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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

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)
) *Scott C. Hutchison,*
) *Brennagh Smith,*
) for the Crown
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)
)

- and -

LARRY O'BRIEN

)
) *Michael D. Edelson, W. Vincent Clifford,*
) *Connie D'Angelo, David M. Paciocco,*
) for Larry O'Brien
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)

) HEARD: May and June, 2009 at Ottawa

CUNNINGHAM A.C.J.S.C.J.

[1] For anyone who might be tempted to characterize this trial as a credibility contest between Terry Kilrea and Larry O'Brien, it is essential to appreciate the dictates of the law. The task of the Court is not to select between the two versions of events offered at trial. To do so would misapply the required standard of proof in a criminal trial. It is for me to consider all of the evidence, to weigh it and determine whether the Crown has proven the essential elements of the offences charged beyond a reasonable doubt. Reasonable doubt is not a speculative or imaginary doubt. It must be logically derived from the evidence or absence of evidence in support of the charges (*R. v. Lifchus* [1997] 3 S.C.R. 320).

[2] It is vitally important that the trier of fact apply the rule of reasonable doubt when considering issues of credibility. When one is faced with dramatically opposite versions of an event, one must carefully assess the credibility of each witness. Some of the considerations

involved in assessing evidence are these: realizing that I may believe some, none or all of a witness's evidence, does the witness seem honest; does he or she have an interest in the outcome of the trial; is the witness able to make accurate and complete observations; how good is the witness's memory; is the memory selective, and if so why; is the witness's evidence reasonable and consistent; how important are the inconsistencies; and what is the demeanor of the witness.

[3] As the Court of Appeal stated in *R. v. Morrissey* (1995), 22 O.R. (3d) 514:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness' sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness' testimony. The accuracy of a witness' testimony involves considerations of the witness' ability to accurately observe, recall, and recount the events in issue. When one is concerned with a witness' veracity, one speaks of the witness' credibility. When one is concerned with the accuracy of a witness' testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[4] While the Crown, to a very great extent, relies upon the evidence of Terry Kilrea – evidence which the Crown submits was essentially unchallenged – it says this is not a classic “he said/he said” credibility contest. There is, the Crown asserts, a “wealth” of independent corroborative evidence. On the other hand, it is the position of the defence that Mr. Kilrea's evidence is unreliable and therefore not credible. A number of colourful adjectives were used to describe Mr. Kilrea by the defence in closing submissions, but suffice to say, it was asserted that his evidence was contradictory, inconsistent, unclear, illogical and selective.

[5] It is therefore important that I consider all of the evidence; not only that of the two principal witnesses, but also of the supporting cast and the exhibits filed.

[6] From the evidence before me, I have determined that Larry O'Brien in early July 2006 was seriously considering a run for the mayoralty in Ottawa and asked his niece Heather Tessier, who was then assisting Terry Kilrea's campaign, for Mr. Kilrea's telephone number. Mr. O'Brien realized that if he were to run for Mayor it would be helpful if Mr. Kilrea bowed out of the race, otherwise they would risk splitting the right-of-centre vote. I have no doubt Mr. O'Brien arranged the meeting of July 12th and that his purpose was to convince Mr. Kilrea not to run.

[7] The meeting occurred at a café below Mr. O'Brien's residence at 700 Sussex Drive sometime between 10:00 a.m. and 12 noon and lasted approximately one hour. Mr. Kilrea walked there, a short distance from the Ottawa Courthouse. The meeting consisted largely of each man telling the other how much support he had. By this time, Mr. Kilrea was already in the race and because each, if Mr. O'Brien entered, would be seeking Conservative support, much

time was spent telling one another how strong that base was. For Mr. Kilrea it was the support of John Baird and Pierre Poilievre. For Mr. O'Brien, it was John Reynolds, although while speaking with Mr. Kilrea, I am satisfied Mr. O'Brien spoke more generally about Conservative support. I accept that some time was spent during this meeting discussing what was involved in a mayoralty campaign, considering the fact that this would be Mr. O'Brien's first attempt to secure political office. Nevertheless, the meeting was filled with bravado. To use Mr. O'Brien's rather crude description, the discussion involved "big swinging dicks".

[8] Much was made of Mr. Kilrea's early inability to accurately recall the date of the meeting. In a series of draft affidavits commissioned by the Ottawa Citizen, we see the evolution of Mr. Kilrea attempting to recall when, where and what occurred at this July 12th meeting. What began as "early July" became the first Wednesday in July, then July 5th, and it remained so until a pretrial meeting with the police and the Crown March 4, 2009 when it was determined to be July 12th. Mr. Kilrea was out by a week not only as to the date of the meeting but as a consequence the date of the call from Mr. O'Brien to arrange the meeting. By itself, this error was not particularly important, but provides an early warning sign as to the accuracy of Mr. Kilrea's powers of recollection.

[9] As to the meeting itself, I have little difficulty concluding that Mr. O'Brien, being a determined and successful businessman, wished to arrive at a business arrangement that day – an arrangement that would see Mr. Kilrea leaving the race and supporting Mr. O'Brien. Mr. O'Brien was firm and no doubt aggressive and I accept that he later stated or implied he called this meeting as a courtesy, saying in effect he could have simply dealt with Mr. Kilrea in other ways. Mr. O'Brien, however, was well aware that Mr. Kilrea appealed to and represented a certain constituency, a constituency Mr. O'Brien would have liked to have "onside".

[10] There was some discussion of Mr. Kilrea's finances during this meeting. There were some discrepancies in the evidence as to Mr. Kilrea's exact situation. He told the police in April 2007 that he had a deficit of slightly over \$8,000 from the 2003 election and was currently out of pocket between \$6,000 and \$10,000. At another point in that conversation he said "not a dime had come from his own pocket". At trial and in his final Citizen affidavit, he stated he told Mr. O'Brien he was out between \$25,000 and \$30,000 to date including 2003.

[11] I am satisfied, given Mr. Kilrea's rather expansive view of events, he told Mr. O'Brien during their meeting he was out of pocket between \$25,000 and \$30,000. I also have no doubt Mr. O'Brien may have intimated, if not directly stated, that should Mr. Kilrea pull out of the race, Mr. O'Brien's team might help him recoup his losses. This of course forms no part of the charge before the Court and at trial Mr. Kilrea stated it was not tied to him leaving the race.

[12] It is the portion of this July 12th conversation concerning the National Parole Board that is of significance. In to Mr. Kilrea's final affidavit of December 20, 2006, prepared for the Ottawa Citizen, he stated this at paras 8-9.

[13] Paragraph 8,

During the course of the meeting, Mr. O'Brien asked me what I did for a living. He then advised me that he had "Conservative backing", which I understood to mean the support of the federal Conservative party. This came as a surprise and I advised O'Brien that I wanted to determine if the Conservatives were going to back him if he entered the race.

[14] Paragraph 9,

O'Brien then asked what would happen if I got an "appointment". I responded that the only appointment that I would be interested in was one to the National Parole Board. O'Brien asked: "What if I can make that happen?" I responded that "I would have to look at it at that time", and that I would also have to speak to my wife and my campaign team.

[15] At trial, during examination-in-chief, the conversation was recounted by Mr. Kilrea somewhat differently. Mr. Kilrea testified that Mr. O'Brien said, "What if my team found you other employment?" to which Mr. Kilrea responded, "Other employment? That's federal. The only thing I'd be qualified for federally or remotely interested in would be the National Parole Board because a lot of my campaign was law and order. I was considered the law and order candidate. That's quite an offer." Mr. Kilrea testified Mr. O'Brien then said, "What if I can make that happen?", to which Mr. Kilrea's responded, "You can make this happen? I'd have to think about it and talk to people in my campaign to see if they still want four in the race. A lot of people put in a lot of hours and a lot of their own blood and sweat."

[16] It should be pointed out that in the earliest draft of the Ottawa Citizen affidavit, para. 9 read: "O'Brien then asked me what I did for a living and whether I was interested in another line of work. I said 'yes' and expressed a desire to sit on the National Parole Board. O'Brien....implied....that he had support in the federal Conservative party and that he 'could make it happen'." Importantly, in draft #2 of this affidavit the original wording "what if that can happen", was changed to "what if I can make that happen?"

[17] In his April 2, 2007 statement to the police, Mr. Kilrea stated that Mr. O'Brien asked, "What if something could be done for you?" and it was at that point Mr. Kilrea raised the prospect of the National Parole Board.

[18] In his cross-examination on this point, Mr. Kilrea acknowledged that he raised the subject of the National Parole Board during the July 12th conversation.

[19] On April 3, 2007, Mr. O'Brien was interviewed by the police and a video recording of that statement was introduced by the Crown and made an exhibit at this trial. Clearly, Mr. O'Brien was skeptical about the amount of money Mr. Kilrea told him he had spent to date. Nevertheless, without question, Mr. O'Brien acknowledged he was trying to figure out if there was any way Mr. Kilrea might step aside and throw his support towards him. As to any financial

considerations, Mr. O'Brien acknowledged there might be some assets worth acquiring, such as Mr. Kilrea's website. Mr. O'Brien was convinced any campaign he might undertake would appeal to "conservative thinkers" in the City. He believed the City had had enough of Mayor Chiarelli and he felt his really serious challenge would come from the left in the person of Alex Munter, a popular Ottawa Councillor.

[20] Early in the interview Detective Sgt. Mason put paragraph 9 of the Kilrea affidavit to Mr. O'Brien to which Mr. O'Brien responded, "This is the one that pisses me off the most." In his recorded statement Mr. O'Brien stated that he asked Mr. Kilrea what he was going to do when he lost the mayoralty race. By that point he and Mr. Kilrea had discussed Mr. Kilrea's problems with the Ministry of the Attorney General ("MAG") where he worked as an enforcement officer. Mr. O'Brien stated that was when Mr. Kilrea brought up the National Parole Board and some other possibilities including becoming a Justice of the Peace. Mr. O'Brien said Mr. Kilrea aspired to move on to something like the National Parole Board or an appointment as a JP if he did not win the mayoralty.

[21] The next event of significance is the telephone call later in the day July 12th between Mr. O'Brien and Mr. Kilrea. According to Mr. Kilrea's version at trial, Mr. O'Brien telephoned him to say he had contacted his friend John Reynolds and that he, Kilrea, would be in the queue for the National Parole Board. Then, according to Mr. Kilrea, Mr. O'Brien instructed him to make contact with Mr. John Baird whom Mr. Kilrea had professed to know quite well and who was the Region's political Minister. According to Mr. Kilrea's version, he was to make the call to Mr. Baird to inform him he was "up for an appointment" and to let him know he was "in the queue" for the National Parole Board.

[22] In his affidavit commissioned by the Ottawa Citizen, Mr. Kilrea stated that Mr. O'Brien told him he had spoken with John Reynolds about an appointment to the Board and that he should inform Mr. Baird he was "in the queue". In the first draft of his affidavit, Mr. Kilrea simply stated in para. 11 that Mr. O'Brien called to advise "he had put his name forward... and that he should call John Baird who signs off on order-in-council appointments in Eastern Ontario". The word "queue" appears in the next draft and thereafter until the final draft was sworn.

[23] While the telephone records, and indeed Mr. O'Brien, confirm the July 12th call from Mr. O'Brien, the records also reveal three other calls between the two men that afternoon, two of which were initiated by Mr. Kilrea. Mr. Kilrea has no recollection of those conversations. I find it significant that in his statement to the police on April 2, 2007 Mr. Kilrea stated that Mr. O'Brien asked him how he (Kilrea) got along with John Baird. When Mr. Kilrea responded he got on very well with Mr. Baird, and why, Mr. O'Brien stated, "... because he's the guy who has to make it happen..."

[24] For me, this evidence favours Mr. O'Brien's version which was that he contacted John Reynolds following the meeting at 700 Sussex and was told in no uncertain terms not to have anything to do with trying to get Mr. Kilrea an appointment. Mr. O'Brien stated: "...I did call him back at two o'clock after having made one telephone call to find out if there was anything

that you know what a person does in a political situation in the environment and was given very clear advice don't touch it period full stop this is not something (1) you have the power to do and (2) that um it's probably going to be illegal, it will be illegal don't do it don't touch it...."

[25] I believe Mr. O'Brien's evidence on this salient point. I have no doubt he called his friend John Reynolds, a seasoned political veteran, albeit by then retired from active politics, and was given this appropriate advice. I also accept that Mr. O'Brien, quite naturally, still wanted Mr. Kilrea to withdraw from the race. I also accept that is why he called Mr. Kilrea to have him contact John Baird, who, in his words, "could make it happen". There is no evidence that Mr. O'Brien had influence with the Government of Canada, so if he was pretending, one wonders why he would direct Mr. Kilrea to contact Mr. Baird.

[26] It is not an offence to want an opponent to withdraw from a political race, nor is it an offence to encourage an opponent to seek alternative employment. Were this an offence, there would be a need for many more jails. At no point, according to Mr. Kilrea's evidence, did Mr. O'Brien ever suggest he had any influence with Mr. Baird. In fact, it was Mr. Kilrea who had a much closer relationship with Minister Baird than did Mr. O'Brien.

[27] As a result, at 3:15 p.m. on July 12th Mr. Kilrea sent an email to John Baird stating, "I have just been advised about an appointment with the National Parole Board. I have been told to contact you and give you a heads up. I hope for your support." When Mr. Baird responded, "... What does this mean?", Mr. Kilrea wrote at 3:21 p.m., "Larry O'Brien phoned me and said I was being considered for a vacant appointment with the National Parole Board and I should advise you."

[28] The next day, in a series of emails beginning just before noon, Mr. Kilrea wrote to Mr. O'Brien, "Anything new?" to which Mr. O'Brien responded, "No. I like the fuss about light rail though. How did it go with John last night?" Mr. Kilrea responded, "He didn't call."

[29] The position of the Crown is that the emails are significant. Mr. Hutchison argues that if Mr. O'Brien had told Mr. Kilrea he was not able to help and that Mr. Kilrea would have to pursue an appointment on his own, why would Mr. Kilrea have emailed Mr. Baird at 3:21 p.m. on July 12th, as earlier noted? Perhaps a review of the various drafts to the Citizen affidavit might help in answering the question

[30] In draft #1 at para. 12, Mr. Kilrea wrote: "Later that day I emailed Baird asking whether I was supposed to contact him and whether my name had been put forward for a position in the National Parole Board. Baird's email response indicated that he did not know I was interested in an appointment to the Board. Baird and I agreed to meet." That version was changed to read, "Later that day I emailed Baird indicating LOB told to contact you...." After several iterations, the sworn version speaks of Mr. O'Brien saying he had spoken with John Reynolds and that he (Kilrea) was to advise Mr. Baird his name was in the queue for an appointment to the Board. Mr. Kilrea testified in cross-examination that in his statement to the police he said he had emailed Mr. Baird back that he was not interested. No such email was produced at trial. When asked by defence counsel if he was not interested in an appointment why he would have emailed

Mr. Baird at all, he responded in part that he was under the impression there was an arrangement that people wanted him out of the race and he wanted to see if Mr. Baird was part of it. As well, he had earlier told the police he was not really looking to leave the race for a life on the National Parole Board.

[31] Furthermore, in his statement to the police, Mr. Kilrea stated his real reason for emailing Mr. Baird had more to do with his issues at work and to find out whether the Conservatives were supporting Mr. O'Brien.

[32] In my view, this fact is borne out by some subsequent emails. On July 13th at 7:44 p.m., Mr. Kilrea sent an email to Mr. Baird the topic of which was entirely his difficulty, perceived or otherwise, with the Ministry of the Attorney General, by whom he was employed. Essentially he described a "Liberal plot" to get him out of the race. An arrangement was made for Mr. Kilrea and Mr. Baird to meet the next day. Following those email exchanges, Mr. Kilrea sent an email to Mr. O'Brien advising that he and Mr. Baird were to meet the next day about his employment/leave issues to which Mr. O'Brien responded, "Great!! Good luck."

[33] Again one must ask, if Mr. O'Brien was, as the Crown contends, continuing to pretend he had influence with the government, why would he have encouraged Mr. Kilrea to see John Baird. If this was all a game, why would Mr. O'Brien not have pretended to have influence with Mr. Baird and have kept Mr. Kilrea in the dark? In my view, by encouraging Mr. Kilrea to meet with Mr. Baird provides more support for Mr. O'Brien's contention that, following Mr. Reynolds's advice, Mr. Kilrea would have to pursue his dream on his own. No doubt Mr. O'Brien encouraged him to do so, but as I have noted, that is not a crime. The "How did it go with John" email on July 13th at 12:37 p.m. from Mr. O'Brien to Mr. Kilrea does nothing to support the Crown's case. Nor does the 2:49 p.m. email of the same date wherein Mr. O'Brien states in reference to Mr. Baird, "I will get a hold of him next week."

[34] In addition to the July 13th emails, the telephone records indicate there were four calls that day between the two men. One, for certain, could only represent an incomplete call, leaving another call at 2:53 p.m. from Mr. O'Brien to Mr. Kilrea lasting two minutes, which could be voice mail, and two calls from Mr. Kilrea to Mr. O'Brien, the first at 2:55 p.m. lasting three minutes (again, possibly voice mail) and the other at 3:20 p.m. lasting eight minutes. During one of these calls, Mr. Kilrea testified that Mr. O'Brien, when advised Mr. Baird did not seem to know anything about this, stated he had "screwed up", that he had to go about this a different way and to leave it to him. Mr. Kilrea also mentioned this in his police statement.

[35] Mr. O'Brien puts the "screwed up" conversation in an entirely different context. In reviewing Mr. O'Brien's recorded statement one comes away with the impression Mr. O'Brien, if indeed he did say to Mr. Kilrea he had "screwed up", was berating himself for making what he characterized as a rookie mistake for even getting involved in this interaction with Mr. Kilrea in the first place. I conclude Mr. O'Brien was upset with himself for going down this road as far as he had and suggesting that Mr. Kilrea meet with Mr. Baird. By then he was aware of Mr. Reynolds' advice and he knew he should have simply dropped it. Nevertheless, he was an

ambitious man seeing a political opportunity. I believe he felt he could stay within Mr. Reynolds' admonition and still encourage Mr. Kilrea to pursue other employment opportunities.

[36] In retrospect, he ought to have dropped it. However, by encouraging Mr. Kilrea to see Mr. Baird to pursue his dream does not make the involvement criminal. It might constitute poor judgment or a rookie mistake. Mr. O'Brien was not copied on any of Mr. Kilrea's emails to Mr. Baird on July 12th, so I have real difficulty understanding how it could be that Mr. O'Brien said he "screwed up" in the context of Mr. Baird apparently not knowing anything about Mr. Kilrea's application. Perhaps the two discussed this on a call July 13th. Mr. Kilrea says they did during one of the calls. (He can't recall what was discussed in the others.) I have already noted my impression of the context of the conversation.

[37] By the evening of July 13th, the subject matter of Mr. Kilrea's emails to Mr. Baird changed entirely. Whereas the subject line on July 12th was simply "hello", on the 13th it was "Liberals" when Mr. Kilrea brought to Mr. Baird's attention his difficulty with MAG.

[38] On or about July 12th, Mr. Kilrea had received a letter from the Acting Manager of Court Operations, Lorraine Roy, dated July 10, 2006, which spoke of their recent conversation about his candidacy for the mayoralty and the need to comply with Conflict of Interest Guidelines. Nowhere does the letter suggest that Mr. Kilrea was disentitled from running for the mayoralty. Nevertheless, Mr. Kilrea took this as a direct threat, part of a Liberal conspiracy to have him removed from the campaign. He must have had this letter when he met Mr. O'Brien on the 12th because the subject was discussed.

[39] Completely misrepresenting Ms. Roy's letter, intentionally or otherwise, Mr. Kilrea retained a lawyer who on July 13th wrote Ms. Roy demanding to know how Mr. Kilrea was in conflict. Moreover, Mr. Kilrea authorized his lawyer to issue a press release accusing the Acting Manager of Court Operations of suggesting Mr. Kilrea was in conflict of interest. The press release went on in part to insinuate some connection between the fact that the incumbent Mayor was a Liberal, Mr. Kilrea a Conservative and the provincial government, for whom Mr. Kilrea worked, Liberal.

[40] This rather spurious attempt to distort the facts for some political gain, with the obvious blessing of Mr. Kilrea, has done nothing to enhance his credibility in my eyes. From 2003 until this trial began, Mr. Kilrea has proved to be a master of manipulating the media and keeping his name in the spotlight. On one occasion, when warned by a campaign worker that his facts were wrong about a particular issue, and that he ought to be more careful, he responded, "Let them prove me wrong."

[41] In any event, putting an increasing spin on Ms. Roy's letter, Mr. Kilrea emailed Mr. O'Brien on July 14th pointing out the media stories he had been able to generate with a subject line "Chiarelli". The next day he sent an email to Mr. O'Brien telling him he expected to be fired the following Wednesday. There was absolutely no basis for that assertion and the whole issue rather quickly died down but not before Mr. Kilrea was able to spin it to his advantage with the media. Rather importantly, however, on July 17th, when Mr. Kilrea emailed Mr. O'Brien

advising that the Ministry was going to back off and “give me their blessing” to run, Mr. O’Brien responded, “That is one complication you did not need or deserve—congrats.” This is hardly a response from someone who was continuing to pretend to have influence regarding alternative employment.

[42] In answer to my own question as to whether the Ministry had imposed any conditions on permitting him to run, he responded, “none”. When pressed, he said he did not recall any, but did not think there were any such conditions. In fact, in a letter from Thomas Fagan, the Director of Court Operations, put to him during cross-examination, there were several. Even after acknowledging that he had received and read the letter containing the conditions he stated, “Because I don’t remember getting, I don’t remember the letter having that. I just, I don’t recall having the letter and seeing page 2. I remember getting a letter saying, you’re cleared.” This evidences a rather selective memory, but more importantly provides evidence of how Mr. Kilrea is inclined to form impressions of what people say, rather than what they actually say. The fact that in my view he clearly breached a number of these conditions evidences to Mr. Kilrea’s sense of self-importance and his propensity to do anything it takes to keep his name in the forefront. Mr. Kilrea is perhaps well meaning, but not a particularly reliable witness.

[43] One of the puzzling aspects of this case – and there are many – has to do with the meeting between Mr. Kilrea and Mr. O’Brien which appears to have taken place at a west end Tim Horton’s on August 7, 2006. A consideration of the evidence as to how this meeting was arranged, when and for what purpose, must be undertaken. In an early draft of his affidavit, Mr. Kilrea states that Mr. O’Brien called him in July to say his “offer” had an expiry date and would not be open indefinitely. Mr. Kilrea goes on to state, “I wanted to give my response to O’Brien in person so we agreed to meet at 2:00 p.m. at the Tim Horton’s on Robertson Road.” In early paragraph 16 of this same draft, Mr. Kilrea states, “O’Brien advised that he had consulted a lawyer about his offer and explained that any transfer of funds would have to have been made as contributions to my campaign. He also told me that had I accepted the payment to step aside, he would have honoured regardless.”

[44] In the next draft, now paragraph 21, it reads,

Later that day (July 20, 2006), following my meeting with Baird, I spoke to O’Brien by phone. He advised that his offer “would not be on the table forever” and that I needed to make a decision. I indicated that I would decide shortly, and that I wanted to communicate the decision to him in person. We agreed to meet at the Tim Horton’s on Robertson Road at 2 p.m. on Sunday, July 23, 2006.

[45] Now paragraph 23 which was added reads,

I advised O’Brien that his offer was very generous; however, after discussions with my wife and my campaign team, I was not prepared to exit the race. The offer was the wrong reason to exit; that I couldn’t let my supporters down; and that to exit in these circumstances would be “against everything I stand for”

regardless of how much money was offered or an appointment for a job. I also told him that I wanted to stay in the race as I felt I could win the race.

[46] In other version marked Affidavit 3, Mr. Kilrea says at para. 20,

Later that day (July 19, 2006), I spoke to O'Brien by phone to advise that the appointment to the National Parole Board did not come up in the meeting with Baird. O'Brien responded that, as Dimitri had advised me, the appointment was too hot to handle now and it would have to wait until after the election. O'Brien also commented that the offer "would not be on the table forever" and that I needed to make a decision. I indicated to him that I would make one shortly.

[47] By the final draft sworn December 20, 2006, any reference to the National Parole Board was removed and paragraphs 21-25 read as follows:

21. On Sunday, July 30, 2006 at approximately 10 a.m. I called O'Brien to advise that I had made a decision but wanted to communicate it to him in person. We agreed to meet at the Tim Horton's on Robertson Road at 2 p.m. later that day.

22. I arrived at the Tim Horton's first and waited by my car in the parking lot. Approximately 10 minutes later O'Brien arrived in a gold Mercedes and parked at the back of the lot. I walked to the back of the lot to meet him.

23. I advised O'Brien that his offer was very generous; however, I had to reject it as the offer was the "wrong reason" to exit the race; that I couldn't let my supporters down; and, that to exit in these circumstances would be "against everything I stand for". I also told him that I wanted to stay in the race as I felt I could win it.

24. O'Brien was upset that I was not prepared to withdraw by candidacy and said that neither of us could win. I responded that I had already entered the race, he had not, so if he entered now it would be "with his eyes wide open".

25. O'Brien advised that he had consulted a lawyer about his offer to reimburse my expenses and explained that any transfer of funds would have to be made as contributions to my campaign. He also told me that had I accepted the reimbursement of expenses he would have honoured the payment after the election regardless.

[48] The Crown says this is simply normal drafting evolution and that I should not be concerned with the changes. To me, the various iterations of this draft affidavit tell me a great deal about Mr. Kilrea's ability to recall important dates and events. It also causes me real concern as to exactly what the "offer" was that Mr. Kilrea speaks of. I recognize that in examination-in-chief Mr. Kilrea, when asked what offer would not be on the table forever, responded: "The offer of the National Parole Board and the \$20,000 - \$30,000." By the time of

trial, Mr. Kilrea said the meeting at Tim Horton's was arranged by email and the email exhibits would bear that out. Nevertheless, one must consider that if he is confused about when and how this meeting was arranged, he could be just as confused about what was discussed.

[49] Importantly, in examination-in-chief Mr. Kilrea never once mentioned the subject of the National Parole Board as being something they discussed at this August 7th meeting. Certainly, he said they talked about an offer which he called generous and also that any money to be given to Mr. Kilrea for his expenses would have to be in the form of a campaign contribution. Mr. O'Brien in his statement to the police makes it clear that the only "offer" on the table by that time had to do with Mr. Kilrea's assets, such things as his website and lists. Interestingly, the questioner, Det.Sgt. Mason states, "Okay, that's, that was my interpretation of it I don't want to put words in your mouth..." Mr. O'Brien also stated he thought the idea of meeting at the back of Tim Horton's was bizarre. As to the nature of the "offer", Mr. O'Brien stated,

I, uh at that point I don't think either he or I were talking about the same offer and he had already said no so I'm assuming the offer that he was talking about and the offer I was intending uh was to bring him into you know our team and but it was a bit of a a the point it was uh it was a waste of time to be out there I mean he was in the race or out of the race and I got the feeling actually after that meeting that he was uh like it was two people talking and having different conversations.

[50] One thing seems certain. Mr. Kilrea called for this meeting and if he did not telephone Mr. O'Brien earlier to arrange it he certainly did by email on Sunday August 6th asking if they could meet the next day. There must have been some telephone conversation about a meeting because how else would Mr. O'Brien's email response, "How about around two. West End." translate into the Tim Horton's on Robertson Road? As to what Mr. Kilrea meant when he said in his first email of August 6th, "We have a press conference on Wednesday", he was unable at trial to remember.

[51] As I stated earlier in these reasons, it is the contention of the Crown that this is not a classic he said/he said case. Rather, they submit, there is other independent evidence corroborating Mr. Kilrea's version of the events. It is therefore important to consider the evidence of the supporting cast, beginning with that of Mr. O'Brien's pollster, Dimitri Pantazopoulos. On July 18th, Mr. Pantazopoulos and Mr. Kilrea met for lunch at the Sheraton Hotel in downtown Ottawa. I have little difficulty concluding that this meeting was arranged by Mr. Pantazopoulos at the behest of Mr. O'Brien for the express purpose of discouraging Mr. Kilrea from continuing to be in the race. Mr. Pantazopoulos had done some polling between July 13th and 15th which, although showing Mr. O'Brien fourth in a field of four, demonstrated to Mr. Pantazopoulos that Mr. Kilrea had no room for growth. At their luncheon meeting, Mr. Pantazopoulos advised Mr. Kilrea he could not win the race and that if both he and Mr. O'Brien were in, neither could win. Mr. Pantazopoulos also advised Mr. Kilrea that Mr. O'Brien did have room for growth if he were to enter the race.

[52] In his examination-in-chief, Mr. Kilrea stated that during lunch he told Mr. Pantazopoulos he had been offered an appointment to the National Parole Board along with reimbursement of his campaign expenses and asked Mr. Pantazopoulos if he was aware of that. According to Mr. Kilrea, Mr. Pantazopoulos said he was but that the Parole Board would be "too hot to handle" until after the election.

[53] Mr. Pantazopoulos was asked in examination-in-chief if the issue of a National Parole Board appointment arose during lunch and he responded it had. Mr. Pantazopoulos stated the subject came up when Mr. Kilrea was musing about his real calling not being in politics but rather in law enforcement. According to Mr. Pantazopoulos, Mr. Kilrea spoke of being \$30,000 in debt and that he felt an appointment to the National Parole Board would be more suitable. It was Mr. Kilrea who raised the subject, according to Mr. Pantazopoulos, during a discussion about Mr. Kilrea possibly losing his government job. Mr. Pantazopoulos testified that he told Mr. Kilrea any such appointment could not be made "in the context of an election campaign and that any *quid pro quo* arrangement was out of the question." According to Mr. Pantazopoulos, the tone of Mr. Kilrea's career musings made it implicit that he was thinking of it as a *quid pro quo*. Mr. Pantazopoulos stated he never discussed a National Parole Board appointment with Mr. O'Brien before this meeting which Mr. Pantazopoulos said was scheduled for 12 noon and lasted approximately one hour. Mr. Pantazopoulos testified that he reported back to Mr. O'Brien by telephone following the luncheon and recounted the conversation about the Parole Board. He got the very clear impression from Mr. O'Brien that this was improper and that there should be no further contact with Mr. Kilrea.

[54] My sense of this meeting is that in the early going it was somewhat similar to the early portion of Mr. Kilrea's meeting July 12th with Mr. O'Brien. I have no doubt Mr. Kilrea engaged in a certain amount of bravado, telling Mr. Pantazopoulos he was proud of his 30% showing in 2003 and that because he was starting this race from a stronger position, he could do much better. I accept Mr. Pantazopoulos' evidence that the air came out of Mr. Kilrea's balloon to some extent after he was given Mr. Pantazopoulos' assessment of his chances. I also have no doubt Mr. Kilrea brought up the subject of the National Parole Board. One must consider the timing of this meeting and what was happening in Mr. Kilrea's life at the time. He had been embroiled in a workplace issue for several days, strongly believing that the Ontario Liberal government was trying to force him out of the race. As he wrote in his Saturday, July 15th email to Mr. O'Brien,

As you can see by newspaper and news, someone is trying to force me out. I expect the Ontario government to dismiss me on Wednesday. ...I am 8 years from pension but I won't back down as this is dirty pool. It is obvious who is behind this. The last 4 days have been a living hell.

[55] The issue relating to his employment was far from over on July 18th. Indeed, the very next day, also at the urging of Mr. Pantazopoulos, Mr. Kilrea met with Minister Baird. At this point, Mr. Kilrea was still overreacting to Ms. Roy's letter of July 10th, for whatever reason. Following his luncheon meeting with Mr. Pantazopoulos, at 6:39 p.m. Mr. Kilrea emailed John Baird stating he was facing a big decision and asked if they could meet.

[56] The next day at 8:30 a.m. Mr. Kilrea met with Mr. Baird at the Minister's office. The entire meeting, Mr. Baird testified, was spent discussing Mr. Kilrea's employment issues with the Ontario government and whether Mr. Kilrea ought to resign. According to Mr. Baird, whose evidence I accept, Mr. Kilrea was concerned about not getting permission to run and wondered what he would do if he resigned. Mr. Baird told Mr. Kilrea to think very carefully about resigning, that there could be serious consequences and that he should consider his pension. Indeed, at one point Mr. Baird offered to intervene by calling Michael Bryant, then the Attorney General. Mr. Kilrea declined the offer.

[57] Both Mr. Baird and Mr. Kilrea have testified that the subject of an appointment to the National Parole Board never came up during this meeting. I accept that Mr. Baird never engaged the subject for a number of reasons. First, the nature of Mr. Kilrea's concern was employment related. Second, Mr. Baird was well aware of the process involved in securing a federal appointment. Finally, and perhaps most importantly, Mr. Baird testified that he could not have recommended such an appointment for Mr. Kilrea even if the proper process had been followed. For me, the fact that Mr. Kilrea did not bring up the subject of the Parole Board at this meeting, in spite of his having been advised by Mr. O'Brien and Mr. Pantazopoulos to do so, assists me in arriving at the conclusion that this was by now a dead issue.

[58] In the final analysis, I believe and accept the evidence of Mr. Pantazopoulos that he told Mr. Kilrea unequivocally that any *quid pro quo* arrangement could not be done. I also believe him when he testified he never told Mr. Kilrea the appointment issue was "too hot to handle" until after the election. I found Mr. Pantazopoulos to be a forthright, clear and unambiguous witness who was firm in his recollection of these events. He was an experienced political operative who well knew such trade-off arrangements could not be made.

[59] Following his meeting with John Baird on July 19th, Mr. Kilrea, I accept, telephoned Mr. O'Brien at 2:38 p.m. and that they spoke for eight minutes. Needless to say, their individual recollections of that conversation vary dramatically. Mr. Kilrea testified he let Mr. O'Brien know he had met with Mr. Baird but that the subject of the Parole Board appointment had not come up. According to Mr. Kilrea, Mr. O'Brien responded by saying he "would speak to John", but also that "the offer would not be on the table forever and that Mr. Kilrea would have to make a decision soon." It is worthy to note that in his Ottawa Citizen affidavit of December 20, 2006, Mr. Kilrea stated that Mr. O'Brien told him the appointment "was too hot to handle now and would have to wait until after the election."

[60] Mr. O'Brien recalls the conversation differently. Mr. O'Brien recalls that he was speaking about Mr. Kilrea's assets, such things as supporter lists and his website and that these would be of less importance to him as time went on. I have no doubt Mr. Kilrea brought up the subject of the Parole Board, but I am equally satisfied that by then, at least in terms of Mr. O'Brien being involved, it had become a dead issue. As Mr. O'Brien stated, he had moved on and he was in the process of building his campaign team. At the very least, I conclude the two men were talking at cross-purposes during that telephone conversation. I have no doubt Mr. O'Brien may have continued to encourage Mr. Kilrea to seek an appointment, but I am equally satisfied he did no more than that, given his conversation with John Reynolds. As to Mr.

Reynolds not recalling the conversation, I have little difficulty with that, given the volume of calls and emails he was receiving at the time.

[61] The next witness relied upon by the Crown for corroboration was Lisa MacLeod, the MPP for Nepean-Carleton. When she learned in July 2006 that Mr. O'Brien was considering running for Mayor, she arranged a meeting with him. They met July 31st at her constituency office where Mr. O'Brien was accompanied by Mr. David Gibbons. Ms. MacLeod was pleased there might be a Conservative in the mayoralty race and offered Mr. O'Brien some advice regarding the names of potential campaign workers. During the course of their conversation Ms. MacLeod, stated that, in the context of what Mr. Kilrea might do if he were not a candidate, Mr. O'Brien said, "somebody was talking to Terry about an appointment." It wasn't clear who that was.

[62] After telling the Crown she was at the time more interested in the campaign and its people and how excited she was about the people Mr. O'Brien would draw into his campaign, the Crown asked, "Uh-hum, And this discussion with respect to a Parole Board appointment..." At that point, quite properly, the defence objected. After some discussion Ms. MacLeod said, "I believe it was the National Parole Board. Again, it came up casually, I think once or twice... but we focused generally on (who) would be suitable campaign managers for a Conservative candidate for mayor..." After another question, she responded, "My best recollection is we're talking to Terry about an appointment" which she believed was to the National Parole Board.

[63] During cross-examination, the defence was able to demonstrate that there were a number of rather significant things going on in her life when she gave her statement to the police in early May 2007. She was commuting regularly to Toronto for her work, leaving her husband and child in Ottawa. As well, in March 2007, her father was diagnosed with cancer. Defence counsel put her statement to her during cross-examination and without reciting her evidence in detail, I conclude that any references to Mr. Kilrea being in line for an appointment were casual, beyond the real subject matter of their conversation and really quite peripheral to the matters at hand. She agreed there was "a considerable rumour mill out there" and at one point told the police officer that "90% of it is rumour" and that her job was to try and figure out what is fact and what is fiction. Initially, during examination-in-chief she testified that Mr. O'Brien said, "somebody was talking to Terry about an appointment". That morphed into "we're talking to Terry about an appointment", following which the Crown introduced the subject of the National Parole Board. She agreed with defence counsel that since May 2007 she had offered several alternatives as to what might have been said by Mr. O'Brien. When asked, "...can you say definitely, just for example, when I say the term "we're", can you say definitely the words that fell from his lips weren't something like "we were", she responded, "Well, in the context of his campaign, I, I, didn't ask him. So I really couldn't speculate." Later, she was asked, "You didn't know whether in fact it was Mr. Kilrea who initiated discussions about an appointment" to which she responded, "No." And later, "And you didn't know whether this was an appointment that Mr. Kilrea was working on himself?", to which she responded, "Correct." And then, "...and you didn't know whether this was a discussion that had taken place in the past. Correct?"; to which she responded, "Yes."

[64] Taken as a whole, I cannot conclude that Ms. MacLeod's evidence is corroborative of Mr. Kilrea's assertion that the "offer" was still outstanding in late July 2006. Ms. MacLeod's recollection of a brief, casual portion of her conversation is so imprecise that, through no fault of her own, I must assign it little weight. The various alternatives as to what might have been said by Mr. O'Brien give me real pause such that I cannot determine with any degree of certainty what was said and whether what was said related to something in the past or something that was ongoing. Nor can I conclude it was said in the context of someone looking after Mr. Kilrea or Mr. Kilrea pursuing an appointment on his own. It could just as easily have been a reference to Mr. Kilrea pursuing an appointment through Mr. Baird, something Mr. O'Brien has testified he encouraged Mr. Kilrea to do.

[65] I turn now to the evidence of John Light, Greg Strong and Thomas Bennett. It is the position of the Crown that their evidence represents significant coincidental probative value. This evidence, because it largely consists of out-of-court statements, was not introduced for its truth, but rather as evidence corroborative of Mr. Kilrea's assertion that people were still talking about getting him an appointment in early August 2006. As the Crown has put it, it corroborates Mr. Kilrea's assertion that the discussion of a National Parole Board appointment did not, as Mr. O'Brien contends, end on the afternoon of July 12th. In other words, their evidence demonstrates that certain statements were made at certain times which should assist me in determining the overall truthfulness and credibility of various other witnesses. After a *voir dire*, their evidence was admitted and my ruling forms part of the record.

[66] John Light, in the summer of 2006, was working for Pierre Poilievre in his constituency office. He had worked on all three of Mr. Poilievre's campaigns. Some time during the first week of August, Mr. Light received a telephone call from Thomas Bennett, a long time and well known Conservative party fundraiser. He testified that Mr. Bennett told him he was in his office with Larry O'Brien and Greg Strong and that he had recommended him to Mr. O'Brien and Mr. Strong as a campaign manager. At that time, Mr. Light had heard Mr. O'Brien was showing interest in running. Mr. Light told Mr. Bennett he was good friends with Mr. Kilrea and that he would be supporting him in his bid for the mayoralty. He stated he told Mr. Bennett he appreciated the generous recommendation but so long as Mr. Kilrea was in the race he would be supporting him. At that point, Mr. Light testified Mr. Bennett said, "Hold on a sec," seemed to cover the phone and after about 30 seconds came back on the line to say, "Well, that's okay because he's going to be dropping out of the race soon. He's being offered something." Mr. Light says he was asked, at least, to meet with Mr. Strong who by then was assisting Mr. O'Brien in assembling a campaign team.

[67] It was left that Mr. Strong would contact Mr. Light who was still puzzled, he said, because Mr. Kilrea had told him he was staying in the race. A day or two later, Mr. Light stated he received a call from Mr. Strong. He told Mr. Strong he could not do anything so long as Mr. Kilrea was still running. Mr. Light then testified that Mr. Strong said, "...Terry won't be in the race much longer. He's being offered something. He's being offered something through the party... yes it's Dimitri Pantazopoulos is working on an appointment that Terry is going to accept." No indication as to the nature of the appointment was given.

[68] In cross-examination, Mr. Light confirmed he had not said anything in his statement to the police about any 30 second pause in the conversation. Mr. Light also acknowledged that between the time of Mr. Bennett's telephone call and April 18, 2007 when he gave a statement to the police, there had been a myriad of stories in the press and other media on the subject of an appointment for Mr. Kilrea.

[69] I have no doubt Mr. Light at the relevant time was a strong supporter of Mr. Kilrea. In fact, a series of emails between Mr. Light and Tim Tierney, Mr. Kilrea's webmaster, demonstrate a strong antipathy towards Mr. O'Brien and the notion he had Conservative support. In my view, these emails colour Mr. Light's evidence and give me real concern as to the reliability of his evidence.

[70] Greg Strong, who runs a public relations and marketing group, testified he had been involved in Conservative politics for many years, his last formal involvement being in 1993. Between 1995 and 2000 he worked for Mr. O'Brien's company, Calian. In or about June 2006 he and Mr. O'Brien spoke about the possibility of Mr. O'Brien running for Mayor. Subsequently, Mr. Strong approached Tom Bennett to see if he would be interested in doing fundraising for Mr. O'Brien. He said Mr. Bennett declined due to a conflict, but that he put forward John Light's name while the two were meeting in the kitchen of Mr. Bennett's home. He was very clear that just he and Mr. Bennett were present when Mr. Bennett called Mr. Light. At that point, Mr. Strong, on behalf of Mr. O'Brien, was looking for a campaign manager. Not being a party to the call, he heard only Mr. Bennett speak. He said the conversation was brief and that Mr. Bennett inquired if Mr. Light would be interested in coming on board. Mr. Strong made no mention of any pause in the conversation, although he did confirm a subsequent conversation he had with Mr. Light during which the subject of Mr. Kilrea did arise.

[71] According to Mr. Strong, he and Mr. Light spoke in general terms about Mr. O'Brien's chances of winning and what Mr. Kilrea was doing. He said Mr. Light could not commit to Mr. O'Brien so long as Mr. Kilrea was still in the race. Mr. Strong maintained there was no discussion with Mr. Light about any sort of offer being made to Mr. Kilrea during that telephone call. Moreover, Mr. Strong testified that the only conversations he had with Mr. O'Brien about Mr. Kilrea had to do with the possibility of acquiring his website.

[72] Mr. Strong did say there were very general, non specific discussions, somewhat hypothetical, amongst people involved in Mr. O'Brien's campaign about whether Mr. Kilrea would stay in the race and what might happen if he didn't. He said, "...a lot of this was... people saying different things and people, everybody had an opinion, and it was just, more or less trying to figure out what was real and what wasn't real." He did say there had been some stories about Mr. Kilrea shopping himself around and he agreed with the Crown that these rather general conversations about Mr. Kilrea took place after the telephone conversation between Mr. Bennett and Mr. Light.

[73] I don't find this at all surprising given how political rumours engage a certain segment of the citizens of Ottawa, and given the media involvement commencing with an article written by Sue Sherring in the Ottawa Sun published August 5, 2006, in which she speaks of the rumour

that "pro O'Brien forces" were "looking at a number of possible appointments to convince (Kilrea) to pull out."

[74] The final witness in the Crown's coincidental trilogy was Thomas Bennett. Mr. Bennett is an Ottawa insurance broker, who has been active in Conservative politics for many years. He testified that through politics he had come to know Greg Strong whom he described as a lobbyist. Without being able to recall the exact date he stated that Mr. Strong came to his house to ask if Mr. Bennett might be interested in fundraising for Mr. O'Brien, Mr. Bennett said he declined because he was not really interested in working in municipal politics. Mr. Bennett did, however, suggest that John Light might make a good campaign manager. As a result, Mr. Bennett called Mr. Light from his kitchen. Only he and Mr. Strong were present, according to Mr. Bennett. Mr. Bennett testified that Mr. Light was not interested. Evidently Mr. Light expressed concern that with both Mr. Kilrea and Mr. O'Brien in the race, they would split the vote. Mr. Bennett also recalled that he communicated Mr. Light's concerns to Mr. Strong who responded to the effect, "don't worry about it, he's going to be gone from the campaign". He also stated he handed the telephone over to Mr. Strong who spoke with Mr. Light for a few minutes.

[75] As to whether there was any reference to the National Parole Board, Mr. Bennett stated he couldn't be sure. He said there had been so much media coverage since this telephone call that this is something he might have read in the newspaper. His evidence on this point, I find unhelpful, which is understandable. Of significance, in answer to several of my questions, Mr. Bennett said it was only possible he got off the telephone briefly during his conversation with Mr. Light to speak with Mr. Strong. He was quite clear that all Mr. Strong said was something to the effect that Mr. Kilrea would soon be gone from the campaign. Mr. Bennett had a clear understanding in his own mind as to what that meant. He believed Mr. Kilrea was "dead" politically. He could not raise money and the press was not on his side. He was not running much of a campaign and he could not win. That is what Mr. Bennett took from Mr. Strong's comment.

[76] The Crown suggests I ought to consider the evidence of these three individuals carefully because, in their submission, the conversations about an appointment show the issue was still very much alive in late July or the first week of August 2006. There are certainly a great many inconsistencies in their evidence. For example, I am certain Mr. Light is mistaken in saying Mr. Bennett called him from his office in the presence of Mr. O'Brien. I have no doubt Mr. Bennett and Mr. Strong conferred at some point during the conversation, but I am left in a quandary as to whether there was any discussion about the National Parole Board. The evidence to me is equally consistent with the versions given by Mr. Strong and Mr. Bennett that by "being gone" meant Mr. Kilrea could not sustain a credible campaign.

[77] As a result, I conclude the evidence of these three gentlemen does not establish for the Crown that for which it was intended. At the very best, I have a considerable doubt. Without question, all three of these witnesses were doing their best to recall events which had taken place three years earlier, although I have, as earlier noted, some concerns about Mr. Light's objectivity. Given the level of media scrutiny these issues prompted, I can easily understand

how their memories may have been affected. As political people, they would undoubtedly have read most of the stories in the press concerning Mr. O'Brien.

[78] The only other witness whose evidence I intend to deal with in detail is that of Deputy Chief Susan O'Sullivan of the Ottawa Police Service. On Saturday, January 13, 2007, Deputy Chief O'Sullivan was contacted by then Mayor O'Brien and a meeting arranged at her office. Mr. O'Brien told her he had been at a meeting the evening before with representatives of the Ottawa Citizen to discuss allegations that had come to light from Mr. Kilrea about his dropping out of the mayoralty race the year before. The reporters had told Mr. O'Brien they had a sworn affidavit from Mr. Kilrea containing serious allegations. She stated that Mr. O'Brien told her the matter was serious, that he wanted to do the right thing, and was turning it over to the police. Her relevant evidence in-chief is as follows:

Q. And what did Mr. O'Brien tell you with respect to what he said happened involving Mr. Kilrea?

A. Following that conversation with regards to what the allegations were, he then said to me that in fact that he had met with Mr. O'Brien – or, Mr. Kilrea, excuse me, Mr. O'Brien had met with Mr. Kilrea, and that during this meeting they had discussions with regards to Mr. Kilrea where he was in that time and place in relation to continuing on in his candidacy for the mayoral position. And he indicated that they had discussions around the fact that Mr. Kilrea had some financial difficulties, that he had quite a bit of money invested, and that Mr. O'Brien advised me that he did offer to pay his out of pocket expenses and he advised me they had a discussion, Mr. Kilrea expressed some concern as to the investment he had in his web site as well. And they had some discussions in relation to the web site and whether or not that could be taken over, I believe the words that were used in relation to that. And so that Mr. Kilrea was making a decision as to whether or not he would continue on, that he had offered to pay those out of pocket expenses and then towards the end of the conversation with me, Mr. O'Brien said right towards the end of the conversation, oh, and before he left, Mr. Kilrea inquired about a position with the Parole Board and that he'd look into that, but found out very quickly that that would be inappropriate.

Q. And just so I'm clear, that last part, was that something he was saying in terms of what the allegations were or what he said had happened?

A. Mr. O'Brien said that Mr. Kilrea just prior to leaving the meeting, said that he had an interest in a position with the Parole Board. Mr. O'Brien said he didn't know much about that type of position but would look into it, but that he found out very quickly that that would not be appropriate. And he reiterated for the second time that he was calling because he wanted to turn the file over to the police.

[79] Consistent with the impeccable fairness exhibited by Crown counsel to present all relevant evidence, Mr. Hutchison called Deputy Chief O'Sullivan, whom I found to be a sincere and honest witness. However, one must ask whether her evidence buttressed the Crown's case to any degree. I think not. Indeed, it may be concluded that her evidence lends support to Mr. O'Brien's evidence that, although the subject of the Parole Board did arise, Mr. O'Brien very quickly learned that such a discussion would be inappropriate. To Mr. O'Brien's credit, upon learning of the Ottawa Citizen's involvement, the allegations and the privately obtained affidavit, he believed this was a matter for the police to investigate, and proceeded to contact the police accordingly.

[80] In my consideration of the evidence of Mr. O'Brien, I must first ask myself if I believe him and any other evidence which tends to support his version of events. If I do, then I must acquit him. Even if I do not believe Mr. O'Brien's evidence, but am left with a reasonable doubt about his guilt, then I must find him not guilty. Even if Mr. O'Brien's evidence does not leave me with a reasonable doubt, I may only convict him if the rest of the evidence that I do accept proves his guilt beyond a reasonable doubt. See *R. v. W(D)* [1991] 1 S.C.R. 742.

[81] There are many portions of Mr. O'Brien's evidence that I do believe. As I have already stated, I believe his evidence that he called John Reynolds and was clearly warned not to go any further with the National Parole Board issue in dealings with Mr. Kilrea. I cannot believe Mr. Reynolds would have advised otherwise. I believe that from the afternoon of July 12, 2006 Mr. O'Brien took no further steps to suggest he had influence with the government that might get Mr. Kilrea an appointment. Did Mr. O'Brien want Mr. Kilrea out of the race? He most certainly did. Did Mr. O'Brien, in his own words, feed Mr. Kilrea some "bullshit" from time to time? He most certainly did. But the bottom line is that Mr. O'Brien very early on was aware any *quid pro quo* arrangement was wrong and probably illegal. I am not sure Mr. O'Brien really wanted Mr. Kilrea's website and other assets, but if purchasing them would assist Mr. Kilrea to withdraw, then I have no doubt this issue remained alive.

[82] As to what occurred between Mr. O'Brien and Mr. Kilrea at 700 Sussex in the late morning of July 12th, while I cannot be sure I believe Mr. O'Brien, I am unable to conclude I disbelieve him and accordingly I am left with a reasonable doubt as to what was discussed by the two men.

[83] With respect to the meeting at Tim Horton's on August 7th, I am perplexed as to what occurred on that occasion. Were they discussing an offer related to the National Parole Board, as Mr. Kilrea stated in earlier drafts of his Citizen affidavit, or were they talking about an offer to purchase his assets? I cannot conclude the discussion related to any ongoing offer concerning an appointment to the Parole Board. Again, while I may not entirely believe either one of them, I am unable to conclude that I disbelieve Mr. O'Brien. Even if I were to find Mr. O'Brien's evidence did not leave me in doubt, (which I do not), the evidence of Mr. Kilrea with all its frailties, along with the other evidence I accept, leaves me with a reasonable doubt that Mr. O'Brien offered Mr. Kilrea an appointment to the National Parole Board in exchange for him withdrawing from the mayoralty race.

[84] Some comment must be made on how Mr. Kilrea's allegations came to light. In my view, his agreeing to swear an affidavit at the request of the Ottawa Citizen exhibited naiveté and questionable judgment. He testified he had heard rumours about the circumstances of him leaving the race, so to deal with this he contacted Gary Dimmock in December 2006, an Ottawa Citizen reporter, to learn whether Mr. Dimmock had heard anything. This struck me as a lame explanation. In any event, thenceforth a major story developed and eventually various emails were leaked to Mr. Dimmock, clearly, in my view, by Mr. Kilrea or persons on his behalf. To some extent, this case involves an attempt to dissect media reports from legally admissible reliable evidence.

[85] By early August, Mr. Kilrea must have known his campaign was going nowhere. He had not received the financial support he expected. In fact, financial contributions had decreased dramatically. To continue the campaign would have meant considerable personal financial sacrifice that he was not prepared to undertake. Well before his formal withdrawal from the race on August 20th, I am certain Mr. Kilrea was intending to leave the race. I am satisfied he was, in the words of one witness, "shopping himself around".

[86] The circumstances of how the Citizen affidavit found its way to Sean McKenny, the head of the Ottawa District Labour Council, in March 2007 are also troubling, as are Mr. Kilrea's further lame explanations of how that occurred. None of these circumstances provide me with much comfort as to the reliability of Mr. Kilrea's evidence.

[87] Finally, Mr. Kilrea's reasons for endorsing Robert Chiarelli, one of the hated Liberals, after he dropped out of the race, stretch credibility. I find it difficult to reconcile that he would, as a self proclaimed right wing Conservative, shift his support to Mr. Chiarelli, someone towards whom he had shown considerable personal animosity, calling him, among other things, a "disgrace" and a "coward". Again, it provides yet another troubling aspect of Mr. Kilrea's conduct that does little to bolster his overall credibility.

[88] The offences with which Mr. O'Brien is charged are "general intent" offences. The mental element of the offences is satisfied if the Crown is able to prove that the accused acted of his own volition with knowledge of the external circumstances of the offence. There is no further or "specific" mental element required to complete these offences.

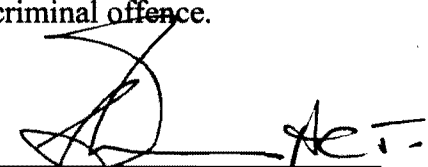
[89] I have already canvassed the nature of these offences in my decision dismissing the motion for a directed verdict of acquittal and will not repeat those comments here.

[90] With respect to offence contrary to s. 121(1)(d), there is no evidence Mr. O'Brien actually had influence with the government, so we are left to deal with the aspect of "pretending". "Pretending to have influence" is at the heart of the prosecution under this section. In my earlier reasons, I discussed "reward, advantage or benefit of any kind". All of the other elements of the offence having been met, it is incumbent upon the Crown to prove beyond a reasonable doubt that Mr. O'Brien, pretending to have such influence, offered Mr. Kilrea the reward of an appointment to the National Parole Board as consideration for Mr. Kilrea withdrawing from the mayoralty race. While I have some suspicions about the exact nature of

the conversation between these two men at 700 Sussex on July 12, 2006, I am left with a reasonable doubt that Mr. O'Brien, by pretending to have influence with the government, offered Mr. Kilrea this *quid pro quo*. He did not have influence with Mr. Baird. In fact, knowing of Mr. Kilrea's prior association with Mr. Baird, Mr. O'Brien encouraged Mr. Kilrea to meet with Mr. Baird directly. This would not, in my view, demonstrate the *modus operandi* of someone pretending to have influence with that person. As I have previously stated, I believe Mr. O'Brien when he stated he was told in no uncertain terms by John Reynolds that to do so would be illegal and that he took that warning seriously.

[91] As to the essential elements of the second count, the charge under s. 125, it is the contention of the Crown that Mr. O'Brien solicited or negotiated with Mr. Kilrea with respect to an appointment to the National Parole Board in the expectation of a reward, advantage or benefit, namely, that Mr. Kilrea would withdraw from the race. As I have previously discussed, while at best I may have suspicions about what was discussed between these two men, I cannot conclude beyond a reasonable doubt that the Crown has proved this charge. I am satisfied they discussed the matter. As to who initiated the topic, I conclude it was Mr. Kilrea. Undoubtedly Mr. O'Brien wanted Mr. Kilrea to withdraw from of the race. I have no doubt he encouraged Mr. Kilrea to pursue an appointment. He was walking a fine line, but for the reasons aforesaid, I am unable to conclude beyond a reasonable doubt that he committed a criminal offence.

[92] Accordingly, both charges are dismissed.


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

Released: August 5, 2009