COURT MARTIAL

Citation: *R. v. Ellison*, 2023 CM 5002

Date: 20230417
Docket: 202157

Standing Court Martial

22 Wing North Bay
North Bay, Ontario, Canada

Between:

Major J. Ellison, Applicant

- and -

His Majesty the King, Respondent

Before: Commander C.J. Deschênes, M.J.

DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE AGAINST THE ACCUSED ON ALL CHARGES

(Orally)

I. Introduction

[1] Major Ellison is being tried for allegedly having committed four fraud-related offences. The details of the particulars of the four charges are similar on all counts. They all allege that between 1 May 2015 and 31 July 2018, at or near North Bay, Ontario, with intent to defraud, or by deceit, falsehood, or other fraudulent means, he wrote prescriptions for medications in the names of Krysti Fawcett and Gabriel Wright for the benefit of his spouse, Amy Ellison. Charges one to three were preferred pursuant to section 130 of the *National Defence Act* (*NDA*). Charge one pertains to "drawing document without authority" contrary to section 374 of the *Criminal Code*. Charge two alleges that his conduct amounted to a fraud contrary to section 380 of the *Criminal Code* while charge three alleges a "breach of trust by public officer" contrary to section 122 of the *Criminal Code*. Charge four, also a fraud, was preferred pursuant to paragraph 117(f) of the *NDA.*

[2] At the close of the prosecution's case, the defence presented a no prima facie motion with regard to the four charges on the basis that the prosecution had failed to introduce any evidence concerning at least one of the essential elements on each charge. Thus, the issue is whether the defence demonstrated, on a balance of probabilities, that no evidence was introduced on at least one of the essential elements of each charge. Said somewhat differently, I must decide if there is some evidence on each essential elements of the offences upon which a properly instructed jury, or panel at a General Court Martial (GCM), could rationally conclude that the accused is guilty beyond a reasonable doubt.

The applicable principles relating to no prima facie motion

[3] The principles applicable to courts martial relating to no prima facie motions are found in *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.05, at paragraph 13:

> (13) When the case for the prosecution is closed, the judge may, of the judge's own motion or upon the motion of the accused person, hear arguments as to whether a *prima facie* case has been made out against the accused person, and:
>
> (*a*) if the judge decides that no *prima facie* case has been made out in respect of a charge, the judge shall pronounce the accused person not guilty on that charge; or
>
> (*b*) if the judge decides that a *prima facie* case has been made out in respect of a charge, the judge shall direct that the trial proceeds on that charge.

Note (B) to article 112.05 provides guidance in this regard:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

Note (B) incorporates the principles that were developed by the Supreme Court of Canada (SCC). Essentially, "[t]he case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt" [Emphasis omitted], *R. v. Fontaine*, 2004 SCC 27, paragraph 53. The SCC confirmed this approach in *R. v. Barros*, 2011 SCC 51, at paragraph 48: "[a] directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction". [Citations omitted.]

[4] The test is the same whether the evidence is direct or circumstantial, *R. v. Monteleone*, [1987] 2 SCR 154. Where the prosecution's case is based entirely on

direct evidence, the judge's task is straightforward; if the judge determines that the prosecution has presented direct evidence as to every element of each offence, the application must be denied. The only issue will be whether the evidence is true, and that is for the trier of fact to decide, *R. v. Arcuri*, 2001 SCC 54, at paragraph 22.

[5] Where proof of an essential element depends on circumstantial evidence, however, the judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution. The judge neither asks whether she would draw those inferences nor assesses credibility. The issue is only whether the evidence, if believed, would reasonably support an inference of guilt, *Arcuri* at paragraphs 23 and 30 and *Monteleone* at page 161.

The prosecution's case

[6] Being mindful of these principles, I have considered the evidence introduced by the prosecution. The evidence shows that at the material time, the accused was the wing surgeon and detachment commander at 31 Canadian Forces Health Services, Detachment North Bay. Mrs Fawcett, who was also serving in the Canadian Armed Forces (CAF) at the time, was posted at the clinic as the chief clerk until she was posted to Kingston in 2018. As such, she was one of the accused's subordinates. The clinic is small, composed of another military clerk, two part-time civilian physicians, one full-time nurse assisted by other nurses, medical assistants, and a Blue Cross administrative clerk.

[7] Major Ellison eventually became Mrs Fawcett's treating physician in 2015 until she left North Bay. His care included prescribing her medications as needed. During her time in North Bay, Mrs Fawcett became close friends with Major Ellison's spouse, Amy. They saw each other on almost a daily basis, and they were like sisters. It was in December that same year that Mrs Fawcett started sharing medications with her, usually sharing a controlled drug called Lorazepam, also known as Ativan, which is used as a sedative. Mrs Fawcett received prescriptions from Major Ellison for this medication, but also on other occasions from other health care providers at the material time. The medication helped her deal with stress and anxiety, and she described her usage as sporadic, using it "as a parachute".

[8] Around the same time, a young woman named Gabriel (Gabby) Wright was living with Major Ellison's family, from 2015 to 2016. Mrs Wright was a tutor to the accused's son in past years when she was seventeen years old and his family supported her during some difficult times. It is not contested that prescriptions were signed by the accused for this person during the period particularized in the charges, including after she had left North Bay.

II. With respect to the first charge, has the defence demonstrated, on a balance of probabilities, that no evidence was adduced to prove that the accused acted in the name or on the account of another person or to prove the intent to defraud?

[9] The defence contended that no evidence was adduced to prove that the accused acted in the name or on the account of another person. Further, although the essential element of intent may be inferred from a confession provided by the accused, no evidence was adduced that is capable of demonstrating an intent to defraud. The prosecution contended in response that there is some evidence, such as the documentary evidence provided as exhibits, with the accused's confession, that if believed by a properly charged panel acting reasonably, would justify a conviction. There was also some evidence that he wrote prescriptions for the benefit of his spouse and that he knew the prescriptions were improperly drawn.

The essential elements required to prove an offence of drawing document without authority

[10] The particulars alleged that, with intent to defraud and without lawful authority, Major Ellison did write prescriptions for medications in the names of Krysti Fawcett and Gabriel Wright for the benefit of his spouse. Prosecutions for offences pursuant to section 374 are non-existent in the military justice system, presumably because there are specific military infractions in the Code of Service Discipline that seem to better address the alleged misconduct. There is also little applicable jurisprudence in the criminal justice system. As listed in the only published case found on this matter, *R. v. George*, 2017 ABPC 277, the essential elements that are unique to paragraph 374(a) are:

> The accused does one of the enumerated acts: makes, executes, draws, signs, accepts, or endorses upon a document in the name or on the account of another person by procuration or otherwise;
>
> The accused did so with intent to defraud. [Emphasis added.]

[11] In accordance with the leading SCC fraud cases of *R. v. Olan et al*., [1978] 2 SCR 1175 and *R. v. Théroux*, [1993] 2 SCR 5, because the *Criminal Code* provision creating this infraction specifies that, to meet the essential elements of this offence, the accused did one of the enumerated acts "with intent to defraud", the prosecution must adduce evidence that the accused had subjective knowledge that the prohibited act could have, as a consequence, the deprivation of another.

Analysis

[12] I find that there is no evidence to prove the essential elements of *actus reus*, and *mens rea*, being the intent to defraud. First and foremost, I need to clarify that the accused did not confess to committing any of the offences. He rather explained to the investigator that he knew his wife had a medical note to the effect that she could not be prescribed Ativan. He also explained that his professional obligations as a physician did not allow him to write prescriptions for family members, particularly for controlled substances. He told the investigator that he found out from his wife for the first time in 2017 that she had received Ativan from Mrs Fawcett, which he believed was when the sharing of Ativan started. He also told the investigator that Mrs Fawcett would

occasionally come to him seeking additional prescriptions of Ativan because she ran out of the medication sooner than expected as a result of sharing some of her medication with his spouse, and that eventually, Mrs Fawcett's requests for Ativan prescriptions became more frequent, from once a month to every two or three weeks. To sum up, what he admitted to was that, since 2017, he knew that some of the prescriptions he was writing for Krysti Fawcett or for Gabriel Wright was for medication that his spouse would eventually use.

[13] Turning to the essential elements required to prove this offence, first the *actus reus* of drawing a document without authority, the evidence provided by Mrs Fawcett demonstrated that she both needed and requested Ativan during the period particularized in the charge sheet. This is corroborated by Major Ellison's statement to the military police but also by Exhibits 12 to 15 which show that, during the period covered in the charge sheet, Mrs Fawcett was prescribed medications from the accused but also, on at least two other occasions for Ativan, from other health care providers. Mrs Fawcett also described her use of Ativan as sporadic, using it as "a parachute". Being mindful that in the context of this motion, that I am not to assess credibility, I note that Mrs Fawcett clarified during her cross-examination that her reference to a "sporadic" usage of Ativan meant that she was not using this controlled drug daily and that, on occasions during the period particularized in the charge sheet, she would use the medication up to four times a week, sometimes using two tablets at a time. I infer from her evidence that some, if not most, of the medication Major Ellison was prescribing her was indeed used by her. This is also corroborated by Exhibits 14 and 15 which demonstrate that the prescriptions the accused wrote for her were picked up either by herself or by her husband. In addition to this evidence, Mrs Fawcett chose to share some of the prescribed tablets of a controlled drug with the accused's spouse after she, Mrs Fawcett, enthusiastically offered to share the medication, or after being asked by the accused's spouse. Thus, while I agree with the prosecution that there is some evidence that Major Ellison knew or found out at some point that Mrs Fawcett was sharing with his spouse the medication he prescribed her during the particularized timeframe, the evidence demonstrates that Mrs Fawcett was his patient and she needed, asked for or consented to receiving, and eventually picked up and used the medication he was prescribing her. Therefore, I am not satisfied that there is some evidence to prove that he wrote prescriptions in the name or on the account of another person by procuration or otherwise, without authority.

[14] Even if I had accepted that the accused committed the act contrary to this *Criminal Code* section, there is no evidence that he had an intent to defraud. In other words, I find that there is no evidence that he had a subjective knowledge that the prohibited act could have as a consequence the deprivation of another. In this instance, I do not see how it is possible that he knew his action risked the deprivation of another since there was no deprivation. The aspect of deprivation is further explained in my ruling on the two fraud charges. In any event, the evidence demonstrates that he or his spouse could not financially profit from him writing a prescription in the names of others for the benefit of his spouse as alleged in the charge because the only evidence on this aspect of the prosecution's case shows that the contentious medication was

usually picked up by the Fawcetts. Further, on the only two occasions that the accused's spouse picked up medication for Mrs Fawcett on 8 December 2017 for thirty tablets of oxycodone as shown at Exhibit 14 page 24, and on 20 June 2018 for forty tablets of Lorazepam as shown at Exhibit 15 page 12, presumably Mrs Ellison would have paid to be allowed to leave the pharmacy with the medication. Additionally, exhibit 22 indicates that Blue Cross reimbursed Mrs Fawcett for these two prescriptions on the same day they were dispensed, respectively for $13.08 and $13.67. No evidence was adduced that Major Ellison or his spouse claimed any medication that she would have received through those prescriptions.

[15] In sum, there is no evidence supporting that Major Ellison wrote prescriptions in the name or on the account of another person by procuration or otherwise, without authority. Accordingly, I find that there is no prima facie case on this first charge.

III. With respect to the second charge, has the defence demonstrated, on a balance of probabilities, that no evidence was introduced to prove the essential elements of intent and deprivation?

[16] The defence argued that there is no evidence of the act of defrauding the Government of Canada. Even if the Court accepted as true that Major Ellison wrote a prescription for another person for the benefit of his spouse, the defence contends that the medication was nevertheless required by Mrs Fawcett. Said somewhat differently, even if the Court accepts that the accused had knowledge that the prescriptions he was writing for his patient led to the medication being shared with his spouse, he did legitimately prescribe the medication. The prosecution contended in response that Exhibits 12 and 13 show that the Government of Canada was deprived and that there is some evidence of deceit. He also contended that if the medication had been prescribed properly, the accused's spouse was eligible as a dependant to have her medication reimbursed, therefore there would be no fraud.

The essential elements required to prove an offence of fraud contrary to the Criminal Code

[17] The *Criminal Code* offence of fraud is found at article 380, which states:

> Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, <u>of any property, money or valuable security or any service</u>,
>
> (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; or
>
> (b) is guilty
>
> (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

> (ii) of an offence punishable on summary conviction,
>
> where the value of the subject-matter of the offence does not exceed five thousand dollars.
> [Emphasis added.]

[18] The essential elements that the prosecution is required to prove for an offence of fraud contrary to the *Criminal Code* were explained in *Olan* at page 1182:

> Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.

Confirming the approach adopted in *Olan*, Justice McLachlin in *Théroux* concluded her judgment defining both the *actus reus* and *mens rea* of fraud:

> [T]he *actus reus* of the offence of fraud will be established by proof of:
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> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

[19] Fraud is often characterized as being a form of commercial crime. That is because to prove this offence, the prosecutor must prove all the essential elements I have explained, which include the consequence element of the act, being the deprivation to a victim. Deprivation may consist in actual loss, or the placing of the victim's pecuniary interests at risk. In *Olan*, the SCC established that "[t]he element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim." at page 1182. The economic interest may take the form of money, property as defined at section 2 of the *Criminal Code*, or titles. In sum, financial consequences resulting from the act of the accused must be proven by the Crown to establish that a fraud was committed.

Analysis

[20] The particulars clearly state that Major Ellison defrauded the Government of Canada of funds of a value not exceeding $5,000 by prescribing the medications in the name of Krysti Fawcett for the benefit of his spouse. After a thorough review of the evidence, I simply could not find any evidence of the alleged deprivation of funds. In this regard, I find it quite revealing that the prosecutor was unable to provide an answer to the Court's question regarding the amount the Government of Canada was allegedly deprived of.

[21] Even if I were satisfied that the accused wrote a prescription for a patient knowing that his spouse would obtain some of it, the alleged act did not subject the pecuniary interest of others to deprivation or risk of deprivation. The cost of the medication was lawfully claimable by Mrs Fawcett who willingly chose to share it with Mrs Ellison. Additionally, no evidence was adduced, and no allegation was made to demonstrate that Major Ellison or his spouse received reimbursement or even claimed for money used to pay for the medication prescribed to Mrs Fawcett. On the contrary, the only evidence of a financial transaction to obtain the medication was when Major Ellison's spouse paid out of pocket to reimburse some of the medication in the name of Gabby Wright that was picked up on her behalf by Mrs Fawcett. Mrs Ellison was presumably eligible, as a spouse of a CAF member, to have her medication reimbursed under the Public Service Health Care Plan (PSHCP). There is no evidence that the economic interest of anyone, in particular the Government of Canada, was ever at risk. The medication was prescribed to Mrs Fawcett because she consented to receiving the health care. As a CAF member at the material time, Mrs Fawcett was entitled to receive reimbursement for the medication the accused prescribed for her.

[22] Furthermore, the documentary evidence shows that, except for the two prescriptions that I referred to earlier for the first charge that were picked up by Major Ellison's spouse, all the Ativan prescribed by him for Mrs Fawcett was picked up at the pharmacy by herself or by her husband. Mrs Fawcett did confirm that she or her husband normally picked up her medication at the local pharmacy. In fact, a review of the pharmacies' patient medical history (Exhibit 12), and prescription transaction list (Exhibit 13), combined with the relevant hard copies of the prescriptions signed by the accused and transaction notes of the pharmacies, indicates that the accused would have prescribed Ativan to Mrs Fawcett twenty-eight times between May 2015 and May 2018. Exhibit 14 confirms that on 14 May 2015, 11 February 2016, 20 May 2016, 5 July 2016, 31 August 2017 and 18 September 2017, Mrs Fawcett or her spouse picked up the Ativan at the pharmacy. No evidence in the form of prescriptions or transaction notes were provided for the ten transactions that took place between 19 August 2016 and 13 August 2017. No evidence explained how these medications were paid for at the pharmacy. Then again, no evidence in the form of prescription or transaction notes were provided for the three transactions that took place between 6 March 2018 and 25 April 2018. The same goes for Exhibit 12, which contains no evidence in the form of prescription or transaction notes for seven of the eleven relevant transactions that took place between 15 May 2016 and 5 July 2018. The evidence contained in the exhibits indicates that the medication Major Ellison prescribed to Mrs Fawcett was all picked up by Mrs Fawcett. I have no evidence that he or his spouse received or even claimed any

amount for the contentious prescriptions. No evidence was presented to explain who paid for the medication when it was picked up. I can only infer, once again, that when the medication was picked up, it was paid for by the person who received it. In other words, if Major Ellison's spouse picked up the medication, she would have paid out of pocket for it and Mrs Fawcett was somehow reimbursed for it. No evidence was adduced to show otherwise.

[23] Therefore, in addition to my ruling on the first charge with respect to the absence of evidence relating to the intent to defraud, I find that there is no evidence of deprivation.

IV. With respect to the third charge, has the defence demonstrated, on a balance of probabilities, that no evidence was introduced to prove the essential elements of *actus reus* and *mens rea*?

[24] The defence argues that the fraud alleged in the third charge must be in connection with the deceit. The evidence does not demonstrate that there were false pretences on the accused's part. The prosecution responded that the accused's actions constituted a marked departure for a public officer because he circumvented his responsibility as a physician. His actions were counter to the public good, and he directly or indirectly benefited. Therefore, there is some evidence of a breach of trust.

The essential elements required to prove a breach of trust by public officer

[25] The third charge alleges a breach of trust contrary to section 122 of the *Criminal Code*, which provides that

> Every official who, in connection with the duties of their 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 of not more than five years; or
>
> (b) an offence punishable on summary conviction.

[26] The particulars of the third charge specifically allege that Major Ellison committed a fraud in connection with the duties of his office by prescribing medications to others for the benefit of his spouse. In order to prove this charge, the prosecution must prove beyond a reasonable doubt the following essential elements, with regards to the act and blameworthy state of mind:

(a) that the accused breached the standard of responsibility and conduct demanded of him by the nature of the office;

(b) that the conduct represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and

(c) and that he acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose, *R. v. Boulanger*, 2006 SCC 32 at paragraph 58. See also *R. v. Bradt*, 2010 CMAC 2.

Analysis

[27] As a preliminary matter, I wish to address that the third charge alleges a fraud as the breach of trust, even though specific charges of fraud were preferred for the same alleged conduct. During the presentation of its case last September, I queried the prosecutor previously assigned to this case regarding the application of the *Kienapple* principle to this case. No satisfactory explanation was provided.

[28] The practice of using multiple counts or charges for the same transaction is often referred to as overcharging. In *R. v. R.V.*, 2021 SCC 10, Moldaver J. wrote in his conclusion, in the context of an appeal of a jury trial that:

> [78] It is incumbent upon the Crown as a participant in the justice system to make the trial process less burdensome, not more. The Crown fails in that regard when it proceeds with duplicative counts. Doing so not only increases the length of the trial; it also places a greater burden on trial judges and juries by increasing, as it does, the complexity of jury instructions (*Rodgerson*, at para. 46) . . .
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> [79] . . . Such duplication is particularly illogical where, as here, this Court's decision in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, will result in at least one of the charges being stayed at the sentencing stage. The framework I have described outlines a solution to the problem presented by inconsistent verdicts, but the optimal solution would be for the Crown to avoid needless duplication in the first place (*Rodgerson*, at para. 45).

Quoting this SCC case in *R. v. Akhi*, 2022 ONCA 264, the Ontario Court of Appeal quashed convictions and ordered a new trial, finding that the case demonstrated "the risks associated with including multiple counts in an indictment that arise out of the same conduct".

[29] While it is true that the practice is more problematic for jury trials or general courts martial, it remains that it is likely to detrimentally impact the trial proceedings before judge alone or before a standing court martial, taking longer than necessary and detracting from the crux of the issue. Effective plea negotiation can take place in the absence of this practice when the right charge is laid. There is also the possibility for the accused to make a request under section 194 of the *NDA* for similar offences, see for examples *R. v. Stuart*, 2003 CM 270 and *R. v. Crosman*, 2013 CM 1004. In the case at bar, only two charges preferred alternatively instead of four, would have been sufficient to address the alleged misconduct.

[30] I do however have to make a ruling on this third charge. Unsurprisingly, considering my comments in relation to the practice of overcharging and my finding on charges one and two, I find that there is an absence of evidence on some of the essential

elements. As I explained for the second charge, I found that the evidence in support of a fraud did not pass the threshold to continue with this trial. In *R. v. Perreault* (1992), 75 C.C.C. (3d) 425, leave to appeal to the SCC refused, the Court of Appeal of Quebec suggested that when a charge of breach of trust alleges an act of fraud, the conduct element of the *actus reus* would be proven when the offence of fraud as defined in *Olan* and *Théroux*, namely that the conduct consisted of an act of dishonesty which gave rise to the consequence of deprivation, is proven. *A contrario*, if the charge of breach of trust alleges a fraud, and there is no evidence on the *actus reus* or *mens rea* of fraud, then the breach of trust charge cannot succeed. This would likely be sufficient to conclude, as I did for the second charge, that there is no evidence provided to support a fraud was committed, therefore, there is no evidence to prove the essential elements of the breach of trust alleging the same fraud.

[31] Nevertheless, I will address the essential elements of the infraction of breach of trust that the accused is facing, had the fraud not been alleged. There is no evidence to prove that Major Ellison acted with the intention to use his public office for a purpose other than the public good, and that his conduct represented a serious and marked departure from the standards expected of an individual in his position of public trust.

[32] Turning to the first contentious essential element, I find there is no evidence proving that he acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose. As already explained for the first and second charges, the evidence provided by Mrs Fawcett shows that she needed Ativan, that she used the medication, sometimes up to four times a week, which meant that the medication Major Ellison was prescribing her was used by her. Exhibits 14 and 15, combined with the testimony of Mrs Fawcett, proved that the prescriptions written for her were used by her, but that she chose to share some of her medication with the accused's spouse. The evidence demonstrates that Mrs Fawcett was the accused's patient and she needed, asked for or consented to receiving, and eventually picked up and used the medication he was prescribing her. His knowledge of the sharing between the two women does not constitute some evidence to prove the required *mens rea*. Therefore, I am not satisfied that there is some evidence to prove that he acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose.

[33] As for the *actus reus*, I am also not satisfied that there is some evidence his conduct represented a serious and marked departure from the standards expected of an individual in his position of public trust. Describing this essential element, the SCC stated in *Boulanger* (paragraphs 50 and 52) that:

> . . . it cannot be that *every* breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public's trust. For example, the personal use of an office computer might be contrary to an employment guideline yet not rise to the level of a breach of trust by a public officer. Such a low threshold would denude the concept of breach of trust of its meaning. It would also overlook the range of regulations, guidelines and codes of ethics to which officials are subject, many of which provide for serious disciplinary sanctions.

> . . .
>
> 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. . . . 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 General's 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).
> [Some citations omitted.]
> [Emphasis added.]

[34] Even if I accept the evidence that the accused prescribed medication to a patient knowing or suspecting that they might share it with the accused's spouse, I do not believe that this act meets the element of *actus reus* as defined in *Boulanger*. Major Ellison did write a prescription for a patient who needed it. I am of the view that his conduct amounted to an error in judgement on his part that may constitute a breach of ethics as a physician, which may call for serious disciplinary actions from the college of physicians he belongs to.

[35] In sum, I am not satisfied that there is some evidence that the accused acted with the intention to use his public office for a purpose other than the public good and that his actions meet the definition of *actus reus* as established by the SCC. Aligning with the *Boulanger* decision, I believe that writing prescription for a patient who needed the medication, knowing that it might be shared with the accused's spouse, is a matter best dealt with by the provincial college of physicians and surgeons.

V. With respect to the fourth charge, has the defence demonstrated, on a balance of probabilities, that no evidence was introduced to prove the essential element of deprivation? Could this charge proceed even though the alleged act would be more appropriately addressed by section 125 of the *NDA*?

[36] Finally, the defence contends that the arguments raised for the second charge in the context of this motion also apply to the fourth charge. In addition, he claims that there is an element unique to an infraction contrary to paragraph 117(f) of the *NDA*. The allegations forming the basis of a charge under paragraph 117(f) must not constitute an offence that is specifically provided for at articles 73 to 128 of the *NDA*. He contends that in Major Ellison's case, the allegations would fall within the ambit of an infraction pursuant to section 125 of the *NDA*. Therefore, no charge should have been laid pursuant to paragraph 117(f) and I should acquit the accused of that charge as well. The prosecution responded that his arguments for the second charge also apply to the fourth charge.

The essential elements required to prove an offence of fraud contrary to paragraph 117 of the NDA

[37] In *R. v. Arsenault*, 2014 CMAC 8, the Court Martial Appeal Court established that the essential elements of a fraud contrary to paragraph 117(f) of the *NDA* are the same as the infraction of fraud contrary to section 380 of the *Criminal Code*. See also *R. v. Downer*, 2016 CM 4006, and *R. v. Berlasty*, 2019 CM 2020. Therefore, some evidence of deprivation is also required for the trial to continue on this charge. This was implied by the prosecution when he made his comment that the arguments he used for the second charge apply to this charge as well.

[38] Prior to the appeal court decision in *Arsenault*, in *R. v. Anstey*, 2011 CM 3001, the MJ specified the concept of deprivation for this service offence, at paragraph 30:

> [d]eprivation includes, but does not require that the Canadian Forces suffers actual economic loss. It is enough that the Canadian Forces were induced to act to their detriment by the accused's conduct. The Canadian Forces' economic or financial interests must be at risk, but they do not have to lose any money or anything of value as a result of the accused's conduct.

Analysis

[39] As explained for the second charge, no evidence of deprivation was adduced by the prosecution. Additionally, this charge alleges a financial deprivation also using the name of Gabriel Wright as a person under which the name of the prescription was made in addition to the name of Krysti Fawcett. No evidence was adduced to demonstrate that Gabriel Wright was eligible for her medication to be reimbursed and that the medication Major Ellison prescribed under her name was claimed. On the contrary, the evidence I had from Mrs Fawcett is that the accused's spouse reimbursed her and paid out of pocket on the only transaction I received evidence of for the prescription under this name. This absence of evidence was recognized by the previous counsel for the prosecution when he asked to amend the second charge by removing the name of Gabriel Wright from the particulars. Strangely, he did not ask this amendment for the fourth charge, a charge which otherwise contains the same particulars. Therefore, I find that there is no evidence of deprivation on the fourth charge as well. In light of my conclusion on this charge, there is no need to address defence's secondary argument.

VI. Conclusion

[40] In conclusion, the prosecution's position is that Major Ellison should be held criminally responsible because he wrote prescriptions for a patient, knowing or suspecting his patient might share the medications with his spouse. By itself, his knowledge of the sharing of the medication does not amount to an intent to defraud. He confessed to knowing that there were medical restrictions for his wife to be prescribed the medication and that he knew it was inappropriate for him as a physician, from a deontological standpoint, to write a prescription for a family member. Writing a prescription for one person knowing or suspecting that the medication may be shared

with his spouse was morally wrong and raises issues of professional ethics. I find that on each charge however, that no evidence was adduced with respect to some of the essential elements showing that Major Ellison's actions amounted to a criminal conduct as alleged in all four fraud-related offences he is facing.

FOR THESE REASONS, THE COURT:

[41] **FINDS** the prosecution has not met its burden of proof and that no prima facie case has been made against Major Ellison on all charges.

[42] **FINDS** him not guilty of all charges.

Counsel:

Lieutenant-Colonel (Retired) D. Berntsen, Defence Counsel Services, Counsel for the Applicant, Major J. Ellison

The Director of Military Prosecutions as represented by Major C.R. Gallant, Counsel for the Respondent