event was open to the local community. Senator Duffy's role was to speak as a Senator on matters of public policy and to listen to what the local community had to say about the government's economic approach and take that back to Ottawa. In the afternoon of the 25th, Senator Duffy attended the sponsor reception for a local charity golf tournament hosted by Mr. Harris and there he engaged with and

spoke to the public on public issues like the importance of volunteerism. None of the public events on the 25th involved any aspect of personal or private business of Senator Duffy. While there were partisan aspects, there were non-partisan public policy aspects and the partisan aspects did not take place during an election or nomination campaign or involve any donation from Senator Duffy's office budget. Mr. Bayne submits that the activities were all parliamentary functions/ public business/partisan activities defined in and authorized by the governing SARs (Dec. 10, 2015, pp. 55-60).

[344] On Friday, June 26th Senator Duffy made a public appearance on local radio in the morning with "a local media legend named Ben Meisner", where, with Mr. Meisner, Senator Duffy discussed "the economy and politics" in Canada. This appearance was publicly broadcast and "was all about public policy". Senator Duffy then appeared at the charity golf tournament where he spoke to people about the importance of charitable endeavours and "what was going on in the government of Canada, and about the role they played and the concern everyone in the government had for them and their concerns, and how we were trying to make Canada better." Then Senator Duffy spoke with another media (radio) outlet, a "call-in interview" about "the current news of the day." Before heading off to the Prince George airport, Senator Duffy spoke on another radio station and to two local newspapers about public issues like the price of lumber. None of this was in any respect the personal or private business of Senator Duffy. Counsel for Senator Duffy emphasized that it was all parliamentary functions (public and, in part, partisan) (Dec. 10, 2015, pp. 60-63). Senator and Mrs. Duffy flew in the late afternoon of the 26th to Kelowna via Kamloops.

[345] On Saturday June 27th, Senator Duffy attended a public event in Kelowna at the invitation of local MP Ron Cannan which Mr. Cannan described as "an afternoon event" set up to "talk about policy", to raise awareness, and to "rally the troops". Organized by his EDA, Mr. Cannan's evidence was that "it's not always a fundraiser, "it's the opportunity to meet new members", "an opportunity for dialogue with your members". It was, said Mr. Cannan, an event that was "definitely partisan in nature" at which Senator Duffy spoke "on matters of public policy, public issues". Senator Duffy attended and spoke "in his public capacity as a Senator", Mr. Cannan agreed. While there was a fundraising aspect to the event, Mr. Cannan agreed that "a more predominant part of the event is talking policy, meeting members, rallying the troops, raising awareness of issues", all "matters of public party business." Mr. Cannon agreed that "public business for Parliamentarians is a pretty broad concept" (Evidence R. Cannan, May 7, 2015, pp. 5- 20).

[346] Senator Duffy testified that he was the featured speaker at the Cannan event, that he spoke publicly in his capacity as a Senator and spoke about "the economy, how we were trying to do our best to prevent us from sliding deeper into recession" (Evidence M. Duffy, Dec. 20, 2015, p. 64).

[347] Exhibit 87 is the public advertising of the Kelowna event, billed as "Mike Duffy's Tough Talk – Current Events and our government". There was nothing of a personal or private business nature to the Kelowna event; it was a parliamentary function (public and partisan) as defined in the SARs. Immediately after the event, Senator and Mrs. Duffy were tak-

en by car to Kamloops for a public appearance the next day, on Sunday the 28th.

[348] On Sunday, June 28th, Senator Duffy attended a public appearance in Kamloops at the request of local MP, Catherine McLeod. Senator Nancy Greene Raine also attended the event. Senator Greene Raine was not called as a witness by the Crown. Ms. McLeod described the event as a fundraising event as well as an event to get people in the riding together. Senator Duffy was the keynote speaker. Senator Duffy spoke "about the issues of the day facing Canada" and he listened to what the people had to say, the questions they raised because part of his parliamentary job was "to listen". He attended and spoke as a Parliamentarian, said Ms. McLeod, not in his personal or private capacity. The event did not take place during an election or nomination campaign, was not a party convention and involved no payments from Senator Duffy's Senate office budget. It was partisan and public activity comprising parliamentary functions as defined in and in no way prohibited by, the SARs, fully "entitled" (in the language of the SARs) to Senate financial resources. Ms. McLeod added in her evidence that speaking on or to the media (radio, or newspapers) on public issues was part of the public business of Parliamentarians (Evidence C. McLeod, May 8, 2015, pp. 1-6; Evidence M. Duffy, Dec. 10, 2015, pp. 66-67).

[349] On Monday, June 29th, Senator and Mrs. Duffy flew from Kamloops to Vancouver to Whitehorse in order to attend public events there at the request to Senator Dan Lang. After leaving for the Kamloops airport at 7:05 a.m. Senator and Mrs. Duffy arrived in Whitehorse at 1:44 p.m., 6½ hours later. There, Senator Duffy attended a community event, what Senator Duffy understood to be a "non-partisan", annual "public picnic" in a park (although it may have been organized by the Yukon Conservative Association) attended by Senator Lang, the Territorial Premier and the local Liberal MP, Larry Bagnall, and held to raise money for the homeless. There is no evidence that Senator Duffy made any charitable donation from his office budget. Senator Duffy spoke to the community on the economy of Canada and the importance of sharing with the disadvantaged. There was no personal or private business aspect to this public activity; it was all in Senator Duffy's parliamentary capacity as a Senator; it was non-partisan public business as described in the SARs. Senator Lang was not called by the Crown (Evidence M. Duffy, Dec. 10, 2015, pp. 67-70); Exhibit 7).

[350] Michael Lauer, a local Conservative EDA official, testified that he organized the event (a charity barbeque) in the park to raise money for the local food bank. He said that Senator Lang had had more direct involvement in Senator Duffy attending in Whitehorse then he himself had. He testified that the event "was not a fundraising event for the EDA" and was "a public event" in a public park where the community was invited (Evidence M. Lauer, June 3, 2015, pp. 1-14).

[351] On Tuesday, June 30th, at 8:00 a.m., Senator Duffy attended at and spoke to the Whitehorse Chamber of Commerce. This was a non-partisan public event at which Senator Duffy addressed the business people present about the government's Economic Action Plan. Senator Duffy again stressed the importance of listening to the people in terms of their questions and concerns, especially because the Yukoners felt, because of their remote location, their voices were not always heard in Ottawa. Rick Karp, the President of the Whitehorse

Chamber of Commerce, testified. First interviewed five (5) years after the events, he could not recall exactly how Senator Duffy's invitation to attend had been extended by the Chamber and so couched his evidence in what he thought "would have happened". Thus, he conjectured that "probably" Senator Lang would have known Senator Duffy would be in the area and "probably" would have called Mr. Karp who then extended the invitation to Senator Duffy to speak to the group. Mr. Karp said "probably" Senator Lang would know better, but Senator Lang was never called by the Crown. In any event, it is clear that Senator Duffy attended the Chamber of Commerce meeting and spoke at the request of the Chamber. Mr. Karp said he "probably" also invited the Territorial Premier and other "Ministers of Government". Mr. Karp testified that Senator Duffy attended and spoke in his Senatorial capacity in what Mr. Karp agreed was "an important public appearance for Senator Duffy to make" to his business group. Mr. Karp agreed that this was a "non-partisan and non-political" public appearance at which Senator Duffy discussed "what's going on" in Ottawa. This was public business as defined in the SARs, "entitled" to Senate financial resources (Evidence M. Duffy, Dec. 10, 2015, pp. 70-72; Exhibit 7; Evidence R. Karp, June 3, 2015, pp. 1-4).

[352] That afternoon, on Tuesday, June 30th, Senator and Mrs. Duffy left Whitehorse at 9:25 a.m. and flew through Calgary to arrive in Toronto at 11:30 p.m., a full day of travel. As they could not continue at that hour on to P.E.I., they overnighted at the airport hotel and flew on to Charlottetown, finally arriving home in P.E.I. at 12:30 p.m. on Wednesday, July 1st. Mr. Bayne submits that all eleven days of this transcontinental travel was related to parliamentary functions as defined in the SARs. It was all expressly "entitled" to Senate resources. Senator Duffy testified that he believed that this travel was validly billed under the provisions of the SARs (and, was consistent with what his "guru", Senator Tkachuk, had advised him). He made no false statement in his travel claim and intended no deception (Evidence M. Duffy, Dec. 10, 2015, pp. 73-75; Exhibit 7).

[353] Mr. Bayne concludes that in respect of Counts 5 and 6, there is no proof beyond reasonable doubt of the *actus reus* or *mens rea* of any crime of fraud or breach of trust.

Conclusion

[354] Like counts 3 and 4, Mr. Holmes sets out a factually thin outline of Senator Duffy's itinerary suggesting a purely partisan agenda.

[355] The evidence, however, demonstrates that the trip encompassed a balanced combination of public, non-partisan parliamentary functions and partisan parliamentary functions that fall within the valid expense provisions of the SARs.

[356] The Crown has not established the guilt of the accused beyond a reasonable doubt and accordingly counts 5 and 6 are dismissed.

SAANICH FAIR

[357] Counts 7 and 8 of the information read that Senator Duffy (7) sometime after the period between the 5th day of September, 2009, and the 8th day of September, 2009, at the

City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, exceeding $5,000.00 by filing travel expense claim T64-06774 containing false or misleading information contrary to section 380(1)(a) of the *Criminal Code of Canada* and further that he (8) sometime after the period between the 5th day of September, 2009, and the 8th day of September, 2009, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-06774 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown Submissions

What the evidence reveals

[358] Mr. Holmes states that Senator Duffy advised the court that he had arranged to travel to B.C. on the Labour Day weekend in 2009 to support Gary Lunn MP by attending a large outdoor agricultural fair that took place over three days every September in Saanich, B.C. Senator Duffy said this arrangement was discussed with Lunn at a meeting held during June at a local steakhouse. Senator Duffy's diary reflects that he shared a meal with Mr. Lunn, but it fails to record any agreement that may have been struck at that time. Mr. Lunn had been re-elected in the 2008 general election but was "holding on by his fingertips" according to Senator Duffy.

[359] Mr. Lunn testified that in his mind there had never been any solid arrangement concerning Senator Duffy's attendance at the Saanich Fair. Mr. Lunn identified the Fair as a prominent and important local event. He testified that Senator Duffy would have been welcome at the Saanich Fair "if he was coming to the west coast". He explained that a number of different Electoral District Associations could share the costs if Senator Duffy was coming with the plan to attend a number of events. Mr. Lunn stated that the discussion about Senator Duffy coming to Saanich likely happened following a caucus meeting. He reiterated that the details had not been locked down. Mr. Lund had a vague recollection of discussions between the members of his EDA with Senator Duffy concerning payment of his expenses about one to two weeks prior to the event. Certain members of Mr. Lunn's EDA executive testified and while some discussions about Senator Duffy's attendance at the Fair had occurred, no final agreement was reached.

[360] Robert Hallsor said that it was common to try to secure the attendance of a special guest "if a travelling dignitary [was] in the area". Don Page understood that some efforts were made to secure Senator Duffy's attendance. Mr. Page also said that if Senator Duffy was in the area (that is, for some other reason) then he could come over to the Fair. Marilyn Loveless said she had no part in cancelling Senator Duffy's attendance at the Fair and was unaware of any reason for that to happen.

[361] In short, nobody specifically recalls arranging for Senator Duffy to attend, no one cancelled him at the last moment and one member of the executive expressed the view that there was no reason to cancel his attendance.

[362] Senator Duffy made travel arrangements on September 1st for himself and his wife to fly to Vancouver. Mr. Holmes suggested that it might have made more sense to have made arrangements to fly directly to Victoria B.C. since Saanich is located nearby.

[363] In any event, Senator Duffy never attended the Saanich Fair. Mr. Holmes states that Senator Duffy claimed he received a phone message in his hotel room, a mysterious phone call some might say, instructing him, "Do not come to the Saanich Fair". Crown Counsel notes that in each retelling of the call it differs. Minutes later, the message from a voice he didn't recognize advised him, "Senator, plans have changed, do not come to Saanich. Please do not come."

[364] Senator Duffy agreed with the Crown that he could have noted down the name of the caller but he didn't.

[365] Furthermore, Senator Duffy testified that last minute cancellations are common in the world of politics. Mr. Holmes seemed skeptical about Senator Duffy's ability to make such a statement since Senator Duffy had only been a Senator for eight months at the time of this event.

[366] I find that Senator Duffy was well-positioned to state that cancellations in politics are commonplace keeping in mind that Senator Duffy had spent years covering political matters as a journalist.

[367] Mr. Holmes reminded the court that Senator Duffy had Gary Lunn's cell phone number because that was how he was going to arrange to be picked up when he flew from Vancouver to Vancouver Island. Crown Counsel expressed his curiosity as to why Senator Duffy did not telephone Mr. Lunn to get an explanation about the last minute cancellation. It was only after both gentlemen returned to Ottawa that the topic was broached by Senator Duffy.

[368] Crown Counsel stated that when the RCMP began examining Senator Duffy's travel expenses some years after the Saanich Fair event had come and gone, Senator Duffy sent a message to Mr. Lunn reminding him that the reason Senator Duffy's attendance at Saanich was cancelled was because the Olympic Flame had taken priority. Mr. Holmes noted that neither Mr. Lunn nor the other members of the executive viewed the presence of the Olympic flame as a reason to cancel Senator Duffy's attendance at the Fair.

[369] Even though Senator Duffy said he received the voice message cancelling his appearance at Saanich on the first night he stayed at the hotel, he elected to stay on in Vancouver awaiting the date of his booked departure.

[370] Mr. Holmes takes the position that even if the sole purpose of this trip had been to attend the Saanich Fair and that Senator Duffy had attended the Fair, there could be no justification that this trip amounted to an appropriate expense claim and that such a trip was preposterous. The Crown suggests that the considerable expenses incurred for the purpose of making an appearance at an agricultural fair on the opposite side of the country from the

province that Senator Duffy represents offends the requirement in the SARs that travel expenses be reasonable and adhere to principles of due economy. Mr. Holmes maintains that this expenditure of funds flies in the face of common sense.

[371] In any event, Senator Duffy never made it to the Saanich Fair and as Mr. Holmes observed he wasn't missed because on the evidence no one was actually expecting him to attend the Fair.

[372] Senator Duffy and his wife spent three nights at the Four Seasons Hotel in Vancouver. On September 7th, Sean and Miranda came to "chill" at the "4 Seasons". In fact, according to Senator Duffy's diary, he appears to meet up with either his son-in-law "Sean", or his "kids", or "Sean and Miranda" each day at the hotel.

[373] Senator Duffy said that "it was nice to see my daughter's play and it was nice to see my kids, but it wasn't the purpose of the trip." A notation in the diary for 4 September 2009 reads: "pack for Vancouver". A notation in the diary for 5 September 2009 reads: "Fly to Vancouver – AC #139 - arrive 14:44 for Miranda's play."

[374] Mr. Holmes contends that the timing of the travel, the destination selected, and the notation in the diary all demonstrate that Senator Duffy and his wife travelled to Vancouver to see Miranda's play. The Crown concedes that while any event can be cancelled, what renders Senator Duffy's account of the Saanich Fair scenario totally incredible is the Senator's failure to follow up with the person whom he claims he arranged the visit, despite having the means to do so.

[375] The bottom line from the Crown's point of view is that the trip was purely a private matter and expensing the trip was fraudulent.

Defense Submissions

[376] Mr. Bayne states that Senator Duffy testified that on June 18, 2009 at 6:00 p.m. he met Gary Lunn and David Angus at Hy's restaurant in Ottawa. Exhibit 7 confirms this evidence. Mr. Angus was the Ottawa lobbyist for Molson and Mr. Lunn was the Minister of Sport and MP for Saanich Gulf Islands. Mr. Lunn convened the meeting at Hy's to discuss potential re-election problems he was facing. Mr. Lunn had almost lost the prior election to Green Party candidate Elizabeth May and did in fact lose the subsequent election to her in 2011. In addition, there had been a reported scandal in *The Globe and Mail* that Conservative forces had used robocalls to misdirect voters in Mr. Lunn's prior election victory. Mr. Lunn knew that Senator Duffy was being lauded in caucus for travelling to MP's ridings for public appearances and raising the profile of the party and the MP. Mr. Lunn told Senator Duffy about the Saanich Fair upcoming on the Labour Day weekend, Sept. 5-8, 2009 and that it was "the largest event, public gathering on Vancouver Island in the course of the year." Senator Duffy was told by Mr. Lunn and understood that this was a non-partisan community event at which all parties made their presence obvious. Mr. Lunn requested that Senator Duffy attend with Mr. Lunn at this event to meet and greet the public and to help to raise Mr.

Lunn's profile (and chances for re-election). It was, to Senator Duffy's understanding, a clearly non-partisan major public event on Vancouver Island, but with a partisan undercurrent of providing some "third-party validation" of Mr. Lunn after the scandal. When Senator Duffy demurred, saying that he was reluctant to travel coast to coast on the Labour Day weekend, Mr. Lunn encouraged Senator Duffy by saying that making the trip for Mr. Lunn and the Party would also give Senator and Mrs. Duffy a chance to see their children in Vancouver. Mr. Bayne pointed out that family reunions is an encouraged aspect of Senate policy and combining personal (family reunion) aspects with parliamentary functions travel is well accepted. Senator Duffy agreed to Mr. Lunn's request. (Evidence M. Duffy, Dec. 10, 2015, pp. 75-80; Evidence G. Lunn, June 5, 2015, pp. 32-35).

[377] Senator and Mrs. Duffy had just arrived back in Ottawa from P.E.I. (driving) on Friday, August 28th (Exhibit 7). Senator Duffy flew back to P.E.I. for an event on P.E.I. on September 2nd, returning to Ottawa on the 3rd. On Saturday, September 5th, Senator and Mrs. Duffy flew to Vancouver. While the actual recorded booking of the flights occurred roughly four days before the travel, Senator Duffy explained that this was the product of his travel agent's, Scott McCord's, system used to book travel. Mr. McCord, who did a volume business of bookings ("many, many, many Senators and MP's use him for that reason"), was not called by the Crown to explain his booking system or the dates of bookings, or when he finalized bookings. The purpose of the travel, Senator Duffy testified, "was to attend a public event with the Honourable Gary Lunn, who was Minister of Amateur Sport and Fitness, and it was the Saanich Fair". With all the travel he and Mrs. Duffy had done the week prior and just two days before the flight west, Senator Duffy testified that he would not have gone to Vancouver "except for the invitation or request by the Minister to attend with him at the Saanich Fair." Senator and Mrs. Duffy saw Miranda, Senator Duffy's daughter, in an amateur play on Saturday evening. Senator Duffy was planning to leave on Sunday morning to meet Mr. Lunn: "I was to call Gary's cell phone when I was getting on" the Harbour Air hourly commuter flight out of Vancouver Harbour "so they'd have someone to meet me at the plane when it landed in Victoria" (Evidence M. Duffy, Dec. 10, 2015, pp. 76-83).

[378] When Senator and Mrs. Duffy arrived back at their hotel Saturday night there was a recorded message instructing him not to come over to the Saanich Fair, that "Senator, plans have changed, do not come to Saanich". At the time, Senator Duffy did not know the reason for the cancellation of his planned public appearance but later Senator Duffy spoke with Prime Minister Harper who explained that Senator Duffy was cancelled so as not to detract from the focus on Mr. Lunn with the Olympic torch: "It was all about keeping the focus on two things: the Olympics and Lunn – the visual's not Mike Duffy with the torch. It's got to be Gary Lunn with the torch." Mr. Lunn was to get visual credit for bringing the Olympics to B.C. Senator Duffy did not personally cancel his planned attendance at the Saanich Fair, the purpose of his travel. He said he wouldn't do that as he had been travelling widely to make public appearances, such as the 11 day, 10 night B.C./Yukon travel referred to in Counts 5 and 6. At the heart of the allegations made in respect of Counts 7 and 8 is proof of who cancelled this attendance and when (Evidence M. Duffy, Dec. 10, 2015, pp. 80-85).

[379] Senator Duffy testified that his original supposition as to the reason for cancellation

was confirmed by the Prime Minister. He testified that cancellations are not unusual in parliamentary life. He testified that cancellations beyond the traveller's control are paid for out of Senate resources. He had originally booked to return on the 8th and left that schedule intact because he reckoned that the cost of re-booking to try to fly out on the 6th or 7th (if he even could) would occasion change fees as much as or more than the $145.00 per night hotel cost, so staying on the original schedule would not occasion additional cost. Mr. Bayne takes the position that regardless of the administrative wisdom of this decision, the issue should be a matter for the Internal Economy Committee and not a criminal court. Senator Duffy's evidence was that he made the decision in good faith and believed travel expense account T64-06774 was valid and within the SARs. The public appearance at the Saanich Fair qualified both as public business and partisan activity as defined in the SARs and thus, "entitled" to Senate travel resources. He had no intention to deceive or defraud. Mr. Bayne stresses that Senator Duffy had not unilaterally cancelled the public event appearance nor did he have any advance notice of a cancellation. (Evidence M. Duffy, Dec. 10, 2015, pp. 83-88).

[380] Counsel for Senator Duffy submits that the Crown's evidence on the cancellation of Senator Duffy's attendance came from Mr. Lunn, Robert Hallson, Marilyn Loveless and Don Page. This evidence was internally inconsistent and mutually self-contradictory. Mr. Lunn and Mr. Hallson had recall problems and relied on hearsay and/or conjecture. This evidence is an unsafe, unreliable basis on which to find beyond reasonable doubt that the cancellation of Senator Duffy's Saanich Fair public appearance was other than as Senator Duffy testified.

[381] Mr. Lunn gave evidence inconsistent with his statement to the police. To the police Mr. Lunn said he "vaguely" recalled a conversation with Senator Duffy about the possibility of attending the Saanich Fair. To the court he claimed he "clearly" recalled a couple or a few such conversations. To the police he stated nothing whatsoever about a conversation he allegedly had with members of the EDA Board to cancel Senator Duffy's planned attendance weeks before the event. To the court he first claimed that he spoke with the Board members, including Ms. Loveless and Mr. Page about Senator Duffy's alleged request for travel expenses and those Board Members' collective decision not to pay and, thus, to cancel Senator Duffy's attendance. (Ms. Loveless and Mr. Page flatly contradicted this version.) Mr. Lunn then changed his story to recalling having had this discussion only with his "very close friend", Mr. Hallson, with whom Mr. Lunn spoke frequently, including a day before giving his evidence and, who had himself (Mr. Hallson) just testified and given this version. Mr. Lunn stated, improbably, that he had not told the police about this alleged conversation to cancel Senator Duffy's attendance because "they didn't ask...." But the police did ask Mr. Lunn expressly, "whether" Senator Duffy had attended. Mr. Bayne contends that if Mr. Lunn's evidence of such a prior collective decision by the Board to cancel Senator Duffy's attendance was true, he would have known Senator Duffy did not attend because the Senator had been previously cancelled and he would have told the police. Mr. Lunn's response, however, to the police inquiry whether Senator Duffy had attended was to explain that he had called a Board member to ask if Senator Duffy had attended the Fair. This is quite inconsistent with allegedly knowing the Senator had been cancelled weeks before and not telling

the police this fact. Mr. Lunn said he never told the police because it wasn't "that big a deal". Mr. Lunn for the first time came up with this allegation only after speaking with Mr. Hallson, a prior witness. Mr. Lunn never told the police or Crown this alleged relevant fact over the course of 16 months from February 2014, when he was interviewed. Further, Mr. Lunn first asserted that his conversations with Senator Duffy about attending the Saanich Fair were "really casual" and it was "never firmed up" that Senator Duffy was actually coming. Yet Mr. Lunn could not then explain, if this was true, why Mr. Page, then the EDA President, was "thrilled" that Senator Duffy was in fact going to attend. Mr. Lunn could not recall who allegedly contacted Senator Duffy (or his office, he couldn't say) to cancel Senator Duffy's appearance. He could not recall when this would have been done ("sometime prior to the fair"). He could not account for what the message, if any, might allegedly have said (Evidence G. Lunn, June 5, 2015, pp. 1-29).

[382] Mr. Hallson, Mr. Lunn's friend, had a problem with his memory, because "a lot of these meetings and so on blend together." Mr. Hallson was first contacted to try to remember events concerning the Saanich Fair in "late 2014" more than five years after the event. Mr. Hallson's evidence was that the EDA Board made a collective decision prior to ("close to") the Fair to cancel Senator Duffy's attendance. Mr. Hallson offered no evidence of what "close to" meant. Mr. Hallson himself had no communication with Senator Duffy or his office to advise Senator Duffy of that alleged decision, and offered no evidence that such a communication actually took place. He "guessed" that maybe someone emailed Senator Duffy or his office. While Mr. Hallson had "no knowledge" of Mr. Lunn's arrangements with Senator Duffy to attend, he was advised that Senator Duffy was in fact planning to attend the Fair. (Evidence B. Hallson, June 4, 2015, pp. 1-7).

[383] Marilyn Loveless was the current EDA President when she testified and had been a Board member since 2002-03. She testified that she knew nothing of any EDA Board meeting or "collective decision" to cancel Senator Duffy's attendance at the Saanich Fair in 2009 and was never told that.

[384] Don Page was EDA President in 2009. He heard that Senator Duffy would be attending the Fair in 2009 and was "thrilled". He was interviewed six (6) years after 2009 and couldn't recall when he first heard that Senator Duffy's attendance was cancelled or why. Mr. Page testified that he "expected to see him [Senator Duffy] there", at the Fair. Mr. Page understood that "Mr. Hallson and Gary Lunn got Mike Duffy to agree to come to the fair." He did not know "the circumstances of his not being there". He said, "I was merely informed that circumstances had changed and he was not going to show up, and so we got on with the rest of the Fair without him." (Evidence D. Page, June 4, 2015, pp. 18 – 21).

[385] The evidence of Ms. Loveless and Mr. Page is inconsistent with and contradicts the evidence of Mr. Hallson and Mr. Lunn about an alleged "collective" Board decision weeks before the Saanich Fair to cancel Senator Duffy's public appearance. It is inconceivable that the then Board President (Mr. Page) would not know of a collective Board decision as alleged by Messrs. Lunn and Hallson. Moreover, Mr. Page's evidence tends to corroborate Senator Duffy's evidence that the actual cancellation occurred on the Saturday night, after

the Fair had started, not weeks before. Saying we got on with "the rest" of the Fair suggests that Mr. Page first heard that Senator Duffy had been cancelled during the currency of the Fair. Just as Senator Duffy first heard that he was being cancelled.

[386] All of these witnesses agreed that the weekend Saanich Fair is the largest public event on Vancouver Island (60,000 – 70,000 people attend), and is non-partisan although heavily attended by all parties who compete for connection and profile with the public. The Olympic torch was a popular prop for Mr. Lunn and gave him "an advantage" or a "leg up" on the other political parties present.

[387] Mr. Bayne maintains that the totality of the evidence falls far short of proving the Crown's contention that Senator Duffy incurred the travel (and related expenses) solely to visit his daughter or see her play, knowing in advance that his public appearance at the Saanich Fair had been cancelled. The internal inconsistencies in and contradictions between the witnesses on whose evidence the Crown relies to displace the presumption of Senator Duffy's innocence, undermine the Crown case. It is probable on all this evidence that Senator Duffy first heard that his pre-arranged public appearance at the Saanich Fair was cancelled during the Fair, on Saturday night after Senator and Mrs. Duffy had travelled west in order that he could make that requested appearance. Senator Duffy's evidence is supported by that of Ms. Loveless and Mr. Page. Mr. Bayne submits that the Saanich Fair public event clearly involved public business (with some perfectly acceptable partisan overtones) for all Parliamentarians who attended and took part. Senator Duffy's travel was incurred for that public purpose as defined in the SARs. The Crown has not proved the contrary beyond a reasonable doubt.

Conclusion

[388] Mr. Holmes submitted that there was never any solid arrangement for Senator Duffy to attend the Saanich Fair at the behest of Mr. Lunn and that Senator Duffy used the pretext of the Fair to fly to Vancouver to see his daughter's play and that this was strictly a private matter fraudulently expensed to the Senate.

[389] After listening to the Crown witnesses on these charges, I was reminded of the skit, "Who's on First?" I do not mean to be too critical of Team Lunn because the witnesses were questioned about the events some years after they had occurred and they would not have had any reason to expect to be testifying about these events in the future.

[390] The fuzzy memory syndrome was highlighted when Mr. Lunn contacted a board member of his EDA to ask whether in fact Senator Duffy had actually attended the Fair.

[391] I find as a fact that Senator Duffy had been recruited to attend the Saanich Fair and had made arrangements to make an appearance there. I do not ascribe any criminal intent to the fact that Senator Duffy flew into Vancouver, where his daughter lives, as opposed to flying into Victoria. The fact that Senator Duffy was able to see his daughter's play was incidental to the primary purpose of his flight, namely, to attend the Saanich Fair.

[392] I accept Senator Duffy's version of events as to the circumstances surrounding the cancellation of his personal appearance.

[393] I do not find it strange that Senator Duffy did not immediately seek out an explanation for his cancellation.

[394] I accept Senator Duffy's explanation for overstaying in Vancouver. The cost of rebooking flights is not insignificant.

[395] The cost effectiveness of flying to an event in British Columbia is a matter best left to Senate Finance.

[396] I find that the purpose of this trip combined the elements of public business and partisan activity and it is within the SARs.

[397] The Crown has not established the guilt of the accused on counts 7 and 8 beyond a reasonable doubt and accordingly, the charges are dismissed.

PETERBOROUGH PUPPY

[398] Counts 9 and 10 read that Senator Duffy did (9) sometime after the period between the 2nd day of July, 2010, and the 3rd day of July, 2010, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by filing travel expense claim T64-06798 containing false or misleading information contrary to section 380(1)(b) of the *Criminal Code of Canada* and further that he (10) sometime after the period between the 2nd day of July, 2010, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-06798 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[399] Mr. Holmes submits that the evidence at trial reveals that Senator Duffy and his wife went to the dog show in Peterborough, Ontario on the 3rd of July, 2010 "to make arrangements" to buy a puppy.

What the evidence reveals

[400] Senator Duffy and his wife previously had purchased a Kerry Blue Terrier from a woman named Barb Thomson. The name of the dog was Ceilidh. Mr. Holmes noted that there were sixteen references to this dog in Senator Duffy's diary and the entry for 22 April 2010 at page 78 reads: "Ceilidh leaves us at March Rd. Vet Clinic".

[401] The diary, Exhibit 7, indicates that Senator Duffy drove to Peterborough on Friday July 2nd, 2010 and stayed at a Super 8 Motel. The next morning he met up with Dean Del

Mastro and his wife for coffee. Thereafter the Senator attended what he portrayed as a "PA" (public appearance) at the "Cdn Kennell Club show and luncheon – Nicholls Oval, Peterborough". This is all of the information that is available from the entries in the diary.

[402] According to the claim, found in Exhibit 6A, Tab 4, he was accompanied by Heather Duffy. There are *per diem* claims for both individuals for both days of the trip.

[403] Mr. Holmes acknowledges that amongst some of the Crown witnesses there was some confusion whether Barb Thompson attended the dog show in Peterborough in July 2010. The mystery was solved when Barb Thompson testified and said she didn't attend that year, but had been a past participant in that dog show. A more fulsome examination of the confusion is contained in Mr. Bayne's review of the evidence on this point.

[404] Louise Lang met Senator Duffy at Nicholls Oval on July 3rd, 2010. France Godbout also met Senator Duffy and testified that he was "looking to acquire a Kerry Blue puppy" but he didn't get one from her. Ms. Godbout was uncertain whether she didn't have any puppies at the time or, in the event that she did, that he was not ready to purchase one right away. Senator Duffy provided Ms. Godbout with a business card and asked her to contact him "if I had something".

[405] Mr. Holmes stated that according to Senator Duffy's testimony the purpose of the trip to Peterborough was to meet some "Christian broadcasters". Senator Duffy further said that Dean Del Mastro had failed to make the necessary arrangements and so no meeting took place. Senator Duffy and his wife were dog fanciers. Mr. Del Mastro told them about the dog show. They attended the dog show where Senator Duffy discharged his parliamentary duties by visiting the booths.

[406] Crown Counsel contends that Senator Duffy's account of what had occurred is contradicted by the testimony of Dean Del Mastro. Mr. Holmes notes that Mr. Del Mastro advised the court that he had no recollection of the purpose of the get together in Peterborough and that he never mentioned that the purpose of the trip involved a meeting with some "Christian broadcasters". Mr. Del Mastro further testified that he received a call from Senator Duffy "indicating that he was in Peterborough and was hoping to have an opportunity to get together with me, which I was able to do later that day". They met up for coffee at a Tim Hortons, spending ½ hour to an hour together. All of this tracks with the information in Senator Duffy's diary. Mr. Del Mastro was asked:

> Q. "Did the Senator tell you why he was in town?"
>
> A. "He did. They had been – they were attending a dog show that's an annual event in Peterborough."
>
> Transcript of Dean Del Mastro on May 8, 2015, p.15

[407] Mr. Holmes directed the court's attention to the fact that although the expense claim indicates that the purpose of travel was to "meet local officials on broadcasting issues,"

there is no corresponding entry in Senator Duffy's diary in respect of any such meeting.

[408] The Crown contends that the evidence shows that this trip was a window shopping trip to look at dogs, specifically at Kerry Blue Terriers and should not have been the subject to a travel expense claim.

Defence Position

[409] Mr. Bayne states that counts 9 and 10 are based upon the Crown's allegation that the car travel to Peterborough and back to Ottawa July 2 and 3, 2010, and staying overnight at the Super 8 Motel (cost $79.99 + tax), and related travel expense claim T64-06798 (Exhibit 6, Tab 4) –which totalled $698.58 rather than the $503.41 claimed because Senator Duffy failed to claim *per diems* to which he was entitled and which were pointed out by Senate Finance – was all criminal because Senator and Mrs. Duffy made the trip to go to a dog show, "arrange to acquire a puppy" and then "drive home" (Crown opening April 7, 2015, pp. 15-16). Counsel maintains that the evidence does not support – and in fact contradicts – this proposition. The evidence given by Senator Duffy indicates that Senator and Mrs. Duffy did not even know of the existence of the Peterborough dog show when they undertook the travel to Peterborough. There is no evidence to the contrary. The evidence is that Senator and Mrs. Duffy acquired no "puppy" at the show nor did they try to acquire a dog at the show. Senator Duffy advised the court that he learned of the show while speaking with Mr. Del Mastro, the local MP, whom Senator Duffy had travelled to meet (expecting as well to meet local broadcasters). The Crown's evidence (through Louise Lang) that a dog breeder named Barb Thompson was at the 2010 Peterborough dog show was refuted completely by Ms. Thompson herself. Ms. Thompson was not present at and did not sell or solicit to sell a "puppy" to Senator Duffy at this dog show. In fact, Senator Duffy's acquisition of a Kerry Blue Terrier from Ms. Thompson took place in January of 2011 in New Brunswick. Mr. Bayne concludes that the Crown's assertion is not proven beyond a reasonable doubt and in fact it is refuted convincingly.

[410] Senator Duffy testified that he travelled to Peterborough to meet Mr. Del Mastro who was at the time the Parliamentary Secretary to the Minister of Canadian Heritage, a portfolio responsible for funding of the arts. Senator Duffy had been told by Mr. Del Mastro that a local Christian radio station was looking for advice as to how to make their enterprise economically viable and Mr. Del Mastro had asked Senator Duffy to come to Peterborough to meet these people and assist them (given his media experience).

[411] Senator Duffy was at the same time trying to advance the case for funding for the Charlottetown Confederation Centre of the Arts in P.E.I. Mr. Del Mastro was in a position to help that particular project, being well-placed in Heritage and being, at that time "part of the Prime Minister's inner circle". Senator Duffy wanted a one-on-one with Mr. Del Mastro to advance the P.E.I. public arts project and figured that helping Mr. Del Mastro by helping the local broadcasters would create "an I.O.U." for the P.E.I. project. Mr. Bayne submits that Senator Duffy travelled to Peterborough for this purpose, a public purpose – to advance the arts in P.E.I. – and for no personal or private business purpose. He was unaware of the exist-

ence of a Peterborough dog show, let alone when it took place, not being from Peterborough and seldom having been there (Evidence M. Duffy, Dec. 10, 2015, pp. 89-92)

[412] Senator Duffy met Mr. Del Mastro at 8:45 a.m. in Peterborough (Exhibit 7). Mr. Del Mastro advised Senator Duffy that the Christian radio station issue was resolved (the station had been sold). The two Parliamentarians then discussed Mr. Del Mastro's proposal to create a nightly internet program reporting on Parliament's activities and "the government's policies" (which ultimately was created by the PMO). Senator Duffy added that he "was always badgering" people like Mr. Del Mastro about funding for the Charlottetown Arts Centre. After their discussions, Mr. Del Mastro mentioned what he described to Senator Duffy as a big public event going on in town, "the biggest dog show in Canada". Senator and Mrs. Duffy attended, not to buy a dog or shop for one, but to see the show: "we weren't there to buy a dog. We were there to see the show and friend-raise". Barb Thompson was not at the show and Senator Duffy never met her there, or expected to meet her there. The Duffys had previously owned a Kerry Blue that had died of cancer and they inquired if Kerry Blues had a genetic disposition for the disease. Senator Duffy testified that he had a discussion at the dog show with a "woman from Quebec" (Ms. Godbout resides in Magog, Quebec) about "if Kerry Blues had a genetic propensity for leukemia... we weren't interested in buying from her." There was no shopping for a "puppy" (Evidence M. Duffy, Dec. 10, 2015, pp. 92-98).

[413] Senator Duffy testified (and Barb Thompson confirmed as did Exhibit 7) that he visited Ms. Thompson to look at new puppies in New Brunswick on November 28th, 2010 (the day his mother died) and that he and his wife acquired a dog from Ms. Thompson in New Brunswick on January 24, 2011. The Peterborough dog show had nothing whatsoever to do with Senator and Mrs. Duffy's dog acquisition (Evidence M. Duffy, Dec. 10, 2015, pp. 98-100).

[414] Mr. Del Mastro said that although he couldn't "remember specifically" all of the issues he and Senator Duffy discussed in Peterborough on July 3rd, he recalled the meeting as lasting approximately an hour and involving "rollout of the Economic Action Plan ("money the government was making available for projects across Canada") and an "initiative I wanted to start which was kind of an Internet broadcast of Members of Parliament that would be .... a communications tool" and would allow "people to see much more depth to elected representatives". This would be a format in which "current topics" would be discussed, Parliamentarians could thus make "their positions certainly more available to people – in short a public affairs program format". Mr. Del Mastro (incorrectly) recalled the meeting with Senator Duffy as taking place in the afternoon at 2:00 or 2:30 p.m. and thought that perhaps, "if my memory serves me correctly" that the Duffys had been to the dog show before the meeting and "may have went back to it." Mr. Del Mastro described the dog show as "a significant community event" and that "getting out and just talking to everyday people" was an important part of public life, "one of the more important things that parties do." (Evidence D. Del Mastro, May 8, 2015, pp. 10-19).

[415] Louise Lang was called by the Crown. She testified that "for sure" Barb Thompson was at the 2010 Peterborough dog show. Ms. Lang was interviewed 3 ½ years after the

show; when interviewed she could not recall the year Senator Duffy attended. She said, "My brain is just on overload when I'm at these shows." She told the police that "To the best of my knowledge, yes, he bought – he picked up a dog" at the 2010 show, that he picked up this dog from the breeder, Barb Thompson. Ms. Lang said she had "no idea what time of day it would have been" when she saw Senator Duffy. She described the encounter with Senator Duffy as follows: "I was going from point A to point B, my husband said, 'Come here and meet Mike Duffy', so I did as politely as I could and then I ran off to do what I was doing." The total time of this brief encounter last "probably less than a minute." She testified that Senator Duffy "didn't tell me why he was there..." (Evidence L. Lang, May 5, 2015, pp. 3-7).

[416] Barbara Thompson, a New Brunswick resident, testified that she did not attend the 2010 Peterborough dog show (she and her daughter were at a barrel-racing show elsewhere that weekend). Ms. Thompson had sold, in 2006, a Kerry Blue Terrier to the Duffys that became ill with cancer and died. Ms. Thompson never met the Duffys at the time of the 2006 internet sale and the dog was shipped to the Duffys. Ms. Thompson offered the Duffy's a replacement puppy when she learned of the death of the first dog. Ms. Thompson met the Duffys on September 18, 2010, in New Brunswick and advised that one of her dogs was expecting a litter. The Duffys attended her residence in New Brunswick to see the pups on November 28, 2010, and picked the dog up January 24, 2011, at her New Brunswick residence. The Duffys never got a dog from Ms. Thompson at the Peterborough dog show (Evidence B. Thompson, May 6, 2015, pp. 7 – 30; Exhibit 7).

[417] After Ms. Thompson's evidence given on May 8, 2015, the police contacted France Godbout three days later on May 11, 2015. This was almost five (5) years after the June 2-3, 2010 Peterborough dog show. Ms. Godbout (a Quebec resident) testified that Louise Lang introduced her to Senator Duffy at the 2010 Peterborough dog show. This evidence was wholly inconsistent with Ms. Lang's evidence. She claimed that Ms. Lang told her that the Duffys were looking into acquiring a puppy, but were not ready to get one right away. This, too, is wholly inconsistent with Ms. Lang's evidence. Ms. Godbout could not recall "all the details" of her own 5-10 minute conversation with Senator Duffy. Her recollection was that there was talk of looking for a puppy, that they had had one before. She could "not remember" if the conversation was about a prior Kerry Blue that had died from leukemia although that would "not surprise" Ms. Godbout. Ms. Godbout stated that 2011 was the last show held in Peterborough, that in 2012 the dog show was held in Sarnia. When the Peterborough *Examiner* for June 2012, was shown to Ms. Godbout (reporting on the 2012 show in Peterborough), she agreed that her evidence was in error, "just plain wrong." Ms. Godbout agreed that she was, in respect of her version of a conversation with Senator Duffy, "talking about a few minutes of a casual conversation five years ago." Ms. Godbout agreed that she "would be able to offer no evidence whatsoever as to why he [Senator Duffy] was in Peterborough at all that weekend", of July 2-3, 2010. Mr. Bayne therefore submits that Ms. Godbout's evidence is no sound basis for a finding of fact, especially given the contradictory evidence of Ms. Lang (and Senator Duffy), the years that had passed, the incomplete nature of her recall of what was a casual conversation and her demonstrated erroneous recall of where the dog show even took place in 2012 (Evidence F. Godbout, June 2, 2015, pp. 1-7).

[418] Mr. Bayne submits that the Crown has not proved beyond reasonable doubt either the *actus reus* or *mens rea* of the offences alleged. Senator Duffy's meeting and discussion with the Parliamentary Secretary for the Minister of Heritage was non-partisan, representative, public business as defined in the SARs – Senator Duffy was trying to advance the cause of a major arts project in his Province of appointment, the Province he represented. Their discussions concerned public business. The travel was not undertaken for personal purposes as the Crown has alleged and failed to prove. Senator Duffy believed that the travel and related expense claim was public, representative business ("parliamentary functions") as defined in the SARs. There was no fraudulent or corrupt intention.

Conclusion

[419] I was most impressed by Mr. Holmes' opening statement to the court when he said: "Counts 9 and 10, the Senator and his wife drive to Peterborough, they stay in a motel, they have coffee with Dean Del Mastro, then an MP, they go to a Kennel Club show, a dog show, and they arrange to acquire a puppy and they drive home. That is portrayed as public business, meet local officials on broadcasting issues. It's in effect a shopping trip and it's fraud."

[420] The message was clear. It was said in a measured manner and tone. It seemed to be a very straightforward and uncomplicated proposition for the Crown to develop. Alas, these counts ebbed instead of flowed.

[421] In fairness to the Crown and the police regarding these charges, the witnesses seemed to provide assumptions to the police initially as to what Senator Duffy's intentions were at the dog show and corrected themselves at trial. Again, these are witnesses that were approached long after an event and would not be expected to have total recall of what happened. Also, the "incident" cannot be considered particularly dramatic to warrant long-time recall.

[422] I accept the evidence of Senator Duffy when he advised the court that he was not even aware of the dog show until after he had arrived in Peterborough and that he initially had gone to Peterborough to meet on a broadcasting issue. Although this meeting failed to materialize, he did discuss several non-partisan issues representing public business as defined in the SARs with Mr. Del Mastro. Thereafter, he and Mrs. Duffy attended the dog show. Sometimes, not every event is recorded in a person's diary.

[423] Mr. Del Mastro admitted that he could not remember specifically everything that was discussed at the meeting but did remember discussing the Economic Action Plan and an internet communication system involving the Members of Parliament. This evidence demonstrates that this meeting was not just a coffee break.

[424] I believe Senator Duffy when he stated that he also did some lobbying for an arts project in P.E.I.

[425] I am not satisfied that the Crown has proven the guilt of Senator Duffy on counts 9 and 10 beyond a reasonable doubt and accordingly find the accused not guilty.

COCKRELL HOUSE

[426] Counts 11 and 12 allege that Senator Duffy (11) sometime after the period between the 9th day of December, 2010, and the 12th day of December, 2010, at the City of Ottawa, in the East Region, did by deceit, falsehood of fraudulent means defraud the Senate of Canada of money, exceeding $5,000.00 by filing travel expense claim T64-09996 containing false or misleading information contrary to section 380(1)(a) of the *Criminal Code of Canada* and further that he (12) sometime after the period between the 9th day of December, 2010, and the 12th day of December, 2010, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-09996 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[427] Mr. Holmes considers that the true purpose of this trip was to be present for the birth of his grandchild and it was packaged in the guise of a charitable event for homeless veterans.

What the evidence reveals

[428] Mr. Holmes stated that Troy Desouza was the Conservative candidate of record for Esquimalt Juan de Fuca. In 2010, the campaign Christmas party was scheduled for Friday December 10th. Beyond celebrating the holiday season, the secondary purpose of the event was to raise donations for Cockrell House, a shelter for homeless veterans. They didn't have a speaker and Desouza testified that he let "the party" know in an effort to secure the attendance of a speaker to the event. On the Monday or Tuesday of the week before the event he was surprised to learn that Senator Duffy would be coming to their event. The date is quite important: on Desouza's evidence, he only learned of Senator Duffy's participation on December 6th or 7th.

[429] This account corresponds with Senator Duffy's testimony, where he said that an inquiry about his attendance at the event was made "probably on the Monday". (Evidence of Senator Duffy 10 Dec 2015, p.101).

[430] Senator Duffy answered follow up questions at p. 107 about the date that the arrangements were made.

[431] According to his testimony, Senator Duffy recalled some discussion about his attendance at the event over the weekend. It therefore seems settled in the evidence that the arrangement to go to the "Cockrell House event" were finalized on the Monday, December 6th, 2010.

[432] Mr. Holmes asked the court to be mindful of the foregoing information and be aware that Senator Duffy had already booked travel to Vancouver for himself and his wife, on Thursday, December 2nd, 2010. Mr. Holmes found it curious that Senator Duffy would

have committed to travel to Vancouver before having any parliamentary function to attend.

[433] The Crown states that to determine the actual purpose of the trip it is necessary to consider this question: Was there anything else happening in Vancouver during that same time period that could have prompted Senator Duffy to make those travel arrangements on December 2nd?

[434] Mr. Holmes observes that Senator Duffy's daughter was due to deliver a son on December 1st. In his testimony, Senator Duffy suggested that his travels to B.C. around the time of the birth of his grandchild were coincidental. He was asked if he had "any advance notice that she was going to go into labour that day". Senator Duffy said "none whatsoever". He must have known that the birth was imminent because on the day he travelled to Vancouver his daughter was eight days overdue.

[435] Mr. Holmes also draws the court's attention to diary entries in Senator Duffy's diary. The entries in the diary show the history of his daughter Miranda's pregnancy within its pages. On page 84 [21 May 2010], Senator Duffy notes "Miranda calls – she's expecting in December". On page 106 [16 October 2010], Senator Duffy has recorded: "Miranda calls re baby gifts etc." On page 108 [27 October 2010] this notation appears: "Miranda medical update on baby". As mentioned before, there is a notation concerning the due date on p.114, 1 December 2010.

[436] Crown Counsel observes that according to his notes, Troy Desouza testified that Senator Duffy attended at the Christmas party for forty to forty-five minutes. According to the diary entries concerning the evening of the event (p.116), Senator Duffy flew in to Victoria at 6:00 p.m. and had a return flight to Vancouver at 9:00 pm.

[437] Mr. Holmes noted that Troy Desouza said that Senator Duffy told stories and jokes and discussed what was happening in Ottawa.

[438] In his testimony, 10 December 2015, p.103 Senator Duffy described his speech as follows:

> Q: And did you speak on personal matters or public policy matters?
>
> A: Public policy, the importance of supporting our veterans, and how the federal government could work in partnership with the Legion and other charitable groups to try to help our veterans, and if you check the record, Mr. Bayne, there were several contributions from the federal government made to Cockrell House after that event, and I'm not saying it's because of me. I'm just saying it was the kind of ideal mixture of public and private partnership to help people in need.

[439] Mr. Holmes states that Senator Duffy's portrayal of the event is inconsistent with Troy Desouza's account.

[440] I disagree. Mr. Desousa indicated that Senator Duffy discussed what was happening in Ottawa whereas Senator Duffy gave more precise details of the content of his talk.

[441] The fact that Senator Duffy employed jokes and stories to illustrate and enliven his presentation does not elevate the speech into criminal conduct. Senator Duffy seems to have the reputation of being an entertaining speaker and part of his style relies on humour and storytelling.

[442] Mr. Holmes contends that the cost of Senator Duffy's attendance at the Christmas party where he stayed for less than one hour exceeded $10,000. Furthermore, he states that on the face of it, this travel is "unreasonable" and consequently not an appropriate cost to pass on to the Senate considering the nature of the event and Senator Duffy's contribution and that the travel offends the "due economy" requirement as set out in the SARs.

[443] I leave the cost analysis question to the staff at Senate Finance. I do find that any other Senator accepting the assignment of speaking at Cockrell House would have incurred similar fixed cost expenses similar to Senator Duffy.

[444] I do not find the length of the speech to be an issue. A guest speaker who exceeded an hour might very well have been unappreciated.

[445] Mr. Holmes concludes his submissions on these charges by stating that it is clear from the evidence that the Conservative Christmas party, including as a secondary component a modest fundraiser for Cockrell House, was ancillary to the birth of Senator Duffy's grandson. The true purpose of the trip was to visit with his daughter and his new grandson. There is simply no other way to explain the sequence of events. He was being updated with respect to his daughter's pregnancy and when she was a week overdue he arranged to fly to Vancouver where she lived (not to Vancouver Island where Colwood B.C. is located). After making those travel arrangements, he then accepted an invitation to a Christmas party. On all the evidence, Senator Duffy used the Christmas party to slip an expense claim past Senate finance. It perverts the notion of "incidental personal use" to view the arrangement any other way. The claim associated with the Senator's personal travel in connection with the birth of his grandchild is a fraud upon the Senate and a breach of the trust deposed in him in connection with his public responsibilities.

Defence Position

[446] Mr. Bayne takes the position that these counts refer to Senator Duffy's travel to Victoria (through Vancouver) December 9 to 12, 2010 to attend, as a featured speaker, a non-partisan, public, "broad-based" event to which "every household" in the area was invited, in aid of and to raise funds for Cockrell House, a facility for homeless veterans who need assistance transitioning to civilian life. The Crown alleges fraud and breach of trust because Senator Duffy also, while in Vancouver, saw his daughter, Miranda, who had just given birth.

[447] Senator Duffy testified that his attendance at this event was requested by the regional Cabinet Minister for B.C., James Moore. Cockrell House, to Senator Duffy's under-

standing, was a locally organized charitable facility providing "housing for veterans returning from our recent wars." While organized by local Conservatives, the event was not partisan, was not designed for Conservatives but rather for the public, for people willing to help Canadian veterans. The event was not during an election or nomination campaign and involved no donation to Cockrell House from Senator Duffy's office budget. Senator Duffy spoke publicly about "the importance of supporting our veterans and how the federal government could work in partnership with the Legion and other charitable groups to try to help our veterans". Veterans' issues were a particular concern for Senator Duffy and his Senatorial work. Senator Duffy testified that Cockrell House has now attracted funds from the federal government as a matter of public policy and referred to a B.C. Legion press release (Exhibit 88) about this fact (Evidence M. Duffy, Dec. 10, 2015, pp. 101-106).

[448] Senator Duffy explained that he undertook this travel for the purpose of attending the public event as requested by the Minister. Mr. Moore was not called by the Crown. Senator Duffy further explained that his daughter's due date was two weeks prior to the event date; that due date had already come and gone. The flights were booked December 2, 2010, by Mr. McCord for December 9th and 12th. The day Senator and Mrs. Duffy flew west, the 9th, was the day Miranda went into labour. The Duffys had had no advance notice that Miranda would go into labour on the day of their flight nor any knowledge that delivery by Caesarean would occur that day. After, however, the baby was delivered, and because he was in Vancouver, Senator Duffy with his wife visited his daughter and new grandson in hospital on the 10th just before flying to Victoria for the scheduled public appearance on the evening of December 10th. The Duffys did not fly back to Ottawa on the 11th, returning instead on the 12th, but incurred no hotel expenses during the stay. The return business class air fares comprise the bulk of the expense claim. It would appear that Ms. Bourgeau in Senate Finance advised Ms. Vos in Senator Duffy's office about unclaimed *per diems*, adding approximately $550.00 to the claim (Exhibit 6, Tab 5, p. 1; Evidence M. Duffy, Dec. 10, 2015, pp. 106-108).

[449] Troy De Souza was called by the Crown to give evidence regarding these counts. He testified that the Cockrell House event was a broad-based, non-partisan event to raise funds for a facility for homeless vets in B.C. The entire community was invited. It was a public event: "Could never get a more public event that this." Between 200 and 250 people attended. Senator Duffy spoke in his capacity as a Senator about what was happening in Ottawa "i.e. government, parliamentary matters." The event was not an EDA or party fundraiser. Mr. De Souza confirmed the contents of Exhibit 88, about the nature of Cockrell House and its important role in the community (Evidence T. De Souza, June 2, 2015, pp. 1-5).

[450] Mr. Bayne says that the Crown alleges fraud and breach of trust, claiming that Senator Duffy really undertook this travel to see his daughter and her baby. Alleging does not make it so. The Crown must prove beyond reasonable doubt, with evidence, both the *actus reus* and *mens rea* of the offences it alleges. Mr. Bayne states that the fact is, the evidence is, that Senator Duffy conducted non-partisan public business in his capacity as a Senator, as defined in the SARs and the travel is therefore, pursuant to the SARs, "entitled" to Senate financial resources. There is no fraud or breach of trust and none proven, no criminal *actus*

reus or intention to defraud. Senators can and do combine personal matters with parliamentary functions: the rules permit this and there is no evidence, none at all, that any other Senator does differently than Senator Duffy did on this trip. He visited his daughter and new grandson, like any father/grandfather would, being in the area on business. Furthermore, Mr. Bayne takes the position that even if Senator Duffy had pre-arranged the travel to the Cockrell House public event to coincide with seeing his new grandson, it would not be an offence. Public business may be combined with personal business so long as additional costs to the Senate are not incurred. They were not. By visiting their daughter and grandson the Duffys incurred no additional flight costs, no hotel costs and the on-the-road *per diems* were no more than the NCR *per diems* would have been back in Ottawa. There was no additional cost to the Senate.

Conclusion

[451] I am satisfied that Senator Duffy attended the Cockrell House event in his Senatorial capacity on public business and that visiting his daughter and new grandchild did not result in additional costs to the Senate.

[452] This trip illustrated the age old debate of what came first, the chicken or the egg. I tend to agree with Mr. Holmes that the pending birth of Senator Duffy's grandchild was a great motivational reason to be in the Vancouver area near the beginning of December 2010. Any suggestion by Senator Duffy to the contrary does not impress me much.

[453] Although Senator Duffy's opportunistic acceptance of a legitimate speaking engagement also provided him with the opportunity to see his new grandchild does create a negative perceptual image, it does not amount to criminal conduct.

[454] Accordingly, counts 11 and 12 are dismissed.

LUNCH AT VANCOUVER BOAT CLUB – SAXON

[455] Counts 13 and 14 allege that Senator Duffy (13) sometime after the period between the 30th day of December, 2011, and the 5th day of January, 2012, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by filing travel expense claim T64-18674 containing false or misleading information contrary to section 380(1)(b) of the *Criminal Code of Canada* and further that he (14) sometime after the period between the 30th day of December, 2011, and 5th day of January, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-18674 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[456] Mr. Holmes suggests that the expense claim found at Tab 6 of Exhibit 6A shares many parallels with the previous British Columbia trip discussed above.

What the evidence reveals

[457] At issue is a lunch meeting that Senator Duffy attended with MP Andrew Saxton Jr. and his father Andrew Saxton Sr. that took place on January 3rd, 2012 at the Royal Vancouver Yacht Club. The significance of this event is that Senator Duffy relies on that single lunch to justify over $4000 in travel expenses in connection with his trip to Vancouver from 30 December to 4 January. Heather Duffy accompanied him. There is no dispute that during this same trip Senator Duffy celebrated New Year's with his family. He says so in his diary. With the exception of the lunch on January 3rd he spent almost all of his time with family members, visiting, sharing meals, "hanging out". The diary entries are found in Exhibit 7 on p. 183, p.184 and p.186.

[458] Mr. Holmes contends that the key issue for the court to determine is whether the aspect that is undeniably a family vacation is merely an "incidental personal use" of Senate resources associated with Senator Duffy's attendance at the lunch. While the existing policy framework declared it to be perfectly acceptable for a Senator to receive some incidental personal advantage in the course of discharging their parliamentary functions, such benefit would necessarily have to be ancillary to the predominant or main purpose for which the cost was incurred. Mr. Holmes maintains that no other interpretation is possible without rendering the concept of "incidental use" meaningless. The relevant provision from the SARs is Div. 3:00, Chap 3:01, s.7 [SARs 2009, Exhibit 20, Tab 1-A, p.3-2]:

> "A person may use a Senate resource for personal purposes where such use is minor, customary and reasonable and does not give rise to a direct cost to the Senate or to a Senate expenditure"

[459] The Crown states that in order to draw reasonable conclusions about the purpose of the trip one must start with Andrew Saxton Jr. He was a Member of Parliament and assigned as Parliamentary Secretary to the President of the Treasury Board. Mr. Saxton Jr. has an extensive background in banking and finance. Mr. Saxton Jr. told us that "Senator Duffy wanted to come and meet with business leaders in Vancouver" (Testimony of Andrew Saxon Junior June 3, 2005 p.3). There was some uncertainty whether the lunch could be arranged "around the holidays". The arrangements for the lunch on January 3rd, 2012 were made "at least a couple or a few weeks" before the lunch itself. In response to further questioning Mr. Saxton Jr. clarified this to mean two to three weeks in advance of the lunch. There's no doubt that the lunch arrangements were made, at Senator Duffy's request, in Vancouver, at Senator Duffy's request, in early to mid-December 2011.

[460] Mr. Saxton Jr. understood from Senator Duffy that he wanted to get ideas about the budget, scheduled for release in March.

[461] Including Senator Duffy, seven people attended the lunch that lasted between 1½ to 2 hours.

[462] Andrew Saxton Jr. testified that the attendees were people he saw on a regular basis.

[463] Mr. Saxon Jr. also advised that no note-taking was permitted during the lunch because that would have infringed the rules of this private club.

[464] Andrew Saxton Sr. paid for the lunch.

[465] While Andrew Saxton Jr. couldn't recall what the conversation consisted of his father, Andrew Saxton Sr. described it like this:

> "…mainly current events, and in B.C. at that time the pipeline was quite an issue in the forefront, and we were all well-acquainted with what goes on, and we're all very interested in normal proceedings of events both provincially and federally, and it was a general discussion about those matters."

[466] Mr. Holmes believes that considering Andrew Saxton's background and position in the government that he would have been perfectly situated to secure the information from this group himself and forward it on to the budget process. In his testimony, Senator Duffy said that Mr. Saxton Jr. wanted to have an "expansive meeting" and he (Saxton) suggested that it take place while Senator Duffy was out in B.C. for Christmas. (10 Dec 2015, p.112) Senator Duffy's testimony is inconsistent with Mr. Saxton Jr.'s testimony on that same point. Mr. Holmes contends that Senator Duffy's version of the event doesn't make sense. How would it be of value for an MP with such an extensive background in business and finance to introduce Senator Duffy into a dialogue with Saxton Sr.'s friends?

[467] In any event, the lunch was a matter of significance to Senator Duffy. In an email he sent to Mr. Saxton Sr. in February 2014 (filed as Exhibit 32 in the trial) – at a point when the RCMP was known by Senator Duffy to be conducting an investigation -- Senator Duffy described the lunch as one of the highlights of his career. Elsewhere he took the opportunity to remind Mr. Saxton Sr. about the nature of the lunch discussion in these terms: "you explained the "discount" we are giving the U.S. for our oil, I was able to bring the case for the pipeline directly to the PM".

[468] The meeting would prompt Senator Duffy to write one email to Nigel Wright. It can be found in Exhibit 45C, January 5 (2012). In it Senator Duffy claims that "Andrew Saxton Sr. arranged a luncheon with a dozen B.C. business leaders." There were five "business" people, plus Saxton Jr., plus Senator Duffy. There is no explanation why Senator Duffy inflated the number of people who had lunch together just two days earlier. Otherwise he listed five "concerns" including a "big concern about pandering to natives". Nigel Wright's email in response is curt and dismissive.

[469] Mr. Holmes summarised the luncheon as follows: The arrangements for the lunch occurred in mid-December. The lunch meeting happened at Senator Duffy's instigation. The men had food. They discussed B.C. politics and business. Senator Duffy sent an email to

Nigel Wright (not to the Minister of Finance or anyone else connected with the budget.) Then nothing more came of it.

[470] Crown Counsel draws attention to the fact that the documents under Tab 6 show that the travel to B.C. in relation to this visit had been booked on the 8th of November 2011. The last document under that Tab suggests that Senator Duffy had "a number of meetings" in Vancouver in respect of the travel expense claim. Mr. Holmes states that there was only the one meeting. In her testimony, Diane Scharf denied any involvement in the preparation of this document. She surmised that it must have been authored by someone in Senate finance following a direct discussion with Senator Duffy.

[471] Regardless, Mr. Holmes categorically maintains that there is no way that a 3000 km trip for a two hour lunch would represent a reasonable expense or satisfy the "due economy" principle.

[472] Likewise, Mr. Holmes points out that given the timing, it is clear that the underlying purpose of the trip was a family vacation around the Christmas holidays. The lunch was arranged a month after the flights had been booked. Mr. Holmes concludes that Senator Duffy's suggestion that his self-directed pre-budget meeting was the underlying rationale for the trip is preposterous.

Defence Position

[473] Mr. Bayne noted that counts 13 and 14 relate to the travel December 30, 2011 – January 5, 2012 to and from Vancouver related to the "pre-budget consultation" with the Saxtons and other prominent business/commercial leaders in B.C.

[474] Andrew Saxton Jr. was called by the Crown. He was previously Parliamentary Secretary to the President of Treasury Board (2008-2011); by 2011 he was Parliamentary Secretary to the Minister of Finance. Mr. Saxton Jr. testified in chief that "pre-budget consultations" with business leaders were not unusual and that he had personally participated in a number of such consultations. All were conducted face to face with business leaders and a cross-section of professions – lawyers, accountants, bankers – in order to assess what they wanted to see in an upcoming federal budget. The pre-budget consultation of January 3rd was arranged by himself a couple or a few weeks prior, testified Mr. Saxton Jr. The purpose of the January 3, 2012 meeting of Senator Duffy with such B.C. leaders was because a budget was coming in March, 2012, and Senator Duffy met these leaders in order to discuss and get ideas for the federal budget. Mr. Saxton Jr. agreed in cross-examination that budget documents were "important matters of public policy" and that pre-budget consultations "are equally matters of ongoing public business relevant to the important concern of the budget." The January 3rd consultation was like all other pre-budget consultations Mr. Saxton Jr. had ever attended – a Parliamentarian canvassed "from relevant or prominent business leaders across the spectrum, ideas for the budget to take back" to Ottawa. Issues discussed by Senator Duffy with the B.C. leaders included pipelines and energy, Farm Credit Corporation loans as an unfair advantage; Industrial regional benefits, IRB's, could also have been discussed,

Mr. Saxton Jr. testified. All of the issues discussed between Senator Duffy and the B.C. leaders were "highly germane to the upcoming budget", he agreed. Mr. Saxton Jr. identified those present with Senator Duffy as Andrew Saxton Sr., a highly prominent B.C. business, investment, financial and development leader in the province (he agreed that his father would be an "archetypal" figure to be consulted on the budget); Ed Odishaw and Scott Lamb, business lawyers; Scott Shepherd, banker; Barry MacDonald, accountant. Mr. Saxton Jr. testified that his father knew Senator Duffy prior to the January 3rd pre-budget consultation (Evidence A. Saxton Jr., June 3, 2015, pp. 1-5).

[475] Andrew Saxton Sr. testified that his son requested that he set up the luncheon consultation. Mr. Saxton Sr. said that Senator Duffy was a long-time acquaintance. The topics discussed included pipeline issues, federal and provincial matters and current matters.

[476] Senator Duffy testified that the purpose of the consultation was to discuss, pre-budget, issues of government, public and economic policy with the business leaders, "To listen to their concerns about the fiscal direction of the country, and issues that mattered to them" and to take that back to Ottawa. Senator Duffy knew that Mr. Saxton Sr. was important to the Prime Minister as a "day-oner", a Harper supporter going far back, as well as being a prominent business leader. Senator Duffy had previously met Mr. Saxton Sr. and seen evidence of his accomplishments in B.C. (BCTV, Grouse Mountain, buildings he'd built). Senator Duffy testified that the issues discussed during the consultation included pipelines, the Farm Credit Corporation and IRB's, all matters of public policy for the Government of Canada and none a personal or private business matter of Senator Duffy. Senator Duffy stated that this pre-budget consultation was "Probably one of the most important meetings in all my years as a Senator." (Evidence M. Duffy, Dec. 10, 2015, pp. 109 -116).

[477] Mr. Bayne noted that two days later, on January 5, 2012, Senator Duffy reported on the pre-budget consultation to the PMO, emailing Nigel Wright, the Prime Minister's Chief of Staff (Exhibit 45A, p. 1). That email relates to the pipeline, Farm Credit and IRB issues that were discussed and expressed the views of the business leaders on those issues. Mr. Wright responded with his own and the government's position on some of these matters. Senator Duffy stated that later he "delivered a much more detailed report including sensitive material that I didn't dare put in an email...directly to the Prime Minister." (Evidence M. Duffy, Dec. 10, 2015, p. 113)

[478] Mr. Bayne states that there can be no doubt that the January 3rd pre-budget consultation in Vancouver was public, non-partisan, business ("parliamentary functions") as defined in the SARs and entitled to Senate financial resources. Senator Duffy believed this and it is so. Mr. Bayne agrees with the Crown that this pre-budget consultation was conveniently scheduled to permit Senator and Mrs. Duffy to visit with their children. Senator Duffy said so in his own evidence. Senator Duffy had said to Mr. Saxton Jr. that, because it was an important consultation, he didn't want to squeeze it into a hurried weekend trip that would be "brutal": "let's arrange it for a time when I can come out and take a couple of days, see my kids, and I'm not bent like a pretzel from flying halfway across the country." Senate travel policy not only permits combining personal with parliamentary travel, it encourages family

reunion as part of the life of a Senator: "family reunion travel" is "an important contributor to the health and well-being of Senators and their families". (Exhibit A, Tab 6, p. 6). It makes sense to combine business travel with family reunion where possible. Mr. Bayne maintains that there is no violation of the SARs whatsoever to schedule an important business meeting to permit connection with family. Defence Counsel is of the opinion that what the Crown really impugns are the Senate travel policies that permit this to occur and that the Crown believes that there should be greater restrictions on such practices in the interests of taxpayers.

[479] However, Mr. Bayne is quick to remind the court that the court is not in the role of legislating the Crown's (arguable) views of improved administrative policy for the Senate. It is judging the circumstances on the basis of guilt or non-guilt on the criminal law standard, based on the evidence as it is and in accordance with what the SARs actually provided. Mr. Bayne highlights that this important point applies not only to these two counts but to all of the criminal charges encompassed in Counts 1 through 28. He also directs the court to the fact that this is a criminal trial, not an administrative hearing or administrative policy-making endeavour. The task of this court is not to do work that the Internal Economy Committee should have done, nor to fix Senate rules and policy not fixed by the responsible committee.

[480] Mr. Bayne concludes that what Senator Duffy did was reasonable, was recognized as reasonable by Senate policy, and was encouraged by Senate policy and violated no provision of the SARs. Combining personal connection to faraway family with important business happens all the time in life. The Crown has led no evidence that the other 104 Senators did not regularly follow this practice. The evidence actually strongly suggests that they would have because it was encouraged. There is no evidence of fraud or breach of trust much less proof beyond reasonable doubt.

[481] Senator Duffy's combining seeing his children during the Christmas break with the important public business of a pre-budget consultation occasioned no direct additional cost to the Senate. Travel expense claim T64-18674 is made up almost entirely of flight cost. The Duffy's did not stay in a hotel. There were some minimal *per diems* that they would have been paid otherwise in the NCR.

Conclusion

[482] The fact that Mr. Saxon Jr. was in a position to relay the information from Mr. Saxon Sr.'s group of associates does not preclude Senator Duffy or any other Senator the right to make their own independent assessment of a particular situation.

[483] In the case at bar, Senator Duffy wanted access to some very successful and well-informed business people from the Vancouver area in advance of the upcoming budget. He forwarded his observations to Nigel Wright in the PMO's office.

[484] The meeting met the requirements as set out in the SARs as public, non-partisan business.

[485] Touching base with a "Day-Oner" of the Conservative Party could be viewed by the cynical as a good public relations move. I find that this aspect of the meeting should be considered peripheral at its highest.

[486] The crux of the Crown's case on counts 13 and 14 is a repetition of the Crown's position in the previous two counts and the answer to the Crown's argument is best addressed by a preceding paragraph of Mr. Bayne's written submissions that bears repeating:

> … what Senator Duffy did was reasonable, was recognized as reasonable by Senate policy, and was encouraged by Senate policy and violated on provisions of the SARs. The combining personal connection to faraway family with important business happens all the time in life. The Crown has led no evidence that the other 104 Senators did not regularly follow this practice. The evidence actually suggests that they have because it is encouraged. There is no evidence of fraud or breach of trust much less proof beyond reasonable doubt.

[487] I find that the Crown has failed to prove the accused guilty beyond a reasonable doubt on counts 13 and 14 and accordingly they will be dismissed.

MEDICAL APPOINTMENT IN OTTAWA

[488] Counts 15 and 16 allege that Senator Duffy did (15) sometime after the period between the 9th day of July, 2012, and the 10th day of July, 2012, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate Of Canada of money, not exceeding $5,000.00 by filing travel expense claim T64-20139 containing false or misleading information contrary to section 380(1)(b) of the *Criminal Code of Canada* and further that he (16) sometime after the period between the 9th day of July, 2012, and the 10th day of July, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-20139 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[489] Mr. Holmes notes that the claim found at Tab 7 was rejected because officials in Senate Finance concluded that Senator Duffy's appointment with a specialist in Ottawa was not connected with his parliamentary duties. Furthermore, the medical appointment was not for Senator Duffy but rather for his wife.

[490] Crown Counsel takes the position that the purpose of the trip was precisely as was stated at the outset in the claims form prepared by Melanie Mercer Vos, based on the information she had. It was travel in relation to a medical appointment in Ottawa.

[491] Following the rejection of the claim by staff in Senate finance, Melanie Mercer Vos changed the reason for the trip by adding that it "tied in to a community event in the NCR as well". She said she just received some photographs alerting her to the mistake.

[492] Senator Duffy testified that he was engaged in "half a dozen events", including an appearance on Sun TV, to justify the brief trip (from the afternoon of July 9th to the early evening of July 10th) between Cavendish and Ottawa. There is no information in the trial record to suggest that it was necessary for Senator Duffy to participate in a TV interview, but if it was, Mr. Holmes is of the opinion that Senator Duffy could have participated remotely or even by telephone. At the very least, the Crown takes the view that the TV appearance was ancillary to the need to travel to address Heather Duffy's health concerns, not the other way around. In his testimony Senator Duffy told us that he was booked for the December 10th Sun TV appearance on June 27th, 2012. What's curious is that the travel arrangements were not made until July 5th, 2012, begging the question: Was anything else going on in Senator Duffy's life in the period immediately preceding the 5th of July?

[493] According to Mr. Holmes, the diary, Exhibit 7, reveals the true state of affairs. The entries on p.217 from the 3rd, 4th and 5th of July 2012 disclose a health problem involving Heather Duffy's blood pressure. The flight was booked on July 5th. The Senator and his wife flew to Ottawa on July 9th permitting Heather Duffy to attend two medical appointments on July 10th, 2012.

[494] Mr. Holmes concludes that Melanie Mercer Vos' original impulse to describe the travel as "Medical appointment with specialist in Ottawa" was the correct one and that all efforts thereafter to assign some vestige of legitimacy to the travel are in furtherance of the fraud associated with the claim.

Defence Position

[495] Mr. Bayne submits that these counts relate to the July 9-10, 2012 travel from Charlottetown, P.E.I. to Ottawa and return. He points out that this is travel between the location of the Senator's province of appointment (and primary residence in the province of appointment) and the NCR, travel that the evidence of Crown witness, Nicole Proulx, the Director of Senate Finance, stated required no justification. Such travel she testified, is automatically verified and entitled to Senate financial resources as it is between the designated primary residence in the province of appointment and the NCR: "the trip between Ottawa and the primary residence of a senator does not need to be justified to be reimbursed, basically going home, and we do have instances of Senators that do have other, like, cottages, residence, I guess that's all I'm saying, in their province." (Evidence N. Proulx, April 28, 2015, p. 16. Furthermore, Counsel highlights that this travel actually involved both a medical appointment in Ottawa for Mrs. Duffy and a matter of public business for Senator Duffy, a public appearance on a televised public affairs program to discuss matters of public, government business and policy. This public business was "parliamentary functions" "as defined" in and "in accordance with" the SARs. This fact also "entitled" the travel to Senate financial resources. There was no fraud or breach of trust.

[496] Mr. Ezra Levant was called as a Crown witness. He testified that "absolutely" his television show "was directed to public issues, public policy, and the domain of public interest in Canada." Parliamentarians – MP's, Senators and Cabinet Ministers – appeared as

guests on his show to discuss public issues. The "standard practice" was that Mr. Levant's chase producer would recruit the Parliamentarians to appear on the show. Senator Duffy appeared in his Senatorial capacity on Mr. Levant's show, "Not to talk about personal matters but about the public interests. It was a public affairs show. It was public affairs interviews and, and commentaries." (Evidence E. Levant, May 6, 2015, pp. 3-5).

[497] Ms. Catherine McLeod, another Crown witness, testified that she, too, has spoken in the media (television, radio, newspapers) in her capacity as a Parliamentarian and identified such activity as part of her public business. She agreed that "similarly, with other Parliamentarians including Senator Duffy, when they speak with, to or on the media on issues of public concern and parliamentary life that's part of public business." (Evidence C. McLeod, May 8, 2015, p. 6).

[498] Senator Duffy testified that his understanding was that a trip between his region and the NCR was "a routine trip", of which each Senator was allocated up to 52 per year, and which was entitled without any required justification to Senate financial resources (as Ms. Proulx had testified). He further testified that he was not trying to deceive the Senate with expense claim T64-20139 or to "hide something". He said that he simply could have had Ms. Vos put "Senate business" or "parliamentary functions" or "trip between region and the NCR" and the expense claim would have been settled without question. He was "fine" with Ms. Vos describing the purpose as "Medical appointment with specialist in Ottawa" because the line above read "Charlottetown – Ottawa – Charlottetown", obviously a trip between his region and the NCR that needed no justification for payment. If anything, the reference to a medical appointment reveals no deceptive intent at all as it is more that the generic purpose recommended and accepted for use; and, again, if anything, it caused a second look at the expense claim before it was verified as in accordance with the SARs and paid by Senate Finance (Evidence M. Duffy, Dec. 10, 2015, pp. 121-122).

[499] Senator Duffy testified that public business was done on this trip. At 2:30 p.m. on July 10, 2012, Senator Duffy attended the Sun TV studio in Ottawa for a public appearance on Mr. Levant's public affairs television show (Exhibit 7). On the publicly aired program Senator Duffy, in his Senatorial capacity, discussed "public policy issues", in particular "it was essentially a debate or a discussion about freedom of speech: should the Canadian Broadcast Standards Council be censoring what broadcasters say in the debate of public issues." This public appearance had been arranged on June 27, 2012. Sun TV did not have a studio in Charlottetown. This was clearly public business as defined in and in accordance with the SARs and thus "entitled" to Senate financial resources. Mr. Bayne concluded that Senator Duffy believed that to be the case. There was no *actus reus* or *mens rea* of fraud or breach of trust (Evidence M. Duffy, Dec. 10, 2015, pp. 118-122).

[500] Mr. Bayne points out that there is no violation of the SARs in combining public business travel with personal business. There is no evidence which appointment, the public T.V. appearance or the medical appointment, was booked first, but even if there was that would be irrelevant. Public business was done. The trip was between the region and NCR and required no justification for payment. Mr. Bayne quite rightly assumed that the Crown

would argue, as with the preceding two counts, that Senator Duffy conveniently arranged the public appearance to coincide with a personal matter, a scheduled medical appointment for his wife. In the first place, as set out above, there is no evidence which was first scheduled and the Crown must prove its case with evidence, not conjecture. In the second place, it simply does not matter which was scheduled first. The SARs do not require a chronological criterion of scheduling to justify public business. The test is whether parliamentary functions (public business, partisan activities, representative business) as defined in the SARs were done. Such business was clearly done and the expense claim is valid within the SARs. There is no violation of the administrative rules much less the criminal law.

[501] Expense claim T64-20139 is almost all flight (and taxi) costs. The NCR *per diems* are fully entitled as Senator Duffy had to be in Ottawa for the scheduled public television and public affairs discussion. There is no additional cost to the Senate of Mrs. Duffy's medical appointment. There is, additionally, no evidence at all from Mr. McCord (who was interviewed by the police as a Crown witness) as to his booking practices.

[502] This travel occurred after the new Senators' Travel Policy "came into force". Mr. Bayne repeated his earlier submission that there is simply no evidence of any notification to Senators about the content of this policy. The only evidence is that Senator Duffy learned about the new policy only in the fall, after the travel (and claim) had been completed. In any event, just as the travel was "entitled" (pursuant to the SARs) to Senate resources, because public business was done and because it was a trip between the region and NCR that required no justification for payment, so too it was travel and an expense claim well within the provisions of the new policy. It was travel "Between the Senators' province or territory and the NCR to carry out ... parliamentary functions" (Exhibit A, Tab 6, Appendix A, p. 26). It also qualified under that new policy as a "Speaking engagement on a topic of public interest" for which no remuneration was paid (Appendix A, p. 27).

Conclusion

[503] I find that this trip falls within the category of travel from Province of Primary Residence to the NCR and therefore does not require additional explanation.

[504] Additionally, Senator Duffy has demonstrated that, as part of this trip, he participated in public business as well in accordance with the SARs.

[505] I do not find that Senator Duffy's E. A. was instructed to alter the travel claim in furtherance of a fraud as suggested by Mr. Holmes. I find that she was subsequently provided appropriate additional information that allowed her to more accurately reflect the circumstances of the travel.

[506] I find the accused not guilty on counts 15 and 16.

OTTAWA SPEECH FOR BUILDING OWNERS ASSOCIATION OF OTTAWA

[507] Senator Duffy stands charged that he (17) sometime after the period between the

11th day of September, 2012, and the 13th day of September, 2012, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by filing travel expense claim T64-20671 containing false or misleading information contrary to section 380(1)(b) of the *Criminal Code of Canada* and further that he (18) sometime after the period between the 11th day of September, 2012, and the 13th day of September, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claim T64-20671 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

[508] The travel expense claim form contained under Tab 8 relates to Senator Duffy's trip from Charlottetown to Ottawa for the purpose of delivering a paid speech to the Building Owners and Managers Association of Ottawa [hereafter, "BOMA"].

[509] Dean Karakasis testified at this trial. Mr. Holmes observed that through his testimony and the documents filed [see Exhibit 31] the following information emerged:

- 16 January 2012 A contract between the National Speakers Bureau and the "sponsor" (BOMA) was signed serving as an agreement that the speaker (Mike Duffy) would deliver a one hour luncheon keynote on Wednesday September 12th, 2012 at the Westin Hotel in Ottawa;
- The fee payable to the speaker was $10,000;
- The contract contemplated that BOMA would provide accommodation (when required by the speaker) in the form of a business hotel room;
- While travel was to be arranged by the Speakers Bureau or the speaker, the agreement contained a term which obliged the sponsor to reimburse for airfare and ground transportation cost "from the Speaker's location to the event";
- Despite the foregoing terms, Mr. Karakasis, listed as the contact person on the contract, testified that no flight or hotel costs were anticipated in respect of Senator Duffy's appearance because he was a "local person";
- The invoice dated 19 January 2012 specified a total cost of $11,384.75 with the inclusion of a $75 expense allowance and GST/HST;
- An initial deposit of $5000 payable to the speakers bureau was due January 30th, 2012;
- The initial deposit was made around the 22nd of February;
- The balance ($6384.75)was due by August 13th, 2012;
- BOMA paid that balance to the Speakers Bureau on the 26th of July 2012.

[510] The travel arrangements were made on the 26th of June 2012. Senator Duffy and

his wife were booked to fly from Cavendish to Ottawa on the 11th of September 2012, the day before the speaking engagement.

[511] The arrangements for the return leg (Ottawa to Charlottetown) of the trip were only booked on 4 September 2012. Once the Duffys returned to Cavendish, Senator Duffy's diary shows that the soon thereafter they made the return drive to Ottawa by car in advance of the opening of the Senate.

[512] The Crown's position is that the reason the travel was booked was so Senator Duffy could come back to Ottawa and give the paid speech that he had agreed to give. Mr. Holmes maintains that while Senator Duffy may very well have undertaken some additional activities while in Ottawa, even Senate related activities, those were ancillary to the real purpose of the trip: to come back to Ottawa and give the speech at the Westin Hotel.

[513] In his testimony Senator Duffy said that he met with his administrative assistant to "execute Senate business documents" that he said couldn't be done "conveniently" at a distance. In addition, Senator Duffy said that he "was coming for Sun TV" (there's no diary entry reflecting that) and spoke to a Senate I.T. specialist to address problems he was having with his Blackberry.

[514] Mr. Holmes states that logic and common sense make it obvious that Senator Duffy did not book the flight on the 26th of June to travel to Ottawa on the 11th of September to sign some documents, or make a TV appearance or get his Blackberry fixed. Moreover, Senator Duffy's diary reflects other travel from P.E.I. to Ottawa on the 9th of July 2012 and on the 19th of July 2012. Mr. Holmes asserts that the flight in question was arranged in connection with the paid speech and that no other conclusion is available on the evidence.

[515] It is obvious from Dean Karakasis' testimony that BOMA had no intention of paying for the flight and the evidence is that Senator Duffy never made such a demand.

[516] The Crown states that if Senator Duffy had returned to Ottawa for legitimate parliamentary purposes then his luncheon speech could be characterized as incidental personal use. However, the date that the ticket was purchased combined with the errands that Senator Duffy attended to while in Ottawa, demonstrate that that is not the case.

[517] Senator Duffy says that he was unaware that the "new" travel policy precluded the use of Senate resources in respect of paid public speaking. It is fundamental and non-contentious that "the private business interests of a Senator" are not part of "parliamentary functions". Over the years Senator Duffy participated in 10 or 15 paid speaking engagements. With the exception of the BOMA speech and the speech commissioned from Nils Ling he never billed any expenses in association with his paid speeches. There is a body of evidence from which it is safe to conclude that, in respect of paid speeches, Senator Duffy knew the difference between "parliamentary functions" and "private business".

[518] Mr. Holmes acknowledged that when Senator Duffy said he spoke to the BOMA group as a Senator he was a Senator but he was being paid in his private capacity and accord-

ingly, the travel expense claim that he submitted in connection with this "private business trip" on 11 September 2012 amounted to a fraud.

Defence Position

[519] Mr. Bayne states that counts 17 and 18 relate to travel undertaken September 11 and 13, 2012, between the Senator's region (primary residence in the Province of appointment) and the NCR. Senator Duffy had a number of meetings in Ottawa to conduct Senate-related business – with his Senate office Executive Assistant, with a Senate IT specialist and with an internet specialist, Tori Gunn. Senator Duffy also made a public appearance as a paid speaker at the Building Owners and Managers (BOMA) national conference.

[520] The travel impugned in these counts took place between Senator Duffy's primary residence in the Province of his appointment (P.E.I.) and Ottawa/the NCR, and therefore, as Senate Finance Director and Crown witness, Nicole Proulx testified, "does not need to be justified to be reimbursed." Senator Duffy believed this (as set out above in respect of Counts 15 and 16). This was a "routine trip" between his region and the NCR that needed no further justification to be validly paid by the Senate. Expense claim T64-20671 on its face makes plain that it is such a trip: "Charlottetown – Ottawa – Charlottetown"

[521] Mr. Bayne stresses that Senator Duffy had no intention to deceive or defraud the Senate, as this was valid Senate-expensed travel and he believed it to be so. There is no evidence before the court that every other Senator appointed to represent a distant Province or Territory does not submit identical travel claims for "routine" travel to and from the NCR. Based on Ms. Proulx's evidence, the only reasonably available conclusion is that they do. This alone explains why Senator Duffy did not request to have BOMA pay his travel costs (a request he could have made) – his "routine" travel was already validly covered by the Senate (Exhibit 6, Tab 8; Evidence M. Duffy, Dec. 10, 2015, pp. 123, 126-127).

[522] Senator Duffy conducted three separate items of Senate-related business while in Ottawa. He testified that he met with his Senate office E.A. on September 12th "to execute Senate business documents", something that could not be done while he was in P.E.I. and she was in Ottawa. This is clearly parliamentary functions/public business as defined in the SARs and "entitled" to Senate financial resources. "It is also well within activities described in the New Senators' Travel Policy as "eligible" to be "fully funded" as a travel expense: it is travel "Between the Senators' province or territory and the NCR to ... carry out other parliamentary functions". Senator Duffy also met on September 12th with "Menelia" from "Senate IT": Senator Duffy needed his Senate-provided telecommunications device replaced but this required a transfer of all data by the expert to a new device that she was providing to Senator Duffy in person (the SARs make plain that information and communications generated by a Senator and/or his office are "confidential") (Exhibit A, Tab 2, pp. 2-15 to 2-17). This was not business to be conducted at great distance by mail. This Senate-related business was also, by itself, parliamentary functions/public business directly related to the performance of Senator Duffy's Senate functions that qualified under both the SARs and the new Travel Policy to be "fully funded" for travel.

[523] In addition, Senator Duffy met on September 13th with Tori Gunn, an internet and website expert, to discuss ways to improve Senator Duffy's Senate website. This, too, was public business eligible for Senate financial resources (Exhibit 7; Evidence M. Duffy, Dec. 10, 2015, pp. 123-126).

[524] Mr. Bayne acknowledges that Senator Duffy also made a public appearance on September 12th, to speak to approximately 250 attendees at the BOMA conference. Senator Duffy described his speech contents as being about "the federal government's approach to leasing office space here in the National Capital Region." This was a speech about "federal government policy". It was a speech made in Senator Duffy's Senatorial capacity. Mr. Karakasis, BOMA's Executive Director, recalled it as a speech about "Parliament" and the "back halls" and "behind the scenes" of the federal government. Mike Duffy Media Services Inc. was paid $10,000.00 for the speech. The speech was made during the summer recess of Parliament. Senator Duffy testified that at the time of this speech that he had not received any notice of the new Travel Policy and he had no training on its provisions. Senator Furey's evidence confirmed this lack of any formal training. The Internal Economy Committee's public report (Exhibit A, Tab 20) found "poor communication" of some policies that were not well understood by Senators. There is no reliable evidence of any communication of this policy to Senator Duffy before the fall of 2012, after this travel was undertaken and travel account submitted. Senator Duffy was, as he testified, unaware of any new provision that restricted paid public speaking engagements from access to Senate financial travel resources. He had no knowledge of any such restriction and had no intent to defraud or deceive Senate Finance. In any event, he believed that as a "routine" trip between the region and the NCR and because several items of public business had been conducted, the travel was entirely eligible for Senate resources. (Evidence M. Duffy, Dec. 10, 2015, pp. 123-127).

[525] Exhibit 31, the "Speakers' Agreement" (contracting for a "one-hour luncheon keynote") was entered into January 16, 2012, eight (8) months before the event and the travel to Ottawa from the region. Mr. Karakasis testified that Senator Duffy did not request travel expenses to make the public appearance. It is clear from the face of Exhibit 31 that "TRAVEL" is a negotiated expense – ie had Senator Duffy believed that the travel would not already have been validly "eligible for" or "entitled to" Senate resources, he could have requested that BOMA pay all or some of the travel expense. The evidence is that Senator Duffy did not even request travel, confirming the evidence of his belief that the travel would already be validly covered by the Senate as a routine trip. Mr. Bayne anticipated the Crown's argument, that Senator Duffy conveniently arranged all of the items of Senate business, and his wife's echo cardiogram, to coincide with his planned trip to Ottawa to speak. No doubt this is true. It is eminently reasonable to do so. It is perfectly appropriate under the SARs (and even the new Travel Policy). The personal business may validly be combined with public business; there is no requirement or criterion of chronological precedence; there is no order of relative importance test (of the events or business), nor could there be as that would be impossible to assess or administer and would be completely subjective. Travel expense claim T64-20671 is all flight expenses, travel to and from the airports and NCR *per diems*. Those *per diems* are perfectly standard whenever Senator Duffy is in the NCR, as he was on the 11th, 12th and

13th, on a routine trip and to do multiple items of Senate business. No direct additional cost to the Senate was occasioned by the paid BOMA speech or Mrs. Duffy's medical test (Exhibit 31; Exhibit 6, Tab 8). Mr. Bayne concludes that there is no proof beyond reasonable doubt of any *actus reus* or *mens rea* of fraud or breach of trust.

Conclusion

[526] I find that the BOMA speech was a personal matter for Senator Duffy. However, I am not satisfied that the Crown has proven the accused guilty on counts 18 and 19 beyond a reasonable doubt.

[527] I find that this particular travel falls under the provisions for travel between the province of primary residence and the NCR.

[528] I also find that sufficient Senate business was conducted by Senator Duffy to warrant reimbursement for his travel.

[529] I accept that, if Senator Duffy had any misgivings about the legitimacy of this trip, he would have pursued reimbursement from BOMA.

[530] Counts 18 and 19 are hereby dismissed.

EXPENSE CLAIMS ASSOCIATED WITH PERSONAL ATTENDANCE AT FUNERALS AND RELATED CEREMONIES

[531] It is alleged that the accused (19) between the 10th day of April, 2009, and the 2nd day of March, 2012, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, exceeding $5,000.00, by filing travel expense claims T64-05408, T64-18668, T64-18669, T64-20166 and T64-20164 containing false or misleading information contrary to section 380(1)(a) of the *Criminal Code of Canada* and further that he (20) between the 10th day of April, 2009, and the 2nd day of March, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by filing travel expense claims T64-05408, T64-18668, T64-18669, T64-20166 and T64-20164 containing false or misleading information contrary to section 122 of the *Criminal Code of Canada*.

Crown's Position

Analysis of the various claims relating to attendance at funerals and other related ceremonies.

[532] Mr. Holmes began his submissions with respect to this area by expressing the view that this broad topic and the costs associated with it are generally frowned upon by Senate administration.

[533] The guidelines to Miscellaneous Expenditures Account, found in Exhibit 20 at Tab 12, stipulate that "tokens of appreciation and expressions of sympathy of a personal nature (e.g. flowers)" are not eligible for reimbursement. While Senators may send flowers to a funeral, those would be personal expenses not eligible for reimbursement.

[534] Mr. Holmes concedes that the Miscellaneous Expenditure guidelines are relatively obscure and acknowledges that Senator Duffy is unlikely to have reviewed them or embraced the contents of the guidelines even though they had been included amongst the materials the Senator received before his swearing-in, in January of 2009. See the letter from Nicole Proulx at page 7 found in Exhibit 20, Tab 7.

[535] The Senator's Travel Policy contains an Appendix listing examples of travel and indicating whether that travel was fully funded, funded with restrictions or unfunded. The table shows that funerals respecting dignitaries are fully funded; while funerals for friends and family members are not funded at all. That policy was adopted by Internal Economy in May 2012 and came into force on 5 June 2012. The court heard evidence that the Appendix did not recast Senate policy with respect to travel expenses, but codified practices that had been in effect before 2012.

[536] The Crown notes that travel for funerals is prohibited except in the case of VIPs and dignitaries. That was the case before and after the introduction of the Senator's Travel Policy in June 2012.

[537] Despite telling us that he skimmed all of the policies that he received, Senator Duffy said that he was unaware of any restrictions on the use of Senate resources to attend funerals. Mr. Holmes observed that it is reasonably clear from his testimony that Senator Duffy does not approve of the policy respecting funeral attendance on the basis that a person is or is not a "VIP". "Everyone's a V.I.P." according to Senator Duffy's testimony from 10 December 2015, at p.130.

[538] The following chart provides details about the funeral attendances captured in counts 19 and 20:

Claim #	Date	Cost	Justification per claim	Diary entries	Date travel booked
T64-05408	10 April 2009	$1400.	"Visit region"	Notes travel and on 11April 2009: "Funeral for Isobel DeBlois"	8 April
T64-18668	17-18 May 2011	$3599.59	"Senate business"	Notes travel and on 18 May 2011: "Funeral for Cliff Stewart, sit with Ron McKinley" Lunch with Norman Cleary	16 May 2011; return flight booked on the 17th May 2011
T64-18669	29 May 2011 DAY TRIP	$3627.27	"Senate business meetings"	Notes her death on 25 May; travel arrangements and at 3:00: "Limo to Halifax meeting" and at 3:30 on 29 May: "Jackie Doyle @ JA Snow".	27 May 2011

T64-20166	30-31 January 2012	$2016.77	"Senate business"	27 January: "Bob LeClair dies" 30 January: notes travel and at 3:15 this entry: "MD Hennessey Funeral Home Bobby LeClair" 31 January, 9:30 am entry: "Bob LeClair's funeral @ Basilica" Meets Wayne Hooper	Flight booked on the 27th January ; flies out on the 30th, funeral the next morning
T64-20164	14 Feb 2012 DAY TRIP	$1875	"Senate business – crucial meeting"	He just left Charlottetown 3 days earlier (he actually visited her on 11 Feb); diary shows MD monitoring Mary McCabe's condition. She dies on the 12th Meeting Cecil Villiard	Booked on 13 Feb.

[539] Mr. Holmes noted that in an apparent attempt to justify his travel to some of the funerals, Senator Duffy testified at length about the accomplishments and background of the deceased persons. In the cases of De Blois, Stewart and Doyle-Proude, Mr. Holmes indicated that he had nothing to say. He commented that there is nothing of an established personal connection between those individuals and Senator Duffy and therefore nothing to gain by inviting the court to assess the value of their contributions to their respective communities.

[540] Senator Duffy said that the trip that allowed him to attend Bobby Leclair's funeral was "really about" his meeting with Wayne Hooper (Testimony of Senator Duffy, 11 December 2015, p.21). Senator Duffy did not seek to justify his travel to attend Bobby Leclair's funeral. He portrayed it as an activity that was incidental to the meeting with Hooper.

[541] Senator Duffy testified that his attendance at Mary McCabe's wake was made possible by the meeting with Cecil Villiard. Mary McCabe was Senator Duffy's cousin.

[542] Mr. Holmes poses the question that in respect of both the Hooper meeting and the Villiard meeting: why couldn't Senator Duffy just have talked with these men on the telephone as opposed to travelling to P.E.I.? The diary reveals that such phone contact was common with Wayne Hooper; there are diary reference to this happening in Exhibit 7, pp. 112, 123, 207 and 232.

[543] I would pose a question to Mr. Holmes: Why not ask Senator Duffy this question in cross-examination?

[544] Senator Duffy contends that the trip to attend Leclair's funeral was really about the meeting with Hooper at the Holman Grand Hotel, which occurred just before Senator Duffy met up with some of his other relatives for dinner. "Bob Leclair dies" is the entry found in Senator Duffy's diary on the 27th of January 2012. The records reveal that Senator Duffy booked his travel the same day. The Crown observes that surely he didn't book travel that day for the purpose of a relatively brief meeting with Wayne Hooper at the Holman Grand

Hotel on the 30th of January.

[545] Mr. Holmes contends that the evidence shows that the afternoon meeting with Hooper was ancillary to the Leclair funeral which was a personal matter for Senator Duffy and one that Senator Duffy should have paid for out of his own pocket.

[546] Likewise, the Crown observes that while Senator Duffy contends that the trip to attend McCabe's wake was undertaken for the purpose of meeting Cecil Villiard, the evidence shows that the Villiard meeting was merely ancillary to travel connected with the McCabe wake and that the evidence establishes that Senator Duffy travelled for the real purpose of attending Mary McCabe's wake and therefore, the expenses incurred should be characterized as personal in nature.

[547] The entries in the diary reveal that Ms. McCabe died on 12th of February 2012. There is a diary entry on the 13th of February that says: "Call Joan Conklin – re Mary McCabe's funeral details". The materials contained in Exhibit 6A, Tab 13 reveal that the travel arrangements were made on the 13th of February 2012. Senator Duffy testified that the meeting with Mr. Villiard was to discuss the threat posed to the shell fishery from the City of Charlottetown dumping raw sewage into the harbour. Mr. Holmes poses a series of questions relating to the meeting between Senator Duffy and Mr. Villiard. How much could possibly be accomplished during this meeting? What was so urgent that day? The evidence reveals that the problem was of a longstanding nature. Is it realistic to believe that Senator Duffy booked travel on the 13th of February 2012 to have a lunch time meeting with Cecil Villiard at the Charlottetown Hotel the next day?

[548] The series of questions posed by Mr. Holmes in the preceding paragraph might have be better put to Senator Duffy in cross-examination rather than in the Crown's submissions.

Defence Position

[549] Mr. Bayne advised the court that counts 19 and 20 relate to five trips between the NCR and Senator Duffy's region to attend funerals in the region and to conduct public business concerning issues of public importance in P.E.I. He states that none of this travel and the related travel expense claims was in violation of the SARs, and none constituted fraud or breach of trust for the following reasons:

1. All of the impugned travel was between the Senator's region and the NCR and did "not need to be justified to be reimbursed"; it was routine travel and Senator Duffy believed it to be so – there was no *actus reus* or *mens rea* of crime:

2. All of the travel pre-dated the provisions of the new Senators' Travel Policy which for the first time created a limitation criterion on funeral-related travel.

3. Mr. Bayne submits that all the travel was related to "parliamentary functions" (public business, partisan activities, representative business) as defined in the

SARs and performed in the Senator's region, namely regional representation and public business; no provision of the SARs was violated; the SARs contained no limitation on funeral travel nor any categorization of deceased in a supposed order of importance; Senator Duffy's region was a small, close-knit Island community where showing respect (from a representative of the Parliament of Canada) was important to the regional community.

4. Three of the funerals (De Blois, Stewart, Doyle-Proude) would in any event have qualified even under the (subsequent) Senators' Travel Policy as all represented the funerals in the region of "other VIP's"; they were regional VIP's (this is in any event a curious and poorly defined criterion – who is a "VIP", like the concept of beauty is in the eye of the beholders and varies from community to community; it is also unfortunately elitist in a democracy).

5. Three of the items of travel (May 17-18, 2012; January 30-31, 2012 and February 14, 2012) involved the conduct of other significant public business: the Provincial Nominee Program which is a federal program to encourage investment in Canada; the Industrial Regional Benefits (IRB) program which is a major wealth and job creator for PEI; and federal government funding ($6-8 million) to build a new sewage treatment plant for Charlottetown;

6. The Crown offered no evidence to the court of other Senators' practices and standards in attending funerals in their respective regions as a matter of regional representation; there is no comparator evidence at all on which one could find any marked and substantial departure; the only evidence on this issue came from Senator Duffy about the regular practice among Parliamentarians of checking obituaries to identify funerals in their respective regions – evidence to the contrary of any marked departure;

7. Senator Duffy's evidence was to the effect that he had no fraudulent intent or corrupt purpose in making the travel and related expense claims and was not questioned at all by the Crown in cross-examination; that evidence was unchallenged.

[550] Although I sensed that Mr. Holmes' submissions relating to the funeral expenses were focussed on Robert Leclair and Mary McCabe, I intend to include Mr. Bayne's submissions on all five deceased individuals.

Isobel De Blois

[551] April 10-11, 2009: (T64-05408): Isobel De Blois was a remaining matriarch of the De Blois family, direct descendants of Father of Confederation, and first Premier of the Province of P.E.I., George Coles (Exhibit 89). The De Blois family were also prominent on P.E.I. as owners of a major wholesale grocery service for Islanders. The Crown witness, Allison Swan, testified that the De Blois family was "a prominent name in Prince Edward Is-

land" and Mrs. De Blois had also been a close friend of Senator Duffy's mother. Senator Duffy testified that the De Blois family was "memorialized in buildings around the province" and had been "very prominent" on P.E.I. "for more than a hundred years" and were "major contributors" to the Island's arts and culture. Senator Duffy could not remember ever having personally met Mrs. De Blois (Evidence A. Swan, June 4, 2015, p. 14; Evidence M. Duffy, Dec. 10, 2015, pp. 132-133; Dec. 11, 2015, pp. 2-3; Exhibit 89).

[552] Senator Duffy testified (confirmed by Exhibit 7) that from Thursday, April 2, 2009 to Thursday, April 9th, he was in Ottawa, then Toronto, Vancouver, Edmonton and Saskatoon before returning to Ottawa. It was the Easter weekend on April 10 through 13. He had just returned from cross-continent travel on the 9th yet on Good Friday, April 10th, he flew to his region (Charlottetown) to attend and give the eulogy at Isobel De Blois' funeral service on the 11th. While Mrs. De Blois and her family would qualify as (under the spurious title of) "VIP's" in P.E.I., Senator Duffy made plain that "Absolutely, but I also come back ... to what we were told by Nicole Proulx, which is the understanding every Senator has, is you can go home at any time without giving a reason, and so you leave Ottawa, you go home, you go to a funeral, and you get on the evening plane and come back, and go back to work in the Senate the next day. I fail to understand how anyone could find that that was in any way improper or not part of the SARs". And, indeed, there was no SARs limitation on funeral travel to the region as part of regional representation. Furthermore, as Senator Duffy testified in an Island province of 140,000 people, "Everyone is a VIP" (Evidence M. Duffy, Dec. 10, 2015, pp. 128-134).

[553] Senator Duffy further testified that regional funeral attendance, as part of regional "representative business", occurred "absolutely" in other Senators' offices: "keeping track of people who have passed away in your area is a major concern of members of the House of Commons and members of the Senate"; Parliamentarians have "staffers who actually clip the obits every day to make sure that we don't miss someone"; missing the funeral is a sign that the Parliamentarian, a regional representative, "seems to forget us folks back home pretty fast." Senator Duffy attended regional funerals as "a very important sign of respect for the family" and "on behalf of the Senate of Canada", like other Parliamentarians. The Senate Today (Exhibit A, Tab 14, p. 25) identified "regional representation" as "one of the essential features" of the Senate and the SARs explicitly identify "representative business" as part of "public business" which is "entitled" to Senate financial resources (Exhibit A, Tab 2, pp. 1-3 and 1-10).

[554] According, Mr. Bayne submits that the travel to the funeral of Isobel De Blois in P.E.I., Senator Duffy's region, represented no *actus reas* of fraud or breach of trust nor did Senator Duffy have the *mens rea* for such alleged crimes.

Clifford Stewart

[555] May 17 – 18, 2011: (T64-18668): The funeral of Cliff Stewart, attended by Senator Duffy May 17-18, 2011, was, Crown witness, Myrna Sanderson agreed, the funeral of "a famous World War II spy", a man who was "a hero to many on P.E.I. and all Canadians".

Mr. Stewart had had several stories done of his life, "several documentaries, several interviews, several articles in the newspapers", Ms. Sanderson testified. Exhibit 90 is an example of Ms. Sanderson's evidence. Mr. Stewart served with and under Sir William Stephenson, the model for Ian Fleming's James Bond. Mr. Stewart was known as "The Spy from P.E.I.". Senator Duffy gave detailed evidence of Cliff Stewart's status as "a war hero" who flew behind enemy lines into France where "he basically ran training schools behind the lines for the French resistance." Senator Duffy personally met Mr. Stewart once a year at a barbecue on P.E.I. put on by a mutual friend. Ms. Sanderson testified that she and her family "felt when we saw Senator Duffy at the funeral that he was representing the federal government to honour this man"; and, "we did feel honoured that Senator Duffy did attend the funeral." Regional representation is important to the people of a small insular region (Evidence M. Sanderson, June 4, 2015, pp. 8-9; Evidence M. Duffy, Dec. 11, 2015, pp. 7-11).

[556] Senator Duffy also conducted other public business on this trip to his region. He met on May 18, 2011, in Charlottetown with Norman Cleary, one of P.E.I.'s "designated agents" for the PNP, the Provincial Nominee Program", which is a cross-Canada program encouraging investment in Canada through "entrepreneurial immigration". Exhibit 7 confirms Senator Duffy's evidence of this meeting. The PNP has been "very big in P.E.I. More than 550 million dollars invested in our province of 140,000 people, over half a billion. It's a staggering amount of money." The meeting with Mr. Cleary on May 18th was part of a series of meetings between Mr. Cleary and Senator Duffy (August 20, 2010 and June 9, 2011: see Exhibit 7); Mr. Cleary was lobbying Senator Duffy to approach the Minister of Citizenship and Immigration, Mr. Kenney, to get the program "ramped up again" in P.E.I. as it had done much economic good in the region. This was clearly public business as defined in the SARs and entitled to Senate travel resources (Evidence M. Duffy, Dec. 11, 2015, pp. 12-16).

[557] The travel May 17 and 18, 2012 to attend the Stewart funeral and to meet Mr. Cleary to discuss the future of the PNP program was travel between the region and NCR, as T64-18668 makes clear (Exhibit 6, Tab 10). Representative and other public business was conducted by Senator Duffy as defined in the SARs. Senator Duffy's evidence about the meeting with Mr. Cleary and the PNP program was unchallenged.

Jackie Doyle Proude

[558] May 29, 2011: (T64-18669): Senator Duffy made a same day return trip to the region on Sunday, May 29, 2011, to attend the funeral of Jackie Doyle-Proude. The Crown called no witness to give evidence about Mrs. Doyle-Proude or the funeral itself, other than filing the travel expense claim (Exhibit 6, Tab 11). The only evidence before the Court about Ms. Doyle-Proude and the funeral itself was that of Senator Duffy. It was unchallenged by the Crown.

[559] Senator Duffy testified that Ms. Doyle-Proude and her husband "were both very big" in the Atlantic Canada musical community. Ms. Doyle-Proude's father was the piano player for the Don Messer Band and her husband, Garth Proude, was the bass player for Anne Murray and the Sing-a-Long Jubilee television show and was a "Maritime jazz leg-

end". (See also Exhibit 91). Ms. Doyle-Proude herself was a prominent musician/singer in the Maritime musical scene. Both Ms. Doyle-Proude and Garth Proude were "very well known" in the Atlantic Canada arts and culture community. Many "other prominent musicians from Atlantic Canada attended this event, this funeral." Senator Duffy attended as "a representative of the Senate of Canada". This was clearly representative business in the region as defined in the SARs. There is no evidence of any personal connection between Senator Duffy and Ms. Doyle-Proude (Evidence M. Duffy, Dec. 11, 2015, pp. 16-20).

Robert Leclair

[560] January 30 – 31, 2012: (T64-20166): This travel, Senator Duffy testified, involved an attendance at the funeral of Robert Leclair, but that was not the principal purpose of the trip. The principal purpose was public business conducted in Charlottetown with Wayne Hooper, former Deputy Cabinet Minister in P.E.I. who ran ACOA, the Atlantic Canada Opportunities Agency which encourages "economic development and job growth in Atlantic Canada." This business meeting on January 30th was part of an ongoing series of meetings and efforts by Senator Duffy to advance job creation and economic growth and prosperity in P.E.I. (See Exhibit 7, Nov. 11, 2011; Nov. 16, 2011; Nov. 20, 2011; Nov. 30, 2011; Feb. 8, 2012; Feb. 10, 2012; March 7, 2012). Exhibit 92 (comprised of correspondence from Senator Duffy to four Federal Cabinet Ministers about "the P.E.I./Atlantic Canada Technology & Venture Development Trust", a memo attached to the letter describing how the Trust would advance" the Industrial & Manufacturing Situation for P.E.I.", and five pages of a power-point presentation on "Industrial Development with positive political results in P.E.I.") evidences the significance for P.E.I. of the public business Senator Duffy sought to advance with the assistance of Mr. Hooper. Senator Duffy explained that the Federal Industrial Regional Benefits program required large foreign manufacturers (like Boeing) who sell goods (like airplanes) to Canada, to provide "industrial offsets to Canada", a promise to buy from Canadians goods and/or services equal to at least half the cost of the airplane contract. Islanders like Kirk Foley and Mike Currie sought to take advantage of the IRB program but were stymied by upfront bidding costs; they had an idea for companies like Boeing to provide letters of credit to offset the bidding costs. Senator Duffy needed "someone who knows about ACOA" and "about government purchasing" and who could help perfect the proposal he sought to make on behalf of his region to the Federal Cabinet. Senator Duffy met with Mr. Hooper January 30th in Charlottetown to advance this important regional project", to advance this job-creation program for P.E.I."; Mr. Hooper "was my fact-checker" who would "tell me how to make it succeed". This was clearly public business as defined in the SARs and "entitled" to Senate travel resources (Evidence M. Duffy, Dec. 11, 2015, pp. 21-38); Exhibit 92).

[561] Peter McQuaid, a Crown witness, testified that he was aware that Mr. Hooper, Mr. Foley and Mr. Currie were all involved "in IRB efforts to create jobs and create some well [sic] fund on the – on the island," and that they were "approaching Federal officials to do what they could on behalf of Prince Edward Island on ... a major public issue". Senator Duffy was championing that effort (Evidence P. McQuaid, April 20, 2015, pp. 39-40).

[562] Senator Duffy also attended the Leclair funeral on January 31st, before returning to

the NCR, as he had been asked by the family to do a reading. Senator Duffy testified that Mr. Leclair was "an acquaintance. He was a school friend of my younger brother." The Crown witness, Thane Arsenault testified that he knew of no personal relationship between Senator Duffy and Mr. Leclair and that he knew of no reason for Senator Duffy's funeral attendance "other than this paying of respect as the regional senator" (Evidence M. Duffy, Dec. 11, 2015, pp. 20-21; Evidence T. Arsenault, June 4, 2015, pp. 11-12).

[563] Quite apart from the important public business Senator Duffy conducted on behalf of his region, Mr. Bayne submits that this travel was eligible for Senate travel resources as representative business in the region and as a trip between the region and NCR requiring no justification to be reimbursed. There was no fraud or breach of trust nor any intention to defraud nor any corrupt purpose.

Mary McCabe

[564] February 14, 2012: (T64 – 20164): Senator Duffy's same day return trip from the NCR to his region and back was for "the purpose of meeting Cecil Villiard." Senator Duffy had already paid his respects to his comatose cousin, Mary McCabe, in the Prince Edward hospice on February 11th. Senator Duffy had not been able to meet with Charlottetown City officials on the weekend in respect of a pressing problem and need for federal funds, so Senator Duffy arranged to meet Mr. Villiard, the Chair of the Charlottetown waterworks committee on February 14th. That scheduling also permitted Senator Duffy to attend the McCabe funeral (Evidence M. Duffy, Dec. 11, 2015, pp. 39-43).

[565] On arrival in Charlottetown, Senator Duffy immediately met Mr. Villiard at 1:00 p.m. (Exhibit 7 – "Cecil Villiard on federal answer to sewage problem"). Contaminated and raw sewage was being dumped into Charlottetown Harbour. This was not merely an aesthetic issue: it threatened locally to "shut down the shellfish industry". Senator Duffy, as part of his regional representative and public business functions ("parliamentary functions"), was trying to assist the City in getting "fast-tracked" federal funding assistance (from Peter Kent, Minister of the Environment) to upgrade Charlottetown's sewage treatment system facilities and "remove this problem from Charlottetown Harbour." Mr. Villiard represented his Mayor, Clifford Lee, and the City in these discussions with Senator Duffy; the City needed the federal government to commit $6 to $8 million of the project cost. Senator Duffy was trying to "get the sewage problem fixed so we could get a clean harbour, and to get fishers back to work." Exhibit 93 confirms Senator Duffy's identification of this public issue.

[566] The Crown witness, Peter McQuaid and Diane Scharf also confirm Senator Duffy's evidence. Mr. McQuaid agreed that the sewage contamination of Charlottetown Harbour was a threat to the shellfish industry and that Mr. Villiard and Mr. Lee were lobbying Parliamentarians for federal funds to deal with this "important public issue". Ms. Scharf testified that she knew that the Charlottetown need for federal funding for sewage treatment was a "crucial matter" because "300 fishermen were out of work". She and Senator Duffy worked on this issue together in his Senate office and she knew that there were discussions going on between Mr. Villiard and Senator Duffy to address a situation she described as "desperate"

(Evidence M. Duffy, Dec. 11, 2015, pp. 42-48; Evidence P. McQuaid, April 20, 2015, pp. 38-39; Evidence D. Scharf, June 9, 2015, pp. 38-39; Exhibit 93).

[567] Mr. Bayne points out that Mary McCabe was not merely Senator Duffy's cousin. Having been Director of Child Welfare for Edmonton, she returned to P.E.I. and brought social work innovations to the province as Director for Child Welfare for PEI that led to her being recognized in the social history of PEI. Senator Duffy's funeral attendance was regional representation and a trip between the NCR and his region, was in no way prohibited by the SARs and, in fact, authorized by them (and Ms. Proulx's express instructions). Mr. Bayne submits that the travel was undertaken to address an important P.E.I. public issue, clearly a "parliamentary function".

Conclusion

[568] I agree that all five funerals encompassed by counts 19 and 20 can be covered under the umbrella of a trip between the Senator's region and the NCR and thereby legitimate travel under the SARs.

[569] In any event, the first three funerals would be covered by the VIP designation that that in turn would result in reimbursement.

[570] I find that the attendance by Senator Duffy at the Leclair and McCabe funerals coincided with valid public business as outlined by Senator Duffy in his unchallenged evidence.

[571] The charges covered in counts 19 and 20 are hereby dismissed.

PAYMENTS MADE TO AND THROUGH MAPLE RIDGE MEDIA AND OTTAWA ICF AND GERALD DONOHUE TO VARIOUS INDIVIDUALS AND ENTITIES

[572] It is alleged that the accused (21) between the 23rd day of February, 2009, and the 5th day of April , 2012, at the City of Ottawa, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of the office by amending consulting contracts in favour of Gerald Donohue, contrary to section 122 of the *Criminal Code of Canada* and further that he (22) between the 23rd day of February, 2009, and the 5th day of April, 2012, at the City of Ottawa, in the East Region, did by deceit, falsehood or fraudulent means defraud the Senate of Canada of money, exceeding $5,000.00, by awarding consulting contracts in favour of Gerald Donohue, contrary to section 380(1)(a) of the *Criminal Code of Canada*.

BACKGROUND OF MAPLE RIDGE MEDIA INC. (2008-2010) and OTTAWA ICF (INSULATING CONCRETE FORMS (2010-2011) AND GERALD DONOHUE

[573] Before embarking upon an analysis of the payments made by Maple Ridge Media and Ottawa ICF to the various recipients associated with this trial, I believe it is worthwhile to examine the formation and structure of these companies and the role Gerald Donohue had

with them.

Maple Ridge Media and Ottawa ICF

[574] Matthew Donohue, the son of Gerald Donohue, testified that both companies were private entities and were in essence construction companies. Matthew and his mother were the sole shareholders. Matthew advised the court that he was a director of the companies and ran the day to day operations but he acknowledged that his dad (Gerald) made the key decisions for the companies including the determination of dividends.

[575] Matthew Donohue explained that the name change from Maple Ridge to Ottawa ICF was made to better reflect the nature of the business.

[576] Matthew Donohue also stated that his dad did not have any cheque writing privileges regarding the companies. The cheques and the evidence of Gerald Donohue make it clear that with or without "authorization", Gerald Donohue wrote many company cheques over the years.

[577] Gerald Donohue was in receipt of a disability pension and did not want it to appear that he personally was receiving any income. Although this arrangement was not known by Senator Duffy, the under-the-table nature of this conduct does impact somewhat on the credibility of Mr. Gerald Donohue.

Qualifications of Gerald Donohue to Act as a Consultant

[578] The Crown called Gerald Donohue as a witness. I must say that after the examination-in-chief was completed, it seemed that Mr. Donohue possessed few attributes that would have allowed him to be a useful consultant for Senator Duffy. Likewise, Mr. Donohue's status as the paymaster for the funds that Senator Duffy had provided to him under the various contracts was put into serious doubt. Mr. Holmes painted a picture of an uneducated high-school-drop-out possessing no qualifications to be considered either as a *bone fide* consultant or trustee.

[579] Mr. Bayne's cross-examination of Mr. Donohue put to rest any concerns about Mr. Donohue's ability to carry out his role as a consultant/advisor and an administrator of the funds paid to Maple Ridge and Ottawa ICF through the various contracts.

[580] Mr. Bayne began his submissions by stating that: consistent with public media reports based on police Information to Obtain Search Warrants that painted a (false) picture of Mr. Donohue as merely a television technician with no credentials and/or experience that would have qualified him to offer consulting, research and advice services that would be of value to Senator Duffy (in Senator Duffy's discretionary view), the Crown in its examination-in-chief of Mr. Donohue was content to have the court hear only that Mr. Donohue was a television technician with a grade 10 education. There was but passing reference to Mr. Donohue having been a national level labour representative and the director of HR at the CJOH television station. The Crown was in possession of Mr. Donohue's 51-page, August

28, 2013, statement in which he sought to explain his experiences in collective bargaining and at CJOH (Evidence G. Donohue, November 25, 2015, pp. 21-22).

[581] Mr. Donohue was, in fact, well qualified by his life's work and achievements to consult, to do research for, and to advise Senator Duffy on a daily/weekly basis on a broad range of matters. Of course, the SARs expressly created the right of every Senator to retain consulting services of their own choice, in their own "full", "sole" and "exclusive" discretion and control. Mr. Donohue was, pursuant to the SARs, a member of Senator Duffy's "staff", all of whom serve at the "pleasure" of the Senator. All Senators are made by the SARs the sole judges of the staff they choose to retain (and pay out of the allotted office budget), of the value of those staff to the individual Senator and of the value of the work they do for the Senator, the advice and research they provide (Exhibit A, Tab 2, pp. 1-3 to 1-4; 1-11; 3-1, 3-8, 4-7; 4-8; 4-10; 6-1).

[582] Mr. Donohue had extensive experience (almost 30 years) representing the approximately 6,000 employees of NABET (National Association of Broadcast Employees and Technicians) in coast to coast collective bargaining and arbitrations in Canada. On behalf of the union and its people Mr. Donohue made representations to the Prime Minister, the Minister of Labour and the BC Federal Liberal Caucus (Exhibit 63, Tab 1). Mr. Donohue was principal author of a brief to the Prime Minister of the day. Issues such as national policy on cable TV, pay TV, FM policy as well as federal-provincial jurisdictions and perceived anti-labour bias were addressed by Mr. Donohue as far back as 1977. In 1988 Mr. Donohue was retained as a consultant for the Calgary Olympics by the national broadcaster CTV (which had TV rights and a significant financial stake in the successful telecasting of those Olympic Games). Fearing labour unrest, CTV hired Mr. Donohue as its consultant in a "problem solver" role: Mr. Donohue was paid $3,000 for 3 months of being "on standby" in case of labour disruption, more if Mr. Donohue was actually pressed into active service (Exhibit 63, Tab 2). By contrast, as is set out below, Senator Duffy paid Mr. Donohue for a full year – an average of 150 hours per year of active consulting, not mere standby – approximately $5,000, a modest total. CTV paid for consulting services to be rendered principally by telephone, exactly as did Senator Duffy. The "problem solver" role was one Mr. Donohue played for Senator Duffy as well as for CTV (Evidence G. Donohue, November 25, 2015, pp. 1-8).

[583] In 1990 Mr. Donohue was designated a "Human Resources Professional of Ontario". For the professional association, HRPAO, Mr. Donohue was active on the "Federal Government Affairs Committee", which addressed federal government policy and the formulation of presentations made to government. The types of entities represented by HRPAO included "broadcast entities, banks … interprovincial transportation" (Exhibit 63, Tab 3; Evidence G. Donohue, November 25, 2015, pp. 8-11).

[584] In 1997 Mr. Donohue was retained by Mr. Duffy (as he then was) to attempt to negotiate an employment contract and its terms with CHUM radio (Exhibit 63, Tab 4), and thus Senator Duffy had direct experience working with Mr. Donohue, more than a decade before his 2009 Senate appointment. Mr. Donohue acted as a consultant for Senator Duffy in those

contract negotiations (Evidence G. Donohue, November 25, 2015, pp. 12 – 13).

[585] By 1987 Mr. Donohue was at CJOH in Ottawa. Brought in to "establish a complete Human Resource Department", Mr. Donohue managed pensions, benefit plans and administration and helped establish a human resource information system (HRIS). Mr. Donohue became the Director of Administration and Human Resources for CJOH and his list of duties, responsibilities and accomplishments were extensive (see Exhibit 63, tab 5). So accomplished was Mr. Donohue that it was proposed that he become a Vice President of Baton Broadcasting, but Mr. Donohue was forced to retire in 1997 due to health reasons. In his decade at CJOH Mr. Donohue had "extensive management administration experience", including in respect of "compensation, pensions, communications, labour relations, health and safety, employment equity, administration … benefits and pension plans" (Evidence G. Donohue, November 25, 2015, pp. 13-20).

[586] In addition, Mr. Donohue had political experience, having served for 3 years as the Liberal Riding President in Richmond, BC, for Provincial Liberal Leader Gordon Gibson, readying for the federal election (Evidence of G. Donohue, November 25, 2015, p. 20).

[587] In short, Mr. Donohue was, as he described it, "well qualified" to consult to Senator Duffy after the 2009 Senate appointment. Senator Duffy, in his discretion, made that same determination himself, as the SARs entitled him to do (Evidence G. Donohue, November 25, 2015, p. 23).

[588] I recognize that Mr. Donohue was suffering from serious health issues when he gave his evidence by video at this trial. He also admitted quite candidly that he now has some issues with his memory. In spite of these issues, I find that Mr. Donohue possessed a good overall command of the events that are before the court and that he was a reliable witness.

[589] I also find Mr. Donohue to be a credible witness in spite of my earlier stated reservation about the under-the table-nature of this enterprise.

[590] I cannot help but note that the overall plan developed by Senator Duffy and Gerald Donohue to disperse the Senate funds provided has a number of shortcomings that cause me to conclude that such a financial arrangement should not be considered as a wise option moving forward.

[591] Firstly, Mr. Donohue may have been the operating mind of the companies in question but he had no legal connection with either company. There is no evidence suggesting that Senator Duffy was aware of this shortcoming.

[592] Secondly, the nature of the setup is such that it is open to the suggestion as put forward by Mr. Holmes that this arrangement amounts to a slush fund. Although, I do not agree with Mr. Holmes' assessment, there is a negative perception created.

[593] Thirdly, Senator Duffy did not retain any direct control over the funds once they

were put into the hands of Mr. Donohue's corporate entity.

[594] Fourthly, Senate Finance did not have any idea as to the precise use made of the funds.

Crown's Position

Introduction

[595] Mr. Holmes takes the position that the allegations concerning the contracts with Gerald Donohue have virtually nothing to do with Senate policy. He states that the arrangement between Senator Duffy and Mr. Donohue involve Senator Duffy actively misrepresenting Mr. Donohue's role, certifying the validity of Donohue's invoices and establishing a secret fund over which Senator Duffy enjoyed unilateral control. Mr. Holmes characterizes the set up as a slush fund.

[596] Mr. Holmes defines a slush fund as money earmarked for a loosely defined but legitimate purpose that is then surreptitiously used for an illegitimate purpose. Furthermore, the Crown draws the court's attention to the fact that Senate Finance was unaware of the inner-workings of Maple Ridge Media and Ottawa ICF and how the funds were dispersed.

[597] The Crown notes that the deception of the funding vehicle must be kept in the context of Senator Duffy's other misrepresentations, involving his residency, his unentitled travel expenses, his artificially increased office budget, and Gerald Donohue's role in the scheme. He concludes that all of these factors should render all of the payments out of the account invalid.

[598] Furthermore, Mr. Holmes contends that this "slush fund" would have made it impossible for Senate Finance to conduct meaningful oversight of Senator Duffy's expenditures.

[599] The Crown acknowledges that "parliamentary functions" are broadly defined and that a Senator enjoys wide latitude over hiring and staffing. Likewise, the Crown recognizes that service contracts fulfil a necessary and useful purpose and that such contracts are available for a Senator to use in respect of their Senate duties.

[600] Once a Senator identifies a need and confirms the availability and qualifications of a prospective contractor the process is simple: someone from the Senator's staff prepares a two page "Request for Services Contract" specifying four things:

(1) The name of the contractor;

(2) The services to be performed;

(3) The duration for the services; and

(4) The cost of the service.

Senator Duffy's involvement with Senate contracts

[601] Mr. Holmes states that shortly after his appointment, Senator Duffy made requests for three contracts that were processed. There is no suggestion he encountered resistance from staff in Human Resources who were then tasked with processing such requests. His Executive Assistant, Melanie Mercer (Vos) was new to her position. Nevertheless it appears that she experienced no difficulty preparing the necessary paperwork. Mr. Holmes notes that once a Senator makes a request for a services contract the bulk of the work in finalizing that contract rests with Senate administration.

[602] Service contracts are an authorized part of the Senator's office budget. The office budget has a set limit each fiscal year. The evidence at the trial revealed that the office budget allocation cannot be carried over until the next fiscal year. However, the Crown suggests that's what Senator Duffy did with his service contracts, certainly the first two contracts involving Mr. Donohue in late 2009 and late 2010. He moved money that would be otherwise unavailable to him (after the 31st of March) and put it in the bank account of Maple Ridge Media, over which his old friend Gerald Donohue exercised control.

[603] As an example of the ease with which legitimate contracts could be arranged we have the case of Eastern Consulting. The documents pertaining to that contract are found in Exhibit 3A, Tab 11. The Request for Services Contract is at p.6-7. The contractor, services, duration and cost are set out. The cost of the various services was capped at $5950, inclusive of HST/GST. A detailed invoice was received from Eastern Consulting and was processed and paid.

[604] This example is one of which Senator Duffy was aware. It was, after all, at his request that arrangements were made for Peter McQuaid to provide services to Senator Duffy.

[605] The practices respecting service contracts anticipated things to occur in this sequence:

(1) Contract request

(2) Contract

(3) Work

(4) Verification of work

(5) Payment for work performed.

[606] Mr. Holmes contends that Senator Duffy deviated from this practice in relation to Gerald Donohue. However, administrators responsible for processing his requests accommodated him. Sonia Maklouf explained in her testimony that the Senator, having made arrangements for the performance of work, any such work performed prior to the creation of a contract nevertheless created an obligation upon the Senate to pay. The Crown considers her

reaction to Senator Duffy's error as understandable and correct.

[607] Exhibit 23 contains the "Donohue" contracts resulting from Senator Duffy's requests. Senator Duffy acknowledged that he received copies of the contracts and would need to review them in the course of approving the invoices received from the contractors (Testimony of Senator Duffy, 17 December 2015, p.95).

[608] The contracts specify the type of work being performed and identify the contractor who will perform that work. The contracts were capable of amendment, upon request by the Senator. The evidence reveals that Senator Duffy availed himself of this mechanism from time to time. In a July 2009 memo to Ms. Makhlouf, Senator Duffy discontinued the contract with Spry Consulting seeking that the funds allocated in connection with their services be returned to his general budget, expressing his anticipated future plan to move those funds to Maple Ridge Media (Exhibit 3A. Tab 3, p.16). In October 2009 Senator Duffy reduced the allocation of funds to Maple Ridge from $20,000 to $10,000 and sought the return of the difference to his "general office budget" Exhibit 3A, Tab 3, p.9). Approaching the fiscal year end he increased the allocation to Maple Ridge from $10,000 to $14,000. In a memo to Senate HR dated March 10, 2010 Senator Duffy said: "As it turns out, we have a small surplus that can be used". He said that he wanted Maple Ridge Media to "assist me with a project on the aging of the Canadian population" and that the approval of the transfer of funds "will allow me to start them on this project immediately" (Exhibit 3A, Tab 3, p.8).

[609] Mr. Holmes stated that the bottom line is that the service contract system was simple and flexible and, with the exception of those instances where Senator Duffy claimed work had been performed before a contract was in place, was a system that Senator Duffy had "mastered".

[610] The contract respecting the first fiscal year in which Senator Duffy was a member of the Senate is located in Exhibit 23 at Tab 1. The contractor is identified as "Gerald Donohue CHRP – Maple Ridge Media Inc." This contract specified a maximum amount of $10,000.00 plus HST and GST. The contract specified the following services:

> "Editorial services" and
>
> "Writing services (Including speeches)".

[611] An invoice was submitted by Gerald Donohue bearing a date of 18 March 2009 for $10,500.00. Unlike the invoice submitted by Peter McQuaid in respect of his work around the same time period, the Donohue invoice was for the full amount stipulated by the contract. The corresponding payment to Maple Ridge Media Inc. is dated 22 April 2009 and can be found at Exhibit 3A, Tab 2.

[612] The money paid out to Maple Ridge Media in respect of this first contract was really for the work performed by L. Ian MacDonald. Mr. MacDonald, a professional speech writer, wrote the speech. Gerald Donohue's role was to process MacDonald's payment request.

[613] The contract respecting the second fiscal year in which Senator Duffy was a member of the Senate is located in Exhibit 23 at Tab 2. By the fiscal year end the contractor is identified as "Maple Ridge Media Inc." represented by Gerald Donohue. The description of services is as follows:

> "Editorial services",
>
> "Writing Services (including speeches)" and
>
> Project on the aging of the Canadian Population.

The maximum amount of the contract was $14,000, inclusive of GST/HST.

[614] Gerald Donohue's invoice dated 29 March 2010 was submitted to Senator Duffy. The invoice was in the amount of $13,996.50. Senator Duffy signed the invoice verifying the completion of the work. The cheque issued in respect of this invoice bears a date of 17 April 2010 and can be found in Exhibit 3A at Tab 4. It is in the amount of $13996.50 as per the verification process undertaken by Senator Duffy.

[615] The Crown notes that Senator Duffy neglected to specify the date that the work was performed and questions whether this was an oversight or deliberate act to deceive Senate Finance. As the bank records and the evidence shows the work hadn't been performed. The money that ultimately flowed to Maple Ridge Media in the middle of April 2010 would be used to make twelve future payments for things that included make- up costs (Lambert) and photos (Jiffy) and consultations about law suits (Bourrie) and to reward his cousin for sending him newspaper stories about his family (McCabe) and to pay a volunteer (Cain) and to pay for the cost of his personal trainer (Croskery).

[616] Mr. Holmes alleges that by orchestrating the payment of almost $14,000 into the account of Maple Ridge Media, Senator Duffy accomplished two things: (i) he artificially and fraudulently increased the amount of his office budget; and (ii) he put public funds beyond the scope of any supervision by Senate administration. The Crown concludes that as a practical matter Gerald Donohue exercised complete control over the public money that had been deposited into the Maple Ridge media bank account and that Senator Duffy exercised authority over the money contained in the slush fund that he created.

[617] The following chart shows the payments that were made by Maple Ridge Media and Ottawa ICF out of the funds:

Payment	Recipient	Payment Date	Amount	Payor	Cheque
1	MacDonald, L. Ian	Apr. 3, 2009	$7,350	Maple Ridge Media	624
2	Levant, Ezra	Apr. 29, 2010	$2,100.00	Maple Ridge Media	721
3	Croskery, Mike (MyoMax Perform.)	Apr. 29, 2010	$3,150.00	Maple Ridge Media	722
4	McQuaid, Peter (Eastern Consulting)	Apr. 29, 2010	$2,887.50	Maple Ridge Media	723
5	Radwanski, George	Apr. 29, 2010	$500.00	Maple Ridge Media	724
6	Cain, Ashley	May 3, 2010	$500.00	Maple Ridge Media	728
7	McCabe, David	May 25, 2010	$500.00	Maple Ridge Media	729
8	Lambert, Jacqueline	May 25, 2010	$300.00	Maple Ridge Media	730
9	Vermeer, Mark (Jiffy Photo)	Jun. 4, 2010	$104.31	Maple Ridge Media	732
10	Bourrie, Mark	Jun. 16, 2010	$500.00	Maple Ridge Media	739
11	Vermeer, Mark (Jiffy Photo)	Aug. 18, 2010	$56.71	Maple Ridge Media	744
12	Brennan, R.A.	Dec. 21, 2010	$734.50		
13	Ling, Nils	Jan 4, 2011	$2500.00		
14	McQuaid, Mary (Sen. Duffy's staff)	Mar. 3, 2011	$1,068.08	Ottawa ICF	1041
15	Levant, Ezra	Mar. 14, 2011	$2,100.00	Ottawa ICF	1042
16	Vermeer, Mark (Jiffy Photo)	Apr. 4, 2011	$195.33	Ottawa ICF	1044
17	Croskery, Mike (MyoMax Perf.)	Jun. 3, 2011	$3,390.00	Maple Ridge Media	1057
18	Vermeer, Mark (Jiffy Photo)	Jun. 30, 2011	$54.24	Ottawa ICF	1063
19	Vermeer, Mark (Jiffy Photo)	Jul. 14, 2011	$139.71	Ottawa ICF	1078
20	Vermeer, Mark (Jiffy Photo)	Aug. 25, 2011	$82.91	Ottawa ICF	1082
21	Vermeer, Mark (Jiffy Photo)	Sep. 19, 2011	$175.85	Ottawa ICF	1086
22	Vermeer, Mark (Jiffy Photo)	Oct. 17, 2011	$116.96	Ottawa ICF	1099
23	Vermeer, Mark (Jiffy Photo)	Nov. 15, 2011	$206.57	Ottawa ICF	1107
24	Scharf, Diane (Sen. Duffy's staff)	Nov. 18, 2011	$199.63	Ottawa ICF	1136
25	Vermeer, Mark (Jiffy Photo)	Dec. 28, 2011	$102.27	Ottawa ICF	1119
26	Scharf, Diane (Sen. Duffy's staff)	Jan. 17, 2012	$193.49	Ottawa ICF	110?
27	Vermeer, Mark (Jiffy Photo)	Jan. 13, 2012	$106.49	Ottawa ICF	1126
28	Croskery, Mike (MyoMax Perform.)	Jan. 20, 2012	$3,559.50	Ottawa ICF	1129
29	Sphyr Communications	Jan. 20, 2012	$598.11	Ottawa ICF	
30	Scharf, Diane (Sen. Duffy's staff)	Feb. 2, 2012	$97.30	Ottawa ICF	11??
31	Vermeer, Mark (Jiffy Photo)	Feb. 20, 2012	$97.75	Ottawa ICF	1137
32	Kittelberg, William	Mar. 2, 2012	$2,000.00	Ottawa ICF	1140
33	Vermeer, Mark (Jiffy Photo)	Mar. 14, 2012	$139.42	Ottawa ICF	1144
34	Scharf, Diane (Sen. Duffy's staff)	Mar. 14, 2012	$94.76	Ottawa ICF	
35	Receiver General – Parl. Boutique	Mar. 30, 2012.	$298.70	Ottawa ICF	
36	Brouse, Elizabeth (MQO Research)	Aug. 10, 2012	$1,054.66	Ottawa ICF	1168
Grand Total			$37,254.85		

[618] None of these recipients was ever known or knowable to members of Senate administration. For these payments totalling over $37,000 Gerald Donohue was the paymaster.

[619] The evidence reveals consultations between Senator Duffy and Gerald Donohue whether there was any money on hand, and if there was Gerald Donohue would cut a cheque. The $13,996.50 paid into the Maple Ridge Account was almost completely depleted upon the payment that was made to Nils Ling on 4 January 2011. The following chart shows this:

Levant	2100
Croskery	3150
McQuaid	2887.5
Radwan.	500
Cain	500
McCabe	500
Lambert	300
Jiffy	104.31
Bourrie	500
Jiffy	56.71
Brennan	734.5
Ling	2500
	13833.02

[620] Mr. Holmes states that undoubtedly, sensing the inevitable depletion of the money in the account, efforts were already underway to secure additional financing from the Senate. The amended contract in respect of these efforts is found in Exhibit 23, Tab 3. It was signed on December 20th, 2010 by Mr. Donohue and on December 23rd, 2010 by a Ms. Bernier, representing the Senate. The notable changes included an expansion to Gerald Donohue's "duties". For this, see Senator Duffy's document: "Gerald Donohue Duties" found in Exhibit 23, Tab 3, p. 4. The contract was for a maximum amount of $13,560.

[621] Gerald Donohue's corresponding "Statement of Account" is dated December 31, 2010. This document can be found in Exhibit 3A, Tab 5, p.1. Senator Duffy's certification of the performance of work is located on the bottom right.

[622] Thereafter a cheque in the amount of $13,560.00 was issued, payable to Gerald Donohue, dated 10 January 2011. That cheque can be found in Exhibit 3A at Tab 6.

[623] The Crown observes that Sonia Makhlouf believed that Gerald Donohue was performing the work under the contracts as did Melanie Mercer Vos who actually prepared the documents.

[624] Mr. Holmes concedes that some of the aforementioned payments might have been approved had they been submitted properly. However, the manner in which the financial arrangement was structured by Senator Duffy removed any realistic possibility of public scrutiny of his expenses thereby putting public funds at risk.

[625] The Crown contends that this concern is even more pronounced in respect of inappropriate payments, including some that themselves have attracted specific charges (Croskery, Cain and Lambert).

[626] Money was paid to Diane Scharf to cover the cost of telephone services beyond limits set out in the Senate policy. Ms. Scharf was told that Senator Duffy had exhausted the

allowable phone services for himself and his office. More importantly it was known by Senator Duffy. He had options: he could apply to Internal Economy to seek permission to exceed the limits of the telecommunications policy, or he could have paid the cost himself. Instead he elected to "work around" the problem by assigning the payment of those expenses to Gerald Donohue.

[627] Mr. Holmes is of the opinion that the payment to Nils Ling is, perhaps, the clearest example of outright fraud.

[628] Exhibit 98 is the Speaker Payment Record reflecting the accused's agreement to give a speech at the Chateau Laurier hotel on Wednesday October 20th, 2010. The sponsor was the Canadian Federation of Agriculture. The agreement contemplated a speaker's fee of $10,500.

[629] It is absolutely clear from the email on the first page of Exhibit 95 that Senator Duffy commissioned Nils Ling to write that speech. In the email dated 10 October 2010 Senator Duffy says:

> I was blown away by the eloquence of the speech you wrote for Jamie last week. In fact I wonder if I could hire you to write a short speech for me on the subject of Agriculture in Canada. I'm filling in for Rex Murphy at the 75th anniversary of the Cdn Fed of AG. On Oct 20th. If you could undertake this assignment (confidential of course)….

[630] Nils Ling wrote the speech and sent it to Senator Duffy on Wednesday October 20th, 2010 at 3:20 am. A copy of this speech is filed as Exhibit 99.

[631] It was delivered by Senator Duffy later that night with some modifications.

[632] Nils Ling was ultimately paid $2500 for the speech that garnered Senator Duffy over $10,000.

[633] A version of that speech was ultimately posted on the Senator's website. However, the Crown takes the position that that does not in any way justify the payment to Nils Lings from public money. Mr. Holmes concludes that the speech was a private business matter for Senator Duffy. He was paid for the appearance. No Senate resources, that is, taxpayer money, could legitimately be used to underwrite the payment to Mr. Ling.

Defence Position

[634] Mr. Bayne approaches counts 21 through 28 inclusive by addressing issues that apply to the charges overall and then he addresses the specific counts of alleged fraud and/or breach of trust by Senator Duffy "by awarding consulting contracts in favour of Gerald Donohue" and by "facilitating payment(s)" to Ms. Cain, Ms. Lambert and Mr. Croskery.

[635] Counsel submits that there are at least 12 critical evidentiary factors that, taken to-

gether, should lead the court to find that the crimes alleged have not been proved beyond reasonable doubt:

1. *The evidence of Sonia Makhlouf*

Ms. Makhlouf was the principal (and only) witness from the Senate HR Directorate, responsible for Senate administration of staffing, services providers and services contracts for Senators, to assist the Court on Senate service procurement policy or guidelines, and on actual practices. Her extensive evidence strongly supports the conclusion that, in awarding service contracts to the corporate contractors Maple Ridge Media and to Ottawa ICF (not to "Gerald Donohue" as is alleged), and in arranging for payment to Ms. Cain, Ms. Lambert and Mr. Croskery for actual services rendered, Mr. Bayne contends that Senator Duffy committed no crimes as alleged.

2. *Exhibit 10*

As the evidence of Ms. Makhlouf and Ms. Proulx, both key Crown witnesses on Senate administrative policy and practice, made plain, there was no actual Senate policy that governed procurement by Senators of services until the *Senate Procurement Policy* (Exhibit 12) that became effective November 7, 2011 and which governed services contracts starting in the fiscal year 2012-2013. All of the Maple Ridge Media and Ottawa ICF contracts impugned by these counts are in preceding fiscal years (2008-09; 2009-10; 2010-11; 2011-12). The operative "guideline" that related to Senators' procurement of services out of their allotted Research and Office Expenses Budget, prior to the Procurement Policy and to the four impugned contracts, is the Thirty-Sixth Report of the Standing Committee in Internal Economy dated April 28, 1988: "*Guidelines for Senators' Research Expenditures*" (Exhibit 10). Mr. Bayne concludes that Senator Duffy never violated this operative guideline.

3. *The evidence of Nicole Proulx*

Ms. Proulx's evidence was that the "guiding principle" governing appropriate use of Senate financial resources in respect of service providers was "Senate funds for Senate work". Mr. Bayne maintains that Senator Duffy did not violate this overriding principle – all service providers did in fact provide services of value to Senator Duffy in the exercise of his Senate-related work, his "parliamentary functions" as defined in the SARs. In all cases, Senator Duffy used his allotted and discretionary office budget funds to pay for services related to his work and projects as a Senator. In all cases, "Senate funds" were used to pay for actual "Senate work" for Senator Duffy and not for his personal use or benefit. Mr. Bayne concludes that no crimes were committed as alleged; the contrary has not, on the evidence, been established beyond reasonable doubt.

4. *The Senate Administrative Rules (SARs*)

Mr. Bayne points out that these governing administrative rules, the "comprehensive code" governing Senators in the administration of their allocated annual office budget create in each of the 105 Senators an exceptionally broad administrative discretion – a "full discretion", a "sole discretion", an "exclusive direction and control" – over those who provide services and work for them and what that work is. In the exercise of awarding consulting contracts, procuring service providers and having those services providers paid, Senator Duffy, like all other Senators, was exercising this exceptionally broad, explicitly assigned discretion. Mr. Bayne submits that the Crown may argue with Senator Duffy's exercise of his discretion, but these were discretionary decisions taken by Senator Duffy and, as Justice Belanger held in *Radwanski*, *supra*, (in respect of what he identified as the exercise by Mr. Radwanski of a "wide and important discretion"), discretionary administrative errors or "unwise" or negligent or even "bizarre" discretionary decisions do not amount to crimes without more. Discretionary conduct is an important contextual consideration and militates against criminalizing the conduct.

5. *No real or effective oversight*

Mr. Bayne directs the court to Mr. Holmes' opening where he asserted his theory in relation to these counts that, even if the work done by service providers for Senator Duffy was in fact Senate-related (as it was) and may well have been approved for payment if "applied for in an orthodox way", Senator Duffy, by having services providers paid in effect as subcontractors under the approved Maple Ridge Media/Ottawa ICF contracts, had "decided to opt out of any financial scrutiny". These were discretionary decisions by Senator Duffy. The Crown alleges that they were unorthodox – the evidence does not support and even contradicts this. But even if they were "unorthodox", that is not proof of a crime as Justice Belanger found. However, the real point is that the evidence (Ms. Makhlouf, Ms. Proulx, Ms. Mercer Vos, Ms. Scharf, the 11th Report of Internal Economy) reveals that there was in fact no real or effective oversight, no "monitoring" or scrutiny of the work or contracts of service providers – no oversight of exactly what work was done, by whom, when, what if any work product was produced, whether work was written or oral advice or research, whether there was value for money. Mr. Bayne concludes that there was, on the evidence, no oversight, no financial scrutiny to be avoided or to "opt out of". The evidence does not support the theory advanced by the Crown.

6. *The 11th Report of Internal Economy (Exhibit A, Tab 20)*

Mr. Bayne points out that this public report, a report on "Internal Audits" of "Senators' Office Expenditures" and "Services Contracts" identified in December, 2010, that "in certain instances policies were poorly communicated and/or

not well understood by users". Included among "users" are Senators. In respect of services paid out of the Research and Office Budget the report identified the need to ensure that "the correct process and contracting authority is used by Senators' offices" because of a lack of clear guidance in Senate policies. In particular, it was identified that office expenditures to pay for service providers "may not always have formal service contracts in place". It was also noted in the report that there was no "contract review process" in Senate Administration to "monitor" amounts being paid to service providers/ suppliers. The report, in other words, found no real or effective oversight or financial scrutiny of services contracts or payments to services providers. This evidence contradicts the Crown theory and allegation of crime – there was no oversight to "opt out of".

7. *Common practice*

Mr. Bayne notes that from many independent sources (the 11th Report – Exhibit A, Tab 20; Exhibit 10 – the 36th Report; Diane Scharf; Iain MacDonald; Ezra Levant; Exhibit 23 –the four impugned contracts themselves) evidence was provided to the Court that services providers working without a formal written contract in place covering their particular work, and/or the practice of subcontracting service work under an existing (organization/corporate) contract were "common practice", not "unorthodox" at all.

The 11th Report found that services were being provided to Senators without a formal contract in place or a contract to cover that particular service provider. It found further that there was no contract review process, no monitoring or oversight by Senate administration of contract performance. Exhibit 10 created a broad ("full") discretion and "latitude" in all Senators in respect of services provided in relation to Senators' interests, including the discretion to make "any personnel changes necessary" under existing approved services contracts (without a new contract authorization). Ms. Scharf's evidence was that payment for Senate office-related services through a third-party services contract "is a very common practice at the House of Commons, and I'm, I'm quite accustomed to this". Ms. Scharf further agreed that "This is a common practice on the Hill …" a practice that has gone on there "for 100 years" (Evidence D. Scharf, June 10, 2015, pp. 3, 30, 31). Iain MacDonald's evidence in chief (there was no cross-examination) was that he billed Maple Ridge Media for his speech writing services for Senator Duffy, Maple Ridge Media acting as what he called the "third party agent". Mr. MacDonald, who had considerable experience providing services for Parliamentarians, obviously thought this arrangement was perfectly normal in his experience. Mr. Levant's evidence was that he never signed any conflict declaration in respect of any service provided (speech written) for any Parliamentarian. This can only mean that Mr. Levant provided his services outside of the provisions of a services contract he executed with Senate HR – all such contracts contain such a conflict provision (see Exhibit 23, Tab 1, p. 5). The four impugned contracts themselves bear evi-

dence that under at least two of them (50%), all services were provided before any contract was executed or in place.

Mr. Bayne concludes that on the evidence, Senator Duffy's arrangements with his services providers were not unorthodox, did not violate the provisions of the operative (inadequate per Ms. Makhlouf) guideline (Exhibit 10), which provisions may themselves reasonably (on the evidence) have been poorly communicated and were the subject of no formal training (Senator Furey). Furthermore, Mr. Bayne submits that the evidence does not prove beyond reasonable doubt, and in fact contradicts, the Crown theory of criminal guilt.

8. *No inculpatory normative comparator evidence*

The Crown offered no evidence to the Court of the practices of the 104 other Senators who also administered their office budgets with an exceptionally broad assigned discretion; nor any evidence of the understanding by 104 other senators of Exhibit 10, the operative guideline in the absence of a Senate policy. No evidence was tendered for the Court's consideration of how other Senators conducted their arrangements with services providers, what kinds of services they sought and paid for out of their office budget, whether they, too, used general consulting contracts with subcontractor services providers, whether they received oral or written work product, what they paid each service provider and over what period of time, whether for each services provider they had a formal contract with the Senate in place, how they assessed value for money, whether some of the projects they sought assistance for with services providers were not completed or fulfilled (or whether many or most were not). The Crown led no comparator evidence which might, if sufficiently compelling, justify a finding beyond reasonable doubt of marked and substantial departure. Mr. Bayne observes that in the absence of such evidence, Justice Belanger held in *Radwanski*, it is well high impossible to find breach of trust as alleged.

9. *Organizational/corporate contracts*

All four of the contracts impugned in Counts 21-28 (under which services providers were paid) are organizational contracts. The terms of the Personnel Services Contracts themselves (Exhibit 23), where the Contractor is organizational/corporate, expressly contemplate that "person(s)" distinct from the organization/corporate Contractor will in fact provide services. The Contractor need not be (in the case of a corporate Contractor, cannot be) the actual person providing the service(s). Equally probative, evidence of the provisions of Exhibit 10, the governing guideline, demonstrates that individual service providers may change – "any personnel changes necessary" – under an outstanding contract. Mr. Bayne says, little wonder, then, that the 11th Report (Exhibit A, Tab 20) found service provision outside of individual formal contracts and no effective monitoring of payments to individual services providers. Relevant to the find-

ings of the 11th Report as well, concerning poor communication and lack of understanding of policies (or guidelines where there was no government policy) that governed administratively, there is no evidence of effective communication of or training on Exhibit 10 (a 1988 document); in fact, the available evidence suggests there was none.

10. *Evidence of pattern*

From every services provider, each one a Crown witness, the answer was the same – valid Senate-related work was done and no kickback to Senator Duffy was made out of the funds paid to the services provider. The police repeatedly asked and sought out such evidence. There was and is none. This did not happen once or only rarely. In every case of every service provider no kickback was sought or paid. Mr. Bayne states that this is strong evidence of an exculpatory pattern. Furthermore, if this really was a fraudulent scheme concocted by Senator Duffy to deceive the Senate and defraud it of Senate monies, to avoid Senate financial oversight, if this truly was Senator Duffy's fraudulent intent and corrupt purpose, it is reasonable to expect that there would be here a "badge of fraud" (as in *R. v. Milec, supra*, evidence of personal monetary gain. Mr. Bayne suggests that in the Crown's theory, Senator Duffy has set this up to be beyond Senate financial oversight, to create a 'black hole' into which Senate money is being diverted, and so a real and perfect opportunity, if it was a fraudulent scheme with fraudulent intent, for Senator Duffy secretly to avail himself of Senate money. As to the further Crown theory of financial motive created by allegedly being in desperate financial straits, Senator Duffy most certainly would have sought access to these Senate monies through kickbacks but the evidence is that he did not. He never did. Not once. Mr. Bayne insists that if this truly was a scheme of fraud with criminal intent to create a fraudulent "reserve pool" of cash (as the Crown called it in its opening), Senator Duffy would have sought to access that pool, every time. Otherwise there is no purpose to the fraud. Rather, the evidentiary pattern is that he arranged with every services provider (all qualified to do the work they did in fact perform) to do real, Senate-related work and he sought nothing for himself. If this was a fraudulent scheme with fraudulent intent, why have the services providers do anything? Senator Duffy could have just made out false invoices and split the money. But there is no such evidence; the evidence is to the contrary of fraud. Real work of value to Senator Duffy was done, Senate-related (parliamentary functions, public business) work, and never once did Senator Duffy seek access to these Senate monies. The services providers were paid (as Ms. Proulx said was the "guiding principle") "Senate funds for Senate work". Senator Duffy sought and got not a penny of it. Furthermore, this strong evidence of exculpatory pattern of conduct is corroborated by evidence from each of the services providers that none of them was told to keep secret the service provided, the funds paid or the fact that payment came from the organizational/corporate

Contractor, Maple Ridge Media or Ottawa ICF. If this was a fraudulent scheme, Senator Duffy would have requested/suggested secrecy. He did the opposite, emailing Nils Ling, a services provider (speech-writer) to advise that the payment cheque would come from "my general contractor". In addition, there is evidence (from David McCabe and Mark Vermeer) that Senator Duffy made real efforts to separate the purely personal from Senate-related work. Even the gratuitous payments of relatively small amounts to services providers not demanding payment (Ms. Cain, Mr. Bourrie) is inconsistent with a fraudulent scheme and fraudulent intent. Mr. Bayne asks: "Why then pay them anything, thereby reducing the remaining annual office budget funds that would otherwise be available to be deployed in Senator Duffy's "sole" and "exclusive" discretion?" "Why deplete the alleged "reserve pool" of cash with no personal gain to himself?" "What is in it for Senator Duffy other than making payment for real Senate-related work of value rendered?" Mr. Bayne suggests that there is nothing in it for Senator Duffy. Mr. Bayne concludes that when one combines, with all the other critical evidentiary factors, this strong evidence of an exculpatory pattern of conduct it demonstrates no fraudulent scheme, no fraudulent intent or corrupt purpose.

11. *Financial evidence*

Mr. Bayne submits that the Crown tendered the evidence of forensic accountant, Mr. Grenon, in an effort to prove that, because he was in desperate financial straits and needed money, Senator Duffy had a motive to commit fraud to obtain it, to take frequent dips into his "reserve pool". Mr. Grenon's evidence is reflected in Exhibits 52, 53 and 54. Senator Duffy introduced cogent evidence reflected in Exhibits 78 and 79, that, contrary to Mr. Grenon's incomplete evidence and reports, there were no unexplained sources of deposits to Senator Duffy's bank accounts, all deposits had legitimate sources and were more than ample to explain the deposits, and Senator Duffy and Mrs. Duffy were never in dire financial straits without lawful access to funds or being pressed by creditors so that Senator Duffy had to resort to financially-motivated fraud. None of that is proved. The contrary is demonstrated. Exhibit 54 is Mr. Grenon's report relating to his "Analysis of Maple Ridge Media Inc. and Ottawa ICF's Bank Accounts". The report, and Mr. Grenon's evidence, is "preliminary" and incomplete. The "preliminary findings" (Mr. Grenon reserved the right to "modify the results of this analysis should additional documents or information be made available at a later date") suggested that of the $65,177 paid by the Senate to Maple Ridge Media (MRM) and Ottawa ICF (ICF) over the four (4) contracts, only $25,733 was paid out to service providers, leaving $39,404 in the hands of MRM and/or ICF (or, Senator Duffy). The evidence of Crown witness Gerald Donohue completed Mr. Grenon's incomplete evidentiary picture. (See Exhibit 63). In fact, $40,079.75 was paid out to service providers other than Mr. Donohue: MRM and ICF retained only just over $25,000, from which GST

and HST had to be removed, leaving approximately $21,000 in payment for consulting services provided by Mr. Donohue over four fiscal years, an average of a modest $5,250 per year for a year's worth of services. Meanwhile, Senator Duffy, the alleged fraudster who set this up to gain access fraudulently to Senate funds to feed an alleged financial need – he got nothing, sought nothing, said Mr. Donohue, not a cent. Mr. Bayne concludes that the financial evidence, touted by the Crown as a motive for alleged fraud, is actually inconsistent with financial need, with motive, with fraud. Senator Duffy got no funds from any service provider, nor did he even try.

12. *Evidence of Senator Duffy/mens rea*

Senator Duffy testified that he had no fraudulent intent or criminal, corrupt purpose in contracting with Maple Ridge Media and Ottawa ICF and paying services providers what he considered, in his "sole" and "exclusive" discretion, to be fair pay for work he adjudged, in an exercise of that same discretion, to be of value to him as a Senator in his Senate work, undertakings and interests. The work was actually done. There were no false invoices. There was no padding of accounts. He sought and got not a penny back of Senate money from any services providers. Mr. Bayne states that Senator Duffy believed in good faith that he was in compliance with what he understood, without any formal training and given the nature of communication of the policy/guideline, to be the policy (or guideline) and valid practice "common practice" of the Senate and other Senators.

[636] The provisions of the SARs make plain that Senators may award consulting contracts. The Crown alleges that Senator Duffy committed a crime by awarding four consulting contracts in favour of Gerald Donohue. Actually, the contracts were with Maple Ridge Media and Ottawa ICF. Mr. Bayne stresses that the SARs make plain that Senators – all of them – have a "sole" and "exclusive" discretion that they exercise in the awarding of services contracts and in "facilitating payments" to services providers. Senators pick services providers that meet their particular needs and work interests and they are given broad discretionary latitude in doing so. Senators also fix the compensation for services providers, within this broad discretion. Senator Duffy's services contracts and the amounts paid under them were completely in line with those of all other Senators. Ms. Makhlouf's evidence was that, regarding services contracts, "he [Senator Duffy] is like any other Senator"; "Q. Senator Duffy's contracts and the amount of detail in them, and the way he described his requests, are like any other Senator?" "A. Yes"; the amounts paid out under the four impugned contracts "are all within the normal range"; all four contracts with Maple Ridge Media and Ottawa ICF are "You know, normal contracts". Mr. Bayne concludes that in the evidence, then, Senator Duffy, in the exercise of his broad discretion, awarded normal contracts and paid normal amounts. (Evidence S. Makhlouf, April 14, 2015, pp. 93-95).

The evidence of Sonia Makhlouf:

[637] Ms. Makhlouf was the key Crown witness to testify about Senate Administration of the Research and Office Expenses Budget as it related to Human Resources services – the hiring and pay of Senators' staff, services contracts and services providers. Ms. Makhlouf worked in the Senate H.R. (Human Resources) Directorate. At the time of her testimony Ms. Makhlouf had been employed in the Directorate for 18 years. She had been an H.R. Officer (one of only two) dealing directly with Senators' H.R. needs (staff, contracts, services providers) since 2008, before Senator Duffy was appointed. She had, she agreed, "quite extensive experience in H.R.". For example, in the four fiscal contract years of the impugned consulting contracts, Ms. Makhlouf dealt with approximately 200 such contracts per year – or a total of about 800 such contracts in all. She agreed that "most of the Senators" wanted advice, research and consultation services. Ms. Makhlouf testified that her Directorate, the H.R. Directorate, was the appropriate Senate administrative authority overseeing staffing, services provision and services contracts during the four fiscal years of the impugned contracts. This responsibility was shifted to the Senate Finance Directorate at the time of the new Procurement Policy on November 7, 2011, but that was after all four contracts had been executed and approved by her Directorate as being within the SARs and appropriate guidelines. Ms. Makhlouf, as the key administrative witness concerning personnel staffing, services providers and services contracts, gave the following evidence (Evidence S. Makhlouf, April 14, 2015, p. 13; pp. 69-70; April 15, 2015, pp. 20-21):

1. The SARs were the "key foundational document" governing Senate administration (April 14, 2015, p. 2).

2. The provisions of the SARs, she agreed, created "an exceptionally broad administrative discretion for all 105 Senators as to the work they can legitimately have performed on their behalf" and "as to who they're going to hire to do this work". It was, she agreed, "full discretion" and "sole and exclusive discretion" (April 14, 2015, p. 4-5).

3. Pursuant to the provisions of the SARs Ms. Makhlouf testified that Senators' "staff", over whom Senators had "sole" discretion and "exclusive direction and control", included "contractors and volunteers". Staff are paid out of the Senators' office budget, in the "sole" discretion of the Senator. Ms. Makhlouf agreed that the SARs emphasized how "broad this latitude is [for Senators] to hire the researchers and pay them what you want, and to hire the office staff, including volunteers, that you want." There was, prior to the Procurement Policy (November, 2011), Ms. Makhlouf testified, no written guideline or rule against paying a volunteer as a staff member, in the exercise of a Senator's broad discretion (Evidence S. Makhlouf, April 14, 2015, pp. 17-18; 23-29).

4. Ms. Makhlouf testified that doing research or consulting work at the request of the Senator and/or work related to the operation of a Senator's office were Senate-related work (Evidence S. Makhlouf, April 14, 2015, p. 30).

5. Ms. Makhlouf testified that, while the SARs were the foundational document

for Senate administration of personnel, staffing, services provision and services contracts matters, her own policy document guiding her work in the 4 years of the impugned contracts and services provision was Exhibit 10, the "1988 decision from Internal Economy", the "Guidelines for Senators' Research Expenditures". This document was the operative guideline for all of the 4 impugned services contracts and payments to services providers. This was Ms. Makhlouf's "foundational document" for the work she did. This document created a fund within the overall office budget called a "research allowance" (it started in 1988 at $40,000 per year and was at $70,000 per year from 2009 – 2012), which Senators "can allocate at their own full, sole and exclusive discretion, where that budget money goes, and who it goes to, to get the work done they want", Ms. Makhlouf agreed. Senator Duffy's dealings with services contracts and services providers were governed or guided, she said, by this document (Evidence S. Makhlouf, April 14, 2015, pp. 5 – 7; 13).

6. To her knowledge, Senator Duffy never exceeded either his overall office budget allowance or his "research allowance" (Evidence S. Makhlouf, April 14, 2015, p. 7).

7. Ms. Makhlouf testified that it was correct that each Senator, Senator Duffy included, had authority and "full discretion" under this document (Exhibit 10) to select "public policy topics and studies they wished to pursue" and that the "research allowance" funds could be used "for research and office work" and for "other related matters according to the needs of the individual Senator". Subject to being related to the Senators' Senate-related activities or interests, pursuant to this guideline document, "the concept of research is wide open … It's according to the needs of the individual Senator" (Evidence S. Makhlouf, April 14, 2015, pp. 10 – 12).

8. Ms. Makhlouf explained that application to an Ad Hoc Committee referenced in Exhibit 10 (for amounts from $10,000 to $40,000) was procedurally changed in 1997 – "after 1997, I think … The Senator has a global budget and he can operate the way he wants" (i.e. the entire research allowance was subject to the Senator's full discretion) (Evidence S. Makhlouf, April 14, 2015, p. 12).

9. Also, pursuant to the Exhibit 10 Guideline document, Ms. Makhlouf testified that Senators had the discretion, providing the "general area(s) of work" did not "materially change" under an approved contract, to "make any personnel changes necessary" without further recourse to Senate administration. Senators under an approved services contract could change service providers or add or delete service providers, and pay the added ones, at their own discretion and without seeking the approval of Senate Administration (or Internal Economy) (Evidence S. Makhlouf, April 14, 2015, p. 13).

10. Ms. Makhlouf testified that Exhibit 10 was not a Senate policy; it was, she

said, merely a "general guideline"; "we didn't have a policy prior to November, 2011, on services contracts. It was always a guideline." Ms. Makhlouf explained that non-compliance with a mere guideline was "not as serious administratively as a policy infringement". A guideline meant that actual practice could deviate concerning services contracts and services providers and "we can still go ahead and issue payment". Accordingly, Mr. Bayne submits that Senator Duffy's contractual arrangements with Maple Ridge Media and Ottawa ICF and with his paid services providers did not even violate a mere guideline, much less a Senate policy, and much, much less the criminal law (Evidence S. Makhlouf, April 14, 2015, pp. 77-78; 89; April 15, 2015, pp. 2 & 17).

11. Ms. Makhlouf's evidence was that although the Procurement Policy (Exhibit 12) which came into effect November 7, 2011, effected some "pretty significant changes" in services contracts and the provision of services to Senators (better oversight; value for money; more controls over contract amounts; prohibition of backdating contracts; clearer descriptions of services), it did not apply to the four impugned contracts or the service providers paid under them – the Exhibit 10 guideline did. It is significant that even the subsequent Procurement Policy does provide that contractors under Senate-approved services contracts are "able to subcontract or hire others to do the research work … or consulting or advice"; just as the guideline did. Subcontracting under an approved contract is a recognized reality, and no violation even of the subsequent Procurement Policy; it is not, as asserted by the Crown in its opening, "unorthodox" (Evidence S. Makhlouf, April 14, 2015, pp. 115-120; April 15, 2015, pp. 2-12).

12. Ms. Makhlouf testified that Senator Duffy's contracts for services were normal in all respects, just "like any other Senator" (Evidence S. Makhlouf, April 14, 2015, pp. 93-95; April 15, 2015, pp. 12-13).

13. Ms. Makhlouf testified, like Ms. Proulx, that "the baseline principle" governing services provision for Senators was 'Senate funds for Senate purposes/ parliamentary functions'. That was the "real key to the use of the office budget" funds. The Defence reiterates that Senator Duffy's contracts and payments to services providers never violated this baseline administrative rule much less constituted a crime – he solicited real work related to his Senate work and interests and paid for it in his discretion; and never sought or got a cent of the monies paid to his services providers (Evidence S. Makhlouf, April 15, 2015, pp. 13-14).

14. The evidence of Ms. Makhlouf was that generic services descriptions were adequate in services contracts: "just a couple of lines" like 'research, speeches' and "we don't ask questions". When shown the "generic work descriptions" suggested to Senator Duffy by Acting HR Director Suzanne Poulin on December 23, 2008 (Exhibit A, Tab 12 and Tab 16), Ms. Makhlouf agreed that the suggested descriptions, including "Performing other duties on occasion as re-

quired by the Senator" were "pretty open-ended" and covered an "enormous range of acceptable research". Senator Duffy never violated this concept or sought to perpetrate fraud through either short generic or all-encompassing generic work descriptions in the four impugned contracts (Evidence S. Makhlouf, April 14, 2015, pp. 48-49) (Exhibit A, Tabs 12 & 16).

15. Ms. Makhlouf agreed that the four services contracts impugned in these counts were corporate (organizational) contracts: "the four contracts … are corporate. They're contracts with corporations: Maple Ridge Media or Ottawa ICF". All were approved by her as corporate contracts and treated by her as corporate contracts. She further agreed that services provided under these 4 corporate contracts, "doesn't have to be a written product …It's perfectly appropriate if it's advice" (Evidence S. Makhlouf, April 14, 2015, p. 51, p. 47).

16. Ms. Makhlouf's evidence revealed that there was in fact, prior to and during the time of the four impugned contracts, no real or effective Senate oversight of services contracts or services provision to Senators. While there was 'boilerplate' and nominal review that forms were filled out properly and that a maximum amount was set out, a generic description (limited or broad and open-ended) of proposed services appeared and some time frame was included, there was no oversight (despite the responsibility assigned by the SARs to Senate Administration and the Internal Economy Committee for "good internal administration") of actual work done, by whom, what work product if any resulted, value for money or even the qualifications of the chosen services providers. There was, in short, no real financial or other scrutiny to "opt out of", as the Crown alleges. Proposed work was described generically, and that was fine. On the one occasion that Ms. Makhlouf sought more work purpose description, she was given and approved a description taken by Senator Duffy off the Senate website so broad and open ended as to be meaningless in imparting specific information: "other such duties as may arise from time to time … in a fast-changing media/political environment" (Exhibit 23, Tab, 3, p. 4). Ms. Makhlouf agreed that this approved description of purpose authorized "a very compendious and wide landscape of valid services", just like the all-encompassing generic purpose description suggested to Senator Duffy December 23rd by Ms. Poulin (Exhibit A, Tabs 12 and 16).Not only was no specific description of proposed services required, but "the actual individuals" who performed the services, chosen by each Senator in his/her "sole" discretion, under organizational contracts, were unknown to Ms. Makhlouf and she did not inquire: "Q. … you don't know who they are and you don't ask? A. That's correct." This was true for all Senators. Ms. Makhlouf agreed that "there's no enquiry as to who actually performed the work", or "what actual work was done". This was, Ms. Makhlouf explained, because "it's the discretion of the Senator", it's "totally up to the Senator what work is done." She stated that HR does no "follow up with oversight of how that contract is performed" and

agreed, therefore, that there's "no follow up or effective oversight by HR over the contract performance." She agreed further that for all 4 impugned contracts (and all Senators' services contracts) "there's no oversight of whether the work was done, what was done, who did it, whether there was value for money for the taxpayer, any of that … it was all left up to the Senator and his discretion." And, Ms. Makhlouf added that, to her knowledge, Senate Finance, responsible only for paying the final contract invoice, did not perform such oversight either – "they don't ask questions either"; they did "no in-depth oversight". Not only is the central Crown thesis underpinning these criminal charges – "opting out" of or avoiding Senate oversight or scrutiny – not proved beyond reasonable doubt, it is refuted by the Crown's own evidence: there was no real scrutiny or oversight to "opt out of" (Evidence S. Makhlouf, April 14, 2015, pp. 54-57; 80-91; 95-107; April 15, 2015, pp. 29-32; 67; 72).

17. When confronted with the publicly reported findings of the Internal Economy Committee in its 11th Report (Exhibit A, Tab 20), Ms. Makhlouf stated that "we had to do some modernisation to our policies". Ms. Makhlouf stated that she was aware that "practises were such that there weren't formal service contracts in place in the Senate for services" being rendered and paid for. There was a need, she testified, for a formal policy to govern this area: "that's why they needed to do – to go – to do a policy, to have more clear guidelines", the "existing guidelines [Exhibit 10] and criteria require replacement." The problem, she said, was that "we didn't have a policy prior to November, 2011, on services contract. It was always a guideline … a general guideline". There was no Senate policy governing the services providers retained in his "sole" discretion by Senator Duffy and paid under the four Senate-approved services contracts impugned in these counts. And the general guideline that existed that applied to this area lacked adequate clarity and needed replacement (Evidence S. Makhlouf, April 14, 2015, pp. 58-79).

18. The reality that existing – fully tolerated and retrospectively approved – practices by Senators regarding service provision under services contracts differed from the unclear guideline (Exhibit 10), was brought home when Ms. Makhlouf gave evidence about the four impugned services contracts themselves. Practice did not match the existing guidelines or memos: for example that services contracts could not be backdated (see Exhibit A, Tab 15D from Ms. Proulx). The first of the four impugned contracts (Exhibit 23, Tab 1) was not even executed until all services had been performed and the fiscal year had ended (March 31, 2009). This was to the knowledge of both Senate HR and Finance, yet HR approved this process and Finance paid for the services, "without any questions being asked" that Ms. Makhlouf was aware of from Senate Finance. The "actual practice" was that HR would approve and Finance would pay for services rendered for Senators where "there wasn't a contract in place." This was, Ms. Makhlouf agreed, "a pretty clear illustration about the

breadth of this discretion … that is accorded to all of these Senators." Ms. Makhlouf testified that the $10,000 amount retrospectively approved (the first of the 4 impugned contracts) for five weeks of "Editorial services, Writing services (including speeches)" was "reasonable and appropriate" in her experience. The amount and time frame were "normal" and "within the range of requests" Ms. Makhlouf received from other Senators (Evidence S. Makhlouf, April 14, 2015, pp. 22-39; Exhibit 23, Tab 1).

The second impugned contract (Exhibit 23, Tab 2) about which Ms. Makhlouf gave evidence represented (see Exhibit 3, Tab 3), like the first contract was a situation of retrospectively approved services with no contract in place, but much more. Because the services request was for an amount to be determined ("TBD"), which could not be approved in that form, Senate HR suggested to Senator Duffy "an approximate amount" which, if exceeded, could be subsequently increased. Then, HR approved dropping one proposed service provider (Spry Consulting) and applying that $10,000 allocation to Maple Ridge Media. Then HR approved an increase of the "approximate" $10,000 contract amount to $14,000. All of these changes reflected, Ms. Makhlouf agreed, the "wide latitude" of Senatorial discretion over services providers and contracts. The various dealings with this second contract revealed, Ms. Makhlouf agreed, that "we crafted administrative solutions to administrative irregularities" (Evidence S. Makhlouf, April 15, 2015, pp. 40-70).

Ms. Makhlouf's evidence regarding the third contract (Exhibit 23, Tab 3); Exhibit 3, Tab 5) reflected an HR recommendation effectively to backdate a services contract for services previously performed not under contract. Senator Duffy's office openly requested on November 11, 2010, that the services contract be backdated to April 1, 2010 (owing to "health issues" of Mr. Donohue) because services had actually been performed since April 1st (a seven and a half month period without a contract). Mr. Bayne again points out that such an open request and open disclosure is hardly consistent with an attempt to deceive and defraud. Senate HR suggested instead dating the $10,000 contract from November 15, 2010, to March 31, 2011, and paying the earlier services on simple provision of an invoice (Exhibit 3, Tab 5, pp. 25 and 31). This was contrary to the June 23, 2009, memorandum from Internal Economy (Exhibit 3, Tab 5, pp. 26-28). Ms. Makhlouf agreed that she "effectively backdated" this contract, contrary to the memorandum guideline. This was, she further agreed, another example of crafting administrative solutions to what were administrative (not criminal) issues: "Senate HR and Senate Finance developed internal practises, not necessarily consistent with the guidelines and in fact contrary to the guidelines but an administrative solution to an administrative issue" (Evidence S. Makhlouf, April 15, 2015, pp. 71- 77).

In respect of the description of services in this third contract, and "'cause the guidelines have changed", Ms. Makhlouf testified that she asked for a more de-

tailed services description (Exhibit 3, Tab 5, pp. 23-24). She corrected herself to saying guidelines had not changed but "the practise" had. She received the compendious services description (Exhibit 3, Tab 5, p. 10) that Senator Duffy testified he had found on a Senate website – and that Ms. Makhlouf said "probably" rang a bell in her memory of a job description HR maintained on the InterSen webpage. This was a generic description that she agreed was so "open-ended" that it permitted "an enormous range" of acceptable service (Evidence S. Makhlouf, April 15, 2015, pp. 71-84).

Finally, in respect of this fourth contract, Ms. Makhlouf agreed that, as it was a corporate contract (like the other three), and because of the open disclosure of Mr. Donohue's "health issues", it was "clear" to her "that, under this contract, there may be others performing the research or advice services". Senator Duffy breached no administrative policy (there was none), no administrative guideline and no accepted practice in paying for services providers other than Mr. Donohue, under these contracts. Senate HR reasonably anticipated this and approved all four contracts. Accordingly, the Defence maintains that there was no fraud or breach of trust (Evidence S. Makhlouf**,** April 15, 2015, pp. 71-73).

The Senate Administrative Rules

[638] The Senate Administrative Rules relevant to staffing, services provision to Senators and services contracts, this comprehensive code governing Senate administration expressly provides the following:

1. "The following principles of parliamentary life apply in the administration of the Senate:

   (d) a Senator is entitled to have full discretion over and control of the work performed on the Senator's behalf by the Senator's staff in carrying out the Senator's parliamentary functions, subject only to the law and to the rules, direction and control of the Senate and the Internal Economy Committee" (Exhibit A, Tab 2, pp. 1-3 to 1-4;) (emphasis added);

2. "staff means those persons who serve a Senator in carrying out the Senator's parliamentary functions and those persons who serve the Senate Administration, including employees, contractors and volunteers" (Exhibit A, Tab 2, p. 1-11) (emphasis added);

3. "Senate resources shall be used for ...
   (a) the parliamentary functions of Senators" (parliamentary functions and public business are expansively defined in the SARs) (Exhibit A, Tab 2, p. 3-1) (emphasis added);

4. "A person may use a Senate resource for personal purposes where such use is minor, customary and reasonable and does not give rise to a direct cost to

the Senate or to a Senate expenditure (Exhibit A, Tab 2, p. 3-2) (emphasis added);

5. "… employees hired to serve on the staff of a Senator shall be hired at the direction of the Senator, exercised at the Senator's sole discretion" (Exhibit A, Tab 2, p. 3-8);

6. "Telecommunications resources are intended for use by Senators for purposes related to their functions as Senators and for family communications" (Exhibit A, Tab 2, p. 4-3) (emphasis added);

7. "Every Senator is entitled to cause staff to be hired and paid out of the Senator's office budget to assist in carrying out the Senators' parliamentary functions (Exhibit A, Tab 2, p. 4-7) (emphasis added);

8. "A member of the staff of a Senator may be an employee of the Senate, an independent contractor, or a volunteer" (Exhibit A, Tab 2, p. 4-7) (emphasis added);

9. "Staff of a Senator are employed or retained and dismissed by the Senate Administration at the direction of the Senator in the Senator's sole discretion, and serve at pleasure" (Exhibit A, Tab 2, p. 4-8) (emphasis added);

10. "Staff of a Senator are subject to the exclusive direction and control of the Senator" (Exhibit A, Tab 2, p. 4-8) (emphasis added);

11. "Every Senator is entitled to an office budget in an amount set by finance rule (Exhibit A, Tab 2, p. 4-10) (emphasis added);

12. "The amount above which a proposed acquisition of goods or services must be made by tender, unless the acquisition without tender is approved by the Committee, is:

Consulting services	$35,000
Goods and other services	$25,000

(Exhibit 20, p. 6-1) (emphasis added);

Other Senate provisions

[639] The *Orientation Guide* for New Senators sent by Senate Clerk Belisle to Senator Duffy and the HR Directorate materials given by acting Director Ms. Poulin to Senator Duffy December 23, 2008 (see Exhibit A, Tabs 12 and 16) also emphasize the scope of Senatorial discretion in respect of research and services provision. The *Orientation Guide* (Exhibit A, Tab 13, pp. 22 and 27) directs Senators to the "wide range of topics" they may explore and in respect of which they may validly seek research and consulting advice "relevant to the issues they are working on". Ms. Poulin's HR materials (Exhibit A, Tab 16) highlight the "flexibility" all Senators have "in the hiring of their staff", a matter over which "Senators

exercise their discretion" (including in "the compensation of their staff"). The breadth of potential services that may validly be provided by services providers to Senators is set out in the research assistant generic description: "Duties may include but are not limited to:"

- "Researching and gathering information needed" for speeches, presentations, briefing, correspondence;
- "Keeping the Senator … abreast of current issues by researching news articles, identifying areas of interest and preparing background information";
- "Assisting senior staff in handling media inquiries, by searching information and providing factual and accurate data";
- "Performing other duties (on occasion) as required by the Senator".

Exhibit 10

[640] The April 28, 1988, Thirty-Sixth Report of the Internal Economy Committee, the Guidelines for Senators' Research Expenditures", created a "research allowance" of up to $40,000 (increased in subsequent years) "for the purpose of research and office assistance in relation to Senators' duties. The first $10,000 of this $40,000 allowance (part of the overall budget) was to be "allocated at the Senators' discretion", i.e. with no Administration or Committee oversight. The next $30,000 was, up to 1997, subject to an application to an Ad Hoc Committee (according to the evidence of Ms. Makhlouf) and after 1997, the entire amount was at the discretion of the Senator: "he can operate the way he wants". Exhibit 10 further provides

(i) "The purpose of the research allowance is to provide funds to assist Senators in carrying out their duties in relation to their Senate responsibilities";

(ii) "While the monies allocated must be expended on Senate related activities, Senators should have full discretion in selecting the public policy topics and studies they wish to pursue and these funds may be utilized for other matters such as the preparation of speeches, draft replies to correspondence, clerical assistance or other related matters according to the needs of the individual Senator."

(iii) "The Ad Hoc Committee of Senators would be expected to allow latitude when reviewing applications in order to ensure that each Senator is able to carry out his or her mandate in a manner consistent with the Senator's interests and objectives in the Senate."

(iv) "Senators wishing to utilize their maximum of $30,000 allocation will apply in writing to the Ad Hoc Committee indicating: The general area or areas of work to be undertaken."

(v) "Provided the general area or areas of work does not materially change from the initial application the Senator is entitled to spend a sum, up to the amount approved for the fiscal year, and make any personnel changes necessary without further recourse to the Committee" (Exhibit 10) (emphasis added).

Evidence of Nicole Proulx:

[641] Ms. Proulx's Directorate, Senate Finance, paid HR-approved services contracts invoices. Other than checking that an approved contract was in place and that invoiced amounts did not exceed the maximum amount provided in the contract for the rendering of services, Senate Finance did not do any real or meaningful scrutiny or oversight of contract performance – who provided the service, what the service precisely was, when was the service provided, was there any final work product, was the service product oral or written, was there value for money expended. Mr. Bayne states that the evidence is clear that unless there was some 'red flag' on the face of the documents themselves, Senate Finance performed no meaningful scrutiny of services contracts payments, primary residence declarations or travel expense claims: the form (of the contract and invoice or declaration form or travel expense claim) "triggers the allocation of budget resources"; "Q. You don't look behind it in Senate Finance? A. No"; "We do not ask questions. This is what Finance required to be able to allocate the budget [the sheer form, duly completed]. Our role is not to establish the eligibility or, or to go beyond that. … That is where our responsibility ends." Given this limited (actually non-existent) role in scrutinizing services contracts payments, Ms. Proulx also gave the following evidence (Evidence N. Proulx, April 27, 2015, pp. 61-62):

(i) Both in chief and in cross-examination, Ms. Proulx stressed that the main, the overarching principle that guided Senate Finance Directorate work in respect of the payment for services provided to Senators (both under and not under contracts) was 'Senate funds for Senate purposes': "this was the overriding, overarching principle". Payment is properly made where the service, as Exhibit 10 stated, appears to Senate Finance (who conduct no inquiry) to be related to the "Senator's interests and objectives in the Senate", to the "public policy topics and studies they wish to pursue." Senator Duffy's paid services providers all – each and every one – satisfied Senate Finance's overarching principle, the SARs and Exhibit 10: they were paid for providing services that, in the "full discretion" (as the SARs and Exhibit 10 state) of Senator Duffy, related to the work and projects and "interests and objectives" he had as a Senator. Therefore, Mr. Bayne says that there is no *actus reus* of fraud or breach of trust (Evidence N. Proulx, November 20, 2015, p. 55; Exhibit 10; Exhibit A, Tab 2 – the SARs; Exhibit 20 – the SARs).

(ii) Ms. Proulx agreed when confronted with the 11th Report of Internal Economy (Exhibit A, Tab 20), that among the policies that Internal Economy identified in its report as "outdated" and/or "inadequate" was that related to services contracts: "Inadequate, I would say for service contract, for sure that was – it needed to be consolidated." In fact, she later added in her evidence in re-examination to Crown Counsel, "for service contract, that was an area where there was no clear policy …" Mr. Bayne states that this corroborates the evidence of Ms. Makhlouf. No clear Senate policy governed the area of services provision to Senators and services contracts during the time of all of the impugned services provision and contracts encompassed by counts 21 to 28. Senator Duffy breached no Senate administrative policy in his services contracts with Maple Ridge Media and Ottawa ICF and by paying legitimate services providers under those HR-approved contracts because there was none. What guidelines there were in Exhibit 10 were inadequate and, as Ms. Makhlouf testified, lacked clear criteria and "needed replacement". This is not even a case of administrative malfeasance much less of crime (Evidence N. Proulx, November 20, 2015, pp. 16; 59).

(iii) Because there was no governing policy in this area, Ms. Proulx agreed that "actual practice might be different from" the non-policy guidelines. This was evident in her testimony concerning the four impugned contracts: all of these contracts, she agreed, were "pre-procurement policy". Just as the 11th Report of Internal Economy identified, these contracts bore evidence of services being provided outside of any approved contract: "consulting arrangements going on here without a governing contract". In respect of the first contract with Maple Ridge Media, the HR Directorate approved an after-the-fact contract and the Senate Finance Directorate approved and paid for the services, services not rendered pursuant to a services contract. The services were rendered from February 23rd to March 31st, 2009, the end of the fiscal year. There was no contract executed until April 21st, 2009, the next fiscal year. This practice, of HR retrospectively authorizing and Senate Finance paying for services without any services contract in place, was "not the way it's supposed to be done". But it was done and was approved and paid. The same practice was followed in respect of the second impugned contract, Ms. Proulx agreed: it was executed after services were rendered, "after the fiscal year". The third contract, purportedly covering services from November 15, 2010, to December 31, 2010, was not executed until December 23, 2010. Actual, accepted and approved practices did not match the inadequate guidelines. And, as Ms. Proulx agreed in respect of the first contract "the treatment of this contract and the payment of it was no different than the way the other 104 Senators would have been treated." These practices were approved for all Senators. Mr. Bayne reminds the Court that in his opening the Crown alleged that Senator Duffy's payments to services providers and the four services contracts were "completely out-

side of the established system". The evidence demonstrates that this Crown assertion is incorrect – Senator Duffy's approved services contracts and payments to services providers for valid Senate-related work they all did were entirely within the accepted system of Senate administration practice, a system accepted for all Senators. Senator Duffy's services contracts and payments to service providers were not frauds or breaches of trust: they reflected the accepted practice of all Senators, contrary to no policy because there was none (Evidence N. Proulx, November 20, 2015, pp. 40-54) (Crown Opening April 7, 2015, p. 11).

(iv) In respect of actual Senate Finance scrutiny or oversight of services provided and services contracts, Ms. Proulx agreed with the recommendation of Internal Economy in the 11th Report that there was a need for "enhanced" monitoring of "contracts, consulting and personnel services for amounts paid to suppliers/contractors." This was because no real or effective monitoring was going on. The following question and answer evidences that: "Q. And I asked you, did your department, if a contract came in and it was evident to you from the documents that all the services had already been performed before there was even a contract here, did you ask any questions? Did you go back to the Senator, any one of the 105, and say: Senator, who did the services, when, what were they in detail, show me what was produced, and was there value for service? A. No." Ms. Proulx agreed with the findings of the 11th Report that "We did not observe any presence of a management contract review process" and that "there is no monitoring or reporting on the amounts being paid to each supplier". In respect of corporate contracts, Ms. Proulx agreed that "It's a corporate entity that's being paid" yet Senate Finance did not "ask who actually provided the services". In respect of the expanded (open-ended) services definition of the third and fourth impugned contracts, Ms. Proulx said no questions were asked by Senate Finance as to what, exactly, was the particular service provided given that the description could cover anything. Senator Duffy did not "opt out" of Senate Administration scrutiny of services providers and/or services contracts because the evidence reveals that there was none, only formulaic boilerplate. This is true of both the HR Directorate and Finance Directorate, and it applied not just to Senator Duffy, but to every other Senator in the Senate of Canada (Evidence N. Proulx, November 20, 2015, pp. 23-26; 45-55).

(v) Ms. Proulx offered to the court her opinion on the nature and breadth of the discretion and latitude created expressly for all Senators over personnel (staffing, services provision, services contracts) and work by the SARs, Exhibit 10 and other Senate guidelines such as the Orientation Guide. Her opinion was expressed that Senators could, given the scope of discretion conveyed, 'choose the colour of pens' they were provided. Mr. Bayne notes

that it is entirely for this court to determine whether Ms. Proulx's opinion is a fair and reasonable statement given the extensive explicit conferral of "full discretion over and control of the work performed", and of "sole discretion over staff", of "exclusive direction and control" over staff, of "full discretion" and "latitude" in "selecting the public policy topics and studies" Senators may wish to pursue. He submits that Ms. Proulx's opinionated characterization of the express words of the SARs and Exhibit 10 is manifestly unreasonable and inconsistent with those important pieces of documentary evidence. Her comment is at least flippant and more probably ludicrous when set against the verbatim provisions of those documentary exhibits – one the "comprehensive code" governing Senate administration and the other the "foundational document" guiding administration of services provision and services contracts. Mr. Baynes states that it is, however, unfortunately indicative of the generally argumentative, overly-opinionated and unhelpful evidence she offered in so many respects (i.e. Ms. Proulx's opinions as to what Senate Finance "would have done" on hypotheticals put to her by Crown Counsel that incompletely and inaccurately represented the actual facts of this case.) The Defence asserts that Ms. Proulx's opinions as to hypotheticals are simply inadmissible.

I would be remiss if I did not comment at this juncture on Mr. Bayne's overzealous comments and portrayal of Ms. Proulx's testimony. I found Ms. Proulx to be a credible witness in an awkward situation. Ms. Proulx had been in charge of Senate Finance during the time when the events that are before the court arose. I did sense a degree of defensiveness on the part of Ms. Proulx that I attributed to criticism that she perceived was being directed at Senate Finance. I have no doubt that Ms. Proulx was more than competent in her role as the head of Senate Finance and may have felt it necessary to respond as she did from time to time.

(vi) Mr. Bayne concludes his comments regarding Ms. Proulx's evidence by noting that similarly, in re-examination, Mr. Proulx purported to offer evidence of how or if decisions of Internal Economy were communicated to Senators. She said that "The decisions are issued through a memo … I'm just not sure how to …. Yes, we have a number of memorandums and I have binders of memorandums that are issued to Senators when decisions are made." Quite apart from the fact that there is no documentary evidence proving actual communication of, for example the new Senators Travel Policy in 2012, or even of Exhibit 10, this answer is inconsistent with the 11th Report which identified "poor communication" of policy documents and inconsistent also with Ms. Proulx's earlier answer in cross-examination that she agreed with that finding and that it was "a very important finding, yes." She was even aware, she said, before the 11th Report, that this was one of "what we identified as risks." The 11th Report's finding of "poor commu-

nication" to Senators of policy documents leading to policies that are "not well understood by users" is of course completely consistent with Senator Furey's evidence that there never was (before 2015 in response to the Auditor General's report) any mandatory formal training on policy for Senators (Evidence N. Proulx, November 20, 2015, pp. 10, 11, 69).

Evidence of Gerald Donohue:

[642] For four fiscal year periods Mr. Donohue (who had no social relationship with Senator Duffy) was Senator Duffy's chief and most trusted advisor. Senator Duffy consulted Mr. Donohue on all issues that would arise, on all projects Senator Duffy was working on, on political issues as well as policy matters, on office administration and, when necessary, the sourcing of other consultants.

[643] Mr. Donohue's extensive background and suitability to act as a consultant has been addressed under the *Heading Qualifications of Gerald Donohue to Act as a Consultant* earlier in these reasons.

[644] Mr. Bayne contends that Mr. Donohue did the work he was retained and paid to do. Both in-chief and in cross-examination Mr. Donohue gave evidence of the extensive range of consulting, research and advice services he provided, mainly by telephone, and mainly in the evenings, over the four fiscal year periods for Senator Duffy. In-chief, Mr. Donohue described that he consulted on 'essentially anything and everything he asked me' in relation to Senator Duffy's Senate work, issues, interests and projects. His evidence in cross-examination remained consistent. While Mr. Donohue's health was a factor in his ability, in 2015, to recall the details of all of the work from 2009 through to April 2012, Mr. Donohue nevertheless described the work he did:

- advised Senator Duffy and researched projects the Senator was working on, like the "aging" project, the Conservative Heritage ("Why I'm a Conservative") project and "a whole range of ideas" that Senator Duffy wanted more information on;

- "there was never any limitation on the number of items" Senator Duffy could and would ask Mr. Donohue about, seeking the latter's advice and counsel;

- practical advice about Senator Duffy's website and the content that actually works – delivers hits – on a website and what should be avoided;

- discussions, advice, consultation and research involved seniors, baby boomers, aging, obesity, organ transplants, health care, home care, the pros and cons of hospital vs. home care, the aging of the Canadian population;

- Mr. Donohue contacted and dealt with services providers on behalf of Senator Duffy like Mr. MacDonald and Mr. Brennan – speechwriting: see Exhibit 62;Mr. Donohue reviewed and provided editorial comment/opinion on speech-

es and their length and content;

- Mr. Donohue on occasion provided a list of suggested contents for a proposed speech;
- "I would provide research material on any subject that he required";
- "monitoring media", "briefing the Senator on emerging and current issues of special interest to the Senator, and researching subjects of special interest" was "exactly" what Mr. Donohue did;
- Mr. Donohue provided "general advice and counsel to Senator Duffy" and was "a sounding board on political issues in which he was engaged" over the 4 years;
- Most research was conducted on the internet.

[645] Mr. Donohue described to the court his medical history and conditions: he had 2 heart attacks in 1989-90 and triple bypass heart surgery. Mr. Donohue's memory problems became evident around late 2012, 2013. He is a diabetic, taking insulin twice a day. He is on a long list of daily medications. He has a defibrillator. In the Easter period of 2015, 7 months before his testimony, his kidneys quit and on October 26th, 2015, (less than a month before he gave evidence) he was hospitalized for 9 days for the surgical insertion inside his stomach wall of dialysis equipment. The court saw and heard Mr. Donohue by video link from his home as he was too ill to attend court. He could testify for only a half-day period at a time with frequent breaks. It is fair to say that his serious medical condition was evident to all, and not surprising that some memory detail now escapes him. From 2009 through to April, 2012, however, he was able to advise, consult and do research for Senator Duffy and did so. There is no evidence that the work requested was not in fact done, merely evidence that, at the time of his testimony, he could not recall all of the details (Evidence G. Donohue, November 23, 2015, pp. 23 & 42; November 25, 2015, pp. 24 – 48).

[646] Mr. Donohue's evidence (he was called by the Crown) was that all of the consulting advice and research work he did for Senator Duffy and was paid for (through MRM and ICF) was directly related to Senator Duffy's role and functions as a Senator and work on issues, interests and projects of Senator Duffy in his Senatorial capacity. No aspect involved any personal or private business of Senator Duffy. Mr. Bayne reminds the court that there is no evidence to the contrary. Senator Duffy's evidence is consistent with and confirms the Crown witness's evidence. This was all, as Ms. Proulx termed it "Senate work", for which Senate funds may properly be used (Evidence G. Donohue, November 25, 2015, pp. 36-37).

[647] Mr. Donohue testified that his work averaged 150 hours per year, 100 hours of telephone advice and consultation and 50 hours of research on various issues and projects (Evidence G. Donohue, November 25, 2015, p. 27).

[648] All of Mr. Donohue's services were rendered pursuant to Senate pre-approved ser-

vices contracts, all involved the submission of invoices to Senate Finance and payments by cheque; on occasion, and whenever requested, Mr. Donohue dealt directly with Senate Administration (HR and/or Finance), and cooperated fully with their requests or directions (see Exhibit 23, Tabs 1 through 4) (Evidence G. Donohue, November 23, 2015, p. 3).

[649] In respect of his own consulting services, Mr. Donohue testified and produced documents (see Exhibit 63, Tabs 6 – 8) confirming the receipt by MRM and ICF over the 4 fiscal periods of $65,177. This amount is the same as that shown in Exhibit 54, the forensic accounting report of Mr. Grenon. Of this $65,177, the sum of $5,846 was the aggregate amount in tax, which represented a tax liability of Maple Ridge Media or Ottawa ICF to the Canada Revenue Agency. The total received by Maple Ridge Media/Ottawa ICF over the four fiscal years, net of the tax owing, is $59,331. Of the $65,177 gross amount received by Maple Ridge Media/Ottawa ICF, $40,079 was paid out to other services providers to Senator Duffy. The gross sum of $25,098 was retained by Maple Ridge Media/Ottawa ICF after that payout, and it was further reduced by the remaining tax liability. Mr. Donohue's evidence was that, after the tax liability was paid by Maple Ridge Media/Ottawa ICF a net sum in the range of $21,000 to $22,000 was retained by Maple Ridge Media/Ottawa ICF in payment of Mr. Donohue's own services over the four fiscal year periods. That would mean that the average fiscal period amount paid to Mr. Donohue was in the range of $5,250 to $5,500. At 150 hours per year, that is $36.67 per hour, far below the rate charged by other consultants (Peter McQuaid said $125.00 per hour represented a "dirt cheap" rate). On the evidence, Mr. Donohue was paid modestly for his services by Senator Duffy (Evidence G. Donohue, November 27, 2015, pp. 2-23; Evidence P. McQuaid, April 20, 2015, pp. 11-12).

[650] Out of the $65,177 gross amount paid to Maple Ridge Media/Ottawa ICF, "Not a penny" was paid to or received by Senator Duffy, Mr. Donohue testified. No 'kickback' payments were ever sought by Senator Duffy or paid by Mr. Donohue, Maple Ridge Media or Ottawa ICF, though the police asked about all that. No phony invoices were requested or submitted. Senator Duffy "never got anything out of our company", Mr. Donohue testified, no cash, no cheques, no salary, no kickbacks, no dividends, nothing. Additionally, Senator Duffy knew nothing about and had no involvement whatsoever in, the accountant-advised corporate structure, ownership or operations of Maple Ridge Media or Ottawa ICF, Mr. Donohue said. Senator Duffy's own evidence was corroborated in all these respects by the Crown witness's evidence (Evidence G. Donohue, November 27, 2015, pp. 24-28).

[651] All four Senate-approved services contracts involving Maple Ridge Media and Ottawa ICF were corporate contracts, the corporate "Contractor" being Maple Ridge Media or Ottawa ICF, corporate entities (Evidence G. Donohue, November 25, 2015, p. 24; November 27, 2015, p. 5).

[652] No aspect of Senate Administration performed any oversight as to approved contract performance – there were never inquiries from Senate HR or Senate Finance about the particular nature of the services performed, the work done, the product delivered or in what form or who was (the actual people) providing services. Senator Duffy did not avoid or "opt out of" Senate scrutiny or oversight because there was none to opt out of. Had he ever been

asked for these details, Mr. Donohue testified that he would have "fully" and "honestly" provided all details, including "all invoices requested" (Evidence G. Donohue, November 25, 2015, P. 43; November 27, 2015, pp. 5 & 25).

[653] In respect of other services providers, all were paid under the Senate-approved services contracts. All were paid by the corporate "Contractor" Maple Ridge Media or Ottawa ICF, not by Mr. Donohue personally. All were paid for services they performed for Senator Duffy. None was paid cash; all were paid by corporate cheque. Maple Ridge Media and Ottawa ICF kept full records of all payouts (as evidenced by Tabs 6, 7 and 8 of Exhibit 63 and by Exhibit 61, the email list provided by Mr. Donohue to the Crown of all services providers paid under these contracts). Maple Ridge Media and/or Ottawa ICF did not forward on invoices received from individual services providers because the Senate system was such that "There was just no requirement to". Mr. Donohue agreed that he would "have provided any and all invoices requested" had the Senate requested (Evidence G. Donohue, November 23, 2015, pp. 13, 16, 33; November 27, 2015, p. 25).

[654] Mr. Bayne submits that Mr. Donohue's evidence and documents completed a financial picture left "preliminary" and incomplete in the evidence and exhibits of Mr. Grenon. Through Mr. Donohue the court received a much more thorough and reliable picture of the amounts paid into and out of the corporate contractors Maple Ridge Media and Ottawa ICF, the amounts those corporate contractors retained (gross and net) for the services performed over the four fiscal years by Mr. Donohue, and the fact that all Senate monies (out of Senator Duffy's office budget allowance) are accounted for. Mr. Bayne concludes that any hanging innuendo that suggests that some of this money found its way into Senator Duffy's pocket has been conclusively refuted. "Not a penny" ended up there. Senator Duffy, as Mr. Donohue testified, "never got anything" out of these services contracts other than the provision of services he requested, in his ample discretion, in respect of work related to his Senate office, his projects, his interests and the issues and matters of concern to him as a Senator. Mr. Bayne states that there is no fraud or breach of trust "by awarding consulting contracts in favour of Gerald Donohue" as alleged in counts 21 and 22.

Evidence of Senator Duffy

[655] Senator Duffy testified that he read and understood the SARs provisions governing staff and work provided by staff, which included services providers and services contracts utilizing his allotted annual office budget, to mean that he could hire and pay services providers in his "full discretion": "you should have your own discretion in terms of who you hire". Senator Duffy was encouraged to be an "activist Senator", to have an area or areas of interest, or "special or pet projects" and he understood from the SARs that "absolutely" he, like all other Senators, had "full discretion over and control of the work performed" by services providers and all other staff. He understood from the SARs that staff, over whose pay he had full discretion, included volunteers. He testified that "Senators have complete and sole discretion over who they hire, who they hire as contractors, who they deal with as volunteers, how much they're paid, and the terms for how long they work." Senator Duffy testified that he never authorized payment for any services provider except for actual services re-

lated to Senate work and projects: there were never false invoices. Senator Duffy never exceeded his annual office budget or the $35,000 annual limit in 2009 (growing to $70,000 annually by 2011-12) for consulting/personal services. He testified that he attempted to comply with all guidelines as he understood them relating to services provision and services contracts within his office budget. Senator Duffy maintained that he had no fraudulent intent to deceive or any corrupt purpose in his dealings with service providers or service contractors (Evidence M. Duffy, December 11, 2015, pp. 57-68).

[656] Mr. Bayne states that the generic descriptions suggested (in Exhibit A, Tab 16) by Ms. Poulin of HR, for the potential range of acceptable services to Senators seemed to Senator Duffy quite open-ended, so long as the service related to the Senator's office work, Senate issues, his interests and projects: "It's up to the individual Senator to decide what issues, what topics are of concern to him." His understanding of services contracts guidelines during the 2009-12 time period was that "I had a general contractor, and from that general contractor I hired other contractors as needed, for the time and duration as required, so long as the total amount of money expended did not exceed the budget", and so long as the work "related to Senate work". Senator Duffy testified that the use of a general contract for services provision "was very common". Indeed it was recommended to him by other Senators in order to avoid the problem of not being able to approach services providers for rush jobs of some urgency without having a formal contract in place with each individual service provider. This, he said, was "the common wisdom. When people would complain about the problem, not being able to get the information in a timely way, other Senators would say, well you should have a general contractor, so that you don't have this problem. The money's already allocated and the general contractor is – is drumming up and paying the subcontractors." This evidence is uncontradicted. The Crown did not challenge this evidence in any way in cross-examination. The Crown called no Senator(s) to say that general contracts were not in fact common practice. That is because, as Ms. Scharf testified after 42 years on Parliament Hill, they were "common practice". They were neither unorthodox as the Crown contends nor an effort to "opt out" of non-existent scrutiny (Evidence M. Duffy, December 11, 2015, pp. 68-88).

[657] Mr. Bayne contends that in respect of the services provided by Mr. Donohue, Senator Duffy's evidence was consistent with and corroborated by that of Mr. Donohue, the prosecution witness. Mr. Donohue was Senator Duffy's trusted "sounding board" on all or most issues. He was a "very, very smart man" who "knew labour law", "knew about setting up an office", "how to avoid conflicts", he was "a professional negotiator" with business, political, administration knowledge and experience and "a wealth of knowledge" that Senator Duffy sought to tap. Mr. Donohue was not a social friend; they saw each other once or twice a year. Mr. Donohue knew how to present ideas or issues, so that they would not be rejected out of hand, and that was "valuable advice" on which Senator Dufy relied. "We spoke many times a week" said Senator Duffy in his evidence; "we were in constant contact". "Every day, every time we spoke" political issues of the day were discussed, Senator Duffy relying on Mr. Donohue's experience and judgment and advice. IRB's and EI changes were discussed; Mr. Donohue advised Senator Duffy how to approach a "top down" government to

try to convince it that "some of these policies were not only wrong, wrong-headed, but more importantly, socially unjust". Mr. Donohue was Senator Duffy's "number one" advisor who had "thoughts and ideas" on all matters raised by Senator Duffy, as well as ability to do research to gather additional information and data as needed (Evidence M. Duffy, December 11, 2015, pp. 89-94).

[658] Senator Duffy testified that Mr. Donohue's pay (through the corporate contractors Maple Ridge Media and Ottawa ICF) for services rendered was relatively modest as compared with the rates charged by the "Sparks Street Mall" lobbyists. This evidence of modest pay is corroborated by Mr. Donohue's evidence, the Exhibit 63 records, and comparison, for example, with the evidence of the Crown witness Peter McQuaid. Senator Duffy chose Mr. Donohue as his chief advisor as an exercise of his SARs-provided broad discretion and was "A hundred percent" satisfied with the work (consulting, advice, researching, ideas-bouncing, speech-writer sourcing) Mr. Donohue did. Senate Administration was so impressed with Mr. Donohue they suggested he be brought into the office daily (Evidence M. Duffy, December 11, 2015, pp. 94-96; Exhibit 63).

[659] Senator Duffy testified that consulting work for Senators is "more commonly in non-written form" as opposed to a written product. Mr. McQuaid, a professional consultant and the principal of Eastern Consulting Ltd., confirmed this evidence (Evidence M. Duffy, December 11, 2015, p. 97; Evidence P. McQuaid, April 20, 2015, pp. 34-38).

[660] Senator Duffy's evidence was that Mr. Donohue, because he was available to Senator Duffy on a daily basis, gave timely advice about current issues as they arose – "That was the main thing". Mr. Donohue was always there as the reliable sounding board, the trusted and confidential advisor. Weekly, Senator Duffy consulted Mr. Donohue pre-caucus about issues and how Senator Duffy should promote issues and ideas; then they debriefed after caucus. All of this consultation involved public policy and it did not involve the personal life or business of Senator Duffy. Mr. Donohue also gave advice about projects, such as the Holland College housing renewal project in Charlottetown, the Age Wave project (see Exhibit 101 sourced by Mr. Donohue), Senator Duffy's fight against Internal Economy's desire to lay off Senators' office staff during Senate recesses (Evidence M. Duffy, December 11, 2015, pp. 97-119).

[661] Mr. Bayne concludes that the evidence strongly supports the proposition that Mr. Donohue was Senator Duffy's principal consultant/advisor over the four fiscal periods covered by counts 21 to 28. Mr. Donohue did the work and was paid modestly for his own work. He did all work pursuant to Senate-approved services contracts. Those services contracts represented an exercise of Senator Duffy's assigned discretion. All of the services contracts were corporate; the services contractors were Maple Ridge Media and Ottawa ICF. The Senate knew and approved this. Senator Duffy used these services contracts in good faith, based on advice from other Senators about the "common practice" among Senators, of having general contracts which enabled services personnel to be changed as needed, just as Exhibit 10, the 1988 guidelines document, provided. All services providers paid under these services contracts rendered Senate-related services. No Senate contract monies were re-

ceived by Senator Duffy. There was no fraud or breach of trust in the "awarding" of these services contracts by Senator Duffy, nor any criminal intent or corrupt purpose on the part of Senator Duffy.

INDIVIDUAL SERVICE PROVIDERS

[662] All services providers paid under the "common practice" general services contracts with Maple Ridge Media and Ottawa ICF rendered Senate-related services, just as Ms. Proulx stated was the critical test ("the guiding principle") for valid use of office budget resources.

Iain MacDonald:

[663] Mr. MacDonald dealt with and through Mr. Donohue to provide speech-writing services to Senator Duffy in February and March, 2009. Exhibit 63 details those contacts. The speech was to deal with "the significant heritage of the Conservative Movement here in Canada". Mr. MacDonald was a well-known speech writer for Parliamentarians; he was the chief speechwriter for former Prime Minister Mulroney. He was a freelance speechwriter operating under the corporate entity Lian Public Affairs Ltd. He testified that he wrote a "core speech" (a "speech that … could be given on many occasions and also adapted as an op-ed") for Senator Duffy and that he billed his "going rate" for such a speech, which was $7,000 plus GST ($7,350 total). He invoiced Maple Ridge Media and was paid by Maple Ridge Media cheque. Exhibit 19 is the speech ("a long speech" said Mr. MacDonald). Mr. MacDonald billed Maple Ridge Media as third party agent. Senator Duffy testified that this speech was a "major piece that I could put on the website". Senator Duffy used "a kind of Reader's Digest version" when he used the speech from the podium. This was all Senate-related work and Senator Duffy testified that he believed it was a valid services provision expenditure, as it was. Mr. MacDonald was paid out of office budget/consultant funds, not a penny of which was received by Senator Duffy (Evidence I. MacDonald, April 21, 2015, pp. 1-11; Evidence M. Duffy, December 11, 2015, pp. 119-124).

Ezra Levant

[664] Ezra Levant wrote 3 speeches for Senator Duffy (not 2 as the crown and Mr. Grenon thought). Mr. Levant was a well-known public affairs TV host and a speechwriter. All 3 speeches were, he testified, on "public issues"; "they were speeches to be delivered at "very much public policy events"; "it was all public interest history and – and policy, which is what I was hired to do by other Senators as well". Mr. Levant was paid by cheque; no kickback was sought or paid. There was "no suggestion by Senator Duffy that the payment form [cheque from Maple Ridge Media or Ottawa ICF] had to be kept quiet or secret or that there was anything suspicious about it". Mr. Levant left the fee up to the client but agreed that "Absolutely" $2,000 was standard and "in the ballpark of what other Senators and office holders would have paid me." As an experienced speechwriter for other senators, Mr. Levant found nothing unusual in the payment via Maple Ridge Media/Ottawa ICF, which confirms all other evidence that this was, indeed, a "common practice". Senator Duffy testified that he

believed this to be valid Senate work and use of office budget/consultant resources in his broad discretion, and it was (Evidence E. Levant, May 6, 2015, pp. 1-3; Evidence M. Duffy December 11, 2015, pp. 125-127).

Nils Ling

[665] Nils Ling was not called by the Crown. Mr. Donohue and his records revealed Mr. Ling and the $2,500 ICF payment to him (Exhibit 61), to the Crown. Exhibits 95 – 99 and 107 relate to the speech writing service provided by Mr. Ling to Senator Duffy in October, 2010. Mr. Ling is, Senator Duffy testified, a freelance speech writer. Senator Duffy arranged for a speech written by Mr. Ling about "agriculture on P.E.I". Senator Duffy wanted "a piece that can go on my website as a member of the agriculture committee that would celebrate the farm heritage of P.E.I". Senator Duffy was a member of the Standing Senate Committee on Agriculture and Forestry. The speech would also be delivered to the 75th anniversary meeting of the Canadian Federation of Agriculture – where Senator Duffy would be filling in for Rex Murphy and for which Senator Duffy was paid $10,500 (Exhibit 98). Senator Duffy testified that he believed that Mr. Ling's work was clearly Senate-related and a valid services provision/consultant expense within his discretion over his office budget: the Ling speechwriting expense was "clearly valid under the existing Senate rules and we were constantly being reminded that we should get into the website age and get our stuff up on the web. And this was a man who had a feel for P.E.I. agriculture. He also had a way with words. And I thought this would be ideal". Exhibit 97 shows the posting of this speech (as well as the MacDonald speech) on Senator Duffy's Senate website. Senator Duffy described the Ling speech, like the MacDonald speech, a "main foundational speech". Mr. Ling was paid by Ottawa ICF: the October 21, 2010 email in Exhibit 95 (5th page in) from Senator Duffy to Mr. Ling thanks Mr. Ling for the speech and requests that Mr. Ling invoice his work: "I am making arrangements with my general contractor, and will get the cheque in the mail soonest. Send your invoice to: Ottawa ICF c/o Gerald Donohue, 1321 Huntmar Drive, Carp, Ontario." Mr. Bayne stressed that Senator Duffy regarded Ottawa ICF as the general contractor and the Senate-approved services contract with that corporate contractor as a general services provision contract, as was "common practice" in the Senate and among Senators. There was no attempt to deceive or opt out of Senate scrutiny, no marked and substantial departure from other Senators' use of general services contracts. Senator Duffy's open statement to Mr. Ling about his "general contractor" was on October 21, 2010, years before any question about these services contracts and services providers was raised by the police (Evidence M. Duffy, December 11, 2015, p. 123; December 14, 2015, pp. 60-75).

R.A. Brennan

[666] R.A. Brennan, like Mr. Ling, was brought to the Crown's attention by Mr. Donohue (see Exhibit 61 the email from Mr. Donohue's lawyer dated November 21, 2015, to Mr. Holmes of the Crown's office). Like Mr. Ling, Mr. Brennan was not called by the Crown to give evidence. Senator Duffy testified that Mr. Brennan is a "brilliant writer" from P.E.I. who was paid $734.50 by the "general contractor" ICF for a written Christmas message to the people of P.E.I. from Senator Duffy. The message from Senator Duffy was broadcast to

the public on East Link Cable. This was clearly "Senate work for Senate funds", the work was done by Mr. Brennan, he was paid modestly for his service, there is no evidence that Senator Duffy received a penny and all of this Senator Duffy believed was a perfectly valid exercise of his broad SARs discretion and the existing guidelines (Exhibit 10), because it was. Mr. Bayne concludes that there is no fraud or breach of trust nor any criminal intent whatsoever (Evidence M. Duffy, December 14, 2015, pp. 59-60).

George Radwanski

[667] George Radwanski, author of the first biography of P.E. Trudeau and the former editor of the Toronto Star, was paid $500 April 29, 2010, by the "general contractor" Maple Ridge Media for a Senate tribute, written by Mr. Radwanski and delivered by Senator Duffy in the Senate Chamber, to the late Maxwell Cohen, Dean of the McGill law school. Senator Duffy needed the service quickly on the passing of Dean Cohen and arranged the service promptly through the general services contract as had been recommended to him by other Senators. This was "Senate work for Senate funds" with none of the funds going to Senator Duffy, all valid within the SARs and Exhibit 10 and all believed to be so by Senator Duffy (Evidence M. Duffy, December 14, 2015, pp. 15-17).

Eastern Consulting Ltd. / Peter McQuaid

[668] Eastern Consulting Ltd./Peter McQuaid is a corporate consulting entity through which Peter McQuaid provided Senate-related services to Senator Duffy. Exhibit 3, Tabs 11 and 12 represent the documentary evidence that Senate-approved services contracts were concluded with Eastern Consulting Ltd. (for the 2008-09 fiscal year period – ending March 31, 2009, and for the 2010-11 fiscal year period – ending March 31, 2011) as a corporate contractor: the corporate contractor invoiced the Senate, provided the corporate contractor's T1204 (Exhibit 11) when requested and was paid by Senate Finance for the services provided. The same type of services were provided to Senator Duffy in the 2009-10 fiscal year period, for the same rate of pay, by Eastern Consulting Ltd. except that for this period the services were invoiced to and paid by the general contractor Maple Ridge Media under the Senate-approved general contract to Maple Ridge Media. Mr. Bayne notes that the same work was performed at the same rate of pay, all Senate-related work, all under approved Senate services contracts, all valid "Senate work for Senate funds".

[669] Peter McQuaid testified. He was the former Chief of Staff to P.E.I. Premier Pat Binns. He knew intimately the P.E.I. political and public policy scene. Mr. McQuaid agreed that he was "very close to the issues of public and parliamentary concern and social concern in Prince Edward Island". He did consulting work for the federal government. He was, he said "Absolutely" qualified to advise Senator Duffy on P.E.I. and Atlantic region matters. He was the President of Eastern Consulting Ltd. He testified that all 3 years of services to Senator Duffy were "provided to Senator Duffy in his capacity as a Senator, as a member of the Parliament of Canada". All services represented, he agreed, "valid Senate related consulting/advice services". All three fiscal periods of services were the same except that one was "administered differently", but the services and rate of pay were the same. The rate of pay,

$125.00/hour he said was "dirt cheap" for the advice and consulting service provided (Evidence P. McQuaid, April 20, 2015, pp. 8-11).

[670] Mr. McQuaid's first period of services purported to cover the period March 4, 2009, to March 31, 2009, but the Request for Services Contract (RSC) was not even sent out to Eastern Consulting by Senate HR until March 30th, 2009. There was thus in fact no services contract in place for all or most of the services rendered, yet Senate Finance paid the Eastern Consulting Ltd. invoice. The description of services in the RSC did not match the description in the invoice, yet the invoice was paid by Senate Finance. The RSC allocated $5,000 for the 27 days of Eastern Consulting's services, yet only $2,887.50 was invoiced, leaving some $2,112.50 "on the table". Senator Duffy, an alleged fraudster motivated to seek money, never sought to access these additional monies personally. There was, Mr. McQuaid testified, no suggestion of any payment back/kickback to Senator Duffy. Mr. McQuaid agreed that had Senator Duffy been trying to defraud the Senate of funds, he could have done so in respect of these "already approved and allocated funds". But he didn't. (Evidence P. McQuaid, April 20, 2015, pp. 12-21).

[671] In all three service periods, the breadth of services provided was broader than set out in any contract or invoice, Mr. McQuaid testified. But all services were always in relation to public business, all Senate-related matters. In respect of the third service period, 2010-11, the RSC proposed services from March 10, 2011, to March 18, 2011, for a total of $3,000 (for 8 days' work). That RSC was amended by Senate HR to read March 16, 2011, to March 18, 2011, meaning $3,000 was approved for 2 days' work (the same amount paid to Mr. Croskerry for an entire year of consulting services); Senate Finance authorized payment in full of the $2,625 invoice (money, again, was 'left on the table'). Mr. McQuaid confirmed that Senator Duffy sought no kickback. Payment was made for actual Senate-related services provided, services "relating to important issues that affected P.E.I." (Evidence P. McQuaid, April 20, 2015, pp. 21-34).

[672] The sole difference respecting the 2009-10 service period, Mr. McQuaid testified, was the administrative process of payment, by MRM. The same amount – exactly – was billed in 2009-10 as in 2008-09 ($2,887.50). The same services were provided to Senator Duffy, Senate-related services. In all three services periods Mr. McQuaid provided mainly oral advice ("research and information") on P.E.I.-related issues of public concern (just as Mr. Donohue did on a broader range of issues). Occasionally, Mr. McQuaid edited speeches for Senator Duffy. There was no kickback sought or paid in respect of this MRM payment to Eastern Consulting. There was no request for secrecy of the payment arrangement. Payment was by cheque based upon an invoice, as before. All was documented. There was "nothing sinister" about the services payment (Evidence P. McQuaid, April 20, 2015, pp. 34-38).

[673] Senator Duffy's evidence was consistent with that of the Crown witness Mr. McQuaid. Eastern Consulting Ltd., "a business/political consulting firm based in P.E.I." provided the consulting services of Peter McQuaid whose "roots in the political environment of P.E.I." made his advice valuable to Senator Duffy. Mr. McQuaid knew, *inter alia*, about the Atlantic Power Accord (the undersea cable between P.E.I. and N.B.) as he had been in-

volved in the original Accord negotiations, and he knew of the importance to P.E.I. of the almost $600 million of equalization transfers to the province. Mr. McQuaid was also valuable advising Senator Duffy through "weekly updates on the main issues affecting P.E.I.", as well as editing and advising on Senator Duffy's speeches. Most of the service was oral advice. In the 2009-10 fiscal period, as in the ones before and after, Senator Duffy retained Mr. McQuaid's services related to public issues and matters, but did so in the 2009-10 period through "the general contract" with MRM. In all three fiscal periods the same types of services were provided for the same rate of pay – all Senate-related work. In all three periods the funds represented a discretionary use of Senator Duffy's allotted office budget funds, always 'Senate funds for Senate work'. There was no fraud or breach of trust in respect of Mr. McQuaid's services nor any intent to defraud or corrupt purpose (Evidence M. Duffy, December 14, 2015, pp. 2-15).

David McCabe

[674] Mr. Bayne noted that David McCabe, Senator Duffy's P.E.I.-based cousin, was paid a nominal $500 for services spanning 16-18 months, serving as Senator Duffy's "reliable eyes and ears in the region". Regional representation is a core function for Senators. Mr. McCabe kept Senator Duffy in up-to-date contact with events on P.E.I., providing Senator Duffy scanned copies of local newspaper coverage of local issues and commentary. Mr. McCabe reviewed the media for items that might prove of interest to the Senator and forwarded them in a timely manner. He estimated that a minimum of 32 hours of reviewing, scanning and sending was covered by the $500 payment. Mr. McCabe testified that he had not asked to be paid, that he was paid by cheque, not cash, that no kickback of money to Senator Duffy ever occurred or was requested and that there was no secrecy suggested in respect of the payment for services. Asked by the police if he had ever been paid for strictly personal services for Senator Duffy, Mr. McCabe advised that, yes, he'd been paid for doing upholstery work on a loveseat and chesterfield. The payment for personal services, however, in contrast to the Senate-related regional update services, was paid personally by Senator Duffy. Senator Duffy distinguished between personal services, for which he paid personally, and Senate-related services, paid out of his office budget in his SARs assigned broad discretion. All of the services for which he received the $500 (via the general corporate contractor MRM) were Senate-related work: "I wanted Mike to be a bigger voice for the Island and if he was missing things in *The Guardian* or local *Journal Pioneer*, he should be aware of it" (Evidence D. McCabe, April 20, 2015, pp. 1-7).

[675] Senator Duffy testified that he regarded Mr. McCabe's service, which he found "invaluable" as a P.E.I. Senator, to be a "clipping service". Such a service is expressly authorized as eligible for Senate funds (see Exhibit A, Tab 15D, Appendix A – "Press clipping services" are an "Approved Items for Senate-Related Business"). The clippings scanned and sent represented things going on in P.E.I. "that I should be aware of" as a Senator representing the Island, said Senator Duffy. In respect of any personal services provided by Mr. McCabe, Senator Duffy testified that "I was always very careful to pay him separately out of my personal account by cheque". The $500 payment to Mr. McCabe was 'Senate work for Senate funds' in fact and Senator Duffy judged it to be so in his broad discretion. No fraud

or breach of trust was committed (Evidence M. Duffy, December 14, 2015, pp. 21-24).

William Kittelberg

[676] William Kittelberg (aka Bill Rodgers) was a former career journalist who had covered city hall in Toronto, Queen's Park and Parliament Hill. After his journalism career he served a number of federal Cabinet Ministers in different portfolios as Director of Communications. He served the Ministry of the Environment, Indian and Northern Affairs, Industry Canada, and Ministers Prentice, Kent and Baird. He was, he testified, well qualified to provide Senator Duffy with advice respecting climate change, aboriginal issues, Industry Canada issues like copyright and oil and gas industry issues such as pipelines. These were all, Mr. Kittelberg agreed, "public issues" on which he provided advice to Senator Duffy, every 2 – 3 days after Senator Duffy's Senate appointment, in order "to advance his [Senator Duffy's] knowledge on those issues so that he could discuss them with his colleagues". None of this represented the private business of Senator Duffy and the advice was always provided to Senator Duffy in his capacity as a Senator. Mr. Kittelberg was paid $2,000 for these Senate-related services. No kickback was sought or paid. No secrecy was suggested; in fact a written invoice was requested by Senator Duffy (see Exhibit 3, Tab 15) and payment was by corporate cheque from the corporate general contractor ICF – everything was documented. In chief, Mr. Kittelberg testified that he understood that payment for Senate-related services through a third party "happens with other Senators" (just as Ms. Scharf had testified) (Evidence W. Kittelberg, June 2, 2015, pp. 1-5).

[677] Senator Duffy described Mr. Kittelberg's advice on global warming/climate change, pipelines and aboriginal issues to be "very valuable" because it "allowed me to understand better the public policy landscape in which we were operating". Senator Duffy particularly relied upon Mr. Kittelberg's advice on these issues in caucus, where the issues would be discussed among Parliamentarians and Senator Duffy could better separate the wheat from the chaff, the real situation from the "political spin". Once again, Mr. Kittelberg's services and payment for those services represented quite appropriate 'Senate work for Senate funds' (Evidence M. Duffy, December 14, 2015, pp. 85-88).

Mark Bourrie

[678] Mark Bourrie is a PhD who testified in chief as a Crown witness that he has done extensive research into news control, internet "trolling" and reputation management on the internet and he has consulted for the federal government. He explained his efforts to shut down the offensive internet posts about Senator Duffy that were damaging to his reputation as a Senator. In cross-examination Mr. Bourrie further explained that the offensive internet posts were linked to Senator Duffy's "parliamentary life and performance" and Senator Duffy's "life as a public figure". Mr. Bourrie provided Senator Duffy with advice on how to deal with such damaging material and in fact had some of the worst of it removed. He said he spent perhaps 100 hours in these efforts at internet reputation management on behalf of Senator Duffy and was paid $500 for his work, all of it Senate-related work for Senator Duffy in his capacity as a Senator. The $500 Mr. Bourrie regarded as a "token payment".

He had not expected to be paid but given the services rendered, there was "very good value for money". No kickback was sought or paid nor was any secrecy suggested over the payment, which was by cheque from the corporate services provider MRM (Evidence M. Bourrie, April 17, 2015, pp. 1-8).

[679] Senator Duffy testified that he retained Mr. Bourrie's services because Mr. Bourrie was qualified to deal with the offensive internet posts and Senator Duffy was not. Senator Duffy was, he agreed, "concerned about (his) reputation as a Parliamentarian". Senator Duffy had originally thought Mr. Bourrie's wife, a lawyer, would be the one to address the problem with a legal letter, but directed the $500 payment in his discretion out of his office budget to pay for the work that Mr. Bourrie had, in fact, done to clean up some of the posts. Senator Duffy regarded this as reputation management work related to his position as a Senator and authorized both generally by the SARs and guidelines but also by Exhibit A, Tab 15D, the "List of Approved Items for Senate-Related Expenses" provided December 23rd, 2008, by Mr. Proulx of Senate Finance: "public relations charges" may property be billed. This, too, was 'Senate funds for Senate work'. Mr. Bayne again points out that there was no fraud or breach of trust nor any intended by Senator Duffy (Evidence M. Duffy, December 14, 2015, pp. 17-20).

Mary McQuaid

[680] Mary McQuaid, as the evidence of Melanie Mercer Vos, Diane Scharf and Senator Duffy made clear, was Senator Duffy's "Prince Edward Island policy advisor". Ms. McQuaid was based in, and worked out of, P.E.I. She was not called by the Crown as a witness and the only evidence concerning the circumstances of this $1,068.08 payment (Exhibit 3, Tab 19) was given to the court by Senator Duffy, evidence that was not challenged in cross-examination by the Crown. Senator Duffy testified that Ms. Vos, his Ottawa-based E.A., had just gone off on maternity leave. A replacement, Monique Grenon, was coming in to Senator Duffy's office in Ms. Vos's absence but Ms. Grenon was not fluent in computer "electronics" or the office's policy work related to P.E.I. Ms. Grenon was overwhelmed and so Ms. McQuaid, who had been working for Senator Duffy by that point for over two years, came in from P.E.I. Ms. McQuaid came from P.E.I. to the Ottawa office for two reasons. The first was "for a training course at the Senate". The second was "to brief a temporary employee in Ottawa as to what our priorities and procedures were". The Senate Finance people agreed with Ms. McQuaid doing this and Ms. McQuaid attended a session with Senate Finance on how to file claims, as she would be doing that, helping Ms. Grenon, while Ms. Vos was away (Evidence M. Duffy, December 14, 2015, pp. 75-78).

[681] The entire $1,068.08 is made up of Ms. McQuaid's return travel Charlottetown–Ottawa–Charlottetown plus her hotel costs while in Ottawa to be trained herself and to assist in the office. This is all indisputably Senate-related. When Ms. McQuaid went to submit her expense claim to Senate Finance, Senator Duffy's office was advised that all office budget funds were committed. However, there were unused office budget funds remaining in the ICF corporate service contract, and those office funds were used to pay Ms. McQuaid's completely legitimate and clearly Senate-related expenses. No new net cost was occasioned

to the Senate. Senator Duffy had, pursuant to the SARs, "full discretion" over the deployment of his office budget funds (work and staff). He had office funds committed to the general corporate contractor to be used for Senate-related purposes. Exhibit 10, the governing guideline, expressly includes "office assistance" as appropriate use of research allowance/consulting funds. Exhibit A, Tab 15D also lists "temporary help" as an approved use of office budget funds. The Defence submits that there can be no question that this was 'Senate funds for Senate work'. There was no fraud or breach of trust in having Ms. McQuaid's expenses related to her own training and Ms. Grenon's training paid out of office budget funds. Nor did Senator Duffy have the slightest intent to defraud or breach his trust – a Senate office staffer was being recompensed legitimate Senate-related expenses, nothing more (Evidence M. Duffy, December 14, 2015, pp. 78-81).

MQO Research

[682] MQO Research was paid $1,054.66 (Exhibit 3, Tab 20) for a monthly periodical subscription entitled "Atlantic Matters". Exhibit A, Tab 15D makes "Books and subscriptions" a valid Senate-related expense out of each Senator's office budget funds. As set out above, Senators enjoy a broad, "full" discretion over the Senate-related deployment of those office budget funds.

[683] Elizabeth Brouse was the marketing and business development person for MQO Research, the publisher of Atlantic Matters, a monthly online periodical containing focus group/polling data on public issues ("hot topics") current in Atlantic Canada. Her job included getting sales. Subsequent to the events about which she gave evidence she left her employment with MQO Research. Ms. Brouse testified that in January or February of 2012, Senator Percy Mockler met with her. A "group subscription" to Atlantic Matters was discussed where the total $5,000 cost would be shared by five Senators. Sometime later Senator Mockler confirmed the group subscription. Senator Mockler provided the names of the Senators which included Senator Mockler and Senator Duffy Ms. Brouse testified, but she said she could not recall the names of the other three Senators. Senator Duffy had nothing whatsoever to do with setting up this group subscription. Ms. Brouse stated that Senator Mockler later sent her a list of the five Senators, including himself, who he said would participate. Her evidence was that "There were five in total. That's why the bill – $5,000 was divided five ways" (Evidence E. Brouse, April 17, 2015, pp. 1-12; p. 14).

[684] In fact, Exhibit 71 demonstrates that Ms. Brouse's evidence is unreliable. Exhibit 71 is a package of additional emails provided by a Frank Skanes of Atlantic Matters, after Ms. Brouse testified. Ms. Brouse's evidence was that she had sent out a "welcome" email to all five named subscribers after Senator Mockler had confirmed the group subscription. That welcome email (March 2, 2012, 2:52 p.m.) appears on page 2 of Exhibit 71. There are actually seven Senators and two MP's welcomed as "new subscribers", not five as claimed. This is relevant because Ms. Brouse later in her testimony asserted that she had sent Senator Duffy an email advising that he need not pay his share of the subscription. Senator Duffy's evidence did not agree with Ms. Brouse's in this regard. Ms. Brouse was unable to point the court to such an email. Exhibit 71, the additional emails, contains no such email. Although

there is, in Exhibit 3, Tab 20, and in Exhibit 71 a lengthy chain of emails between Ms. Brouse (and others at MQO Research) and Senator Duffy (and/or his office), there is before the court no such email as Ms. Brouse claimed. Indeed, the email evidence before the court contradicts Ms. Brouse's evidence of such an offer of non-payment: Exhibit 71 includes an email on July 30, 2012, at 1:16 from Ms. Brouse to her boss in which she advises that "I spoke with Mike Duffy today and he was not pleased with Percy for pressuring him into this and does not want to be involved"; at 3:23 p.m. on that same date, July 30th, Ms. Brouse further advises her boss that "I tactfully reminded Mike Duffy of our earlier contact and he will pay his share". The evidence relating to payment of this group subscription supports Senator Duffy's evidence that Ms. Brouse was actually becoming "quite strident" about his office paying a share of the subscription, and, in order to avoid legal action (which was threatened) and "a potentially ugly and perhaps embarrassing situation for the Senate", he arranged to have the subscription paid, just like all other Atlantic Canada Senators (Evidence E. Brouse, April 17, 2015, pp. 12-32; Evidence M. Duffy, December 14, 2015, pp. 95-96).

[685] Senator Duffy testified that he had nothing to do with Senator Mockler arranging a group Atlantic Matters subscription. Senator Duffy had told Senator Mockler that he was not interested in such a subscription. Senator Mockler was not called to give any evidence. Senator Duffy learned that Senator Mockler had signed him up, with a number of other Atlantic Canada parliamentarians, when he got an invoice representing his office's share of the cost of the subscription. Senator Duffy initially resisted payment but relented because all other Senators had paid, because this represented his office's share of their group subscription, and because MQO Research, through Ms. Brouse, was threatening to escalate the situation if payment was not received. Senator Duffy had as yet unused office budget funds allocated to his general contractor, Ottawa ICF, and directed payment for the group subscription share. There was no new net cost in Senate funds, as those office funds had already been approved for Senate-related use. This was clearly a Senate-related subscription. There was no personal gain for Senator Duffy. No fraud or breach of trust was committed or intended. The Defence asserts that the only reasonable conclusion is that the Senate had approved the same subscription expense for all other Senators involved, or that they paid, like Senator Duffy, through a services general contract (Evidence M. Duffy, December 14, 2015, pp. 89-97).

Diane Scharf

[686] Diane Scharf replaced Melanie Mercer Vos as Senator Duffy's E.A. when Ms. Vos was on maternity leave. Ms. Scharf was an experienced veteran of Parliament Hill office work. Called by the Crown, Ms. Scharf testified that she worked for Senator Duffy for six months in "a very busy office". Both Senator Duffy and Ms. Scharf "worked hard" on Senate-related work, she testified. To do her work and be effective as an E.A., Ms. Scharf needed the use of a cell phone/telecomm device (Blackberry). The Information Services Directorate of the Senate provided the device to Ms. Scharf and "they did the configuration" that enabled the device to receive and send emails that came to Senator Duffy's Senate office computer (Evidence D. Scharf, June 9, 2015, pp. 1-8; pp. 42-43).

[687] Senator Duffy explained that when Ms. Vos went on maternity leave, she retained

her Blackberry in order to be able to communicate with the office, Senator Duffy and Ms. Scharf. Having the permanent and replacement E.A.'s communicate would provide necessary continuity in respect of ongoing office and Senate-related work; the two E.A.'s could "collaborate" on Senate-related services, testified Senator Duffy. It appears on all the evidence that Senator Duffy had a Senate Blackberry (and data plan), Ms. Vos had one and Mary McQuaid, who worked on the ground in P.E.I. for Senator Duffy, had one – all to enable communication among them for the sole purpose of enabling Senate-related work to be done. To be effective, Ms. Scharf needed one as well, solely to do Senate work and for no other purpose (Evidence M. Duffy, December 14, 2015, pp. 81-82).

[688] Exhibit 10, the guideline governing services provision and services contracts, explicitly includes "office assistance" as a valid expenditure from the research allowance portion of the office budget. Ms. Scharf's services are clearly Senate-related "office assistance" and within the guideline. In addition, Exhibit A, Tab 15D expressly authorizes as appropriate expenditures from the office budget (discretionary for each Senator) those for "temporary help", precisely what Ms. Scharf was providing.

[689] Ms. Scharf was issued a configured Blackberry device by the Senate, however, the Senate Information Services Directorate (ISD) declined to pay for a monthly service plan through the bulk budget provided by the Telecommunications Policy for Senators (Exhibit 48). That policy provides a "centralized budget" (s. 1.5) to pay for, *inter alia*, telecommunication device service plans (data plans), up to a maximum number of plans which, by Ms. Scharf's arrival, had been reached. Thus, Ms. Scharf's data plan could not be paid by ISD under that "centralized budget" which is separate and apart from each Senator's office budget. The policy also provides, however, that "Should there be insufficient funds in the individual Senator's Research and Office Expense Budget, the Senator will be responsible for those costs". Senator Duffy did have sufficient office budget funds, already allocated but not yet used, under the corporate services contract with Ottawa ICF. And so, in order to pay for the data plan enabling the "office assistance" and "temporary help" referred to as an appropriate use in Exhibit 10 and Exhibit A, Tab 15D, Senator Duffy paid for Ms. Scharf's plan using available office budget funds. As Ms. Scharf testified "We were just trying to serve the public. And it was a legitimate bill". Such payment through a general services contract, Ms. Scharf further testified, was "a very common practice" on Parliament Hill (Evidence D. Scharf, June 9, 2015, pp. 43-44; June 10, 2015, pp. 1-3; 30-32).

Jim Cooke of the Senate ISD testified. His evidence was as follows:

> "Q. But doing parliamentary functions is expressly the purpose of the research and office budget, isn't it?
>
> A. Yes.
>
> Q. And then it [Exhibit 48, the Telecommunications Policy] goes on to say, 'Should there be insufficient funds in the individual senator's research and office expense budget the senator will be responsible for these costs', right?

A. Yes. Yes.

Q. So if there are sufficient funds in the senator's research and office expense budget, the senator is not responsible, according to this, right?

A. Yes.

Q. If he's got money in his office budget, right? That's what it says doesn't it?

A. That's what it says."

(Evidence J. Cooke, November 19, 2015, pp. 6-7).

[690] Ms. Scharf testified that the data plan enabled her to do the Senate-related office work she was hired and paid to do. It was "a purely job related device". She returned the device to the Senate ISD at the end of her six months of work. There was no private gain or advantage to Senator Duffy in paying the data plan cost ($505.18) out of his (discretionary) office $150,000 budget. It was solely Senate-related. It was 'Senate funds for Senate work'. Senator Duffy was told by ISD, because the maximum plan number for the centralized budget had been reached, to "find another way to pay for the data plan" for Ms. Scharf, which is exactly what he did, using the office budget funds as authorized by Exhibit 10 and Exhibit A, Tab 15D. There was no new net cost to the Senate as the office budget funds used had already been allocated for use by Senator Duffy under the corporate services contract. Mr. Bayne contends that there was no fraud or breach of trust nor was any intended (Evidence D. Scharf, June 10, 2015, pp. 26-31; Evidence M. Duffy, December 14, 2015, pp. 81-83).

Jiffy Photo / Mark Vermeer

[691] Jiffy Photo/Mark Vermeer: Exhibit A, Tab 15D, a document given to Senator Duffy on December 23rd, 2008, at the outset of his Senate career by the Director of Senate Finance, Ms. Proulx, advises Senator Duffy (and all other Senators given the same materials by Ms. Proulx) that office budget funds (the "Research and Office Expense Budget") may appropriately, as part of the Senators' broad discretion regarding staff and work/services, be used to pay for "Photographs" and "Films, development of films and photo albums" and "Framing Services". Tab 15E of Exhibit A given at the same time, includes as proper matters for miscellaneous expenditures within the office budget "official gifts and promotional items" in "some way representative of the Senate, Parliament or Canada", "small token items" to be given to "visitors, school groups, etc.".

[692] Exhibit 3, Tab 14, records a total of $1,578.52 paid to Jiffy Photo over the period June 4, 2010, to March 14, 2012, 2 fiscal year periods. The average per year is $789.26 per year or .5% of Senator Duffy's over $150,000 annual office budget. One half of one percent of Senator Duffy's discretionary office budget was spent on the "common practice" among Parliamentarians (including Prime Ministers) of providing photographic and/or mounted memorabilia to individuals, groups, other Parliamentarians, other international political fig-

ures, royals, the Governor General, memorabilia of retirements or official events or Jubilee Medal presentations.

[693] Senator Duffy gave evidence, none of it challenged in cross-examination, that such items of memorabilia as Jiffy Photo produced were "common among Parliamentarians". The PMO had suggested the practice to him. Prime Ministers regularly provided such memorabilia. Jiffy Photo was selected by Senator Duffy as a service provider for this common service because it was faster, cheaper by half and more electronically enabled than Senate photo-finishing services. In addition, Jiffy could format photos with a signature space, unlike the Senate. Such small items of memorabilia were "important to the people" in the photos. Doing this was part of Senate "outreach", connecting with the public and others. Senator Duffy was careful to instruct Mark Vermeer, the proprietor of Jiffy, that "we wanted to make it very clear that the personal and the public be kept separate". A small amount of personal photo finishing was done for the Duffy's, but the vast bulk of the work was related to Senate-related memorabilia. When Senator Duffy went meticulously in his evidence through all of the invoices in Exhibit 3, Tab 14, he identified 2 personal items – one a $5.25 cost for photos of his son and daughter, the other a "two or three bucks" expense for a photo sent to Senator Duffy's son – that were mistakenly overlooked and should have been paid personally. These were mistakes, not intentional, Senator Duffy testified; there was no fraudulent intent or corrupt purpose to defraud the Senate of the $7 to $8 involved. Senator Duffy could have manufactured a self-serving story trying to connect those photos to Senate events or memorabilia for his children, but did not. He picked them out as items he should have paid for personally, but mistakenly overlooked (Evidence M. Duffy, December 14, 2015, pp. 24-58).

[694] Mr. Vermeer's evidence confirmed Senator Duffy's about Senator Duffy's instruction from the outset "that the personal was to be kept separate from the Senate related". In fact, "On at least several occasions" Senator and/or Mrs. Duffy did pay privately for clearly personal photo finishing. All other photo finishing, mounting, framing and enlarging represented material Mr. Vermeer would identify as typical parliamentary memorabilia (Evidence of M. Vermeer, April 21, 2015, pp. 3-11).

[695] This perfectly common parliamentary memorabilia was paid for out of Senator Duffy's office budget funds, funds approved for Senate-related use by Senate HR and allocated to the corporate services providers MRM and ICF, funds specifically authorized by Exhibit A, Tabs 15D and 15E to be used for this type of service. With the exception of the $7 to $8 of unintentional errors, all of this represents 'Senate funds for Senate work', Ms. Proulx's guiding principle of eligibility. The Defence position is that Senator Duffy committed and intended no fraud or breach of trust in sending routine memorabilia paid for by office budget funds, like all other Parliamentarians.

DISBURSEMENTS OF MONIES PAID TO GERALD DONOHUE FOR "ILLEGITIMATE EXPENSES"

INTERN

[696] It is alleged that the accused (23) on or about May 3rd, 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by facilitating a payment to Ashley Cain, contrary to section 122 of the *Criminal Code of Canada* and further that he (24) on or about May 3rd, 2010, at the City of Ottawa, in the East Region, did by deceit, falsehood or other fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by facilitating a payment to Ashley Cain contrary to section 380(1)(b) of the *Criminal Code of Canada*.

Ashley Cain

Crown's Position

[697] Mr. Holmes advised the court that Speaker Furey testified that there is no mechanism authorizing payments to volunteers. Despite the explicit prohibition on payment of taxpayer funds to cover gifts to staff or employees of the Senate, Senator Duffy arranged for a $500 payment to Ashley Cain, who had previously worked as a volunteer in his office. The SARs preclude payments to volunteers. Mr. Holmes submits that only a tortured reading of the SAR's provisions would allow any contrary conclusion. He allows that Senator Duffy was perfectly free to bestow a gift upon Ms. Cain but that such a payment would have to come from Senator Duffy's personal funds. Mr. Holmes concludes that Senator Duffy's decision to direct the payment of public money to Ms. Cain through Gerald Donohue defies common sense and is both a fraud and a breach of trust.

[698] I note that the SARs defines "volunteer" as a person who provides Senate-related services to the Senate or to a Senator free of charge and without remuneration from any source (SAR's Division 1:00 Interpretation Chapter 1:03 Definitions).

Defence Position

[699] Counts 23 and 24 allege fraud and breach of trust by Senator Duffy in his "facilitating a payment to Ashley Cain". Mr. Bayne outlines the circumstances of Ashley Cain's payment in the following narrative.

[700] Ms. Cain was a volunteer intern who worked as a clerical assistant to Senator Duffy's E.A., Ms. Vos, in Senator Duffy's Senate office. Ms. Cain did temporary office work during a period of four to six months from February, 2010, to June or July, 2010. She testified that she would work every week of that time period for 2 to 4 hours (a total, she agreed, of 60-72 hours of work). She was paid $500 out of Senator Duffy's discretionary office budget funds for her Senate work (which works out to approximately $7 to $8 per hour). She had not asked or expected to be paid, but agreed that she had done "real and genuine office work" in the Senator's office, "clearly parliamentary Senate-related work", and that both Ms. Vos and Senator Duffy thought that Ms. Cain was "really working hard and doing a great job for them in the office", and deserved to receive a small payment. She agreed that "the sole reason" she was paid was for the Senate-related temporary office work done. No kickback request was made by the Senator, she testified, and there was no aspect of personal benefit to

him in her services, they were solely Senate-related (Evidence A. Cain, April 16, 2015, pp. 1-8).

[701] Ms. Cain did temporary, purely Senate-related, office work as a volunteer in the office of the Senator. She was paid $500 for her work out of office budget funds approved by Senate HR and allocated for Senate-related use to the corporate services contractor MRM. Exhibit 10, Ms. Makhlouf explained, was the sole guideline – in the absence of a policy at the time – relating to services contracts when this payment was made. Exhibit 10 was, testified Ms. Makhlouf, the guiding document for her in Senate HR during the time period of counts 23 and 24. Exhibit 10 clothes every Senator with "full discretion"/"latitude" and expressly authorizes payments from the "research allowance" (service contracts) for "office assistance". Such a payment offends no policy (there was none) and is within the guidelines. (Evidence S. Makhlouf, April 14, 2015, pp. 17-18; 23-29).

[702] The SARs, the comprehensive administrative code for the Senate, create a "full discretion" in every Senator over Senate-related work performed on their behalf and a "sole discretion" over the pay of staff, including "volunteers", who are to be paid using office budget funds. Senator Duffy testified that he believed that "It was perfectly within the rules to pay a volunteer and this was an honorarium as a thank you for her excellent work…" (Evidence M. Duffy, December 14, 2015, pp. 118-119).

[703] Exhibit A, Tab 15D expressly authorizes the use of office budget funds to pay for "temporary help".

[704] Mr. Bayne contends that Senator Duffy's payment of $500 to Ms. Cain for her Senate-related office work violated no administrative policy and was within the administrative guidelines. It was 'Senate funds for Senate work'. There was no administrative violation much less any crime. Senator Duffy believed the payment was entirely valid and it was.

Comments

[705] I propose to deal with my ultimate findings regarding guilt or innocence on counts 20 to 28 inclusive at the end of this section of my judgment. At this point, on these two particular counts, I find that Senator Duffy exceeded his discretionary powers to pay Ms. Cain in light of the specific prohibition against such payments.

[706] However, I might add that I believe that Senator Duffy was acting in good faith and that he honestly believed that this particular payment was permissible when he instructed funds to be forwarded to Ms. Cain.

MAKE-UP SERVICES

[707] It is alleged that Senator Duffy (25) sometime after May 17th, 2010, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by facilitating a payment to Jacqueline Lambert, contrary to section 122 of the *Criminal Code of Canada* and further that he (26) some-

time after May 17th , 2010, at the City of Ottawa, in the East Region, did by deceit, falsehood or other fraudulent means defraud the Senate of Canada of money, not exceeding $5,000.00, by facilitating a payment to Jacqueline Lambert contrary to section 380(1)(b) of the *Criminal Code of Canada*.

Jacqueline Lambert

Crown's Position

[708] Mr. Holmes drew the court's attention to the fact that a $300 cheque was paid to Jacqueline Lambert in May 2010 in respect of professional makeup services for Senator Duffy. The cheque was from Maple Ridge Media. A previous claim for makeup, in March 2009, in the same amount by the same person, was denied. While Senator Duffy initiated an appeal of that determination he ultimately abandoned it and endured the cost personally. The Crown maintains that Senator Duffy was aware that the Senate viewed expenses associated with make-up as personal matters for which it was not possible to make a valid expense claims. The Crown contends that the payment from the Donohue funds to Ms. Lambert is an obvious attempt to avoid the clear prohibition on the use of public money for that purpose. And accordingly, it is both fraudulent and a breach of trust.

Defence Position

[709] Counts 25 and 26 allege fraud and breach of trust by Senator Duffy in "facilitating a payment to Jacqueline Lambert". Mr. Bayne takes the position that Ms. Lambert was paid $300 out of Senator Duffy's discretionary office budget funds for providing make-up services for Prime Minister Harper and Senator Duffy for their joint televised appearance in Ottawa at the May 17, 2010, G8/G20 National Youth Caucus on Parliament Hill (see Exhibit 102). This was a publicly televised Government of Canada/Parliamentary function of international significance. It was in no way private or personal to Senator Duffy or Prime Minister Harper.

[710] Ms. Lambert testified that make-up is "a regular and normal part of appearances on television" and is "directly connected to the appearance". There can be no question but that this was a purely parliamentary, public event; Ms. Lambert agreed that this was "an official event of the Government of Canada". The $300 payment covered her services for making up both the Prime Minister and Senator Duffy. The fact that a second person added nothing to the $300 make-up service fee meant, she agreed, that making up "Senator Duffy added nothing whatsoever to the $300 bill that would in any event have been occasioned by your making up the Prime Minister" (Evidence J. Lambert, April 16, 2015, pp. 1-10).

[711] Ms. Lambert explained that she has provided make-up services for other parliamentarians. She has made up the Prime Minister for televised events. She gave the example of the late Finance Minister, Mr. Flaherty, for whom she provided make-up services "for many years" in relation to televised budget presentations. She was always paid (even when she billed the Conservative Party), she agreed, for these services "by Government of Canada

cheques", "And so the Government was clearly authorizing make-up for parliamentary events" (Evidence J. Lambert, April 16, 2015, pp. 12-13).

[712] Ms. Lambert testified that the May 17, 2010, G8/G20 televised event was "a very different kind of event" than a March 5, 2009, "photo shoot" for which she had made up Senator Duffy.

[713] Senator Duffy testified and referred in his evidence to Exhibit 7, his calendar. On Thursday, May 13, 2010, Senator Duffy was in Toronto and Niagara Falls with Cabinet Minister Nicholson. On Friday the 14th, Senator Duffy flew from Toronto to P.E.I. On Saturday the 15th he attended a Girl Guide rally in P.E.I. On Saturday evening Senator Duffy received a message in P.E.I. from the PMO in Ottawa that the Prime Minister wanted Senator Duffy back in Ottawa on Monday the 17th to attend a G8/G20 gathering with the Prime Minister. So, on Sunday the 16th, Senator Duffy flew back to Ottawa, as requested. On Monday the 17th, Senator Duffy attended the televised event with Prime Minister Harper and immediately after flew "back home" to P.E.I. that evening. Senator Duffy had come to Ottawa to attend the G8/G20 event solely at the request of the PMO and Prime Minister. The attendance was not Senator Duffy's idea (Evidence M. Duffy, December 14, 2015, pp. 120-121).

[714] When Senator Duffy arrived at the Commonwealth Room for the event on the 17th, he inquired of the PMO people "where's the makeup?" They responded that "Oh we forgot to call the makeup artist". At that point in time, the Prime Minister's personal make-up artist was a Michelle Muntean who lived in Toronto and who normally would be flown in to do the Prime Minister's pre-television make-up. There was, however, insufficient time for that. When the PMO people queried what could be done, Senator Duffy suggested Ottawa-based Ms. Lambert, who was known to the Prime Minister and who had on occasion previously done his make-up. Senator Duffy, like Ms. Lambert, testified that make-up is "a standard feature of going on television" and it is part and parcel of formal TV appearances. Ms. Lambert was thus contacted, attended and did the Prime Minister's and Senator Duffy's pre-event make-up. The fee for her emergency services was small (Evidence M. Duffy, December 14, 2015, pp. 122-125).

[715] Senator Duffy had, on March 5, 2009, been made up for a still photo shoot photograph. Make-up on that occasion was because Senator Duffy had scalp lesions he did not want to appear in the photo, a personal decision. On April 9, 2009, Ms. Proulx had written to Senator Duffy (Exhibit 3, Tab 16) to say that Ms. Lambert's make-up for that photo shoot was not allowed under Senate guidelines. Ms. Proulx (despite the provisions of the SARs requiring referral of the Senator to any written direction prohibiting the expense) pointed to no specific policy or rule or guideline provision in support of her decision. Senator Duffy, however, took the matter to his "guru", Senator Tkachuk, who initially authorized the make-up expense as a member of the Steering Committee of Internal Economy: "that's alright. We'll authorize that. It's perfectly understandable". But politics trumped policy, and when Senator Furey threatened what Senator Tkachuk feared would become a media issue, Senator Tkachuk claimed that Senator Duffy had decided not to pursue the matter. In the end, Senator Duffy paid personally. This was not done because the make-up service on that occasion

was contrary to a policy or guideline – there is no such policy or guideline and Senator Tkachuk had overruled Ms. Proulx on the administrative appropriateness of the expense claim. It was done because of the politics of that particular situation (Evidence M. Duffy, December 14, 2015, pp. 125-128).

[716] Mr. Bayne concludes that in respect of the May 17, 2010, G8/G20 event, Senator Duffy reasonably believed that the small expenditure for that televised, highly parliamentary event, all at the request of the Prime Minister, and involving standard pre-television make-up services for both the Prime Minister and himself, was clearly a "parliamentary function" as defined in and expressly authorized by the SARs for access to Senate resources. He had, he testified, no criminal intent or corrupt purpose whatsoever. This is, at most, a matter for Internal Economy, not a criminal court.

Comments

[717] I find that the counts involved in this "inappropriate make-up scenario" are distinguishable from Senator Duffy's prior make-up rejection.

[718] The first time Senator Duffy requested reimbursement for make-up services it was in connection with his portrait photograph for the Senate. Initially, payment was denied. Subsequent discussions followed. In the end, Senator Duffy paid for the make-up service personally.

[719] I do not adopt Mr. Holmes' characterization that there is a clear prohibition on the use of public money for make-up purposes. The circumstances of the first make-up situation are readily distinguishable from the one before the court. Even without the obvious differences, the end result of the first incident certainly leaves unanswered questions.

[720] The G-8/G-20 event can be viewed as an emergency situation that Senator Duffy addressed efficiently and reasonably. Any debates over the appropriateness of his decision are best dealt in a non-criminal environment.

EXERCISE CONSULTANT

[721] It is alleged that the accused (27) between March 30, 2010 and January 20th 2012, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by facilitating payments to Mike Croskery, contrary to section 122 of the *Criminal Code of Canada* and further that he (28) between March 30, 2010 and January 20th, 2012, at the City of Ottawa, in the East Region, by deceit, falsehood or other fraudulent means defraud the Senate of Canada of money, exceeding $5,000.00, by facilitating a payment to Mike Croskery contrary to section 380(1)(a) of the *Criminal Code of Canada*.

Mike Croskery

Crown's Position

[722] Mr. Holmes advised the court that Mike Croskery acted as Duffy's personal trainer before Senator Duffy's appointment to the Senate. Following his appointment to the Senate, according to Mr. Croskery's testimony, Senator Duffy proposed that they "do this as consulting". Nothing had changed. The preparation of invoices declaring the activity to be consultative does not affect its essential nature. They met at Senator Duffy's home in Kanata where the Senator worked out. The cost was roughly the same before Senator Duffy's appointment, as after. Over a period of three year the aggregate amount of the invoices exceeded $10,000. The Crown maintains that these were private and personal costs to Senator Duffy and that the secretive arrangement to expend public resources for these services was illegal.

Defence Position

[723] Mr. Bayne notes that the allegations that Senator Duffy committed fraud and breach of trust "by facilitating payments to Mike Croskery" bring into play certain relevant Senate instruments that give important context to these charges.

[724] Exhibit 10 is the guideline document that Ms. Makhlouf from Senate HR testified was the key Senate guideline relating to services provision (research and consulting) and services contracts during the time period alleged in the counts. Counts 27 and 28 identify the March 30, 2010, to January 20, 2012, time frame (and therefore parts of the 2009-10, 2010-11 and 2011-12 Senate fiscal years). No Senate policy covered these fiscal years, Ms. Makhlouf testified (the November 7, 2011, Procurement Policy applied to services contracts concluded after that date – none of the 4 contracts impugned in these charges was concluded after that date). All consulting payments to Myo Max Performance (Mike Croskery) were made under Senate HR approved services contracts allocating funds for Senate-related services from Senator Duffy's discretionary office budget.

[725] Exhibit 10 authorizes payments out of "A research allowance" (later known as the "Consulting Services" budget set out at Exhibit 20, p. 6-1 – the SARs), to pay for "public policy topics and studies" that Senators "wish to pursue", "according to the needs of the individual Senator". Exhibit 10 directs that Senators should have "full discretion in selecting the public policy topics and studies they wish to pursue". Exhibit 10 further directs that "latitude" should be given each Senator "to ensure that each Senator is able to carry out his or her mandate in a manner consistent with the Senator's interests and objectives in the Senate". "General areas of work" (as opposed to particular) only, need to be set out or proposed.

[726] Mr. Bayne states that it is abundantly clear that, under Exhibit 10, Senator Duffy, like all other Senators has full discretion and latitude to choose and pursue "topics and studies" according to his interests and wishes, so long as those pursuits have a public policy aspect. Senator Duffy chose ageing, seniors' health and fitness and their relation to the "demographic time bomb" of a cohort of seniors that, with their numbers and health care and social care costs, threatened to consume government resources. Mr. Bayne suggests that the entire tenor of the Crown's case in respect of these 2 counts impugns Senator Duffy's choice of policy topics. The Crown suggests that prior work/reports had already been done on this subject. Those reports, however, were different from what Senator Duffy hoped to achieve

as an "activist Senator", namely, to fulfil Dr. Keon's wish (an author of one of the earlier reports) to have someone put into action reports that "were sitting on the shelf gathering dust". Senator Duffy was trying to build on and "carry forward" the work began by Dr. Keon and the prior reports. In any case, however, Senator Duffy's topic choice was within his "full discretion", whether prior work had been started in this field or not. Mr. Bayne notes that the Crown's case overlooks or ignores this explicitly assigned broad discretion (Evidence M. Duffy, December 11, 2015, p. 111; December 14, 2015, p. 102).

[727] Similarly, Mr. Bayne contends that the thrust of the Crown's case on these two counts seeks to attack the value of the consulting services rendered by Mr. Croskery. The Crown seeks to put the court into the position of assessing administrative value for money, an oversight function Senate Finance never did. Mr. Bayne suggests that the court is not to substitute itself for the Internal Economy Committee in deciding whether Exhibit 10 was a good administrative tool or guideline, whether the assigned discretion and latitude were too broad. Nor is the court to take on the value for money administrative assessment that should have been done internally by Senate Finance. Mr. Bayne reminds the court that this is a criminal court, making a judgment on criminal law standards. Exhibit 10 accords all Senators this "full" discretion and the consulting service on Senator Duffy's chosen "Age Wave" project provided by Myo Max Performance/Mike Croskery fell within this assigned discretion.

[728] The SARs themselves, as the comprehensive Senate administrative code governing use of Senate resources, provide as a "principle of parliamentary life" that Senator Duffy, like all Senators "is entitled to have full discretion over and control of the work performed on the Senator's behalf". Further they provide that "staff" (including service providers under services contracts) "is subject to the exclusive direction and control of the Senator". This consistent explicit message of "full discretion" over the work done and topics chosen to pursue rings loudly and clearly in the SARs. Senator Duffy's choice of the "Age Wave" project and the consulting work he directed pursuant to his discretionary choice must be judged in the context of the governing Senate provisions (Exhibit A, Tab 2, pp. 1-3 to 1-4; p. 4-8).

[729] Exhibit A, Tab 16 (p. 3), the HR materials provided to Senator Duffy December 23, 2008, by Ms. Poulin of Senate HR advise that research work is to go on in respect of topics "that are of interest to the Senator"; such research includes "researching and gathering information" and "performing other duties (on occasion) as required by the Senator". Yet again, broad discretion and choice of topics "of interest" to the Senator are clearly set out.

[730] Mike Croskery is the principal of Myo Max Performance, "a consulting and publishing business for fitness and human performance" (Exhibit 17). Mr. Croskery has provided consulting services as an "exercise science consultant … to design specific training routines" for "Canadian National Athletes and Teams", "Professional Athletes and Teams", "International Athletes and Teams" and for "Performance Oriented Occupations". Mr. Croskery had "over 20 years of experience working with well over a thousand clients ranging from professional and Olympic athletes to fitness enthusiasts and individuals with a wide variety of limitations and health concerns". His consulting approach was "research and science

based" and he had both done research on and experience with "disease prevention". He has taught at Algonquin College, written a text and has several references in scientific articles on personal training for fitness. Mr. Croskery agreed that he had "very long and broad experience in consulting" and had often been hired "as a professional consultant", before Senator Duffy retained Mr. Croskery in that capacity in 2010. Senator Duffy testified that he regarded Mr. Croskery as well qualified to consult on fitness and health issues for seniors as part of Senator Duffy's "Age Wave" project as an activist Senator (Evidence M. Croskery, April 16, 2015, pp. 45-48; Evidence M. Duffy, December 14, 2015, P. 106).

[731] Before being retained in a consulting capacity, Mr. Croskery had provided fitness training sessions for Senator Duffy. These were not strenuous sessions, but rather "comfortable … so that you can talk and carry on a conversation". In 2007 Mr. Croskery was paid $381.60 for such fitness training for Senator Duffy; this amount was paid personally by Senator Duffy; no consulting was then involved. In 2008, Mr. Croskery was paid $3,855.60 for such fitness-training, was paid personally by Senator Duffy and no consulting was involved. In 2009 Mr. Croskery was paid $396.90 for such fitness-training, was paid personally and no consulting was involved. Mr. Croskery agreed that "the focus on fitness training with Senator Duffy had really tailed off by the time of his appointment in 2009". In "2010 the relationship changed and became focussed on consulting". The consulting theme was to design "a package for older adults in concern (sic) with health and fitness", "getting out information to older adults on health and fitness" (Evidence M. Croskery, April 16, 2015, pp. 10, 13-14, 17, 21, 49).

[732] The consultations on this project went on for parts of 3 years, 2010, 2011, 2012 (into 2013). Consultation sessions included discussions of fitness and nutrition plan design, delivery (a book, a website, a CD) and distribution of the information, demographic changes in the Canadian population, health of older adults, life spans of the baby boomer generation, research statistics on the baby boomers, disease reduction, cardio-vascular disease, cancer risks, the impact of exercise on physiology, publication, distribution rights, copyright. Mr. Croskery agreed that "the entire focus" of the consulting was "to create a program" for and system of delivery to the aging demographic, a health promotion and fitness program tailored for seniors known by Senator Duffy's project name "The Age Wave". Mr. Croskery agreed that Senator Duffy "was relying" on Mr. Croskery's consultation/research information input and advice (Evidence M. Croskery, April 16, 2015, pp. 22, 26, 28, 52, 54; Evidence M. Duffy, December 14, 2015, p. 111).

[733] Mr. Croskery invoiced his consulting services (Exhibit 3, Tab 21) as "Consulting" and "Consulting - Research the Age Wave". The invoices are dated March 30, 2010, May 20, 2011, January 5, 2012. Those invoices for consulting services (in contrast to the erratic payment amounts for personal fitness in 2007, 2008 and 2009) were for a standard lump sum of $3,000 (the last year the price went up to $3,150) plus tax. All consulting services payments were made by MRM and ICF, the corporate contractor, under approved Senate services contracts. Mr. Croskery agreed that he was paid for actual consulting work done on the Senator's project, "actual consulting done" in his "professional capacity". It was, he agreed, "fair pay" on a "Senatorial project" (Evidence M. Croskery, April 16, 2015, pp. 54-55).

[734] Mr. Bayne states that the Crown alleges fraud and breach of trust because Senator Duffy received a personal benefit as well as professional consulting services on a Senate project of major interest to him: most consultation sessions also involved personal fitness for Senator Duffy. Although Senator Duffy testified that these sessions really represented "guinea pig" sessions where programs for seniors were being tested on him for results, he still, in fact received an element of personal benefit, as the Crown alleges. But there was no additional direct cost to the Senate. Mr. Bayne points out that the SARs provide that incidental personal benefit may result from use of a Senate resource (such as payment of office budget funds for consulting services) so long as it "does not give rise to a direct cost to the Senate" (Exhibit A, Tab 2, p. 3-2). Mr. Croskery's evidence in this regard is critical. He agreed that "clearly from 2010, '11 and '12, the prime focus here is consulting. There's fitness going on the side, but the prime focus is consulting". Mr.Croskery further agreed that had there been no fitness on the side "the consulting bill would have been exactly the same as what was charged … the sessions were combined but the invoices and the payments were for the consulting time that was going on". The annual agreed upon $3,000 amount was "for consulting" and was, in comparison with other evidence before the court (P. McQuaid; I. MacDonald; E. Levant; N. Ling), a modest annual consulting fee. There was no direct or additional cost for the incidental personal benefit (Evidence M. Croskery, April 16, 2015, pp. 56-57; Evidence M. Duffy, December 14, 2015, p. 109).

[735] Senator Duffy testified that he was fully aware of Exhibits 65 and 100, Senate Committee reports on aging and the effects of demographic change in Canada. Senator Duffy wasn't trying to re-write these reports, he was trying to turn them into positive action. Senator Keon, the co-author of Exhibit 100 (and Senator Duffy's "sponsor" in the Senate – he had also performed life-saving heart surgery on Senator Duffy) told Senator Duffy that he hoped someone would pick up on the information in the reports and 'carry them forward' into some form of action or program. The problem identified in the reports had not gone away or been ameliorated; it was persisting and getting worse (Exhibit 101). Senator Duffy briefly discussed the issue of an Age Wave project with Mr. Donohue who offered only a "5BX" type plan, so Senator Duffy turned to Mr. Croskery, the fitness consultant professional. He was trying to turn into action "two reports sitting on the shelf gathering dust". This was, he testified his main project as an "activist Senator". Although he worked during 2010, '11 and '12 with Mr. Croskery on this project and even received encouragement on it from Senator LeBreton, Mr. Novak of the PMO effectively killed the project because it would involve too much government. Senator Duffy testified that he never had any intent to deceive or defraud the Senate or any corrupt purpose in respect of this project and he is entitled to the benefit of a reasonable doubt. Mr. Bayne contends that the evidence on these counts does not meet the criminal standard of proof. As the Supreme Court stated in the *R. v. Boulanger*, *supra*, a breach of trust case, "the law does not lightly brand a person as a criminal".

Comments

[736] I think it is fair to conclude from Senator Duffy's evidence that he has never been an eager participant in exercise regimes. However, to his credit, Senator Duffy did make a concerted effort for a one-year-period prior to his appointment to the Senate to embrace the

exercise lifestyle. Mr. Mike Croskery provided training to help Mr. Duffy (as he then was) to achieve his health goals.

[737] After his appointment to the Senate, Senator Duffy took a keen interest in pushing forward better health initiatives for seniors and used the services of Mr. Croskery as a consultant to assist him in that regard.

[738] Mr. Croskery's was very qualified to provide the consulting services required by Senator Duffy.

[739] I also am satisfied that the consultant component of Mr. Croskery's meetings with Senator Duffy became the main focus of their meetings. I acknowledge that Senator Duffy may have sat on an exercise bike during some of these sessions but the exercise component of the relationship had become negligible.

[740] Considering Senator Duffy's prior relationship with Mr. Croskery, I am of the view that it would have been preferable to have a formal contract signed by Senator Duffy and Mike Croskery clearly setting out the new arrangement between the parties.

THE LAW

[741] The Crown and Defence each prepared a memorandum of law. The cases with respect to fraud and breach of trust were strikingly familiar in each memorandum. The issue of wilful blindness was one that attracted the attention of the Crown. The issue of onus drew comments from the Defence.

FRAUD

[742] Section 380(1) (a) of the *Criminal Code of Canada* states that:

> 380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars.

Jurisprudence: Fraud

[743] The leading Canadian case setting out the legal requirements for a finding of criminal fraud pursuant to s. 380(1) of the *Criminal Code* is the Supreme Court of Canada's decision in *R. v. Théroux* , [1993] SCJ No. 42.

[744] *Théroux* is a unanimous decision (in the result) of the Supreme Court, with three

sets of reasons. Factually, Robert Théroux was the directing mind of a residential construction company (Les Habitations Co-Hab Inc.): the company (through subsidiaries) contracted with residential home buyers for the sale of homes and represented that deposits on purchase contracts were insured. These representations were made both orally and by written certificate of insurance. In fact, the representations that the deposits were insured were false and Théroux knew them to be false ("the appellant deliberately lied to his customers") (*Ibid*, at paras 3; 13, 29; 41), although he believed he could successfully complete the housing project. The company went bankrupt, the project was not completed and most depositors lost their deposit money. The Supreme Court in those circumstances upheld Théroux's fraud conviction based upon his "deliberate falsehoods" which caused deprivation: the representations were false and Théroux knew them to be false. He knowingly told his customers lies to induce them to pay deposits for the purchase of homes.

[745] The majority judgment (LaForest, Gonthier, Cory, McLachlin, JJ) dealt with the constitutional elements of fraud under s. 380(1), holding that the *actus reus* of fraud is established by proof of a prohibited ("dishonest") act – "the prohibited *actus reus*" – be it an act of deceit, falsehood or other fraudulent means, and proof of deprivation caused by the dishonest act (actual loss or risk of loss). (*Ibid*, at paras 16-19; 20; 24) The Supreme Court found (as did the trial judge and Quebec Court of Appeal) that "There is no doubt that the appellant deliberately practised a deceitful act, constituting the *actus reus* of the offence." (*Ibid*, at para 13) The dishonest act is judged objectively, and there was no objective doubt that Théroux had deliberately, knowingly and intentionally lied to his customers; Théroux did not believe at any time that his representations to his customers were true. The "prohibited *actus reus*" was proved.

[746] The majority then dealt with the required *mens rea* for fraud, stating that "*Mens rea*, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. To constitute criminal fraud, there must be proof beyond reasonable doubt of a "guilty mind."(*Ibid*, at para 20) Here, unlike the objective test for the prohibited *actus reus*, "the test for *mens rea* is subjective." (*Ibid*, at para 21) In applying this subjective test for *mens rea*, "the court looks to the accused's intention and the facts as the accused believed them to be." (*Ibid*, at para 21) The *mens rea* (the required guilty mind) to constitute fraud is the "subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation" (*Ibid*, at para 24): i.e. it must be proved beyond a reasonable doubt (as in *Théroux*) that the accused knew he was lying in order to induce the deprivation, knew (believed) he was deliberately undertaking a "prohibited" act of dishonesty. "(T)he proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence" (deprivation or risk thereof).(*Ibid*, at para 24) The accused, to commit criminal fraud, in addition to voluntarily performing a prohibited act, must have "subjective knowledge" that the act is prohibited and "subjective knowledge" that deprivation could ensue. (*Ibid*, at para 27) The accused in *Théroux* knowingly ("deliberately") told repeated lies to many customers in order to induce them to part with deposit money, and thus was found to have had the *mens rea* required for fraud:

"The appellant told the depositors they had insurance protection when he knew that they did not have that protection. He knew this to be false. He knew that by this act he was depriving the depositors*."* (*Ibid*, at para 43)

[747] The majority in *Théroux* (*Ibid*) summarized its comments about the required *mens rea* for fraud as follows at paragraph 40:

> [40] The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk."

[748] The minority (Lamer, CJ, Sopinka, L'Heureux-Dubé) issued separate concurring judgments, which do not alter the majority's principal requirements for the *actus reus* and *mens rea* of fraud.

[749] The Supreme Court released its decision in *R. v. Zlatic,* [1993] 2 SCR 29, concurrently with *Théroux*. *Zlatic* is a fact-specific 3:2 decision, L'Heureux-Dubé, Cory and McLachlin J.J. being in the majority, Lamer, C.J., and Sopinka J being in the minority (dissent).

[750] Zlatic ran a business as a wholesaler of t-shirts and sweatshirts. He accepted goods from suppliers, worth more than $375,000. He sold the goods but then gambled away those sale monies and all of the assets of his business.(*Ibid*, at paras 16-17) Applying *Théroux*, the majority upheld Zlatic's fraud conviction, finding that the prohibited act (the "other fraudulent means") was "taking the goods without concern for payment and gambling away the value they represented"; "the funds which the accused used to gamble represented the means by which the creditor, who had supplied the goods that produced these funds, could be repaid." (*Ibid*, at paras 29 and 36) *Mens rea* was found because Zlatic "knew precisely what he was doing and knew that it would have the consequence of putting his creditors' primary interests at risk." (*Ibid*, at para 41) It was no defence that Zlatic believed he would win at the casinos and be able to pay his creditors.

[751] The dissent disagreed that, in the unusual facts of the case, fraud was made out.

Sopinka, J., writing for himself and Chief Justice Lamer, found an absence of both *actus reus* and *means rea* : (*Ibid*, at paras 9-12) Zlatic's conduct represented "poor financial management" but not "dishonesty"; (*Ibid*, at para 10) and if Zlatic honestly believed there was no likelihood of deprivation (he believed his system would win), "this aspect of *mens rea* is not made out." (*Ibid* at para 11)

[752] Both the majority and minority agreed that to constitute fraud "Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment. (*Ibid*, at para 32) "Unwise business practices are not fraudulent," (*Ibid*, at para 37) nor is "poor financial management."(*Ibid*, at para 10)

[753] In *Milec*, [1996] O.J. No. 3437, a unanimous Ontario Court of Appeal applied *Théroux* to reverse fraud convictions (2 counts) and substitute acquittals.

[754] Milec ran a produce business with substantial monthly revenues. He received produce from two suppliers who were to be paid within 30 days. Cheques were given in payment of successive produce deliveries but were returned "NSF" because of cash flow problems Milec's business incurred as a result of loans taken out to pay for additional merchandising space. When Milec's business went bankrupt, $290,000 was owed to the two suppliers. Milec had received advice from his bank manger that his cash flow would not be impaired by taking on the additional space (and loans). There was no evidence of any "diversion of cash" for Milec's personal use, although Milec had made statements to the police "that could have been taken that he knew that some of the cheques would not be honoured as of the dates when they were written." (*Ibid*, at paras 2-7) However there was no evidence as to Milec's intentions or knowledge when he placed the orders from the suppliers.

[755] The Court of Appeal noted that *Théroux* required a subjective test for fraudulent *mens rea* and that "In applying the subjective test, the Court looks to the accused's intentions and the facts as the accused believed them to be. (*Ibid*, at para 13) The Court of Appeal found no proof of fraudulent *mens rea* (as required by *Théroux*) because "There were none of the badges of fraud such as diversion of monies for personal use." The accused Milec may have been "simply scrambling to save a crumbling business" rather than knowingly depriving the suppliers of goods with no intention to pay: "The reality of commercial life mandates that the line between acts directed to the preservation of the business, even if desperate, and acts which are fraudulent, be meticulously drawn." (*Ibid*, at paras 14-16)

[756] Mr. Bayne submits that this careful, "meticulous" line drawn by the Court of Appeal between reasonably possible good faith (although unwise or even erroneous) acts and criminally fraudulent ones is applicable in the case at bar.

[757] In an earlier decision, *R. v. Doren*, [1982] O.J. No. 3196, the Ontario Court of Appeal foreshadowed the *Théroux* decision in finding that multiple "specific misrepresentations" made by the appellant Doren and others in his private company induced the public to buy diamonds and emeralds as an investment and constituted conspiracy to defraud and fraud: "the public were deliberately lied to and deceived as to three important attributes of

the investment that they were making, the misrepresentations were made with a view of being acted upon and members of the public did so to their detriment." (*Ibid*, at paras 1-6; 10; 23) The Court held that:

> (i) Evidence of deliberate (knowing) lies, misrepresentations, falsehoods, or deceits with the intention of depriving via the known falsehood is required for the criminal proof of fraud;
>
> (ii) The Court of Appeal cautioned, however, that conduct short of proven deliberate falsehoods intended to deceive and thereby deprive will not make out the criminal offence of fraud: "I agree with counsel for the appellant that it cannot be said in every case where the trier of fact determines that conduct falls below the highest standard of straightforwardness or honourable dealings that that finding alone would be sufficient to make out a case of fraud or conspiracy to defraud. I think that imposes too high a standard against which to measure criminality." (*Ibid*, at para 15) "A person's business conduct or ethics may fall short of being of the highest standard of straightforward or honourable dealings and yet it could not be said that such a failure would constitute a crime in every case." (*Ibid*, at para 18)

[758] Mr. Bayne indicated that a number of guiding legal principals emerge from the case law on fraud:

1. The *actus reus* of criminal fraud requires the intentional/deliberate commission of a "prohibited" act, an intentional act of dishonesty (deliberate deceit, falsehood or other fraudulent means): "the prohibited *actus reus*." (*Théroux*);

2. Negligent, careless or erroneous misrepresentations will not suffice to constitute the *actus reus* of fraud; nor will sharp practice nor taking advantage of an opportunity presented nor poor financial (or administrative) management nor conduct that merely falls below the highest standard of straightforward or honourable dealings. The *actus reus* for fraud is an intentional or deliberate prohibited act of dishonesty. (*Théroux*, *Milec*, *Doren*);

3. The *mens rea* required for proof of criminal fraud is a subjective guilty mind, the accused person's subjective knowledge that his/her act is prohibited and that deprivation will result: "the accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established." (*Théroux, Milec)*;

4. The subjective test for fraudulent *mens rea* requires consideration of the facts as the accused believed them to be: "the court looks to the accused's intention and the facts as the accused believed them to be." (*Théroux, Milec*). If the accused believed factually that the act was not prohibited (or if there is a reasonable doubt about this), there is no proof of the subjective *mens rea* required for

fraud;

5. What the accused was told by someone on whom he relied (a bank manager as in *Milec* or an authoritative Senate leader, for example) is relevant to whether criminal *mens rea* for fraud has been proved or not (*Milec*);

6. If the evidence lacks classic "badges of fraud", such as diversion of monies for personal use, or kickbacks sought and/or paid, courts (including appeal courts) will consider this relevant on the issues of *actus reus* and *mens rea* for fraud (*Milec)*

BREACH OF TRUST

[759] Section 122 of the *Criminal Code* reads as follows:

> Breach of trust by public officer – Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

Jurisprudence: Breach of Trust

[760] The unanimous decision in 2006 of the Supreme Court of Canada in *R. v. Boulanger,* [2006] S.C.J. No. 32, is the leading Canadian jurisprudence on the required constituent elements of the offence of breach of trust by a public officer, s. 122 of the *Criminal Code*. The subsequent Ontario decisions of *R. v. Radwanski,* [2009] O.J. No. 617, and *R. v. Lavigne,* [2011] O.J. No. 1193 represent relevant applications of *Boulanger* and consideration of related fraud charges.

[761] In *Boulanger,* the Supreme Court reversed a breach of trust conviction and entered an acquittal. The appeal required the Supreme Court, in the words of McLachlin, C.J., "to clarify those elements" of the crime of breach of trust. (*supra,* at paras 1; 4; 7)

[762] Boulanger was a municipal official (director of public security of Varennes, Quebec) whose daughter was involved in a motor vehicle accident. He directed the investigating officer to prepare a second, "more complete" accident report which led to the conclusion that his daughter was not at fault and meaning that Boulanger did not have to pay the insurance deductible. (*Ibid,* at para. 2)

[763] The Supreme Court analyzed the common law roots of the s. 122 offence, noting that "error in judgment" did not make out the offence and that proof of "corruption" was required, not mere "mistake or error". (*Ibid,* at paras 11-18) As well, the common law required that "the misconduct at issue be serious misconduct: there must be a serious departure from proper standards… A mistake, even a serious one, will not suffice." (*Ibid,* at para. 28) The Supreme Court rejected the concept of "nonfeasance" ("neglect of official duty" as sufficient

to constitute the offence, requiring proof of "misfeasance" requiring "dishonesty, corruption or oppression." (*Ibid,* at paras. 30-41)

[764] The Supreme Court endorsed the 1992 decision of the Quebec Court of Appeal in *Perreault* which "stressed the need for a meaningful distinction between administrative fault and criminal behaviour." (*Ibid*, at para. 43)

[765] The Supreme Court defined its task in *Boulanger*: "We are faced with the task of defining the *mens rea* and the *actus reus* of the Canadian offence of breach of trust by a public officer set out in s. 122. The matter is important." Because reputation and liberty were at stake, the Court stated that "Public officers, like other members of the public, are entitled to know where the line lies that distinguishes administrative fault from criminal liability." (*Ibid,* at para 47)

[766] Discussing the required *actus reus* for the crime of breach of trust, the Court noted that it could be a violation of a duty "imposed by law or regulation" or "by a guideline." However, "it cannot be that every breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public's trust." (*Ibid*, at paras 49-50) The Court went on, importantly, to state that "This said, perfection has never been the standard for criminal liability in this domain: 'mistakes' and 'errors in judgment' have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. … What is required is conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. … As stated in *R. v. Creighton*, [1993] 3 S.C.R. 3, "[t]he law does not lightly brand a person as a criminal." (*Ibid,* at para 52) Thus, the *actus reus* for the offence must be "a marked departure from accepted standards" and not mistakes or errors in judgment or administrative fault.

[767] The *mens rea* required to make out the criminal offence of breach of trust, stated the Court, is the "elevated" standard of dishonest or corrupt intention. "Mistakes" or "errors of judgment" could not suffice. A "dishonest, partial, corrupt or oppressive" state of mind is essential. (*Ibid*, at paras. 55-56) The mere "fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*." (*Ibid*, at para. 57) If the action by the official was taken "honestly and in a genuine belief it was a proper exercise of his jurisdiction," no crime will be made out. (*Ibid*, at para. 57)

[768] The Court summarized its findings about the required *actus reus* and *mens rea* for breach of trust as follows:

> I conclude that the offence of breach of trust by a public officer will be established where the Crown proves beyond a reasonable doubt the following elements:
>
> 1. The accused is an official;
> 2. The accused was acting in connection with the duties of his or her office;

3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose. (*Ibid*, at para 58)

[769] Applying its *actus reus* and *mens rea* principles to the case of Mr. Boulanger, the Supreme Court found no proof beyond a reasonable doubt of either the required *actus reus* or *mens rea* to constitute the criminal offence. Boulanger's act, which clearly benefited him, represented an error in judgment (in directing the second, more favourable report) not a marked departure from the standards expected or accepted of one in his official position. In respect of *mens rea*, Boulanger's conduct was occasioned, not by corrupt or dishonest intention (beyond a reasonable doubt), but by an honest (though mistaken) belief that it was a proper exercise of his power, even though this was an error in judgment by Boulanger (he should have had his insurer deal with the investigator). There was a "reasonable doubt that the *mens rea* necessary for conviction under s. 122 of the *Criminal Code* was established. (*Ibid*, at paras 63-67)

[770] Mr. Bayne pointed out that in *Boulanger* the Court noted as relevant that Boulanger had not directed that the 2nd report be falsified (just as Senator Duffy directed no falsification of services invoices or travel or living expenses incurred).

[771] The following key legal principles concerning the breach of trust criminal offence emerge from the decision in *Boulanger*:

> Serious, marked departures from the proven standard of conduct expected and accepted of peers in the same position is required, not errors in judgment or mistakes, even serious ones;
>
> Administrative fault is different from criminal fault and the courts must be alert to maintain this "meaningful distinction";
>
> The law does not lightly brand a person as a criminal;
>
> The "elevated" mental culpability of a "corrupt" or "dishonest" or "oppressive" intent must be proved beyond a reasonable doubt;
>
> If there is any reasonable doubt that the accused acted out of an honest (even if mistaken) belief that his conduct was a proper exercise of his jurisdiction, power or discretion, he is entitled to be acquitted, as proof of the required *mens rea* will be lacking;
>
> It will be factually relevant to the consideration of whether the requisite *mens rea* has been proved, that there is no evidence that the accused directed falsification of

a document (a report or an invoice, for example).

[772] In *Radwanski*, Belanger, J., applied *Boulanger* (and *Théroux*) – in a case highly applicable to the Duffy case – to acquit on fraud and breach of trust charges. *Radwanski*, its facts and reasoning, bear close consideration.

The facts in Radwanski:

[773] Radwanski (R) was charged with one Lamarche (L) with four counts, two of fraud and two of breach of trust. The fraud charges related to a $15,000 travel advance. The breach of trust charges related to alleged contraventions of policy, conduct code employment terms and legislation relating to R's position as Privacy Commissioner for Canada (the Conflict of Interest and Post-Employment Code for Public Officer Holders, Treasury Board Hospitality Policy, the Financial Administration Act and Terms and Conditions of Employment for Public Office Holders). In particular, R's charges involved three distinct set of activities:

i. Contravention of the hospitality policy

ii. Improper use of travel advances

iii. Cash-out of unearned annual leave pay to Radwanski. (*Radwanski*, *supra* paras 1-3

[774] L was an advisor and then chief of staff to the office of the Privacy Commissioner.

[775] One Donna Vallieres (DV) was an employee in the Privacy Commissioner's office (Director General of Communications). (*Ibid*, at paras. 9-10)

[776] The hospitality claims involved $24,009.14 filed for meals in the NCR (National Capital Region) with, principally R and DV, at well-known restaurants. All hospitality expense claims were documented and submitted by R or on his behalf. (*Ibid*, at para. 13)

[777] The Hospitality Policy created a discretion in R, although generally hospitality such as meals and beverages, were not to be offered to government employees or during meetings of close colleagues working together on a regular basis, unless the work session extended over meal hours. (*Ibid*, para. 14)

[778] No evidence was called at the trial concerning periodic audits of this policy (unlike the evidence in the Duffy trial of Exhibit A, Tab 20, the 11th Report of the Standing Committee on policies and practices relating to living expenses, travel expenses and services contracts). (*Ibid*, para. 14)

[779] The evidence was that both R and DV had sizeable offices and 2 available boardrooms for meetings: there was clearly ample space available for meetings with staff. (*Ibid*, at para. 14)

[780] R testified that he had participated in meetings with others of equal rank where ex-

pensive restaurant hospitality was extended to employees and that he had been advised by Julien Delisle (executive director of the office of the Information Commissioner) that he, R, had the discretion to extend hospitality (restaurant meals) to DV as "working lunches" once or twice a week. Delisle, in his evidence, stated that he said once or twice per month or "maybe" once per week. (*Ibid*, at paras. 15-17)

[781] R further testified that he did not recall ever seeing/reading the hospitality policy but rather relied on the "administrative experts" in his office. He testified that he was claustrophobic in the windowless boardroom(s) and that the restaurant lunches permitted space and privacy and he could "see and be seen" by other senior officials. (*Ibid*, para 15)

[782] When appointed Privacy Commissioner, R had no prior government administrative experience. He had been a journalist, author and advisor with expertise in communications and policy, not administration. R said that was why he relied on the advice and expertise of others, such as Delisle, a career civil servant. (*Ibid*, para. 16)

[783] R testified that all lunches with DV were business, not social, affairs. DV was not called to give evidence. (*Ibid*, at para. 18)

[784] Belanger, J., noted that no evidence of normative practice of others in R's position was called by the Crown: "Apart from non-contextual tidbits about expense items by other deputy ministers or the Auditor General, no evidence of any kind was called to show the frequency, location and amounts expended by other senior government officials at Mr. Radwanski's level for staff hospitality over comparable periods of time. … Absent such comparators, however, it is impossible for me to assert that the hospitality claims made or approved by Mr. Radwanski are indicia of criminality either as frauds or breaches of the public trust. As Commissioner, Mr. Radwanski was given a wide and important discretion." (*Ibid*, at paras. 19-20) Finding that R's exercise of his wide discretion might justifiably be called "unwise" or even verging "on the bizarre" (the off-site meetings at restaurants with DV), or were even at "the extreme high end of the discretionary range permitted to persons in his situation", Justice Belanger applied *Boulanger* to acquit R of breach of trust.

[785] Justice Belanger quoted directly from paragraphs 50 through 58 of *Boulanger*: not every breach of an appropriate standard of conduct constitutes the crime of breach of trust; a marked departure from proven acceptable standards is required; "mistakes", "errors of judgment" and "administrative fault" do not amount to the crime of breach of trust; breach of trust requires more than "conduct meriting civil or administrative sanction"; criminal breach of trust requires proof of "an elevated" stated of mental culpability, a "dishonest, partial, corrupt or oppressive purpose"/intent. (*Ibid*, at para. 21)

[786] Justice Belanger held that without actual evidence of the normative conduct and practices of similarly situated officials, he could not find R guilty of breach of trust: "Without the comparables to which I have referred, it is impossible for me to state that Mr. Radwanski's conduct constituted a marked departure from standards expected of an individual in his position of public trust." (*Ibid*, at para. 22)

[787] Justice Belanger also noted that R had filed openly with the appropriate authority his expense claims and they were verifiable: there was no evidence that R fabricated his expenses. (*Ibid*, at para 22)

[788] Mr. Bayne reminded the court that that Senator Duffy had likewise filed all his claims openly.

[789] Justice Belanger then turned to consideration of the travel advances that gave rise to charges of fraud and breach of trust against R.

[790] The practice in the Office of the Commissioner was to issue "travel-specific advances" (for upcoming identified specific trips) and "standing advances" (for unspecified future trips). Two "standing advance" request forms were completed by R, each for $15,000: the forms had as their stated purpose (under "purpose of travel") only "Special Travel Advance re: Amex" or "Special Travel Advance". One form was used for both travel-specific and standing advances. R had travel-specific plus a standing advance plus his Amex card all at the same time. This was "not the best practice" and was "somewhat irregular." (*Ibid*, paras 24-31)

[791] At the end of one fiscal year (2002-03), R had a $15,000 standing advance outstanding. L lent R $15,000 to pay this off (March 31st, 2003) and then R requested almost immediately and L approved a new $15,000 standing travel advance which was paid to R on April 24, 2003. This amount R used to pay L back his $15,000 loan. (*Ibid*, at para. 33)

[792] The original standing travel advance (for 2002-03) to R was, as Belanger, J. noted, "perhaps irregular" but was nevertheless permitted by the wording of the existing Regulations. (*Ibid*, at paras. 33-34)

[793] Belanger, J., found that R's record keeping in relation to travel expenses was "less than meticulous and careful". R accumulated receipts in a bag similar to a Loblaws bag and turned them over to his secretary for claiming on his return. He was late in some instances in providing receipts and he commingled receipts from different trips. R's assistant testified that the receipts did not justify (total) the $15,000 standing advance R had received to pay off his Amex balance. R testified that he believed this was a mistake. He testified that he had discussed this situation with Julien Delisle who had suggested that the standing advance be issued to R while "the errors were being sorted out." (*Ibid*, at paras. 35-41)

[794] R testified that he was confident he was in compliance with policy because Delisle had suggested the standing advance. Delisle denied telling R this. (*Ibid*, at paras. 41-42)

[795] Belanger, J., observed that it was "very difficult to ascertain which of the two versions is true," but that "a motive of untruthfulness cannot be attributed to an accused person solely based on his status as an accused person" and that "Despite Mr. Delisle's evidence I have no reason to disbelieve Mr. Radwanski when he says he was acting on the recommendation of" Delisle. (*Ibid*, at paras. 43 and 49)

[796] Mr. Bayne stressed that there is no evidentiary contradiction of Senator Duffy's evidence as to what he was told by Senator Tkachuk about designating P.E.I. as his primary residence and making NCR living expense claims and about "partisan activities" which can be properly expensed as the Crown never called Senator Tkachuk to give any evidence.

[797] Belanger, J., stated that the essence of the Crown's allegation of fraud and breach of trust was that when it became clear that the first $15,000 standing advance would show up in the public accounts at the end of 2002-03, R and L engaged in a scheme to evade that exposure; L loaned R the money, R paid down the first advance, a second advance was obtained by R immediately in the new fiscal year and R repaid L with the second standing travel advance: "The scheme, says the Crown, allowed Mr. Radwanski to enjoy an interest free loan of $15,000 from the Government." Belanger, J., stated: "I do not view matters in the same light." (*Ibid*, at paras. 47-48)

[798] Applying *Boulanger*, Belanger, J., held that, if the Court accepted or could not reject that R had been told by Delisle to resort to the standing advance, then even if R's conduct represented a serious and marked departure from expected standards there must be at least a reasonable doubt that he had the requisite *mens rea*, the subjective mental element, to commit the crime of breach of trust. In respect of the fraud allegation, and applying *Théroux*, Belanger, J., held that "similarly, and for the same reasons, on Mr. Radwanski's version, there must be a doubt that he was subjectively aware that he was undertaking a prohibited act by renewing the advance in the new fiscal year." (*Ibid*, at para. 51)

[799] Belanger, J., observed, in respect of his findings in respect of the breach of trust and fraud charges, that R "had very little practical administrative experience when he was appointed" and so his negligence in accounting for expenses could be understood in that context. As well there was evidence of administrative disorganization throughout the office of the Commissioner (just as the evidence of Exhibit A Tab 20 makes clear the lack of communication and understanding of policy, the difference between policy and normative practise, and the lack of clarity in policy.) (*Ibid*, at paras. 52-53)

[800] Belanger, J., distinguished the *Radwansaki* case from *R. v. Lemire*, [1965] SCR 174 (on which the Crown relies) where the accused "had knowingly fabricated expense items that were clearly fictitious." (*Radwanski*, *supra*, at para. 54) R. may have been "negligent and cavalier" in his accounting and office administration, but that did not constitute fraud or breach of trust. (*Ibid*, at para. 56)

[801] Justice Belanger made the following comments, highly applicable to the Duffy case: "the law does 'not lightly brand a person as a criminal.' Too low a 'threshold would denude the concept of breach of trust of its meaning. It would overlook the range of regulations, guidelines and codes of ethics to which we subject officials, many of which provide for serious disciplinary sanctions,' to use the language of the Supreme Court in *Boulanger* (*supra*). Indeed, Mr. Radwanski's behaviour resulted in the most serious of sanctions, including, of course, his [forced] resignation as a result of the June 23, 2003 Order-in-Council and the virtual depletion of all of his entitlements by the set-offs previously mentioned." (*Ibid*, at pa-

ra. 55) Similarly, Senator Duffy was compelled to resign from the Senate Conservative caucus and was suspended from the Senate without a hearing, both in 2013. Mr. Bayne is strongly of the view that Senator Duffy has been presumed guilty in the media and unfairly characterized as a criminal in commentary from editorials to political cartoons without a trial or a full hearing of the evidence and that his reputation has been reduced to tatters. Mr. Bayne says that only the courts can vindicate the presumption of innocence.

[802] Belanger, J., also acquitted R of fraud and breach of trust in respect of R's cash-out of unearned annual leave pay of $16,605.53.

[803] Evidence was tendered that cash-out of annual leave could not exceed accrued entitlement. A Human Resources compensation specialist testified that R was not entitled to have his entire annual leave cashed as it was not yet earned. L told this HR person to pay out R's unearned leave. R had asked L to approach administration officials about the cash-out because he (R) would not be taking the vacation time and would therefore accrue the vacation time and would therefore accrue the leave pay in the future. R used the payout to buy furniture for a condo he had purchased. R testified that he had merely requested L to inquire whether such a payout would be possible and he subsequently received a cheque in payment; he said he did not direct such a pay-out.

[804] Justice Belanger found that he had no reason to reject R's evidence that he had no intention to contravene policy on cashing out accrued annual leave. Justice Belanger noted that "this was all done quite openly"; no documents were falsified. Highly relevant to the Duffy case, Justice Belanger observed that "Finally, without wishing to put too fine a point on it, when one reads the Terms and Conditions booklet there is no outright prohibition" against taking the payout in advance. Even if there was a breach of the rules in the booklet, it "cannot be said to be criminal in nature." Applying *Boulanger*, there was an absence of the required proof beyond a reasonable doubt of the "elevated" *mens rea* of "dishonest, partial, corrupt or oppressive purpose." (*Ibid*, at paras. 77-79)

[805] Similarly, applying *Théroux*, there was no proof of criminal fraud. While R was not entitled to the annual leave payment when received, based on R's evidence "there would at least be a reasonable doubt that Mr. Radwanski thought he was undertaking a prohibited act." (*Ibid*, at para 80) The required proof of *mens rea* for fraud was lacking.

[806] The Defence urges that Justice Belanger's decision in *Radwanski* is persuasive authority for the following propositions, all in application of the Supreme Court's decisions in *Boulanger* and *Théroux*:

1. In the absence of actual comparative evidence as to the normative practice of similarly situated officials, it will be "impossible" to find guilt, either as criminal breach of trust or fraud, on the basis of a "marked departure" from standards expected or accepted of an individual in the position of the accused or on the basis of the knowing and deliberate commission of a prohibited act (in the Duffy case, there is an absence of inculpatory evidence of the comparative

normative practices of other Senators, but an abundance of exculpatory evidence.)

2. Where "a wide and important discretion" is given to an official, even if it is exercised unwisely or negligently, or at the extreme high end of discretionary conduct, it will not be criminal absent agent proof of specific intent to defraud or corrupt purpose. Discretionary conduct lessens the likelihood of a finding of criminal fraud or breach of trust, and is an important contextual consideration in evaluation the conduct and *mens rea* of an accused person.

3. The open submission of expense claims for review and verification by appropriate authorities is a factor tending to negate criminal *actus reus* and/or *mens rea*. Another such factor is the absence of evidence of fabrication of expenses or invoices.

4. The evidence of an accused person given under oath, even when directly contradicted by the evidence of another witness, ought not to be rejected on the basis that he is the accused. The Defence reminds the court that in the absence of evidence contradicting key parts of the evidence of an accused person (such as Senator Duffy's evidence of his conversations with Prime Minister Harper, Senator Tkachuk and Senator LeBreton), that evidence is more clearly entitled to acceptance and weight, being uncontradicted.

5. The lack of administrative experience is a relevant factor in assessing an accused person's conduct and state of mind in relation, particularly, to administrative expense claims and alleged criminal conduct.

6. What the accused person has been told by an authoritative other, on whom the accused relies, is an important factor in determining whether the accused acted with criminal *mens rea* or not.

[807] The 2011 decision in *Lavigne* demonstrates the critical importance of the particular facts of a given case. Senator Lavigne (L) was convicted of fraud in respect of $10,000 worth of false mileage expense claims for expenses he never actually incurred. He was convicted of breach of trust for having a Senate employee, at Senate expense and during regular working hours, cut down trees on his private property and for drafting false letters attributed to the employee claiming the private work was done during the employee's time off.

[808] Mr. Gendron, Senator Lavigne's parliamentary assistant, charged L $50.00 per round trip to drive L between Montreal and Ottawa in Gendron's vehicle. L paid the $50.00 in cash. However, for 16.5 months (April 2002 to August 2003) Gendron drove himself only – L did not even make the trip with Gendron. Yet for all of these "trips", L claimed and was reimbursed by the Senate $217.50 per trip, both for the trips that had actually cost L only $50.00 as well as for the many "trips" L never actually made at all. (*Lavigne, supra*, at paras 1-9; 28-32)

[809] Daniel Côté was hired by L to work as a research assistant. Côté often drove L (between Montreal and Ottawa) and was unaware that he was entitled therefore to mileage expenses. L told Côté that Côté's travel expenses were included in his salary, yet L claimed and was paid the Côté mileage expenses although his car had not been used and he had incurred in fact no mileage expense (i.e. L deceived and defrauded his own employee as well as the Senate). (*Ibid*, at paras. 16-27; 33-36)

[810] Applying *Théroux*, Smith, J., found that L made false and dishonest mileage expense claims for trips he had both never taken and on which his vehicle had not been driven. L personally pocketed the expense money for trips he knew he'd never taken, for expenses he knew he'd never incurred. He dishonestly appropriated expense money actually owed to his employees. (*Ibid*, at paras. 38-52) The prohibited *actus reus* of dishonesty was made out.

[811] In respect of the *mens rea* for fraud, Smith, J., found that L knew that, despite the fact that the SARs were only consolidated in 2004, mileage could only be claimed for the use of one's own vehicle and for trips/travel actually taken: Senate officials (Belilse, Quevillon and Dufour) had explained this to L and the expense claim form indicated this. In addition, L had previously been an MP "for many years" and had experience making travel claims. Thus L subjectively knew he was making false travel/mileage claims (in many/most cases he had never even made the trip), for expenses he had not incurred: "Senator Lavigne hid the fact that he had not driven his own vehicle, that he had not travelled to Ottawa with Mr. Gendron…" (*Ibid*, at paras. 55-75)

[812] In respect of the breach of trust charge, Smith, J., applied *Boulanger* to convict L.

[813] L instructed Côté, L's Senate research assistant, to cut down trees on L's private property in Wakefield, Quebec, in order to connect hydro to the property. Côté worked during regular weekly working hours while the Senate was sitting. The days of work cutting trees on L's property, plus lodging expenses for Côté were all charged by L to the Senate. (*Ibid*, at 77-80)

[814] Smith, J., found, unsurprisingly, that Côté's work cutting trees on L's private property was not work related in any way to Senate activities. Côté, for the private tree-cutting time period, did no other or Senate-related work. L claimed that Côté had accumulated overtime and had taken time off to cut the trees; Côté denied that he had accumulated overtime or had taken time off to cut the trees. Letters signed by Côté claiming he had done the work on his time off were false and had been drafted by L (and others) to protect L. (*Ibid*, at 82-90)

[815] Smith, J., further found that because L had directed Côté to spend approximately two months (393 hours per Côté's records) devoted solely to work on L's private property for L's personal benefit, this constituted the serious and marked departure from the standard expected of one in L's position. (*Ibid*, at paras. 91-94)

[816] Smith, J., held that "breach of trust by a public official is a general intent offence." This is arguably an error of law as *Boulanger* had made expressly clear that an "elevated"

culpable mental state of "corrupt" or "dishonest" purpose was required to be proved. However, on the facts of the case, and given the false letters drafted by L to cover himself (he had even lied to Côté that he – L – had the permission of Hydro-Quebec and his neighbour to cut the trees, which was not the case), it may be argued that this error caused no miscarriage of justice (and the finding was not appealed). (*Ibid*, at paras. 85; 95-97)

[817] The decision in 2011 by Justice Cooper of the Ontario Court of Justice in the case of *R. v. Krdzalic*, [2011] O.J. No. 6058 provides another helpful example of the application of *Boulanger* to a breach of trust allegation. Cooper J. applied *Boulanger* to acquit *Krdzalic*, an OPP officer on the basis that there was neither the required *actus reus* or *mens rea* for breach of trust proved beyond reasonable doubt.

[818] Unknown to Krdzalic (K), the RCMP had obtained judicial authorization to intercept the communications of Melissa Alic, K's second cousin. At the request of one Trklja, Alic asked K to check out a license plate of a male person (on the MTO database). In exchanged text messages with Alic, K said he would do so for "$$$$$"; that he was "not supposed to do this shit"; that Alic should not "tell anyone what I have done." In his testimony, the accused K said he never really wanted or received any money (he'd been joking) and did this because Alic was a family member. K provided the name and address of the license plate owner. K "knew he was breaking OPP rules, but did not think he was committing a crime." He accessed the MTO databank while he was off duty. (*Ibid*, at paras. 1-16)

[819] Cooper J. quoted extensively from *Boulanger* in finding K not guilty. Cooper J. accepted K's evidence that he was not seeking payment for the information; that he "knew what he was doing was contrary to OPP rules and was caught in a conflict between a family member and his police duties"; that K was unaware Alic was being investigated. The learned Justice observed that "As the Crown pointed out, it is odd that the defendant never asked Ms. Alic why she wanted the name and address of the person behind the license plate. A suspicious mind might jump to the conclusion that he knew his cousin was involved in criminal endeavours and wanted to know if the person in question was a police officer." But Cooper J. did not jump to such a conclusion: while it was unclear to him why K did not ask, Cooper J. was "unable to infer any criminal intent from his failure to do so. Mere suspicion is not an acceptable alternative to proof beyond a reasonable doubt." (*Ibid*, at paras. 17-21; 22-26)

[820] Justice Cooper observed that the MTO data bank, unlike CIPC, was accessible to people like private investigators and parking lot attendants. He noted that police disciplinary proceedings might be a more appropriate forum than the criminal court. (*Ibid*, at paras. 27-28)

[821] Given the right facts, Cooper J., held that a police officer releasing CIPC or MTO information could be markedly departing from expected and accepted standards, but "on the facts before me, I do not see this case as a serious and marked departure from the standards expected of an individual in the accused's position of public trust." (*Ibid*, at para. 31) (i.e. no proof of *actus reus*).

[822] On the issue of proof of the required *mens rea* for breach of trust, Cooper, J., found that "While I cannot say that the release of the information by Krdzalic to his cousin was for the public good, I cannot conclude it was for any dishonest, corrupt or oppressive purpose. At its highest, it was for a 'partial' purpose in that it was doing a favour for a cousin." (*Ibid*, at para. 30) The "elevated" standard of culpable mind required by *Boulanger* was not made out beyond a reasonable doubt.

[823] *Krdzalic* is a useful example of the *Boulanger* proposition that not every breach of the appropriate standard of conduct will amount to criminal breach of trust. In *Krdzalic* the OPP rules had been broken, even knowingly, but the elements of criminal breach of trust as required by *Boulanger*, had not. Cooper, J., also wisely observed that suspicion was not a substitute for required proof beyond a reasonable doubt.

WILFUL BLINDNESS

[824] Mr. Holmes directs the court's attention to the concept and principles of wilful blindness.

[825] Wilful blindness exists where "a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth." It requires "actual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion." (*R. v. Sansregret*, [1985] 1 S.C.R. 570 at paras 21-22; *R. v. Duong*, [1998] O.J. No. 1681 Ont. C.A. at para 23)

[826] Wilful blindness is purely subjective. "The question is not whether the accused should have been suspicious, but whether the accused was in fact suspicious." (*R. v. Malfara*, [2006] O.J. No. 2069 Ont. C.A. at para 2)

[827] Where wilful blindness is found, the law deems knowledge on the part of the accused. Put another way, wilful blindness will fulfil the *mens rea* requirement. Doherty J.A., in *R. v. Duong*, *supra*, at paragraph 23 states:

> [23] [...] Where the Crown proves the existence of a fact in issue and knowledge of that fact is a component of the fault requirement of the crime charged, wilful blindness as to the existence of that fact is sufficient to establish a culpable state of mind.

[828] McIntyre J. in *R. v. Sansregret, supra,* at paragraph 22 cites a definition of wilful blindness from a criminal law text by Glanville Williams, who cautions against overuse of the doctrine. The quote is instructive and remains prolific in subsequent decisions:

> [22] …The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the

> final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

[829] In *R. v. Briscoe*, 2010 SCC 13 at paragraph 24, Charron J., citing Professor Don Stuart, suggests an alternate, more accurate descriptor for the doctrine: "deliberate ignorance," as it connotes "an actual process of suppressing a suspicion." So understood, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind." (*Don Stuart, Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Carswell, 2007) at 241)

[830] The Supreme Court in *Sansregret*, *supra*, at paragraphs 21-22 takes care to note that wilful blindness is distinct from recklessness. One is reckless who sees the risk of a prohibited result, and nonetheless takes the chance. One is wilfully blind who, aware of the need for inquiry, declines to make the inquiry because he or she does not want to hear the answer. Recklessness has both subjective and objective components. To be reckless, one must do something that is "objectively determined to risk bringing about a prohibited result." Wilful blindness is a purely subjective form of *mens rea*.

[831] The mere fact that an accused has made inquiries does not absolve him or her from a finding of guilt based on wilful blindness. In *R. v. Lagace*, [2003] O.J. No. 4328 Ont. C.A., Doherty J.A. noted:

> [28] …Where an accused makes some inquiry, the question remains whether that accused harboured real suspicions after that inquiry and refrained from making further inquiries because she preferred to remain ignorant of the truth. Where some inquiry is made, the nature of that inquiry will be an important consideration in determining whether the accused remained suspicious and chose to refrain from further inquiry because she preferred to remain deliberately ignorant of the truth.

[832] Similarly, in *R. v. Rashidi-Alavije*, 2007 ONCA 712, the accused was convicted by a jury of importing a controlled substance, despite having made some inquiries upon his suspicions. While at an airport in Bulgaria, the accused was approached by an unnamed stranger who requested that he take a suitcase with him to Toronto, as the stranger had too many. The accused agreed to help, but only after asking what was in the suitcase, and then opening it and examining its contents.

[833] In *Rashidi-Alaviji*, *supra*, Gillese J.A. upheld the trial judge's instruction to the jury on wilful blindness, and observed at paragraph 24:

> [24] … While the appellant made some inquiries, it was open to the jury to find that he still harboured suspicions. For example, there is no explanation for why the appellant failed to inquire about the smell of glue in the suitcase which must have been evident to him when he examined its contents nor why he failed to inquire about the suitcase's abnormal weight. Given these facts, [...] there was ample evi-

> dence on which the jury could find that the appellant still harboured suspicions even if a basic inquiry had been conducted.

[834] In *R. v. Oulianov*, [2006] O.J. No. 3340, Kitely J. of the Ontario Superior Court convicted the accused of fraud on the basis of wilful blindness and noted at paragraph 39:

> [39] … On a charge of fraud, the Crown is required to prove subjective knowledge about the facts underlying the court's finding of deceit, falsehood or other fraudulent means. While the standard is subjective, the knowledge of the accused need be merely in relation to the facts of the transaction and the circumstances in which it was undertaken, not the deceitful, false, or fraudulent nature thereof. Furthermore, the subjective standard does not require actual knowledge. The characterization of wilful blindness by the Court of Appeal in *Harding* as equivalent to knowledge makes it clear that wilful blindness will suffice.

[835] In *Oulianov*, *supra*, the payee on a substantial cheque had been altered to reflect the name of the accused's business. The accused deposited the cheque. Kitely J. ultimately found that the accused had a real suspicion that the cheque was not legitimate and did not make the relevant inquiries. He did not press for an explanation "as to how a cheque drawn on what is clearly a grocery store account in Peterborough had come to be made payable to Alfa Group [his business]."

[836] Kitely J. wrote at paragraphs 50 - 51 that:

> [50] "… However, it is compelling that Mr. Oulianov, at the urging of his brother, met a man in a coffee shop whom he barely knew, asked where the cheque had come from but not how it came to be made payable to Alfa Group, and accepted for deposit a cheque payable to Mr. Oulianov's company knowing that the payer had nothing to do with Mr. Oulianov's company.
>
> [51] I find that Mr. Oulianov was wilfully blind when he received and attempted to negotiate the cheque.

ROLE OF THE COURT/ REASONABLE DOUBT/ PRESUMPTION OF INNOCENCE/ BURDEN OF PROOF/ ONUS

[837] I have addressed most of these issues at the beginning of this judgment and do not intend to repeat my earlier remarks. However, Mr. Bayne included the following paragraph in his written submissions that raised one issue that I do wish to address.

[838] Mr. Bayne reminded the court that Senator Duffy is being judged in a criminal trial, not an administrative or Senate Committee hearing, or a disciplinary proceeding even though much or most of the evidence concerns the provisions of Senate administrative rules, policies, guidelines and practices and whether they existed or were clear or how they might be interpreted or were well communicated or were well understood or were breached or were not breached. All of the evidence, including the state of Senate rules and administrative

practises, must be judged in the criminal law context on the criminal standard of proof. Senator Duffy, although maligned in the national media (without all the facts being known), Mr. Bayne says and subjected to having his reputation destroyed by innuendo before his trial even began, is, in the criminal court, presumed innocent of each and every charge. The Crown must prove beyond reasonable doubt every essential element (*actus reus* and *mens rea*) of every count. Senator Duffy need not prove his innocence. The Crown must, with cogent evidence, displace the presumption of innocence but if any reasonable doubt remains on the evidence, he is entitled to be found not guilty in the criminal proceedings.

[839] Mr. Bayne, on more than one occasion during this trial, has commented on the media coverage surrounding Senator Duffy. I can assure counsel that media coverage does not enter into my determination of any of the issues that are before this court.

[840] Furthermore, I find that the media coverage of this trial from my viewpoint has been accurate and balanced and has consistently upheld the presumption of innocence principle.

CONCLUSIONS

General Recap

[841] A significant amount of evidence has been presented at this trial on the residency issue, the travel expense claims and the Donohue contracts and payments.

[842] Prior to ruling on counts 20 to 28 inclusion, it might be useful for me to recap several key findings that I have made in these proceedings.

[843] Firstly, I have found Senator Duffy to be a credible witness.

[844] Secondly, I have concluded that Senator Duffy is a hardworking Senator. This conclusion, in part, has been validated by Prime Minister Harper's ringing endorsement on June 11th, 2009 wherein he wrote, "Thanks for being one of my best, hardest-working appointments ever."

[845] Senator Duffy's work ethic also was demonstrated through his evidence, his diaries, and his executive assistants.

[846] Thirdly, Senator Duffy's appointment to the Senate instantly focused interest in his residency.

[847] Senator Duffy, in turn, immediately brought his concerns regarding his residency to the attention of appropriate individuals for advice and thereafter he acted upon the advice he received in good faith. It cannot be said that Senator Duffy was avoiding the residency question or trying to hide or ignore the issue.

[848] I agree with Mr. Bayne's submissions that in designating his "primary residence in

the province or territory that I represent" and making living expense claims for his "NCR" residence, Senator Duffy committed no prohibited act, violated no Senate rules and did not in all the circumstances commit the *actus reus* of fraud. Furthermore, he did not make his primary residence designation and living expense claims (made on the direct advice and instruction of his key Senate leader on the authoritative Standing Committee on Internal Economy) with the required proof beyond reasonable doubt of a "guilty mind", namely the subjective knowledge and belief that he was deliberately perpetrating a deceit on the Senate of Canada. "The facts as [Senator Duffy] believed them to be," including his reading and understanding of the SARs, the advice he had received from Senator Tkachuk (vice-chair of Internal Economy), the memorandum received from his Senate Leader LeBreton (authored by Mr. McCreery), the statements of the Prime Minister of Canada that appointment as a P.E.I. Senator would change the status of his P.E.I. residence, the wording of the designation/declaration form, the Constitutional importance to his Senatorial status of being "at all times" resident in P.E.I. (as set out in the letter of the law clerk Mr. Audcent), these and many other relevant evidentiary facts led Senator Duffy to believe that his designations and living expense claims were entirely appropriate and within the rules. He had no criminally fraudulent *mens rea*.

[849] Fourthly, I have ruled that all of the travel claims before the court were appropriate. In arriving at these conclusions, I considered the principles regarding the law on fraud and breach of trust. I do not intend to readdress the individual charges pertaining to the travel claims.

[850] Fifthly, I do not find that Senator Duffy was wilfully blind in connection with his dealings on any of the charges contained in counts one to twenty-eight inclusive.

Conclusion on Counts 21 and 22

[851] Senator Duffy was instrumental in obtaining contracts for two incorporated companies, Maple Ridge Media and Ottawa ICF, for writing, editorial services and speeches.

[852] Gerald Donohue was the operating mind behind these two entities. Monies were paid into the companies by Senate Finance. Thereafter, Mr. Donohue paid out funds to various individuals for goods and services. In addition, Mr. Donohue retained some of the money to cover his consulting services.

[853] Mr. Holmes categorized this arrangement as an illegal slush fund that allowed Senator Duffy free range as to how this money was to be spent. He also maintained that Senate Finance would have no knowledge or oversight over these funds.

[854] I note that Mr. Bayne's response to the oversight function: there was no oversight to avoid.

[855] Mr. Holmes considered this scheme as just another example of misrepresentation and deception on the part of Senator Duffy that included his residency and travel claims. Since I have already ruled that there was no impropriety in connection with Senator Duffy's residency and travel claims, we can focus on the flow of funds from Maple Ridge Media and

Ottawa ICF exclusively.

[856] I do not attach any sinister or fraudulent or breach of trust stigma to these contracts. Undoubtedly, it would have been preferable to itemize all the transactions as opposed to relying on the editorial/writing services umbrella.

[857] I find that Senator Duffy honestly was focused on a vehicle that allowed him as much flexibility as possible to facilitate him carrying out his Senate responsibilities and it was not intended as a means to bilk Senate Finance out of their resources.

[858] Senator Duffy recognized that the SARs gave him great latitude in using his discretion on hiring people to assist him in carrying out his duties as a Senator and paying for services to further his mandate as a Senator. Mr. Holmes conceded that parliamentary functions are broadly defined and that Senator Duffy had wide latitude in managing his parliamentary functions.

[859] Senate Finance showed great flexibility in how they managed their contracts. In fact, the rewriting of contracts after the work had already been completed did not seem to present any insurmountable hurdles.

[860] I find that Senate Finance regime was aware or should have been aware that Senator Duffy's corporate entity might very well outsource work and they might have been well advised to enquire as to how exactly their funds were being spent.

[861] As I listened to the evidence regarding the payments being made on Senator Duffy's direction, I was struck with an overriding and repetitive message and that was, "Senate funds for Senate business."

[862] The recipients of the funds from Maple Ridge Media and Ottawa ICF met the criteria for Senate Business.

[863] The circumstances of this case are a far cry from the usual fraud/breach of trust playbook. I was not presented with evidence suggesting expensive wining and dining or lavish living or pricey gambling junkets or secret financial hideaways.

[864] Now, fraud and breach of trust can occur outside the aforementioned examples. However, the thrust of all of Senator Duffy's perceived misadventures are focused on Senate business.

[865] I have stated earlier and I shall state it again, Senator Duffy's approach to several of the financial payments raises legitimate questions related to best practices and best results or best return for a particular expenditure. None of these considerations impact on criminal liability.

[866] To illustrate the foregoing paragraph one needs to go no further than to consider the following three contracts. Senator Duffy brought a new perspective to the area of contract

law. The allegations regarding his cousin, David McCabe, and Mr. Bourrie, and Ms. Cain altered the standard offer and acceptance approach to contracts. In the three cases that I have referenced, the eventual recipient of the funds did work for Senator Duffy without asking for payment. They were not expecting any payments. However, Senator Duffy, on his own, took the position that valuable work had been provided by each of the parties that it was only fair that they should be paid for their services. The contracts came into being with the cashing of the cheques. I find that the individual payments were certainly not exorbitant. These actions may have been unorthodox and in the case of Ms. Cain not within the SARs but they certainly don't have the hallmarks of fraud or breach of trust.

[867] I find that Senator Duffy honestly believed that he was working within the guidelines in the SARs when he made these payments and that he was using his assigned Senate resources properly in order that he might carry out his functions as a Senator.

[868] The *Senate Procurement Policy* that came into effect as of November 7, 2011 highlights a fundamental change in how contracts to acquire goods or services are to be pursued by Senators. This policy document is a very comprehensive blueprint designed to assist Senators step by step through the procurement process.

[869] The *Senate Procurement Policy* should be welcomed by Senate administration, the Senators, and the public at large. It does away with the uncertain guideline approach that was in place during the time Senator Duffy was carrying on his rather unorthodox but not criminal misadventures.

[870] As I examine each of the particular recipients of counts 21 and 22, I am aware of Mr. Bayne's list of the twelve evidentiary factors to keep in mind when determining whether the Crown has proven their case beyond a reasonable doubt.

[871] Each recipient did the work that they were paid for and did not provide Senator Duffy with any kick-back.

[872] I find that the speeches prepared by MacDonald, Levant, Brennan and Radwanski are all appropriate expenditures.

[873] I find that the consulting and advice services provided by Eastern Consulting Ltd./ McQuaid, William Kittelberg and Gerald Donohue are all appropriate expenditures.

[874] I find that Senator Duffy's reluctant payment to MQO Research is an appropriate expenditure.

[875] Mr. David McCabe provided Senator Duffy with a useful clipping service. Although Mr. McCabe is a cousin of Senator Duffy, in law he is not barred from receiving payment for his services.

[876] I find that Mark Bourrie's computer trolling skills were of assistance to Senator Duffy and were appropriate for reimbursement.

[877] Paying Mary McQuaid's expenses to attend in Ottawa and help out in Senator Duffy's office in the circumstances was a legitimate expenditure.

[878] Diane Scarf's Blackberry was purely a job related expense and Senator Duffy used his discretion to pay that expense through Mr. Donohue since his communication's budget had been exhausted. This was an appropriate expenditure.

[879] The Jiffy Photo/Mark Vermeer payments fall under the broad discretionary powers of Senator Duffy's miscellaneous office budget to provide small tokens to visitors etc. This appears to be a common practice on parliament Hill. These expenses are appropriate.

[880] Mr. Donohue stated that the clearest example of fraud/breach of trust involved Nils Ling. Mr. Ling wrote a speech for Senator Duffy on agriculture and was paid $2500.00 for his services. Mr. Holmes contends that Senator Duffy used this work product for his own personal gain and delivered it at the 75th Anniversary for the Canadian Federation of Agriculture and was paid $10,000.00.

[881] Mr. Ling was not called as a witness.

[882] Senator Duffy gave evidence indicating that he had commissioned this speech as a foundational speech similar to the one he had prepared by Mr. MacDonald. Mr. Ling's speech was placed on Senator Duffy's website. It also should be noted that Senator Duffy was a member of the Standing Committee on Agriculture and Forestry. This fact certainly supports the position that the speech was in fact a foundational speech and therefore an appropriate expense for Senate resources.

[883] This fact situation is more problematic than any of the other examples in counts 21 – 22.

[884] I find that the use of a speech paid for out of Senate funds should not be used for personal gain. However, I accept Senator Duffy's explanation that the primary purpose for commissioning of the speech was to provide a foundational speech and he also used it for a secondary purpose. I find that Senator Duffy did not possess any criminal intent in all of the circumstances.

[885] I am not satisfied beyond a reasonable doubt that Senator Duffy is guilty of Counts 21 -22 and accordingly, those counts are dismissed.

Counts 23 – 24

[886] I find that the counts involving Ms. Cain amount to an honest mistake on the part of Senator Duffy and that there was no criminal intent when he paid Ms. Cain a modest stipend for working as a volunteer in his Senate office. These counts are hereby dismissed.

Counts 25 - 26

[887] In addition to the comments that I have made under MAKE-UP SERVICES, I find that the payment to Ms. Lambert for emergency make-up services does not amount to criminal conduct. Senator Duffy exercised his discretion to obtain a make-up artist in a time sensitive situation not of his making. No hint of criminality is demonstrated in these circumstances. Accordingly, these counts are dismissed.

Counts 27 – 28

[888] I find that the relationship between Senator Duffy and Mike Croskery materially changed after Senator Duffy's appointment to the Senate from that of an exercise oriented regime personally benefiting Senator Duffy to that of a consultant based relationship assisting Senator Duffy dealing with issues of exercise as they related to an aging population. These counts hereby are dismissed.

CHARGES PERTAINING TO THE RECEIPT OF $90,172.24 PAYMENT, ORIGINATING FROM NIGEL WRIGHT

[889] The factual framework relating to these counts is explicitly outlined in the email traffic that flowed between members of the Prime Minister's Office (PMO), Senator Duffy, and Janice Payne, counsel for Senator Duffy.

[890] Before examining the email trail, it is beneficial to take a moment to examine the PMO. If anyone was under the impression that this organization was a benign group of bureaucrats taking care of the day to day tasks associated with the Prime Minister, they would be mistaken.

[891] The approximately one-hundred or so members of the PMO may be tasked to carry out the mundane matters of bureaucracy but the evidence in this trial shows that this group wields significant power in the corridors of Parliament Hill. All of the PMO witnesses called in this trial impressed me as being highly intelligent and hardworking individuals who executed their mandates with ruthless efficiency.

[892] In the case of Senator Duffy's situation, the common theme was to get it done. The "it" refers to the political storm created by Senator Duffy's residency and expense issues. The goal was to calm that storm. As the evidence will reveal, the methods employed to achieve a successful outcome to the problem seemed to have known no bounds. Some of the specifics will be dealt with subsequently in these reasons.

EMAILS: THE FACTS BEHIND THE PAYMENT

December 3-4, 2012 to January 31, 2013

[893] The story emerges in the media in Ottawa. (Dec. 3rd, 2012 (email #6) (Tab 1, Exhibit 45b).)

[894] The initial approach to the situation was to adopt a two-month "classic" political

damage control strategy that can best be characterized as "keep your head down and say nothing" and hope the story will go away. Nigel Wright used the following phrases in his evidence to capture the essence of this approach: "Classic that if no one's talking about it don't create a story"; don't fan the story flames; let the media interest "fall off" and don't drive "another media cycle".

[895] The PMO Director of Issues Management, Chris Woodcock's specific job was to monitor the media; to ascertain whether a news item has the potential for political damage or embarrassment to the Government; and to protect the Government of Canada's (and thereby the Prime Minister's) reputation. The Prime Minister was briefed daily by Mr. Woodcock on "the day's hot issues" and any items that "would ruin [The Prime Minister's] day."

[896] One of Nigel Wright's many roles, as head of the PMO, included an overall damage control role in respect to "matters that affected the government's reputation" or "could cause embarrassment" to the government.

[897] The media story that broke on December 3rd, 2012 highlighted the primary and secondary residency issue; the NCR living expenses and claims of Michael Duffy; where he spent most of his time; that he owned his Ottawa-area house before appointment; that he lived in Ottawa region since the 1970's; and whether it was valid to claim his P.E.I. residence/cottage as his primary residence. This same story re-emerged in February 2013 and was referred to within the confines of the PMO's inner circle in terms of "bleeding/agony/Chinese water torture."

[898] At this stage the PMO's office was not raising the issues that they subsequently deemed to be of great importance. There was no suggestion that Senator Duffy needed to repay (with or without interest) his housing claims. There was no suggestion raised regarding Senator Duffy admitting that he had made a "mistake". No one raised the issue that the situation was a matter of principle, or morals, or doing what was "right". The political response was calculated to ignore the outcry so as not to fan the flames and to let it die. In other words, the plan was to follow a tried and true "classic" political strategy.

[899] Mr. Bayne argued that from the outset Senator Duffy's situation was about political expediency and political damage control and was not about principles and morals.

[900] Mr. Bayne stated that the "mistake-repay scenario" (a political damage control scenario) is conceived later and forced upon Senator Duffy when the story proves to have "traction" (staying power). Counsel put forward the suggestion that even though many of the principals at the PMO believed that Senator Duffy's claims were within the rules of the SARs, they became intent on staunching the political "bleeding" as quickly as they could. It was all about the money and the problem was to be shut down. (email #127)

[901] It is important to note that Senator Tkachuk, Chair of the Standing Committee on Internal Economy publicly stated that the impugned living expense claims of Senator Duffy were valid within the existing Senate rules. (Exhibit 45(b) Tab 1)

[902] The newspaper article by Glen McGregor of the *Ottawa Citizen* on December 3, 2012 reported Senator Tkachuk's remarks and comments about Senator Duffy's residency and living allowances. Senator Tkachuk's responses included: that Duffy's living expense claims are "entirely within the rules"; that there is no reason for Senator Duffy not to claim the housing allowance; that Senator Duffy has a home here, so he can charge the daily rate; that there is no test to determine whether a Senator actually lives in his or her primary residence; that a lot of other Senators stay here all winter and then go home for the summer; and many Senators make similar claims for housing expenses.

[903] Mr. Bayne stated that Nigel Wright was fully aware of the aforementioned story because Senator Duffy specifically drew it to his attention

[904] Senator Duffy took the position that the media story was a "smear" because the "rules have been followed."

[905] Mr. Bayne stressed that Senator Duffy, far from hiding from a negative story, went to the top authorities to draw attention to the situation.

[906] Nigel Wright replied to Senator Duffy's concerns regarding the media article: "I am told you have complied with all applicable rules and that there would be several senators with similar arrangements. I think that the Standing Committee should review those rules." (Email #7)

[907] Mr. Bayne stated that the evidence demonstrates that this was always a purely political issue from the PMO's point of view. It was about political damage control and the strategy that might best achieve that goal.

[908] Counsel for Senator Duffy noted that if this was truly an issue of principle, of morality, or doing the "right thing", as some PMO witnesses came to claim, it was one on December 4, 2012. However, the actions of the PMO and Senate throughout December 2012 and January 2013 did not address any of these concerns.

[909] The PMO and Senate leadership seemed content with Senator Duffy's four years (2009-2012) of living expense claims and viewed them to be valid and entirely within the rules.

[910] No one was suggesting a RCMP reference at this time. The game plan was one of politically calculated inaction, a classic strategy.

[911] Senator LeBreton, Government leader in the Senate, was still advocating this strategy in January 2013 and encouraging Senator Duffy not to engage with Mr. McGregor and to just ignore him. (emails #10; 13)

[912] Mr. Bayne contends that the rest of the story told in emails is how this "classic" strategy of calculated passive political ignoring of the story and the explicit admission by the heads of the PMO and Senate that Senator Duffy's living expense claims were "entirely

within the rules" changed to an active "mistake" and "must repay" "scenario". Mr. Bayne takes the position that Senator Duffy never believed that he made a mistake and was forced/pressured to utter scripted lines to that effect. Furthermore, Mr. Bayne maintains that Senator Duffy never in truth made the payment but rather it was Prime Minister Harper's Chief of Staff, Nigel Wright, who personally and privately and secretly paid the funds for purely political damage control reasons. (emails #155; 346)

[913] Both Nigel Wright and Chris Woodcock confirmed the pressure that they applied on Senator Duffy in order to achieve their desired political results.

[914] Mr. Bayne advised the court that the payment was made through Senator Duffy to make it look like Senator Duffy was paying it and thereby advancing the PMO's political agenda. The payment was also designed to make it appear that Senator Duffy was repentant for this mistake.

[915] Mr. Bayne stated that the entire scheme designed by the PMO was intended to deceive the Canadian public and the Tory base.

[916] Counsel suggested that the initial supportive and calculated approach to the problem turned dramatically when Parliament reconvened at the end of January and start of February, 2013.

First Week of February (February 1 – 6, 2013)

[917] The media interest has not gone away. Senator LeBreton points out to Senator Duffy that there is nothing to be gained by speaking to Mr. McGregor. (email #13)

[918] Senator Carolyn Stewart-Olsen observes that the situation has become very troubling. (email #16)

[919] Senator Carolyn Stewart-Olson expresses her support for Senator Duffy assuring him that she has his back. (email #17)

[920] It is clear that Senator Duffy wants to provide a press release (Email #22) but was advised by Senator LeBreton (Cabinet Minister and Government Leader in the Senate) to hold off the release pending a decision from the PMO. (email #24) Senator Tkachuk is involved in the ongoing discussions.

[921] Nigel Wright is of the belief that the Duffy Affair is going to end badly early on in the proceedings. (email #21)

[922] Senator LeBreton now asks Senator Duffy to put something out in response to the stories. (Email #20) and the PMO and Senate hierarchies are becoming engaged in attempting to quell the rekindled interest in Senator Duffy's residential/expense issues.

February 7, 2013: As Senator LeBreton had promised, the PMO and Senate Leadership do

decide on a new political strategy

[923] The PMO and Senate Leadership strategy is revealed. (emails #28, 31, 32, and 33).

[924] To respond to the renewed stories/perceptual problems that pose potential serious political damage, a two – pronged strategy is developed in concert between the PMO and Senate leadership: Senators Tkachuk/Stewart-Olsen/LeBreton. (emails #25-41)

[925] The first prong of the strategy was announcing the plan to hire outside legal advice regarding Senator Duffy's residency and independent auditors to review the expenses issues. This approach had the advantage of buying time. (Feb 8, 2013 comments by Senator Tkachuk) (Tab 4, Exhibit 45b) (emails # 28, 31 and 32)

[926] This approach had the perceived bonus of preventing Senator Duffy from "going squirrelly on a bunch of weekend panel shows." (email #28)

[927] The second prong of the plan dealt with the options to deal with the problem.

[928] Nigel Wright states his go forward plan as follows: "As regards Senate expenses, the concept of a primary residence implies the existence of at least one other residence, So Mike could be primarily resident in the NCR for expense rules and still be constitutionally resident in P.E.I. That leaves the very big problem of his having collected $900.00 per month . The only plausible ways out of that are (i) it was wrong and he has to be disciplined and/or repay, or (ii) there was ambiguity so it will be clarified and he will not claim the amount going forward. Marjory assures me that no other CPC Senator claims the $900.00 per month in similar circumstances. Mike said that no one ever told him he shouldn't be doing it. (email #33)

[929] Mr. Bayne submits that ultimately this plan was shown/proven to be a bad plan because, although politically "plausible" (per Nigel Wright), it involved deliberate deceits and a cover-up. Mr. Bayne suggests that the main weakness of the proposal is that Senator Duffy was never willing to acknowledge a mistake or commit to personally repaying the money.

[930] Mr. Bayne maintains that Nigel Wright and Senator Tkachuk believed that Senator Duffy's claims were within the existing Senate rules but that that approach presented a political perceptual problem. Therefore, they opted for a dishonest strategy as opposed to an honest one involving a rules problem. Counsel points out that it is important to note that Nigel Wright had done his own legal analysis of the Senate rules and knew/believed that Senator Duffy was probably right; that the expense claims for NCR residence were probably valid; and that Senator Duffy was probably legally and technically right. However, from Nigel Wright's perspective, the situation was politically embarrassing and creating public agony. Therefore, Mr. Wright opted for and orchestrated a non-principled solution that was politically opportune. Mr. Bayne contends that Nigel Wright and his "small group" of PMO and Senate leaders had to overcome Senator Duffy's will to resist the mistake-repayment scenario, ultimately had to (in his own words) "basically force" Senator Duffy to appear to "repay" money he probably did not legally owe.

[931] Senator Duffy retains independent counsel to advise him. The PMO now presses the proposition that the mistake – repay approach is the "right thing to do."

[932] Mr. Bayne advises that Senator Duffy's statements consistently demonstrate a mind consistent with no criminal *mens rea*. (emails #6 and 39)

[933] Senator Duffy's statements show consistent state of mind: no criminal *mens rea* (emails #6 and 39).

[934] Mr. Bayne states that it takes fifteen days (February 8-22, 2013) for the PMO and Senate leadership to break Senator Duffy's resistance and "force" him into the false scenario because it was the "right thing to do."

The ten days, February 8th through 17th sees the PMO pressuring Senator Duffy into accepting and agreeing to the new mistake-repay strategy but Senator Duffy resists

[935] On February 11th, as evidenced by email #54, Mr. Bayne says that it is clear that the mistake – repayment scenario has been chosen as the go-forward strategy to be employed in spite of what Nigel Wright believes about the Senate Rules and that Senator Duffy's expense claims were within the rules.

[936] The Defence says that the emails (#54, 72, 73, 106) make clear that the "mistake-repay" strategy chosen and directed by PMO/Nigel Wright was a purely political strategy to "staunch the bleeding"; to stop feeding "every media cycle"; to "close out this situation" and to end the "Chinese water torture of new facts in the public domain which the PM does not want."

[937] The command/control edicts and language of the Chief of Staff of the Prime Minister are revealed (Emails #54, 55, 59, 62, 67, 74). According to the Defence, it is clear that nothing is to happen without all other actors (PMO subordinates, Senate leadership and staff) clearing "every move" with "us"/PMO. Senator LeBreton is scolded by Nigel Wright/PMO for acting without prior PMO approval. Nothing is to be set in motion "without knowing where we want it to end up and how we will make that happen." The PMO/Nigel Wright is determined to impose ("force" in his own statement to the police) on Senator Duffy the political damage control strategy of "mistake-repay", to overcome Senator Duffy's resistance to this strategy and to "make it happen."

[938] Mr. Bayne maintains that pressure to accept the PMO strategy was repeatedly applied to Senator Duffy from the highest levels (by the Chief of Staff of the PMO, by the Prime Minister, by Senate leadership working in concert with the PMO – emails 53, 54, 55, 64, 72, 74, 106, 109, 110 and Nigel Wright's forceful intervention on February 13th when Senator Duffy tries to argue his case personally to the Prime Minister), but still Senator Duffy resisted and made clear his own true will – to assert the lawfulness of his living expense claims as within the existing Senate rules structure.

[939] On February 8th (email #49) Senator Duffy asserted his belief in the validity of his

expense claims and intent "to challenge the unfair process."

[940] On February 11th (emails #51 & 56) Senator Duffy's lawyer sought to contact the independent auditor Deloitte and Senator Duffy (emails #71, 75, 77) sought proof of the state of Senate rules which he and his lawyer believed were "very vague" on the issue of "primary residence" and living expenses for a "secondary residence."

[941] On February 14th (email #87 and Exhibit 45b, Tab 10) Senator Duffy, through his lawyer, sought to meet with the independent auditor and inquired as to what "material" it would be helpful for him to bring with him." Also on the 14th, Senator Duffy sent Nigel Wright his count of days spent on P.E.I., to demonstrate the legitimacy of his primary residence and related expenses claims (email #88).

[942] On February 15th (email #95) Senator Duffy argued his case to Nigel Wright through a forwarded P.E.I. court decision. All of this explicit resistance to the PMO's political strategy Senator Duffy continued even after the Prime Minister's "ruling" (Nigel Wright's own word) on February 13th. Senator Duffy's continued resistance to the PMO's damage-control scenario "deflates" Mr. Wright. The next week this deflation turns to outright anger as Senator Duffy's resistance "pissed" Nigel Wright.

[943] Even as Senator Tkachuk (Chair of the Standing and Steering Committees) publicly referred the matter of Senator Duffy's living expense claims to the independent auditor Deloitte (email #44), he publicly states that the reference to an outside auditor is "because the Senate doesn't want to appear as if it is hiding anything." Senator Tkachuk also publicly states that the existing Senate rules on residency and related expenses may need to be changed, that definitions are lacking and that "rules that made sense a long time ago don't necessarily make sense today" (Exhibit 45b, Tab 4). Senator Tkachuk (email #94; Exhibit 45b, Tab 11), in correspondence to Senator Duffy's lawyer describes the "obvious overarching public interest" in "an independent external review and opinion" (Deloitte) to the "public's trust and confidence in Parliament".

[944] Senator Duffy's constitutional eligibility to sit as a P.E.I. Senator is publicly challenged and clearly made a live issue (email #46; Exhibit 45B, Tab 5). This is an ongoing perceived vulnerability of Senator Duffy.

[945] Mr. Bayne submits that the PMO's willingness to direct and command conduct and outcomes as well as to manipulate due Parliamentary process to achieve their own political objectives is made clear by the extensive email exchanges concerning the writing of a constitutional definition of residency by the PMO in concert with Senate leadership (see emails #82-86; 90-93; 100-130; 138; 139). A so-called "test" is developed so the Defence says that is purely political, not principled: "We need to be sure that all of our Senators [Conservative Senators] will truly be on the right side of the bright line test" (email #90). Nigel Wright says "a prime objective is not to disqualify our sitting Senators" (email #102). Resolution of the constitutional test for residency is important to the PMO as a precondition to ending the "Chinese water torture": "…all that stands in the way of Senator Duffy paying back his

$32,000 and closing out this situation" (email #106). However, there cannot be "new facts" getting out to the public which "the PM does not want" (email #109). The PMO will "slam through" (email #110) their expedient residency test based on "practical/political" reasons (email #112) and if the Senate committees do not have the "right membership", the "right Senators" will be conscripted to serve dutifully to deliver the scripted PMO test (email #109). Mr. Bayne stated that again and again the evidence supports the proposition that the PMO was determined to compel action (from Senate leadership, from individual Senators, from Parliamentary committees, from Senator Duffy) if necessary for political ends. Small wonder then, and no coincidence, that both Nigel Wright and Chris Woodcock independently described to the police (truthfully, they stated) that Senator Duffy had been "forced" to go along with the PMO's "mistake-repay" scenario.

[946] Mr. Bayne highlighted PMO's/Nigel Wright's willingness to manipulate and misrepresent what he characterized as a two-faced response to the LeBreton-Cowan letter of February 11th (emails #53; 57-60; Exhibit 45b, Tab 8). In the emails, Mr. Wright reprimands Senator LeBreton for "making this more difficult" (i.e. executing the mistake-repay strategy) and two minutes later tells Senator Duffy (in order to re-assure him that the scenario strategy should be followed) that "it does not make our task more complicated."

[947] Mr. Bayne reminds the court that Senator Duffy's only request during this period relating to money is for his legal fees (on the evidence a standard matter), not that some party other than himself pay the living expense claims amount (email #68). The offer to pay that amount came directly and solely from Nigel Wright (on February 20th), Chief of Staff to the Prime Minister, for his own political damage control reasons (emails #50 & 68).

[948] The Defence points out Nigel Wright's dissatisfaction with the execution by Senate leadership of their role in the overall plan. (Emails #59, 61-67, 74): "We cannot rely on the Senate Leader's office to get this right". This dissatisfaction becomes more explicit in ensuing days, weeks and months, leading to Mr. Wright's March 22nd memo to the PM (Exhibit 46).

[949] Mr. Bayne submits that this 10-day period ends with the Duffy living expense issue having become so politically damaging to the PMO it is described as "Chinese water torture". It is evident from an overview how far and how quickly the matter progressed because of the media stories' traction:

- December 2012, and January 2013, "classic" inaction strategy (let story die)
- February 1, 2013: re-emergence of story "very troubling"
- February 6, 2013: so politically damaging "will end badly"
- February 7, 2013: "very big problem" so new strategy decided: "mistake-repay" scenario
- February 11, 2013: need to "staunch the bleeding"
- February 16, 2013: PM and PMO must put an end to the "Chinese water torture" of the stories and new facts emerging to the Canadian public which the PM did not want.

- The pressure, therefore, to end this, and quickly, through the PMO's "mistake-repay" strategy (to put the stories to bed) is clear, significant and mounting.

Key 5 day work week Monday, February 18, 2013 to Friday February 22, 2013: The break-down week – leads to capitulation

[950] The Senate break week found Senator Duffy alone in P.E.I. He was scared and vulnerable: Nigel Wright described Senator Duffy as "a scared man"; he "thinks we're like he thinks I've threatened to kick him out of caucus and force him to repay the money". "He thinks his very existence as a Senator is at risk".

[951] Mr. Bayne stresses that there is a serious ramping up of pressure to end the "bleeding"/Chinese water torture and to break down/overcome Senator Duffy's continued resistance and to get him to capitulate to the mistake-repayment scenario. Nigel Wright has reached the stage that he is now "pissed" off at Senator Duffy's continued resistance. (emails 127, 128, 129, 134, 141, 142, 144, 145, 152, 154, 161, 166, 202, 207, 215, 225)

[952] Mr. Bayne contends that the "Scenario" language is explicitly that of the PMO's: "scenario for repayment" and "Duffy scenario".

> Scenario PMO's creation (from Feb 7th forward) and scripting of lines for all (Senator Duffy, Senate leadership) (emails 121, 146, 147, 151, 153, 154, 160, 161, 164, 165, 173, 174, 175).
> False scenario founded on misrepresentations; deliberately misleading

[953] Mr. Bayne submits that the "small group's" (PMO and Senate leadership) scenario is given fixed content during the week and must/will include:

- Mistake (from Nigel Wright/Ray Novak, though Nigel Wright believes truth probably different, that Senator Duffy's living expense claims are not "mistaken" claims; are probably all lawful and within existing Senate rules)
- Repayment (whole small group from the 7th forward). Senator Duffy must publically promise to repay personally to give the appearance of making amends (as the Toronto Star characterizes it, to make it appear "as if this was a laudatory act of altruism": Exhibit 45b, Tab 21).
- Senator Duffy is to be withdrawn from Deloitte (comes from Senator Tkachuk: "steering committee proposal") (Nigel Wright) (February 20th)
- Senator Gerstein and Conservative Party of Canada is to secretly fund "repayment" (Nigel Wright/Senator Gerstein)(February 20-21)
- The purpose of all this to end "our public agony": purely political (Nigel Wright)
- The legal fees of Janice Payne are to be paid by the Conservative Party of Canada (Nigel Wright/Senator Gerstein/Arthur Hamilton) (February 19th; email #134).

- A fully scripted capitulation statement by Senator Duffy for the scenario and media lines and Q&A are to be prepared for all participants. (Nigel Wright/PMO) Senator Duffy is to forward a letter to Senator Tkachuk "mimicking scripted mistake-repay lines".
- Senator Duffy's input to scripted message is minimal amounting to some 'down home' language to phrase it.
(emails # 146, 147, 151, 153, 154, 159, 160, 161, 164, 173, 174, 208, 210, 214, 221-224, 226, 227, 229, 231, 240, 246, 247).

[954] Mr. Bayne points out that everyone (in their official capacities as PM, Chief of Staff to PM, legal counsel to PM & PMO, Issues Management Director of PMO, Leader of Government of Canada in Senate, Chair of Senate Standing Internal Economy Committee and executive Steering Committee, the PM's principal secretary) advised Senator Duffy that he must/should do this (go through with mistake-repay scenario) on the basis that it is the "right thing to do". (emails #146, 164, 173).

[955] According to Mr. Bayne, it is clear that all of the key scenario components are part of the command/control/compulsion directed by PMO's Chief of Staff, Nigel Wright:

> Nigel Wright directs on Monday February 18th, that "we get things fixed in one fell swoop", not "dribble out Senate news over weeks and months so that the story never dies". Time is clearly of the essence and the Duffy's living expense story must be quickly resolved (i.e. this week!) through the chosen mistake-repay scenario strategy (email #120).
>
> Nigel Wright further directs that his PMO subordinates work with him and Senate leadership to "take charge", "to make it happen", give "clear marching orders" to "close out the Duffy situation" and "stop our public agony". Mr. Bayne observes that this is the language of compulsion, not free choice and accords with Mr. Wright's (and Mr. Woodcock's) description that Senator Duffy was "forced" to go along with the PMO's scenario. (email #120).
>
> On Tuesday February 19th, Nigel Wright advises the PMO group that he "will advise Senator Duffy that we will defeat any challenge to his residency for 23(5) purposes" (if Senator Duffy capitulates to the scenario) and that he will "advise" Senator Duffy "to settle that expenses matter promptly". Mr. Bayne directs the court's attention to the fact that this is a veiled threat. If Senator Duffy continues his resistance, he will receive no support on constitutional residency issue. The express order is to "settle" this now. (email #129)
>
> Also on the 19th, Nigel Wright instructs the government's Senate Leader (LeBreton) that "I will be calling Mike today or tomorrow to move to the final step of resolution" (which will be getting Senator Duffy to capitulate). Mr. Bayne points out that Mr. Wright was not calling Senator Duffy to discuss Senator Duffy's views or to solicit them. Mr. Wright was going to achieve "the

final step of resolution", namely, Senator Duffy's forced acceptance of the mistake-repay scenario strategy, against the Senator's true wishes and irrespective of them (email #134).

On Wednesday February 20th, Nigel Wright threatened that, if Senator Duffy continues his resistance and desire to let Deloitte pursue its audit to conclusion, Deloitte "will conclude that your primary residence is in Kanata" and that he has told Senator Duffy this "several times". Mr. Bayne notes that these threats were unfounded based on Nigel Wright's own analysis that Senator Duffy's primary residence designation and related living expense claims are probably all lawful as within existing Senate rules. The threats were calculated to frighten Senator Duffy into capitulation to the scenario. (email #142). It is to be noted that Deloitte made no such finding as threatened by Mr. Wright.

On Wednesday February 20th, Mr. Wright advises his PMO subordinates that "maybe" Senator Duffy's diaries will persuade "us"/the PMO to "let him take his chances with Deloitte's findings". Mr. Bayne observes that "letting" someone do something suggests that you are controlling them, not deferring to their free will. Moreover, Mr. Wright never bothered even to advert to the diaries. He did not "let" Senator Duffy meet with Deloitte (email #154; 465-477; and Exhibit 45b, Tab 29 & 30).

On Thursday February 21st, Nigel Wright directed the PMO's legal counsel to send the proposed public statement and Q&A, all scripted by the PMO and all part of the mistake-repay scenario, directly to Senator Duffy and to "walk him through" the scripted lines over the phone (email #161). Those are the scenario lines the PMO had crafted for utterance by Senator Duffy as part of the latter's capitulation to the scenario (a "capitulation" he and his lawyer did not want in advance of letting Deloitte do its audit work: email #157).

On February 21st, Nigel Wright advises his PMO subordinates that the five capitulation terms (all of which originally emanated from Nigel Wright and/or Senator Tkachuk) "will happen" because Nigel Wright has already prearranged them (he "will receive" commitments from Senator LeBreton, Tkachuk and Stewart-Olsen; "the party is open" to paying the expense amount; the government "will make a statement" confirming Senator Duffy's constitutional qualification; the PMO has already written the script of everyone's lines). (email #181).

On Friday, February 22nd, Nigel Wright demands secrecy concerning "the entire agreement"/the mistake-repay scenario (email #190). This evidences both the true ownership of the scenario terms and command over Senator Duffy.

On February 22nd, Nigel Wright states that "Senator Duffy still has to send the letter to the steering committee mimicking his public lines saying ambiguity in

the rules, might have made mistake, desires to repay…" (email #208). Mr. Bayne contends that having to do something is consistent with compulsion and not free will.

[956] The emails reveal that at the start of the week, Monday, February 18th, the "small group" (PMO and Senate leader's staff) continues to work on a politically expedient solution to/test for constitutional residency (emails # 113-126). These efforts continue on Tuesday, February 19th (emails # 127-133). Mr. Bayne asserts that the PMO crafts a political test calculated to serve Tory Senators and suggests a "slam through" process of cherry-picked compliant Senators to form a compliant committee to pass this test, but fears (in a 3 page memo to the PM – email # 127, Exhibit 45b, Tab 13) that Senator LeBreton and other key senators will not "buy in" to the PMO "vandalizing the process and traditions of the Senate". Mr. Bayne points out that the PMO's main concern, expressed in the memo, however, is simply to get that "buy in", whether that involves vandalizing Senate process or not.

[957] Mr. Bayne's submissions continue: On Tuesday, February 19th, the PM responds directly (through Ray Novak) to the PMO memo of the 18th, directing, in no uncertain terms, that he "feels strongly", that he wants this drawn-out constitutional residency test process (which is a pre-condition, as Nigel Wright states, to "closing out" the Duffy expenses issues and stopping "our public agony" – email #120) to be "shut down", that he ("we") will "deem" that owning property will satisfy the constitutional test (an illegal resolution per his counsel – email #128) and that the real "issue" is about "$'s". Within forty minutes, Nigel Wright (email #129) advised Senator Duffy that he must "settle that expenses matter promptly." The pressure is on Senator Duffy (and even on Nigel Wright) to execute the mistake-repay scenario, quickly.

[958] Therefore, on the 19th, the Defence says that Nigel Wright sets up a call directly with Senator Duffy to "move to the final step of resolution" (emails #134 & 135) and to break down Senator Duffy's continued resistance to the PMO scenario for political damage control.

[959] Also on the 19th, Nigel Wright advises Senator LeBreton (email #134) that he has "offered to" Senator Duffy (with Irving's prior approval) "to have the Party pay his legal" fees.

[960] On the 19th, both Nigel Wright and Senator LeBreton agree that the four residency-for-living-expenses-criteria created by the Internal Economy Committee are poorly thought out (email #138).

[961] On Wednesday, February 20th, however, Senator Duffy was still resisting. He wanted to see any purported legal analysis that his living expense claims were in violation of existing Senate rules (as he believes they were not) and his lawyer wanted to see the mandate to Deloitte (she had already written seeking a meeting so that Senator Duffy could provide documentation to Deloitte) (email #141).

[962] Nigel Wright responds that Deloitte will find against Senator Duffy (email #142), but does not advise Senator Duffy that his own legal analysis (done February 7th, 2 weeks prior) supports Senator Duffy's view that his living expense claims are probably all within the existing Senate rules.

[963] The Defence position is that the email evidence makes clear that Senator Tkachuk is working together with Mr. Wright and the PMO on "the path forward" (the scenario) and bringing high-level Senate pressure on Senator Duffy (email #152). Thus, on the 20th, Senator Tkachuk called Senator Duffy (to propose the inducement that if Senator Duffy will accede to the mistake-repay scenario, he will arrange, as committee Chair, the withdrawal of the Deloitte audit of Senator Duffy's living expense claims) (email #145). Nigel Wright, in his oral evidence, called this Senator Tkachuk's "Steering Committee Proposal". Mr. Bayne stresses that pressure, inducements, and threats are coming now from multiple authoritative sources.

[964] On the 20th, Senator Duffy confided in his own lawyer that Nigel Wright had called him on both the 19th and 20th. Senator Duffy advised his lawyer about all the "urging" calls/pressure he had been receiving, about the threats that he would be "alone" with respect to his own party, and about the media and the opposition being against him unless he went along with the proposed scenario. A further threat was made "obvious" to Senator Duffy by Nigel Wright, namely, that the Steering Committee (the majority of which consisted of Senator Tkachuk and Senator Stewart-Olsen, two members of the "small group" working on the scenario with the PMO) would declare Senator Duffy constitutionally unqualified unless Senator Duffy took "the dive" and acquiesced to the PMO's mistake-repay scenario. (email #155 & 156). Nigel Wright even suggested to Senator Duffy that he listen to Mr. Wright rather than to his own lawyer (Ms. Payne) as he, Mr. Wright, was in a better position to determine the propriety of the living expense claims under the rules. Mr. Bayne found this approach by Mr. Wright to amount to cunning hypocrisy considering Mr. Wright's own analysis supported the validity of those claims.

[965] Ms. Payne, Senator Duffy's lawyer, replied the same evening to Senator Duffy, that she was "flabbergasted" at the pressure and tactics of the PMO. She agreed that "capitulating now in advance of Deloitte" was unwise and that she had so advised the PMO's lawyer (Mr. Perrin). Ms. Payne described Mr. Perrin's offer, on behalf of the PMO of media lines ("strategies around communication" from "communications specialists, very talented"). She also communicated to Senator Duffy that Mr. Perrin warned not to wait for (and cooperate with) the Deloitte audit. Ms. Payne pointed out that the PMO counsel "started to heat up his tone" and encouraged Senator Duffy to "move fast". Mr. Perrin offered support on constitutional residency (eligibility) issue. (emails #157, 158)

[966] Ms. Payne suggested (instead of capitulation) that she pursue contact with Deloitte to make it "clear that we expect to be interviewed". She stated that she would write to Mr. Perrin to "ask him to advise in specific terms" the PMO's proposed conditions (inducements/offers) for capitulation. (email #158).

[967] Mr. Bayne stated that on Thursday, February 21st, the accumulation of warnings, pressure, inducements, threats and authoritative "persuasion" of Senator Duffy had effectively worn him down and broken down Senator Duffy's resistance to the scenario being forced upon him although there are still important evidentiary indicia that Senator Duffy's true voluntary will is to resist the scenario, to cooperate with Deloitte (see email #166; Exhibit 45b, Tab 16), and trust to their assessment of the living expense claims in light of the state of the Senate rules.

[968] The PMO, by noon on the 21st, sensed Senator Duffy's capitulation ("…sounds like they will consider it") (email #160). Immediately the PMO group seized the momentum and Nigel Wright directs that the scripted capitulation lines be sent directly to Senator Duffy (he doesn't like the "optics" of them going to Senator Duffy's lawyer) and that Senator Duffy be "walked" through both the lines and "the support we would provide" (all the inducements from the PMO and Senator Tkachuk: withdrawal from Deloitte; constitutional eligibility supports; supportive media lines; Mr. Wright's offer of cash for repayment from the Conservative Party of Canada) (email #161).

[969] Mr. Bayne reminds the court that the PMO's script of the capitulation statement and Q&A featured the assertion of mistake, a promise of personal repayment by Senator Duffy and doing the right thing/making it right (emails # 146, 147, 151, 164, 173). Nigel Wright knew that Senator Duffy did not believe he had made a mistake. He also knew (because he offered and arranged it) that Senator Duffy would not be repaying personally because the Conservative Party of Canada was going to pay. Mr. Bayne stated that Mr. Wright deliberately authorized and directed untrue, misleading public statements designed to deceive the Canadian public.

[970] According to the Defence: the PMO scripts everyone (emails # 208, 209, 210, 221, 226).

[971] By the evening of the 21st, Nigel Wright reported that "Mike is going to do this" (the breakdown had been achieved) but he wants to see the Janice Payne email which is forthcoming "summarizing our conversations" (Nigel Wright's with Senator Duffy; Ben Perrin's with Janice Payne) (email #176).

[972] Within forty-six minutes, Janice Payne's "summary" of the conversations (of the 19th and 20th) arrives, as Nigel Wright predicted (email #175). Mr. Bayne contends that this is not, as suggested by the Crown, a list of demands emanating from Senator Duffy. It is a summary of the terms of capitulation (the inducements) all of which emanated directly from Mr. Wright, the PMO's scenario and Senator Tkachuk. Senator Duffy capitulates on the terms and conditions set by the PMO and Senate leadership. Mr. Bayne stresses that Messrs. Wright and Woodcock would never have stated that Senator Duffy was "forced" to go along with the PMO scenario if, as the Crown seeks to argue, Senator Duffy had authored the terms. Nigel Wright's immediate response to this summary (to his PMO subordinates), evidences that Mr. Wright has pre-arranged these terms; they are his terms of capitulation. Mr. Wright's frank concession that these were "forced" on Senator Duffy is important evidence

as to their true provenance. (email #181)

[973] On Friday, February 22nd, Mr. Wright demands secrecy about "the entire agreement"/the scenario and in particular regarding the funds from the Party. Mr. Bayne asserts that it is clear that at this point in time Mr. Wright is seeking the direction and approval of the PM on "everything" related to the scenario scheme. (emails #189 & 190). It is confirmed that the PM is "good to go" with the plan. (email #193).

[974] The Defence maintains that the PMO recognizes the necessity to keep the pressure on Senator Duffy and his counsel to follow through on the scenario and that is demonstrated in the spate of emails through the day under the header, "Urgent, Senator Duffy". (emails #202, 211-225)

[975] The tone and words of the emails stress that Senator Duffy must publicly capitulate "imminently" (email #202); "I am pressing them hard to finalize this" (email #215); "We should finalize this" (email #215); "We should go today" (email #218); "We should GO" (email #225).

[976] Mr. Bayne observes that even in the midst of this pressure-cooker on the 22nd, Senator Duffy continues to demonstrate his true will. He pleads with Ray Novak that he be allowed to "let Deloitte decide", he is being "cooked", he "did nothing wrong", and he does not want to take this "dive for my leader when I am innocent". (email #198)

[977] Mr. Novak, the PM's Principal Secretary, tells Senator Duffy that it is "Best to seize the initiative and not wait for [the] audit" (email #207). Senator Duffy's resistance and efforts with Mr. Novak persist until 4:28 p.m., only minutes before he is ushered in front of the pre-arranged TV crew to utter his scripted message (emails #230, 231) of capitulation.

[978] Nigel Wright directs that Senator Duffy also must ("has to") send a letter to the Steering Committee "mimicking his public lines" of capitulation to the PMO scenario (emails #208, 240, 246, 247, 248).

[979] The Defence draws attention to the fact that the PMO celebrates what they have publically pulled off: "one down, two to go (and one out)"; "yay, this is fun"; "sweet". (Emails #242-244).

Immediate Post-Capitulation: February 23rd – 28th, 2013

[980] According to the Defence, almost immediately, the wheels start to fall off the PMO-engineered scenario. The PMO begins to lose control of the full execution of its scenario and the various players it relies on to "make it happen".

[981] On Monday (the 25th), following the televised public statement of Senator Duffy, the media story was not going away.

[982] The scripted announcement by Senator Duffy was not playing out very well in the

press. It was reported that it was "a belated attempt to make a sideshow disappear" and it "smack[ed] of a deal: make this mess go away and we will try to save your job" (emails #250 & 257; Exhibit 45b, Tab 20 & 21).

[983] Likewise, the constitutional eligibility issue was not (despite the "deeming") resolved: "the question the government does not want aired is whether Duffy is qualified to sit as a Senator for Prince Edward Island". This, reports the media, "should have been resolved when Prime Minister Stephen Harper appointed a long-time Ottawa resident to represent Prince Edward Island". (Exhibit 45b, Tab 21).

[984] On Tuesday the 26th, Senator Tkachuk apologized to the PMO "for misleading" them as to the repayment amount, which was now estimated to be in the 80K range, instead of the 33K that he had initially represented. Nigel Wright was "beyond furious". (emails #252, 253).

[985] By Wednesday, the 27th, the independent auditor Deloitte was pressing Janice Payne for the meeting and document production offered by Senator Duffy two weeks earlier on February 14th. (emails #187 and 256). Ms. Payne sought clarification from Ben Perrin about the Tkachuk/PMO scenario term concerning the arrangement to have Senator Duffy removed from the Deloitte audit (i.e. is it happening or not?) (emails #257; 261; 268; 271; 273-275) Mr. Perrin stalls her: "We are looking into it." (email #271).

[986] The Defence points out that Nigel Wright, as of the 27th, still "believes" that Senator Tkachuk will arrange for a letter from Deloitte saying that the Duffy audit is now "moot" (email #262), but "the subcommittee has to do its work on that" (i.e. Senators Tkachuk and Stewart-Olsen have to deliver Deloitte) (email #280). The PMO (Mr. Woodcock) informs Nigel Wright that he has talked to Tkachuk and that Senator Tkachuk is meeting Deloitte tomorrow" (email #283).

[987] According to Mr. Bayne, even as the PMO directed Senator Tkachuk to deliver his promised inducement, the PMO (both Mr. Woodcock and Mr. Wright) had to rewrite "extensively" an internal Senate Audit report on residency for the purposes of eligibility to claim living expenses. (Emails # 270, 272, 276). Mr. Woodcock advised the subcommittee that it is "out of the question" that the internal audit will continue (email #282).

[988] Mr. Bayne observes that as the month ends on February 28th, only six days after Senator Duffy's pressured/forced public capitulation, Nigel Wright still "foresees" Deloitte complying and reporting the Duffy audit as moot, but, prophetically, also foresees that "we [the PMO] are not in total control". Senator Tkachuk may not in fact deliver Deloitte as promised. (emails #285-286).

[989] The Defence submits that there is obvious danger for the PMO in the failure to execute the scenario terms it (and Senator Tkachuk) proposed, including:

- That Senator Duffy and his lawyer will meet and cooperate with Deloitte and put Senator Duffy's case to them arguing that Senator Duffy's living expense claims

are within the existing Senate rules;

- That Senator Duffy never made a "mistake" or believed he had made one;
- That this whole mistake-repay scenario was a political fiction devised by the PMO to make their "public agony" go away and deceive the Canadian public;
- That the pressure, inducements, secret payment and the attempted cover-up would be exposed.

[990] Mr. Bayne concludes that as February ends with Senator Duffy having publicly capitulated according to the PMO's mistake-repay scenario, the PMO is already losing control of the execution of the scenario, despite its command and control approach.

March, 2013: Nigel Wright/the PMO resort to desperate/improper conduct to salvage its scenario and "make it happen"

[991] The Defence says that, fearing that Senator Tkachuk will not deliver on his "Deloitte withdrawal/moot" inducement, and fearing the fallout that that in turn will occur, a "beyond frustrated" Nigel Wright recruits both Senator Stewart-Olsen and Senator Gerstein secretly to approach the independent auditor and script the auditor's report.

[992] On Friday, March 1st, Nigel Wright directs a clearly compliant ("I am always ready to do exactly what is asked") Senator Stewart-Olsen to "stay close to Chris [Woodcock] and Patrick [Rogers]" and "make this happen" – "Deloitte to state that that matter is resolved." Nigel Wright orders this because "despite agreement to this in advance from you, Marjory [LeBreton] and David [Tkachuk] no one on the Senate side is delivering." (emails #287, 288)

[993] When Senator Stewart-Olsen advises Nigel Wright that the Deloitte audit of Senator Duffy's living expense claims "will not be pulled", Nigel Wright delivers to Senator Stewart-Olsen the precise script of the Deloitte report conclusion acceptable to the PMO (to serve its political purposes), to be conveyed by Stewart-Olsen to Deloitte: "Thanks Carolyn. I agree that the auditor (it's not really an audit) should report. But the report can be – if Kanata were a primary residence, here is how much would be owed. It shouldn't conclude that "Kanata is the primary residence", and it doesn't need to conclude that because Mike has committed to repay the money as if that were the case. I could use your help getting them to understand that and making it happen. N" (email #291).

[994] Nigel Wright separately confides in his PMO subordinates Woodcock and Rogers that he is also recruiting Senator Gerstein to do the same as Stewart-Olsen: "FYI, BTW, I will also be asking Irving Gerstein to help get this done" (email #292). Woodcock says the message is "understood" (email #293). Nigel Wright explains (email #296) that he has asked Senator Gerstein "to work through senior contacts at Deloitte and with Senator LeBreton". Mr. Wright explains that "the outcome we are pushing for is for Deloitte to report publically that IF Kanata [was] the primary residence then the amount owing would be the $90 thousand figure and since Sen Duffy has committed to repay this amount then Deloitte's work in

determining primary residence is no longer needed." "That is what we are working towards". And, Mr. Wright confirms the political danger of non-execution of the scenario: "I am no longer 100% sure we can deliver, but if we can't then we and Mike have a bigger problem" (email #297).

[995] Mr. Bayne notes that the Deloitte audit had been touted by Senator Tkachuk as fully "independent", to avoid any suggestion of political influence or cover up (see Exhibit 45b, Tab 4: not "hiding anything"). Further, Senator Tkachuk stressed in writing that "an obvious overarching public interest" and "the dignity and reputation of the Senate" and "the public's trust and confidence in Parliament" were involved in the decision of the Standing Committee to refer to Deloitte for "independent external review and opinion" the matter of Senator Duffy's living expense claims (Exhibit 45b, Tab 11). In addition, the Standing Committee mandate to Deloitte makes explicit that the auditor's work and report were to be undertaken and treated "with the strictest confidentiality". To protect the work's "integrity and confidentiality", the documents will be sealed in "double confidential envelopes". Communication with the independent auditor is limited to the Standing Committee, Senator Duffy and a Senate Finance representative (the latter two with the permission of the Standing Committee). Mr. Bayne contends that the secret approaches by unauthorized political operatives to direct a script for the auditor are highly improper, unethical and dishonest. Yet that is exactly what the PMO (Wright, Novak, Woodcock, Rogers) and Senate Tory leadership (Tkachuk, LeBreton, Stewart-Olsen, Gerstein) conspired to do.

[996] The Defence submission continues: Senator Gerstein pursued this backdoor approach to the "independent" auditor through his "senior contacts" at the Deloitte firm (emails #307, 308). By March 6th, Senator Gerstein has reported back to the PMO (email #311) that "Deloitte has reported to him" that "Deloitte's ability to pull off what we want" is limited by the mandate. However, "Senator Gerstein confirmed that his channel into Deloitte is open and he is happy to continue assisting us" with "our goal" of having Deloitte state "that their work is done". Nigel Wright and his PMO subordinates direct that Senator Duffy's/Janice Payne's contacts with Deloitte be delayed until Senator Gerstein delivers Deloitte: "until we know that Deloitte will do what we want them to". (emails #313, 316, 317, 321).

[997] Mr. Bayne submits it is clear that the PMO obtains the Deloitte mandate in an effort to get around the mandate's limits, and provides it to Senator Gerstein (emails #323-326; 332). Despite the mandate's explicit wording of "strictest confidentiality" and limited contacts, Nigel Wright, the PMO and Senator Gerstein read it as "perfect" to facilitate their secret, backroom approach and scripted conclusion (emails #333, 334, 336). By March 7th, Senator Gerstein "has committed to getting our views to Deloitte today" (emails #336, 337) and by the 8th Senator Gerstein reports back to the PMO that his senior "Deloitte contact agrees", but needs to "get the actual Deloitte auditor on the file to agree" (emails #341-344). Senator Gerstein will report back to the PMO "once we have Deloitte locked in" (email #343).

[998] By March 20th, three weeks into these clandestine efforts to approach and influence the independent auditor, the PMO group report being "on the phone constantly with Gerstein

who has been trying to arrange the necessary commitments from Deloitte but to date he hasn't been able to receive these assurances" (email #355).

[999] By March 21st, however, the PMO receives from Senator Gerstein (through his senior Deloitte contact) a critical and informative leak of the proposed Deloitte findings, namely, repayment will not affect Deloitte's conclusions; there will be no conclusion on Senator Duffy's residency (i.e. no finding of inappropriate expenses) (email #366). This enables Nigel Wright to "pivot" (his word) and to push execution of the scenario without term #1 (the Tkachuk inducement proposal: having Deloitte declare moot or withdrawn its Duffy audit). Mr. Bayne states that the Deloitte audit report has not been made public or even conveyed to the Standing Committee that mandated the work and yet the PMO/Senate leadership backroom conspirators have the gist of the report and it enables them to represent to Senator Duffy and his lawyer that they should act out the rest of the scenario without cooperating with or providing documents to Deloitte, as they wish to do (emails #313, 372, 374). By this stage of narrative, Nigel Wright has made a "personal and private" decision that he will provide the scenario's "repayment" amount (see email #346).

[1000] Mr. Bayne draws to the court's attention that throughout the month of March, Senator Duffy (and his lawyer) had, in the face of non-delivery by Senator Tkachuk of his promised term #1, and because they had not truly entered into the scenario voluntarily in February**,** pursued communications with Deloitte with a view to meeting and providing documents for the audit process (emails #294, 295, 298, 300, 303, 304, 307, 310, 353, 376, 377, 398). These efforts continued even into April.

[1001] Also throughout March, the PMO and Senate leadership sought to delay and defeat Senator Duffy from communicating and cooperating with the Deloitte audit, as they tried to "arrange" secretly (through Senator Gerstein) the withdrawal/mooting of that audit. When Janice Payne repeatedly pressed Ben Perrin as to what was happening in respect of item #1 of the PMO's scenario, Mr. Perrin, as he was instructed to do by Nigel Wright delays and "placates" Ms. Payne: "For now, she has been placated, but I suspect will want more later" (emails #298, 299, 300, 301, 303-307, 376, 377). In early March, Senator Tkachuk had suggested to Senator Duffy that he (via Ms. Payne) write Deloitte to re-assert his "promise" of repayment and obtain Deloitte's confirmation of audit withdrawal (email #305). The PMO directs no such contact until Deloitte was "locked in" (emails #307, 313): Senator Tkachuk "will back off suggesting to Duffy that he meet with Deloitte right now" (emails 313-321). When, by March 20th, Ms. Payne pressed for answers (email #353) the PMO (with Ben Perrin dissenting) proposed "that the Senator continue to **not** engage with Deloitte" (emails #372 & 374). Mr. Wright did not "trust" Senator Duffy and Ms. Payne "never" to tell the truth, namely "that PMO told them not to respond to DT's [Deloitte's] requests for information" (email #374). Mr. Bayne suggests that, fearing the truth, and its consequences, Mr. Wright and his "small group" of PMO and Senate leadership conspirators instead pressed on to execute their scenario. The PMO directed that repayment arrangements be completed because they now knew (through Senator Gerstein) that Deloitte will not report negatively on Senator Duffy's residency claims (emails #372 & 374). Janice Payne drafted the letter (email #401) to Deloitte about a "moot" audit and no need to provide documents now, the

very words that Nigel Wright suggested (in email #374). Mr. Bayne maintains that Mr. Wright, although he did in fact convey what should be written, wanted to be able to deny that he told Ms. Payne what to write (email #404), another artful deceit. Mr. Wright had told Senator Duffy, in effect, that Senator Duffy had no choice but to go through with the scenario: "The nub of what I said to Mike is that his expenses would have to be repaid, so his choice was between having that plus a finding that they were inappropriate or that without such a finding. This is what we are working towards." (email #297).

[1002] Senator Duffy's constitutional eligibility to represent P.E.I. remained a live and public issue (email #309) hanging over Senator Duffy's Parliamentary head.

[1003] Nr. Bayne notes that Nigel Wright, with the concurrence of Ray Novak, also directed the management of Ms. Payne, both through his directions to Ben Perrin and in his direct, personal telephone conversation with her on March 22nd (emails #297-300, 317, 318, 320, 327, 330, 331, 348, 350, 351, 353, 359-364, 367-375, 377, 378, 382-385, 394-397, 398-405, 407-410, 420-429). Mr. Wright, who did not "care about her expectations" (email #299), directed various approaches that Mr. Perrin should take with Ms. Payne, including an "aggressive tone" (email #317), "friendly advice" (email #317), stalling and/or "placating" Ms. Payne (email #300), threatening her: "let her know that if she discusses any understanding with anyone outside of PMO, we will not hesitate to correct any statement that is not 100% accurate" [and the evidence has clearly revealed the PMO view of the truth and accuracy] (email #363). Mr. Wright directed the content of a letter Ms. Payne should write to Deloitte, while maintaining 'plausible deniability' that he told them (Senator Duffy and Ms. Payne) not to cooperate with Deloitte (email #374). Mr. Wright's call with Ms. Payne on March 22nd is, in his own words, intended to "persuade her to persuade Senator Duffy" to carry out the scenario.

[1004] In early March, Mr. Wright had decided that he will personally provide the "repayment" money the scenario requires, although it must appear to have come from Senator Duffy as an act of honourable Tory contrition, and on March 8th, he clearly and succinctly advised his subordinate (Mr. Woodcock) in a brief email sent directly and only to Mr. Woodcock that "For you only: I am personally covering Duffy's $90K". Mr. Woodcock claimed that he read the rest of this brief email from his boss, but not this line (email #346). Mr. Woodcock responded to this email within 6 minutes (email #347).

[1005] Mr. Bayne submits that in response to a media inquiry (email #38) concerning "under what circumstances" the Conservative party would provide funding to cover a Senator's expenses, particularly Senator Duffy's, Nigel Wright and Mr. Woodcock – despite knowing that the party had already agreed to cover $32,000 of Senator Duffy's expense claims, (not remotely a matter of "party business") – devise the response that "… the Party would only cover expenses incurred for party business" (emails #346, 347). Mr. Bayne suggests that the truth, of course, is different: the Party would also secretly pay substantial amounts as political hush money but demanded absolute secrecy about that.

[1006] March break (the 11th to 17th) interrupts the steady flow of email.

[1007] The Government's Leader in the Senate, Senator LeBreton, advised Senator Duffy not to go "crashing around invoking Nigel's name or that of the PMO" (email #379). The Defence says that this is consistent with the secrecy demanded by the PMO about the scenario ("the entire agreement", email #190) and the role played behind the scenes by the PMO and Senate leadership. Senator Duffy is told to keep his mouth shut and not to engage the media.

[1008] Mr. Bayne states that, therefore, when on March 19th, the media inquire whether Senator Duffy has in fact "repaid" the $90K (email #352), Senator Duffy does not respond. As instructed, he "stays quiet."

[1009] According to the Defence, Nigel Wright and the PMO direct not only Senator Duffy and Ms. Payne, but also Senate leadership: Senator Tkachuk was been told to "back off" suggesting Senator Duffy meet with Deloitte (email #313); Senator LeBreton was advised by Mr. Wright to "stay together on this" with the PMO to "minimise the damage already caused" (email 380); Senator LeBreton and Senator Tkachuk, whom Mr. Wright sarcastically refers to as "our esteemed Senators on the committee and our Senate leadership" (email #372), had to "be handled very delicately" by the PMO (email #413), but both are brought "onside" (emails #416 & 417) to ensure the playing out of the scenario.

[1010] By the end of the month (March 23rd-26th) Mr Wright scripted and directed the playing out of the "repayment" part of the scenario. Mr. Bayne indicates that this was passed off on the public as Senator Duffy's personal repayment and that Mr. Wright had organized the logistics of the money flow to portray that untrue and deceptive scenario (emails #398-409; 429-432; Exhibit 45b, Tab 26). Mr. Wright's testimony in court explained that the money flowed as it did because he just never thought of doing it differently.

[1011] The Defence suggests that much as the PMO exulted on February 22nd after Senator Duffy's scripted TV "mistake" appearance, so now in late March the PMO thinks it has written "the final chapter" (emails #413, 417) of the scenario to end its "Chinese water torture" via the deceptive "repayment". Events will prove otherwise.

April 2013

[1012] With the Easter recess of Parliament for 2 1/2 weeks, there is very little email traffic for the first half of April. There has been no public statement concerning the "repayment" effected because, as Nigel Wright explained, "it would be kind of classic that if no one's talking about it don't create a story". Per Mr. Bayne: this is further evidence that this was all political damage control of a story that "might ruin the PM's day".

[1013] Mr. Bayne states that on April 3rd, Arthur Hamilton, the Conservative Party's lawyer, pays Ms. Payne's legal fees in what his letter to Ms. Payne describes as an "Agency Matter". He says that this is yet more evidence of deliberate, concerted deceit. Ms. Payne was never "agent" for Mr. Hamilton or his law firm, never "agent" for the Conservative Party, never the "agent" of the PMO. Mr. Hamilton, the PMO and the Party, however, do not

want a written record revealing the "entire agreement"/scenario, so Mr. Hamilton invents Ms. Payne's "agency". (Email #433; Exhibit 45b, Tab 27).

[1014] By Wednesday, April 17th, however, a media story appears querying whether Senator Duffy has yet repaid the living expense amount as he publically promised in his (scripted) February 22nd TV statement (email #434). Senator Duffy has been "basically cornered" in an elevator and asked if he has repaid. Mr. Bayne explains that Senator Duffy, who has been repeatedly told to keep quiet about the scenario, told not to engage the media and not to mention the PMO, refers the journalist to Senator Tkachuk, the Chair of the Internal Economy Committee (who knows that the $90K has been paid because he received the cheque: see Exhibit 45b, Tab 26). Senator Tkachuk has apparently also declined to confirm to the journalist the payment, instead referring the journalist to Senator Duffy. No one knows what the PMO will want them to say. Senator Duffy keeps repeating "I'm a man of my word", precisely as instructed by Senator LeBreton (emails #437-448: "please keep repeating that you are a man of your word) and by Nigel Wright: "he should repeat that he is a man of his word if he gets ambushed and, better yet, not get ambushed". (Email #449). Early on Friday April 19th, the PMO (Mr. Woodcock) suggest the "man of his word" line be maintained (emails #450-454) and scripts media lines using that phrase verbatim. Senator LeBreton suggests in the afternoon of the 19th that because "there has been zero interest in this today" no further statements be issued until after the weekend (email #456). But the PMO (Mr. Wright & Mr. Woodcock) decide later in the afternoon of the 19th (emails #458 & 460) that Senator Duffy must issue a statement because the story now is a "schmozzle". The PMO scripts a statement that reads "I can confirm that I have repaid these expenses" (email #461), an assertion Nigel Wright knows to be untrue since Mr. Wright personally and as a Mr. Bayne contents, for purely political reasons, paid the $90K. As the 19th ends, Mr. Woodcock confirms that "Duffy will issue this"… (Email #463). The Defence reiterates that, the PMO, through careful misrepresentation continues to attempt to write the "final chapter" of their political scenario.

[1015] On Saturday, April 20th, Senator Duffy communicates with the independent auditor through his lawyer (email #465; Exhibit 45b, Tab 29) offering to meet: "I will be happy to appear before your committee or subcommittee or auditors from Deloitte, to respond to questions on this, or questions about my residency in P.E.I.".

[1016] Deloitte immediately upon receipt of the emailed communication from Senator Duffy's lawyer, emails the Senate's internal auditor, Jill Anne Joseph, to express clearly the independent auditor's position: "…we believe that we should be meeting with Senator Duffy and also will be requesting that he provide the documentation requested previously…" (Email #466).

[1017] Ms. Joseph expressly agrees with Deloitte: "I agree that a meeting and the provision of request documentation will further assist your review of Senator Duffy's claims…" (Email #467).

[1018] However, the Defence reminds me that such a meeting and cooperation with

Deloitte by Senator Duffy was contrary to the playing out of the PMO's scenario and is precisely what the PMO and Senate leadership had been trying to prevent behind the scenes (emails #313, 372, 374) throughout the month of March. Therefore the "small group" on Monday, April 22nd, reacts to Senator Duffy's cooperation proposal: Senator Stewart-Olsen asked the PMO why Senator Duffy "wants to escalate" (email #469); Nigel Wright responded "is bad" (email #471) and added his instruction to both the PMO and to Senator LeBreton's office: "I think it makes no sense for Senator Duffy to meet with Deloitte" (email #473). Mr. Wright further instructed Mr. Montgomery, Senator LeBreton's issue manager, to keep tabs on Senator Duffy "every two days" in order to maintain control over him. Following Mr. Wright's explicit instruction, the Steering Committee majority (Senators Tkachuk and Stewart-Olsen) denied Senator Duffy the opportunity (that he and Deloitte and Ms. Joseph want) to meet with Deloitte, citing – with startling hypocrisy – Senator Duffy's failure to meet with Deloitte earlier, the very thing they conspired with the PMO to prevent (emails #474-477; Exhibit 45b, Tab 30). For good measure, Nigel Wright gave his blessing to this hypocrisy: "I agree too that Steering should say what they propose" (email #476). Senator Tkachuk's letter to Senator Duffy (Tab 30) denying the opportunity was directly contrary to his promise to Senator Duffy in February that "Senator Duffy will be provided opportunities to be heard" (Exhibit 45b, Tab 11).

[1019] Mr. Bayne says that even as Nigel Wright directed the defeat of Senator Duffy's attempt to meet with Deloitte, he conspired with one Goldy Hyder (whom Senator Duffy thought was helping him) to "manage" Senator Duffy's alignment with the PMO scenario script: "We can count on Goldy's good judgment, which aligns with how we see things unfolding". The PMO used Mr. Hyder to "keep Mike [Senator Duffy] on an even keel" (email #486). Mr. Hyder reported to Mr. Wright (email #482) that he has Senator Duffy "focused on closing this chapter" (i.e. accept the denial of the opportunity to meet with Deloitte and play out the PMO scenario) and planned to send Mr. Wright the draft of a statement Mr. Hyder proposed that Senator Duffy will utter in response to the Deloitte and Standing Committee reports (emails #482 & 485). Senator Duffy had not even seen this draft statement, which Mr. Hyder made plain is "between us" (himself and Nigel Wright) (email #485).

May 2013

[1020] The Defence submissions continue: On Wednesday, May 1st, (email #485), Mr. Hyder confidentially forwarded to Mr. Wright for his review and approval, a draft of a proposed Mike Duffy statement that Senator Duffy will not see until Thursday, May 2nd. The statement cited "the highest standards of transparency and clarity" in its content, claims to promote "the highest standards of integrity Canadians expect of Parliament", described the Deloitte audit as "a fair, impartial effort by a credible third party" and promised that Senator Duffy "paid back just over $90,000 in housing expenses." Mr. Bayne stated that all of this is, on the evidence, a knowing and blatant misrepresentation of the truth although Mr. Wright in his evidence to the court stated that he did not think it was a "bad misrepresentation". The highest standards of transparency and clarity were hardly achieved by the playing out of a scenario where secret payments were arranged, and the PMO issued "marching orders" to all to play it out according to scripted lines. The highest standards of integrity were not exem-

plified by repeated deceptions calculated to cloak the truth. Deloitte was hardly treated as "impartial" given the concerted and highly improper efforts secretly to approach and script the auditor's report. And Senator Duffy, to Mr. Wright's knowledge, never "paid back" the $90K either in February (when Mr. Wright had secretly conspired with Senator Gerstein to have the party pay) or in March (when Mr. Wright paid personally and privately). But, as Mr. Wright stated, "the Government was gonna be happy if people thought that Duffy repaid". The scenario from February through to May, was a calculated ruse authored and directed by the PMO for the political benefit of the government of Prime Minister Stephen Harper.

[1021] Therefore, Mr. Wright gave his explicit blessing to Mr. Hyder's dishonest draft statement: "I think it is fine, Goldy" (email #486); "this is good" (email #493).

[1022] Mr. Wright also approved that Mr. Hyder is directing Senator Duffy to "just stick to statement script" (email #492).

[1023] The statement which ultimately goes out May 9th, has written into it that repaying "was the right thing to do", as everyone who has pressured Senator Duffy assured him throughout February, March, April and May, (emails #535, 536) all of them in their official capacities as Prime Minister, Chief of Staff to the Prime Minister, legal counsel to the Prime Minister and PMO, principal secretary to the Prime Minister, Leader of the Government in the Senate, Chair of the Internal Economy and Steering Committee of the Senate.

[1024] Mr. Bayne emphasizes that not only did Nigel Wright work secretly with Mr. Hyder to draft Senator Duffy's lines for the supposed "final chapter" of the scenario, but he directed, with his PMO subordinates, the scripting of the "final chapter" lines for Senate leadership and the Senate Committee spokespeople too (email #525-533). Once again, the key message in the scripted lines was that "by repaying", Senator Duffy "did the right thing" (email #531); Mr. Wright blessed this message as "really quite good" (email #533). This lauding of Senator Duffy having done the "right thing" (on May 8th) is only 8 days before Senator Duffy was cast out of caucus without a hearing as a political liability.

[1025] Concurrently with the express scripting of Senator Duffy and Senate leadership in the first week of May, the PMO also commanded the re-writing of the Steering Committee report on Senator Duffy to accord with their scenario (emails #495-522). The changes, the PMO reminded the committee member (Senator Stewart-Olsen) are a "fulfillment of her commitment to Nigel and our building" (email #502); the Committee received a PMO "direction" to make the changes (email #507); Nigel Wright insists on the changes as part of the playing out of the political damage control scenario: "They think they are hurting Duffy, but they will end up hurting the Prime Minister" (email #513); the PMO "made it happen" (email #524). Senator Duffy had nothing to do with this PMO rewrite.

[1026] The management, control and manipulation of Senator Duffy by the PMO and Senate leadership continue after the scripting of his "final chapter" statement: Senator Marjorie LeBreton discusses with Nigel Wright the need to "avoid any media contact" by Senator Duffy (because he will assert his innocence and threaten the scenario) (email #545); Nigel

Wright reports back that "we are on it" (email #546); Mr. Woodcock confirms "He won't do any media and will stay away from the Chamber today" (email #549).

[1027] On Tuesday, May 14th, CTV queries Nigel Wright's actual role in the "repayment" (email #551). The PMO stated that it was "neither confirming, nor denying any Nigel involvement" (email #551). Nigel Wright stated that "the PM knows, in broad terms only, that I personally assisted Duffy when I was getting him to agree to repay the expenses". Mr. Bayne questions what else can this reasonably mean other than providing the money? (Email #553). Mr. Bayne says that the PMO feared that the media had somehow received a leaked copy of Senator Duffy's February 20th email to his lawyer, describing Nigel Wright's threats, pressure tactics and inducements, including the offer of "cash for the repayment" (email #155). The PMO's scenario was unravelling. Even so, the PMO directed Senator Duffy to "stick to the same answer you gave Fife: That you repaid but no taxpayer money was involved" (email #561). However, Mr. Bayne notes that denials and misrepresentations no longer work and that the scenario was exposed on Thursday, May 16th (email #562; Exhibit 45b, Tab 31): CTV headlines a story that "Nigel Wright wrote personal cheque for 90K to repay Mike Duffy's expenses". Even as the scenario was exposed, the PMO clings to the line and message, repeatedly told to Senator Duffy, that "it was the right thing to do".

[1028] Mr. Bayne concludes his summary of the email traffic by saying, that on the evening of May 16th, Senator Duffy was forced out of caucus without a hearing**.** The PMO and Senate leadership, who conspired throughout to concoct and execute their scenario as a political damage control strategy, and who forced Senator Duffy to accept it, now made him pay for their conduct.

PEERING THROUGH THE LOOKING GLASS

[1029] The email traffic that has been produced at this trial causes me to pause and ask myself, "Did I actually have the opportunity to see the inner workings of the PMO?"

[1030] Was Nigel Wright actually ordering senior members of the Senate around as if they were mere pawns on a chessboard?

[1031] Were those same senior members of the Senate meekly acquiescing to Mr. Wright's orders?

[1032] Were those same senior members of the Senate robotically marching forth to recite their provided scripted lines?

[1033] Did Nigel Wright really direct a Senator to approach a senior member of an accounting firm that was conducting an independent audit of the Senate with the intention to either get a peek at the report or part of the report prior to its release to the appropriate Senate authorities or to influence that report in anyway?

[1034] Does the reading of these emails give the impression that Senator Duffy was going to do as he was told or face the consequences?

[1035] The answers to the aforementioned questions are: YES; YES; YES; YES; YES; and YES!!!!!

[1036] The political, covert, relentless, unfolding of events is mindboggling and shocking.

[1037] The precision and planning of the exercise would make any military commander proud.

[1038] However, in the context of a democratic society, the plotting as revealed in the emails can only be described as unacceptable. Putting aside the legalities with respect to some of the maneuvers undertaken and the intensity of the operations, a simple question comes to mind. Why is the PMO engaged in all of this activity when they believed that Senator Duffy's living expense claims might very well have been appropriate?

[1039] Now, let us examine whether Senator Duffy's conduct in the unfolding narrative amounted to criminality or whether Senator Duffy was just another piece on the chessboard when it came to Mr. Wright's $90,172.24 cheque.

Crown's Position

Overview of Senator Duffy's Receipt of $90,000 from Mr. Nigel Wright

A. Overview of Senator Duffy's decision to seek and receive payment from Nigel Wright

[1040] Assistant Crown Attorney, Jason Neubauer, began his written submissions by setting out the Crown's theory as to the $90,000.00 repayment scenario as follows:

> Nigel Wright called Senator Duffy on the evening of February 19, 2013, with an update that he believed would please Senator Duffy: That the resolution and repayment of his expenses would not jeopardize Senator Duffy's constitutional eligibility to represent Prince Edward Island in the Senate. Senator Duffy was indeed pleased to hear that; however, Senator Duffy met the removal of that barrier to repayment with the imposition of another. He told Mr. Wright that he could not afford to repay the money. It was a remark that Mr. Wright ignored for the time being but it was a milestone. It was the first time Senator Duffy had thrown personal remuneration into the mix and it would ultimately be that fact - his solicitation and acceptance of money - that would form the basis of the charges against him.

[1041] Mr. Neubauer contends that while several people were engaged in the dealings to sweep away the expense scandal, it was Senator Duffy's solicitation of funds and acceptance of Nigel Wright's money that elevated his conduct to the level of a criminal offence. He maintains that it is important to bear this focus in mind given the breadth of cross-examination undertaken by the Defence and the evidence of Senator Duffy in this matter.

[1042] The Crown suggests that Senator Duffy went to great lengths in his attempts to portray himself as the victim of a concerted, persistent and determined effort to see his expense

scandal—which had become a serious problem for the Conservative government—go away. The theory Senator Duffy advanced is that the Prime Minister's Office, with the obedience of the Conservative leadership in the Senate, forced him into the mistake-and-repay scenario, notwithstanding the opposition and personal cost faced by Senator Duffy. They, says Senator Duffy simply would not take 'no' for an answer and exerted any and all pressure required to overcome his will.

[1043] Mr. Neubauer submits that the conception of Senator Duffy as a victim in this scenario is untrue.

[1044] The Crown conceded that while the PMO had a compelling interest in seeing the Duffy expense scandal resolved, so did Senator Duffy. Mr. Neubauer states that Senator Duffy realized the strength he had in the negotiations and exercised that power to extract the agreement that best suited him. That included someone else paying him more than ninety-thousand dollars.

[1045] According to the Crown, Senator Duffy's conduct as outlined below reveals the exercise of his will in arriving at the agreement that saw him receive $90,172.24 from Nigel Wright:

(1) Senator Duffy misled Mr. Wright regarding the procedure he followed to claim a secondary residence allowance. He referred to the Primary Residence Declaration he submitted and referred to it as a "trap". Senator Duffy described the NCR living expense claims procedure to Mr. Wright as follows:

> "Once you fill out that form and submit it, you get an allowance for the NCR home. Mike says this is a trap."

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 26, p. 92

Senator Duffy did not tell Mr. Wright that submission of the form did not trigger any payment at all. He did not tell Mr. Wright that he submitted Travel Expense Claims to trigger the secondary residence allowance.

Evidence of Nigel Wright, Aug. 12, 2015, p.101, l.1-22

(2) Senator Duffy asked that Mr. Wright take steps to see that the Senate treated him differently from Senator Brazeau and Senator Harb in its examination of expenses. Mr. Wright agreed to undertake this on Senator Duffy's behalf and was successful. Senator Duffy was pleased.

Evidence of Nigel Wright, Aug. 12, 2015, p.14, l.30 – p.16, l.8

(3) Senator Duffy told Mr. Wright on February 11 2013 that he would agree to repay his NCR expenses on two conditions: (1) his constitutional eligibility to sit as a senator from P.E.I. would not be compromised, and (2) that the PMO ac-

cept and support the position Senator Duffy's claim to the expenses was a mistake caused by lack of clarity in the rules.

Evidence of Nigel Wright, Aug. 12, 2015, p.21

N.B.: This appears to the genesis of the mistake-and-repay scenario, which the Crown contends, was in fact proposed by Senator Duffy himself.

(4) Later that evening, Senator Duffy sent an email to Mr. Wright containing talking points provided by Senator Duffy's lawyer, Janice Payne. Among Janice Payne's points to Senator Duffy are the following:

> The Senate revised its policy language effective June 2012 and arguably added a clearer definition of "primary residence" that does not appear in the 2010 document and may well have been new in 2012.
>
> If it would settle the matter you would repay back to June of 2012 and not claim expenses going forward unless the policy is further revised to make it clear that you can claim expenses or your personal circumstances change so that it is clear that PEI is your only primary residence.
>
> You would need assurance that you will be removed from the audit, your legal expenses will be reimbursed pursuant to Senate policy and a mutually acceptable media release will be issued confirming that you have repaid arrears owing since the travel policy was clarified in 2012 and are not claiming expenses going forward.
>
> As an alternative, you would agree to repay any arrears found by Deloitte to be owing.
>
> A third alternative would be to pay all of the arrears with the coverage of legal fees by the Senate and a mutually acceptable media release confirming that you have repaid all arrears although you believed at the time and maintain that the expense claims were proper.
>
> Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 12, p. 4.

(5) Upon learning of the February 11th letter co-authored by Senator Lebreton and Senator Cowan, Senator Duffy emailed Mr. Wright, asking "What does Marjory's letter mean for our talks?"

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 10, p. 40

(6) Senator Duffy approached Prime Minister Harper at the conclusion of the Conservative caucus meeting on February 13 2013, without notifying Mr.

Wright or making any attempt to involve him in the consersation. He did this to plead his case with the Prime Minister.

Evidence of Nigel Wright, Aug. 12, 2015, p.21

(7) Senator Duffy, through counsel, presented the PMO with his list of demands in respect of their agreement. Here are Senator Duffy's demands:

> Assuming we can work out the communication, we will need agreement on the following before we can proceed:
>
> 6. The Internal Economy Committee will confirm that Senator Duffy has been withdrawn from the Deloitte review and it will assure him that his expenses are fully in order to date and will not be the subject of any further activity or review by the Committee, the Senate, or any other party. If any member of the Committee makes any statement, it will ensure that such statement is consistent with the agreed media lines.
>
> 7. There will also be a written acknowledgement that Senator Duffy meets and has always met all requirements necessary to sit as the Senator from P.E.I.
>
> 8. As his apparent ineligibility for the housing allowance stems from his time on the road on behalf of the party, there will be an arrangement to keep him whole on the repayment. His legal fees will also be reimbursed.
>
> 9. If the Senate rules or travel policy are rewritten to permit Senator Duffy to claim a housing allowance in the future he will be free to do so as to that point in time.
>
> 10. The PMO will take all reasonable efforts to ensure that members of the Conservative caucus, if they speak on this matter, do so in a fashion that is consistent with the agreed media lines.
>
> I am available to discuss in the morning.

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 33, p. 116

(8) Senator Duffy's above noted list of demands excluded any reference to the conditions Mr. Wright was seeking, namely that:

1. Senator Duffy repay the NCR expenses;

2. Senator Duffy stop submitting claims for payment of NCR expenses;

3. Senator Duffy stop suggesting that he was entitled to compensation for his

Ottawa expenses.

Evidence of Nigel Wright, Aug. 12, 2015, p.41, l.19-32

(9) Senator Duffy insisted on the drafting and use of media lines that met his approval, as illustrated by the following emails from his lawyer, Janice Payne:

Subject: Senator Duffy

Revised bullets.

You have our media lines and we are waiting to hearing from you.

1. Senate representatives M. Lebreton, David Tkachuk and Stewart Olsen will confirm that Senator Duffy has been withdrawn from the Deloitte review and will assure him that his expenses are fully in order to date and will not be the subject of any further activity or review, at their initiative or at the initiative of the Internal Economy Committee, by any other party. If any member of the Committee makes any statement, it will ensure that such statement is consistent with the agreed media lines. HOW WILL THIS OCCUR?

2. Senior government sources and the PMO, including the PM, will respond to any inquiries about Senator Duffy's qualifications to sit as P.E.I. Senator by indicating that there is no doubt and has never been any doubt that he meets all constitutional requirements.

3. As his apparent ineligibility for the housing allowance stems from his time on the road on behalf of the party, there will be an arrangement to keep him whole on the repayment. His legal fees will also be reimbursed – AS DISCUSSED.

4. Senator Duffy will be permitted to claim a housing allowance in the future if his circumstances meet Senate requirements.

5. The PMO will take all reasonable efforts to ensure that members of the Conservative caucus, if they speak on this matter, do so in a fashion that is consistent with the agreed media lines.

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 38, p. 144

From: Janice Payne
Sent: Friday, February 22, 2013 02:16 PM Eastern Standard Time
To: Perrin, Benjamin
Subject: RE: Urgent: Senator Duffy

I am calling in five minutes. Attached are revised media lines. Critical that these are okay. Please confirm.

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 39, p. 149

From: Janice Payne
Sent: Friday, February 22, 2013 03:14 PM Eastern Standard Time
To: Perrin, Benjamin
Subject: Re: Urgent: Senator Duffy

This is a problem. There is to be no suggestion of an error by MD. They need to adapt to our revision.

From: Perrin, Benjamin
Sent: Friday, February 22, 2013 03:30 PM Eastern Standard Time
To: Janice Payne
Subject: Re: Urgent: Senator Duffy
Solicitor-client privilege

"An error" is changed to "any possible error". As discussed, with this change, we are good to go.

Please notify your client immediately.

Our people will be in touch with him to implement.

From: Janice Payne
Sent: Friday, February 22, 2013 03:33 PM Eastern Standard Time
To: Perrin, Benjamin
Subject: RE: Urgent: Senator Duffy

Ok. Good. We are done.

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 1, Tab 41, p. 158

(10) Senator Duffy insisted that he be "made whole" in respect of the repayment of his NCR living expenses.

(11) Senator Duffy ultimately agreed to the repayment scenario.

(12) On February 22, 2013, Senator Duffy went on television and told the Canadian public that he may have made a mistake in claiming payment for his Ottawa living expenses and intended to repay the money.

Trial Exhibit 73 & 73(b), CBC News Interview, Feb. 22, 2013 (video & transcript)

(13) Senator Duffy persisted in his efforts to see his removal from the Deloitte au-

dit.

Evidence of Benjamin Perrin, Aug. 20, 2015, p.94, l.26 – p.95, l.10

(14) Senator Duffy explicitly sought assurance from the PMO that his matter would not be referred to the RCMP.

Trial Exhibit 43(a), Emails from Nigel Wright, vol. 2, Tab 12, p. 328

(15) Senator Duffy agreed to accept and in fact accepted $90,172.24 from Nigel Wright.

(16) Senator Duffy's May 15 2013 draft letter to the Senate Ethics Officer fully supports the reality that he willingly accepted Nigel Wright's $90,172.24. While Senator Duffy professes to be uncertain of how to characterize the payment, he expresses no doubt whatsoever of his voluntary participation [of] his receipt of the money.

Trial Exhibit 47(a), Additional email including Senator Duffy and Mr. Chris Woodcock, Tab 8, p. 10-11

[1046] Mr. Neubauer suggests that Senator Duffy and the Prime Minister's Office approached the expenses problem from different perspectives. Nigel Wright outlined the PMO's perspective thusly:

> b. All members of the Conservative caucus are members of the Conservative government's team, and their conduct reflects on the reputation of the party and the government;
>
> c. Senator Duffy's conduct in seeking payment for his Ottawa living expenses was morally wrong, even infuriating, and reflected poorly on the Conservative government, in particular given the sensitivities surrounding expenses;
>
> d. PMO was interested in ensuring that Senator Duffy repaid the money and stopped claiming it, and in the containment of the fallout of the matter so as to limit any further disrepute brought upon the Conservative government.

[1047] The Crown contends that Senator Duffy's interest in the matter clearly centred on his eligibility to sit as a senator, his reputation and his personal financial situation.

[1048] Mr. Neubauer concludes that although the parties had a common goal, their perspectives diverged. The divergence in their perspectives led to repeated disagreements along the way, but ultimately it was Senator Duffy who insisted on being paid personally in respect of the repayment and it was Senator Duffy who accepted the funds given to him at his re-

quest.

B. Senator Duffy's decision to claim payment for his Ottawa living expenses

[1049] Mr. Neubauer noted that Senator Duffy testified that Senator David Tkachuk told him to submit claims for his Ottawa living expenses, including the monthly accommodation allowance and *per diem* allowances. This, testified Senator Duffy, was the fallout from a column written by University of Prince Edward Island professor David Bulger. Senator Duffy testified that Senator Tkachuk told him that he must not "leave any light" between himself and the other Atlantic Canada conservative senators, and so he must claim all living expenses just as those Senators did. The rationale, according to Senator Duffy, was that a difference in his claims practice would only fuel the controversy surrounding his eligibility to sit as a senator from P.E.I. Senator Duffy testified that as a result of this conversation—and contrary to his disinclination to ever claim *per diems*—he dutifully claimed repayment for his Ottawa living expenses. To be more specific, Senator Duffy's evidence is that he would go on to claim more than $80,000 in public money to hold at bay the criticism of a university professor (a professor whom according to Senator Duffy "nobody took seriously") who had written an article challenging his constitutional eligibility to sit as a senator representing P.E.I.

[1050] The Crown contends that Senator Duffy's explanation for his decision to claim Ottawa living expenses is absurd. It is inherently absurd to suggest that Senator Duffy would decide to claim Ottawa living expenses in perpetuity (totalling more than $80,000 by his fourth year in the Senate) to fend-off criticism of a professor whom "nobody took seriously".

[1051] Mr. Neubauer submits that the internal flaws of that evidence are compounded by its inconsistency with other evidence. For example, in the early stages of discussion on resolving the burgeoning expense scandal, Senator Duffy wrote the following email to Senator Tkachuk:

> From: From Senator Duffy
> Sent: Thursday, February 07, 2013 11:13 PM Eastern Standard Time
> Subject: Before you issue news release ….
> 7 Feb 2013
>
> David:
>
> After speaking with my lawyer, I now understand that the issue in question is not whether I own property in P.E.I.; but rather whether my principal residence is there, thus entitling me to expenses for my home in Kanata.
>
> If this is indeed the issue, then this is the first time a concern has been raised with me by anyone. I have been claiming these expenses routinely, as I was told I could do at the time of my swearing-in in 2009.

However if there is anything improper about these expense claims, I want to correct it. I have no interest in claiming expenses to which I am not entitled.

Can we discuss this matter before you issue any media release naming me, as I believe we can resolve this expense issue without the need of an audit.

Sincerely,

Mike

[1052] Senator Duffy's assertion in his February 7, 2013 email that "this is the first time a concern has been raised with me by anyone" is inconsistent with his testimony at trial that it was a concern about his eligibility that moved him to claim his Ottawa expenses in the first place. Senator Duffy's differing statements cannot honestly co-exist; at least one of his statements must be untrue.

[1053] A further difficulty with Senator Duffy's evidence that he claimed Ottawa living expenses on the suggestion of Senator Tkachuk is the information Senator Duffy chose to provide Senator Tkachuk as the basis for Senator Tkachuk's opinion. More important is the information Senator Duffy chose not to share with Senator Tkachuk, according to the Crown, including:

i. His P.E.I. property was a cottage

ii. While there was hydro service to his cottage, it was cut-off in the winter

iii. He held an Ontario health card.

[1054] Senator Duffy was apparently content that Senator Tkachuk be misled into a state of belief of the facts that would support a view that he should claim his Ottawa living expenses.

[1055] Let me now turn to the specific submissions relevant to the bribery charge.

COUNT 29 Section 119(1)(a) of the *Criminal Code*

[1056] It is alleged that the accused (29) between the 6th day of February, 2013, and the 28th day of March, 2013, at the City of Ottawa, in the East Region, being a member of Parliament did directly or indirectly corruptly accept, obtain, agree, or attempt to obtain, for himself, money, valuable consideration, or office in respect of anything done or omitted, or to be done or omitted by him in his official capacity contrary to section 119(1)(a) of the *Criminal Code of Canada*.

[1057] Section 119(1) (a) of the *Criminal Code of Canada* reads as follows:

> 119 (1) **Bribery of judicial officers, etc.** – Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

> (a) Being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by them in their official capacity,

Crown Argument

Elements of the Offence

[1058] Mr. Neubauer addressed the elements of s. 119(1)(a) as follows:

[1059] 1. *Being a Member of Parliament*

[1060] Upon his appointment to the Senate of Canada in January 2009, Senator Duffy became a Member of Parliament and remained so for all material times.

2. *Accept, obtain, agree to accept, or attempt to obtain*

[1061] Senator Duffy's acceptance of Mr. Wright's money followed nearly three months of discussions between the two of them. These discussions also involved counsel for Senator Duffy and staff from the PMO. The subject matter of these communications centred on the repayment of the NCR living expenses claimed by Senator Duffy. The Crown submits that the basis for the criminal charges that Senator Duffy is facing is not about the circumstances that underlie Senator Duffy's decision to repay the funds but rather his solicitation of funds and his eventual acceptance of Nigel Wright's money.

[1062] The Crown alleges that during a conversation on February 19, 2013, between Nigel Wright and Senator Duffy, Senator Duffy planted the seed that would later result in Mr. Wright giving him money to repay the living expenses. During that call, Senator Duffy told Mr. Wright that the possibility of repayment was rendered moot by the reality that he did not have the money to repay. Mr. Wright ignored that comment at the time, but Senator Duffy mentioned it again in a conversation with Mr. Christopher Woodcock.

[1063] The Crown relies on his submissions as set out earlier under the heading, Overview of Senator Duffy's Decision to seek and receive payment from Nigel Wright, in respect of Senator Duffy's exercise of his own free will in seeking personal reimbursement and accepting the $90,172.24 payment from Nigel Wright.

[1064] The Crown states that the key events which reveal the truth that Senator Duffy actively sought the payment are as follows:

> (a) Senator Duffy told Nigel Wright that the repayment of his expenses would be complicated by the fact that he could not afford to repay;
>
> (b) Senator Duffy insisted on a condition that he be made whole on the repay-

ment;

(c) On March 22, 2013, Senator Duffy's apparent resistance of repayment based on principle vanished upon hearing that Mr. Wright would personally pay him the $90,000. The agreement and payment proceeded quickly and easily after that.

(d) Senator Duffy in fact accepted Mr. Wright's $90,172.24, in respect of the repayment of his Senate expenses.

[1065] The Crown contends that this element has been proven beyond a reasonable doubt.

[1066] 3. *Any money or valuable consideration*

[1067] Senator Duffy, through counsel, awaited and received a payment of $90,172.24 from Nigel Wright.

[1068] The Crown states that this element has been proven beyond a reasonable doubt.

4. *Directly or indirectly*

[1069] The path through which Mr. Wright's funds passed from him to Senator Duffy is well documented. Senator Duffy received the $90,172.24 from Nigel Wright indirectly, through his counsel. The path through which the money was routed is documented in the chart prepared by Mr. Mark Grenon.

Trial Exhibit 57, Flowchart – Summary of Transactions Involving Nigel Wright and Senator Duffy

[1070] The Crown submits that this element has been proven beyond a reasonable doubt.

5. *For himself*

[1071] Mr. Neubauer states that it is clear from his conduct that Senator Duffy was of the view that he had his own interest in seeing the end of the expenses scandal swirling around him. Again, the Crown refers the court back to his earlier submissions under the header, Overview of Senator Duffy's decision to seek and receive payment from Nigel Wright. Mr. Neubauer states that Senator Duffy had his own motivation and his own agenda and that Senator Duffy made the request for payment and Senator Duffy readily accepted the $90,172.24. The Crown says that there is an irresistible inference that he did so for himself.

[1072] Accordingly, the Crown contends that this element has been proven beyond a reasonable doubt.

6. *Corruptly*

(a) *Legal meaning of "corruptly"*

[1073] The Oxford Dictionary defines "corrupt" as "having or showing a willingness to act dishonestly in return for money or personal gain."

[1074] Corrupt intent can be inferred from circumstances of the agreement and acceptance, including the manner in which the agreement was struck and manner in which the money was transacted.

[1075] In *R. c.Yanakis*, [1981] J. Q. No. 356, the Quebec Court of Appeal stated the following:

> "If the evidence can be said to show that Yanakis did anything in his official capacity in return for the cheques I would agree with the Crown's contention that the cheques were accepted corruptly. In my view it would be difficult to decide otherwise because of the clandestinity surrounding the giving and acceptance of them. As Mr. Justice Humphreys put it in the case of *Howard Bateman Case Briant* (1943) 29 Cr. App. R. 76 at p. 22:
>
> "Secrecy has always been regarded as the badge of fraud."

[1076] In *R. v. Reid*, [1968] O.J. No. 1287 at para. 11 the Ontario Court of Appeal stated:

> "… That payments were made corruptly can seldom be proven by direct evidence of intention, the intention is an inference to be drawn from what was done. In this case the nature of the act in respect of which the payments were made, the amounts of the payments, the fact that they were paid in cash and no receipts were given or records made or kept lead only to one rational conclusion that is that they were made for the purpose of, and with the intention of corrupting Pike, an agent of the British Mortgage and Trust Co."

[1077] Further, in *R. v. Ohanian*, [1984] O.J. No. 715 (Ont. H.C.) at para. 22, Rosenberg J. observed that:

> "Although no proof of evil intent was offered it should in these circumstances be implied."

(b) *Senator Duffy corruptly accepted Mr. Wright's money*

[1078] The Crown contends that Senator Duffy corruptly accepted Mr. Wright's money. This position is founded upon the following evidence:

1. The parties viewed the burgeoning scrutiny of Duffy's expense practices as a scandal for the Conservative government and for Senator Duffy personally;

2. Senator Duffy was motivated to seek and in fact sought his removal from audit scrutiny of his expenses;

3. Senator Duffy also sought protection from potential RCMP scrutiny as part of

the agreement. While Wright explicitly refused to include that in the agreement, Senator Duffy's pursuit of that term is relevant to the mental element of the offence. It reveals that Duffy's intention—at least in-part—was to thwart any investigation of his own potential criminality;

4. The agreement was clandestine;

5. Senator Duffy misrepresented to the public that the funds provided to the Senate for repayment were his, obtained by a mortgage, affixing his intention with the "badge of fraud";

6. The funds were directed through a circuitous route from Mr. Wright to Senator Duffy's lawyer to Senator Duffy personally to the Senate, including Senator Duffy's use of a bank mortgage to support the fiction (and his public statement) that he was taking personal financial responsibility for repayment.

[1079] The Crown concludes that the above circumstances establish beyond a reasonable doubt that Senator Duffy received the $90,172.24 from Nigel Wright corruptly.

7. *In respect of anything done or omitted to be done*

[1080] Mr. Neubauer states that the evidence plainly establishes that the things that Senator Duffy agreed to do and omit to do upon receipt of the $90,172.24 from Nigel Wright. Senator Duffy agreed to do the following in exchange for the money:

1. Reimburse the Senate in the identical amount ($90,172.24) on the same day;

2. Discontinue claiming reimbursement for his Ottawa living expenses (unless the rules should be modified to clearly entitle him to do so);

3. Discontinue his assertions that he was entitled to reimbursement for his Ottawa living expenses;

4. Maintain the position arrived at with his approval and collaboration (i.e., the media lines).

[1081] The expectations of Senator Duffy's actions and omissions were coupled with the demands he made of the PMO in respect of settlement of the his living expenses.

[1082] The Crown contends that this element has been proven beyond a reasonable doubt.

[1083] 8. *In his official capacity*

[1084] All of the events surrounding Senator Duffy's decision to repay his Ottawa living expenses—including his request and receipt of money—occurred within the context of his official capacity. The Crown concludes that this element has been proven beyond a reasonable doubt.

Crown's Conclusion Regarding Count 29

[1085] The Crown submits that the essential elements of the offence of s.119(1)(a) as contained in count 29 of the Information have been proven beyond a reasonable doubt.

Defence Position

[1086] Mr. Bayne submits that in count 29, the Crown alleges that Senator Duffy corruptly accepted a bribe. However, he notes that the only potential "bribers" – Nigel Wright, Chris Woodcock, Patrick Rogers, David Tkachuk, Ben Perrin – are not charged. In fact, the RCMP Commissioner publically has stated that there was no evidence of criminal wrongdoing by Mr. Wright, that the facts uncovered by investigators simply did not lead to the conclusion of criminal wrongdoing: "You've got to believe that there's an offence there. If you can't demonstrate or explain to another human, that there is an offence there, then you've got nothing." (May 3, 2014, *The Globe and Mail*, Daniel Leblanc). Mr. Bayne maintains that Senator Duffy alone faces a criminal charge based on a course of conduct conceived and orchestrated by others, and "forced" onto Senator Duffy through calculated pressure, inducements and threats and directed, solely for political reasons, toward the political protection of the government of Prime Minster Harper and the Prime Minister. Mr. Bayne argues that Senator Duffy should be found not guilty on count 29.

[1087] Count 29 alleges that Senator Duffy,

1. being a member of Parliament,
2. did corruptly
3. accept, obtain, agree to accept or attempt to obtain
4. for himself
5. money, valuable consideration or office
6. in respect of anything done or to be done, or omitted, in his official capacity.

[1088] Mr. Bayne submits that:

1. Senator Duffy did not "accept" or "agree" to accept in the sense of having his will unencumbered. In fact, Mr. Bayne suggests that the evidence shows beyond a reasonable doubt that there was no true acceptance and that Senator Duffy was coerced into a course of conduct that demonstrated a lack of true free will.
2. Furthermore, Mr. Bayne states that Senator Duffy did not "corruptly" accept a bribe but rather he capitulated to an orchestrated course of pressuring/increasingly threatening conduct calculated to break down his persistent resistance and free will. Senator Duffy never had the "elevated" mental state of a corrupt purpose.

3. Mr. Bayne stresses that Senator Duffy did not accept a bribe "for himself" at all. He capitulated to a scheme orchestrated to end political embarrassment ("Chinese water torture"; "public agony") of the Prime Minister and his government. The "money" was not for Senator Duffy "himself" – it was for the Receiver General and merely routed through Senator Duffy to give the fictitious appearance of having come from Senator Duffy and to end the political problem of the Prime Minister and his government. Counsel contends that any other "valuable consideration" was not for Senator Duffy "himself" but rather was part of a concerted PMO-led scheme/"scenario" that included threats, pressure and inducements, all calculated to overcome Senator Duffy's will and all directed toward (i.e. "for" the) political damage protection of the Prime Minister and his government. Mr. Bayne concludes that in truth, Senator Duffy capitulating to the threats and inducements was "for" the Prime Minister and PMO, not for "himself".

4. Mr. Bayne further submits that in the unique circumstances of this case the defence of officially induced error of law is made out, precluding any conviction of Senator Duffy and that a stay be entered.

No true acceptance or agreement

[1089] The case law on s. 119(1) (a) – bribery – is sparse. Mr. Bayne observes that no reported case has ever dealt with the exceptional circumstances of the alleged recipient of a bribe being pressured, encouraged, "forced" (in the words of Nigel Wright and Chris Woodcock) into the course of conduct that then results in the alleged recipient being charged criminally. As Doherty, J.A., stated in *R. v. Greenwood,* [1991] O.J. No. 1616 at para 19, "unusual circumstances" must be considered (in *Greenwood* it led to acquittal). Mr. Bayne points out that there has never been a "bribery" case like the one currently before the court.

1. "Accept" and "agree" connote volitional conduct. Threats and intimidation, coupled with inducements, all calculated to induce someone to do something they would not otherwise wish to do, all calculated to overcome the will/resistance of that someone, vitiate true wilful acceptance or agreement. This is stated clearly in the Ontario Court of Appeal's decision in *R. v. H.A.,* [2005] O.J. No. 3777, and the Supreme Court's decision in *R. v. Davis,* [1999] S.C.J. No. 67. Mr. Bayne states that it is trite contract law that acceptance under duress or undue influence is no true acceptance of an offer and vitiates the contract. The criminal law has, if anything, even stricter standards than contract law. Mr. Bayne contends that Parliament's intention in s. 119(1)(a) is to proscribe and punish truly voluntary conduct, not that which has been coerced by concerted pressure, threats and inducements that compromise free will.

2. Mr. Bayne notes that the course of conduct of Nigel Wright, his PMO confederates (Woodcock, Rogers and Perrin) and collaborating Senate Leadership (Tkachuk, LeBreton and Stewart-Olsen) as well as others like Senator White and Angelo Perscichilli (who also brought pressure to bear on Senator Duffy with calls to Senator Duffy on February 19, 2013) must, as the Supreme Court in *R. v. Natarelli,* [1967]

S.C.R. 539 at p. 5 held, be "considered in its entirety". Mr. Bayne points out that from early February 2013, when the PMO-directed strategy to control political damage switched from the classic 'don't feed the story, just let it die off' to the active PMO-conceived "mistake-repay Duffy scenario" (email #146); through scripted statements for Senator Duffy and others; to anger and threats by Nigel Wright because Senator Duffy was resisting; to defeating Senator Duffy's expressed wish to meet and cooperate with the independent auditor Deloitte; to attempting secretly to "fix" the Deloitte audit conclusion through a (wholly improper) back-door approach; to threats to kick Senator Duffy out of the Tory caucus and threats to kick him out of the Senate completely; to scripting Senator Duffy's televised capitulation statement and "Q&A"; to offers to have the Conservative Party (secretly through Senator Gerstein) pay the challenged living expenses; to Nigel Wright "personally" deciding to pay the Receiver General the disputed expense amount; to arranging the logistics of payment to make it appear that the repayment money came from Senator Duffy when actually it came from the architect of the entire political scheme, Mr. Wright; to scripting further statements that Senator Duffy was to "mimic," all to put an end to the "Chinese water torture" that the PMO calculated posed a political problem for the Prime Minister - all of this conduct, so much of it appallingly wrong, must be considered on the issue of whether Senator Duffy's true will was overcome and no true "acceptance" or "agreement to accept," as intended by s. 119(1)(a), has been proven here beyond reasonable doubt at all.

As well, Mr. Bayne asks the court to keep in mind the "entirety" of the course of conduct of Senator Duffy, including his repeated resistance to the "scenario" being forced upon him; his statements and pleas that strongly evidence that his will was being overborne; his statements from the outset (email #6) and continuing throughout that he made no "mistake" that his living expense claims are "all within the rules"; his efforts with his lawyer to meet and cooperate with the Deloitte auditors (emails # 51, 56, 87, Exhibit 45B, Tab 10); his sending Mr. Wright case law to prove his position (email #95); his recounting to his own lawyer (email #155) the threats made by Nigel Wright (Deloitte will find against him; he either "take the dive" or be thrown out of the Senate); his request that Mr. Wright provide a legal analysis (email #141) showing any impropriety to the expense claims; his plea to Ray Novak (email #198) that he not be forced to take this "dive for my leader when I am innocent"; and his efforts even after February 22nd to meet with the Deloitte auditors (emails #465, Exhibit 45b, Tab 29). In particular, Mr. Bayne highlights the email evidence (email #198) on February 22nd at 12:40 p.m. that he states is critically probative evidence as to Senator Duffy's lack of free will, his volition being overborne and his being coerced to go along with the PMO's scenario against his will. February 22nd is the very day that the first part of the Scenario is to be acted out on television, as scripted by the PMO. Mr. Bayne states that the Crown alleges that Senator Duffy was actually a willing participant, co-scripting his statement. Email #198 puts the lie to that allegation. Email #198 is a desperate, last-second, plea that eloquently evidences Senator Duffy's true state of mind. It is written months before these matters became a police investigation. Sena-

tor Duffy wanted no part of the PMO's Scenario or any of its terms. They are not his "demands" at all. "Let Deloitte decide" he pleaded to Mr. Novak whom he knew was close to the Prime Minister and would relay the message. Mr. Bayne stresses that Senator Duffy did not want to "take a dive for my leader when I am innocent." Mr. Bayne submits that the Scenario is a PMO-created political damage control strategy to protect the Prime Minister and Senator Duffy wanted no part of it. Counsel contends that "Accepting" the PMO's "scenario" was not Senator Duffy exercising his free will, free of the pressure, threats and inducements. Mr. Bayne submits that at the very least there is reasonable doubt on this issue.

3. Mr. Bayne takes the position that the concerted pressure, threats and inducements by Nigel Wright and his "small group" (of PMO accomplices and collaborating Senate leaders) amounts in law to "extortion" as defined in s. 346(1) of the *Criminal Code*. Counsel submits that even if I should regard the conduct as less than criminal extortion, the Ontario Court of Appeal decision in *H.A.*, *supra,* at paragraphs 80 and 92 makes it plain that even technically lawful threats – like threats to remove a person from their employment or office (i.e. Senate office) – can be "powerfully coercive" and "strike at the very heart of that individual's autonomy and free will." The Supreme Court states in *Davis*, *supra,* at paragraph 45 when threats are coupled with demands (i.e. the demand to accede to the 'mistake-repay scenario') then "there is an inducement to accede to the demands. This interferes with the victim's freedom of choice" and the person (Senator Duffy) "may be coerced into doing something he or she would otherwise have chosen not to do." Mr. Bayne notes that clearly, Senator Duffy's "choice", but for the pressure and threats, was not to "do" the "scenario."

4. Mr. Bayne directed me to the Ontario Court of Appeal decision in *H.A.*, *supra*, where it was found that "threats of any kind" made "in an attempt to induce any person to do anything" can "overwhelm the free will of others," can "overwhelm a person's free choice" through their "coercive effect." Nigel Wright conveyed threats to Senator Duffy that:

    1. Deloitte would find against Senator Duffy if Senator Duffy did not relent and "accept" the "scenario" and its terms (knowing from his own Senate rules research that this was unlikely);

    2. Senator Duffy would be removed from the Tory caucus unless he went along with the scenario;

    3. Senator Duffy would be kicked out of the Senate entirely (by the majority of the Steering Committee of Internal Economy, Senators Tkachuk and Stewart-Olsen) as ineligible unless he capitulated.

    Mr. Bayne contends that these are meaningful, powerful threats, threats that went to the heart of Senator Duffy's status as a Senator and his employment and that the combined threats overwhelmed Senator Duffy's free will. Senator Duffy testified

as follows:

> "Q. And, sir, did you truly voluntarily accept anything here?
>
> A. No, I was coerced into going along with this under threat of losing my job" (Evidence M. Duffy, December 15, 2015, p. 135).

Mr. Bayne concludes that there was no true, voluntary acceptance" or "agreement" to accept the *Scenario*, the terms of which – all emanating from Nigel Wright and Senator Tkachuk – embody the alleged bribe and that the Crown has failed to prove beyond reasonable doubt truly voluntary "acceptance" or "agreement" to accept a bribe.

No "corrupt" acceptance

[1090] In *R. v. Boulanger*, 2006 SCC 32, the Supreme Court in its unanimous decision in 2006 relating to s. 122, breach of trust, held that "the bar for mental culpability for the offence of public misfeasance was an elevated one." The accused must have "acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose." The Supreme Court held that "corrupt" reflected an "elevated" requirement or "bar" of proof of mental culpability in offences relating to the use of a public office (sections 119-125 *Criminal Code*). In s. 119(1)(a), Parliament has expressly provided that only when a bribe has been proven beyond reasonable doubt to have been "corruptly" accepted is it a criminal offence. Mr. Bayne observes that it is a trite rule of statutory interpretation that every word in the statute must be given a meaning. The Supreme Court in *Boulanger, supra,* gave "corrupt" the meaning of connoting an "elevated" mental element/*mens rea*. Mr. Bayne states that the information alleges that Senator Duffy "corruptly" accepted a bribe and that the Crown must prove beyond reasonable doubt that "elevated" mental element.

1. Mr. Bayne suggests that a person whose will and personal free choice have been overcome by a concerted pattern of pressuring, inducing, threatening conduct calculated to induce or coerce that person to do "something he or she would otherwise have chosen not to do" (in the words of the Supreme Court in *Davis, supra,*) is neither doing that "something" freely nor acting "corruptly." The person is the object of coercion and has no true mental volition to do the "something" that is being induced. Rather than having the "elevated" *mens rea* of a "corrupt purpose," the person's *mens rea* is reduced by the "coercive effect" of the threats and pressure. Mr. Bayne states that the Crown, in the unique circumstances of this alleged bribery case, has failed to prove beyond reasonable doubt that Senator Duffy "corruptly" accepted any bribe and that the truth of the matter is that he "capitulated" (in the words of his own lawyer Janice Payne – email #157) to the scenario "forced" on him by the PMO and their Senate collaborators. Counsel contends that capitulation is giving up, not having an elevated mental state of a "corrupt purpose." The only ones having an elevated corrupt purpose here were the conspiring members of the

PMO and their Senate leadership collaborators who acted out, and coerced onto Senator Duffy, a political damage control "scenario" to protect the Prime Minister and his government from political scandal.

2. Mr. Bayne notes that the case law relating to s. 119 is sparse and of little help to trial judges. There is a decision over half a century ago (in 1956) in *R. v. Brown,* [1956] O.J. No. 573 relating to "Secret Commissions" (agents for principals secretly receiving rewards or benefits unknown to their principals – s. 426(1) of the current *Code* and s. 368(1) in the *Brown*,) that held, in respect of the "Secret Commissions" offence that "the act of doing the very thing which the statute forbids is a corrupt act within the meaning of the word 'corruptly' used in the section under consideration" (at para. 4). Mr. Bayne observes that this is hardly helpful for determining Parliament's intended meaning in s. 119 and, more importantly, it appears inconsistent with the authority of the Supreme Court's unanimous decision in *Boulanger, supra*. Where *Brown* in 1956 seems to hold that "corruptly" in respect of s. 426(1) does not mean "wickedly or dishonestly" (see p. 248, 2016 Martin's *Criminal Code*), *Boulanger* in 2006 unanimously holds that public office holder offences (like s. 122, in the same "Corruption" section of the *Code* as s. 119) require proof of the "elevated" *mens rea* of corruption (and the Supreme Court included intentional dishonesty as an example of corruption).

3. Mr. Bayne submits that Parliament intended that the word "corruptly" in s. 119(1)(a) have independent meaning and that the Supreme Court decision in *Boulanger* is better, more reliably persuasive, authority for the meaning to be ascribed to the word: it requires proof of an "elevated" standard of *mens rea*, a "corrupt or oppressive purpose." The only people with an oppressive purpose were the PMO architects of the "Duffy Scenario" who then forced it on an unwilling Senator Duffy with the active assistance of Senate Tory leadership collaborators. Mr. Bayne concludes that the Crown has failed to prove beyond reasonable doubt such an elevated corrupt purpose on the part of Senator Duffy.

"The Scenario"

[1091] Mr. Bayne submits that the "Scenario" and its terms – including Nigel Wright's "personal decision" to use his own money to effect the appearance of Senator Duffy "repaying," and including the PMO's offered inducement of "communications products" (scripted lines) and Conservative party support for Senator Duffy's eligibility to represent P.E.I., and including Senator Tkachuk's proposal of withdrawing Senator Duffy from the Deloitte audit – were not "for" Senator Duffy. They were, all of them, part and parcel of the PMO "Scenario" "for" the political benefit of the Prime Minister and his government. Counsel contents that Senator Duffy has not been proven beyond reasonable doubt to have "accepted", "corruptly" "for himself" the money, valuable consideration or office the "Scenario" represented. Indeed, Mr. Bayne states that the evidence is virtually overwhelming (including the powerful tale told eloquently in the emails – Exhibit 45a & 45b; and in the oral evidence of Nigel Wright, Chris Woodcock, Ben Perrin and Senator Duffy) that all of this was done, against the

true wishes of Senator Duffy, "for" political damage control purposes, was conceived and directed by the PMO, and then "forced" upon an unwilling Senator Duffy (it took some time and ramping up of the threatening messages to break his will to resist) all to put an end to the "public agony" (email #120) and "Chinese water torture that the P.M. does not want" (email #109). Senator Duffy accepted no bribe "for himself" at all. The "Scenario" was created by the PMO "for the PMO and Prime Minister," to control perceived political damage.

1. In *Greenwood, supra*, Doherty, J.A., cautioned that trial courts must examine "unusual circumstances" to assess whether, in truth, the alleged "advantage or benefit" was "for" the accused. Whether the government employee or official "profited" from his or her status as a government official is a key inquiry that turns on a close examination of all the circumstances, including "the nature of the gift," the "prior relationship, if any, between the giver and recipient," the "manner in which the gift was made," the "nature of the giver's dealings with the government," the "state of mind of the giver and receiver." All of those, wrote Doherty, J.A., have "evidentiary significance" as would "no doubt" other facts in any given case.

2. In *R. v. Dubas*, [1992] B.C.J. No. 2935, MacDonnell J. of the BCSC applied the reasoning of *Greenwood* to acquit the B.C. Deputy Minister of Health because he concluded that the "benefit" was really that of the giver (Siemens, who paid the Minister's hotel expenses) rather than that of the Minister. Mr. Bayne suggests that in the case at bar, the "benefit" is really that of the PMO and Prime Minister (political damage control).

3. Mr. Bayne states that in Senator Duffy's case there are (as in *Greenwood*) "unusual circumstances," namely of a PMO-conceived "Scenario" calculated to end or reduce the "Chinese water torture" of political damage to the Prime Minister and "forced" (in Nigel Wright's and Chris Woodcock's own words to the investigating police) on Senator Duffy. Furthermore he contends that any "profit" or "advantage or benefit" was that of the PMO and Prime Minister, not that of Senator Duffy who did not want to go through with the Scenario. The "nature of the gift" was a coerced Scenario. There was a "prior relationship" between the giver (Nigel Wright) and Senator Duffy, namely a coercive relationship. There were threats to employment, to caucus membership, to reputation and inducements calculated (with the threats) to break the will of Senator Duffy to resist. The "manner in which the gift was made" was as part of a secretly scripted, PMO-created "Scenario" devised and executed solely for political damage protection of the Prime Minister. The "nature of the giver's [Nigel Wright's] dealings with the government" was that Mr. Wright at the time was the government. He represented, as Chief of Staff of the PMO, the Prime Minister of Canada. He was in a powerful position in the government. The intended advantage was for the government. The "state of mind" of Mr. Wright was to create and execute a political damage control strategy even though he conceded in his evidence that he recognized that Senator Duffy's living expense

claims were probably all lawful and within the Senate rules. Senator Duffy's "state of mind" was to resist the imposition of the "Scenario" on him until the threats and pressure induced him to a course of conduct he otherwise (in the Supreme Court's words) would "have chosen not to do." Applying Justice Doherty's criteria to the unusual facts of this case demonstrates that Senator Duffy did not corruptly accept "for himself" the "Scenario"; it was "forced" on him, tactically through threats, pressure and crafted inducements. Mr. Bayne observes that the evidence is so strong as to prove that the "Scenario" was not "for" Senator Duffy "himself" in any truthful sense. He resisted it. Counsel stresses that Senator Duffy need not "prove this" but only raise a reasonable doubt on this essential element (as on all the other essential elements) of count 29. Mr. Bayne concludes that the Crown, on all the evidence, and in the unusual circumstances of this case, has failed to prove beyond reasonable doubt that Senator Duffy corruptly accepted "for himself" the money, valuable consideration or office encompassed in the PMO's "Scenario".

Conclusion on Count 29

[1092] The Crown's theory with respect to the bribery count is very simple. Senator Duffy solicited funds and then voluntarily accepted Nigel Wright's money thereby elevating his conduct to the level of a criminal offence.

[1093] In this case, the Crown seems to want to brush aside the particular facts of the case out of hand and turn a blind eye to Senator Duffy's particular circumstances in any possible "Scenario".

[1094] The Crown directs me to focus on their theory keeping in mind the breadth of Mr. Bayne's cross-examination of the Crown witnesses that were called and the evidence given by Senator Duffy in this matter.

[1095] I have no difficulty focusing on the Crown's submissions and keeping them at the fore when I am considering the evidence and submissions that were tendered in his case. However, I am baffled by the reference to Mr. Bayne's thorough cross-examination and the testimony given by Senator Duffy. I thought that Mr. Bayne's cross-examination provided many thought- provoking points for my consideration and that the evidence of Senator Duffy was most compelling. The only question that occurs to me is, if there was something of particular concern about Senator Duffy's evidence about the $90,000.00 why was there no cross-examination on it?

[1096] Was there a "Scenario" or was this a case of Senator Duffy demanding or asking for funds and eventually accepting them for his benefit?

[1097] I do not accept the premise that Senator Duffy's comments to Mr. Wright and Mr. Woodcock about not having the funds to facilitate Mr. Wright's master plan amounted to any demand for reimbursement of his living expenses. This comment can be viewed as just an-

other example of Senator Duffy's reluctance to buy into Mr. Wright's plan period.

[1098] I find that there is an overwhelming amount of evidence from the Crown witnesses, the emails and from Senator Duffy that the "Scenario" theory put forward by the Defence was alive and well throughout this drama.

[1099] I have included the emails earlier in this judgment to highlight the unbelievable lengths that Mr. Wright and his crew went to in order to deal with the "Duffy Problem". Could Hollywood match such creativity?

[1100] To say that the circumstances of this case are unusual amounts to gross understatement.

[1101] The beginning of the eventual payment goes back to the murky uncertainty regarding Senator Duffy's claim regarding his primary residence and claims resulting from that designation.

[1102] The underlying message of, "We're asking, basically forcing someone to repay money that, uh. That they probably didn't owe and I wanted the Prime Minister to know that, be comfortable with that:" keeps on resonating with me.

[1103] Senator Duffy certainly agreed with Nigel Wright's aforementioned position as he consistently repeated that he did not owe any money and consistently tried to get the powers that be to get on board. The truth to tell, it seemed that the PMO team were of the same mind as Senator Duffy regarding his legal liability involving his living expenses.

[1104] However, the PMO was dialled into the political fallout that Senator Duffy was generating and the PMO was determined to make the problem go away.

[1105] As a result, they set in motion a number of initiatives that were designed to bring about a resolution. They devised positions to deal with the issue that commenced with the "stay quiet and hope things disappear strategy" which gave way to "the mistake and repay strategy".

[1106] Regrettably, from the PMO's point of view, they had a major problem and that problem was one Senator Duffy. He just was not buying into the mistake-repay scenario and more importantly he was resisting and kicking and screaming every step of the way.

[1107] Senator Duffy continued throughout to maintain that he did not owe any money and that all his expenses were proper. He wanted the Deloitte firm to hear his side of the story. He begged not to have to go through with the plan.

[1108] The PMO employed a two – pronged approach to deal with Senator Duffy. The primary approach involved the use of a steady stream of threats and pressure being applied from all quarters. These have been well documented throughout this judgment.

[1109] The other approach involved using the "do the right thing" message. It is interesting that no one ever suggested doing "the legal thing". The message was always to "do the right thing". I find that the "do the right thing" message had only one meaning. Senator Duffy was to do the politically right thing by admitting "his mistake" and repaying back the accrued living expenses

[1110] The PMO were also very active working behind the scenes to get all their ducks in a row. They attempted to get the Conservative Party of Canada to provide the funds for the repayment. When that failed, Nigel Wright stepped up and provided the funding out of his own pocket. He explained that the $90,000.00 payment did not impact his bottom line. It seemed that this sum was a mere bagatelle. Mr. Wright certainly did not view his financial contribution and payment as untoward behaviour. He took the position that he had made an agreement with Senator Duffy and he was determined to see that his political solution to the "Duffy Problem" came to pass. I think it is fair to say that the only expectation on the part of Mr. Wright was that a nasty political thorn would be removed from the body politic.

[1111] I find based on all of the evidence that Senator Duffy was forced into accepting Nigel Wright's funds so that the government could rid itself of an embarrassing political fiasco that just was not going away.

[1112] I find that Senator Duffy did not demonstrate a true acceptance of the funds and he did not accept them voluntarily. Throughout the entire "Scenario", Senator Duffy was kicking and screaming to have the issues dealt with in an appropriate forum. However, as a result of the coordinated and threatening efforts of the PMO, his free will was overwhelmed and he capitulated.

[1113] I find that there was no corrupt acceptance of the funds by Senator Duffy and he did not have the necessary elevated mental culpability or *mens rea* required to support a conviction on this count.

[1114] I agree that this entire "Scenario" was not for the benefit of Senate Duffy but rather, it was for the benefit of the government and the PMO. This was damage control at its finest.

[1115] Accordingly, count 29 is hereby dismissed.

Officially Induced Error – Judicial Stay

[1116] Mr. Bayne argues that if I were to find that the Crown had proven Senator Duffy guilty beyond a reasonable doubt on the bribery allegation I should consider the appropriateness of a judicial stay on the basis of an officially induced error.

[1117] Although I have found Senator Duffy not guilty on the merits on count 29, I propose to also address the applicability of an officially induced error in the circumstances of this case.

[1118] Mr. Bayne contends that a judicial stay should be entered because all of the elements of the defence (as set out in *R. v. Jorgensen*, [1995] S.C.J. No. 92 and *Lévis (City) v. Tetreault,* [2006] S.C.J. No. 12) are made out. The evidence establishes clearly that the PMO crafted a political damage control strategy that they themselves called the "Duffy Scenario," the "Scenario for Repayment" (email #146). The strategy involved Senator Duffy making a public (televised) statement that he had made a "mistake" in claiming NCR living expenses (even though Senator Duffy believed, reasonably, and Nigel Wright shared that belief after a rules review, that his expense claims were "All within the rules" – email #6), and then a "repayment" of the total expense amount. The strategy was intended to "staunch the bleeding" (email #72), to stop the "Chinese water torture" (email #109), to end the "public agony" (email #120) of the continued "traction" (as Mr. Woodcock called it) of the politically damaging media stories of Senator Duffy's living expenses, which "the PM does not want" (email #109). Senator Duffy said he was forced to go along with this strategy against his wishes. Mr. Wright and Mr. Woodcock, both independently of one another, told the police that Senator Duffy had been "forced" to go along with the "Scenario" strategy, although in their testimony they tried to wriggle out of that term (despite both being expert wordsmiths). But all Crown witnesses (Wright, Woodcock, Perrin) agreed that at the very least they strongly "encouraged" or "persuaded" or "heavily pressured" Senator Duffy to go along with the "Scenario". They also all agreed that Senator Duffy was resisting. Senator Duffy hired a lawyer to advise him. Nigel Wright is himself legally trained. Ben Perrin acted as the Prime Minister's personal lawyer as well as the lawyer for the PMO. There was no shortage of lawyers. Senator Duffy has no legal training. At all times Nigel Wright acted officially in the capacity of Chief of Staff of the PMO, the office of the Prime Minister of Canada. At all times Ray Novak acted in his official capacity as principal secretary to the Prime Minister. At all times Mr. Woodcock acted in his official capacity as Director of Issues Management in the PMO. At all times Ben Perrin acted as "Legal Counsel to the Prime Minister's Office" and "the Prime Minister of Canada" representing the "Government of Canada." At all times Prime Minister Harper was acting and speaking and receiving updates as the Prime Minister of Canada. At all times Senators Tkachuk and Stewart-Olsen were leaders of the Senate acting as the majority on the executive Steering Committee of the Internal Economy Committee. At all times Senator LeBreton was the majority Senate leader. Mr. Bayne quite rightly states that these individuals were not minor or middling bureaucrats or behind-the-desk officials in a local motor vehicle bureau or a building inspection office**.** Counsel opines that they all, orally and in writing, actively encouraged and persuaded (if not "forced," which is more likely the truth) Senator Duffy (and his lawyer) that going through with the "Scenario" – a scenario that by February 22nd, 2013 involved someone else (the Conservative Party of Canada, the CPC) in fact making the "repayment," and by March 21st, 2013 involved Mr. Wright "personally" repaying, that going through with the terms of the Scenario – was the "right thing to do" as they all believed that it was perfectly lawful. Mr. Bayne states that they never would have "persuaded" ("forced") Senator Duffy to do this if they thought any aspect of it involved any illegality. They all believed that it did not and so repeatedly told Senator Duffy that it was the "right thing" for him to do. These were officials and legal representatives of the highest office in the land, that of the Prime Minister of Canada and the majority leaders of the Senate of Canada. The Prime Minister's Chief of Staff (himself legally trained) and

the Prime Minister's and PMO's lawyer assured Senator Duffy that it was the right thing for him to do, to accept the "Scenario" terms, despite his unwillingness. When Senator Duffy finally capitulated, he had the assurance of all of these people that, although he really wasn't doing this of his own free will, it was at least "the right thing to do" and so clearly not unlawful. Mr. Bayne says that the state cannot now turn around and prosecute Senator Duffy to conviction for what these senior Government of Canada officials assured him was "the right thing" for him to do. It cannot be the "right thing to do" if it is a crime. If it is, as represented by all, the "right thing to do," it cannot be a crime, especially if the assurance comes from the lawyer for the Prime Minister and Government of Canada (official lawyer to the PMO) and from the Chief of Staff of the Prime Minister (speaking and acting for the Prime Minister of the country).

[1119] Mr. Bayne notes that the six required elements of officially induced error are made out in this case more clearly and emphatically than in any of the decided cases that have held the defence to be made out successfully. The following six elements arising from the Supreme Court decisions in *Jorgensen, supra,* and *Lévis, supra,* are to be considered by the court when deciding the appropriateness of staying the charge.

The error is one of law or mixed fact and law

[1120] Mr. Bayne states that this element, in the decided case law, has not proved difficult to demonstrate.

1. In *Jorgensen, supra*, Lamer, C.J.C., held that an official of the Ontario Film Review Board had "approved" videotapes that the police concluded were obscene. While there was a factual element to this (the content of the tapes), the mixed legal element was whether it was lawful or "right" to sell them. "Approval" of the tapes for the proposed sale amounted to an error of law or mixed fact and law because it meant to Jorgensen that it was "right" for him to embark on that conduct, i.e. not a crime – just as repeated assurances that Senator Duffy's conduct in acceding to the terms of the "Scenario" (Mr. Wright paying; favourable media lines; proffered withdrawal from the Deloitte audit; support on Constitutional eligibility) was the "right thing" for him to do, i.e. not a crime, amounted to an error of law.

2. In *R. v. St. Paul (City),* [1993] A.J. No. 953, a provincial official's advice that the province "would agree to fund" a course of conduct that resulted in the Town of St. Paul being charged, amounted to an error of law or mixed fact and law: i.e. the advice amounted to being told it was "all right" for the Town to embark on the conduct, just as Senator Duffy was repeatedly told that acceding to the Scenario terms was the "right thing" for him to do (a Scenario that Nigel Wright had personally decided to fund).

3. In *R. v. Cadieux,* [2008] O.J. No. 1246, Justice Coulson of the Ontario Court of Justice held that a zoning official telling a person accused in relation to her proposed course of conduct "Don't worry about it," was an error of law or mixed fact

and law as it amounted to an assurance that it was "all right" for her to go ahead and do it. Senator Duffy was told much more than just not to worry about acceding to the Scenario. He was actively encouraged, pressured (forced) to do so and that it was "the right thing" for him to do.

4. In *R. v. Wabasca*, [1987] A.J. No. 1757, Staples J. of the Alberta Provincial Court held that he had a reasonable doubt whether in fact the police officer had directed the suspended driver to move his car, and so directing the conduct amounted to the required error of law or mixed fact and law to constitute officially induced error of law. Mr. Bayne states that in the case at bar, the senior officials of the Prime Minister's office (representing and acting on behalf of the Prime Minister) very much directed Senator Duffy's conduct in acceding to the Scenario terms. They admittedly "persuaded", "heavily pressured" and "encouraged" the Senator, against his wishes (and more probably "forced" him), to pursue the course of conduct of which he is now charged, a clear error of law or mixed fact and law.

5. The repeated assurances that Senator Duffy should accede to the very conduct of which he is now charged, on the basis that it was "the right thing" for him to do, amounts to an error of law or mixed fact and law (as in the decided cases), is even more pointedly made out by the fact that one of the officials urging this conduct upon him was the "Legal Counsel" to the "Prime Minister of Canada" and to "the Prime Minister's Office." Mr. Perrin represented "the Government of Canada" legally. His repeated assurances that Senator Duffy should accede to the Scenario and its terms because it was the "right" thing to do are clearly assurances from a most senior Government legal authority, speaking for the Prime Minister and Government of Canada. This was legal assurance that the course of conduct (Senator Duffy acceding to the Scenario terms, despite his overt resistance) was "right" to do. There is no other reasonable way to view Mr. Perrin's assurances – he was acting and speaking legally, as the lawyer for the Canadian Government and Prime Minister. Mr. Perrin's statements are legal authorization or approval of the proposed conduct: i.e. that it is lawful.

6. Mr. Bayne notes that Mr. Perrin's detailed evidence is instructive. In his testimony he agreed that he was "trying to encourage him [Senator Duffy] or convince him to do this … to do the right thing". He agreed that he did this "encouraging"/ "convincing" in his "capacity as Counsel to the Government of Canada, the Prime Minister of Canada, and the Prime Minister's Office". He agreed that he would "never be encouraging or convincing him [Senator Duffy] to do a course of action if you [Mr. Perrin] believed it to be illegal – "Absolutely not. No", said Mr. Perrin. He agreed that he believed that Senator Duffy acceding to the "five points" of the "Scenario" (repayment) strategy was "lawful", was the "right thing to do". He agreed that if he, Mr. Perrin, as the legal representative of the Prime Minister and Government of Canada "had thought any – any part of those five points was illegal or improper" he would have so advised the Prime Minister. He did not so advise the Prime Minister. Not only did Mr. Perrin not advise the Prime Minister that any

part of the conduct of the "five points" of the "Scenario" was unlawful, he agreed in his evidence that when Nigel Wright reported that "we're good to go from the PM" (email #193), he "fully believed" that the Prime Minister "had personally approved the five points", five points of conduct all of which Mr. Perrin believed to be lawful conduct. Senator Duffy also believed, reasonably as did Mr. Perrin, that the Prime Minister had approved the "Scenario". After all, both Mr. Perrin and Mr. Wright spoke "for" the Prime Minister, Mr. Perrin as his legal representative, Mr. Wright as his official Chief of Staff. Mr. Perrin believed that Senator Duffy acceding to all the Scenario's terms was lawful, was the "right thing to do". This was, therefore, in effect, legal advice from the most senior office in the Government of Canada that, should Senator Duffy embark upon the conduct set out in the "Scenario's" five points, that conduct would be lawful, the "right thing to do". The conduct of which Senator Duffy stands charged in counts 29-31 is the very conduct that the lawyer for the Government of Canada, the Prime Minister's legal representative, assured Senator Duffy was lawful as the "right thing to do". (Evidence B. Perrin, August 21, 2015, at pp. 94-98).

7. Mr. Bayne indicates that Nigel Wright gave similar evidence to the court. He agreed that "the message to Senator Duffy kind of throughout this piece in February and March and April and May" that acceding to the "Scenario's" terms (even when the Conservative Party or Nigel Wright was actually secretly making the payment) was "the right thing to do". Mr. Bayne points out that Mr. Wright, an articulate witness and intelligent, precise man, tried to squirm out of his own description to the police of having "forced" Senator Duffy to accede to the "Scenario". He did, however, concede that at the very least he had been "pressuring Senator Duffy pretty heavily" to "do his part of this repayment scenario" and that he had been "pushing him very hard to do this". He did this heavy pressuring in his "official" capacity, his "governmental role as the Chief of Staff to the Prime Minister of Canada". He agreed that he "approved" Senator Duffy carrying out the "heavily pressured" conduct of the "Scenario". He agreed that many emails (examples of which were #146, 164, 173, 531, 535) demonstrated written evidence of the consistent message that Senator Duffy should accede to the Scenario's terms as the "right thing to do". Importantly, he agreed that in giving Senator Duffy this repeated advice, he believed that "it was a lawful course of action" that Mr. Wright was "pressuring him [Senator Duffy] very heavily to do". Mr. Wright agreed in his evidence that he would never have been party to pressuring someone (Senator Duffy) heavily to do something if he believed that conduct, or any part of it, was "unlawful or criminal conduct". He pressured Senator Duffy heavily to accede to the conduct set out in the "Scenario" because it was, in his view as Chief of Staff of the PMO, "right and lawful" to do. This clear mistake of law assured Senator Duffy that the very conduct of which he is now charged criminally was lawful. The State, through its most senior representatives, assured Senator Duffy that the conduct that has him now before a criminal court was lawful. Moreover, it did not simply advise or assure him of that fact, it "heavily pressured" him to perform the

conduct (more likely "forced" him). As Lebel, J. stated at paragraph 22 in *Lévis, supra*, "where the error in law of the accused arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused … the fundamental fairness of the criminal process would appear to be compromised" (Evidence N. Wright, August 19, 2015, pp. 65-68).

The Accused considered the legal consequences of the conduct, rather than "simply assuming legality"

[1121] Mr. Bayne notes that Senator Duffy, unlike the "passive" Mr. Tetrault in the *Lévis* case, *supra*, actively sought advice, legal advice, from the outset and throughout all of February, March, April and May, 2013. He sought legal advice in respect of his living expenses claims, his constitutional eligibility and he relied on his legal adviser to conduct all direct contacts with the Prime Minister's and PMO's official lawyer, Mr. Perrin, concerning the proposed "Scenario". It was through his own legal advisor that Mr. Perrin's repeated assurances (that acceding to the "Scenario" and its terms of conduct was all lawful, was the "right thing" for Senator Duffy to do) reached Senator Duffy. There were lawyers on both sides of the "Scenario" discussions, because legalities were involved and important for Senator Duffy (see Exhibit 45b, Tab 14) and that was why he had his lawyer dealing with the Prime Minister's and PMO's legal representative. Mr. Bayne states that Senator Duffy actively resisted the imposition on him of the PMO's "Scenario". He was not passive. He resisted personally in his own dealings with Nigel Wright and Senator Tkachuk, and he relied on his retained legal adviser to resist on his behalf when dealing with the Prime Minister's legal adviser. Lamer, C.J.C., in *Jorgensen, supra*, stated that having "sought advice" rather than "simply assuming" legalities was proof of consideration of legal consequences. That's what lawyers are for – to advise about legal consequences. That's what Senator Duffy's lawyer and the Prime Minister's/PMO's lawyer did, as lawyers, lawyer to lawyer. Senator Duffy relied on the legal advice coming from Mr. Perrin through his own lawyer. He received legal assurance that, as much as he did not want to play any part in the PMO's "Scenario", if he did capitulate (to the "forcing", the threats, the "heavy pressure", the inducements all calculated to overcome his will) at the least his part in the "Scenario" conduct would all be lawful. He actively sought advice on legal consequences and received it. This advice (assuming this Court finds the bribery offence to be proved) was a mistake of law. Mr. Bayne submits:

1. From the very outset (February 7, 2013) Senator Duffy retained legal counsel (emails #35, 39). The lawfulness of his living expense claims was in issue. The matter had been referred to the "External Auditors", Deloitte, with a mandate to report (Exhibit 45b, Tab 3). The mandate included the potential for a referral "to further investigation by appropriate authorities" (Exhibit 45b, Tabs 23 and 24). From the outset, Senator Duffy sought legal advice including potential exposure to criminal investigation of his actions.

2. Senator Duffy instructed his legal representative to act on his behalf in dealing with the Prime Minister's/PMO's lawyer (the lawyer for the "Government of Can-

ada") in all "Scenario" discussions, including the proposed terms of conduct of the "Scenario". Those discussions clearly adverted to legal consequences. Email #420 is from Senator Duffy's legal representative to the Prime Minister's legal representative. Ms. Payne is representing Senator Duffy who is seeking from the Government's legal representative "some better clarity" and "assurance" that the "RCMP or any other party" would not be involved. Mr. Perrin legally advised the PMO "small group" (Messrs. Wright, Novak, Woodcock, Rogers) that "if we don't think a crime has occurred here, we would surely not support a motion referring it to the RCMP" (email #421). All parties were considering potential legal consequences, including criminal consequences. Mr. Wright agreed that "the facts known to us do not warrant a referral of this matter to the RCMP (email #422) and Mr. Perrin agrees that the facts do not warrant criminal investigation (email #424). The RCMP and potential criminal investigation was a live issue on everyone's mind as the "Scenario" discussions were heading to the conduct climax on March 26th, 2013, when Mr. Wright's cheque passed through Senator Duffy's lawyer's account to facilitate the "repayment" part of the Scenario. Legal consequences were clearly and seriously being considered.

3. On March 22nd, 2013, Nigel Wright by-passed both Senator Duffy and Mr. Perrin by arranging direct telephone contact with Ms. Payne, Senator Duffy's legal adviser. In his evidence to the court, Mr. Wright testified that he agreed that "my objective" in speaking directly with Senator Duffy's lawyer was "to personally persuade her to persuade Senator Duffy to continue going along with this scenario". He further agreed that he "called Janice Payne with a view to persuading her to then go and persuade her client to accept the playing out of this scenario". Mr. Wright knew that it would be a "tough call" with Ms. Payne because Mr. Perrin's evidence was that, even as late as March 22nd, Senator Duffy resisted the imposition on him of the PMO's "Scenario". "He [Senator Duffy] wants to fight this out". Mr. Perrin told Mr. Wright that the call to Ms. Payne would be a "really difficult call because they're quite incensed" at being forced to do this. Nigel Wright testified that when he called Ms. Payne directly on March 22nd, "I feel I have to – I feel I have to persuade her and it's going to be a tough call". But Mr. Wright, persuasive as he is, did persuade Ms. Payne: "I think I persuaded her". How did he do that? In his own words, by convincing her "it's the right way forward". Not only did the PMO prevail on Senator Duffy's lawyer through Mr. Perrin's assurances to her that it was the "right" and "lawful" thing to do (for Senator Duffy to "go along with this Scenario") but Nigel Wright personally "persuaded" her (in his own words) that Senator Duffy acceding to the "Scenario" terms was "the right way forward". The PMO, through the Prime Minister's lawyer and Chief of Staff, persuaded Senator Duffy's lawyer that executing the "Scenario" was the right thing to do and right way forward. Senator Duffy adverted to legal consequences and the PMO made certain that Senator Duffy's own lawyer passed on to him their authoritative view of the consequences, namely that carrying out the "Scenario" was all lawful, was the "right thing" for Senator Duffy to do (Evidence N. Wright, August 18, 2015,

pp. 62, 98, 105, 110-111).

The advice obtained came from an appropriate official

[1122] Mr. Bayne points out that the "advice" was much more than mere, benign, advice. The decided case law on officially induced error all involves (with the possible exception of *Wabasca, supra,* where the officer may have directed the moving of the car) relatively passive advice in response to a query. Counsel states that in the case at bar, however, we are dealing with "heavy pressure" at the very least and, more likely, "forced" conduct, part of which involved the repeated assurance by highly placed, authoritative Government officials (including the Government's legal expert), that Senator Duffy should/must do the conduct because it was the "right thing to do" and it was all "lawful". This was not said once, or in passing. It was repeated and repeated, orally and in writing (see emails #146, 147, 151, 153, 164, 165, 173, 174, 175, 176, 181, 190, 193, 208, 210, 221-224, 226, 229, 231, 240, 246, 247, 318, 420, 422, 424, 448, 485, 531-533, 535; Exhibit 45b, Tab 31). It was not uttered by only one official, it was the operative mantra and message of Mr. Wright, Mr. Perrin, and Mr. Woodcock. It was not the "advice" of middling bureaucratic officials behind a government desk in a zoning by-law office or motor vehicle bureau but was persuasive importuning of Senator Duffy by the legal representative of the Prime Minister of Canada and the Government of Canada, the Chief of Staff of the Prime Minister's Office and the Director of Issues Management for the PMO, all people who can reasonably be taken to be authoritative in their own right but who also directly represent the Prime Minister himself. Mr. Perrin's evidence was that he legally represented the "Government of Canada" and "the Prime Minister of Canada". He therefore spoke legally for the Prime Minister and Canadian Government. He legally represented the highest elected government official in Canada's democracy. Mr. Wright's evidence is that, as Chief of Staff to the Prime Minister, his role "is a governmental role" and that "there's a lot of authority in the Prime Minister's office, yes", and that he, Nigel Wright was "number one" in that office, reporting directly "to the Prime Minister". Mr. Woodcock's evidence is that, as Director of Issues Management in the PMO, he "shaped the stance of the Government on various issues of the day". He "was responsible for briefing the Prime Minister um daily for kinda the day's hot issues"; "I was the key person in the Prime Minister's office who coordinated all of the different pieces that were moving at a given time"; "I would inform the Prime Minister on a daily basis of the key issues" (Evidence B. Perrin, August 21, 2015, p. 43; Evidence N. Wright, August 13, 2015, pp. 19, 24-25; Evidence C. Woodcock, August 24, 2015, pp. 125, 128, 130). The Defence submits that:

1. These officials, both individually but also collectively, represent among the most highly placed, authoritative government officials who could speak for a Prime Minister and elected government, other than the Prime Minister himself. They did speak for the Prime Minister. They directly represented him and his office. Lamer, C.J.C. noted in Jorgensen, *supra*, that "the advice of officials at any level of government may induce an error of law". These were officials at the highest level of government, the office of the Prime Minister of the country.

2. Mr. Bayne asks whether these officials were the kind of officials who, in Lamer,

C.J.C.'s words were, "appropriate to receive advice from" in the circumstances of this case? Mr. Bayne suggests that they were. They authored and executed the Scenario in question. Mr. Perrin represented the Prime Minister on legal matters – of course his legal "advice" (importuning) would be seen, reasonably, as authoritative. He was a legal expert. Mr. Wright was "number one" in the PMO, reporting directly to the Prime Minister and representing his office throughout. He, too, would reasonably be seen as an appropriate authority by Senator Duffy, speaking for the Prime Minister, being legally trained, issuing authoritative edicts daily on the conduct of Ministers, MP's, Senators (his "command and control" management style and language is evidenced throughout Exhibit 45a, the emails). Mr. Woodcock, given his age, may have alone been less authoritative but, in combination with Messrs. Perrin and Wright, and uttering exactly the same, 'it's the right thing to do' message, would be seen, reasonably, as authoritative. There is no "closed list of officials whose erroneous advice may be considered exculpatory", as stated by Lamer, C.J.C. In the unusual circumstances of this case, and because the PMO "small group" had created this "Scenario" and Nigel Wright demanded secrecy about it (email #190), these were the very people whom Senator Duffy had to deal with concerning it. They compelled him to deal with them. They included highly authoritative, even legally expert, officials, officials far more authoritative than any in the decided case law upholding the defence.

The advice was reasonable in the circumstances

[1123] Lamer, C.J.C. said that this element, in most cases, "will not be difficult to meet". This, he reasoned, was because "As an individual relying on advice has less knowledge of the law than the official in question, the individual must not be required to assess reasonableness at a high threshold. It is sufficient, therefore, to say that if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable". To this analysis, the decision in *Lévis, supra,* added that "clarity or obscurity of the law" and the "position and role of the officials who gave the information or opinion" as well as the "definitiveness" of the opinion are relevant considerations. Senator Duffy has no legal training. He would and did defer to the legal opinion of the Prime Minister's official lawyer, the legal expert representing the "Government of Canada". He would and did defer to the legally trained, authoritative opinion of the Prime Minister's Chief of Staff and "number one" man. The issue and law are obscure indeed. Mr Bayne asks, "What citizen knows intuitively the legal consequences of a coerced political Scenario authored by PMO officials for political damage control?" The opinion was definitively and repeatedly stated: it is the right thing/lawful to do. What would a "reasonable person in a situation similar to that of the accused" think was reasonable advice in these circumstances? Mr. Bayne observes that, first of all the question is virtually hypothetical because the circumstances here are so exceptional. Second, however, the strong, unqualified, definite opinion of the legal representative of the Prime Minister of Canada and of the Prime Minister's "number one" official representative is surely reasonable in the circumstances. The opinion of one is reinforced by the same opinion emanating from the other. Advice coming from the Prime

Minister's legal expert is going to be regarded as reasonable by non-legally trained people. As Lamer, C.J.C. cautioned, this should not be a difficult element to meet in any event.

The advice was erroneous

[1124] As Lamer, C.J.C. instructed, this need not be demonstrated by the accused. In proving the elements of the offence, the Crown will have demonstrated the legal error.

The accused person relied on the advice

[1125] This will be demonstrated, stated Lamer, CJC, by evidence that the advice was obtained before the conduct in question. The message/advice/importuning was enunciated repeatedly from February 11th (Nigel Wright's oral message to Senator Duffy) and February 20, 2013 (email #146). While Senator Duffy went on television with a capitulation (scripted) statement on February 22nd, 2013, it was not until March 26th, 2013, that the "repayment" was made. The message/advice/importuning that this be done as the "right thing to do" had been repeated many, many times before that. In any event, the advice had come from both Mr. Wright and Mr. Perrin even before February 22nd. Clearly the advice was being given before the "Scenario" was begun and/or concluded.

Mr. Bayne says that there is additional, confirming evidence that the accused relied on the representations of Mr. Perrin and Mr. Wright. Senator Duffy testified that, from February 7th when he retained legal counsel to advise him, he "relied on legal advice". He was, he said "not a lawyer" himself, and had no legal training or expertise. Critically, "there were lawyers on the other side of this like Ben Perrin", and Nigel Wright was "trained as a lawyer". Senator Duffy's evidence was that, as early as February 11, 2013, Nigel Wright told him "No, no, no, Duff. You're too emotional. You're overreacting. Trust me. You can trust me. We've got this under control: Just do what I tell you. Do the right thing and all will be well." Senator Duffy gave the following evidence:

> "Q. And, sir, even when this involved that element [that Nigel Wright had arranged that the Conservative Party would pay], what was their message to you in terms of whether this was right that you were – by agreeing to go through this, what were they telling you were doing?
>
> A. I was doing the right thing.
>
> Q. And was this a repeated message to you?
>
> A. It was a repeated message, and it was designed to overcome my last reservations, which were that maybe this was improper. And so I had a lawyer, Nigel Wright, telling me it was the right thing to do. I had the PMO lawyer telling my lawyer it was the right thing to do. I had the Senate leadership telling me it was the right thing to do. I had a former police officer, Vern White, telling me it was the right thing to do. Everyone, with the possible exception of John

Wallace, who didn't opine on this, he just gave me emotional support, he didn't comment one way or another on it, everyone in a position of authority said it's the right thing to do."

Senator Duffy gave further evidence about the evidence that came to him through his own lawyer:

"Q. And, sir, in Nigel Wright's description of his evidence, he said the purpose of his call was to try and persuade your lawyer to persuade you to complete this scenario; i.e., and act out the payment.

A. Right.

Q. And what message did you get from your lawyer about what they had told her and whether it was a right thing for you to do or so on?

A. Um, well they emphasized over and over again that this was the right thing to do, that we had to put an end to this and that I should go along."

[1126] Senator Duffy's evidence was that he relied upon the repeated message from Mr. Perrin, Mr. Wright, Mr. Woodcock, Mr. Novak, Senator Tkachuk that going along with the PMO's "Scenario" was "the right thing to do" because, "They were all people in senior leadership positions, people in authority, people I considered to be my superiors, and people I thought I could trust". Senator Duffy's evidence was as follows:

"Q. When you capitulated on the 22nd and with continued pressure through March and so on to act out the payment, what did you take – you didn't want to do it, but if you had to do it, what did you believe by "the right thing to do" that they were conveying to you?

A. This was going to damage my reputation, but it was all lawful. It was the wrong thing to do, in my view, but that's because it would destroy my reputation which I'd worked so hard. But even though it might kill my reputation with Canadians, it was still the lawful thing to do and that's what they said, all of them, and they repeated it over and over again.

Q. Did you ...

A. 'It's the right thing to do,' meaning it's lawful.

Q. Did you believe in capitulating that you were doing anything unlawful?

A. No, never."

"Q. Sir, did they, these various officials and lawyers, when they were telling you that this was the right thing to do, did you rely on that?

A. Yes, I did. They're in positions of trust. They – a lawyer could not, an ethical lawyer, could urge you to do something that was illegal. I mean, that's – my grandfather was a lawyer and a judge. There are legal ethics involved, and I had a bunch of lawyers telling me it was the right thing to do. So, the last thing I thought was that there could be anything illegal about it."

Mr. Bayne states that Senator Duffy's evidence, that he relied on these representations, was clear and emphatic. It also was unchallenged evidence. The Crown in cross-examination asked not a question about all of this evidence.

Further, Mr. Bayne contends that Senator Duffy's evidence is consistent with that of Nigel Wright and with all of the email evidence in Exhibit 45a about the consistency of this message/advice/ importuning. Senator Duffy's evidence is consistent with Mr. Wright's further evidence that he did succeed in persuading Senator Duffy's own lawyer to persuade Senator Duffy himself that going along with the PMO Scenario was the "right thing to do".

The evidence is overwhelming that Senator Duffy relied upon the advice/representations/ message coming from the Prime Minister's and Government of Canada's authoritative officials. Mr. Bayne opines that there is no other reasonable conclusion to reach on all of this evidence.

The Evidence of Senator Duffy

[1127] In respect of Count 29 (and Counts 30 and 31) the Defence highlights that Senator Duffy gave the following evidence, all of which was unchallenged by the Crown in any cross-examination:

1. The "Scenario", he testified, was entirely the creation of the PMO (Messrs. Wright, Perrin, Woodcock, Rogers) and Senator Tkachuk. Exhibit 45a (emails # 121, 127, 129, 134, 142, 146, 147, 151, 152, 153, 157, 161, 164, 173, 176, 181, 190, 193, 198, 200, 208, 215, 221, and many, many more) confirms this. Senator Duffy did not want to go through with the "Scenario" and resisted. Exhibit 45a confirms this as well (emails #6, 7, 49, 71, 75, 77, 87, 88, 95, 141, 155/156, 157/158, 166, 198, 207, 465). The evidence of Mr. Woodcock also corroborates that of Senator Duffy: Mr. Woodcock testified that "we", the "people in the PMO", "put together the following scenario for Senator Duffy to repay the allowance." Mr. Woodcock agreed that the scenario was created to "end the 'public agony'" of media stories about Senator Duffy's living expenses; it was approved by Nigel Wright who suggested scripted "Q & A's"; Mr. Woodcock agreed that it was all being "written by [himself] and Nigel Wright", who instructed that Mr. Woodcock "walk" Senator Duffy through the PMO's scripted lines. Mr. Woodcock testified that that 'walk through' "took place". Although there was some limited input by Senator Duffy or his lawyer to what Senator Duffy had to say (the scripted statement and Q & A), Mr. Woodcock testified that this resulted in "no substantial change" to the Scenario script created by the PMO, no change to the "meaning of the overall

statement". Senator Duffy's (and his lawyer's) input to the PMO "Scenario" was minimal and incidental. The Scenario was the creation of the PMO (with a term added by Senator Tkachuk) (Evidence M. Duffy, December 14, 2015, pp. 134-158; December 15, 2015, pp. 3-20, 56-61; Evidence C. Woodcock, August 25, 2015, pp. 36-89).

2. Resistance and Threats/Pressure/Inducements to overcome resistance: As set out above, the email evidence in Exhibit 45a strongly demonstrates Senator Duffy's persistent resistance to the PMO's Scenario. His actions do as well. Senator Duffy through his lawyer repeatedly tried to meet and cooperate with the independent auditor Deloitte (Exhibit 45b, Tabs 10 & 29; emails #87, 465, 466, 467, 473, 477). On February 17th, 2013, Senator Duffy was preparing a brief of materials for Deloitte (despite having been told by Senator Tkachuk on February 7th not to meet with Deloitte as they had all the information they needed and before his efforts were subsequently blunted by the PMO and Senate Leadership). He wanted a judge to examine his living expenses claim in the belief he had done nothing wrong. He tried to take his case directly to the Prime Minister. He wanted Nigel Wright and others to show him where in the Senate rules it said that his expense claims were inappropriate. He sent Mr. Wright his personal calendar to try to prove the validity of his expense claims. He uttered a desperate plea to Ray Novak on the very afternoon (February 22nd) that he was to capitulate and go on television with the scripted statement, a plea that he not be compelled to "take a dive for my leader when I am innocent", a plea that fell on deaf ears (Evidence M. Duffy, December 14, 2015, pp. 134-158; December 15, 2015, pp. 8-55).

   Mr. Bayne maintains that Senator Duffy's evidence, consistent throughout, was that he never voluntarily wanted to go through with the "Scenario"; he "wanted to go on TV and tell my story" of full compliance with the rules (i.e. no "mistake"; no "repayment"; no "Scenario"). But on February 11th an "icy" Nigel Wright issued "orders dictated straight at me" that, despite the fact that no Senate rules had been broken, "The story had gotten away from them and they were bound and determined to shut it down and shut it down as quickly as possible. And therefore I was going to do this" (go through with the "Scenario", whether he wanted to or not). Similarly, on February 13th, the Prime Minister told Senator Duffy "I know it's unfair Duff. I know it seems unfair. I know you didn't break the rules, but the rules are inexplicable to our base, and therefore you're going to have to pay the money back. Nigel will make the arrangements" (Evidence M. Duffy, December 15, 2015, pp. 22-42).

   By the start of the week of February 18, 2013, Senator Duffy was "exhausted, emotionally drained, [and] beaten down". His health had been a problem for weeks (after his suspension from the Senate, he had open heart surgery). He was in P.E.I., alone, and received telephone calls from Nigel Wright, Senator Tkachuk and others. Their pressure on him to go along with the Scenario was "immense". Senator Duffy testified that he was "physically ill" and "hanging by my finger-

nails". Nigel Wright called him February 19th (to, as Mr. Wright's own email attests "move to the final step of resolution: email #134). When he called on the 19th, Senator Duffy testified, Mr. Wright was "quite angry" at Senator Duffy's resistance to the "Scenario" and he (Mr. Wright) "practically slammed down the phone". Mr. Wright's own evidence is that he was "pissed" at Senator Duffy's resistance. Mr. Bayne stresses that Mr. Wright threatened Senator Duffy that Deloitte would find against him and that "you'll end up like Patrick Brazeau: out of the caucus and probably out of the Senate". Furthermore, Mr. Wright said that Senator Duffy should "Listen to me: you're defying the Prime Minister … You're going to do this". Mr. Bayne reminded the court that Senator Brazeau had just been kicked out of the Tory Senate caucus February 7th and suspended from the Senate without a hearing on February 11th, so it was no coincidence that Mr. Wright brandished this threatening and recent object lesson before Senator Duffy. Mr. Wright further threatened that Senators Tkachuk and Stewart Olsen (just by coincidence his collaborators in the "Scenario") would rule that Senator Duffy was ineligible to sit as a P.E.I. Senator (email #155) unless he went through with the "Scenario". More people called, including Senator Tkachuk himself (a coincidence?) offering to withdraw the very Deloitte audit his Committee had requested publicly. An "old friend", Angelo Persichilli, called Senator Duffy, warning that Senator Duffy "will be all alone" (i.e. out of caucus), "Your Party against you" unless Senator Duffy capitulated (just another coincidence?) (Evidence M. Duffy, December 15, 2015, pp. 55-82).

The threats and ominous messages continued on February 20th. Nigel Wright called to say that he had a "scenario" prepared for Senator Duffy that included an offer of cash to make the "repayment" the Scenario required but threatening, again, that the Steering Committee majority (Senators Tkachuk and Stewart Olsen) would find him ineligible unless he capitulated and that Mr. Wright was merely trying to "protect" Senator Duffy from this "rogue committee". Mr. Bayne opined that this was a cunning ploy. Yet again Senator Tkachuk called (another in an amazing string of coincidences?) to tell Senator Duffy that "You have to do it. You gotta do it for the Prime Minister. We're coming back next Monday. We gotta get this out of the way … It's about the politics of this thing". Senator Vern White called to tell Senator Duffy to "do what the Prime Minister wants". Senator Duffy had said to Mr. Wright, as his "last card that I can play" in resisting the Scenario, that he didn't "have the cash, so forget it. It's not on. I can't pay back money I don't owe if I don't have money to pay it back." Mr. Wright said "Irving [Gerstein] has all kinds of things. Don't worry about that. We'll look after all of that" (Evidence M. Duffy, December 15, 2015, pp. 55-82).

The pressure, the inducements, all the calls and especially the threats caused Senator Duffy to capitulate (the very word used by his lawyer, Ms. Payne, in email #157):

"Q. So did those threats have an effect on you?

A. That was it. That was it. I'd fought and I'd fought and I'd fought, and I'd tried every kind of resistance. When they pulled that knife out and held it over my head, I felt I had no other choice."

(Evidence M. Duffy, December 15, 2015, p. 68).

Mr. Bayne notes that it is no coincidence that two major threats uttered by Nigel Wright in order to induce Senator Duffy to capitulate to the "Scenario", actually came to pass as 'punishments' for Senator Duffy. He was, indeed, kicked out of the Tory Senate caucus. He was, indeed, suspended from the Senate without a hearing. Mr. Bayne contends that these punishments have no rationale other than political scapegoating.

3. Mr. Bayne insists that the "Scenario" terms were not "demands" of Senator Duffy and/or his lawyer. Mr. Perrin used the term "demands" (email #180) because, as he admitted, he was unaware that his client, the PMO/Nigel Wright, had been dealing directly in discussions with Senator Duffy. In his evidence, Mr. Perrin agreed that these discussions, to which he was not a party and about which he could not offer evidence were the genesis of the five points in Ms. Payne's February 21st email (#179). His evidence was as follows:

   Q. [Reading Mr. Perrin's police statement to him]: "Mr. Perrin. So I'm merely pointing to this as there being at least some genesis in those five demands in apparent direct communications that occurred between Mr. Wright and Mr. Duffy.

   Q. Yes.

   Q. Correct?

   A. That's right.

   Q. And so you're recognizing there, I take it, and I think quite perceptively, that 'look, what I'm characterizing as demands, there's a genesis of this in a conversation to which I wasn't a party'?

   A. Yes, that's correct."

   (Evidence, B. Perrin, August 21, 2015, p. 68).

   Mr. Bayne points out that the Crown has been quick to jump on Mr. Perrin's uninformed, off the cuff, characterization to allege that it was Senator Duffy who demanded the "Scenario" terms. In truth, when all the evidence is considered in context, it is seen that email #179 is not a list of Senator Duffy's "demands" at all, but a message "summarizing our [Nigel Wright's and Senator Tkachuk's and Senator Duffy's] conversations" (email #176) on the telephone February 19th and 20th.

These are the five points that Mr. Wright and Senator Tkachuk had discussed with Senator Duffy as inducements to go along with the "Scenario". Nigel Wright, who knows, does not say that these are demands. He says, instead, that they are a summary of "conversations". They all emanate from the PMO and/or Senator Tkachuk. Senator Duffy says this in his evidence and the email evidence confirms it. Email #146 evidences that the PMO created the "Scenario", the "Duffy Scenario". Immediately, the PMO scripts a statement and Q & A for Senator Duffy (emails #146; 151; 152 – where Senator Tkachuk agrees with this "path forward"; 153; 154).

Senator Duffy says that Senator Tkachuk proposed the first point/term of email #179, that the Internal Economy Committee will withdraw Senator Duffy from the Deloitte audit. Emails #152 ("Dave" will be calling Senator Duffy) and #155 ("David Tkachuk called to say that if I would write a letter saying I had made an error and offering to repay, the committee would agree to pull my case from Deloitte") confirm this. Mr. Bayne says that Nigel Wright also confirms Senator Duffy's evidence. Nigel Wright testified that "Senator Tkachuk had told me, and I presume he said the same to Senator Duffy, that the steering committee would, if he did these other things, the steering committee would withdraw him from the Deloitte review. That was, that was what Senator Tkachuk had proposed" (Evidence N. Wright, August 17, 2015, p. 58). This is the same as Senator Duffy's evidence as follows:

"Q. So, let me ask you something here. Number one, the proposition of having Deloitte withdrawn came from who?

A. Came from David Tkachuk."

(Evidence M. Duffy, December 15, 2015, p. 81).

Senator Duffy testified that point number 2, support for constitutional eligibility, came from Nigel Wright. Email #151 confirms this: this email is Mr. Wright's instruction to his PMO "group" as to the "Scenario" and its terms. Mr. Wright instructs that "we will defend his Constitutional residency qualification without question." In his evidence, Mr. Wright agreed that he had "repeatedly assured" Senator Duffy that constitutional eligibility support would be provided (Evidence N. Wright, August 17, 2015, pp. 59-60) as Mr. Wright already had that assurance from the Prime Minister "very early on".

Senator Duffy testified that point number 3 in email #179 came from Nigel Wright. Email #155 confirms this. Mr. Wright's evidence also confirms this:

"Q. But this is essentially the keeping him whole on the repayment is your suggestion on the 20th to Senator Duffy, at a time when he's resisting, that we will – I will look into a source of funds to make this payment. If you don't have the

money, I'll look into the funds. Right?

A. Yes." (Evidence N. Wright, August 17, 2015, p. 61).

The fourth point in email #179 is merely prospective about future possible rules changes. It was, Nigel Wright agreed "not a demand" (Evidence M. Wright, August 17, 2015, p. 62).

The fifth point in email #179, consistent media lines, Senator Duffy testified came from the PMO. Emails #146 and #151 – 154 confirm this. Nigel Wright's evidence also confirms this:

"Q. … The media lines, and, are all being scripted by the PMO. Aren't they? On this.

A. Yes. We're being – yes. We, you know, we think Senator Duffy can comment on them, if he disagrees with them. But they are being originated by us and this is a non-contentious point, number five" (Evidence N. Wright, August 17, 2015, p. 63).

All five points in Ms. Payne's email #179 either came from the PMO or Senator Tkachuk. They were not "demands" of Senator Duffy or his lawyer. There were an attempt to "summarize" (in Nigel Wright's own word) the telephone calls to Senator Duffy on February 19th and 20th. Senator Duffy was not "demanding" any of this. He was, again in Nigel Wright's word, "hostile" to the Scenario on the 20th (Evidence N. Wright, August 14, 2015, p. 83). And, as email #198 so vividly demonstrates, even on February 22nd, Senator Duffy wanted no part of the "Scenario" or its five proposed terms.

The evidence of Nigel Wright:

The "Scenario":

[1128] Mr. Wright agreed that "the government was happy that it looked like Duffy had paid, because that was the scenario that you [Nigel Wright] had created in the PMO". "That's also true" he said. Mr. Wright agreed that he paid his own money as part of the PMO Scenario to make a political problem go away: "I did, I absolutely wanted the problem to go away. And I did pay myself, when there was no other source of funds after we committed to a course of action." This was, he said, a "private, personal decision" of his (Evidence N. Wright, August 13, 2015, pp. 47, 52, 60).

Resistance:

[1129] Mr. Bayne highlights a number of examples confirming Senator Duffy's ongoing resistance. Mr. Wright conceded that Senator Duffy was resisting the "Scenario" persistently. Senator Duffy and his lawyer asked for production of all the versions of the Senate rules to

have someone show them where a rules violation had taken place such that he should promise "repayment" for a "mistake" – this, Mr. Wright agreed, was "evidence that Senator Duffy is just not going along with your [the PMO] plan". Mr. Wright agreed that in conversations Senator Duffy stated that he did "not want to do this scenario" and that that was "exactly the view he was expressing". Senator Duffy even resisted the Prime Minister's edict (February 13th) that he had to "repay": "it became clear to me that, that Senator Duffy was not at that stage agreeing to repay". When Senator Duffy and Ms. Payne on February 14th sought to meet and cooperate with Deloitte, Mr. Wright agreed that that was further evidence of resistance to the "Scenario". He agreed that email #88 (data proving time spent in P.E.I.) was evidence of resistance as was email #95 (a P.E.I. case supporting Senator Duffy's position) which Mr. Wright promised to forward to "in-house counsel" (Mr. Perrin?) but never did. All of this, Mr. Wright testified, was evidence that "He was resisting." Even on February 20th, Nigel Wright testified, Senator Duffy was "hostile" to the "Scenario" terms. Mr. Wright claimed he was "unaware" of email #198, Senator Duffy's plea to Ray Novak not to be compelled to act out the "Scenario".

"Forcing", threats, heavy pressure:

[1130] By February 20th, when Senator Duffy, according to Mr. Wright, is "hostile" to the "Scenario" terms, Mr. Wright says, "his lawyer has called Ben Perrin and reported to me, reported to Ben who reported to me that Senator Duffy was hostile to that report. And I was pissed about that". Mr. Wright says, "I got angry"; "my telephone call with him on the 20th was a very challenging call". Senator Duffy was "worried", "scared" and "alone". Senator Duffy "argued against that proposal on the 20th and I argued for it. And we had a very heated telephone conversation". Mr. Wright claims that suddenly, immediately after this angry, heated argumentative, pissed off call on the 20th, "… on the 21st he agreed to it" (the Scenario). Mr. Bayne poses the question, "Now what would have caused such an abrupt and inexplicable change in Senator Duffy? – threats by Nigel Wright as Senator Duffy claims, or some inexplicable agreeableness on the part of the Senator? Mr. Wright's further evidence helps to fill in the blanks in his evidence (as do emails #155/156 and #157/158, between a client confiding in his lawyer and the lawyer's response). Mr. Wright, in his statement to the police told them that Senator Duffy was "a scared man, um, flailing around", that Senator Duffy "thinks I threatened to kick him out of caucus and force him to repay the money". He told the police that Senator Duffy, after talking to Mr. Wright, "thinks his very existence as a Senator is at risk". Now why would Nigel Wright think that Senator Duffy believed those things unless Mr. Wright, "pissed off" at Senator Duffy's resistance to the Scenario, resorted to the very threats that the emails detail? Mr. Wright admits that he told the police that "We're asking, basically forcing someone to repay money that uh, that they probably didn't owe. And I wanted the Prime Minister to know that, be comfortable with that".

[1131] Mr. Bayne contends that "forcing" a person to do anything with threats calculated to induce a course of action is extortion. It is far more reasonable to believe Senator Duffy's evidence that Mr. Wright, "pissed off" at Senator Duffy's "hostile" resistance, uttered the very threats that the emails detail, the very threats that, for some unexplained reason, Mr. Wright concedes that Senator Duffy "thinks" he's just received from Mr. Wright. Mr. Bayne

emphasizes that Mr. Wright's evidence suggesting an unexpected and inexplicable sudden epiphany of agreement is utterly unreasonable.

Unreliability:

[1132] Mr. Bayne concludes that much of Mr. Wright's evidence was, frankly, unfortunately, unreliable, hard to believe. Mr. Wright spent much effort trying to explain that when he told the police he/the PMO and Senate leadership had "basically forced" Senator Duffy to go along with their Scenario he only meant "heavy pressure" and/or "browbeating". Forcing to overcome will does not require a gun to the head; threats of loss of employment are "powerfully coercive" as Justice Doherty observed in *H.A.*. Mr. Wright, an intelligent and precise leader of the PMO, knew what he was saying to the police – that the PMO Scenario had been "forced" upon an unwilling, resisting Senator Duffy.

[1133] Mr. Bayne notes that there are many examples of Mr. Wright's testimonial unreliability. He claimed that Mr. Novak "was not on the call" that Mr. Wright made March 22, 2013, to "persuade" Ms. Payne "to persuade Senator Duffy" to go along with the "Scenario" as "the right thing to do". In this call Mr. Wright stated to Ms. Payne that he personally would provide the "repayment" funds. Mr. Novak's public position was that he did not learn this until May, when the matter was exposed in the media. Mr. Novak, "popped in and out" of the office as Mr. Wright spoke, claimed Mr. Wright (protecting Mr. Novak's – and the Prime Minister's – deniability). In detailed evidence, Mr. Perrin refuted Mr. Wright's evidence: Mr. Novak was not only present throughout the call, was present when Mr. Wright said that he was personally paying the "Scenario's" "repayment", but Mr. Perrin looked directly at Mr. Novak when Mr. Wright uttered those words. Of course, there is email #400 from Mr. Wright to Messrs. Novak and Perrin, the day after the call, advising that "I will send my cheque on Monday." Mr. Bayne is of the opinion that Mr. Wright's evidence, at its charitable best, is unreliable (Evidence N. Wright, August 18, 2015, pp. 98 – 111; Evidence B. Perrin, pp. 85-92).

[1134] Faced with the multiple misrepresentations of PMO-scripted statements for Senator Duffy asserting that he (Senator Duffy) had "repaid" the money, when actually Mr. Wright had made the "Scenario's" required "repayment", Mr. Wright's evidence under oath was that "I didn't think it was a bad misrepresentation". Mr. Bayne points out that in Mr. Wright's view, it was not "bad" to deceive the Canadian public (Evidence N. Wright, August 19, 2015, p. 5).

[1135] Mr. Bayne zeroed in on Senator Gerstein's and Mr. Wright's role in with the ongoing Deloitte audit. He noted that Mr. Wright conceived and directed an improper, secret, backroom attempt to influence the independent auditor Deloitte and to script for them an audit conclusion, using a willing Senator Gerstein to use his personal contacts with the accounting firm. Mr. Perrin agreed that such an approach to the auditor "would be highly improper", yet Mr. Wright would not concede the obvious impropriety of his conduct, claiming, incredulously, that his intent was merely to get Senator Tkachuk to talk to Deloitte: "Again, all I was trying to do here was for him [Senator Gerstein] to get you know, the client [Senator

Tkachuk for the Committee] and the contractor [Deloitte] together." Mr. Wright did not call his collaborator on the Scenario, Senator Tkachuk, to ask that Senator Tkachuk speak with Deloitte (about what? – even that would be improper). He secretly directed an attempt to interfere with the work and conclusions and independence of an audit called in the public interest. Mr. Bayne concludes that this evidence is offensive nonsense and wholly unreliable. The email trail (emails #287, 288, 291, 292, 297, Exhibit 45b Tabs 4 and 11, 307, 308, 311, 313, 316, 317, 323-326, 332-343, 355, 366, 372, 374) proves the lack of candour in Mr. Wright's self-serving evidence (Evidence N. Wright August 17, 2015, pp. 128-155).

[1136] Mr. Wright stated that while much of what he did in directing and executing the PMO's "Scenario" – misleading statements, secret arrangements with Senator Gerstein and the Conservative Party to "fund" the repayment, telling the media, and Canadian public, that the Conservative Party would only ever fund Senators' expenses for "Party work" (while setting up such a "repayment" for non-Party work), secretly defeating Senator Duffy's attempt to meet and cooperate with the independent auditor, the improper, secret, backroom approach to Deloitte – did not meet "the high standards of transparency and clarity", nevertheless "I thought that was okay." Mr. Bayne emphatically proclaims that Mr. Wright is a witness whose evidence is not "okay". He states that Mr. Wright professes piety but practices deception and adheres to the motto, 'The ends justify the means'. Mr. Bayne notes that there are other examples of the unreliability of Mr. Wright's word as a witness. When he claims that he never uttered, or at least never intended to utter (he hedges even this bet) the threats that Senator Duffy and email #155 say he did utter, he is no more reliable than when claiming that having Senator Gerstein secretly go through personal back doors into the independent auditor to suggest an audit conclusion was just an attempt to have Senator Tkachuk speak with Deloitte – offensively ludicrous and unreliable. Mr. Bayne concludes that Mr. Wright proved himself unworthy of belief (Evidence N. Wright, August 19, 2015, pp. 26-33).

The evidence of Chris Woodcock:

[1137] Mr. Woodcock told the police that "Duffy was the one that we had to force him, you know, to convince, to – to persuade to go out and repay." Mr. Bayne points out that like Mr. Wright, Mr. Woodcock spent great testimonial energy trying to extract himself from his own words. He tried to turn the word "force" into "agree", suggesting that Senator Duffy had actually agreeably "collaborated" on the "Scenario". His evidence was that "…force, persuade convince. I said 'agreed'. I believe I said 'agreed'. I'd have to double check, but I used those terms interchangeably, because they carried … for – for my description of the event … they carried … the same meaning." For Mr. Woodcock "force" means the same as "agree". On this, as on so many other parts of his evidence, Mr. Bayne suggests that Mr. Woodcock showed himself to be a witness whose evidence was unworthy of the Court's reliance (Evidence C. Woodcock, August 25, 2015, pp. 22-26).

[1138] Mr. Woodcock claimed that, although he received email #346, a brief email from his boss, Nigel Wright, advising that Mr. Wright was "personally covering Duffy's $90K", an email directed, not in a chain, but solely to himself and highlighted by the boss "For you only", and although he read the email and responded directly to it within six minutes (email

#347), he never read the line that reads, simply and clearly, "For you only: I am personally covering Duffy's $90K", he never saw those eight words and a number. This, of course, would serve to protect Mr. Woodcock's deniability (and that of the Prime Minister to whom Mr. Woodcock spoke every day about every issue that 'might ruin the Prime Minister's day'), that he was unaware that it was Mr. Wright's money funding the PMO's Scenario strategy. Mr. Woodcock was, however, compelled by the hard facts to agree that, as this email came directly from his boss, he would "prioritize" it. Mr. Bayne contends that because Mr. Woodcock answered it immediately he would have had to have read it. It is short, direct, clear. It was different from the torrent of emails that Mr. Woodcock received daily because it was on his "personal gmail" account. To respond to the email it was, he had to agree, important that he knew what it had said – his job was "to know the facts" in order to be able to "respond effectively". He claimed "I just simply didn't see the line." Mr. Woodcock has to claim this. If he doesn't, then he knew and the Prime Minister knew on March 8, 2013, that Nigel Wright, the Prime Minister's Chief of Staff, was funding the "repayment Scenario" drafted by the PMO, contrary to the Prime Minister's public statements. If it is difficult for a reasonable person to believe Mr. Woodcock's evidence of inexplicably not seeing this line in a short email – not buried in the middle but standing out as the last line and headed with the red attention flag, "For you only" – Mr. Woodcock himself recognized the unbelievability of his own evidence: he told the police it was "hard to believe" he hadn't read that line. He agreed that there is usually "a reason if something's hard to believe." Mr. Bayne contends that Mr. Woodcock's evidence on this, as on so many matters, is not worthy of belief (Evidence C. Woodcock, August 24, 2015, pp. 132-162).

[1139] Mr. Woodcock did, however, admit that he knew that Mr. Wright had earlier (secretly) arranged that the Conservative Party would fund the "Scenario's" required payment. Mr. Bayne states that emails #181, 189 and 190 leave Mr. Woodcock little room to wriggle out of this knowledge, although he tried to do so. Mr. Woodcock had to concede that the words of those emails are "clear". It was also clear from the words of email #190 that the fact of the Conservative Party paying and indeed the "Scenario" itself ("the entire agreement") had to be kept secret. So, as PMO wordsmith, Mr. Woodcock drafted statements and media lines stating that Senator Duffy was repaying (knowing he was not). That untruth, he testified, he "didn't view it as a misrepresentation". "I felt like it was the truth." Mr. Bayne takes the position that Mr. Woodcock's cunning misrepresentations calculated to keep the "Scenario" secret are "the truth" (Evidence C. Woodcock, August 25, 2015, pp. 108-115).

[1140] Mr. Bayne highlights the fact that Mr. Woodcock also claimed in his evidence that he never told the Prime Minister the key fact that it was his own Party, the Conservative Party, making the "repayment". He said he didn't think it was "important" to tell that to the Prime Minister about the funding source for the payment despite the fact that he spoke daily to the Prime Minister about hot issues and that by this date, February 22nd, the Duffy living expenses issue was "public agony" for the PMO, was "Chinese water torture" that the Prime Minister wanted stopped. Mr. Bayne's position is that it was "important" (Evidence C. Woodcock, August 24, 2015, pp. 152-153).

[1141] Mr. Bayne reminds the court that Mr. Woodcock, who was copied throughout on

the emails that track Mr. Wright's improper secret attempt to influence the independent auditor, did nothing and said nothing to stop this conduct or even to raise ethical concerns about it: "I did not raise concerns" (Evidence C. Woodcock, August 25, 2015, pp. 115-129).

Jurisprudence: Officially Induced Error

[1142] Officially induced error of law is a Common Law defence developed and recognised by the Supreme Court and based upon a fairness/fundamental justice rationale. The defence, where the elements are made out, leads to a judicial stay of proceedings. The accused person bears the onus of making out the defence. The two key Supreme Court cases dealing with the defence are *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 102 C.C.C. (3d) 97 and *Lévis (City) v. Tetreault*, 2006 SCC 12, [2006] 1 S.C.R. 420.

[1143] In *Jorgensen*, *supra*, at para. 42, Lamer, C.J.C., stated that, had the Crown proved all of the elements of the alleged offences of knowingly selling obscene materials contrary to s. 163(2)(a) of the *Criminal Code*, the accused(s) would have been entitled to a stay of proceedings, having made out the defence of officially induced error of law: "I would conclude that had appellants had the requisite *mens rea* for this offence, they would be entitled to a judicial stay of proceedings as a result of officially induced error of law."

[1144] Jorgensen and his co-accused numbered company which owned and ran an adult video store were charged after undercover police purchased eight videos, despite the fact that the Ontario Film Review Board (OFRB) had approved all of them. *Jorgensen, Ibid*, at para. 46.

[1145] Lamer, C.J.C., recognizing the defence of officially induced error of law, stated that "I believe that reasonable reliance on this type of official advice is sufficient basis for a judicial stay of proceedings to be entered." (*Ibid*, at para. 2) Lamer, C.J.C., explained that "Officially induced error, on the other hand, does not negate culpability. Rather it functions like entrapment, as an excuse for an accused whom the Crown has proven to have committed an offence" (*Ibid*, at para. 22); "Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse" (*Ibid*, at para. 25); "In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence." *(Ibid*, at para. 36)

[1146] Lamer, C.J.C., set out 6 required elements of the defence:

> The error was one of law or mixed fact and law;
>
> The accused considered legal consequences, rather than assuming legality;
>
> The advice came from an appropriate official (there is no "closed list" of such officials and this factor is determined in the circumstances of each case: "the advice of officials at any level of government may induce an error of law");
>
> The advice was reasonable in the circumstances (Lamer, C.J.C., noted that "in

most instances, this criterion will not be difficult to meet")

The advice was erroneous;

The accused relied on the advice. (*Ibid*, at paras 28 – 35)

[1147] The defence is rooted in the concept of fairness, the prevention of a "manifestly unjust" conviction. (*Ibid*, at para.6)

[1148] Lamer, C.J.C., noted that the defence had been successfully raised in many Canadian cases over the years. The cases factually involved officials in government bureaus, offices, agencies, boards and/or regulatory duties advising people about proposed conduct. Such relatively minor officials and bureaus included Motor Vehicle Bureau officials, Customs officials, Ministry of Labour inspectors, building inspectors, local firearms officers, and provincial film board officials. (*Ibid*, paras 13 – 21)

[1149] Because the reasons of Lamer, C.J.C., in *Jorgensen* stood alone (the majority reversed the conviction and substituted an acquittal on other grounds), it took the decision in *Lévis (City) v. Tetrault, supra,* to confirm the defence.

[1150] *Lévis*, in 2006, represents the unanimous (seven judges) decision of the Supreme Court. In *Lévis* the Supreme Court adopted the reasons of Lamer, C.J.C., in *Jorgensen* and held that "the defence of officially induced error is available in criminal law" in Canada. (*supra*, at para. 2)

[1151] In *Lévis*, a Mr. Tetrault was charged with driving without a valid driver's license; the numbered company that owned the vehicle was charged with putting a vehicle on the road without having paid the registration fees, both charges being contrary to the Quebec "Safety Code." The Supreme Court (LeBel, J.) held that these were "regulatory offences", "not always perfectly compatible with the fundamental principles of criminal law." *(Ibid*, at paras 3,4, and 13) The Court categorized the regulatory offences as ones of "strict liability," affording the accuseds a due diligence defence. (*Ibid*, at para. 15) Because Tetrault had done nothing to obtain information (his situation was merely one of "passive ignorance" *(Ibid*, at para. 30) and because the numbered company had not been "duly diligent," the due diligence defences failed. So, too, did the officially induced error defence: "The issues raised related at most to administrative practices, not to the legal obligation to pay the fees by the prescribed date." (*Ibid*, at paras 20 and 27)

[1152] The existence of the defence of officially induced error in true criminal law matters was, however, confirmed: "the defence of officially induced error is available in criminal law." (*Ibid*, at para. 2) Noting that "this Court has never clearly accepted this defence, although several decisions by Canadian courts have recognized it to be relevant and legitimate," the Court in *Lévis* considered Lamer, C.J.C.'s, proposed framework for the defence and adopted it: "I believe that this analytical framework has become established." (*Ibid*, at paras 20 and 27)

[1153] In *Lévis* (Lebel, J.) stated the rationale for the defence this way: "Where the error in law of the accused arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused… the fundamental fairness of the criminal process would appear to be compromised." The defence of officially induced error "responded to the concerns," (*Ibid*, at para. 22) preventing such a conviction.

[1154] In *Lévis*, the court adopted Lamer, C.J.C.'s, six constituent elements of the defence and added that "Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definiteness and reasonableness of the information or opinion. It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused." (*Ibid*, at paras 26 and 27)

[1155] Canadian cases on the defence of officially induced error demonstrate that where the state, through an official or officials, "authorizes" or "directs" or agrees to fund the conduct later alleged to be criminal, the defence will succeed.

[1156] The trial and appellate level decisions in *R. v. Gravel Chevrolet Oldsmobile Inc.*, [1991] J.Q. No. 1837 occurred some years before the Supreme Court decisions in *Jorgensen* and *Lévis*, decisions that made plain that a successful "officially induced error" defence results in a stay, not an acquittal. The trial judge in *Gravel* applied the defence of "officially induced error" to acquit the accused who was charged contrary to s. 189(d) of the *Criminal Code* (now s. 206(1) (d)) with operating an unlawful lottery. The accused had received authorization or approval from officials of the Quebec Lottery Commission to operate the proposed lottery and then was charged for having done so. The Quebec Court Appeal, on the Crown appeal from acquittal, entered a stay for abuse of process (officially induced error by that point had not been approved by the Supreme Court).

[1157] In *St. Paul*, Dzenick J. of the Alberta Provincial Court held that because a provincial official (one Znak, an official in the provincial Transportation and Utilities branch) had advised the Town of St. Paul's municipal administrator, Horner, that the province would agree to fund an extension of the town's raw water intake piping out into Lac Saint Cyr (without advising of any need for additional permits), charges under the *Fisheries* and *Water Resources Acts* against the Town of St. Paul could not proceed to conviction: "As Town Manager, Horner received financing authority to proceed with the water intake extension project under the existing water transmission line project without being informed of any additional permit requirements, the Court would likely have allowed the defence of 'officially induced error of law' with respect to both charges." *R. v. St. Paul (Town)*, [1993] A.J. No. 953, at paras 1.2,10, 162, 170, 171-174, 178, 184 and 185 (As it was, the charges were dismissed on other grounds)

[1158] In *R. v. Wabasca*, [1987] A.J. No. 1757 at paras 7-10 and 15, Staples J. of the Al-

berta Provincial Court held that because of the accused person's reasonable belief that a police officer had directed him to move his vehicle from a parking lot (Wabasca was asleep in the car when approached by the police officer), the accused could not be convicted of driving under suspension: "the accused's belief that he was moving the vehicle at the invitation or direction of the constable was a reasonable belief in the circumstances and that belief constitutes a defence to the charge."

[1159] In *R. v. Cadieux*, [2008] O.J. No. 1246, at paras 4-6, Coulson, J. of the Ontario Court of Justice, sitting in appeal of a decision of the Provincial Offences Court, set aside a by-law conviction, applying *Jorgensen* (Lamer, C.J.C.) on officially induced error. The accused, concerned about whether local zoning would permit her intended usage, asked a City of Ottawa zoning official who told her "Don't worry about it." This, she took, reasonably in the judgement of Coulson, J., as authority to proceed and so "the City of Ottawa was, from that point forward, precluded from prosecuting her."

[1160] In *R. v. Mitri*, [1989] O.J. No. 1873, at pages 1,4, and 8, Megginson, J. of the Ontario Provincial Court (as it then was) upheld the defence of officially induced error because someone in the Ministry of Transportation mailed a new, facially valid Ontario driver's license to Mitri, whose 12-month license suspension was not yet over. The charge of operating a motor vehicle while disqualified could not result in a conviction because "on the unique facts of the present case, I am of opinion that I must give effect to the 'justification' or 'excuse' of 'officially-induced error of law.'"

Conclusion Regarding Officially Induced Error

[1161] I have reviewed Mr. Bayne's very thorough and thoughtful submissions on the defence of officially induced error and agree with them in their entirety.

[1162] The facts in this case can define officially induced error.

[1163] Accordingly, this charge would have been stayed if I had not dismissed it on the merits.

[1164] COUNT 30: s.121(1)(c) of the *Criminal Code*

[1165] Senator Duffy stands charged that he (30) between the 6th day of February, 2013, and the 28th day of March, 2013, at the City of Ottawa, in the East Region, being an official in the Senate of Canada, did for his benefit and without the consent in writing of the head of the branch of that government of which he is an official, accept an advantage or benefit of money originating from Nigel Wright, a person having dealings with the government of Canada contrary to section 121(1)(c) of the *Criminal Code of Canada*.

[1166] Section 121(1) (c) of the *Criminal Code of Canada* reads as follows:

> 121(1) **Frauds on the government –** Every one commits an offence who

> (c) being an official or employee of the government, directly or indirectly demands, accepts 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;

Crown's Argument

[1167] Mr. Neubauer analyzed the component parts of s. 121(1)(c) of the *Criminal Code*.

1. Being an official

[1168] Senator Duffy is an official in the Senate of Canada. The Crown contends that this element has been proven beyond a reasonable doubt.

2. Accept a benefit

[1169] Senator Duffy sought and accepted a benefit from Nigel Wright. He sought and received $90,172.24 from Mr. Wright in respect of his agreement to repay his disputed living expenses.

[1170] The Crown again relies on its earlier submissions regarding Senator Duffy's exercise of his own will in under the header, Overview of Senator Duffy's decision to seek and receive payment from Nigel Wright. The Crown relies on that position with respect to this particular element of the offence and contends that this element has been proven beyond a reasonable doubt.

3. From a person who has dealings with the government

[1171] Nigel Wright provided his own personal funds to Senator Duffy. He made that clear to Senator Duffy`s lawyer, Janice Payne. Payment is ultimately made to Senator Duffy in the form a personal bank draft bearing Mr. Wright`s name.

Trial Exhibit 44, CIBC Band Draft $90,172.24

[1172] Mr. Wright testified that he made the payment in his personal capacity. He did so as part of his dealings with the government, including Senator Duffy.

[1173] The Crown contends that this element has been proven beyond a reasonable doubt.

4. Without the written consent of the head of the branch of government of which he is an official

[1174] It is Senator Duffy`s receipt of a benefit (i.e., $90,172.24) that forms the basis of the this charge. Nigel Wright testified that his decision to pay that money to Senator Duffy was his personal decision. The evidence is that the $90,172.24 was not the subject of the consent of any head of branch of government. Mr. Neubauer notes that more to the point,

Senator Duffy took no steps whatsoever to seek or obtain written consent of the head of his branch of government. He insisted on being made whole, conducted himself in a way to that was deceitful and clandestine, and—by his own evidence—was entirely unconcerned about whether his receipt of money from Nigel Wright had been approved by anybody at all.

[1175] The Crown contends that this element has been proven beyond a reasonable doubt.

Crown's Conclusion Regarding Count 30

[1176] The Crown contends that the essential elements of the offence of s.121(1)(c) as contained in count 30 of the Information have been proven beyond a reasonable doubt.

Defence Submissions on Count 30

[1177] Count 30 alleges that Senator Duffy did for his benefit, without the consent in writing of the head of the branch of government of which he was an official, accept an advantage or benefit of money originating from Nigel Wright, a person having dealings with the government of Canada.

[1178] Mr. Bayne submits that:

1. The Crown has adduced no evidence whatsoever that Nigel Wright was a person having dealings with the Government of Canada (the evidence is flatly to the contrary) as defined by the Supreme Court in *R. v. Hinchey*, [1996] 3 S.C.R. 1128;

2. Senator Duffy not only had the "consent" of the Prime Minister of Canada (through Messrs. Wright and Perrin) but also that of his Senate leadership to going along with the "Scenario". He also had the active direction of those government authorities and it was, repeatedly, reduced to writing as the appellate case law has defined such written consent. Moreover, it is not Senator Duffy's onus to prove such written consent, but rather the Crown's onus to prove, in all the circumstances and beyond a reasonable doubt, that Senator Duffy knew he did not have such consent in any written form, which the Crown has not done (the evidence is to the contrary);

3. Senator Duffy received no true "advantage or benefit" as defined in the case law. The benefit was Nigel Wright's, the PMO's, the Prime Minister's, the Conservative Party's;

4. There was no true "acceptance" of any advantage or benefit, in the sense of truly voluntary conduct;

5. In any event, if the Court finds the elements of this offence to be proved beyond reasonable doubt, the defence of officially induced error of law precludes a conviction of Senator Duffy.

Nigel Wright was not a person "having dealings with the Government of Canada":

[1179] The Supreme Court of Canada's decision in *R. v. Hinchey,* [1996] 3 S.C.R. 1128, requires proof, in order to make out the offence under s. 121(1)(c) of the *Criminal Code*, that the "giver" of the alleged advantage or benefit be proved beyond reasonable doubt to be a person "in the private sector" and one who, at the time of allegedly giving a benefit was "in the process of having commercial dealings with the government." The Crown's own evidence proves the opposite, beyond doubt. Mr. Wright, in his evidence, agreed that at the time he made a "personal and private decision" to pay the disputed living expense amount (plus interest) to the Receiver General (through Senator Duffy's lawyer's account for appearance purposes), he "had, at no time, any external or private, commercial or business relationship, or dealing, with the Government of Canada". He agreed that there was not "an iota of element" of "advancing any business interests or commercial interest" in making such a payment (Evidence N. Wright, August 19, 2015, pp. 70-71). This is hardly surprising, for, as he testified, his role as Chief of Staff to the Prime Minister of Canada "is a governmental role, Government of Canada role". In his six months dealing with Senator Duffy, the PMO "Scenario" and the living expenses payment, Mr. Wright's evidence was that it was all in "a governmental role, Government of Canada role" (Evidence N. Wright, August 13, 2015, p. 20). Senator Duffy's evidence is to the same effect: asked if at "any time during these events, sir, back from December of 2012 through May of 2013, was Nigel Wright – did he ever have business or commercial dealings with the Government of Canada?", Senator Duffy answered, succinctly, "No". There is no other evidence. The Defence maintains that Count 30 must be dismissed on this basis alone.

The Crown has failed to prove beyond reasonable doubt that Senator Duffy knew that he did not have the consent, reduced to writing, of the head of the branch of government of which he was an official:

[1180] Mr. Bayne suggests that emails #24 and #33 provide background – on February 6th, 2013, the PMO and Senate leadership "will decide" on a new political damage control strategy; on February 7th Nigel Wright enunciates to his PMO/Senate leadership group the "plausible" strategy options. Email #54 on February 11th evidences that the mistake-repay strategy has been chosen. Email #146, scripted in the PMO, is the "Duffy Scenario", the "Scenario for Repayment", pursuant to which Senator Duffy will admit a 'mistake' in making living expense claims and will promise to 'repay'. Emails #155/156 and #157/158 on February 20th evidence the threats and heavy pressure used by the PMO and Senate leadership to coerce Senator Duffy to go along with their "Scenario". From email #159 forward is a written email record (that satisfies the Ontario Court of Appeal definition in *R. v. Fisher,* [1994] O.J. No. 358 of "consent in writing" as including electronic recordings/messages) of the consent in writing of the Prime Minister and Senate leadership to Senator Duffy executing the terms of the PMO Scenario. Mr. Bayne submits that it is, of course, more than evidence of mere consent. It is evidence of active direction that Senator Duffy go through with the Scenario. Reading it, Senator Duffy would know that he had this consent, this direction, this "marching order" (to borrow from one of Mr. Wright's favourite phrases) from the Prime Minister's office and from Senate leadership.

[1181] Email #159 records Senator Duffy's lawyer soliciting from the Prime Minister's lawyer the "media lines" the PMO has promised to provide to Senator Duffy so that the "Scenario" may be executed. Mr. Bayne states that this is on February 21st, the day before Senator Duffy capitulates and goes along with the "Scenario". In email #167, Mr. Woodcock of the PMO suggests going "over some possible comms [communication] products on the phone", and in #169 Mr. Woodcock says he will discuss "at a high level" the proposed "Statement and Q & A" scripted by the PMO that Senator Duffy is to utter on T.V. the next day. Mr. Bayne contends that there can be no doubt that the office of the Prime Minister is "consenting" to Senator Duffy's conduct in going through with the full terms of the "Scenario" (and its alleged "benefits" to Senator Duffy). In email #173, the PMO (Mr. Woodcock) sends Senator Duffy the lines of the Scenario he is to utter.

[1182] Email #179 on February 21st – which the Crown has tried to characterize as Senator Duffy's "demands" but which really represents, in Nigel Wright's own words (see email #176) an email "summarizing our conversations", i.e. the telephone conversations in which Mr. Wright, in his evidence, says he "heavily pressured" Senator Duffy to go along with the "Scenario" – sets out the "Scenario" terms, all of which originated with Mr. Wright and the PMO (terms 2 through 5) or with Senate leadership/Senator Tkachuk (term 1). These are the terms that Senator Duffy, in email #198, pleads with Ray Novak not to be compelled to go along with. Emails #181 and #188 on February 21st and February 22nd are further evidence that these are the PMO's/Senator Tkachuk's "Scenario" terms and that Mr. Perrin, the Prime Minister's lawyer, has conveyed to Ms. Payne the PMO position on the terms. Mr. Perrin, keeping the pressure up on February 22nd, tells Ms. Payne in email #195 that "We hope to finalize things now so we can proceed". Mr. Bayne concludes that clearly the PMO/Senate leadership are "consenting", and in written form.

[1183] In email #207, Ray Novak, the Prime Minister's Principal Secretary, rejects Senator Duffy's plea not to execute the "Scenario" and, referring to Senator Duffy's (coercive) discussions with "Nigel" (strongly evidencing that Mr. Novak and Mr. Wright are closely working together on the "Scenario"), suggests that Senator Duffy go ahead with execution of the "Scenario": "Best to seize the initiative and not wait for audit." Only minutes before, the Prime Minister's lawyer has told Ms. Payne that it is "imperative" that Senator Duffy go through with the "Scenario" terms "today" – email #202. The Defence submits that there can be no doubt that this is written consent. Ms. Payne and Senator Duffy would see it no other way.

[1184] At 3:07 p.m. on February 22nd, Mr. Perrin conveys the "Scenario's" media "lines" to Ms. Payne (email #222) and in emails #227 and #229 Mr. Woodcock of the PMO offers Senator Duffy "some Q & A prep before you speak to media today" and sends the "Scenario" statement script.

[1185] Mr. Bayne states that moments after Senator Duffy goes on T.V., against his wishes, to "perform" the "Scenario's" first Act, Mr. MacDougall, the Prime Minister's Communications Director, reassures Senator Duffy, in writing, that "we have your back on the residency file. We will defend to the hilt" (email #233) – unfortunately that proved to be untrue, but

it was a clear message to Senator Duffy that the PMO fully consented to their own "Scenario" and Senator Duffy's part in it.

[1186] Mr. Bayne points out that in the days and weeks after February 22nd and leading up to March 26th, 2013, the "repayment" second Act of the "Scenario", there is ample further evidence of the "consent in writing" of the PMO and Senate leadership to Senator Duffy's (coerced) role in the "Scenario". In email #246, the PMO sends Senator Duffy his "mimic" lines (see Nigel Wright's email #208) of the "Scenario" to be sent to the Senate Committee. Ms. Payne advises that Senator Tkachuk has suggested to Senator Duffy that Ms. Payne write to Deloitte about withdrawal of the audit (email #305), the "Scenario's" first term. In email #348 Ms. Payne reports that Mr. Wright has spoken to Senator Duffy "and was reassuring" (about the "Scenario's" execution). In email #401 Ms. Payne and Mr. Perrin discuss the logistics of "repayment", all arranged by Mr. Wright to make it appear that the money came from Senator Duffy. Mr. Perrin in email #403 approves those logistics. In email #407 Ms. Payne confirms that Senator Duffy "will follow the approach recommended", a repayment approach conceived by Mr. Wright, who continues to direct the "Scenario's" execution. In email #415, Mr. Wright confirms delivery of his cheque for "repayment".

[1187] Even after March 22nd, Senate leadership (Senator LeBreton) continues to "manage" Senator Duffy and what he can and can't say or do (email #447).

[1188] Counsel for Senator Duffy states that the evidence before the court amply demonstrates the fact of "consent in writing" to the "Scenario's" terms (including the alleged "advantage or benefit of money originating from Nigel Wright") from the Prime Minister, through his legal and PMO representatives, and from Senator Tkachuk, the Chair of the powerful Senate Internal Economy Committee responsible for the "good administration" of the Senate. Mr. Bayne suggests that Senator Duffy would reasonably have understood that he had such consent. Indeed, he clearly understood that he was being effectively ordered by the PMO and Senate leadership to go through with the "Scenario". Mr. Bayne concludes that the Crown has failed to prove lack of written consent or knowledge of Senator Duffy that he had no such consent.

The "advantage or benefit" was not in fact Senator Duffy's:

[1189] Mr. Bayne puts forth the contention that it was the PMO, the Prime Minister, and the Conservative Party who received the advantage or benefit. Counsel relies on his earlier submissions on this issue and on the Court of Appeal's decision in *Greenwood* and the decision of MacDonell, J. in *Dubas*. He states that the unusual circumstances of this case and a careful analysis of who really sought and stood to "profit" from the "Scenario" reveals that it was a political damage control strategy conceived by the PMO (with Senator Tkachuk's input), calculated to put an end to the "Chinese water torture that the PM does not want" of ongoing media controversy over Senator Duffy's living expenses. Nigel Wright's "repayment" was simply one term or aspect of that "Scenario" that Mr. Wright himself devised and forced (heavily pressured) upon Senator Duffy, against the Senator's true wishes (email #198, etc.), in order to protect or benefit Prime Minister Harper and his government. The

PMO represented and acted for the Prime Minister of Canada, to protect him. That there was no true "profit", no true "advantage or benefit", to Senator Duffy, and that his "state of mind" (as Doherty, J.A. characterized it) did not want the "Scenario", or any of its terms, or Nigel Wright's money, is made crystal clear by email #198. Mr. Bayne submits that this wasn't a profit or advantage or benefit for Senator Duffy, it was taking "a dive" for Prime Minister Harper "when I am innocent". The benefit was actually the givers, Nigel Wright, (as in *Dubas*), the PMO, the Prime Minister, and the Conservative Party. Mr. Bayne suggests that because the "Scenario" has now blown up in everyone's face does not change that reality.

Senator Duffy did not truly "accept" the "Scenario" or Nigel Wright's money in the sense of a truly voluntary act.

[1190] Mr. Bayne relies on his earlier submissions with respect to Senator Duffy's will being overcome by a calculated, multi-person, course of pressure, promises and threats, all calculated to overcome Senator Duffy's will to resist and reject the "Scenario", so that he would capitulate and do "something he or she would otherwise have chosen not to do" (*R. v. Davis*). No true, voluntary, "acceptance" of Nigel Wright's money has been proved beyond reasonable doubt.

[1191] Mr. Bayne submits that even if this court finds that all of the elements of the alleged s. 121(1)(c) offence have been proved beyond reasonable doubt, a conviction of Senator Duffy is precluded because the defence of officially induced error of law is amply made out.

Defence Submissions Regarding The Law on s.121(1)(c) of the Criminal Code

[1192] The leading case on the elements required to be proved to constitute the criminal offence created by section 121(1)(c) of the *Criminal Code* is the 1996 decision of the Supreme Court of Canada in *R. v. Hinchey, supra*.

[1193] The facts of *Hinchey* involved a provincial government transportation official (Hinchey) whose wife was hired (placed on the payroll) and paid by a road construction company (Beothuk Crushing and Paving Ltd.) that built roads on government contracts. Mr. Hinchey's job was to oversee and direct provincial road construction; he dealt directly with the Beothuk general manager. Hinchey's wife did no work for Beothuk yet received $7,400 in envelopes delivered to her or to Hinchey. Hinchey was convicted at trial of the s. 121(1)(c) offence as he knew that he did not have his employer's (Government of Newfoundland) consent to his receiving a benefit. The Supreme Court set aside the conviction and ordered a new trial. (*Ibid*, at paras 84 and 86-89)

[1194] The majority of the Supreme Court held that "the proper interpretation of s. 121(1)(c)" requires that the reference in the section to "a person who has dealings with the government" must be restricted or limited to persons "in the process of having commercial dealings with the government at the time" of the alleged offence. (*Ibid*, at para 51) The majority stated that such persons were in "the private sector" (*Ibid*, at paras 14 and 94): "Such

advantages or benefits can create the appearance of impropriety and suggest that the loyalty of the employee has been divided between his or her government employer and the private benefactor." (*Ibid*, at para 16) Only situations in which those persons conferring a benefit on a government employee or official were themselves external to the government (in the "private sector") and were having ongoing commercial/business dealings with the government at the time of conferring the benefit, were caught by the section.

[1195] The majority further held that "advantage or benefit" referred to in the section (and in count 30) "is a question of fact for the jury to determine based on all the evidence in the case," and that "situations could still arise which do not warrant a criminal sanction." (*Ibid*, at paras 68 and 69) The fact that the employee did or did not regard a gift as a profit by him from his employment is but one factor to consider in deciding whether the gift amounts to an 'advantage or benefit' for the purposes of s. 121(1)(c)."

[1196] In respect of the *mens rea* required to constitute the s. 121(1)(c) offence, the majority held that proof of "knowledge (or wilful blindness) at the time of the receipt that the giver was having dealings with the government and that the employee's superior had not consented to his or her receipt" of the advantage or benefit was required. (*Ibid*, at para 71) This is because "a simple, complete and exonerating defence" is the consent of the government official's "superior" reduced to "writing." (*Ibid*, at para 38)

[1197] The pre-*Hinchey* decisions in *Greenwood, supra,* (O.N.C.A.) and *Dubas, supra,* (B.C.S.C.) resulted in acquittals on the basis that the "advantage or benefit" to the accused required by the section was not made out beyond a reasonable doubt.

[1198] In *Greenwood*, Doherty, J.A., wrote for the appeal court. One Tsinonis (T) worked for the Province of Ontario as a provincial offences prosecutor; Greenwood (G) operated a POINTTS franchise defending *H.T.A.* offences. Mr. and Mrs. Greenwood, "close friends" of Mr. and Mrs. Tsinonis, bought a cable TV service for the Tsinonis', paid for by POINTTS. T knew that he did not have the consent in writing from his superior in the Provincial government. (*Greenwood*, *supra*, paras 1 -12)

[1199] In upholding the trial judge's acquittals of G (charged under s. 121(1)(b)) and T (charged under s. 121(1)(c)) Doherty, J.A., stated that "This case, however, presents unusual circumstances." (*Ibid*, at para 19) Doherty, J.A., held that the case against T, under s. 121(1)(c) turned on the analysis of the concepts of "advantage" and "benefit" appearing in the section: "A government employee receives an advantage or benefit when that employee receives something of value which, in all of the circumstances, the trier of fact concludes constitutes profit to the employee (or a family member) derived, in part at least, because the employee is a government employee, or because of the nature of the work done by the employee for the government." (*Ibid*, at para 46)

[1200] The key part of Doherty's, J.A., reasoning that, although T received a "gift" from G, it was not an "advantage" or "benefit" contemplated by the section, appears as follows:

> In the case of a gift to a government employee, the trier of fact would have to determine whether in taking a gift the employee profited from his or her status as a government employee, or from the nature of the work done for the government by the employee. The Crown bears the burden of establishing that connection between the gift and the employment. In considering whether the gift constituted a benefit or advantage, the nature of the gift, the prior relationship if any, between the giver and the recipient, the manner in which the gift was made, the employee's function with the government, the nature of the giver's dealings with the government, the connection, if any, between the employee's job and the giver's dealings, and the state of mind of the giver and the receiver would all have evidentiary significance, as no doubt would other factors which may arise in any given case. (*Ibid*, at para 47)

[1201] Doherty, J.A., concluded as follows:

> The Crown was required to prove that Mr. Tsinonis received an advantage or benefit from Mr. Greenwood. It was conceded he received a gift. Whether that gift was an advantage or benefit depended on whether the trier of fact concluded, in all of the circumstances, that by taking the gift Mr. Tsinonis profited from his position as a government employee or from the work he was doing for the government. I am satisfied that the trial judge's findings preclude the conclusion that Mr. Tsinonis received an advantage or benefit when he received the gift from Mr. [Greenwood]. (*Ibid*, at para 53)

[1202] As the learned trial judge had a reasonable doubt whether T's receipt of G's "gift" "constituted, in all of the circumstances, the profiting by Mr. Tsinonis from his position, or the nature of his employment with the government" (there may have been other reasons for the gift), the Court of Appeal upheld the acquittal. (*Ibid*, at para 81)

[1203] In *Dubas*, MacDonell, J. of the B.C.S.C. applied the reasoning in *Greenwood* to acquit the B.C. Deputy Minister of Health on 3 charges contrary to s. 121(1)(c) (for having received from Siemens Electric Ltd., an external provider of high tech hospital equipment to the B.C. government, payment for his hotel expenses while touring European manufacturing facilities). MacDonell, J. stated that "It is apparent from the authorities that all of the circumstances must be considered in deciding whether Mr. Dubas received a benefit or not." "Was it the government, or the taxpayers of British Columbia, who received the benefit by not having to pay for the trips which would otherwise be paid for by the Ministry, or was the benefit for Siemens?" MacDonell, J. concluded that Siemens, the payor, received the benefit because it was cheaper to pay the government official's hotel bills then to fly its scientists to B.C. for demonstrations. (*Ibid*, at paras 1 -32) The facts of each case matter.

[1204] MacDonell, J. also acquitted Mr. Dubas on related breach of trust charges. (*Ibid*, at para 51)

[1205] In *R. v. Fisher*, [1994] O.J. No. 358, at para. 28, the Ontario Court of Appeal held

that the "consent in writing" required by s. 121(1)(c) was satisfied so long as the consent is "traceable in some physical (or electronic) form."

[1206] The cases since the *Hinchey* decision (*R. v. Jaber*, 2001 ABQB 384; *R. v. Pilarinos*, 2002 BCSC 1267; *R. v. Mathur*, [2007] O.J. No. 4366) all apply the *Hinchey* requirements to their particular facts.

Conclusions on Count 30

[1207] I agree with Mr. Bayne's submission that the Crown has not proven beyond a reasonable doubt that Mr. Wright was a person having dealings with the Government of Canada.

[1208] I find that Senator Duffy had the consent of the Prime Minister through the PMO and his Senate leadership to go along with the "Scenario".

[1209] I find that Senator Duffy did not receive a true advantage or benefit and that the true recipients of any benefit (the disappearance of a political embarrassment) are Nigel Wright, the PMO, the Prime Minister and the Conservative Party of Canada

[1210] I find that there was no true acceptance of any benefit as per my findings and submissions in connection with Count 29.

[1211] Accordingly, Count 30 is hereby dismissed.

[1212] In the alternative, for reasons contained under the heading, "Officially Induced Error" in Count 29, Count 30 would have been stayed if I had found Senator Duffy guilty of this charge.

COUNT 31 Section 122 of the *Criminal Code*

[1213] Senator Duffy stands charged that he (31) between the 6th day of February, 2013, and the 28th day of March, 2013, at the City of Ottawa in the East Region, being an official in the Senate of Canada, did commit a breach of trust in connection with the duties of his office by accepting an advantage or benefit of money originating from Nigel Wright contrary to section 122 of the *Criminal Code of Canada*.

[1214] Section 122 of the *Criminal Code of Canada* reads as follows:

> 122 **Breach of trust by public officer** – Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person

Crown's Submissions

1. Being a public official

[1215] There is no dispute over the fact that Senator Duffy, as a member of the Senate of Canada, is a public official.

2. Acting in connection with the duties of office

[1216] All of the events surrounding Senator Duffy's decision to repay his Ottawa living expenses—include his request and receipt of money—occurred within the context of his official capacity and in connection with the duties of his office.

[1217] The Crown contends that this element has been proven beyond a reasonable doubt.

3. Breached the standard of responsibility and conduct demanded of him by the nature of that office

[1218] According to the Crown, the following circumstances establish that Senator Duffy breached the standard of responsibility and conduct demanded of him by the nature of the office with which he was entrusted:

a. The Senate inquiry into expense claims—including retaining an accounting firm to review expense claims—filed by Senators attracted broad and significant public interest;

b. The public would expect a Senator to duly cooperate with a Senate committee inquiry of third party review of something as significant as how taxpayers` money is being spent;

c. Senator Duffy`s conduct in reaching the repayment agreement with Nigel Wright constitutes a breach of the standard of responsibility and conduct demanded of him in that his conduct was motivated not by a desire to cooperate; rather, by a desire to thwart that inquiry as it related to him;

d. His conduct was exacerbated by the fact that his intention to shield himself from public scrutiny extended beyond his expense claims; it also included a desire to avoid scrutiny of his very eligibility to sit as a Senator from Prince Edward Island;

e. In addition to his removal from any further Senate or third party scrutiny, Duffy also sought assurance of protection from any police investigation of his expense claims;

f. Senator Duffy misled the Canadian public about the source of the funds provided to the Senate for repayment of his expense claims, asserting that he took out a mortgage to obtain the money. He led the public to believe that he was taking personal financial responsibility for repaying the money, a point he accentuated by pointing out that he had obtained a mortgage. The mortgage, however, was a fiction intended to cover-up the fact that Nigel Wright provided

the funds for repayment.

[1219] The Crown submits that this element has been proven beyond a reasonable doubt.

4. By conduct representing a serious and marked departure from standards expected of an individual in the accused's position of public trust

[1220] The serious and marked departure from what is expected of a Senator is evident from the conduct itself, as outlined above. In particular:

a. Senator Duffy covered-up the true source of his repayment money, and in that effort went as far as to open a mortgage to support the fiction that he was taking personal financial responsibility for repaying the money;

b. Senator Duffy`s intention was to thwart scrutiny undertaken in respect of issues of significant public interest: how public money is spent, and qualifications to sit in the Senate;

c. Senator Duffy sought assurance that his conduct in seeking and receiving more than $80,000 of public money would be shielded from scrutiny by the RCMP.

[1221] The Crown submits that Senator Duffy`s actions in seeking and receiving money to resolve the scrutiny into his Ottawa living expenses were driven by deceit, manipulation and carried out in a clandestine manner. The Crown states that this conduct represents a serious and marked departure from the standard expected of a person in Senator Duffy`s position of public trust.

[1222] The Crown states that this element has been proven beyond a reasonable doubt.

5. With intent to use his public office for a purpose other than public good, for a dishonest, partial corrupt or oppressive purpose

[1223] According to the Crown, the evidence in this case reveals the following as the intention of Senator Duffy:

a. To hide the true source of the money used to repay his expense claims;

b. To create a fiction (his mortgage) to portray his repayment as reflective of having taken personal financial responsibility for the affair;

c. To thwart the Senate`s (and as a result, the public`s) inquiry into questionable expense claims;

d. To thwart any police investigation into his conduct in seeking and receiving more than $80,000 in Ottawa living expenses;

e. To thwart that inquiry as it related to him, not only as it related to his expense

claims but also as it may have it related to his very eligibility to sit as a Senator from Prince Edward Island.

[1224] The Crown says that this element has been proven beyond a reasonable doubt.

Crown's Conclusion Regarding Count 31

[1225] The Crown contends that the essential elements of the offence of s.122 as contained in count 31 of the Information have been proven beyond a reasonable doubt.

Defence Submissions

[1226] Count 31 alleges that Senator Duffy committed a breach of trust in connection with the duties of his office by accepting an advantage or benefit of money from Nigel Wright.

[1227] Mr. Bayne submits that:

1. No true, voluntary, acceptance by Senator Duffy has been proved, in the circumstances of this case, beyond reasonable doubt

2. No "advantage or benefit", in the circumstances of this case, has been proved beyond reasonable doubt, to have been received by Senator Duffy;

3. No *actus reus* of marked and substantial departure from the standards expected and accepted of other Senators in Senator Duffy's position has been proved beyond reasonable doubt;

4. No "elevated" mental culpability (*mens rea*) of Senator Duffy's has been proved beyond reasonable doubt as required by the Supreme Court in *Boulanger*;

5. Nigel Wright's money (the "repayment" money) was not at all connected with "the duties of [Senator Duffy's] office"; it was connected directly to a political damage control strategy that had nothing whatsoever to do with official Senate duties of a Senator;

6. In any event, even if the offence as alleged under s. 122 is proved beyond reasonable doubt, a conviction of Senator Duffy is precluded because, in the circumstances of this case, the defence of officially induced error is made out.

[1228] For reasons stated by Mr. Bayne regarding count 29, he maintains that there has been no proof beyond reasonable doubt of true, voluntary, acceptance of the PMO "Scenario" or Nigel Wright's money. Email #198 alone (sent after Mr. Wright had offered "cash for repayment" – see email #155) shows no true acceptance and that at the very least a reasonable doubt is raised.

[1229] Mr. Bayne relies on his earlier submissions regarding count 29 and he maintains that Senator Duffy received no "advantage or benefit" as the Court of Appeal and other

courts have interpreted these terms. As Senator Duffy testified, "I didn't accept anything for me and anything I did in this political maneuver was done for the Prime Minister's benefit, not mine" (Evidence M. Duffy, December 15, 2015, p. 133). Mr. Bayne maintains that there is a reasonable doubt entitling Senator Duffy to a finding of not guilty.

The actus reus of marked and substantial departure has not been proved beyond reasonable doubt:

[1230] Mr. Bayne states that the Supreme Court in *Boulanger*, *supra*, established that the Crown must prove a marked and substantial departure from the conduct expected and accepted of officials similarly situated to Senator Duffy in order to constitute the *actus reus* of breach of trust. In *Radwanski*, Belanger, J. held that in the absence of "comparator" evidence relating to similarly situated officials, it was well nigh "impossible" to prove a marked and substantial departure. There is no such comparator evidence here to provide the Court with a bench mark. Mr. Bayne contends that there is good reason for this. He opines that the circumstances of this case are so rare and unusual that one hopes and believes that it is almost unthinkable that Prime Ministers, through their PMO's and legal representatives (and Senate collaborators) would routinely conceive political damage control scenarios and force, extort, heavily pressure a Parliamentarian who was resisting on a principled basis to capitulate to the terms of that "Scenario". Mr. Bayne concludes that, "Yes, it is, after all, politics." However, he maintains that the criminal law does not and should not endorse and apply crass political standards. In any event, he states that there is no known comparator situation to the case before this court. How would other Senators have reacted if placed in Senator Duffy's situation, with the Prime Minister, his legal representative, his Chief of Staff, his PMO staff and key Senate leaders all pressuring/ threatening/forcing a "Scenario" on them? The answer is conjectural. The bottom line is that the onus is the Crown's and it has failed to prove beyond reasonable doubt, with evidence, the *actus reus* of marked and substantial departure.

The Crown has not proved that Senator Duffy had the required "elevated" mens rea of a "corrupt purpose", so as to constitute breach of trust.

[1231] As the Supreme Court held in *Boulanger*, proof is required of a "dishonest, partial, corrupt or oppressive" state of mind to make out the offence. Rather than having been proved to have such an "elevated" criminal intent, Senator Duffy, in the circumstances of this case, had a state of mind, a *mens rea*, reduced by the coercive effect of calculated threats, heavy pressure and inducements. His state of mind (email #198) was to resist to the bitter end, even as the television cameras were warming up. As Senator Duffy testified, "I'd fought and I'd fought and I'd fought, and I'd tried every kind of resistance. When they pulled that knife out [removal from the Senate] and held it over my head, I felt I had no other choice." Senator Duffy capitulated in the face of threats, pressure and inducements. That capitulation is giving up (being extorted), not having a proven elevated criminal intent.

Nigel Wright's money was not connected "with the duties" of Senator Duffy's office.

[1232] Mr. Bayne notes that the money was connected to and part of Mr. Wright's/the

PMO's political damage control strategy to protect the Prime Minister. It is no part of the "duties" of a Senator's office to capitulate to PMO damage control strategies. Senators' "duties" are to perform "parliamentary functions", "public business", "representational business", not to be forced or heavily pressured into secret and deceptive political scenarios. As Senator Duffy testified, "This was a political stunt, Mr. Bayne. It was all about the Prime Minister and politics, nothing at all to do with my responsibilities as a legislator" (Evidence M. Duffy, December 15, 2015, p. 133). There is at least a reasonable doubt in respect of this element, entitling Senator Duffy to a finding of not guilty.

[1233] Mr. Bayne concludes that even if I were to find that all of the elements of the alleged offence under s. 122 have been proved beyond reasonable doubt, a conviction of Senator Duffy is precluded because the defence of officially induced error of law is amply made out.

[1234] The jurisprudence regarding breach of trust has been set out separately under the heading Payments Made To and Through Maple Leaf Ridge Media and Ottawa ICF and Gerald Donohue to Various Individuals and Entities – Jurisprudence Breach of Trust.

Conclusion

[1235] Many of the points referred to by Crown Counsel under counts 29 and 30 find their way into his submissions under count 31 and I have some concern with them.

[1236] I do not view Senator Duffy's comments that he did not have the funds to repay the living expenses as a request or demand for funds.

[1237] I do not find that Senator Duffy was trying to thwart or avoid cooperating with the third party auditors. I do find that Senator Duffy was more than willing to meet with Deloitte and explain his position. I find that the PMO did not want this to happen and they endeavoured to prevent such contact.

[1238] The Crown submits that Senator Duffy wanted to shield himself from scrutiny of his very eligibility to sit as a Senator from Prince Edward Island. I do not agree. Quite frankly, this whole area is not before the court and for good reason. The Prime Minister of Canada appoints Senators. If there are issues regarding eligibility, those concerns are addressed by the Senate and not the courts.

[1239] Mr. Neubauer stated that Senator Duffy's actions were driven by deceit, manipulations and carried out in a clandestine manner representing a serious and marked standard expected of a person in Senator Duffy's position of trust. I find that if one were to substitute the PMO, Nigel Wright and others for Senator Duffy in the aforementioned sentence that you would have a more accurate statement.

[1240] I find the repeated and additional comments of Mr. Bayne to reflect the appropriate approach to take on this count and accordingly, Count 31 is hereby dismissed.

[1241] In the alternative, I would stay this count on the basis of officially induced error.

Released: April 21, 2016

Signed: Justice Charles H. Vaillancourt