

Cite as: R. v. Cleary, 1992 NSCO 43

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. NO.: 12364

IN THE COUNTY COURT JUDGE'S CRIMINAL
COURT OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN

against

CLARENCE MARK CLEARY

DATE HEARD: August 17, 18, 19, 20 & 31, 1992.

PLACE HEARD; The Law Courts, Halifax, Nova
Scotia.

DATE OF DECISION: September 11th, 1992

COUNSEL: Gary Holt, Esq., for the Crown
Brian Newton, Esq., Q.C. and
Peter Crowther, Esq., for the
Defence.

BATEMAN, J.C.C. (ORALLY):

Mr. Cleary is charged with an offence contrary to s.
121(1)(d) of the Criminal Code - influence peddling.

I find the facts as follows:

On June 7th, 1990, Mr. Cleary had a meeting with the four stonemasons who owned a company known as Millenium Masonry Limited.

The meeting took place at the instigation of Mr. Cleary.

During a telephone conversation prior to the meeting Mr. Burke, one of the four stonemasons, had outlined for Mr. Cleary the general corporate structure of the company and advised that there was a fifth person who might take up an equal share but was undecided.

At the meeting on June 7th, 1990 Mr. Cleary told the stonemasons of his experience with Minas Electric Ltd. In particular, he related an account of Minas Electric being awarded a contract through the tendering process, although the company was not the lowest bidder. He further advised them that he had received payment from Minas Electric for his role in gaining the contract. That amount was 10% of the difference between the lower bid and Minas Electric's bid which difference was \$158,000.00.

Mr. Cleary recounted, as well, a story about being in Florida with certain government people and friends of

the then Premier and having an opportunity to win a bet with another individual as to who would be the next Deputy Minister of Government Services. He did not, according to his story, accept the bet although he had accurate inside information as to who would be appointed. He said he later confided in the Premier of his turning down the bet. The Premier told him he should have taken it.

Mr. Cleary told the four stonemasons that Mr. Zareski, then Deputy Minister of Government Services, was having problems and under the influence of a cult.

Mr. Cleary discussed the value of the company with Mr. Burke and stated that the company was of no value. He wanted a piece of the company in return for his expertise and contacts. Mr. Burke felt that he should buy an interest, if Millenium made it available to him.

The members of Millenium and Mr. Cleary parted on the basis that the company would consider his proposition and get back to him.

All members of Millenium left the meeting understanding that Mr. Cleary was offering to assist the

company by finding out information from the government and by his access to people in government.

Mr. Cleary and Mr. Burke met briefly the day after the meeting when Mr. Cleary dropped by the Millenium work site to return papers to Mr. Burke. Mr. Cleary, at the meeting, had offered to look into Mr. Burke's status as a bricklayer.

On April 6th, 1990 Mr. Cleary had met with Brian Stonehouse, then Executive Director of Design and Construction with the Department of Government Services, and advised of his intention to help out a group of stonemasons who were forming a company. He told Mr. Stonehouse that he would ensure Canstone did not receive the Government House contract, even if it submitted the lowest tender.

On March 23, 1992, at a reception, Mr. Cleary met Norman Atkinson, Director of Building Services with the Department of Government Services, whom he knew on a casual basis. Mr. Cleary told Mr. Atkinson that if the government insisted upon awarding the Government House contract to Canstone, he would see "John" and make sure they didn't get it. Mr. Atkinson understood "John" to

mean Mr. Buchanan. Mr. Atkinson knew nothing of the Government House job.

The members of Millenium decided not to give Mr. Cleary an interest in the company but rather to make a counter-offer. Some members recall that they decided to offer a finders fee, others thought they decided to offer to sell Mr. Cleary a share of the company.

Mr. Burke called Mr. Cleary around June 19th, 1990. He offered him a 20% share of Millenium for \$20,000.00, Mr. Cleary declined. He told Mr. Burke that he hoped he would not see Mr. Burke quoted in the newspaper. Mr. Burke assured him he wouldn't.

Mr. Cleary did not reach any agreement with Millenium. Mr. Cleary did not expressly say he had influence with the government. He did not promise that he could get government contracts for Millenium.

In finding the foregoing facts I have made certain determinations as to credibility.

There are definite discrepancies among the recollections of the members of Millenium of the conversation at the June 7th, 1990 meeting, and of events

before and after. These recollections differ again from the evidence of Mr. Cleary.

While there are discrepancies as to the timing of events around the meeting, the exact words used during the meeting, the order of discussion of items at the meeting and the timing and form of the decision to reject the association suggested by Mr. Cleary, the four members of Millenium are in agreement on the following material areas:

1. Mr. Cleary initiated the meeting;
2. Mr. Cleary spontaneously told the three anecdotes; (Minas Electric; Zareski; Florida);
3. They all understood the anecdotes were told with the purpose of impressing them with Mr. Cleary's connections to the Premier and in government;
4. In telling the anecdotes and in other conversation during the meeting Mr. Cleary was not referring to the importance of ensuring that tenders were properly completed.

5. Mr. Cleary sought information about the status of the company and indicated that he wanted an interest in the company. He was not prepared to pay money for that interest in the company.

6. At the conclusion of the meeting Mr. Cleary left all members with the understanding that he wanted a piece of the company and that they were to decide if they wanted to give him a share;

7. Mr. Cleary did not expressly say he had "influence" with the government nor did he promise he could obtain contracts for Millenium. His words were to the effect that they would have a better chance of obtaining government contracts with him as part of the company.

8. They all felt Mr. Cleary was suggesting something improper.

9. Mr. Cleary, in response to Millenium telling him they had approached certain Government Ministers to ensure an opportunity to tender, told them that that was not enough, they had to go to the top person or top dog. They understood him to mean the Premier or someone at a high level in government.

Mr. Cleary testified that his discussions with Millenium were at all times directed to ensuring that the company understood the importance of the tendering process. He explains that his comments to Mr. Atkinson and Mr. Stonehouse were to the effect that he would make certain that the Government House jobs were opened to tender. Neither Mr. Atkinson nor Mr. Stonehouse understood that to be the thrust of his comments, nor did the members of Millenium. It is inconceivable that Mr. Cleary could be so universally misunderstood. I can only conclude that the import of Mr. Cleary's comments was as understood by the members of Millenium.

I do not draw any unfavourable inference from the fact that the evidence of Mr. Stonehouse and Mr. Atkinson came to the attention of the Crown Attorney only shortly before the trial.

The burden, as always, is upon the Crown to prove its case beyond a reasonable doubt. The Defendant need not prove his or her innocence.

It is helpful, however, in analyzing the facts to consider the defence put forward by the accused.

It is Mr. Cleary's submission that the members of Millenium do not properly remember the conversation, and that the discrepancies in their accounts make their evidence as a whole unreliable. I have rejected that submission in my factual findings. Notwithstanding the discrepancies, I find their evidence to be credible on the material points.

I do not attribute any improper motives to the members of Millenium who came forward with their evidence. They clearly had different views of their collective abilities and the level of sophistication within the company. They held somewhat divergent goals. That does not detract from the significant aspects of their evidence as it relates to this charge.

The Defence submits that Mr. Cleary did not have the requisite *mens rea* and, that his actions were not sufficient to constitute an offence under s. 121(1)(d).

The charge on the indictment reads:

"...that on about the 7th day of June, 1990, at, or near Halifax, in the County of Halifax, Province of Nova Scotia, did, being a person having or pretending to have influence with the government or

with a minister of the government, demand or offer to accept for himself a benefit as consideration for co-operation, assistance or exercise of influence in connection with the transaction of business with or any matter of business relating to the government, contrary to Section 121(1)(d) of the Criminal Code."

The Crown must prove that:

1. Mr. Cleary had or pretended to have influence;
2. The influence was with the government or a Minister;
3. Mr. Cleary demanded or offered to accept a benefit;
4. The benefit was as consideration for cooperation, assistance or exercise of influence;
5. The exercise of influence, cooperation or assistance was in connection with the transaction of government business.

S. 121 is aimed at ensuring public confidence in the operations of government. Without public confidence the

ability of the government to function effectively is undermined. While many of the offences in s. 121 are directed at those employed by or otherwise representing the government, certain of the subsections catch the conduct of people dealing with the government. S. 121(1)(d) is intended to deter people from holding out influence with the government. Obviously, the public's confidence in government can be eroded not only by the actions of government officials but by others, outside the government, who pretend to be in a position to influence government officials.

The intention required by the person accused of the offence is an intention to hold out that he or she has influence with the government and that he or she will accept a benefit in return for "cooperation, assistance or the exercise of influence". In other words, if Mr. Cleary held out that he had influence he is, nevertheless, not guilty unless he was attempting to trade upon that influence.

If his representations of his information about members of the government (Zareski) and his relationship with the Premier were innocently made and not with the intent of being connected to his potential relationship with Millenium, then the offence is not made out.

I am satisfied that Mr. Cleary, in his dealings with Millenium, and particularly by telling the three anecdotes, suggested he had close connections with the government and, specifically, with the Premier of the Province. He clearly represented that he was privy to confidential information. I reach this conclusion not solely because it was the impression left with all members of the company. Mr. Cleary, in his evidence, could offer no acceptable explanation as to why he would tell these stories. While his explanation for the telling of the Minas Electric experience was ostensibly to convey the importance of properly tendering - that was not the understanding of the members of Millenium. Nor does that explanation satisfactorily explain why Mr. Cleary would include details of his remuneration for gaining the contract. Mr. Cleary addressed this latter point by testifying that he wanted to explain to the group the type of arrangements that could be made for his remuneration and to ensure them that he did not want to take over the company.

It is interesting that Mr. Cleary's account to Millenium of his role in the Minas Electric tender process is somewhat at odds with that given by Donald Fultz of Minas Electric. Mr. Fultz testified that Mr.

Cleary was simply called upon to place a second call to Government Services to advise that Minas Electric was aware that the competing tender had not been properly completed. Why then would Mr. Cleary receive a percentage of the tender differential? If his purpose in recounting the Minas Electric story was to simply emphasize the importance of tendering, he would neither have provided the financial information nor overstated his contribution in gaining the contract. The members of Millenium were universally of the understanding that Mr. Cleary had been pivotal in obtaining the contract. I am satisfied that their understanding is consistent with the information provided by Mr. Cleary.

Mr. Cleary offered no satisfactory explanation as to why he volunteered the information about Mr. Zareski's circumstances. He acknowledged that he wanted them to know of his friendship with the Premier. Mr. Cleary could well have told them of his friendship with the Premier without recounting the Florida story. The only reasonable inference from that story is that Mr. Cleary was demonstrating that he was not only a friend of the Premier but also a confidant.

All members of Millenium recall Mr. Cleary using words to the effect of the importance of "having the

Premier's ear" or going to the "top man" or "top dog" - in the context of someone superior in position to the other government Ministers.

If Mr. Cleary was not implicitly suggesting that he had the Premier's ear or access to the top man, why would he tell Millenium that such was necessary?

The evidence of Mr. Stonehouse and Mr. Atkinson does not bear directly on the charge. It does, however, substantiate that Mr. Cleary was given to speaking of his relationship with the Premier and that he suggested to both that they had sufficient connection to divert the awarding of the Government House contract away from Canstone. I accept their evidence.

Did Mr. Cleary represent that he had influence? In R. v. Giguere (1983), 8 C.C.C. (3d) 1 (S.C.C.) the court held that "influence" as used in the section and in the context of that case means a person who could affect, or pretends he could affect, for example, a decision by government to award a contract.

I am satisfied that Mr. Cleary's collective representations to the members of Millenium could only be construed as suggesting he had influence with the

government. While he did not use the word influence or expressly say he could affect a decision of government, when one couples his story of successfully gaining the contract for Minas Electric, with the information as to his close relationship with the Premier and the necessity of having connections at high levels, the only meaning that could reasonably be assigned is that Mr. Cleary was representing that he had influence with the government.

In my view "influence" is not limited to actually obtaining a contract, for example, but includes the ability to affect decisions as to tendering, meetings and the like.

In a criminal context, the problem, of course, is not in having or exercising influence, but in selling that influence.

Did Mr. Cleary demand or offer to accept a benefit?

All members of Millenium left the meeting with Mr. Cleary understanding that he wanted some association with their company and that he did not want to pay for that association. Certain of them thought he wanted a 20% interest, others thought he wanted a finder's fee for any contract he arranged, or both.

Mr. Cleary says he decided early in the meeting that he did not want any association with the company. I accept the evidence of the members of Millenium that they left the meeting with the understanding that they were to decide upon Mr. Cleary's suggested involvement with the company. I accept, as well, the evidence of Mr. Burke that Mr. Cleary took particulars of their qualifications during the meeting and left them with the advice to get their resume's together, which he reinforced the next day with Mr. Burke. This is inconsistent with Mr. Cleary's evidence that he had determined not to associate with Millenium. He provides no explanation as to why he would leave the company believing he was interested in some involvement. I am further persuaded to this view by the fact of Mr. Burke's subsequent call to Mr. Cleary around June 19th, 1990. I accept Mr. Burke's explanation that the purpose of that call was to finally respond to Mr. Cleary. This call is further confirmation that the members of Millenium understood that the matter remained open.

The conversation with Mr. Burke in which Mr. Cleary described the company as worthless or of no value can only be interpreted as coming from a person attempting to bargain - to convince Millenium that he should not pay for the share.

I am satisfied that Mr. Cleary, in his meeting with Millenium, was offering to accept a benefit, the benefit being some association with the company by which Mr. Cleary would have a share or receive a finder's fee for contracts he obtained for the company.

It is not enough, however, that Mr. Cleary pretend to have influence with the government and that he offer to accept a benefit. He must offer to accept that benefit as consideration for his cooperation, assistance or exercise of influence in relation to government business.

Mr. Cleary was offering no monetary contribution for an interest in or association with Millenium.

According to Mr. Cleary's evidence he concluded early in the meeting that he was not at all interested in an association. The thrust of any discussions he did have, he says, was to demonstrate his experience with fledgling companies, his knowledge of the tendering process and his legal experience.

I have no doubt that those were some of the attributes portrayed by Mr. Cleary in the discussions. I am satisfied, however, that in addition to the above he

was holding out his relationship with the government and the consequent access to power and influence, as a further attribute.

In R. v. Giguere, supra, the Court considered the meaning of "cooperation, assistance and exercise of influence" within s. 121(1)(d) of the Criminal Code (formerly s. 110(1)(d)).

At p. 112, writing for the majority, Dickson J. states:

"The general purpose of s. 110 is to preserve the integrity of government. Those connected with government are meant to carry on the business of government without favours being bought by those who deal with government. The focus of s. 110 is those who have a real connection with government... Section 110(1)(d), although including people outside government, must be limited to those who have, or pretend to have, a significant nexus with government. Someone outside government who has no more 'clout' than to be able to arrange a meeting with a government official has at best a tangential connection with government. That is not the type of person whose actions s. 110 is trying to control. In my view, a person having influence with government is a person who could affect, for example, a decision by government to award a contract, and correspondingly a person who pretends to have influence is a person who pretends he could affect

such a government decision."
(emphasis added)

And at p. 13

"In my view, if someone opens doors or arranges meetings as the first step in an effort by another to secure a government contract, that is indeed assistance or co-operation in connection with the transaction of business with government within s. 110(1)(a) and (d). That is simply giving the words their ordinary meaning. ...

By itself, opening doors or arranging meetings is certainly not a crime. The problem arises only when two conditions meet: (i) when a benefit is given, offered or demanded for the opening of doors or arranging of meetings respecting the matters listed in s. 110(1), and (ii) the person who receives or demands it is an official or one having or pretending to have influence in the sense defined earlier. (emphasis added)

It is not necessary that the accused actually arrange meetings or otherwise open doors in order to ground a charge. This is clearly the case since even those people who do not actually have influence but pretend to are caught.

Even putting the most positive light on Mr. Cleary's position, assuming for the moment he simply intended to

ensure through his connections with the Premier, that contracts went to tender; if he offered to do this in exchange for an interest in or association with Millenium, he committed the offence.

Continuing at p. 13 of Giguere, supra,

"It is clear that the right to contract with government is not something to be bought with under-the-table payments. It is equally clear, in my view, that access to government officials is not something to be bought. Even if it is a seemingly modest intervention, opening doors or arranging meetings [sic] is caught by s. 110(1)(a) and (d) as constituting co-operating or assistance. (emphasis added)

The question remaining is whether Mr. Cleary's references to having the Premier's ear, absent an express promise to use his influence or gain contracts or take some other specific step is sufficient to underpin the charge?

Mr. Cleary did not promise to deliver contracts. He left the members of Millenium believing, however, that with him aboard they would have a better opportunity to receive government contracts.

It is clear from the wording of the statute that there need not be a concluded agreement to exercise influence or provide cooperation or assistance. It is sufficient that the influence, assistance or cooperation be "offered".

Did Mr. Cleary's conduct amount to such an offering? Without question the language used by Mr. Cleary was oblique. All members of Millenium, however, were left with the firm understanding that Mr. Cleary was offering, as part of his qualifications, his connections with high levels of government. Mr. Cleary must be taken to have been offering his cooperation or assistance. There is no other rational explanation.

Mr. Cleary must, of course, have had the necessary mental state to substantiate a charge. Mr. Cleary is not criminally responsible if he innocently made comments about his government connections - with no intent that they be related to his obtaining an association with Millenium.

It is commonly necessary to rely upon circumstantial evidence and, therefore, inferences from circumstantial facts to prove intent.

The usual rule is that before an inference can be drawn from circumstantial evidence, in relation to the commission of an act, it must be the only reasonable inference in the circumstances. This replaced the Rule in Hodge's Case.

Where circumstantial evidence is relied upon, however, to prove intent, this general rule doesn't apply. In R. v. Mitchell [1985] 1 C.C.C. 155 (S.C.C.) Spence J. at p. 167 says:

"This does not, in the slightest degree, reduce the onus of proof which rests upon the Crown in criminal cases and does not substitute any other rule. The direction in Hodge's case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt. It provided a formula to assist in applying the accepted standard of proof in relation to the first only of the two essential elements in a crime, i.e., the commission of the act as distinct from the intent which accompanied that act. The first element, assuming every circumstance could be established by evidence, would be capable of proof to a demonstration. The latter element, save perhaps out of the mouth of the accused himself, could never be so proved. The circumstances which establish the former not only can be, but must be consistent with each other, as otherwise a reasonable doubt on the issue arises. The circumstances which establish the latter, being evidence personal to

one individual, will seldom, if ever, be wholly consistent with only one conclusion as to his mental state and yet the weight of evidence on the issue may be such as to satisfy the jury, beyond a reasonable doubt, as to the guilty intent of the accused. The instruction of Baron Alderson in Hodge's Case does not apply and was never intended to apply to an issue of this kind." (emphasis added)

I take it to be the law that the inference drawn from circumstantial evidence relied upon to prove intent need not be the only reasonable inference but, rather, must be a proper inference, beyond a reasonable doubt.

On the evidence before me I cannot conclude other than that Mr. Cleary was offering to provide to Millenium his cooperation or assistance in relation to government business in exchange for a relationship with the company. As I have previously said, even if it was Mr. Cleary's intention to simply use his influence to ensure that a job went to tender - that is a criminal act when coupled with his offer to trade that exercise of influence or assistance for an association with Millenium. On the facts as I have found them, however, his offer went beyond ensuring the tendering of contracts.

Throughout his evidence Mr. Cleary emphasized that he was motivated by his wish to help the Nova Scotia

stonemasons. He could well have assisted them short of a financially remunerative relationship with the company. He could have attempted to ensure that future contracts were tendered irrespective of his relationship with Millenium or any of the stonemasons. He could have offered, even for a fee, to assist the company in preparing tenders.

I do not accept that Mr. Cleary's primary motivation was to ensure that Nova Scotians received the jobs. I conclude that he was only interested in Nova Scotians receiving the jobs if he stood to gain financially.

Mr. Cleary's comment to Mr. Burke during their final telephone contact - that he hoped he would not see Mr. Burke quoted in the paper - is evidence of his concerns about the meeting which had taken place. I do not accept Mr. Cleary's explanation that he said it out of concern that Mr. Burke would raise his name in the context of Mr. Cleary's role in Canstone. It is clear from the evidence that Mr. Cleary was not the focus of the stonemasons' concerns with Canstone.

Accordingly, I find that the Crown has proved, beyond a reasonable doubt each essential element of the

offence. I find Mr. Clearly guilty of an offence
contrary to s. 121(1)(d) of the Criminal Code.

Nancy Bateman

A Judge of the County Court
of District Number One

NANCY J. BATEMAN