NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Cosh*, 2015 NSCA 76

Date: 20150730
Docket: CAC 428299
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Kenneth Wade Cosh

Respondent

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: February 18, 2015, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Farrar and Bryson, JJ.A. concurring

Counsel: Jennifer MacLellan for the appellant
Alan Ferrier, Q.C. and Benjamin Carver, for the respondent

Reasons for judgment:

[1] The respondent was a paramedic for over 20 years. Unfortunately, he became addicted to narcotics in 2009. The record is scant about the genesis of his addiction, but the consequences are well documented. He stole morphine from his employer to feed his addiction, and falsified records to cover up his pilfering.

[2] The respondent's misconduct was discovered in 2013. He admitted the thefts and falsification of records. A ten count information followed. Charges ranged from criminal negligence, theft, fraud, unlawful possession of morphine and other drugs, to breach of trust in connection with the duties of his office, contrary to s. 122 of the *Criminal Code*.

[3] It is this latter charge that is the sole focus of this appeal.

[4] Initially, the respondent pled not guilty to all charges. Some charges were amended. Eventually, the respondent pled guilty to theft, fraud and unlawful possession of morphine. All of the other charges, save the breach of trust charge, were discontinued.

[5] The Honourable Judge James H. Burrill of the Nova Scotia Provincial Court was the trial judge. No witnesses testified. Two documentary exhibits constituted the evidence.

[6] The trial judge acquitted the respondent of the s. 122 charge because he was not satisfied beyond a reasonable doubt that the respondent was an official within the meaning of the *Criminal Code*. The Crown appeals on the basis that the decision of the trial judge is marred by legal error.

[7] While I do not endorse all of the trial judge's comments, I agree with his ultimate conclusion that the respondent was not an official within the meaning of the *Criminal Code*. Accordingly, I would dismiss the appeal. The following reasons explain.

[8] To understand what facts may be important, it is appropriate to first set out the basic legal framework.

LEGAL FRAMEWORK

[9] Section 122 is found in Part IV of the *Criminal Code*, R.S.C. 1985, c. C-34 "Offences Against the Administration of Law and Justice". It provides:

> 122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

[10] Primarily, there are two statutory provisions that inform who may be an "official". Both are found in the definition section for Part IV, s. 118. "Official" means a person who holds an office, or is appointed or elected to discharge a public duty.

[11] "Office" is defined as including an office or government appointment, a civil or military commission, and a position or employment in a public department. The English version of these provisions is as follows:

> "office" includes
>
> (a) an office or appointment under the government,
>
> (b) a civil or military commission, and
>
> (c) a position or an employment in a public department;
>
> "official" means a person who
>
> (a) holds an office, or
>
> (b) is appointed or elected to discharge a public duty;

[12] As will be described in more detail later, the respondent's job as a paramedic was not with the government or any public department. His employment was with a private corporation. Now, to the facts and the trial judge's decision.

FACTS

[13] No facts were in dispute at trial, nor *a fortiori* on appeal. They are, for the most part, set out in Exhibit #1, entitled "Joint Statement of Facts". This exhibit describes the investigation that revealed the unusually high frequency of narcotic prescription by the respondent, poor record keeping, and an enormous discard rate of morphine. All indicators of narcotics abuse.

[14] When confronted by his employer, the respondent admitted his theft of morphine, and gave details how he was able to do so for years without detection. He denied ever jeopardizing patient care.

[15] The police investigated. A search of the respondent's home uncovered morphine, syringes, other drugs and numerous types of medical equipment. When formally questioned by the police, he repeated his inculpatory remarks. He put the number of thefts of "leftover doses" of morphine at 150. He never gave nor sold the drug to anyone else.

[16] The Joint Statement of Facts also describes the duties of paramedics, the relationship between the respondent's employer, Emergency Medical Care Inc. (EMC), and the provincial Department of Health.

[17] The duties of a paramedic are said to be:

> A paramedic's responsibilities include the pre-hospital emergency medical care of patients. This can involve a limited amount of assessment, diagnosis and treatment of patients. Treatment can include intravenous therapy, cardioversion (drug and electrical therapy to stabilize the heart rate) defibrillation (electrical therapy to the heart), airway management (using various invasive and non-invasive techniques), and administration of drugs (orally or intravenously). In certain conditions, they have discretion to do perform [sic] these treatments while the patient is unconscious or otherwise while [sic] unable to consent. Where necessary, certain aspects of a patient's treatment by a paramedic will be done under the direction or supervision of a qualified physician.

[18] The Department of Health oversees paramedics primarily through its division "Emergency Health Services" (EHS). Any person seeking to work as a paramedic must be registered with EHS and abide by the EHS Code of Professional Conduct. Most paramedics in Nova Scotia are employed by EMC which is a provincially incorporated private company, wholly owned by Medavie/Blue Cross.

[19] The Joint Statement of Facts labels the system under which paramedic services are organized in Nova Scotia as a "Fail Safe Franchisee" model. The Department of Health owns and leases all of the essential components of the ambulance service, and provides them to EMC for its exclusive use. In other words, it owns the assets and equipment, but the system is staffed and managed by EMC. Its duties include:

- Day-to-day operations and administration of ambulance services
- Operation of dispatch and call-taking
- Hire and management of paramedics and nurses
- Professional development of employees
- Develop and implement safety, quality and risk management practices
- Develop and manage the system of resource allocation
- Manage and maintain facilities, vehicles and equipment

[20] The evidentiary record was completed by Exhibit #2, the actual contract between the Department of Health and EMC dated April 1, 2009. There is no need to analyze its terms or any of the multiple appendices to its 48 pages.

[21] No member of the Department of Health or EHS, nor any member of the provincial government, have any ownership in EMC, or any representation on its Board of Directors or its parent company.

[22] Both parties filed detailed briefs prior to trial. Each identified the sole issue to be resolved by the trial judge as whether the respondent was an "official" as defined by s. 118 of the *Criminal Code*. Written submissions were supplemented by oral argument on the day of trial, April 8, 2014. The trial judge reserved his decision.

[23] The trial judge delivered oral reasons on May 27, 2014. They are unreported.

TRIAL JUDGE'S DECISION

[24] The trial judge quoted the actual charge :

> Kenneth Wade Cosh, between the dates of August 1st, 2009 and February 15, 2013, at or near Queens County Province of Nova Scotia, did, being an official Emergency Health Services Paramedic did commit a breach of trust in connection with the duties of his office by committing fraud, theft, ~~administering a noxious thing, assault with a weapon~~, and possession of a controlled drug or substance contrary to Section 122 of the Criminal Code.

[25] By consent, the count was amended prior to trial by removal of the struck through text.

[26] The judge reviewed the factual matrix revealed by the documentary record. He observed that:

> There is no doubt that while employed as a paramedic that he [the respondent] breached the trust of his employer by mishandling and committing fraud and theft in relation to morphine.
>
> No member of the Department of Health or District Health Services or any member of the provincial government has any ownership in EMC, nor any representation on its Board of Directors, or its parent company for that matter.

[27] The trial judge quoted the relevant provisions of the *Criminal Code* and referred to many of the seemingly conflicting authorities that have wrestled with who is an "official" for the purposes of s. 118 of the *Code*. The judge accepted the Crown argument that had a paramedic been employed directly by the Department of Health he would meet the definition of someone who holds an "office" and hence, an "official".

[28] The crux of the reasoning that led to the respondent's acquittal is found in the following paragraphs:

> Essentially, and this is a simplification of this relatively complex issue. The Defence asked me to look at the nature of this individual's employment and how he was hired, and how he was managed, and who he was immediately responsible to, whereas the Crown asked me to look at the service that this individual provided for clearly public benefit and find out of that for all the reasons that I have reviewed that this individual is an office holder and an official within the meaning of section 118 of the **Criminal Code**.
>
> I've carefully considered all of the arguments that have been presented to me. And it is the determination of this Court that the nature of the individual's employment and his employment status is very important to the determination of whether he is an official or not.
>
> Many private persons are employed or gain their livelihood by providing services that are of public benefit. A medical doctor in private practice clearly provides an important public service. He is paid in this country exclusively by the government, provides a core government service in that medical care in Canada is something that the government is responsible for providing to its citizens. But yet, no one would seriously argue in my view that a medical doctor in private practice is an official or an individual who is an office holder within the meaning of Section 122 that is entitled breach of trust by a public officer.
>
> It's important to note as well that section 122 makes a distinction between private persons and public persons essentially. It doesn't talk about the service essentially that they provide because it talks about every official who in connection with the duties of his office commits fraud or breach of trust is guilty. And at the end it says, "… Whether or not the fraud or breach of trust would be an offense if it were committed in relation to a private person." And it begs the question, what do

> they mean by private person? It doesn't talk about a person performing private duties.
>
> In my view, the Crown argument does fail to establish that Mr. Cosh was an official who committed fraud in connection with the duties of his office within the meaning of 122 of the **Criminal Code**.
>
> …
>
> And while the service provided is a service that has immense public benefit, they have by choosing to hire a private company to deliver those services and have that company employ paramedics and administer management services and make those employees responsible to the private company, may have very well transformed those paramedics from employees who might otherwise have been characterized as officials and officeholders under 118.
>
> But in my view, I'm not satisfied beyond a reasonable doubt that it has been proven that Mr. Cosh is an official or officeholder. And because that has been agreed by counsel to have been the only issue in this case, the accused is found not guilty of that charge.

ISSUES

[29] The Crown identifies but one ground of appeal in its Notice of Appeal:

> 1. The Provincial Court Judge erred in law in applying the wrong test in determining whether the respondent was an "official" within the meaning of ss.118 and 122 of the **Criminal Code**.

[30] The ground of appeal is framed as a contention that the trial judge applied the wrong test. However, at trial, and on appeal, both parties agreed that the real issue was simply one of statutory interpretation. Interpretation of a statute is a pure question of law which engages the correctness standard of review (see: *R. v. Hicks*, 2013 NSCA 89). In other words, despite the trial judge expressing his conclusion as not being satisfied beyond a reasonable doubt that the respondent was an official within the meaning of s. 122 of the *Criminal Code*, that doubt was caused by his interpretation of the relevant provisions of the *Code*. The Crown argues that the trial judge's interpretation was legally flawed. What then are the governing principles of statutory interpretation, and did the trial judge reach the wrong conclusion?

PRINCIPLES OF STATUTORY INTERPRETATION

[31] Absent a genuine ambiguity, the principles of statutory interpretation for penal statutes are no different than ordinary legislation. The *Interpretation Act*, R.S.C. 1985, c. I-21, gives general guidance. It provides:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[32] The starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the court in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, wrote:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[33] The same approach applies to the interpretation of penal statutes. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci, again writing for the court, quoted Driedger's principle of modern interpretation:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive

> settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[34] Other aids to interpreting penal statutes such as strict construction or reference to "*Charter* values" only play a role where, despite the application of the canons of interpretation, there is a real ambiguity:

> [28] Other principles of interpretation -- such as the strict construction of penal statutes and the "*Charter* values" presumption -- only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)
>
> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute.

APPLICATION OF THE PRINCIPLES

[35] Legislation is not created, nor amended, in a vacuum. Context can provide important signposts on the path to discerning the intention of Parliament in the words used, and their consequent meaning. The Crown has carefully traced the legislative evolution of the *Criminal Code* sections from their first enactment in 1893 to the present. In addition, the parties have cited virtually every Canadian

case on these sections. Later, I will refer to the details of their legislative evolution and some of the cases cited.

[36] In my opinion, unaided by any extrinsic aids, the words found in ss. 118 and 122, read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Criminal Code*, and the objectives of that legislation, cannot be interpreted to capture a paramedic who is employed by a private corporation. He held no position in government. He was not appointed by any government agency. Furthermore, despite the importance of what a paramedic may be called upon to perform, he owed no duty to the public.

[37] First, the language of s. 122 itself. It speaks of "Every official who, in connection with the duties of his office, commits fraud or a breach of trust ... whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person." As observed by the trial judge, the section itself distinguishes between conduct demanded of an official, punishable by criminal sanction, and that of a private person.

[38] Section 118 uses two seemingly inconsistent drafting approaches to define who is an official for the purposes of Part IV of the *Code*. In relation to the actual word "official", the *Code* directs that it has a specific meaning. Rather than a wide catch basin, it is restricted to being either a person who holds an office, or who is appointed or elected to discharge a public duty.

[39] Yet "office" is not restricted to its ordinary meaning. It is defined as including "an office or appointment under the government"; "a civil or military commission"; or "a position or an employment in a public department".

[40] To complete the scope of who may be an official there are other definitional provisions. "[G]overnment" is defined in s. 118 to mean the Government of Canada, the government of a province or Her Majesty in right of Canada, or a province. "[P]ublic department" in s. 2 is defined to mean a department of the Government of Canada or a branch thereof or a board, commission, corporation or other body that is an agent of Her Majesty in right of Canada.

[41] On closer examination, the use of "means" and "includes" in s. 118 is not at all inconsistent. Parliament has used these definitional techniques to ensure that the crimes set out in Part IV of the *Code* only apply to persons that are either appointed or hold office under government, or are elected or appointed to discharge a public duty.

[42] *Sullivan On the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014), points out that statutory definitions are "conventionally classified as exhaustive or non-exhaustive, and the courts rely on this distinction in interpreting them". The learned author writes:

> The distinction itself is simple enough: exhaustive definitions displace the ordinary (or technical) meaning of the defined term whereas non-exhaustive definitions do not….
>
> §4.33

[43] While cautioning that the classification of exhaustive and non-exhaustive may not fully capture the complexity of statutory definitions, in this instance it is useful. Exhaustive definitions are those that:

> …declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is generally introduced by the verb "means".
>
> §4.34

[44] On the other hand non-exhaustive definitions:

> …do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning. Non-exhaustive definitions are generally introduced by "includes" or "does not include" ….
>
> §4.38

[45] In *R. v. ADH*, 2013 SCC 28, the Court considered the meaning of "abandon or expose", defined by s. 214 of the *Criminal Code* to "include" certain conduct. Cromwell J., for the majority, observed that this non-exhaustive definition indicates that the ordinary grammatical meanings of these words are relevant to their interpretation (para. 43). What then is the ordinary grammatical meaning of "office"?

[46] The *Concise Oxford English Dictionary*, 6th ed (Oxford: Oxford University Press, 1976) reveals a host of meanings for this word. One is relevant:

> **3**. Position with duties attached to it, place of authority or trust or service, esp. of public kind (was given an office under the Government), tenure of official position esp. that of minister of State (take, enter upon, hold, leave, resign, office;

[47] *Webster's Third New International Dictionary* (Springfield: Merriam-Webster, 1986) reveals this definition for “office”:

> office: **1 a :** a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose **:** a position of authority to exercise a public function and to receive whatever emoluments may belong to it (qualified to hold <public ~ > **b :** a position of responsibility or some degree of executive authority **c :** the fact or state of holding a public position of authority....

[48] The essence of the Crown’s argument is that paramedics provide a vital service to members of the public who need emergency health care. Emergency health care is being provided by government, not directly through its employees, but via a contract with EMC who employs paramedics, as well as others, to do so.

[49] The Crown argued at trial, and the trial judge agreed, that if the respondent were employed by the government he would be an “official”. It should make no difference, so the argument goes, that the government chose to provide the service by contract with EMC.

[50] The Crown acknowledges that employment status is an important factor, but it should not be determinative. Hence, it submits that the trial judge erred in law by focussing on the employment arrangement rather than the duties performed by a paramedic.

[51] First, I am far from convinced that, on this record, a paramedic employed directly by a provincial government department is an “official” within the meaning of s. 122 of the *Code*. There is no “office” of paramedic, nor appointment by an agency of government. It may well be a position or employment, but it is not in a “public department” which is defined as meaning a department of the Government of Canada or other body that is an agent of Her Majesty in right of Canada (s. 2).

[52] Second, however important a service may be to the public good, it does not equate to a person discharging “a public duty”.

[53] Extrinsic aids such as the legislative evolution of these provisions and judicial interpretation reinforce this outcome.

[54] Like many offences found in the *Criminal Code*, breach of trust by an official finds its origins in the common law. The common law offence of misconduct in public office, its codification in Canada, and legislative evolution

were canvassed by the Supreme Court of Canada in *R. v. Boulanger*, 2006 SCC 32. McLachlin C.J., for the Court, described the offence:

> [1] The crime of breach of trust by a public officer, embodied in s. 122 of the *Criminal Code*, R.S.C. 1985, c. C-46, is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power. Yet surprisingly, the elements of this crime remain uncertain. This appeal requires us to clarify those elements so that citizens, police and the courts have a clear idea of what conduct the crime encompasses.

[55] *Boulanger* was not about who is or is not an "official", but rather what are the *actus reus* and *mens rea* of the offence. A young woman had an accident. Mr. Boulanger was that young woman's father. He held the position of director of public security for that municipality. A municipal police officer had done an accident report. Mr. Boulanger asked the police officer in charge of the case to prepare a second, more complete report. The police officer did so. The subsequent report cleared his daughter of fault. As a result, Mr. Boulanger did not have to pay the insurance deductible. There was no issue that the appellant Boulanger was an "official".

[56] Chief Justice McLachlin reviewed the common law offence, its codification and subsequent legislative evolution in Canada. She observed that the *Code* does not set out the elements of the offence; it simply reiterates the common law offence of breach of trust in general terms:

> [8] The *Criminal Code* does not inform us of the elements of the offence. It simply sets out the common law offence of breach of trust by public officers in general terms. The purpose of the offence, the *mens rea* or guilty mind required for the offence and the *actus reus* or conduct targeted by the offence remain subject to conflicting decisions and conjecture.
>
> [9] These issues lie at the heart of this appeal. In order to resolve them, we must look to the history of the offence at common law and to how it has developed in Canada and elsewhere.
>
> [10] I conclude that Parliament based s. 122 of the *Criminal Code* on the offence of misfeasance in public office, as defined by Sir James F. Stephen, in *Digest of the Criminal Law* (4th ed. 1887), at p. 85, while choosing not to incorporate the different offence, also recognized by Stephen, of neglect in public office. Much of the confusion surrounding s. 122 stems from the failure to recognize the difference between the two offences and from the fact that Parliament adopted only one of them. Interpreting s. 122 as incorporating the common law offence of

> misfeasance in public office, I conclude that, on the facts found by the trial judge, the appeal should be allowed.

[57] Section 135, then entitled "Breach of trust by public officer", read as follows in the 1892 *Code*:

> 135. Every public officer is guilty of an indictable offence and liable to five years imprisonment who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.

[58] "[P]ublic officer" was defined in s. 2(33) as:

> 2. In this *Act*, unless the context otherwise requires,
>
> (33) 'public officer' includes any excise or customs officer, officer of the army, navy, marine, militia, Royal Canadian Mounted Police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada.

[59] Over time, s. 135 was re-numbered, but the wording remained the same until what is known as the 1954 revision of the *Criminal Code*.

[60] "[O]ffice" was defined in the *Criminal Code*, 1892 in relation to a different offence, that of selling an appointment or resignation from office (s. 137) as:

> The word "office" in this section includes every office in the gift of the crown or of any officer appointed by the crown, and all commissions, civil, naval and military, and all places or employments in any public department or office whatever, and all deputation to any such office and every participation in the profits of any office or deputation.
>
> s. 137(2)(d)

[61] In 1906, Parliament introduced definitions of "the government", and "an official or employee of the government". Section 155 of R.S.C. 1906, c. 146 provided:

> 155. In this part, unless the context otherwise requires,
>
> (a) "the government" includes the Government of Canada, and the government of any province of Canada, as well as His Majesty in the Right of Canada or of any province thereof, and the commissioner of the Transcontinental Railway;

(b) "official or person in the employment of the government" and "official or employee of the government", extend to and include the commissioner of the Transcontinental Railway and the persons holding office as such commissioners, and the engineers, officials, officers, employees and servants of the said commissioners;

(c) "office" includes every office in the gift of the crown or of any officer appointed by the crown, and all commissions, civil, and navel and military, and all places or employments in any public department or office whatever, and all deputations to any such office and every participation in the profits of any office or deputation.

[62] The 1954 Revision (*Criminal Code*, S.C. 1953-54, c. 51) changed the wording of these sections. Breach of trust by public officer became:

> **103**. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

[63] The definitions from s. 155 became subsumed under s. 99 (d) and (e), and are the same ones found today in s. 118 (with one minor addition which I will refer to later):

> (d) "office" includes
>
> (i) an office or appointment under the government,
>
> (ii) a civil or military commission, and
>
> (iii) a position or employment in a public department;
>
> (e) "official" means a person who
>
> (i) holds an office, or
>
> (ii) is appointed to discharge a public duty;

[64] No guidance can be found in legislative documents before, and at the time of, these amendments concerning Parliament's intention with respect to these revisions. McLachlin C.J. commented on the revised wording in *Boulanger*:

> [36] In 1954, the section was amended to assume its present form. The amendment produced two changes: first, the words "in the discharge of the duties of his office" were changed to "in connection with the duties of his office"; and second, the words "affecting the public" were removed. This amendment, which was part of a larger package of revisions to the *Criminal Code* in 1954, was not discussed either in the *Report of the Royal Commission on the Revision of the*

> *Criminal Code* or in the *House of Commons Debates*, vol. II, 1st Sess., 32nd Parl., January 19, 1954. The only reference in the *Debates* states simply: "Sections 103 to 113 inclusive agreed to" (p. 1274).

[65] There was, of course, one other change: "official" replaced "public officer". It is interesting to access the commentary by J.C. Martin, Q.C. about these amendments. Mr. Martin was Research Counsel to the Royal Commission to Revise the *Criminal Code*, 1947-1952, and author of his first annotated *Criminal Code* in 1955. As observed by Doherty J.A. in *R. v. Greenwood*, (1999), 67 C.C.C. (3d) 435, Mr. Martin is recognized as one of the principal architects of the revised *Code.* With respect to the revised section dealing with breach of trust by a public officer (s. 103), Mr. Martin commented:

> This is the former s. 160 without the words "affecting the public". These are unnecessary in view of the definition of "official" in s. 99, and of the words "in connection with the duties of his office".

[66] With respect to s 99(d) and (e), he wrote:

> Par.(d). This is the former s. 155(b). 'Public department' is defined in s. 2(34).
>
> Par.(e). This replaces the former s. 155(c) and is in accord with the cases.

[67] Thus, according to Mr. Martin, not much of a difference was accomplished by the revision of s. 160 and the definitional sections.

[68] The parties referred to numerous cases that have held an accused to have been an "official": *R. v. McMorran*, [1948] 3 D.L.R. 237 (Ont. C.A.); *R. v. Sheets*, [1971] S.C.R. 614; *Dore v. A.G. Canada*, [1975] 1 S.C.R. 756; *R. c. L.(C.)*, (2002), 3 C.R. (6th) 131 (Que. C.A.); *R. v. Cyr*, [1984] J.Q. No. 148 (C.A.), leave denied, [1984] S.C.C.A. No. 404; *R. v. Singh*, 2006 ABPC 324, aff'd 2008 ABCA 79; R. v. Sommers, [1959] S.C.R. 678; *R. v. Martineau*, [1966] 4 C.C.C. 327 (S.C.C.); *R. v. Cogger*, [1997] 2 S.C.R. 845; *R. v. Despres*, [1963] S.C.R. 440; R. v. Blumer, [1993] Q.J. No. 214 (C.A.); *R. v. Perreault*, [1992] R.J.Q. 1829 (C.A.); *R. v. Yellow Old Woman*, 2003 ABCA 342; *R. v. Thibault*, 2014 QCCQ 6474.

[69] And to ones where the accused was found not to be an official: *R. v. Kay*, [1998] O.J. No. 5603 (Ont. C.J.); *R. v. Lacombe*, 2000 CarswellQue 364 (CQ); *R. v. Pruss*, [1966] 3 C.C.C. 315 (Yuk. Terr. Mag. Ct.).

[70] It is unnecessary to review all of these authorities. I will refer to three.

[71] In *R. v. McMorran*, *supra,* the appellant was convicted of breach of trust by a public officer contrary to s. 160 of the *Criminal Code*. Mr. McMorran had been appointed during the war years as a technical advisor to the office of the Wool Administration, a Government wartime organization under the Wartime Prices and Trade Board. The appellant was in charge of administering a scheme to control the availability and distribution of cloth to the public. Convicted and sentenced to three years for breach of trust, he appealed on the basis that he was not a "public officer" within the meaning of s. 160.

[72] At that time, s. 2 of the *Code* defined, as it does today, "public officer" to include any excise or customs officer, officer in the military or RCMP, or an officer engaged in enforcing the laws relating to revenue, customs, trade or navigation. Hope J.A. mused that the appellant might well be an officer engaged in enforcing the laws relating to trade, but the point was not argued.

[73] Justice Hope referred to the common law definitions of who is a public officer:

> [4] …At common law the term "public officer" has been broadly defined. A very early definition is that of Best C.J. in *Henly v. The Mayor and Burgesses of Lyme* (1828), 5 Bing. 91 at 107, 130 E.R. 995, viz., "everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise" is a public officer. In *Rex v. Whitaker*, [1914] 3 K.B. 1283, 10 Cr. App. R. 245, the term was defined (as stated in the headnote in Cr. App. R.) as "one who discharges any duty in which the public is interested, for which he is paid out of moneys provided for the public service, and must be either a 'judicial' or a 'ministerial' officer".

[74] Since the *Code* defined "public officer" as including an enumerated list, he reasoned that the definition in s. 2(33) was not restrictive, and that it captured the common law definition, and, for greater certainty, the enumerated categories. He wrote as follows:

> [8] In my opinion the word "includes" in s. 2(33) is not restrictive, but rather expansive, bringing within the common law definition, for greater certainty, those categories specifically named in the subsection.

[75] After the amendments in the 1954 Revision, courts have continued to rely on the common law to inform who and what conduct is caught by the s. 122 offence of breach of trust by an official.

[76] In *R. v. Sheets*, *supra,* the facts are scarce. Apparently, the accused was an elected municipal councillor. He was charged with breach of trust in connection with the duties of his office by causing payment to be made out of County funds for his own personal benefit. The trial judge quashed the indictment on the basis that the accused was not an "official", he was merely a municipal officer. Ultimately, the Supreme Court of Canada reversed and ordered the trial to proceed.

[77] Fauteux C.J. delivered the unanimous reasons for judgment. He reasoned that the accused was an official, either as an office holder, or as a member of council, as someone appointed to discharge a public duty. He wrote as follows:

> According to recognized rules of interpretation, the expression "means", used in s. 99(e) with respect to the word "official", is of an explanatory and restrictive nature and, in contradistinction, the expression "includes", used in s. 99(d) with respect to the word "office", is of an extensive nature. The definition of official in s. 99(e)(i) being, as it is, governed by the definition of office in s. 99(d), it follows that an official is a person who holds an office either within the meaning of sub-paragraphs (i), (ii) and (iii) of paragraph (d) of section 99 or within the usual meaning of the word office which, validly ascertainably by reference to dictionaries, means, in part, as noted in the dissent of Kane, J.A., "a position of duty, trust or authority, esp. in the public service or in some corporation, society or the like" (cf. *The New Century Dictionary*) or "a position to which certain duties are attached, esp. a place of trust, authority or service under constituted authority" (cf. *The Shorter Oxford Dictionary*).
>
> It goes without saying that the position held by a member of a council of a county is a position of duty, trust or authority in the public service or is a service under constituted authority. Hence, respondent may be held to be an official holding an office, within the meaning of s. 99(e)(i).
>
> A like conclusion obtains on the basis of the text of s. 99(e)(ii), for it is equally obvious that a member of a council of county "is appointed to discharge a public duty".

[78] Chief Justice Fauteux recognized that "appointed" is often contrasted with "elected", but declined to find that Parliament intended to distinguish between the two methods by which one accedes to a public office.[1]

[79] The only case in Canada where a person has been found to have been an "official" within the meaning of s. 118 of the *Code*, who may not have been paid

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[1] Section 118 was eventually amended by S.C., 2007, c. 13, s. 2 to specifically provide that an official also means a person who is "appointed or *elected* to discharge a public duty". [Emphasis added]

directly by government for the performance of his duties, is that of *R. v. Singh*, *supra*. It is to that case, I turn.

[80] The facts are these. The accused took a course and became a Class 1 Driving Instructor. He was certified by the Government of Alberta to teach the airbrake course. An undercover police operation revealed that the accused improperly helped students pass the written exam, and falsified records about students having done actual practice airbrake adjustments and pre-trip inspections. The accused improperly issued to the students notices of "Driver Education Course Completion". Charges of forgery and breach of trust followed.

[81] The record is silent as to how the accused was paid for the performance of his duties; it appears that he was not a direct government employee, as the trial judge referred to the position having been created as part of the government's privatization program. There is no suggestion that it was argued at trial or on appeal that the accused was not an "official".

[82] The trial judge found as a fact that the individuals doing the testing became "in essence, agents of the Crown" (2006 ABPC 324 at para. 5). After referring to the decision by the Supreme Court of Canada in *Boulanger* which had defined the elements of the offence under s. 122, the trial judge concluded:

> [39] Clearly the Accused was "an official" within the meaning of s. 118 of the Criminal Code as being someone who "is appointed to discharge a public duty". That duty of course was to conduct the Airbrake course and the examination therefor.

[83] It is clear that the accused in *Singh* owed a duty to the public. He was charged with only certifying those students who had the requisite knowledge and practical skill to operate airbrake equipped vehicles on public highways.

[84] In the case at bar, the respondent was not appointed by the government to any position. He was employed as a paramedic with EMC. He owed no duty to the public at large, but only to his employer, and to the individual patients he may come into contact with.

OTHER AUTHORITIES

[85] Prior to the hearing of this appeal, the parties were asked to address two English cases, *R. v. Cosford*, [2013] EWCA Crim 466, and *R. v. Mitchell*, [2014]

EWCA Crim 318. Permission was given to file supplementary briefs. Each did so on March 16, 2015.

[86] These authorities are important. In one, the English Court of Appeal commented on the possible impact private employment has on an accused's status as a public official. In the other, the English Court of Appeal found that as a matter of law, a paramedic employed by a government agency was not a holder of a public office.

[87] In *Cosford*, three registered general nurses working in a high security prison were convicted of misconduct in public office and sentenced to imprisonment. Their appeals from conviction were dismissed. The primary defence at trial was that none of the appellants held a public office.

[88] The issue was adjudicated twice in the High Court. One judge (Kearl J.) reasoned:

> [13] …
>
> > They were subject to the provisions of the *Official Secrets Act* and required security vetting and clearance in order to perform their duties. Each was working within the secure environment of a high security prison at the time of these events. They were in a position of trust in relation not only to their employment and employers but also the public as a whole. Public safety depended on the performance of their duties in an environment in which security was a matter of high priority. Their duties went beyond those of a nurse operating within the NHS in a hospital or a GP surgery. They were issued with prison keys and cell keys. They had unsupervised access to the prisoners and had a power of search attached to their duties. This leads me to the conclusion that the level of trust and responsibility placed in those working within the prison environment was far in excess of that of a nurse working in the public sector. They have the trust of the public and are paid by the public to perform their duties within that specific, secure environment.

[89] Relying on case law earlier referenced by the Ontario Court of Appeal in *R. v. McMorran, supra*, the trial judge (Hatton J.) rejected a motion for a directed verdict, based on the same argument, that they were merely nurses:

> [15] Judge Hatton analysed the law and the submissions. He repeated some of the features mentioned by Judge Kearl and observed:
>
> > 'There is evidence before me which clearly demonstrates that each defendant was entrusted with and had responsibilities and duties which

> were of substantial importance to the public at large and went beyond the ordinary duties and responsibilities of nurses out of the environment in which these defendants had chosen to accept employment. They were engaged in a high security prison where dangerous men were housed. The public clearly had an acute interest in the maintenance of order and security in that establishment. Security in that place was of high priority and clear to all staff, including these defendants. The staff themselves were subjected to stringent security procedures. They held keys and had access to all parts of the prison. They had access to cells and, in the Health Care Centre at least, had powers which were exercised for locking and unlocking cells. It is of importance that there was in place a system in the prison whereby staff could and indeed had a responsibility to report matters of concern involving security and other matters, both involving prisoners and colleagues. To that end, there existed what were called security information reports; documents which were stated, on their face, as being to provide security intelligence. Something considered important to the Prison Service and something of importance, in my judgment, to the public. Each defendant was, accordingly, responsible for playing his or her important role in the maintenance of good order and security as part of their duties. Each defendant accepted that responsibility as part of their duty and three of them [including these appellants] in fact completed such reports from time to time … I find that each accepted "an office of trust concerning the public" to use the words of Lord Mansfield and … "is answerable criminally to the King for misbehaviour" in that office. In the words of Best CJ repeated almost verbatim in *R v Whitaker* (1914) 79 JP 28, [1914] 3 KB 1283, and repeated also by Hirst LJ, each was "appointed to discharge public duties" and was, in my judgment, therefore, constituted a public officer.'

[90] The same argument was advanced on appeal—that the appellants were no different from nurses employed by the National Health Service; their possession of keys and other accoutrements that came with their employment in a high security prison was not relevant to the issue of the trust or authority necessary to became public officers. Also noted was that, at the time of the trial, the employment of the appellants had been transferred to a private contractor. This change of status was commented upon.

[91] Leveson L.J. wrote the unanimous reasons for judgment. This included a careful review of the leading authorities (which were also canvassed by McLachlin C.J. in *Boulanger*). He summarized the approach indicated by these authorities as follows:

> [34] Nothing in the authorities justifies the conclusion that the 'strict confinement' should be to the position held by whomsoever is carrying out the duty: rather, it should be addressed to the nature of the duty undertaken and, in particular, whether it is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty. This is consistent with Lord Mansfield's observation *in R v Bembridge* referring to 'an office of trust concerning the public'.

[92] In applying these principles to the appeal at hand, Leveson L.J. approved the reasoning of the lower court judges that the nurses' duties in the prison setting more than amply fulfilled the requirements of holding a public office:

> [36] In the light of the above analysis, we turn to the facts of this case. In our judgment, the aphorism from the evidence adopted by Mr Stubbs that 'a nurse is a nurse' does not start to do justice to the task which these appellants undertook. The responsibilities of a nurse in a general hospital are to the patients for whose care they are responsible; the responsibilities of a nurse (whether trained as a prison officer or not) in a prison setting are not only for the welfare of the prisoners (their patients); they are also responsible to the public for, so far as it is within their power to do so, the proper, safe and secure running of the prison in which they work. The duties described in para [14], above more than amply fulfil the requirements of a public office: the rulings of Judge Kearl and Judge Hatton were correct.

[93] With respect to who actually employed the nurses, Lord Justice Leveson commented:

> [37] We add this. Although counsel for the respondents in *A-G's Ref (No 3 of 2003)* expressed concern that there should be no distinction between those who hold a public office and those who are in private employment who do similar work, in the context of the prison system, we see no distinction. Whether the prison is run directly by the state or indirectly through a private company paid by the state to perform this function does not alter the public nature of the duties of those undertaking the work: the responsibilities to the public are identical.

[94] The Crown argues that these comments are not *obiter dicta*, but integral to the judgment as a whole. With respect, I do not agree. It is fundamental that statements of law are governed and qualified by the particular facts of a case. In other words, a case is only authority for what it actually decides (*Quinn v. Leathem,* [1901], A.C. 495 (H.L.); *Davidson v. McRobb*, [1918] A.C. 304 (H.L.);

Prudential Exchange v. Edwards, [1939] S.C.R. 135; *R. v. Henry*, 2005 SCC 76 at para 52 *et seq*).

[95] The facts in *Cosford* were that the nurses were in fact employed directly in the prison service when they committed misconduct. What outcome may or may not flow should they be appointed to carry out the same duties, but be employed by a private contractor was not before the Court of Appeal.

[96] A debate about whether private versus public employment is *obiter* or forms part of the *ratio decidendi* is rather academic since this Court is not bound by judgments of the English Court of Appeal on any matters, let alone the interpretation of the *Criminal Code*. Further, without such a case before us, it is not appropriate to offer definitive comments if employees in prisons are or are not "officials" regardless of their employment status.

[97] What of paramedics that work in ambulances to provide emergency health care to members of the public? The Court of Appeal in *R. v. Mitchell* found they do not hold a public office. The appellant was employed by a National Health Service Trust to provide emergency healthcare. He sexually molested a patient in the rear of an ambulance. There was no doubt that he failed to conduct himself in accordance with his duty to the patient and to his employers.

[98] The Recorder ruled that the appellant was the holder of a public office and hence subject to criminal sanction for misconduct. The appellant pled guilty. His application for leave to appeal was referred to the full court on the ground that the Recorder erred in law.

[99] Leveson L.J., again writing for the Court, built upon his reasons in *Cosford* to re-state the test as to who is a public officer for the common law offence of misconduct in public office. He posed three questions that inform the issue:

> 16. In our judgment, the proper approach is to analyse the position of a particular employee or officer by asking three questions. First, what is the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty? If the answer to this last question is 'yes', the relevant employee or officer is acting as a public officer; if 'no', he or she is not acting as a public officer.

[100] Lord Justice Leveson concluded that the appellant was not a holder of a public office as his duty was to the individual patients for whose care he came to be responsible. He reasoned:

> 19. In this case, the nature of the duty undertaken by ambulance paramedics was to treat and provide emergency healthcare to the individual patients for whose care they become responsible by reason of the circumstances in which they come into contact with them: it is a duty to the individual. In a general sense, of course, the public would be concerned by any example of a breach of the individual duty (such as occurred in this case) but that is not to say that there is a duty to the public which is different from, or additional to, the general duty owed to the individual. There is not.

[101] The Crown agrees that the test outlined by Leveson L.J. in *Mitchell* is sound, but argues that its application was not. With respect, I disagree. To do otherwise would be to create an offence (a common law offence in the UK and in Canada under our *Criminal Code*) of enormous and unwarranted scope. This is well explained by Leveson L.J.:

> 17. In the context of a case such as this, it is important to underline that the focus is on the duties and responsibilities of the relevant individual and not upon the overall responsibility of the Trust. Thus, there is no doubt that the public has a significant interest in the discharge by the Trust of its duty to provide emergency healthcare which extends beyond the interests of anyone who might be directly affected by a serious failure by the Trust in its operations. Putting the matter another way, it is to the benefit of the public as a whole that the Trust is in a position to provide a competent service to respond to the public's emergency needs. Equally, the public has a significant interest in the discharge by an education authority of its duties to provide children with a safe environment in which to be educated. To focus on the overarching duty of the Trust would be to mean (as the judge foresaw) that every doctor, nurse, paramedic (or indeed employee) of the Trust is a public officer; for an education authority, it would mean that every teacher, classroom assistant or other employee at a school is a public officer. This is not correct.

[102] In other words, the responsibility of EMC to the public is an important one. The Department of Health and the public have legitimate expectations that EMC will properly fulfill its duties to them. As recognized in *Quebec (Procureur général) c. Cyr,* [1984] J.Q No. 148 (C.A.), leave denied, [1984] S.C.C.A. No. 404, a corporation can be an “official” within the meaning of the *Criminal Code*. But on this record, I fail to see how a paramedic, with no appointment or other direct

association with government, can amount to a holder of an office within the meaning of the *Code*.

[103] This interpretation of ss. 118 and 122 is fully supported by the reasons of the Supreme Court in *Boulanger*, where the special status and duties of officials are emphasized:

> [51] **It is also important to keep in mind that breach of trust is not the only criminal offence to which public officials are subject. For example, s. 121(1)(c) makes it a crime for an official or employee of the government to accept a commission, reward, advantage or benefit from anyone who has dealings with the government.** A public official can be prosecuted for fraud under s. 122 as well as under s. 380. Moreover, like all members of the public, a public official can be prosecuted for any criminal offence, including theft (s. 334), extortion (s. 346), obstruction of justice (s. 139) and, in situations like *Dytham*, criminal negligence causing death (s. 220) or bodily harm (s. 221). What purpose, beyond these offences, is s. 122 of the *Criminal Code* intended to serve?
>
> [52] **The purpose of the offence of misfeasance in public office, now known as the s. 122 offence of breach of trust by a public officer, can be traced back to the early authorities that recognize that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be**. This said, perfection has never been the standard for criminal culpability in this domain; "mistakes" and "errors in judgment" have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. This concern is clearly reflected in the seriousness requirement of *Shum Kwok Sher* and the *Attorney's General Reference*. What is required is "conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder" (*Attorney's General Reference*, at para. 56). As stated in *R. v. Creighton*, [1993] 3 S.C.R. 3, "[t]he law does not lightly brand a person as a criminal" (p. 59).
>
> [Emphasis added]

[104] Paramedics employed with EMC are not entrusted with powers, nor owe a duty to the public at large. Despite the importance of the services performed by individual paramedics, the respondent does not come within the definition of an "official" set out in the *Criminal Code*.

[105] I see no error by the trial judge in his conclusion. Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.