

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Kitch*, 2022 NSPC 4

Date: 20220228
Docket: 8277386
8277387
Registry: Halifax

Between:
Her Majesty the Queen

v.

Tracy Kitch

Judge:	The Honourable Judge Paul Scovil,
Heard:	November 8, 9, 10, 12, 15, 16, 17, 18, 19, 23, 24, 2021 and December 10, 2021, in Halifax, Nova Scotia
Decision	February 28, 2022
Charge:	380(1)(A) and 122 Criminal Code
Counsel:	Peter J. Dostal, for the Crown Jacqueline L. King, for the Defendant

By the Court:

[1] Tracy Kitch was the Chief Executive Officer of the Izaak Walton Killam (IWK) Children's Hospital from September 2014, until she stepped down in September of 2017. Several witnesses testified that Ms. Kitch was a very effective CEO and, in fact, earned pay increases based on her performance. In this matter, however, the Crown is not tasked with proving beyond a reasonable doubt Ms. Kitch's abilities as a CEO, but whether in that role Ms. Kitch committed the offence of fraud and breach of public trust.

[2] Ms. Kitch stands charged with the following offences:

That between the 20th day of August 2014 and the 26th day of June 2017, at or near Halifax, Nova Scotia, did

By deceit, falsehood or other fraudulent means, did unlawfully defraud the IWK Health Centre of a sum of money, a total value exceeding \$5,000.00, contrary to Section 380(1)(a) of the Criminal Code

AND FURTHER that she at the same time and place aforesaid, being an official Chief Executive officer for the IWK Health Centre did commit fraud in connection with the duties of her office, by defrauding the IWK Health Centre of a sum of money, contrary to Section 22 of the Criminal Code.

[3] During the course of the trial 76 exhibits were entered by the Crown and 18 witnesses were called over a period of 12 days of testimony. Ms. Kitch elected to call no evidence.

[4] In 2014, the IWK began a search for a new CEO with the anticipated retirement of then President and CEO Anne McGuire, which would occur in September of 2014. On July 22, 2014, Mr. Phil Otto, the Chair of the IWK Board of Directors, wrote to Ms. Kitch acknowledging that she had accepted the position of CEO and included an employment agreement for her signature. The contract was signed by her and returned, setting out the terms and conditions of Ms. Kitch's employment, commencing on September 1, 2014, for a five year term. This contract included the provision that she would comply with all policies, procedures, rules, and regulations in effect at the IWK. The contract further set out the remuneration, benefits, vacation, professional dues, development costs consistent with her professional designations, moving and relocation costs that

would be paid, as well as other aspects of Ms. Kitch's employment. The agreement specifically outlined that Ms. Kitch was entitled to reimbursement for work related travel or other expenses in accordance with IWK's policies. It is also clear that any moving and relocation costs were subject to the Nova Scotia Public Service Moving and Relocation Policy and that those expenses must be submitted with receipts.

[5] The IWK had a travel policy which outlined the policy, protocol and procedures which applied to the IWK employees required to travel for work. The policy became effective on November 1, 2013, and would have been in place during the period that Ms. Kitch served as CEO. It again required receipts for reimbursement where applicable and specifically indicated personal travel is not to be charged or billed to the IWK. The policy also sets out Non-Reimbursable Expenses.

[6] In September of 2014, the IWK obtained credit cards for certain employees who required them for corporate expenses. The Corporate Credit Card policy became effective on September 1, 2014. It was clear in the policy that there was to be no personal use of corporate credit cards. Personal or inappropriate use of a credit card could result in discipline up to and including termination.

[7] Those using a corporate card were required to supply receipts for purchases and reconcile statements promptly on a monthly basis.

[8] Ms. Kitch was aware of this corporate credit card policy and had signed the IWK Credit Card Employee Acknowledgment. This form again advised that personal use of the card was inappropriate.

[9] The Crown's case centered on personal expenditures made by Ms. Kitch using the IWK funds. Proof by the Crown was offered through both witness testimony and documentary evidence.

[10] The Crown introduced expert evidence from forensic accountant Alex Nunez. Mr. Nunez found that the total expenses incurred by Ms. Kitch amounted to \$143,730. He then broke that amount into four categories. Categories included: was there a meeting in Ms. Kitch's business calendar; no meeting in her calendar; expenses that occurred for other individuals; and other expenses.

[11] In looking at travel expenses in the Nunez report, \$28,654 was not supported by scheduled business events on Ms. Kitch's calendar. He also found

that Ms. Kitch incurred a total of \$7,670 in expenses while on vacation or holidays. As well, \$6,782 was listed as expenses which had no supporting receipts or invoices.

[12] The Crown led with evidence from principal investigator, Constable Christian Pluta, of the Halifax Regional Police (HRP). Constable Pluta outlined the investigation HRP undertook. A large number of exhibits were introduced through Constable Pluta, including those obtained through judicial authorization.

[13] Concern over personal expenses of Ms. Kitch being charged to the IWK was expressed by the in-house counsel for the IWK, Jennifer Feron, in the middle of June 2015. Ms. Feron was sufficiently concerned regarding personal travel by Ms. Kitch utilizing the IWK flight passes that she e-mailed Ms. Kitch's Executive Assistant, Alison Lucio, on June 15, 2015, at 11:30 at night. In that e-mail Ms. Feron indicated the use of the flight passes "exposes Tracy and the organization to potential reputational risk when used for both business and personal travel."

[14] Ms. Feron was also made aware in 2016, by Alison Lucio, of parking tickets incurred by Ms. Kitch that were attached to a rental car. The car had been rented by the IWK in Ms. Lucio's name. Consequently, the parking tickets were attached to Ms. Lucio's name. Ms. Kitch had a rental vehicle in Halifax that was used for personal use and for work. Ms. Kitch failed to return the vehicle for a period, which clearly extended past the rental period and work related activity. During that period Ms. Kitch incurred parking tickets as indicated above, which were left under Alison Lucio's name.

[15] Sean Walker was acting Chief Financial Officer for the IWK from spring 2014 until May 2015 when he left for an outside position. Mr. Walker testified that it was his understanding that flight passes were purchased for travel within the Maritime Provinces. Mr. Walker had expressed concern very early in his tenure about Ms. Kitch's use of the corporate credit card. He spoke to Alison Lucio about Ms. Kitch's late filing of expense reports and the fact receipts were missing when reports did come in. Additional concerns were expressed over items charged to the corporate card that were personal, including dry cleaning, iTunes, and Netflix charges.

[16] Mr. Walker took his concerns to Alison Lucio, Ms. Kitch's Executive Assistant, and Steve Ashton, the IWK Vice President in charge of Human Resources and was left with the understanding the matter would be resolved in some fashion. Mr. Walker also spoke to Ms. Kitch regarding the matter. Ms.

Kitch told him he was not to speak to any board members about this if she was not present. As a result, he determined not to bring it up at the board level.

[17] A key Crown witness was former Executive Assistant to Ms. Kitch, Alison Lucio. Ms. Lucio was in that role from September 2014, until April 2016. In that position, Ms. Lucio had access to Ms. Kitch's outlook calendar, and she was well aware of the CEO's schedule. Ms. Lucio also confirmed that the CEO's calendar was reliable in relation to her activities as CEO.

[18] Ms. Lucio outlined the history of how flight passes were obtained and why. She also described being asked by Ms. Kitch to arrange a taxi to pick up Ms. Kitch's mother from the airport as well as book hotel rooms for her at the Halifax Westin Hotel. These were charged to the IWK and were clearly personal expenditures. These were booked through the IWK and invoiced to the organization. Ms. Lucio gave the invoice to Ms. Kitch to pay, however, the same went unpaid for months. Ms. Lucio reminded the CEO of this who told her to "just pay it." Ms. Lucio filled out a purchase order for the hotel account of just under \$600 and had it paid by the IWK.

[19] Ms. Lucio was able to identify a number of flights booked by Ms. Kitch that were taken to Toronto. There was no business reason in Ms. Kitch's calendar for flights to Toronto. Ms. Kitch's family still resided in Toronto.

[20] Ms. Lucio testified that after the question of Ms. Kitch's expenses were brought into question it garnered media interest. Ms. Lucio was asked to prepare invoices for personal travel to give Ms. Kitch. Ms. Lucio was asked to back date these invoices to when the expenses were incurred. She refused to do this.

[21] Ms. Lucio discussed very large data overages related to Ms. Kitch's corporate iPhone account. Apparently, this resulted from Ms. Kitch using her iPhone as a hotspot to watch video content on her iPad. Charges for a Netflix account were also incurred on Ms. Kitch's corporate credit card. Ms. Kitch had Ms. Lucio rent a car from Enterprise for her for a two day business matter. The car was in Ms. Lucio's name and was not returned after the two days. This incurred extra billing for the period not related to business. As well, parking tickets were incurred by Ms. Kitch, but were placed in Ms. Lucio's name as the lessee. When asked by Ms. Lucio when the car would be returned, Ms. Kitch said "eventually."

[22] Ms. Lucio outlined the difficulties she had filing on time expense reports for Ms. Kitch. Receipts were either not forthcoming or Ms. Kitch was not providing timely expense claims that were complete and signed. At some point Ms. Lucio brought her concerns to the IWK General Counsel, Ms. Ferron, who told Ms. Lucio not to create an email paper trail on these matters.

[23] Patti Green was also employed as Ms. Kitch's Executive Assistant during part of the relevant period. Like Ms. Lucio, Ms. Green had access to, and assisted in populating Ms. Kitch's outlook calendar.

[24] Ms. Green was able to outline an instance of travel and expenses incurred by Ms. Kitch that was of some concern. Ms. Kitch was part of a panel engaged in an external review of a strategic planning exercise by the Montreal Children's Hospital from March 8 to 16, 2016. That involved a trip to Montreal.

[25] Utilizing prepaid flight passes for the IWK, Ms. Kitch flew to Montreal via Toronto and then returned to Halifax. Approximately \$225.25 was charged by Ms. Kitch to the IWK on her corporate credit card. These expenses were directly related to the trip together with costs of the flights., which were booked through and paid for by the IWK.

[26] Ms. Green, as instructed, prepared a travel expense report listing total expenses of \$847.25, which was sent to the Montreal Children's Hospital.

[27] A cheque that included the listed expenses, as well as the honorarium, totalling \$3,847.25 was sent by the Montreal Children's Hospital to Ms. Kitch's home address, which was cashed and deposited into Ms. Kitch's personal bank accounts. The \$847.25 was in fact paid out by the IWK to Ms. Kitch.

[28] Janice Buchanan testified to giving assistance to Ms. Kitch's Executive Assistants. She also testified the flight passes were obtained on the basis of flights taking place within the Maritime provinces.

[29] The court heard from Angela MacDonald-Burke, who was in the IWK Finance Department. She reviewed how reimbursement to the IWK could or did work regarding expenses. She indicated that obtaining timely credit card expense accounts from Ms. Kitch was difficult. She, herself, though, had no personal conversation with Ms. Kitch about the repayment of personal expenses.

[30] The difficulty that occurred with individuals at the IWK in obtaining proper details of Ms. Kitch's use of the corporate credit card was again outlined by Carrie Barnhill, from the Financial Department. She described attempts two or three times a month to obtain these figures. Month after month, she stated, she received no response from Ms. Kitch's office.

[31] Gina Connell was Public Relations and Communications Officer with the IWK during a portion of Ms. Kitch's tenure as CEO. When the government mandated that persons in Ms. Kitch's position had to post expenses on a website, Ms. Connell was tasked with overseeing that process. In early January of 2017, shortly after the posting of Ms. Kitch's expenses, these appeared in a CBC article comparing public CEO's expense accounts. In that report Ms. Kitch's expenses were compared to those of a CEO of the Nova Scotia Health Authority, which were significantly less.

[32] Ms. Kitch told Ms. Connell that the story should be about why the reporting of the Nova Scotia Health Authorities CEO's expenses were so low. Further, that the Health Authority CEO must be hiding something. Ms. Kitch had several other suggestions, which included that if Freedom of Information (FOIPOP) requests by the media were to go back as early as 2014, "if we had to, we have to make it up." Ms. Kitch also suggested that there may be a need to strip information out of replies to FOIPOP.

[33] Ms. Kitch told Ms. Connell that the CBC had been after her since she started because she had not relocated to Nova Scotia.

[34] The Crown called Tracy Chisholm to the stand. Ms. Chisholm is a freelance communications advisor located in Toronto. Ms. Chisholm was hired by Ms. Kitch as a speech writer. Ms. Chisholm confirmed several meetings in Toronto that had been placed in Ms. Kitch's calendar. These meetings were usually on a weekend and lasted for one to two hours at a coffee shop or for lunch. Ms. Kitch claimed the travel expenses to and from Toronto on those weekends.

[35] Testimony was given by Ms. Mary Lynn Vantassell. Ms. Vantassell was the Director of Finance at the IWK.

[36] Ms. Vantassell indicated that she became aware of delays in Ms. Kitch's reporting of credit card expenses in April of 2016 and into December of that year.

[37] This became important in October of 2016, when the Government had issued their directive requiring online posting of executive expenses.

[38] Ms. Vantassell was tasked with identifying both personal and business expenses that had been attributed to the IWK CEO, Ms. Kitch. Her draft of expenses that were business related from April 1, 2016, to November 30, 2016, listed a total of \$34,192.80. She expressed surprise at what was the ultimate online posting of \$16,685. The change was described by Ms. Vantassell as dramatic.

[39] Ms. Vantassell also prepared a table of expenses which outlined a range which included personal expenses that had been paid by the IWK. The dates covered December 1, 2014, to March 26, 2017, (see exhibit 15E). This was produced in collaboration with Ms. Kitch. The amount of personal expenses came to \$22,013.91. Ultimately, repayments for personal expenses that were made by Ms. Kitch were listed in Exhibit 5, pp. 20 and 22.

[40] In cross examination, Ms. Vantassell spoke about her interactions with Ms. Kitch in preparing information that was to be provided to Grant Thornton for their review. Ms. Vantassell became uncomfortable dealing with Ms. Kitch, as Ms. Kitch's categorization of the nature of expenses as being business or personal would change. Ms. Vantassell recalled being so affected by this that on one particular occasion she called in sick, rather than having to meet with Ms. Kitch on the expense matters.

[41] The Crown also called several Chairs of the Board of Governors. Phil Otto was Chair of the IWK for a three year term and was Board Chair when Ms. Kitch was hired as CEO. Mr. Otto described how expense claims for Ms. Kitch would be couriered to his office. He would review them and sign off on them. He was never advised that any of the expense claims had personal expenses on them. Neither was he told that flight passes were being utilized for personal matters.

[42] Mr. Otto testified that he had a good relationship with Ms. Kitch and that he had high praise for her work as CEO.

[43] Another former Board Chair was Robert Hanf. He was Chair from 2015 until 2017. His receipt of expense claims from Ms. Kitch followed the same procedure. Mr. Hanf was the Chair when Ms. Kitch's expenses were receiving intense media scrutiny.

[44] Prior to speaking to the media at the June 2017 Annual General Meeting, Mr. Hanf sought assurances from Ms. Kitch that her expenses were “above board.” She assured him that they were and based on that he defended her expenses to the media.

[45] Mr. Hanf was not aware of flight passes being used and they were never discussed.

[46] Mr. Hanf also inquired of Ms. Kitch if the document relating to releasing expenses to the public, as per Government requirements, was in compliance and had no mistakes. She assured him that they were.

[47] A third Board Chair, Karen Hutt, gave evidence. The concerns over the CEO’s expenses were ongoing when she was chair. Under her authority, the Board engaged Grant Thornton, who prepared a report with a number of recommendations.

[48] Ms. Hutt discussed sitting down with Ms. Kitch in person on August 21, 2017. She recalled speaking to Ms. Kitch, in particular of Ms. Kitch’s use of the corporate credit card for a trip to New England, associated with Ms. Kitch’s son’s hockey team. Ms. Kitch told her that she used the corporate credit card as she had accidentally left her personal credit card at home. Contrary to this, Exhibit 22, which contained details of Ms. Kitch’s Capital One Mastercard, shows that her personal card had in fact been used on the trip and declined.

[49] Ms. Hutt indicated the board was unaware of the magnitude of the expense issue until they received the Grant Thornton report. While she was told the personal expenses incurred by Ms. Kitch’s use of corporate funds were going to be repaid, the issue was still of great concern. Ms. Hutt testified that all options were on the table and that she did eventually reach out to law enforcement and called the Chief of Police for Halifax Regional Municipality.

LAW

[50] The Crown’s case against Ms. Kitch involved a large number of documentary exhibits and a number of witnesses. What I must keep clearly in mind is that the evidence offered by the Crown must prove the guilt of the accused on every element of the offence beyond a reasonable doubt before a conviction can be entered.

[51] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Ms. Kitch is presumed innocent of the charges unless the Crown proves each element beyond a reasonable doubt.

[52] Justice Cory speaking for the majority in **R. v. Lifchus**, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt as follows:

36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[53] Justice Iacobucci, of the **Supreme Court of Canada**, for the majority, said in **R. v. Starr**, 2000 SCC 40, that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities”. Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person beyond a reasonable doubt – which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[54] Trial Judges are often called on to resolve credibility between witnesses. In this matter, all the witnesses were credible.

[55] S. 380 (1) of the **Criminal Code** set out the offence of fraud as follows:

380 (1) Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars

[56] Fraud, not unlike almost all offences, consists of two main components, the prohibited act, or actus reus, and the required state of mind, mens rea.

[57] Proof of fraud requires an act of deceit, a falsehood or some other fraudulent means and a deprivation caused by the prohibited act. That deprivation may consist in actual loss or placing of the victim's pecuniary interests at risk. (See *R. v. Riesberry*, [2015] 3 S.C.R. 1167, *R. v. Theroux*, [1993] 2 S.C.R. 5 and *R. v. Zlatic* [1993] 2 S.C.R.29)

[58] In *Riesberry*, Justice Cromwell stated at p. 23-24:

23 . . . Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of "deceit, falsehood or *other fraudulent means*": s. 380(1). The term "other fraudulent means" encompasses "all other means which can properly be stigmatized as dishonest": *R. v. Olan*, [1978] 2 S.C.R. 1175, at p. 1180. The House of Lords [page1176] made the same point in *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819, a case approved by the Court in *Olan* (p. 1181). Fraud, according to Viscount Dilhorne in *Scott*, may consist of depriving "a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled": p. 839. And as Lord Diplock said, the fraudulent means "need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit": *ibid.*, at p. 841.

24 It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.

[59] The actus reus of the offence of fraud was further examined in *R. v. Olan*, [1978] 2 S.C.R. 1178. The elements needed to prove the offence are dishonesty and deprivation. The wording in s. 380 of "other fraudulent means," include means which may not be in the nature of deceit or a falsehood and encompasses

all other means which can properly be stigmatized as dishonest. The element of deprivation can be satisfied on proof of detriment.

[60] *Olan*, and subsequent cases were considered by Justice McLachlin concerning the aspect of mens rea. In *Theroux* at paras. 17 and 18, she stated:

17 *Olan* marked a broadening of the law of fraud in two respects. First, it overruled previous authority which suggested that deceit was an essential element of the offence. Instead, it posited the general concept of dishonesty, which might manifest itself in deceit, falsehood or some other form of dishonesty. Just as what constitutes a lie or a deceitful act for the purpose of the actus reus is judged on the objective facts, so the "other fraudulent means" in the third category is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Second, *Olan* made it clear that economic loss was not essential to the offence; the imperilling of an economic interest is sufficient even though no actual loss has been suffered. By adopting an expansive interpretation of the offence, the Court established fraud as an offence of general scope capable of encompassing a wide range of dishonest commercial dealings.

18 Subsequent cases followed *Olan*'s lead, fleshing out the elements of the offence set out in *Olan* in a broad and purposive manner. One of the first questions which arose was whether the third type of dishonest conduct, "other fraudulent means", was a super-added element which the Crown must prove in addition to proving either deceit or falsehood. This was rejected in *R. v. Doren* (1982), 36 O.R. (2d) 114 (C.A.); see also *R. v. Kirkwood* (1983), 42 O.R. (2d) 65 (C.A.). In a number of subsequent cases, courts have defined the sort of conduct which may fall under this third category of other fraudulent means to include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property: *R. v. Black and Whiteside* (1983), 5 C.C.C. (3d) 313 (Ont. C.A.); *R. v. Shaw* (1983), 4 C.C.C. (3d) 348 (N.B.C.A.); *R. v. Wagman* (1981), 60 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Rosen* (1979), 55 C.C.C. (2d) 342 (Ont. Co. Ct.); *R. v. Côté and Vézina (No. 2)* (1982), 3 C.C.C. (3d) 557 (Que. C.A.); *R. v. Hansen* (1983), 25 Alta. L.R. (2d) 193 (C.A.); *R. v. Geddes* (1979), 52 C.C.C. (2d) 230 (Man. C.A.); *R. v. Currie*; *R. v. Bruce* (1984), 5 O.A.C. 280, and *R. v. Kirkwood*, *supra*. As noted above, where it is alleged that the actus reus of a particular fraud is "other fraudulent means", the existence of such means will be determined by what reasonable people consider to be dishonest dealing. In instances of fraud by deceit or falsehood, it will not be necessary to undertake such an inquiry; all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not.

[61] Justice McLachlin went on to say:

24 Having ventured these general comments on mens rea, I return to the offence of fraud. The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the actus of the offence (see Williams, supra, c. 3), the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

25 This applies as much to the third head of fraud, "other fraudulent means", as to lies and acts of deceit. Although other fraudulent means have been broadly defined as means which are "dishonest", it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the actus reus of the offence can be made out on particular facts. That established, it need only be determined that an [page20] accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.

26 I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge,

commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.

ANALYSIS

CROWN'S POSITION

[62] The Crown argued that this is a matter of a Chief Executive of a public institution falsely and dishonestly arranging for her employer to pay for thousands of dollars in personal expenses without the employer's knowledge. Further, that a majority of the impinged expenses related to travel and improper purchases using the corporate credit card, contrary to known IWK policies.

[63] The Crown further argues that these personal expenditures created a deprivation for the IWK. That deprivation intentionally incurred by the use of public funds on personal expenditures is inherently dishonest.

[64] All of the above grounds the charge under s. 380(1)(a) of the **Criminal Code of Canada**.

DEFENCE POSITION

[65] The position of Ms. Kitch is that there is no evidence of deceit that has been led by the Crown. The core of Ms. Kitch's defence is that there were no false receipts generated, no overt lies, and that she relied on her Executive Assistant to ensure an accurate track of her expenses.

DECISION

[66] While Ms. Kitch may have been an exemplary CEO in many other areas, the question here was her use of corporate funds fraudulently.

[67] As CEO, and having signed documents relating to the same, Ms. Kitch clearly had knowledge that the use of flight passes, and corporate credit cards were not to be used for personal expenditures. Additionally, each and every expense claim contained certification that they were proper charges. They obviously were not.

[68] The numerous flights to and from Toronto for no reason other than personal travel to her home were booked utilizing flight passes paid for by the IWK on an unauthorized basis.

[69] Personal use of corporate funds was clear in taxi charges, hotel stays for relatives, iTunes, Netflix, and data overages. Using a rental car for personal use and not advising of, or paying the parking tickets related to the same, fall within the area of fraudulent activity. It should also be noted Ms. Kitch assured two separate Board Chairs that her expenses were in order, when they clearly were not.

[70] The evidence also contains the fact that Ms. Kitch repaid the IWK of over \$45,000 for personal expenditures that were incurred by the IWK.

[71] The evidence before the court clearly showed that Ms. Kitch used corporate funds for personal expenses, placing IWK funds in potential peril.

[72] On the basis of all the evidence, I find the accused guilty of the one count of fraud.

THE CHARGE UNDER S. 122 OF THE CRIMINAL CODE OF CANADA

[73] Section 122 states:

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, is guilty of:

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years, or
- (b) an offence punishable on summary conviction.

[74] The leading case regarding this section is *R. v. Boulanger*, [2006] 2 S.C.R. 49. There the Supreme Court of Canada set out the elements the Crown needs to prove in this matter. They are:

1. The accused is an official;
2. The accused was acting in connection with the duties of her office;

3. The accused breached the standard of responsibility and conduct demanded of her by the nature of the office;
4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
5. The accused acted with the intention to use her public office for a purpose other than public good.

[75] Here, Ms. Kitch was a very high ranking public servant.

[76] Her action utilized the credit which came with her office to obtain personal enrichment. Given her position as the Chief Operating Officer of a Children's Hospital, which services the entire Maritime region, it demands the strictest adherence to a high ethical standard. Ms. Kitch clearly breached that standard. There can be no doubt that the flagrant abuse of flight passes and credit cards are a marked departure from her position of public trust. The actions taken by Ms. Kitch in her criminal use of public funds can not be seen as other than against the public good.

[77] Having said the above, in *R. v. Hammerling*, [1982] 5, S.C.R, 905, the Supreme Court of Canada made the argument that where an accused is charged with a substantive offence arising out of the same fact, the rule against multiple convictions applies, and a conviction cannot lie for both. Based on that case, I enter a conditional stay of proceedings on the s. 122 charge, which commences upon the expiration of the appeal period, or the charge is upheld, whichever shall first occur.

Paul Scovil, JPC