

NOVA SCOTIA COURT OF APPEAL

Matthews, Hart and Freeman, JJ.A.

Cite as: R. v. Power, 1993 NSCA 123

B E T W E E N:

DONALD JAMES POWER

appellant

- and -

HER MAJESTY THE QUEEN

respondent

) **W.L. Ryan, Q.C.**
) **for appellant**

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) **Kenneth W.F. Fiske, Q.C.,**

) **for respondent**

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) **Appeal Heard:**

) **May 19, 1993**

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) **Judgment Delivered:**

) **May 26, 1993**

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THE COURT: Appeal allowed and conviction quashed per reasons for judgment of Freeman, J.A.; Matthews and Hart, JJ.A., concurring.

FREEMAN, J.A.:

This is an appeal by a former deputy minister of government services from a conviction under s. 122 of the **Criminal Code** for drafting and accepting a contract to continue serving the province after his retirement.

Donald J. Power joined the Department of Highways and Public Works after graduating as a mechanical engineer in 1946. He rose to deputy minister of public works in 1968 or 1969 after the department was divided; it subsequently became the Department of Government Services.

After thirty-eight years service he submitted his resignation effective September 26, 1984 to the then Premier, now Senator John Buchanan. He was then fifty-nine years old, four years past the earliest date for voluntary retirement and six years short of mandatory retirement. The premier asked him to remain on temporarily, and after his retirement took effect to become the province's project manager for the Veterans' Building, Camp Hill Hospital, the largest unit in a major hospital construction initiative the province had undertaken. Mr. Power accepted; it appeared to be understood that he would prepare a written draft agreement for consideration of the management board. Shortly afterwards the premier called an election for November 6, 1984, and his government was returned to office.

In late October Mr. Power prepared a draft contract for continuation of his services as manager of the \$32,000,000 project, using as a precedent a contract extending the services of another Government Services employee beyond his retirement. It provided for the same salary he had been receiving, \$65,000 a year, use of a leased vehicle and expenses. The premier had taken responsibility for hiring Mr. Power as project manager and discussed the matter with ministers including ministers of health, government services and the treasury board. Mr. Power's resignation was accepted by the management board October 17, 1984, and approved by cabinet on November 22 effective November 30, 1984.

On November 21, 1984, Mr. Power presented the draft contract to his minister, Hon. Gerald Lawrence. Mr. Lawrence was aware of the arrangement and signed it after a brief discussion of the main provisions. Mr. Power then sent it to Premier Buchanan; he knew it would not be effective until it had received either the approval of the management board or the cabinet. The following day

the deputy minister of the management board presented it as a non-agenda item at a management board meeting and it was passed subject to one amendment. Mr. Power became employed under the new contract December 1, 1984.

Apparently Mr. Power carried out his duties as competently as he had been expected to do and he was subsequently engaged as project manager for other hospitals the province was constructing, completing his work in 1989 or 1990.

Upon these facts Mr. Power was charged under s. 122 of the **Criminal Code**, which 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."

He was convicted under the breach of trust provision and fined \$5,000.

He has appealed on grounds that the trial judge erred in law or in mixed fact and law as to:

"(a) the essential elements which constitute the *actus reus* of the breach of trust offence under s. 122 of the **Criminal Code** generally, and in the circumstances of this particular case; and

(b) In defining the mental element required to be proven by the Crown in order to support conviction for an offence contrary to s. 122 of the **Criminal Code**, generally as well as in the circumstances of this particular case."

It is fitting that officials be held to high standards of ethical conduct in the interests of preserving the integrity of the public service, and public confidence in it. Nevertheless, courts must be wary of giving events a retrospective interpretation that results in finding criminality where none, on a fair and realistic analysis, had previously existed. On the present facts it is difficult to find any wrongdoing on Mr. Power's part, to say nothing of wrongdoing so offensive to the conscience that it calls into play the sanctions of the criminal law.

Mr. Power elected trial by judge alone and the trial judge correctly instructed herself in the law. She found "breach of trust" to mean "the exercise of a public official's authority, vested in the official by virtue of his/her office other than for the public benefit." She stated:

"In **R. v. Campbell** (1967), 3 C.C.C. 250 (Ont. C.A.) this is defined, broadly, to include 'any breach of the appropriate standard of responsibility and conduct demanded of the accused by the nature of his office as a senior civil servant of the Crown.'

It most commonly involves the misuse of power for the furtherance of personal ends (**R. v. Arnoldi** (1892), 23 O.R. 201 (Ont. Div.) but can include conduct of a more passive nature. This is summarized in the headnote of **R. v. Cyr** (1985), 44 C.R. (3d) 87 (Que. S.C.):

'The breach of trust office under s. 111 [now s. 122] implies the use of a public office by an official for the furtherance of personal ends. It does not matter whether the official is elected, hired under contract or otherwise appointed. He need not act corruptly and, in certain circumstances, his mere presence may be sufficient, as in the case where it may lead a third party to believe that a particular course of conduct is preferable to another. The offence can be committed by the official in many other ways: having to satisfy conflicting public and private interests, remaining silent at the time of the approval of something which procures him personal benefit, or misuse of his public office. For the offence to be committed, the official need not benefit directly or indirectly from his act.'

...

As recently as September 1991, in **R. v. Greenwood & Tsinonis** (1991), 50 O.R. (3d) 71 the Ontario C.A. examined the high standard required of public officers, again, in the context of what is now s. 121(1)(c)--accepting a benefit.

Doherty J.A. says at p 83:

's. 121(1)(c) exists to preserve both the integrity of the public service and the appearance of integrity of the public service.'

...

'That integrity is compromised not only by bribery and corruption in their crassest forms, but by other insidious arrangements whereby a government employee profits from his or her position or employment by way of a private benefit or advantage received from a person having dealings with the government. Such advantages or benefits can create the appearance of impropriety and suggest that the loyalty of the employee has been divided between his or her government employer and the private benefactor.'

And at p. 94:

'Surely the appearance of the integrity of the public service is compromised where an employee receives something which a reasonable observer would regard as an advantage or benefit in that it constituted a profit from his or her employment, even though the employee may not have intended any such connection between the

thing given and his or her employment.'

She carefully considered the mental element as well:

"In **R. v. Vander Zalm**, unreported, a decision of Associate Chief Justice David Campbell of the B.C. Supreme Court (date June 25, 1992), the court considered the intent required by s. 122 of the **Criminal Code**. Reviewing the history of this section of the code, the Chief Justice determined that this is an offence requiring only general intent."

The extent of 'intent' or *mens rea* required to sustain a criminal conviction differs according to the offence.

As set out in '**Criminal Law**' by Mewett and Manning, at page 106, in certain statutory offences, it is necessary only that the person does the act prohibited with knowledge of the circumstances the statute seeks to prohibit. It is not necessary that he/she know the illegal nature of the act.

And at p. 116:

'There are however, a vast number of offences where an act is a criminal act not because it is committed for certain consequences but because it is done under certain circumstances. These offences do not require any ulterior purpose; they merely require certain conditions to exist. . . .

In these cases, and many like them, the *mens rea* that is required cannot be directed towards any consequences of what one is doing but merely towards the conditions that make what would otherwise be a lawful act into an unlawful one. In its simplest form, therefore, we can say that the *mens rea* is the knowledge by the accused of those conditions. Indeed, the statute itself may require that the accused act "knowingly", but even here there may be difficulty in determining precisely what it is that the accused has to know.'

J.D. Ewart in his text "Criminal Fraud" 1986, Carswell, at p. 145 comments, generally, upon 'mens rea' before turning to the specific requirements for fraudulent intent:

'It is trite law that the accused's failure to appreciate that the acts which he knowingly committed did constitute an offence, in other words his ignorance of the law, provides no defence. Similarly, an accused's motive for doing those acts does not exculpate him if he knew what he was doing and desired or foresaw the relevant consequences. His reasons for performing the acts with that knowledge are not relevant to his criminal responsibility.'

The subjective standard of dishonesty or evilness of the accused is not relevant. It is not necessary that the accused thought he/she was acting dishonestly

when committing the act in question.

Authorization by a superior to commit the particular conduct is irrelevant to the determination of the mental element. As stated in **R. v. Hebert**.

'It is nevertheless the case that, if an official charged under s. 111 has, by his conduct, his actions and his general behaviour, clearly breached a public trust placed in him by the state, you cannot hide behind claims of authorization by a superior. In such circumstances, *mens rea* is to be presumed, and in such a case, the person who granted the authority thus becomes a simple co-conspirator.'

In **Greenwood**, Doherty J.A. rejects the notion that a criminal mindset is a required mental element under s. 121(1)(c) (accepting a benefit).

He recognizes that a lesser form of mental culpability can be required by one charge as compared to another. His remarks as to the necessary balancing of interest, made in the context of the s. 121(1)(c) charge are equally applicable to the breach of trust provision. At page 93:

'It is also necessary in considering the fault requirement of s. 121(1)(c), as it was in considering the conduct requirement, to bear in mind both the general purpose of the criminal law and the specific purpose underlying s. 121(1)(c). The former requires that culpability be limited to those who are blameworthy, and the latter seeks to preserve the appearance of the integrity of the public service. In my opinion, once it is accepted that "commission, reward, advantage or benefit" refers only to something of value which in all of the circumstances constitutes a profit to the employee derived in part at least from his or her position, or from his or her work with the government, then the employee's decision to take the thing offered, made with knowledge of the relevant circumstances, is blameworthy and strikes at the appearance of the integrity of the public service. There is no need to read a further fault requirement into s. 121(1)(c) to ensure that it serves but does not overreach its purpose.'

"I agree with the conclusion in **R. v. Vander Zalm** that s. 122 is a general intent offence. While the concept of 'dishonesty' is a part of the definition of 'fraud,' not so with breach of trust. It need not be proved that Mr. Power knew he was in breach of trust, but rather that he knowingly or recklessly engaged in the conduct which the Crown asserts constitutes a breach of trust."

Here a cautionary note must be sounded. Breach of trust under s. 122 is a criminal offence, not an offence of strict or absolute liability, and subjective *mens rea* is a necessary ingredient. The authorities cited come perilously close to describing an objective standard for the mental element in breach of trust cases.

Breach of trust for purposes of s. 122 defies precise definition because it is largely an offence

of perception. Whether a breach of trust has occurred must be determined objectively: would the acts under examination appear wrongful in the eyes of reasonable persons in full possession of the facts? If so, then the mental element may be satisfied if the persons accused of committing them are aware of their own actions; they must be presumed to intend the consequences. This is a low threshold for imposing criminal liability, particularly for offences created by the perception of the beholder, and must be approached with caution. By the same token, in the present case, if Mr. Power had engaged in criminal conduct, lack of intent alone would be an elusive defence. It remains difficult, in my mind, to reconcile the suggestion by the trial judge that "Mr. Power may well have had the most honourable of intentions" with the necessity of finding that he was simultaneously possessed of criminal intent.

The basic question to be determined is whether a crime occurred.

With the greatest respect for the trial judge, in my opinion she erred in applying the law to the facts and reaching the conclusion that Mr. Power had committed a breach of trust. She stated:

"In putting the contract to the Minister for signature Mr. Power was doing so as Deputy Minister of Government Services. He was aware that the Minister relied upon him to advise as to the propriety of a contract entered into by the department. By putting the contract to the Minister for signature he was recommending that it be signed. I conclude from the evidence that in relation to this particular contract Mr. Power did not turn his mind to his responsibilities as Deputy Minister of Government services. In other words, he did not and, arguably could not, due to his personal interest in the contents of the contract, perform his function as Deputy advising the Minister. Again, this is not to say that the personal service contract operated against the interests of the public but rather, by reason of his conflicting position--public and private, Mr. Power failed to perform his duty to the office.

It is no answer to say that Mr. Power sent the proposed contract to the Premier for approval. By that time the document had been signed by the Minister signifying a recommendation by the Department of Government Services that it be accepted. No one had, however, represented the interests of Government Services. Mr. Power was the person to have done so. He did not. Mr. Power, in his evidence, was clear that he did not know what the premier would do with the contract or where he would send it. He assumed that if the Premier did not agree with the terms he would change it.

Putting the very best light on it, however, to that point, Mr. Power had caused to be sent to the Premier a proposed contract approved by the Minister of Government Services on Mr. Power's recommendation which contract provided to Mr. Power in his personal capacity employment as a Project Manager.

It is irrelevant that their contract ultimately went to Management Board for approval. The circumstances which the Crown submits constitute the breach of trust had already occurred.

I cannot stress strongly enough that the issue is not Mr. Power's good character or reputation. The issue is not his motive in procuring the contract. The cases are clear that the Crown need not demonstrate an intent to act illegally or demonstrate prejudice to the government or concealment. Mr. Power may well have had the most honourable of intentions. He failed, however, to meet the high standard impressed upon him by virtue of his office of the Deputy Minister when he attempted to serve two masters in relation to his contract--his personal interests and those of the Department of Government Services.

The fact of Mr. Power's attempted resignation effective September 26th is not relevant. At the request of the Premier he stayed on as Deputy Minister until November 30th. He continued to perform the duties of that office. While the Premier accepted Mr. Power's resignation when tendered and while Management Board recommended acceptance of that resignation on October 17th, the resignation was not approved by Executive Council until November 22nd and was not effective until December 1st. At the relevant time Mr. Power was Deputy Minister of Government Services, knew he was Deputy Minister and acted as Deputy Minister.

I am satisfied beyond a reasonable doubt that the evidence supports the conclusion that Mr. Power acted in breach of trust within the meaning of section 122. By failing to exercise his duties as Deputy Minister of Government Services or exercising them burdened by his own personal interests he used his public office for the furtherance of personal ends.

That is not to suggest that service of those personal interests was, in the end result, contrary to the interests of the public. That question will never be answered.

Accordingly I find Mr. Power guilty as charged."

The trial judge was persuaded to focus on one act out of context, and fell into error in not making a determination on the whole of the evidence as to whether a reasonable person in possession of all the facts would conclude that a crime had occurred. The evidence does not support a finding that Mr. Power procured an appointment for himself by presenting his Minister with a contract for signature in the usual course of departmental business without advice or much discussion, and then releasing the document to find its way through management board on the strength of the Minister's signature. Viewed in the context of what actually happened, the incident of the minister's signature appears to have been a formality with little significance, a neutral occurrence incapable of supporting a conviction.

Considerable evidence was led as to Mr. Power's character. It is relevant less for its bearing on his lack of propensity for committing breaches of trust than for its illumination of the motives of the other players. After thirty-eight years in his department Mr. Power had an unblemished reputation inside and outside government circles as a man of outstanding honour and integrity, a competent, dedicated public servant, and a hard-nosed guardian of the public purse. He was the person in the department best qualified by capability and experience to protect the province's interests in the construction of the hospitals, and he had just completed, with distinction, a similar role during construction of the World Trade Centre in Halifax.

When he presented his resignation it is understandable that Premier Buchanan would have been dismayed to lose him when the province was committed to massive hospital construction, particularly on the eve of an election. Engaging him as project engineer for the Veterans' Building, Camp Hill Hospital, would have been clearly in the public interest, a stroke of sound public policy. It was at that point, in the Premier's office after the presentation of the resignation and in contemplation of his retirement, that Mr. Power entered into the contract to serve as project manager. Little needed to be said; both men were long-term associates experienced in high office, who understood the procedures to be followed and the need for final approval by the management board or cabinet. No secret was made of the appointment; the Premier discussed it with the cabinet ministers concerned.

Mr. Power says he included salary and benefits in the draft agreement he prepared as an offer, knowing these were subject to scrutiny by the management board. Management Board at that time consisted of five cabinet ministers and two deputy ministers. Mr. Lawrence and Mr. Power were not members, and the premier was not present at the meeting in question.

Section 16(2) of the **Public Service Act**, R.S.N.S. 1989, c. 376, provides:

"(2) Notwithstanding any other enactment, where a department, board, commission or agency, to or for the benefit of which the Legislature or the Governor in Council has appropriated money, wishes to engage the services of a person by contract, such contracts have no legal force or effect unless the terms and conditions thereof are in accordance with the regulations made by the Governor in Council or

are approved either by the Governor in Council or the Management Board."

Mr. Lawrence, the minister of government services, was aware of the purpose of the contract when Mr. Power presented it to him as the result of discussions with the premier and cabinet members. Thus he knew it was not in the nature of contracts routinely presented to him by Mr. Power in the course of departmental business and there is no evidence he was relying on Mr. Power's advice.

The following is from Mr. Lawrence's direct examination:

Q. What involvement, if any, did you have in negotiating that contract on behalf of the Province of Nova Scotia.

A. None.

Q. To your knowledge, who decided that the province would enter into that contract with Mr. Power?

A. I would say cabinet, basically, decided.

Q. How is that the basis of your understanding on what you relied for that understanding?

A. Through cabinet meetings that were held, I think it was discussed Don Power would be the best person for the job.

...

Q. Sir, in signing that contract, on whom, if anybody, did you rely?

A. Basically on discussions that we had around the cabinet table, whether it was a full cabinet meeting or just a few of the ministers and the premier that Don was, certainly, the best person for the job, that was basically it.

...

On cross examination he was asked:

... To your knowledge Mr. Lawrence, was Mr. Power an extremely capable Deputy Minister?

A. The best.

Q. The best?

A. Yes.

Q. Was he held in high esteem by cabinet?

A. Yes.

Q. This was a very large project, the Camp Hill Veteran's Hospital?

A. Yes, it was.

Q. In your opinion, was he the best person to do the job as project manager?

A. Yes, by far.

Mr. Lawrence's assessment of Mr. Power's ability was echoed by Michael Zareski, who succeeded him as deputy minister of government services. Cross examined as a Crown witness he testified:

Q. Mr. Power is a professional engineer?

A. Yes.

Q. You have a great deal of respect for his ability?

A. I do.

Q. He is a very capable engineer?

A. He is.

Q. He was more than capable of handling the responsibilities that were placed upon him by the premier of Nova Scotia and by the management board with respect to the contract for the Veterans Hospital?

A. He was.

Mr. Zareski said it was not uncommon for the department to appoint staff members as project managers and to engage construction coordinators from outside the department by contract. He said he considered the terms "project manager" and "construction coordinator" to be synonymous.

After obtaining Mr. Lawrence's signature Mr. Power then forwarded the draft to the Premier who apparently approved and sent it on to the management board for review by the Deputy minister, the late Byron Anthony, who presented it to the board. There is no evidence that either the Premier

or the management board were swayed by Mr. Lawrence's signature on the document. The board considered the contract and directed that it be amended to include provision of a \$6,100 benefit to which Mr. Power had become entitled on his retirement. The contract was presented as a routine non-agenda item, an unremarkable occurrence, and noted in the minutes. Section 16(2) was complied with.

In my opinion the entire transaction, from Mr. Power's agreement with the Premier's request that he continue serving the province beyond his retirement to the completion of the contract under the stamp of approval of the management board, was within the law and in the public interest. All concerned--including Mr. Power--knew he was the best person for the job he was engaged to do. There was no element of the transaction, seen in context, which a reasonable person could construe as a breach of trust on the part of Mr. Power.

I would allow the appeal and quash the conviction.

Freeman, J.A.

Concurred in: Hart, J.A.

Matthews, J.A.

C.A.C. No. 02750

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