

[2007] O.J. No. 5324 | 77 W.C.B. (2d) 714 | 2007 ONCA 906 | 233 O.A.C. 105

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

(14 paras.)

## Case Summary

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**Family law — Child protection — Offences and penalties — Failure to report abuse — Application by Crown for leave to appeal from dismissal of its appeal from accused's acquittal for failing to report suspicion of sexual abuse dismissed — Accused was gym teacher and volunteer director of basketball program for children — Accused learned basketball coach had touched child for sexual purpose — Accused fired coach, met with parents but did not report alleged assault — Accused's duties as director were voluntary and not part of duties as teacher — Finding that information concerning alleged assault was not received by accused while in course of his professional duties was not one of pure law and interpretation of statute.**

**Criminal law — Appeals — Leave to — Application by Crown for leave to appeal from dismissal of its appeal from accused's acquittal for failing to report suspicion of sexual abuse dismissed — Accused was gym teacher and volunteer director of basketball program for children — Accused learned basketball coach had touched child for sexual purpose — Accused fired coach, met with parents but did not report alleged assault — Accused's duties as director were voluntary and not part of duties as teacher — Finding that information concerning alleged assault was not received by accused while in course of his professional duties was not one of pure law and interpretation of statute.**

## Statutes, Regulations and Rules Cited:

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Child and Family Services Act, s. 72(4)

Provincial Offences Act

### Appeal From:

On motion for leave to appeal pursuant to section 131 of the *Provincial Offences Act* from the judgment of Justice Edward W. Ducharme of the Superior Court of Justice dated June 1, 2007 dismissing an appeal from the judgment

of Justice Mark G. Hornblower dated April 28, 2006.

## Counsel

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Megan Ward for the applicant.

Ian J. Fellows and Ania K. Zbyszewska for the respondent.

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### ENDORSEMENT

#### **J.L. MacFARLAND J.A.**

1 The Crown seeks leave to appeal from the judgment of E. Ducharme J. dismissing an appeal from the judgment of Hornblower J. acquitting the respondent on a charge of Failure to Report Suspicion of Sexual Abuse contrary to s. 72(4) of the *Child and Family Services Act*.

2 Section 72(4) of the *Child and Family Services Act* provides:

- (4) A person referred to in subsection (5) is guilty of an offence if,
  - (a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and
  - (b) the information on which it was based was obtained in the course of his or her professional or official duties.

3 The respondent is a gym teacher at St. Clair Secondary School in Sarnia. His duties include coaching the school's basketball team, the St. Clair Colts.

4 The respondent is also the director of a basketball program for elementary school-aged children in the community. This program operates out of the St. Clair Secondary School (SCSS). The team is known as the St. Clair Mini-Colts, the team uniforms are identical to those of the SCSS team, rent for the use of the SCSS facilities, if charged, is minimal and the school bus is available for the team's use.

5 The coach of the St. Clair Mini-Colts was Jim Miller. In February, 2005 Mr. Miller took the team to Peterborough for the weekend for an "away" game. At the end of that weekend, the respondent learned that a Mini-Colt team member had told his parents that Mr. Miller had sexually touched another boy on the trip.

6 In response to the receipt of this information, the respondent fired the coach and met with the parents of team members. He told the parents that if the police became involved he would not take charge of the team and there would be "no more basketball." He did not report his suspicion about the alleged assault and these charges arose as the result.

7 The sole issue, as it has evolved, is whether when he received the information, the respondent was acting in the course and scope of his employment. Subsection (5) of section 74 lists teachers as one of the persons obliged to report any suspicion of a risk that a child may be or have been sexually assaulted.

8 The Crown argues that the issue here raised is a pure question of law and that it is essential in the public interest that leave be granted to appeal. It is argued that the judges below erred in interpreting the Act literally whereas what is required is a more expansive purposive interpretation and one that accords with purpose of the statute:

... to promote the best interests, protection and well-being of children, who, due to their age are among the most vulnerable members of society.

In its factum, the Crown argues:

The legislation, by making every person obliged to report suspected abuse but only penalizing certain professionals for failing to do so, intended to hold these professionals to a higher standard.

And given that teachers play a key role in detecting and reporting suspected abuse in situations such as the one giving rise to these charges - where a professional acts at the periphery of his professional duties, the Act must be interpreted in such a way as to err on the side of the inclusiveness so that more children are protected.

**9** What is clear, is that the legislators intended that it would only be an offence for teachers to fail to report when information comes to them in the course of their professional duties. Otherwise, they are to be treated like other individuals who, while obliged to report suspected risk of sexual abuse of a child, do not commit an offence for failing to do so.

**10** Here, the respondent's duties as director of the Mini-Colts was entirely voluntary and no part of his duties as a teacher at SCSS. It was in essence an act of community service and although similar to his teaching duties at SCSS, in the sense of his coaching a basketball team, was not part of those duties. Indeed it is not clear from the record what the respondent's precise role with the Mini-Colts was. He is described as a "Director". He was not on the Peterborough trip and Jim Miller was the coach of the team at the relevant time.

**11** The trial judge found that the information concerning the possible sexual assault was not received by the respondent while in the course of his professional duties. I am not persuaded the finding was one of pure law and the interpretation of the statute. There seems to be no dispute as to the meaning of the language of the statute but rather the application of it to the particular facts - a question of mixed fact and law.

**12** The Crown has not persuaded me that it is "essential in the public interest" that leave be granted. There are no conflicting cases presented and the section has been in force for some time. There seems to be no particular difficulty in the interpretation of this section.

**13** The Crown's submission that the Divisional Court's decision in *Police Complaints Commissioner v. Dunlop (1995)*, [26 O.R. \(3d\) 582](#) is a conflicting decision is without merit and is on the facts clearly distinguishable.

**14** The onus for leave to appeal under the *Provincial Offences Act* is a high one. In my view, the Crown has failed to meet that onus here. The application is dismissed.

J.L. MacFARLAND J.A.

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