

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Carson, 2018 SCC 12, [2018] 1 S.C.R. 269 | **Appeal Heard:** November 3, 2017  **Judgment Rendered:** March 23, 2018  **Docket:** 37506 |

Between:

Bruce Carson

Appellant

and

Her Majesty The Queen

Respondent

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 49) | Karakatsanis J. (McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ. concurring) |
| **Dissenting Reasons:**  (paras. 50 to 84) | Côté J. |

R. *v.* Carson, 2018 SCC 12, [2018] 1 S.C.R. 269

Bruce Carson Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.*** Carson

2018 SCC 12

File No.: 37506.

2017: November 3; 2018: March 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for ontario

*Criminal law — Fraud on government — Influence peddling — Elements of offence — Accused accepting benefit for another person as consideration for assisting company by calling upon his government contacts to promote sale of product — Whether assistance he promised to provide was in connection with any matter of business relating to government — Meaning of “any matter of business relating to the government” — Whether elements of offence proven — Criminal Code, R.S.C. 1985, c. C‑46, ss. 121(1)(a)(iii), 121(1)(d)(i).*

C was formerly a Senior Advisor in the Office of the Prime Minister. The year following his departure from this position, he agreed to use his government contacts to help H2O Professionals Inc. sell water treatment systems to First Nations. In exchange, H2O promised to pay a commission to his then girlfriend. After this agreement was made, C spoke to government officials in order to promote the purchase of H2O’s products. He sought to convince Indian and Northern Affairs Canada to set up a project whereby it would fund the purchase of H2O’s products to pilot them in First Nations communities. Sections 121(1)(a)(iii) and 121(1)(d)(i) of the *Criminal Code* criminalize the selling of influence in connection with any matter of business relating to the government. C was charged with influence peddling under s. 121(1)(d). At trial, he took the position that his assistance was not in connection with a matter of business relating to the government. The trial judge agreed and acquitted him on the basis that First Nations, rather than government, decided whether to purchase the type of water treatment systems sold by H2O. A majority of the Court of Appeal allowed the appeal. It set aside the acquittal, entered a verdict of guilty and remitted the matter to the trial judge for sentencing.

*Held* (Côté J. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: By criminalizing influence peddling, s. 121(1)(d) of the *Criminal Code* strives to preserve both government integrity and the appearance of government integrity. It helps ensure that government activity is driven by the public interest and promotes confidence in our democratic process. Section 121(1)(d) creates a conduct offence. The offence is complete once the accused demands a benefit in exchange for a promise to exercise influence in connection with a matter of business that relates to government. The accused does not need to actually have influence with the government, endeavour to exercise influence, or succeed in influencing government to be found guilty of this offence. The relevant constituent elements of the offence are: having or pretending to have influence with the government, a minister, or an official; directly or indirectly demanding, accepting, or offering or agreeing to accept a reward, advantage or benefit of any kind for oneself or another person; as consideration for the cooperation, assistance, exercise of influence, or an act or omission; in connection with a transaction of business with or any matter of business relating to the government.

The offence under s. 121(1)(d)(i) requires that the promised influence be in fact connected to a matter of business that relates to government. Simply showing that the accused accepted a benefit in exchange for promising to influence government does not suffice to make out the offence. Nevertheless, the phrase “any matter of business relating to the government” must be interpreted broadly. Reading the words of this phrase in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, a matter of business relates to the government if it depends on government action or could be facilitated by the government, given its mandate. Matters of business relating to the government include publicly funded commercial transactions for which the government could impose or amend terms and conditions that would favour one vendor over others. The phrase “any matter of business relating to the government” must not be restricted to matters of business that can be facilitated by government under its existing operational structure. The offence captures promises to exercise influence to change or expand government programs.

C’s promised assistance was in connection with a matter of business relating to the government. The federal government has the authority to provide services, including clean drinking water, on First Nations reserves. Therefore, it could have facilitated the sale of H2O’s products to First Nations.Although, at the time of the offence, First Nations could have purchased systems such as H2O’s with government funds without obtaining government’s prior approval, the government could have changed its mode of operations, modified its funding structure or terms and conditions, or created new pilot projects in a manner favorable to H2O. Further, it was clear that C believed, at the time he made the agreement, that the sale of H2O’s products to First Nations could be facilitated by the government. By demanding a benefit in exchange for his promise to exercise his influence with the government to H2O’s advantage, C undermined the appearance of government integrity. This is exactly the type of conduct s. 121(1)(d)(i) is intended to prohibit.

*Per* Côté J. (dissenting): It is a fundamental substantive principle of criminal law that there should be no criminal responsibility if an element of the *actus reus* is missing at the time of the alleged offence. In order to make out the offence under s. 121(1)(d), the Crown must establish, as a distinct element of the offence, the existence of an actual connection with government business. This element should be interpreted narrowly by defining government business by reference to the operational structures of government in place at the time of the offence.

The purpose of s. 121(1)(d) is to preserve the integrity of government. It is not intended to protect the perceived integrity of government, which is the unique purpose underlying s. 121(1)(c). The *quid pro quo* required for all s. 121 offences other than ss. 121(1)(b) and 121(1)(c) is a corrupt practice that carries the potential to undermine government integrity. This requirement signals Parliament’s concern with actualgovernment integrity. In contrast, s. 121(1)(c) (and presumably s. 121(1)(b), a mirroring provision) seeks to preserve the integrity of government and the appearance of integrity. No *quid pro quo* is required to establish these offences.

In order to make out the offence under s. 121(1)(d), the Crown must establish, as a distinct element of the offence, that the matter of business contemplated by the agreement actually relates to government. The matter of business must relate to the government in reality and must not merely be believed by the parties to the agreement to relate to the government. This interpretation is supported by a plain reading as well as a purposive and contextual analysis of s. 121(1)(d). It gives full effect to the language of the provision, whereby Parliament very carefully defined the requisite connection to the government. It ensures a consistent interpretation across s. 121 offences. All other offences under s. 121 which do not incorporate s. 121(1)(a)(iii) and (iv) by reference require that the business in question actually relate to the government. The purpose of s. 121(1)(d) confirms that the offence requires an actual connection with government business. It seeks to protect government integrity by criminalizing corrupt agreements, which, if successfully carried out, would pose an actual risk to it. No such risk exists in circumstances where the matter of business in question does not actually relate to the government.

The scope of s. 121(1)(d) should be limited to matters of business that depend on some government approval or action within existing operational structures of government. Section 121(1)(d) creates a conduct offence aimed at deterring behaviour that has the potential to inflict substantive harm, in this case entering into a corrupt agreement. As such, it requires no further action beyond the agreement itself. It follows that any relationship between the matter of business concerned and the government must exist at the time of the agreement. Where the government has intentionally placed matters of business outside of its operational reach, they cannot be said to be matters of government business simply because the government could, at a future date, reclaim control over them. A matter of business will relate to the government only if the operational structures in place at the time of the agreementare such that it depends on some government approval or action.

The agreement between C and H2O was not made in connection with a matter of business relating to the government. The matter of business contemplated by the agreement was the sale of point‑of‑use water treatment systems to First Nations. The trial judge avoided any reliance on the evidence relating to pilot projects or the *Protocol for Decentralised Water and Wastewater Systems in First Nations Communities*. The Crown did not seek to convict C on the basis that he agreed to use his influence to change government policies. As the federal government had, at the time of the agreement, granted First Nations complete autonomy with regard to the purchase of point‑of‑use water treatment systems, the agreement cannot be said to be in connection with a matter of business relating to the government.

**Cases Cited**

By Karakatsanis J.

**Referred to:** *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Giguère*, [1983] 2 S.C.R. 448; *R. v. Cogger*, [1997] 2 S.C.R. 845; *R. v. O’Brien* (2009), 249 C.C.C. (3d) 399; *Valente* *v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Cassidy*, [1989] 2 S.C.R. 345.

By Côté J. (dissenting)

*R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *R. v. Cogger*, [1997] 2 S.C.R. 845; *R. v. Giguère*, [1983] 2 S.C.R. 448; *R. v. Greenwood* (1991), 5 O.R. (3d) 71.

**Statutes and Regulations Cited**

*Constitution Act, 1867*, s. 91(24).

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 24(1), 121, 660, 676(1), 686(4)(b)(ii).

*Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I‑6, s. 4.

*Indian Act*, R.S.C. 1985, c. I‑5, s. 73(1)(f), (k).

**Authors Cited**

Gillies, Peter. *Criminal Law*, 4th ed. Sydney: LBC Information Services, 1997.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Pardu and Miller JJ.A.), 2017 ONCA 142, 347 C.C.C. (3d) 164, [2017] O.J. No. 1223 (QL), 2017 CarswellOnt 5574 (WL Can.), setting aside the acquittal entered by Warkentin J., 2015 ONSC 7127, 25 C.R. (7th) 352, [2015] O.J. No. 6007 (QL), 2015 CarswellOnt 17540 (WL Can.), and entering conviction. Appeal dismissed, Côté J. dissenting.

Patrick McCann and Yael Wexler, for the appellant.

*Roger Shallow*, for the respondent.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. was delivered by

Karakatsanis J. —

1. Overview
2. By criminalizing influence peddling, s. 121(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, strives to preserve both government integrity and the appearance of government integrity. It helps ensure that government activity is driven by the public interest and promotes confidence in our democratic process. This appeal concerns the interpretation of ss. 121(1)(a)(iii) and 121(1)(d)(i), which criminalize the selling of influence in connection with any matter of business relating to the government.
3. The appellant, Bruce Carson, agreed to use his government contacts to help H2O Professionals Inc. sell water treatment systems to First Nations. In exchange, H2O promised to pay a commission to his then girlfriend on all sales of these systems to First Nations. After this agreement was made, Mr. Carson spoke to government officials at Indian and Northern Affairs Canada (INAC) in order to promote the purchase of H2O’s products for use in First Nations communities.
4. He was charged with influence peddling under s. 121(1)(d) of the *Criminal Code*. At trial, he took the position that his assistance was not “in connection with a matter of business relating to the government”.
5. The trial judge agreed and acquitted him on the basis that First Nations, rather than government, decided whether to purchase the water treatment systems sold by H2O. The Court of Appeal allowed the appeal and substituted a conviction.
6. In my view, the offence under s. 121(1)(d) requires that the promised influence be in fact connected to a matter of business that relates to government. Furthermore, a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate. The phrase “any matter of business relating to the government” therefore includes publicly funded commercial transactions for which the government *could* impose or amend terms and conditions that would favour one vendor over others. Governments are not static entities — legislation, policies, and structures delimiting the scope of government activity evolve constantly. “Any matter of business relating to the government” must not be considered strictly with reference to existing government operational and funding structures.
7. Here, Mr. Carson’s promised assistance was in connection with a matter of business relating to the government. While government approval was not required for First Nations to purchase the systems sold by H2O, INAC could have facilitated these purchases, for example, by changing its funding terms and conditions to H2O’s benefit. It also could, and sometimes did, participate in and fund pilot projects involving water treatment systems for First Nations communities. Indeed, Mr. Carson tried to convince the government to create a pilot project to promote H2O’s products.
8. By demanding a benefit in exchange for his promise to exercise his influence with the government to H2O’s advantage, Mr. Carson undermined the appearance of government integrity. This is exactly the type of conduct s. 121(1)(d)(i) is intended to prohibit.
9. For the reasons that follow, I would dismiss the appeal.
10. Facts
11. The appellant was formerly a Senior Advisor in the Office of the Prime Minister. The year following his departure from this position, he negotiated an agreement with H2O, a company selling point-of-use water treatment systems and water softener systems. The agreement provided that commissions would be paid to Mr. Carson’s then girlfriend on all sales of point-of-use water treatment systems to First Nations. The agreement specified that she would receive this commission regardless of whether the First Nations or the Government of Canada paid for the systems. The appellant demanded this commission in exchange for promising to use his government contacts to help H2O sell its products to First Nations.
12. After making this agreement, Mr. Carson communicated with First Nations leaders, government officials at INAC, and cabinet ministers and their staff regarding H2O’s products. INAC advised him that it provided funding to First Nations that could be used towards purchasing point-of-use water systems. However, First Nations had full autonomy in determining how to allocate this funding. That said, INAC sometimes participated in and funded pilot projects for water treatment systems. Mr. Carson sought to convince INAC to set up a project whereby it would fund the purchase of H2O’s products to pilot them in First Nations communities.
13. Mr. Carson was charged with a fraud against the government contrary to s. 121(1)(d) of the *Criminal Code*.
14. Decisions Below
    1. Ontario Superior Court of Justice, 2015 ONSC 7127, 25 C.R. (7th) 352
15. At trial, Mr. Carson admitted he was a person who had influence with the government and that he had demanded a benefit for his girlfriend as consideration for using his government contacts to assist H2O in selling its water treatment systems to First Nations communities. However, he denied that his assistance was “in connection with . . . any matter of business relating to the government”. The trial judge, Warkentin J., agreed with Mr. Carson on this point and acquitted him.
16. In assessing whether Mr. Carson’s assistance to H2O was “in connection with . . . any matter of business relating to the government”, the trial judge examined the role INAC played in relation to funding point-of-use water treatment systems on reserves.
17. She found that INAC’s funding structure enabled First Nations communities to independently procure point-of-use water treatment systems, such as those sold by H2O, without INAC’s approval (para. 34). They could do so using formula-driven operation and maintenance funds provided annually by INAC to First Nations communities. Given the nature of H2O’s water treatment systems, they would not have been funded through INAC’s “capital investments” funding stream, for which INAC must approve proposals for funding. INAC also occasionally contributed to the funding of pilot projects involving water treatment technologies. The trial judge found that a pilot project to which H2O’s technologies might have related was a burgeoning partnership between INAC and the Province of Ontario’s Ministry of Environment to pilot drinking water technologies in certain First Nations communities.
18. Since First Nations did not require INAC’s approval to procure the systems sold by H2O and INAC did not purchase these systems directly for First Nations, the trial judge concluded that Mr. Carson’s assistance to H2O was not “in connection with . . . any matter of business relating to the government” (para. 95). As such, she held that his conduct was not captured by s. 121(1)(d) of the *Criminal Code*.
    1. Court of Appeal of Ontario, 2017 ONCA 142, 347 C.C.C. (3d) 164
19. Writing for the majority of the Court of Appeal, Pardu J.A. allowed the appeal. The majority concluded that the trial judge erred in law by interpreting s. 121(1)(d) so narrowly as to effectively confine its scope to transactions to which the government is a party. On its interpretation, the mischief targeted by this offence is the acceptance of a benefit as consideration for the exercise of influence with the government. The majority reasoned that “exercising influence on government officials in order ‘to push through [H2O’s] water treatment products to First Nation Bands’ is a ‘matter of business relating to the government’” (para. 50). The majority set aside the acquittal and entered a guilty verdict.
20. In dissent, Simmons J.A. held that the trial judge made no error of law in finding that Mr. Carson’s conduct had not been proven to fall within the scope of s. 121(1)(d) of the *Criminal Code*. The trial judge’s conclusion that there was no “matter of business relating to the government” was substantiated by her finding that INAC did not have the authority to approve or purchase H2O’s products. She would have dismissed the appeal.
21. Analysis
    1. Interpretation
22. Section 121(1)(d) provides that:

**121** **(1)** Every one commits an offence who

. . .

**(d)** having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

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

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

Subparagraphs (iii) and (iv) of s. 121(1)(a) provide as follows:

**(iii)** the transaction of business with or any matter of business relating to the government, or

**(iv)** a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow . . .

1. The appellant, Mr. Carson, admitted to having influence with the government. He also admitted that he demanded a benefit for another person as consideration for assisting H2O by calling upon his government contacts to promote the sale of its water treatment systems to First Nations. The sole issue in this appeal is whether the assistance he promised to provide was in connection with “any matter of business relating to the government”.
2. This general question gives rise to two specific questions. The first concerns the role the phrase “in connection with . . . any matter of business relating to the government” plays in the s. 121(1)(d) offence. For the offence to be made out, must the promised influence be *actually* connected to a matter of business relating to the government? The second question pertains to the scope of “any matter of business relating to the government”. How broadly should this phrase be interpreted?
3. The appellant submits that the trial judge correctly interpreted “any matter of business relating to the government” to exclude matters in which the government has no direct interest, given that such matters do not affect government integrity. According to this logic, “any matter of business relating to the government” does not extend to business with entities such as First Nations that receive government funding if the government has no authority to approve the transaction in question. This interpretation limits the offence to agreements that concern matters of business that depend on some government approval or action within existing government operations.
4. The respondent, Her Majesty the Queen, submits that “any matter of business relating to the government” must be interpreted broadly in order to preserve government integrity and the appearance of government integrity. In the Crown’s view, the majority of the Court of Appeal correctly interpreted the provision as criminalizing the “acceptance of a benefit in exchange for a promise to influence government” (appeal judgment, at para. 35). Therefore, Mr. Carson is guilty of the offence under s. 121(1)(d) simply because he demanded a benefit as consideration for influencing government to H2O’s advantage. The Crown argues that, in any event, the co-ordination and supervision provided by INAC in government-funded pilot projects in this case brought the assistance promised by the appellant within the scope of the phrase “any matter of business relating to the government”.
5. For the reasons that follow, I conclude that the promised influence must be *actually* connected to a matter of business relating to the government for the offence to be made out. Accordingly, the relevant constituent elements of the offence in this case are:

having or pretending to have influence with the government, a minister, or an official

directly or indirectly demanding, accepting, or offering or agreeing to accept a reward, advantage or benefit of any kind for oneself or another person;

as consideration for the cooperation, assistance, exercise of influence, or an act or omission;

in connection with a transaction of business with or any matter of business relating to the government.

1. I also conclude that the phrase “any matter of business relating to the government” must be interpreted broadly. A matter of business relates to the government if it depends on government action or could be facilitated by government, given its mandate. Thus, s. 121(1)(d) captures promises to exercise influence to change or expand government programs.
   * 1. What Role Does the Phrase “in Connection With . . . Any Matter of Business Relating to the Government” Play in This Offence?
2. In *R. v. Hinchey*, [1996] 3 S.C.R. 1128, a majority of this Court characterized the offence created by the neighboring provision, s. 121(1)(c), as a conduct offence because it criminalizes certain types of conduct even where the accused’s behaviour causes no substantive harm (para. 22). Like s. 121(1)(c), s. 121(1)(d) sets out a conduct offence. It criminalizes the *selling* of influence in connection with any matter of business relating to the government. The accused does not need to actually have influence with the government, endeavour to exercise influence, or succeed in influencing government to be found guilty of this offence. Indeed, the text of s. 121(1)(d) explicitly targets everyone “having or pretending to have influence with the government”. The offence is complete once the accused demands a benefit in exchange for a promise to exercise influence in connection with a matter of business that relates to government.
3. While “any matter of business relating to the government” must be interpreted broadly, I cannot accept the majority of the Court of Appeal’s conclusion, which was endorsed in the Crown’s submissions before this Court, that the offence is made out simply if the accused accepts a benefit in exchange for promising to influence government (appeal judgment, at para. 35). Some meaning must be given to the requirement that the promised influence be “in connection with . . . any matter of business relating to the government”. It should indeed be presumed that this phrase was deliberately included in the texts describing the offence (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at pp. 43 and 136-38). As Côté J. highlights, had the legislature merely intended to criminalize the selling of influence with government, regardless of whether the promised influence is actually connected to a matter of business relating to the government, it could have omitted the reference to s. 121(1)(a)(iii) and drafted the offence as applying to

every one who, having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts, or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for the exercise of that influence. [Emphasis in original; para. 66.]

1. Furthermore, a contextual reading of ss. 121(1)(a)(iii) and 121(1)(d) supports the conclusion that the promised influence must *actually* be connected to a matter of business that relates to government. The other offences set out in s. 121(1) only criminalize conduct that has an actual nexus with government. For these offences to be made out, one of the parties must work for government (or be related to someone who does) or have made a tender to obtain a contract from government. In contrast, s. 121(1)(d) criminalizes agreements between parties who may have no connection to government, given that this offence can be committed by someone who merely pretends to have influence with government. Interpreting s. 121(1)(d) harmoniously with the other offences set out in s. 121(1) indicates that the promised assistance must in fact concern a matter of business that depends on government or that government could facilitate.
2. As I shall discuss below, the purpose of this provision is to preserve both government integrity and the appearance of government integrity. While this purpose is broad, it cannot override the explicit language of the provision, which requires that the promised influence be connected to a matter of business relating to the government. In fact, this requirement calibrates the scope of the offence to its dual purpose. Given that the offence can be committed by someone who does not have influence with government, this requirement connects the conduct of an individual *outside* of government *to* the government. It ensures that agreements that are so unrelated to the government that they have no potential to affect public confidence in government do not attract criminal liability. Thus, in my view, while the offence is complete upon reaching the agreement, the phrase “any matter of business relating to the government” qualifies the nature of the influence promised by the accused. As such, it is essential that the agreement actually be “in connection with” a matter of business relating to the government.
3. In short, where the influence sold is connected to a matter of business that is not in fact related to the government, the offence under s. 121(1)(d) is not made out. However, if the accused *subjectively* believes that the promised influence is connected to a matter of business that relates to the government, but the offence cannot be proven, solely because the matter of business does not *in fact* relate to government, a judge may find the accused guilty of an attempt to commit the s. 121(1)(d) offence (*Criminal Code*, ss. 24(1) and 660; see also *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 74). Indeed, the impossibility of committing one of the essential elements of the offence is not a barrier to a conviction for an attempt to commit that offence under s. 24(1) of the *Criminal Code* (*Dynar*, at para. 67). For the offence set out in s. 121(1)(d), the law of attempt thus ensures that those who are paid to exercise influence in connection with a matter of business that they believe relates to the government will not escape criminal liability.
   * 1. What Is the Scope of the Phrase “Any Matter of Business Relating to the Government”?
4. Having concluded that the offence under s. 121(1)(d) is only made out where the promised influence is *actually* connected to a matter of business that relates to government, a second question arises: What is the scope of the phrase “any matter of business relating to the government”?
5. The trial judge interpreted the phrase “in connection with . . . the transaction of business with or any matter of business relating to the government” as restricted to transactions to which the government was a party or that it had the authority to approve within its existing operations (para. 97). She therefore reviewed the appellant’s conduct and INAC’s operations extensively.
6. As I will explain, I think the trial judge interpreted “any matter of business relating to the government” too narrowly. Reading the words of this phrase in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, I conclude that a matter of business relates to the government if it depends on government action or could be facilitated by the government, given its mandate.
7. Turning first to the language of the provision, the juxtaposition in s. 121(1)(a)(iii) of “any matter of business relating to the government” with “transaction of business with . . . the government” shows that the former must be different from the latter. A “transaction of business with . . . the government” is a transaction to which the government is a direct party. For instance, in *R. v. Giguère*, [1983] 2 S.C.R. 448, government contracts were found to constitute transactions of business with the government (p. 463). As the Court of Appeal rightly acknowledged in the case at hand, “[i]f the second phrase is to have meaning, it must go beyond the scope of the first phrase, which pertains to business transactions to which the government is a direct party” (para. 34).
8. There is no need in this case to determine whether the term “business” can be read in a non-commercial sense. At the very least, “any matter of business” must encompass commercial matters. Indeed, in *R. v. Cogger*, [1997] 2 S.C.R. 845, obtaining government grants for businesses was treated as a matter of business relating to the government within the meaning of s. 121(1)(a)(iii) (paras. 2-3 and 30).
9. In this case, Mr. Carson promised to influence government in connection with a commercial transaction — H2O’s sale of point-of-use water systems to First Nations. The only question here is whether this commercial transaction relates to the government.
10. The trial judge’s narrow interpretation of ss. 121(1)(a)(iii) and 121(1)(d) is at odds with the expansive language of these provisions. “In connection with”, “any”, and “relating to” are broad terms that appear to go beyond transactions that require government approval. The use of such broad terms suggests that a commercial transaction for which government approval is not required still relates to the government if this transaction *could* be facilitated by government, given its mandate.
11. The nature of the offence set out in s. 121(1)(d) also supports a broad interpretation of “any matter of business relating to the government”. As explained above, s. 121(1)(d) creates a conduct offence which criminalizes the selling of influence, even if the accused takes no subsequent steps to influence government. Thus, a restrictive interpretation of “any matter of business relating to the government”, an interpretation which would narrowly focus on whether the accused could have successfully influenced the government given its existing operations, is at odds with the nature of this offence.
12. The broad purpose of the provision also undermines the trial judge’s interpretation. Like s. 121(1)(c), s. 121(1)(d) aims to preserve both government integrity and the appearance of government integrity (*Giguère*, at p. 462; *Hinchey*, at paras. 13 and 16; *R. v. O’Brien* (2009), 249 C.C.C. (3d) 399 (Ont. S.C.J.), at para. 52). Even people who have no actual influence with government, and people who take no steps to influence government, can be guilty of this offence, which shows that its purpose is not limited to preserving government integrity. As this Court’s jurisprudence on both judicial independence and the impartiality of the public service demonstrates, the appearance of integrity, impartiality, and independence are tied to actual integrity, impartiality, and independence (for judicial independence and apprehension of bias, see e.g. *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689; *R. v. Lippé*, [1991] 2 S.C.R. 114, at pp. 140-41; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 131 and 133; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 69; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 45; for the impartiality of government officials, see e.g. *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at p. 470). Therefore, the broad purpose of s. 121(1)(d) belies a narrow interpretation of “any matter of business relating to the government”. Government integrity and the appearance of government integrity are undermined when people are paid to persuade government to facilitate transactions to one party’s advantage, even if government approval is not required for the transaction to proceed.
13. A broad interpretation of “any matter of business relating to the government” is also consistent with the placement of s. 121(1)(d) in the section of the *Criminal Code* that criminalizes “Frauds on the government”. The offences in this section target dishonest behaviour by members of government and by the people that may attempt to influence them. The behaviour criminalized by this section risks depriving citizens of a true democracy predicated on free and open access to government. Corruption and the sale of influence, whether real or apparent, with government may undermine the integrity and transparency that are crucial to democracy. Where a person accepts a benefit in exchange for a promise to influence the government to change its policies or funding structure, they flout the notion that government decision-making should not be the object of commerce (see *Giguère*, at p. 464). Interpreting s. 121(1)(a)(iii) — as incorporated into s. 121(1)(d)(i) ― in harmony with surrounding provisions suggests that “any matter of business relating to the government” should be read broadly and purposively.
14. For these reasons, “any matter of business relating to the government” is not limited to matters in which government plays a direct approval role. It includes a matter of business in which government could play a role even if it does not do so at the time the offence is committed. A matter of business relates to the government if it depends on government action or could be facilitated by the government, given its mandate. Therefore, it includes purchases funded by the government for which the government *could* impose or amend terms and conditions that would promote a specific transaction. As counsel for the appellant recognized before this Court, s. 121(1)(d)(i) captures agreements whereby the accused, having or pretending to have influence with the government, accepts a benefit as consideration for exercising his influence to change an agency’s operational structure in order to facilitate a transaction or result.
15. In sum, the phrase “any matter of business relating to the government” must not be restricted to matters of business that depend on some government action or can be facilitated by government under its existing operational structure. But while the phrase “any matter of business relating to the government” must be interpreted broadly, this is not to suggest that the scope of s. 121(1)(d) is without limits. While we need not determine the exact limits of the phrase in this case, it would clearly exclude matters that have no plausible connection with the government’s mandate. Furthermore, the fact that an entity receives government funding for some purpose completely unrelated to the matter of business at issue does not suffice to show that a business transaction with that entity constitutes a “matter of business relating to the government”. The fact that First Nations receive government funding does not, in itself, render all commercial transactions with First Nations “matter[s] of business relating to the government”. However, as indicated, for the purpose of s. 121(1)(d), the law of attempt ensures that those who are paid to exercise influence in connection with a matter of business that they believe relates to the government, even if it does not, will not escape criminal liability.
    1. Application
16. As explained above, the trial judge interpreted the scope of s. 121(1)(a)(iii) as incorporated into s. 121(1)(d)(i) too narrowly. On her interpretation, “matter[s] of business relating to the government” only encompassed purchases for which government *approval* was needed under the *existing* structure of governmental activity. She thus assessed INAC’s operations from a static perspective. Given that, under its structure at the time of the offence, INAC did not directly purchase the type of water treatment system sold by H2O, and its approval was not required for First Nations to purchase these systems, she acquitted Mr. Carson. Her legal error in interpreting the provision in issue directly led her to conclude that Mr. Carson’s promise to influence government was not in connection with “a matter of business relating to the government” (para. 97).
17. On appeal, a court may set aside the initial verdict and “enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and . . . remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law” (*Criminal Code*, s. 686(4)(b)(ii)). However, it may only do so when the trial judge has made all the findings of fact necessary to support a conviction beyond a reasonable doubt (*R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326, at para. 50; *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 294; *R. v. Cassidy*, [1989] 2 S.C.R. 345, at pp. 354-55).
18. In this case, it was clear that Mr. Carson believed, at the time he made the agreement, that the sale of H2O’s products to First Nations could be facilitated by the government. Furthermore, the trial judge made the findings of fact necessary to conclude that the influence Mr. Carson promised to exercise was in connection with a “matter of business relating to the government” on a correct interpretation of this phrase. Indeed, her factual findings show that Mr. Carson’s promised assistance was connected to the sale of H2O’s water treatment systems to First Nations, which could have been facilitated by government action, given INAC’s mandate. In reaching this conclusion, I am mindful of the autonomy of First Nations to determine whether or not to make such purchases, whether with their own funds or general funds provided by INAC. The conclusion that the government could have facilitated the purchase of H2O’s products by First Nations in no way diminishes this autonomy.
19. At trial, Mr. Carson admitted “that he was a person who had influence with the Government of Canada at the time of the alleged offence and that he demanded a benefit for [his then girlfriend] as consideration for his assistance in utilizing his government contacts on behalf of H2O” (para. 11). He also admitted that he was “motivated to promote H2O and its products in order for his girlfriend . . . to obtain a benefit by receiving a share of the profits of sales of H2O’s water treatment systems to First Nations communities” (para. 9).
20. Although Mr. Carson did not admit that his promised assistance was in connection with a matter of business relating to the government, constitutional and legislative sources demonstrate that it was. They show that the federal government generally, and INAC specifically, has the authority to provide services, including clean drinking water, on First Nations reserves (see *Constitution Act, 1867*, s. 91(24); *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6, s. 4; *Indian Act*, R.S.C. 1985, c. I-5, s. 73(1)(f) and (k)). Therefore, the government could have facilitated the sale of H2O’s products to First Nations and Mr. Carson’s promised assistance concerned a matter of business relating to the government.
21. These constitutional and legislative sources suffice to dispose of the appeal. In most cases, a lengthy trial will not be required to determine whether the accused is guilty of the s. 121(1)(d) offence. That said, the trial judge’s findings of fact clearly establish that Mr. Carson’s promised assistance was connected to a matter of business relating to government, properly defined. INAC funds some reserve water infrastructure and pilot projects related to the provision of drinking water on reserves. At the time of the offence, First Nations could have purchased decentralized systems such as H2O’s with INAC funds without obtaining INAC’s prior approval. However, INAC could have changed its mode of operations, modified its funding structure or terms and conditions, or created new pilot projects in a manner favorable to H2O. Indeed, the trial judge found that Mr. Carson sought to set up a project to pilot H2O’s products with INAC funding and approval.
22. In these circumstances, and on a correct application of the law, the benefit Mr. Carson demanded was in consideration for his promise to exercise influence in connection with a matter of business relating to the government. But for the trial judge’s unduly narrow interpretation of the scope of the expression “any matter of business relating to the government”, Mr. Carson would have been convicted. The Court of Appeal did not err in substituting a conviction to the acquittal entered by the trial judge.
23. Conclusion
24. For these reasons, I would dismiss the appeal. Mr. Carson is guilty of influence peddling contrary to s. 121(1)(d) of the *Criminal Code*. I agree with the majority of the Ontario Court of Appeal that the acquittal should be set aside, a guilty verdict should be entered, and the matter should be remitted to the trial judge for sentencing.

The following are the reasons delivered by

1. Côté J. (dissenting) — This appeal concerns the correct interpretation of s. 121(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, which seeks to protect the integrity of government by criminalizing influence peddling in connection with any matter of business relating to the government, in return for any kind of benefit.
2. The only question for this Court to decide in this appeal is whether Mr. Carson, who admits to having agreed to exercise his influence with the government for a benefit, did so in connection with “any matter of business relating to the government”. In my view, he did not.
3. It is a fundamental substantive principle of criminal law that there should be no criminal responsibility without an act or omission accompanied by some sort of fault (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 227, per Arbour J., dissenting but not on this point). Both the *actus reus* and the *mens rea* must be made out. While there is no doubt that Mr. Carson had a guilty mind, establishing the *mens rea* is insufficient, in and of itself, to make out the offence. If, as in the case at bar, an element of the *actus reus* is missing at the time of the alleged offence, the defendant cannot be found guilty. In my respectful opinion, my colleagues have allowed Mr. Carson’s criminal intent to overshadow deficiencies in establishing a central element of the *actus reus*.
4. In order to make out the offence under s. 121(1)(d), the Crown must establish, as a distinct element of the offence, the existence of an actual connection with government business. This element should be interpreted narrowly by defining government business by reference to the operational structures of government in place at the time of the offence.
5. As the federal government had, at the time of the agreement between Mr. Carson and H2O Professionals Inc., granted First Nations complete autonomy with regard to the purchase of point-of-use water treatment systems, the very matter of business Mr. Carson agreed to influence, the agreement cannot be said to be in connection with a matter of business relating to the government.
6. For these reasons, I would allow the appeal.
7. The Purpose of Section 121(1)(d) Is to Preserve the Integrity of Government
8. A contextual reading of s. 121(1)(d) and the relevant jurisprudence lead me to conclude that this provision’s underlying purpose is to preserve the integrity of government. Contrary to the approach taken by my esteemed colleagues, I do not understand this provision as being intended to protect the *perceived* integrity of government, which, according to this Court’s reasons in *R. v.* *Hinchey*, [1996] 3 S.C.R. 1128, and *R. v.* *Cogger*, [1997] 2 S.C.R. 845, is the unique purpose underlying s. 121(1)(c).
9. For convenience, I reproduce the full text of s. 121(1) below:

**121 (1)** Every one commits an offence who

**(a)** directly or indirectly

**(i)** gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

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

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

**(iii)** the transaction of business with or any matter of business relating to the government, or

**(iv)** a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

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

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

**(d)** having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

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

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

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

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

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

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

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

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

1. This Court has previously recognized that s. 121, generally, “was enacted for the important goal of preserving the integrity of government” (*Hinchey*,at para. 13). Only in interpreting s. 121(1)(c) has this Court recognized that this provision seeks “not merely to preserve the integrity of government, but to preserve the appearance of the integrity as well” (*Hinchey*,at para. 16 (emphasis deleted); see also *Cogger*,at para. 20). This has been described as the “special role” of s. 121(1)(c) (*Hinchey*, at para. 16).
2. This clear distinction between the purpose of s. 121(1)(c) (and presumably s. 121(1)(b), a mirroring provision) and that of the other provisions of s. 121 was highlighted in *Cogger*. In that decision, Justice L’Heureux-Dubé relied on this very distinction in rejecting the respondent’s argument that s. 121(1)(a) requires the recipient to accept the benefit *qua* government employee, and not in some other capacity:

Still, the respondent attempts to raise the recent decision of *Hinchey*, *supra*, in support of his interpretation. Frankly, I do not believe this case is of much assistance. First, *Hinchey* involved a different section of the *Code* (s. 121(1)(*c*)), one which, at least on the surface, had a potentially unlimited application. Even the minority reasons of Cory J. were premised upon the fact that absent a stricter interpretation of both the *actus reus* and *mens rea*, innocent conduct could be rendered criminal. Here, there is no fear of trapping innocent actions. Indeed, it is clear that for a person to fall within the confines of s. 121(1)(*a*), contrary to s. 121(1)(*c*), his or her actual integrity will have to have been compromised. For an offence under s. 121(1)(*a*) to be committed, an accused will have agreed to deal with the government on another’s behalf for consideration. Contrary to what the respondent submits, it is not necessary for the official to believe his or her integrity has been compromised. On the contrary, this automatically follows from the engaging in of the prohibited *quid pro quo* action: *Greenwood*, *supra*, at p. 456. As *Hinchey* indicates, s. 121(1)(*c*) is markedly different, in that the recipient of the benefit need commit no additional action; it is the appearance of integrity with which that provision is most concerned. [Emphasis added; emphasis in original deleted; para. 20.]

1. Indeed, s. 121(1)(c) is unique in that, unlike the other provisions of s. 121, it does not require a *quid pro quo*. All it requires is that a government employee or official accept a benefit from a person “who has dealings with the government”. Similarly, s. 121(1)(b) makes it an offence for a person “having dealings of any kind with the government” to confer a benefit on an employee or official of the government with which the dealings take place, as follows:

**121 (1)** Every one commits an offence who

. . .

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

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

Under both s. 121(1)(b) and s. 121(1)(c), no *quid pro quo* is required to establish the offence.

1. The *quid pro quo* required for all other s. 121 offences is the corrupt practice that carries the potential to undermine government integrity. This requirement signals Parliament’s concern with *actual* government integrity. Conversely, its absence from s. 121(1)(b) and (c) signals Parliament’s unique concern, under those two provisions, with the appearance of impropriety in circumstances where no corrupt practice exists. This interpretation aligns with the analytical distinction between the two purposes, as described by this Court in *Hinchey*:

For a government, actual integrity is achieved when its employees remain free of any type of corruption. On the other hand, it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. [Emphasis deleted; para. 17.]

1. For these reasons, it is my view that s. 121(1)(d) seeks to protect government integrity by criminalizing corrupt agreements, which, if successfully carried out, would pose an actual risk to it.
2. I respectfully disagree with my colleague’s view, expressed at para. 38 of her reasons, that the fact that s. 121(1)(d) criminalizes conduct by someone pretending to have influence with the government necessarily implies that the provision has a dual purpose, which includes, in my colleague’s opinion, preserving the appearance of government integrity. In my view, by criminalizing the conduct of those having or pretending to have influence, Parliament intended to indicate that it is not necessary to inquire into whether a person actually had or merely held themselves out as having influence with the government. The corrupt agreement relating to government business poses a risk to government integrity in and of itself. Just as it is unnecessary to establish whether the accused ever intended to carry out the agreement, it is unnecessary to establish whether the accused had the influence necessary to succeed. Section 121(1)(d) sets out a conduct offence, and there is no need to look beyond the agreement.
3. Furthermore, I will briefly note that, for the reasons set out above, I cannot agree with Dickson J.’s reasoning in *R. v.* *Giguère*, [1983] 2 S.C.R. 448, where, in discussing what is now s. 121(1)(d), he states that it is the integrity of the person having or pretending to have influence with the government which is at issue (p. 459). Parliament’s intent in enacting s. 121(1)(d) was to protect the integrity of government. It has no interest in protecting the integrity of persons pretending to have influence with the government, who, plainly, have no connection to it.
4. The Offence in Section 121(1)(d) Is Made Out Only Where the Matter of Business in Question Actually Relates to the Government
5. A plain reading of s. 121(1)(d) leads me to conclude that, in order to make out the offence under that section, the Crown must establish, as a distinct element of the offence, that the matter of business contemplated by the agreement actually relates to the government. By this I mean that the matter of business must relate to the government in reality and not merely be believed by the parties to the agreement to relate to the government. This interpretation is also supported by a purposive and contextual analysis.
6. First, this approach gives full effect to the language of the provision. In drafting s. 121(1)(d), Parliament very carefully defined the requisite connection to the government. Had it intended the offence to be made out where the accused agrees to accept a benefit in exchange for promising to exercise influence in connection with a matter of government business, irrespective of whether the matter is truly government business, Parliament could have omitted the reference to s. 121(1)(a)(iii) and (iv) and simply drafted the offence as applying to “every one who, having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for the exercise of that influence”. No specific reference to the transaction of business with the government, matters of business relating to the government, claims against Her Majesty or benefits that Her Majesty is authorized or is entitled to bestow would be required.
7. Second, this interpretation is supported by a contextual analysis of the provision in light of the other offences contemplated by s. 121. Indeed, all the other offences under s. 121 which do not incorporate s. 121(1)(a)(iii) and (iv) by reference require that the business in question actually relate to the government.
8. Section 121(1)(b) criminalizes the conferring of a benefit on a government official by a person *having dealings* of any kind with the government. Similarly, s. 121(1)(c) criminalizes the acceptance of a benefit by a government official from a person *having dealings* with the government. In these cases, the ongoing dealings with the government certainly have an actual connection with government business.
9. Similarly, s. 121(1)(f) criminalizes the offer or acceptance of a benefit by a person having made a tender to obtain a contract with the government, as consideration for the withdrawal of another tender or of the person’s own tender. In this case, the actual making of a tender to obtain a contract with the government and, conversely, its withdrawal, certainly have an actual connection with government business.
10. If s. 121(1)(d) and s. 121(1)(e), the other paragraph that incorporates s. 121(1)(a)(iii) and (iv) by reference, were interpreted as not requiring that the matter of business contemplated by the agreement actually relate to the government, the offences they create would operate quite differently and apply much more broadly than the other offences contemplated by s. 121. Requiring that the matter of business actually relate to the government thus ensures a consistent interpretation across s. 121 offences.
11. The language used in s. 121(1)(a)(iv), which s. 121(1)(d) also adopts by reference, supports this interpretation. By referring to s. 121(1)(a)(iv), s. 121(1)(d) criminalizes influence peddling in connection with “a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow”. This language points to an objective connection to the government where a claim exists against Her Majesty or where Her Majesty possesses a defined power to bestow a certain benefit.
12. Finally, the purpose of s. 121(1)(d) confirms that the offence requires an actual connection with government business. As described above, s. 121(1)(d) seeks to protect government integrity by criminalizing corrupt agreements, which, if successfully carried out, would pose an actual risk to it. No such risk exists in circumstances where the matter of business in question does not actually relate to the government.
13. The heading for s. 121(1), “Frauds on the government”, similarly supports an interpretation recognizing the central place of government in these offences. Parliament’s underlying concern is with the government itself being the victim of a fraud, such that its own integrity risks being compromised. This cannot be the case where there is no connection with actual government business.
14. The Scope of Section 121(1)(d) Is Defined by Reference to the Existing Operational Structures of Government
15. Having established that, in order to obtain a conviction under s. 121(1)(d), the Crown must demonstrate that the matter of business concerned actually relates to the government, I am left to define what constitutes a “matter of business relating to the government”. I agree with the trial judge and the appellant that the scope of s. 121(1)(d) should be limited to matters of business that depend on some government approval or action within existing operational structures of government (2015 ONSC 7127, 25 C.R. (7th) 352, at para. 97).
16. Section 121(1)(d) creates a conduct offence aimed at deterring behaviour that has the potential to inflict substantive harm, in this case entering into a corrupt agreement (see *Hinchey*,at para. 22, citing *R. v. Greenwood* (1991), 5 O.R. (3d) 71, at pp. 81-82; P. Gillies, *Criminal Law* (4th ed. 1997), at p. 32). As such, s. 121(1)(d) requires no further action beyond the agreement itself, which constitutes the gravamen of the offence. The offence crystalizes at the time of the agreement.
17. It follows that any relationship between the matter of business concerned and the government must exist *at the time of the agreement*. It is for this reason that I reject my colleague’s proposition that s. 121(1)(d) “must not be considered strictly with reference to existing government operational and funding structures” and includes “transactions for which the government *could* impose or amend terms and conditions that would favour one vendor over others” (para. 5 (emphasis in the original)). In such cases, the integrity of government decision-making as it relates to the matter of business sought to be influenced will be at risk only in the event of future changes to government operations. In my view, such an interpretation is speculative and overly broad. Where the government has intentionally placed certain matters of business outside of its operational reach, they cannot be said to be matters of government business simply because the government *could*, at a future date, reclaim control over them.
18. Instead, having accepted that s. 121(1)(d) sets out a conduct offence, I am of the view that a matter of business will relate to the government only if the operational structures in place *at the time of the agreement* are such that it depends on some government approval or action.
19. The Sale of Point-of-Use Water Treatment Systems to First Nations Was Not a Matter of Business Relating to the Government
20. Mr. Carson has conceded that, at the time of the alleged offence, he was a person who had influence with the Government of Canada and that he demanded a benefit for his girlfriend as consideration for utilizing his government contacts to assist H2O in selling point-of-use water treatment systems to First Nations (trial judgment, at paras. 11 and 22-23). As previously stated, the only live issue in this appeal is whether this agreement was made in connection with “any matter of business relating to the government”. In my view, it was not.
21. The matter of business contemplated by the agreement was the sale of point-of-use water treatment systems to First Nations. This is plain from the trial judge’s findings, which indicate that Mr. Carson’s girlfriend was appointed as H2O’s exclusive agent “for sales of point-of-use water treatment systems to First Nations” and that she was entitled to a commission and other benefits in relation to all such sales (para. 23).
22. The trial judge’s findings of fact certainly do not “clearly establish” that Mr. Carson’s promised assistance was connected to a matter of business relating to government, as my colleague maintains at para. 47 of her reasons. In fact, they do quite the opposite. The trial judge found, based on the testimony of Indian and Northern Affairs Canada (“INAC”) officials, that the operational structure in place at the time of the agreement between Mr. Carson and H2O was such that First Nations had been granted “complete autonomy” with respect to the purchase of such point-of-use water treatment systems (paras. 32, 34 and 38). Simmons J.A. reaffirmed this finding in her dissenting reasons at paras. 84 and 101 (2017 ONCA 142, 347 C.C.C. (3d) 164):

The trial judge elaborated on these conclusions in the context of the purpose of s. 121 being to preserve the integrity of the government. She found that the government was not in the business of procuring water systems for First Nations communities; nor did the government have any authority to approve the systems to be purchased. Rather, First Nations communities were autonomous from the government in relation to third party vendors such as H20. She said:

*In light of my findings that there was no business with the government, it follows that the integrity of the government was not in issue.* I do agree, however, that it was Parliament’s intent that s. 121(1)(d) . . . should be applied so as to preserve the integrity of government. *It may also be true that the public*, viewing [the respondent’s] conduct, *would believe that there was, at the very least, an appearance that his conduct* as someone with influence with the government *compromised the government’s integrity and gave rise to the appearance of dishonesty* as described . . . in *O’Brien*.

However, the difference between *O’Brien* and this case is that *the government’s integrity was never in issue here* because *regardless of [the respondent’s] attempts to persuade INAC officials to purchase water systems from H2O, INAC officials were not in the business of procuring these water treatment systems for First Nations communities*.

[The respondent] appears to have erroneously believed that the government, particularly INAC, was able to assist H2O in selling their water treatment products to First Nations communities. He either never understood, or chose to ignore the information he received from his contacts at INAC and the [Assembly of First Nations] that they were the wrong entities to engage. *Had I found that INAC had the authority to either approve or purchase H2O’s water treatment systems, beyond the provision of funding to First Nations, [the respondent’s] conduct would have been blameworthy* and I would have found him guilty of the charge of committing a fraud on the government pursuant to s. 121(1)(d).

However, *one cannot engage in “the transaction of business with or any matter of business relating to the government” nor damage the integrity of the government when the government is not the entity with which business must be conducted in order to achieve the benefit sought. In this case, the evidence supports only one conclusion and that is that First Nations communities were autonomous from the government with respect to any business transactions with H2O*. [Emphasis added by Simmons J.A.]

. . .

On my reading of her reasons, the trial judge found that there was no matter of business relating to the government in this case because INAC did not have the authority to either approve or purchase H20’s water treatment systems. [Underlining added; text in brackets added by Simmons J.A.]

Thus, the purchase of point-of-use water treatment systems by First Nations did not constitute a matter of business relating to the government at the time the offence crystalized, i.e., at the time the agreement was entered into.

1. As the Crown is precluded from challenging the trial judge’s findings of fact on an appeal against an acquittal (s. 676(1) of the *Criminal Code*), it would be inappropriate for this Court to rely upon facts relating to the *Protocol for Decentralised Water and Wastewater Systems in First Nations Communities* or pilot projects to convict Mr. Carson. The trial judge dismissed arguments based on the *Protocol* as “not supported by the evidence” (para. 93). The majority of the Court of Appeal found no error in this conclusion (para. 51). Furthermore, the trial judge found evidence relating to the pilot projects to be “somewhat unclear” (para. 40) and avoided any reliance on or further consideration of them in reaching her conclusion. In any event, as noted by Simmons J.A., the evidence from INAC officials was that “it was ultimately up to First Nations Bands to take action in either participating in or advancing” any contemplated pilot project (para. 78).
2. In addition, I would note that while s. 121(1)(d) may capture “promises to exercise influence to change or expand government programs” (Karakatsanis J.’s reasons, at para. 24), those are not the facts of this case. The Crown did not, in crafting its argument, seek to convict Mr. Carson on the basis that he agreed to use his influence to change government policies pertaining to the sale of point-of-use water treatment systems to First Nations. Its theory at trial was that, under existing operational structures, the government was a party to these purchases, i.e., there was a three-way business relationship between the Crown, First Nations communities and H2O (trial judgment, at para. 54). As such, it is my view that the trial judge did not contemplate this alternate theory or make the necessary findings of fact to convict Mr. Carson on this basis.
3. During the hearing before this Court, the question arose as to whether Mr. Carson’s behaviour might constitute an attempt for the purposes of s. 24(1) of the *Criminal Code*. Mr. Carson’s counsel, in his cursory response to this question, submitted that the offence of attempt was not made out in this case because the government’s lack of involvement in and control over the matter of business concerned created a legal impossibility and, consequently, all the elements of the offence were not in place in the circumstances. I would decline to resolve this question in the case at bar. The issue was not raised in the lower courts, and the Crown confirmed before this Court that the offence of attempt did not form part of its theory of the case.
4. Conclusion
5. For these reasons, I would allow the appeal and restore Mr. Carson’s acquittal.

*Appeal* *dismissed,* Côté J. *dissenting.*

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