

[2006] O.J. No. 2177 | 77 W.C.B. (2d) 713 | 2006 ONCJ 193

Between Her Majesty the Queen, and Peter ***Kaija***, Respondent

(24 paras.)

## Case Summary

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**Criminal law — Procedure — Motions — Nonsuit — Motion by the accused for nonsuit in his trial for failure to report child abuse allowed — The accused, a high-school phys-ed teacher, was a volunteer coach of a young boys' basketball team — He did not report a claim that a boy on the team had been sexually assaulted by another coach — The accused had not been acting in his professional capacity as a teacher when he received the information and therefore had not committed an offence by failing to report — Child and Family Services Act, s. 72.**

**Family law — Child protection — Abuse or neglect — Obligation to report abuse — Motion by the accused for nonsuit in his trial for failure to report child abuse allowed — The accused, a high-school phys-ed teacher, was a volunteer coach of a young boys' basketball team — He did not report a claim that a boy on the team had been sexually assaulted by another coach — The accused had not been acting in his professional capacity as a teacher when he received the information and therefore had not committed an offence by failing to report — Child and Family Services Act, s. 72.**

Motion by the accused for nonsuit in his trial for failure to report child abuse to a child protection agency -- The accused, a high school physical education teacher, coached a team of elementary boys in basketball -- He was a volunteer and did not teach the players -- One of the boys in the program told his mother that a coach, not the accused, had sexually assaulted another boy -- The mother told the accused, who had several meetings with the parties involved -- The accused took over coaching duties and dismissed the other coach -- The accused claimed that he was not acting in his professional capacity as a teacher while coaching the team; the principal of his school testified that the boys' team was no part of the accused's professional duties as a teacher at the high school -- HELD: Motion allowed -- The Crown had established that the accused had not reported the suspected abuse to a children's aid society -- However, the information did not come to the accused in his capacity as a teacher -- His role as volunteer coach of the team was not one in which he was exercising his professional duties -- Accordingly, he had not committed the offence set out in s. 72 of the Child and Family Services Act.

## Statutes, Regulations and Rules Cited:

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Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], s. 72(1), s. 72(4), s. 72(5)

Criminal Code, [R.S.C. 1985, c. C-46](#) [as amended], s. 153(1)

**Court Summary:**

Child Protection -- Offences -- Failure to report abuse -- Elements of offence -- Reporting to children's aid society -- Prosecution had to prove that defendant failed to report alleged abuse to "a society" -- Representative of local children's aid society testified that it had received no report of alleged abuse from defendant but that she could not speak for other 52 societies throughout Ontario -- Court ruled that subsection 72(4) of *Child and Family Services Act* does not single out which particular society, effectively requiring prosecution to adduce evidence from all of those other societies before it could establish defendant's failure to report -- In this case, however, evidence of defendant's statements and conduct showed that, aside from taking internal disciplinary measures against alleged perpetrator of abuse, he had no intention of involving public agencies (such as police or children's aid society) in this matter -- Thus, prosecution had established defendant's failure to report to "a society".

Child Protection -- Offences -- Failure to report abuse -- Elements of offence -- Whether information obtained in course of defendant's professional duties -- Defendant was high school teacher who, in his off-hours, was director of basketball program for boys of elementary school age from entire region but not affiliated with any local school -- It was in his capacity as director (and not teacher) that mother of one team member had reported to him that her son had witnessed incident of sexual abuse by team coach -- Words "in the course of his or her professional duties" in subsection 72(4) of *Child and Family Services Act* must be construed more narrowly than concept of being in position of trust under federal *Criminal Code* -- If legislative intent had been to impose duty on teacher to report any information of suspected child abuse regardless of circumstances, then words "in the course of his or her professional duties" would not have been necessary -- Presence of those words was to narrow circumstances under which person, whose profession happened to be teacher, was obligated to report suspected abuse -- On this ground, court concluded that prosecution case against defendant would fail and it granted defence motion of non-suit.

Provincial Offences -- Practice and procedure -- Conduct of trial -- Motion for non-suit -- Grounds -- Test is same as that for committal at preliminary hearing, namely whether there is any evidence upon which properly instructed jury, acting reasonably, could convict -- In assessing evidence at this motion, court is entitled to examine all of evidence without weighing it, and to draw any reasonable inferences from that evidence.

**Cases cited:**

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*R. v. Audet*, [\[1996\] 2 S.C.R. 171](#), [197 N.R. 172](#), 175 N.B.R. (2d) 81, 446 A.P.R. 81, [135 D.L.R. \(4th\) 20](#), [106 C.C.C. \(3d\) 481](#), [48 C.R. \(4th\) 1](#), [1996 CanLII 198](#), [\[1996\] S.C.J. No. 61](#), 1996 CarswellNB 259.

*Ross v. New Brunswick School District No. 15*, [\[1996\] 1 S.C.R. 825](#), [195 N.R. 81](#), [171 N.B.R. \(2d\) 321](#), 437 A.P.R. 321, [133 D.L.R. \(4th\) 1](#), [35 C.R.R. \(2d\) 1](#), [37 Admin. L.R. \(2d\) 131](#), [1996 CanLII 237](#), [\[1996\] S.C.J. No. 40](#), [1996 CarswellNB 125](#).

*Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [\[1997\] 1 S.C.R. 487](#), [208 N.R. 245](#), [98 O.A.C. 241](#), [144 D.L.R. \(4th\) 385](#), [44 Admin. L.R. \(2d\) 1](#), [25 C.C.E.L. \(2d\) 153](#), [1997 CanLII 378](#), [\[1997\] S.C.J. No. 27](#), [1997 CarswellOnt 244](#).

**Statutes cited:**

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*Child and Family Services Act*, R.S.O. 1990, c. C-11 [as amended], subsection 72(1), subsection 72(4) and subsection 72(5).

*Criminal Code*, [R.S.C. 1985, c. C-46](#) [as amended], subsection 153(1).

## Counsel

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Mark A. Czerkowski for the Crown

Ian J. Fellows for the defendant

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### G.M. HORNBLOWER J. (orally)

1 At the completion of the Crown's case, the defence moved for a non-suit with respect to the charge against Mr. Kaija.

2 Peter Kaija is employed as a teacher with the Lambton Kent District School Board. For a number of years, he has been assigned to St. Clair High School as a phys-ed teacher. One of the extra-curricular activities at that school is the senior boys' basketball team - the St. Clair Colts and Mr. Kaija is the coach of that team.

3 For the past few years, Mr. Kaija has been involved as the director of a group known as the St. Clair Mini-Colts. This is a basketball program for elementary aged schoolboys and it appears that the program is available to any boy who is of that age group, regardless of which elementary school he attends and also regardless of which high school he may ultimately attend. This program has been described as a feeder program for the various basketball teams at the high school level. There are several coaches involved in the program; among them was a coach by the name of Jim Miller.

4 On the weekend of 20 February 2005, the St. Clair Mini-Colts travelled to Peterborough for a basketball tournament. When the team returned home that Sunday, one of the boys disclosed to his mother that Mr. Miller had sexually assaulted another of the boys and was also seen to be masturbating in his bed. This information was passed on to Mr. Kaija that evening by the mother of the boy who witnessed the sexual assault. Over the next several days, Mr. Kaija and the parents were involved in several meetings to discuss the allegation.

5 Mr. Kaija was ultimately charged with failing to report the information he received regarding the sexual assault to a children's aid society, as required under subsection 72(4) of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended. The essence of the allegation against him is that, in the course of his professional duties as a teacher, he received information that gave him reasonable grounds to suspect that a child had been sexually assaulted and that he failed to report that suspicion to a children's aid society.

6 At the completion of the Crown's case, the defence moved for a non-suit. Two grounds are advanced. The first is that there is no evidence that Mr. Kaija did not report his suspicion to a children's aid society. The second is that there is no evidence to establish that the information came to him in his capacity as a teacher in the course of exercising his professional duties.

7 Subsection 72(1) of the *Child and Family Services Act* imposes a duty on a person who has reasonable grounds to suspect that a child had been sexually molested, to report that suspicion forthwith to a society. As a result of the operation of subsection 72(1), subsection 72(4) and subsection 72(5), a teacher who does not report a suspicion that is based on information obtained in the course of his or her professional duties, is guilty of an offence.

8 The test at this stage of the proceedings is the same as that for committal on a preliminary hearing - is there any evidence upon which a properly instructed jury, acting reasonably, could convict? In assessing the evidence at this stage, a court is entitled to look at all of the evidence without weighing it, and may draw any reasonable inferences from that evidence.

**9** Turning to the first ground, there is no direct evidence that Mr. Kaija reported his suspicion to a society. Although a representative of the Sarnia-Lambton Children's Aid Society testified that Mr. Kaija had made no report to that agency, she could not speak on behalf of every society in Ontario. The obligation is to report to a society - and not necessarily the one where the disclosure was made, where the suspicion arose or where the incident giving rise to the suspicion is supposed to have occurred. One cannot draw an inference that the failure to report to the Sarnia-Lambton Children's Aid Society means that no report was made to any society.

**10** There is evidence that Mr. Kaija did not want to involve the police. At a meeting with the parents, he made it clear that, if the police became involved, he would disband the team. Although he did not specifically mention the children's aid society, I believe that, under the circumstances, a jury could reasonably infer from his reluctance to involve the police that he did not want any authority involved in the matter. He had, for all intents and purposes dealt with the matter on his own by discharging Mr. Miller from any further responsibilities and by agreeing to take over the coaching duties. It is a reasonable inference that he had done all that he had intended to do by that limited course of action. This being a reasonable inference that a properly instructed jury could draw from this body of evidence, the first argument must fail.

**11** The second ground advanced is that there is no evidence that the information regarding the sexual abuse, was obtained in the course of Mr. Kaija's professional duties.

**12** On behalf of Mr. Kaija, it is argued that, at all times in his dealings with the St. Clair Mini-Colts, he was a volunteer who happens to be a teacher. His involvement with the Mini-Colts was in no way connected with his discharge of his professional duties. Reliance for these conclusions is placed primarily on the evidence of Mr. Keane, the principal of St. Clair High School, and the person who was most directly involved in ensuring that Mr. Kaija discharged his professional duties. Mr. Keane's evidence was that the existence and operation of the St. Clair Mini-Colts formed no part of Mr. Kaija's professional responsibilities. The following factors were used to substantiate this position:

1. Unlike the St. Clair Colts, a team run by the high school with students from that school, to which Mr. Keane, as principal was ultimately responsible, the Mini-Colts are a non-school organization for which Mr. Keane had no responsibility.
2. As principal, Mr. Keane had responsibility to assign teaching duties to Mr. Kaija. He had not assigned any duties to Mr. Kaija with respect to the Mini-Colts.
3. Mr. Kaija's teaching evaluation had nothing to do with his activities with the Mini-Colts.
4. Neither Mr. Keane, nor anyone else with the Board of Education had any administrative responsibilities for overseeing the Mini-Colts.
5. The children involved with the Mini-Colts were all elementary aged students and Mr. Kaija, a secondary school teacher, had no teaching duties with respect to elementary students. In this regard, I would make this observation, which flows implicitly from Mr. Keane's evidence. None of the children involved were affiliated with any particular school. It was, as he said, open to students from a wide variety of areas. That would include students from the public school system, the separate school system, any private school, as well as any child who was home schooled. Mr. Kaija's only professional duties were those that flowed from his employment with the Lambton-Kent School Board.
6. Mr. Kaija's involvement with the Mini-Colts was done in his spare time.
7. Mr. Kaija could not discontinue his teaching duties without consulting Mr. Keane; however, he was free to discontinue his involvement with the Mini-Colts at any time.

**13** Given all of these factors, it is argued that Mr. Kaija's involvement with the Mini-Colts was completely separate from and beyond the scope of professional duties.

**14** The main thrust of the Crown's argument is that the operation of the Mini-Colts had the appearance of being an undertaking sanctioned by the school board and thus it fell within the scope of Mr. **Kaija's** professional duties. That was certainly the perception of some of the parents whose children were involved in the program. Among the factors relied upon by the Crown to support a finding consistent with that argument are the following:

1. Enrolment in the program took place at St. Clair High School.
2. The contact telephone number for Mr. **Kaija** was the high school's phone number.
3. The name of the high school team was strikingly similar to the name of Mr. **Kaija's** team.
4. The team uniforms - that is the high school team and the Mini-Colts - were identical.
5. Practices were held at the high school and there was no fee paid by the Mini-Colts for the use of the school.
6. The Mini-Colts were a feeder team for the St. Clair High School boys' basketball team.
7. Mr. **Kaija** was the coach of the senior boys' basketball team and St. Clair High School.
8. A bus for use by students of St. Clair High School was available for use by the Mini-Colts.
9. The parents meeting after the disclosure of the sexual assault was held at St. Clair High School.

**15** Whether the perception that the Mini-Colts program was sanctioned by the school board and that Mr. **Kaija's** involvement with the team was part of his professional duties is a reasonable one or not, that perception does not create a reality that Mr. **Kaija** was in fact acting in the course of his professional duties while involved with the Mini-Colts. The evidence of Mr. Keane makes it clear that Mr. **Kaija's** involvement with the Mini-Colts was completely outside the scope of his professional duties. It is the scope of those professional duties that is the key to the imposition of a duty to report, and a scope of those duties must be based on reality and not on perception.

**16** Beyond the existence of the various factors I have just noted upon which the Crown relies to show that the Mini-Colts fell within Mr. **Kaija's** professional duties, the Crown also urges a liberal and expansive definition of the words "in the course of his or her professional duties". A number of cases are relied upon in support of that argument for such an interpretation. The Crown's argument, simply put, is that these cases draw no real distinction between a teacher's on-duty and off-duty activities. They **all** fall within the scope of a teacher's professional duties. In other words, a person who is employed as a teacher is a teacher and within the scope of his or her professional duties, 24 hours a day, seven days a week, 52 weeks a year, each and every year from the date of hire until the date of retirement or other termination of employment. Such a proposition is the logical extension of the Crown's argument, but it is not the law and none of the cases relied upon by the Crown stand for the proposition advanced by the Crown - at least on my reading of those cases.

**17** Several cases were cited that deal with the ability of school boards to discipline teachers for activities that occur while a teacher is off duty. Among the cases cited are the *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487, 208 N.R. 245, 98 O.A.C. 241, 144 D.L.R. (4th) 385, 44 Admin. L.R. (2d) 1, 25 C.C.E.L. (2d) 153, 1997 CanLII 378, [1997] S.C.J. No. 27, 1997 CarswellOnt 244 and *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 195 N.R. 81, 171 N.B.R. (2d) 321, 437 A.P.R. 321, 133 D.L.R. (4th) 1, 35 C.R.R. (2d) 1, 37 Admin. L.R. (2d) 131, 1996 CanLII 237, [1996] S.C.J. No. 40, 1996 CarswellNB 125.

**18** In both cases, the Supreme Court of Canada upheld the ability of school boards to discipline teachers for conduct that occurred while they were off duty. In *Ross v. New Brunswick School District No. 15*, Justice Gerard V. La Forest said this:

[44] ... The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for

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the educational message and because of the community position they occupy, they are not able to choose what hat they will wear on what occasion; teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty.

This same principle was adopted in the case of *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*.

**19** Recognizing that both of these cases were dealing with the ability of school boards to discipline teachers for off-duty activities, the principle that I take from these cases is that, because of the position teachers hold in our society, they are still seen as teachers even when off duty and accordingly, even conduct outside the school setting while off duty is conduct that can be the basis for discipline proceedings. What these cases do **not** hold is that, because off-duty conduct may be the subject of discipline proceedings, that off-duty conduct falls within the scope of a teacher's professional duties.

**20** The Crown also relies upon the case of *R. v. Audet*, [1996] 2 S.C.R. 171, 197 N.R. 172, 175 N.B.R. (2d) 81, 446 A.P.R. 81, 135 D.L.R. (4th) 20, 106 C.C.C. (3d) 481, 48 C.R. (4th) 1, 1996 CanLII 198, [1996] S.C.J. No. 61, 1996 CarswellNB 259. Audet had been charged with an offence under subsection 153(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [as amended]. Audet was a teacher. Approximately two weeks after the end of the school year, he was sexually involved with a person who had been a student of his in that previous school year and who was likely to be a student of his in the coming school year. The court found that, in these unique circumstances, Audet was still in a position of trust towards that person, notwithstanding that his teaching duties were, at the time, at an end for the summer. The case turned on the meaning of the phrase "position of trust". There is a significant difference between being in a "position of trust" and being or acting "in the course of his or her professional duties". With respect to the interaction with children as part of a normal school day, a teacher would necessarily be found to be both in a position of trust as well as acting in the course of his or her professional duties. Clearly, however, those terms are not interchangeable.

**21** In *R. v. Audet*, with the school year at an end and all of his teaching duties completed, he could not have been seen to be acting in the course of his professional duties. However, because of the circumstances - namely the school year having just ended and the teacher-and-student relationship that had existed and would likely exist again the coming school year - the court was able to find that the trust relationship remained in existence.

**22** What I take from this case is that the definition or requirements for being found to be acting in the course of one's professional duties is much narrower than the definition or requirements for being found to be in a position of trust. If the obligation to report imposed by subsection 72(5) of the *Child and Family Services Act* was based on being in a position of trust with respect to a child, the obligation would be much more all encompassing. But, the *Child and Family Services Act* required that the person upon whom the obligation is imposed be a person, in this case a teacher, who is "in the course of his or her professional duties".

**23** If the intent of the legislature was to impose a duty on a teacher to report any information that comes to his or her attention that raises a suspicion of child abuse, regardless of the circumstances, the words "in the course of his or her professional duties" would not have been necessary. Those words are part of the requirement for a reason and I can only conclude that their purpose is to narrow the circumstances under which a person, whose profession happens to be a teacher, is obligated to report suspected abuse.

**24** Given that understanding of the meaning of the words "in the course of his or her professional duties", there is no evidence before me that a properly instructed jury acting reasonably could find that Mr. **Kaija** was acting in the course of his professional duties when the information came to his attention. There being no evidence, the motion for a non-suit must succeed. The application is granted and the charge is dismissed.