

Secret commissions s 442B, s 442M

The common law did not have secret commission offences. The *Criminal Code* provides for such offences in Ch 42A (s 442A – 442M).

Section 442B creates the offence of receipt or solicitation of a secret commission and deals with the offence of corrupt receipt or solicitation of valuable consideration with agents. Section 442M(1) provides that for prosecutions under Ch 42A it is not a defence to show that any secret receipt commission is customary in any trade, business or calling. It also deals with matters of proof. Once certain matters are proved, s 442M(2) creates, in effect, a rebuttable presumption that a payment is a secret commission.

Sections 442B and 442M provide different paths to conviction in respect of an offence under s 442B; s 442M is not merely a truncated version of s 442B. The Crown is entitled to have both alternatives left to the jury. Under s 442B, the Crown need not show the absence of the principal's assent or that the payer had business relations with the principal, although it must establish that the receipt was an inducement or reward or on account of the agent acting in the way described, or alternatively would tend to influence the agent in the way described. Under s 442M, business relations between the payer and the principal and the absence of the latter's assent must be proved by the prosecution, together with the receipt of valuable consideration by the agent from the payer. Once those matters are proved, the burden of proving the absence of corruption or the absence of any tendency to influence falls to the defendant.¹

Direction under s 442B

The defendant is charged with the offence of receiving [or solicitation] of a secret commission as an agent pursuant to s 442B of the Criminal Code.

A person commits the offence of receiving [or solicitation] of a secret commission where the defendant being an agent corruptly receives [or solicits] from any person for himself or herself or for any other person any valuable consideration –

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business; or**
- (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal's affairs or business.**

¹ *R v Nuttall* [2011] 1 Qd R 270; [2010] QCA 64 at [31].

It is alleged that the defendant was at the relevant time an agent for the purposes of this provision. For present purposes “agent” encompasses a Minister of the Crown, while “principal” includes the Crown.²

It is further alleged that the defendant when an agent corruptly received [or solicited] for himself [or herself/ or another person specifying which] valuable consideration³ [namely, specify the nature of the consideration].

In the present case it is alleged that the defendant corruptly received [or solicited] the valuable consideration:

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal’s affairs or business; or**
- (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal’s affairs or business.**

[outline prosecution case and defence contentions].

A defendant acts corruptly if at the time he received [or solicited] the benefit he believed that the person providing the valuable consideration intended that it should influence the defendant to show or refrain from showing favour or disfavour in relation to the principal’s affairs or business.⁴

The onus of proof is on the prosecution to prove the offence. In this regard the prosecution must satisfy you beyond a reasonable doubt of each one of the following matters, that is, at the relevant time:

- 1. the defendant, being an agent of the principal [eg a Minister of the Crown];**
- 2. received from any person [specify person or his associated companies as appropriate];**
- 3. any valuable consideration;**
- 4. corruptly;**

² See definition of “agent” and “principle” in s 442A.

³ “Valuable consideration” is defined in broad terms in s 442A.

⁴ This formulation by Brooking J in *R v Dillon and Riach* [1982] VR 434 was adopted by the trial judge in *Nuttall* and referred to without criticism on appeal at [36].

5. as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to the principal's [eg the Crown's] affairs or business [in respect of a case concerning s 442B(a)];
6. the receipt or expectation of which would tend to influence him to show or forbear to show favour or disfavour to any person, in relation to the principal's affairs and business [in respect of a case concerning s 442B(b)].

If the prosecution does satisfies you beyond a reasonable doubt of each those matters, then you would find the defendant guilty of the offence. If you are not so satisfied beyond reasonable doubt then you must find the defendant not guilty unless you are satisfied of guilt proceeding under an alternate approach I will now explain.

Direction under s 442M

There is an alternate approach which arises for your consideration provided the prosecution first satisfies you beyond reasonable doubt of certain matters.

This approach requires the prosecution to satisfy you beyond reasonable doubt of each one of the following 4 matters that is, at the relevant time:

1. the defendant was an agent of his principal [eg that the defendant was a Minister of the Crown];
2. any valuable consideration has been received [or solicited] by the defendant;
3. from any person having business relations with the principal [specify details eg person or associated companies, having business relations with the Crown and the business relations]; and
4. this was done without the assent of the principal [eg without the assent of the Crown (Governor in Council)]

If the prosecution so satisfies you beyond reasonable doubt, then the burden of proof shifts to the defendant to prove that he is not guilty of the offence charged. Importantly, the standard of proof for the defendant in such a case is one on the balance of probabilities (and not one requiring proof beyond reasonable doubt). To discharge that onus of proof, the defendant would have to satisfy you that more probably than not –

- 5. the defendant did not corruptly receive [or solicit] [specify the valuable consideration];**

[eg. when the defendant received that payment, the defendant did not believe that [specify the payer] intended that the payment or expectation of that payment should influence the him/her to show or refrain from showing favour or disfavour to any person];

OR THAT

- 6. the receipt or expectation of that [payment] was not an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business [in respect of a case under s 442B(a)];**

OR THAT

- 7. the receipt or expectation of that [payment] would not tend to influence the defendant to show or forbear to show favour or disfavour to any person in relation to the principal's [eg the Crown's] affairs and business [in a case concerning s 442B(b)].**

If the defendant satisfies you on the balance of probabilities of either 5 or [6 or 7 as appropriate] then you must find him not guilty of the offence in s 442B. If the defendant does not satisfy you on the balance of probabilities of either 5 or [6 or 7 as appropriate] then you would find him guilty.

JURY AID – Secret Commissions

Section 442B

If the prosecution satisfies you beyond a reasonable doubt of each and every one of the following matters that is,

At the relevant time the defendant:

1. was an agent of the principal;
2. received from any person;
3. any valuable consideration;
4. corruptly;
5. as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to the principal's affairs or business;
6. the receipt or expectation of which would tend to influence him to show or forbear to show favour or disfavor to any person, in relation to the principal's affairs and business.

THEN you would have to find the defendant GUILTY.

IF you are not satisfied beyond reasonable doubt of each and every element then you would find the defendant NOT GUILTY.

Section 442M

The prosecution must satisfy you beyond reasonable doubt of each and every one of the following 4 matters:

At the relevant time –

1. any valuable consideration [i.e. \$...insert value]
2. has been given to an agent [i.e. insert name] as Minister for the Crown;
3. from any person having business relations with the principal [i.e. from a person having business relations with the Crown]; and
4. without the assent of the principal i.e. without the assent of the Crown (the Governor in Council)

If you are not satisfied beyond reasonable doubt of all 4 matters, you do not consider this option further.

If, however, you are so satisfied, the burden shifts to the defendant to prove, on the balance of probabilities, that he is not guilty. He would have to satisfy you that more probably than not of any one of the following:

At the relevant time the defendant:

5. Did not corruptly give [\$...insert detail] to [insert name]

OR

6. The receipt of [\$...insert detail] would not tend to influence the agent, [insert name] to show a forebear to show favour or disfavour to his principal's (the Crown – State of Queensland) affairs or business.

OR

7. The receipt or expectation of that [\$...insert detail] would not tend to influence the defendant to show or forbear to show favour or disfavour to any person in relation to the principal's (the Crown – State of Queensland) affairs and business.

If the defendant satisfies you on the balance of probabilities of any one of these matters THEN you must find him NOT GUILTY.

If the defendant does not satisfy you on the balance of probabilities of any one of these matters THEN you would find him GUILTY.