2001 **SFH # C10868**

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN: **MINISTER OF COMMUNITY SERVICES - APPLICANT**

- and -

K. F. - RESPONDENT

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on June 11, 2008.

DECISION
[Cite as MCS v. K.F., 2002 NSSF 28]

HEARD BEFORE: The Honourable Justice Deborah Gass
Justice of the Supreme Court (Family Division)

PLACE HEARD: Supreme Court (Family Division)
P.O.Box 8988, Station "A"
3380 Devonshire Avenue
Halifax, NS B3K 5M6

HEARING DATE: August 29, 2001

DECISION: May 31, 2002

COUNSEL: Deborah Conrad, Counsel for the Minister of Community Services

Publishers of this case please take note that s. 94 (1) of the Children and Family Services Act applies and may require editing of this judgment or its heading before publication.

Section 94 (1) provides:

> "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child."

This is an in camera hearing. Nothing which identifies any party to this application or any witness shall be published.

This is the application of the Minister of Community Services made the 16th day of March, 2001 for a finding that the Respondent, K. F., has abused children as described in Section 62(b) of the *Children and Family Services Act*.

Summary of Facts:

K. F., now 55, was employed at the [...] Centre in [...] from 1968 to 1988 as a counsellor, working primarily with boys at the school. In 1966 he married L.M.F. and as of August 2001 they had been married almost 35 years.

K. F. is alleged to have sexually assaulted a number of female students at the Centre and in particular N.B. and N.M. N.M. was sent to the Centre in 1982 at the age of 14. N.B. was sent to the Centre in 1985 at the age of 15. Both of these students were described as "slow learners". As part of his role of counsellor, K.F. would take students from the Centre to outside activities, including swimming in the summer and hockey games or coasting in the winter. In the course of this, he befriended many female students. It is alleged that he was physically affectionate (kissing and hugging) and that this conduct moved into sexual intercourse with some of them.

In February of 1987, as a result of some reports of inappropriate behaviour, the superintendent of the [...] Centre wrote a letter of caution to K.F., describing his actions toward the female students as "totally unacceptable".

In September 1987 he was fired from his position. As a result of grievance proceedings, he was permitted to resign in early 1988 before the actual hearing of the matter.

In 1995 he was charged with indecent assault on another student, J.M.D. and was subsequently acquitted.

As a result of investigations through "Operation Hope", K.F. was again interviewed by the police in October of 2000.

K.F. describes any physical contact he had with his students as being gestures of comfort and praise. He admits that he embraced the girls in public and that he maintained contact with them outside the school year, which was not uncommon.

K.F. describes his community involvement as being a volunteer in the [...], canvassing for cystic fibrosis, being involved in animal welfare issues, volunteering for the help line, working part time at the golf course and refereeing occasional [...] games. He has not been involved with, or has no interest in Big Brothers or Block Parent Programs.

The matter came to the Court on this application as a result of the Department of Community Services participating in the "Operation Hope" project. Where circumstances were investigated and there was not enough evidence to proceed with a criminal trial, it was the duty of the Community Services representatives to convene risk conferences to determine whether or not there was sufficient basis to seek a finding that a person had committed abuse and was a current risk to children. The current risk that was concluded to exist by the investigating body was that as a referee of [...] games he was in a position of authority and had the opportunity to be in contact with young people. As well in his employment at the [...], he was working in a situation where young people would be coming and going.

K.F. denied his involvement in any sexual relationship with any of the girls, and his wife was supportive of him throughout the entire process. She was well aware of all the investigations and all of the material that was provided in the course of these investigations. She supported him throughout the trial when he was accused of indecent assault on J.D. pursuant to Section 149 of the *Criminal Code*. The result of that trial was that he was found not guilty. She knew many of the students, as she participated in activities with them. She described the two young women who testified in this proceeding as special needs children who were quite bright but had some behavioural problems.

N.B.

N.B. was born [in 1969] testified that she was sexually abused by her father at the age of 12 and as well by her uncle, who was charged and acquitted in 1995. She also advised that she went on the pill at age 12.

She says she entered the [...] Centre in September of 1985 as the result of problems at home, and began to have a friendly relationship with K.F. The relationship then progressed to kissing and hugging, and eventually moved into a sexual relationship. It is unclear as to when the sexual aspect of their relationship began, as she spoke of sexual relationships with others when she was 15 or 16. It appears that all of the conduct was consensual in nature. Considering that she turned 16 on October 26, 1985, any conduct of a sexual nature after that date would not constitute “child abuse” within the meaning of the *Children and Family Services Act*.

In May or June of 1987 there was an incident in which N.B. described hugging and kissing with K.F. in the gym behind the stage. This was relating to N.B. asking K.F. to sign her year book. They were seen embracing at that time. K.F. was interviewed by the police in September and November of 1987 as a result of allegations made against him and he indicated that he was signing her high school year book at the end of the school year and he was embracing her as a gesture of affection.

Before the school closing in June of 1987, N.B. was made aware that K.F. would be attending a [...] convention in [name of place removed] at the end of June and plans were made for her to meet him at his hotel. According to N.B. she went to his hotel on more than one occasion and had sexual intercourse with him.

Clearly in 1987 when it appears that there may have been a sexual relationship, N.B. was 17 years of age.

N.M.

N.M. was born [in1968] and went to the [...] centre at the age of 14 in February of 1982. She remained there for four years and was 18 when she graduated. She had a friendly relationship with K.F. in which he was very kind to her and gave her attention. She says they did not engage in any activity of a sexual

nature until she had reached the age of 16. Prior to that, there was the friendly exchange of hugs at the school. The relationship was never forced or threatened and was entirely consensual. She had had sexual relationships with other people before she had a relationship with K.F.

In 1983 and 1984, N.M. was described as a young person who was physically assertive, hugging various male employees. The staff was attempting to deter her from this behaviour.

She testified that her relationship with K.F. became sexual in the summer of 1984.

It is clear from the evidence that at the [...] Centre hugs and gestures of affection were common. Words of affection were commonly used as well. It is very unclear from the evidence as to whether or not anything of a sexual nature occurred with either of the individuals who testified in this proceeding before they turned 16.

The Law:

The law governing the Child Abuse Register is set out in Section 63 to 66 of the *Children and Family Services Act*.

> 63(1) The Minister shall establish and maintain a Child Abuse Register.
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> (2) The Minister shall enter the name of a person and such information as is prescribed by the regulations in the Child Abuse Register where
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> (a) the court finds that a child is in need of protective services in respect of the person within the meaning of clause (a) or (c) of subsection (2) of Section 22;
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> (b) the person is convicted of an offence against a child pursuant to the *Criminal Code* (Canada) as prescribed in the regulations; or
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> (c) the court makes a finding pursuant to subsection (3).

(3) The Minister or an agency may apply to the court, upon notice to the person whose name is intended to be entered in the Child Abuse Register, for a finding that, on the balance of probabilities, the person has abused a child.

(4) A hearing pursuant to subsection (3) shall be held in camera except the court may permit any person to be present if the court considers it appropriate.

64(1) A person whose name is entered in the Child Abuse Register shall be given written notice of registration in the form prescribed by the regulations.

(2) A person whose name is entered on the Child Abuse Register may apply to the court at any time to have the person's name removed from the Register and, if the court is satisfied by the person that the person does not pose a risk to children, the court shall order that the person's name be removed from the Register.

65. A decision of the court pursuant to subsection (3) of Section 63 or subsection (2) of Section 64 may, within 30 days of the decision, be appealed to the Appeal Division of the Supreme Court and subsection (4) of Section 63 applies *mutatis mutandis* to the hearing of an appeal.

66 (1) The information in the Child Abuse Register is confidential and shall be available only as provided in this Section.

(2) A person whose name is entered in the Child Abuse Register is entitled to inspect the information relating to that person entered in the Register.

(3) With the approval of the Minister, the information in the Child Abuse Register may be

(a) disclosed to an agency, including any corporation, society, federal, provincial, municipal or foreign state, government department, board or agency authorized or mandated to investigate whether or not a child is in need of protective services;

(aa) disclosed to the police by an agency where the police and the agency are conducting a joint child abuse investigation;

> (b) used for the purposes of research as prescribed by the regulations.
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> (4) Upon the receipt of a request in writing from a person as prescribed by the regulations and with the written consent of the person to whom the request relates, the Minister may disclose information in the Child Abuse Register concerning
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> (a) a person applying to adopt a child or to be a foster parent; or
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> (b) a person, including a volunteer, who is or would be caring for or working with children, and the person who receives the information shall treat the information as confidential.
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> 5) Every person who contravenes subsection (4) and every director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation is guilty of an offence and upon summary conviction is liable to a fine of not more than five thousand dollars or imprisonment for a period not exceeding one year or to both.

The purpose of the Child Abuse Register is to assist in the prevention of abuse by having a resource to which certain authorized groups or persons can turn, to determine if a person who may be providing care or services to children is a person who has abused children. Registration of a name comes about in three ways:

1) Where a Court has found a child to be in need of protective services;

2) Where the person has been convicted of an offence against a child pursuant to the Criminal Code (Canada); or

3) Where the Court makes a finding on the balance of probabilities the person has abused a child.

The hearings are “in camera”. The public is absolutely excluded. The Registry itself is confidential and only those designated by the regulations are able to request in writing disclosure from the Registry.

The burden is on the Applicant to prove on a balance of probabilities, that the Respondent has abused a child.

While the burden of proof is a civil burden, I conclude that the standard of proof is elevated in accordance with the seriousness of the allegations and its implications. This is a situation where that standard is higher, although significantly less than proof beyond a reasonable doubt.

In *CAS of Halifax* v. *R.G.*, F.H. C92-17 at p. 4 the Court stated:

> The Court must determine, on a balance of probabilities, whether R.G. committed the alleged offence. It is the civil burden of proof. However, given the gravity of the application and its implications, the standard of proof is considered to be high, but not as high as the standard of proof in criminal cases, where the proof must be beyond a reasonable doubt. This, although the standard is still the civil standard, considering (a) the nature of the allegation and the moral capability attached thereto and (b) the consequences of a finding; that is, publication of the name in the Child Abuse Registry, then the Court must adopt the position that was adopted in *J.L. v. CAS of Halifax v. Attorney General of Nova Scotia*, 44 R.F.L. (2d) 437. Jones, J. A. discusses extensively the burden of proof at pp. 449 to 451, and specifically states that although the civil rule applies, " ... a court must have regard to the gravity of the consequences of the finding." (page 449 to 450) His Lordship goes on to quote Cartwright, J., Laskin, C.J.C., and Lord Dennings. Laskin, C.J.C. in *Continental Insurance Company v. Dalton Cartage Company Limited* [1982 1 S.C.R. 164] refers to "... proof commensurate with the gravity of the allegations ..." Laskin, J. goes on to quote Lord Dennings in *Bater v. Bater* [1952 All E.R. 458, at p. 459.
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> > "It is true by our law there is a higher standard of proof in criminal cases than in civil cases but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond a reasonable doubt but there maybe degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous so ought the proof to be clear, so also in civil cases. The case may be proved by a preponderance of

> probability, but there may be degrees of probability within that standard. The degree depends upon the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court even when it is considering a charge of criminal nature but still it does require a degree of probability which is commensurate with the occasion."

It is significant to note that on an application to remove a person's name from the Child Abuse Register the onus is on the person to prove that she/he does not pose a risk to children. It is interesting to note that the issue of risk to children seems to apply only to applications to remove one's name from the Register, and not to applications to have one's name placed on the register.

"Abuse" is defined in Section 62 of the Act as:

> (a) has suffered physical harm, inflicted by the person or caused by the person's failure to supervise and protect the child adequately;
>
> (b) has been sexually abused by the person or by another person where the person, having the care of the child, knows or should know of the possibility of sexual abuse and fails to protect the child; or
>
> (c) has suffered serious emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour, caused by the intentional conduct of the person.

and "child" is defined in Section 3(1)(e) of the Act as:

> "child" means a person under sixteen years of age unless the context otherwise requires.

The Evidence:

It is important to distinguish what evidence is properly before the Court.

Much of the “evidence” in this application except for that of N.M. and N.B., comes from recordings which were filed by the Applicant in support of the application. These recordings were from the Applicant’s files as case notes and as well material retrieved from the database of the RCMP with respect to this matter.

While it appears that it is settled law that case notes are admissible as “business records” in child protection proceedings, not everything in those documents is equally admissible. Hearsay in case notes has been ruled inadmissible as proof of the alleged facts contained in the statements. Some hearsay may be admissible if certain criteria are met.

Levy, J. in *Family and Children’s Service of Kings v. A.M.S. and S.H.*, July 4, 1997 extensively canvassed the issue of agency case notes and their status as business records in proceedings under the Act.

Substantial material was provided to the Court in this matter relating to allegations with respect to other students at the [...] Centre. Much of the material was gleaned by the RCMP or local police in previous investigations back in 1987, 1995, and more recently in October of 2000. It is impossible for the Respondent, K.F., who was unrepresented in this proceeding, to cross examine on any of that material. In order for the Court to rely on that material, it would have been necessary for the Applicant to present the makers of the various statements to the Court so that they would be available for cross examination. In this case only the evidence relating to N.M. and N.B. can be relied on as proof of the truth of the contents of those statements as they were both present and available for cross examination. The material contained in the Applicant’s notes is relevant to the issue of why the Applicant took the course of action it did: to apply to have K.F.’s name placed on the Child Abuse Register. That information is admissible for that purpose only, but not as proof of the allegation that K.F. in fact abused children. The Court has to question whether the prejudicial effect of these recordings outweighs its probative value. The Court was left to read significant amounts of material which were highly prejudicial in nature, relating to the issue of whether or not on the balance of

probabilities K.F. abused a child. Levy, J. at page 16 of *Family and Children's Service of Kings County v. A.M.S. and S.H.* stated:

> The widespread use of these case notes puts the Respondent (parents) in the virtually impossible position of having to respond to perhaps hundreds of different allegations, never being confident that the one that they might be tempted to ignore won=t strike a chord with the judge.

He goes on to say at page 17:

> In essence I believe it is Section 23 of the *Evidence Act* can be an asset in the pursuit of truth and for an efficient trial, but that there is, as Justice Richards said " a danger of a too broad application ....) of Section 23", a danger to which child protection proceedings as Judge MacDonald and Professor Thompson have noted, are particularly vulnerable.

Thus, while there is considerable material relating to allegations with respect to other female students at the [...] Centre, the Court must be careful to question its admissibility as proof that on a balance of probabilities, K.F. abused a child. The effect of all this material was somewhat counter productive in that it created confusion as to just what activity occurred at what time with respect to the two female students whom K.F. is alleged to have sexually abused. While K.F. denied all allegations of sexual impropriety, I conclude that it is more probable than not that K.F. engaged in inappropriate sexual relationships with N.M. and N.B. It is also more probable than not that these relationships occurred when these young women were 16 or over. While it would appear from the evidence that I have heard and read that K.F. went beyond acceptable boundaries in his relationships with some of the female students at the school, I cannot conclude on a balance of probabilities that his conduct with these two female students constituted sexual abuse of children while they were children within the meaning of the Act.

In the case of N.M. it is abundantly clear that there was no conduct of a sexual nature with N.M. before she turned 16. While it is less clear with N.B., as

there are confusing references by her to incidents that occurred before she turned 16, it is more likely than not, based on the evidence before me, that that relationship became sexual after she turned 16. This finding has nothing to do with the age of consent, or whether the students were intellectually capable of giving their consent even though they were 14 years of age. It merely determines that the Court is not satisfied on a balance of probabilities that these students were children within the meaning of the *Children and Family Services Act* at the time that the alleged events occurred.

There is no judicial authority which addresses and interprets the phrase "... unless the context otherwise requires ..." in the definition of child. That issue was not specifically addressed in this case. While it was argued that these young people were vulnerable by virtue of their intellectual challenges, there was no expert evidence to indicate that the two complainants in this application were individuals whose intellectual age could bring them within the definition of child during the time in which the Court has found that sexual activity was probably occurring. Moreover, the legislation addresses only chronological age, and contemplates by the context, situations where findings were made before the child reached the age of 16, but the proceedings continued beyong the age of 16 as they are able to by virtue of the legislation. This legislation does not govern persons over the age of 16 who may be of an intellectual age of less than 16.

I have concluded on a balance of probabilities that any sexual relationship between K.F. and these two young women, N.B. and N.M. occurred after they reached 16 and therefore the Act does not apply.

On the whole of the admissible evidence before me, I cannot be satisfied that the Applicant has met the burden of proof that K.F. abused children and I am dismissing the application.

Deborah Gass, J.

DG/ng