

## ?Mens rea? the issue in Duffy?s trial

THE JUDGE-ALONE TRIAL of Senator Mike Duffy is expected to run at least 41 days, with much of the time used up in a display of evidence supporting 31 criminal charges that involve allegations of fraud and breach of trust.

However, at the end of the day the big issue confronting Ontario Court Justice Charles Vaillancourt is one hardly mentioned in advance coverage of the trial or in the Crown's opening statement Tuesday. It is mens rea.

Lead prosecutor Mark Holmes told the court he will produce evidence to support all 31 charges, which will show how Mr. Duffy treated the Senate's money after Prime Minister Stephen Harper named him to the red chamber in 2008.

The evidence will deal mainly with the senator's expense claims ? treating his Kanata home as a secondary residence he kept so he could do Senate business in Ottawa, filing for compensation for trips he took across the country for what he will contend had little or nothing to do with Senate business.

If this were a jury trial, the prosecution would be expected to explain that its main challenge would be to demonstrate mens rea ? not just that the spending was fraudulent, but that Mr. Duffy knew it was.

A fundamental principle of criminal law is that a crime requires both a mental and a physical element. Mens rea, a person's awareness of the fact that his or her conduct is criminal, is the mental element, and actus reus, the act itself, is the physical element.

The concept of mens rea developed in England about the year 1600 when judges began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind. The degree of mens rea required for a particular crime varied, murder, requiring a malicious state of mind, whereas larceny required a felonious state of mind.

In this case, the Crown is obliged to prove beyond a reasonable doubt that when Mr. Duffy was appointed as a senator for Prince Edward Island, he knew that having spent decades in Ontario, latterly as a parliamentary correspondent for CTV, he couldn't claim his Kanata home as a secondary residence.

However, the P.E.I. native (born May 27, 1946 in Charlottetown), did have a cottage near Summerside, and one clear Senate rule is that all senators must own land in the province they represent.

Just why he and Pamela Wallin, also an Ontario resident, were appointed to represent P.E.I. and Saskatchewan, respectively, will never be acknowledged, and it surely wasn't because those provinces had no prominent Conservatives willing to become senators.

(Although there apparently were precedents for senators being appointed to represent one province while living elsewhere, none of the previous appointees was so high-profile.)

One thing that's patently obvious is that if the two appointees had been named to represent Ontario, Mr. Duffy wouldn't be on trial and Ms. Wallin wouldn't face the possibility of facing similar charges.

In the circumstances, you can count on Mr. Duffy testifying in his own defence and maintaining that he had been advised more than once that the rules of the day permitted him to file the expense claims on the Kanata house, as well as those filed for trips he made to promote the Conservative cause.

Interestingly, we've seen no evidence that he was prospering as a senator any more than he had been with CTV. On the contrary, it appears that the main reason Nigel Wright, as chief of staff in the Prime Minister's Office, wrote a personal cheque for \$90,172 to Mr. Duffy was that at the time the senator didn't have that much money on hand.

Even if Mr. Duffy persuades Justice Vaillancourt that he didn't realize he was breaking Senate expense rules and wins an acquittal,

he will likely wind up impoverished by his legal bills. (And since November 2013 he and Ms. Wallin have been suspended from the Senate without pay for two years.)