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Ottawa Court File #873/95

ONTARIO' COURT (GENERAL DIVISION)
(DIVISIONAL COURT)

SOUTHEY, MCRAE AND DESMARAIS JJ.

| | | |
|--------------------------------|---|----------------------------|
| B E T W E E N: |) | |
| |) | |
| POLICE COMPLAINTS COMMISSIONER |) | |
| |) | |
| Plaintiff/ |) | <u>W.J. Manuel</u> for the |
| (Appellant) |) | plaintiff |
| |) | |
| - and - |) | |
| |) | |
| POLICE CONSTABLE PERRY DUNLOP |) | |
| |) | |
| Defendant/ |) | <u>Al O'Brien</u> and |
| (Respondent) |) | <u>Steve Welchner</u> |
| |) | for the defendant |
| |) | |
| |) | |
| |) | Heard at Ottawa, |
| |) | Nov. 23, 1995 |
| |) | |

McRAE J.

This is an appeal by the Police Complaints Commissioner from the decision of a Board of Inquiry to stay misconduct proceedings against the respondent, a constable with the Cornwall Police Service.

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The Facts:

Constable Dunlop is an 11 year veteran police officer with an impeccable record of service.

On September 23, 1993, he learned that a sexual assault complaint had been made against Father Charles MacDonald and against a probation officer Ken Séguin. The complainant, identified as D.S., is now an adult but the complaint related to incidents which allegedly occurred when he was a child.

Constable Dunlop was not the officer in charge of the investigation into these complaints. He was with the Drug Enforcement Squad. However, he was present and on duty in the police station when the allegations were discussed by other officers. He also heard from other officers that the investigation had been terminated because the local Roman Catholic Archdiocese had made a financial settlement with D.S. and D.S. was no longer interested in proceeding with charges.

Const. Dunlop knew Father MacDonald well. He was a member of Father MacDonald's parish. Father MacDonald had presided at the officer's wedding and had baptized his eldest daughter.

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Having read the statement given by D.S., Const. Dunlop became concerned about the safety of other children in light of the fact that the prosecution was not continuing. He obtained a photocopy of the statement from the officer in charge of the investigation and on September 25, 1993, he reported the allegations to Mr. Richard Abell, Executive Director of the local Children's Aid Society. On September 26, 1993, as a result of a request from Mr. Abell, Const. Dunlop brought the statement to Mr. Abell's home where he showed it to him, but did not leave a copy with Mr. Abell.

On September 29, 1993, S/Sgt. Brunet advised Const. Dunlop that the police investigation was at an end and asked Const. Dunlop to return any copies of the statement taken from D.S.

On September 30, 1993, Mr. Abell asked for a copy of the statement of D.S. That same day Const. Dunlop complied.

A public complaint against Const. Dunlop was made by D.S. By notice of referral dated May 12, 1994, the Chief of Police of Cornwall Police Service, ordered that part of the complaint be heard by a Board of Inquiry pursuant to Part VI of the *Police Services Act*, R.S.O. 1990, c. p. 15.

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The misconduct alleged is as follows:

It is alleged that you are guilty of misconduct contrary to Section 56 of the *Police Services Act* 1990.

In that you did act in a disorderly manner, or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Police Force, in that on or about the 30th day of September, 1993, you did provide a copy of a statement to Mr. Richard Abell, a representative of the Children's Aid Society, which statement had been provided by D.S. during a criminal investigation conducted by the Cornwall Police Service, and did thereby commit the offence of discreditable conduct contrary to Section 1(a)(i) of the *Schedule Code of Offences* described in Regulation 791 of the *Police Act*, R.S.O. 1980 as amended, which continues in force pursuant to Section 15 of the *Interpretation Act*, R.S.O. 1990.

And further that you did on or about the 30th day of September, 1993, divulge a matter which it was your duty to keep secret, namely, you did provide a copy of a statement to Mr. Richard Abell, a representative of the Children's Aid Society, which statement had been obtained from D.S. during the course of a criminal investigation conducted by the Cornwall Police Service, and did thereby commit the offence of breach of confidence contrary to Section 1(e)(i) of the *Schedule Code of Offences* described in Regulation 791 of the *Police Act*, R.S.O. 1980, as amended which continues in force pursuant to Section 15 of the *Interpretation Act*, R.S.O. 1990.

And further that you did on or about the 30th day of September, 1993, without proper authority, show to Mr. Richard Abell, a representative of the Children's Aide Society being a person who is not a member of the Cornwall Police Service, a

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statement obtained from D.S., which statement had been obtained during the course of a criminal investigation conducted by the Cornwall Police Service, and did thereby commit the offence of breach of confidence contrary to Section 1(e)(iv) of the *Schedule Code of Offences* described in Regulation 791 of the *Police Act, R.S.O. 1980*, as amended which continues in force pursuant to Section 15 of the *Interpretation Act, R.S.O. 1990*.

Const. Dunlop brought a motion to stay the proceedings which was argued September 13, 1994. On January 31, 1995, the Board rendered its decision ordering a stay.

It is from that decision that the Police Complaints Commissioner appeals.

The Issues:

The Board ordered a stay of the prosecution of Const. Dunlop because of the operation of s. 72 of the *Child and Family Services Act, R.S.O. 1990, c. 11*, which provides:

72.(1) In this section and in sections 73, 74 and 75, "to suffer abuse", when used in reference to a child, means to be in need of protection within the meaning of clause 37(2)(a), (c), (e), (f) or (h).

(2) A person who believes on reasonable grounds that a child is or may be in need of protection

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shall forthwith report the belief and the information upon which it is based to a society.

(3) Despite the provisions of any other Act, a person referred to in subsection (4) who, in the course of his or her professional or official duties, has reasonable grounds to suspect that a child is or may be suffering or may have suffered abuse shall forthwith report the suspicion and the information on which it is based to a society.

(4) Subsection (3) applies to every person who performs professional or official duties with respect to a child, including,

- (a) a health care professional, including a physician, nurse, dentist, pharmacist and psychologist;
- (b) a teacher, school principal, social worker, family counsellor, priest, rabbi, clergyman, operator or employee of a day nursery and youth and recreation worker;
- (c) a peace officer and a coroner;
- (d) a solicitor; and
- (e) a service provider and an employee of a service provider.

(5) In clause (4)(b), "youth and recreation worker" does not include a volunteer.

(6) A society that obtains information that a child in its care and custody is or may be suffering or may have suffered abuse shall forthwith report the information to a Director.

(7) This section applies although the information reported may be confidential or

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privileged, and no action for making the report shall be instituted against a person who acts in accordance with subsection (2) or (3) unless the person acts maliciously or without reasonable grounds for the belief or suspicion, as the case may be.

(8) Nothing in this section abrogates any privilege that may exist between a solicitor and his or her client. 1984. c. 55. s. 68.

Counsel for the appellant argued that Const. Dunlop was not entitled to the protection provided to informants by s. 72(7) for several reasons. Most of those reasons were not strenuously pursued by him and can be quickly dealt with.

In my view, Const. Dunlop was an active duty police officer who gained information in the course of his "professional or official duties" - it does not matter that he was not the officer specifically assigned to the case - all police officers have a primary duty to prevent the commission of crime. Nor does it matter that the complainant D.S. was no longer a child as he was at the time of the alleged abuse.

Const. Dunlop in September 1993 had "reasonable grounds to suspect that a child --- may have suffered abuse". He had a duty, therefore, to "forthwith report the suspicion and information on which it is based to a society."

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The more difficult issue ably argued and strongly urged upon us by counsel for the appellant is whether a prosecution under the *Police Services Act* is intended to be prohibited by s. 72(7).

The subsection bears repeating:

(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with subsection (2) or (3) unless the person acts maliciously or without reasonable grounds for the belief or suspicion, as the case may be.

There is no suggestion that Const. Dunlop acted maliciously or that he acted without reasonable grounds.

Counsel for the Commissioner suggested that "action" refers exclusively to "civil proceeding", as defined in the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 1(a), and not to disciplinary proceedings under the *Police Services Act*. He submitted that the Board should not have granted a stay, but should have proceeded to hear the complaints particularly on the facts of this case. Here the officer handed over to the C.A.S. a copy of the complainant's statement the day following a request from Sgt. Brunet that he return to him any copy he had in his possession.

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I disagree. In my opinion, a prosecution under the *Police Services Act* is precisely the type of action intended to be prohibited by s. 72(7).

Section 1 of the *Child and Family Services Act* provides:

1. The purposes of this Act are.
 - (a) as a paramount objective, to promote the best interests, protection and wellbeing of children.

Section 72(7) should be interpreted broadly to best achieve this paramount objective of the Act.

Section 72(7) provides for protection to police, medical, and other professionals who are impressed with the duty to disclose abuse. The very wording of the subsection makes this clear: "This section applies although the information reported may be confidential or privileged. ...".

To find otherwise would place a police officer, or other persons referred to in s-s.(4) in an impossible position. Such persons would be subject to prosecution under the *Child and Family Services Act* and liable to a fine of up to \$1,000 if they fail to report abuse. If on the other hand they do report a suspected case of abuse they would be

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subject to professional disciplinary prosecution.

I am of the view that the duty imposed by s. 72 is paramount. Sub-section (3) begins "Despite the provisions of any other Act ..." To treat the duty of disclosure as subject to orders of a superior officer would be contrary to the intention of s-s. (7) and would defeat the paramount purpose of the *Child and Family Services Act*.

This conclusion, in my view, is consistent with the provisions of s. 1(1) of the *Interpretation Act*, R.S.O. 1990, c. I.11, which provides:

1.(1) The provisions of this Act apply to every Act of the Legislature contained in these Revised Statutes or here-after passed, except in so far as any such provision,

- (a) is inconsistent with the intent or object of the Act;
- (b) would give to a word, expression or provision of the Act an interpretation inconsistent with the context; or
- (c) is in the Act declared not applicable thereto.

Const. Dunlop was asked on September 29, 1993, to turn in any copy of D.S.'s statement in his possession. He refused to comply with this request but rather gave the C.A.S. a copy on September 30. His refusal to

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comply did not avoid the protection to which he was entitled under s-s.
(7). He was under a duty pursuant to s-s. (3) to report the abuse "and
the information on which it is based" to the C.A.S.

For these reasons the appeal is dismissed with costs, hereby
fixed at \$2,500.

D. D. [Signature]
1 agree J. B. [Signature]
2 agree R. B. [Signature]

RELEASED: *Dec. 7/95*