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IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
[Cite as: A.G.C. v. Nova Scotia (Community Services), 2006 NSFC 17]

BETWEEN: **A. G. C.**
-APPLICANT

AND

MINISTER OF COMMUNITY SERVICES
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: KENTVILLE

DATE HEARD: JUNE 1, 2006

DECISION DATE: JUNE 5, 2006

APPEARANCES: CHRIS MANNING FOR THE APPLICANT
TERRENCE POTTER FOR THE RESPONDENT

DECISION

PUBLISHERS OF THIS CASE TAKE NOTE: Section 94 (1) of the Children and Family Services Act applies and this decision may need to be edited. Section 94 (1) reads:

> **"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 relative of the child."**

By The Court:

A.G.C. has applied, pursuant to section 64 (2) of the Children and Family Services Act, for an order to have his name removed from the Child Abuse Register. The Minister opposes the application. Mr. C. was the only witness called. At the conclusion of the hearing I granted the application and said that a written decision would follow, which this is.

Mr. C.'s name was entered into the Child Abuse Register as a result of his conviction, in June of 1986, for a sexual assault upon his daughter who was approximately 11 years old at the time. He testified that the assault consisted of touching her genital area. He said he was clothed at the time. There is no other information about the offence before me, such as how often this may have occurred or whether there were accompanying aggravating factors. He testified that the assault occurred a year or two before the conviction which would place it in 1984 or 1985, twenty-one or twenty-two years ago.

Mr. C. was a high school teacher at the time of his offence and, as a result of his conviction, he resigned from that position, ahead, one imagines, of a dismissal. He spent three months incarcerated and this was followed by a period of probation, or parole and probation.

In 1991, following the coming into force of the new Children and Family Services Act, his name was renewed in the Child Abuse Register under the new

Act. Section 64 (2), providing for applications to have one's name removed from the Register, reads as follows:

> *Application to remove name*
> ***(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.*

The burden of proof, clearly, is on the Applicant.

He testified that there have been no further charges or convictions. His marriage, problems in which he blames as being a contributing factor in the offence, subsequently dissolved. He has re-married and has remained so for a number of years. He pursued further education, and, with apparent success, a different and responsible line of work in the IT/computer field requiring his travelling extensively out of the country. He received a parole in 1997 for the assault conviction, the body of which document reads in part:

> *AND this pardon is evidence of the fact that the (Parole) Board, after making proper inquiries, was satisfied that (A.G.C.) has remained free of any conviction since completing the sentence and was of good conduct and that the conviction should no longer reflect adversely on his character and, unless it ceases to exist or is subsequently revoked, this pardon vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which (A.G.C.) is, by reason of the conviction, subject by virtue of any Act of Parliament or a regulation thereunder.*

There are, he testified, no children in his home. He has not suffered, nor is he currently suffering, nor is he anticipating that he will suffer any economic consequence or other overt adverse effects of his name being on the Register. There was no indication that he will seek to pursue things now which may have been denied to him by reason of his name being on the Register. He testified that this application is simply attending to "unfinished business" in his life and that he was chafing (my word) from the "labelling" of him that his name being on the Register represents. His demeanour and presentation on the stand gave evidence of the weight that the Registration, and the event that precipitated it, has represented in his life. He indicates that he has taken "all the necessary steps for rehabilitation", that he has "changed (his) way of thinking" and that he believes that he "no longer poses a danger to any child".

Attached to the affidavit of Mr. C. is a letter, dated February 1, 2006, from Dr. Brian Garvey, psychiatrist. There is an issue as to the admissibility of this letter, at least as to the opinions expressed therein. There is also a question, as always, if the opinions are to be admitted into evidence, as to the weight that should be given to them. Counsel for the Minister has maintained from the first appearance that he wasn't satisfied that Dr. Garvey could be regarded as an "expert" capable of giving opinion evidence on the specific issue of the extent of

the risk, if any, that Mr. C. might still pose.

The day before the scheduled hearing, the Minister's counsel faxed a letter to the court, copying counsel opposite. The letter said that as Dr. Garvey had refused to provide a copy of his file notes as had been requested though counsel, (even though Mr. C. himself could consent), that he would be seeking an adjournment and an order for disclosure.

As the hearing itself began I took the Minister's counsel to say that he didn't require the file notes after all as long as it was understood that the admissibility of the contents of the letter was restricted to the fact of the dealings Mr. C. had with the doctor and not the opinions. Mr. C.'s counsel demurred, saying that he was tendering the affidavit and the letter with the intent that the opinions be regarded as admissible. I ruled that I would accept the letter including the opinions and that then it would be, like anything else, a question of weight. I indicated that I would elaborate upon my reasoning in this decision.

In doing so I was thinking of, if not expressly citing, Family Court Rule 10.03. It now appears, on more careful reading, that I had mis-directed myself as to the applicable section. In fact the applicable Rule is 10.02 (3). It reads:

> *"Unless an opposite party has been given a written report of an expert witness not requested by the court, at least five days before the commencement of a hearing, the evidence shall not be admissible without the approval of the court, which may be granted on such*

terms as are just.

I take it from this that if such a report is presented in a timely way, (and this was), it may be admissible...that is, if this letter is a “report” and if Dr. Garvey is an “expert witness”.

I doubt that there needs to be any particular form for a document for it to be a “report”. This one takes the form of a “to whom it may concern” letter. In my opinion it is a ‘report’ in every sense of the word of Dr. Garvey’s dealings with and treatment of Mr. C. and his professional opinions derived from those dealings.

The Minister’s counsel argued that anything less that an assessment consisting of a battery of tests, specifically focussing on one’s propensity to sexually re-offend, and given and interpreted by a professional recognized to have specific expertise in the field, would be insufficient. Any opinion not derived from those full assessments and not from specifically qualified experts would not, in his view, constitute “expert evidence”. Thus, he said, without proof of Dr. Garvey having specific expertise in the realm of sexual offending, and in the absence of any assessment as he defined it, the court should not admit Dr. Garvey’s opinions into evidence and certainly they shouldn’t be relied upon.

I disagree. Firstly, we are here very much in the realm of “soft science” difficult, I believe, to objectively verify. I am not persuaded that the result of these

many assessment tools and the views of those with specific and narrow specialization are inherently superior to the opinions of a psychiatrist licensed to practise as such in Nova Scotia following two years of intensive ‘treatment’, (not ‘counselling’ as the Minister’s counsel termed it). It would seem a bit of a stretch that Dr. Garvey would not have some enhanced capacity, greater certainly than is available to the court, to shed some light on the matter. This is an important issue, to the children of Nova Scotia and to Mr. C., and the court could use some help. That does not mean that I feel obliged to accept his findings but it does mean that it is only prudent to take account of what the man has to say.

There was always the safeguard of requiring the doctor’s presence to be cross-examined. Counsel for the Minister could then have explored his reservations fully. He never did elect to do so. It was only literally on the eve of the trial that the Minister’s counsel indicated to the court he wanted access to Dr. Garvey’s notes and that he needed an adjournment and a disclosure order. By then it had been two months since the parties were first before the court and a hearing date was scheduled and three months or more that the letter had been in his hands. This could have and should have been put to the court long before the eve of the hearing. To abort the hearing at the last minute is unfair to Mr. C..

This issue of Dr. Garvey’s opinion having transgressed the “ultimate issue”

rule was not raised by counsel. That is to say: whether Dr. Garvey gave opinion evidence on the very issue before the court, namely whether Mr. C. “poses a risk” to children. I will confess at this point that I have never fully understood or had mush patience for that rule, if it still is a rule. Neither do I claim to be able to apprehend at what point exactly the line is crossed but probably in family law a day doesn’t go by that we don’t get assessments or reports that do. It is my job, not to be delegated, to decide the ultimate issue, but life is too short to spend it arguing about and parsing assessments and reports for whiffs of perceived trespass.

Mr. C. acknowledged when questioned that subsequent to his being treated extensively by Dr. Garvey that they and their spouses have come to socialize occasionally, including being guests in one another’s home. Dr. Garvey reported that his contact with Mr. C. now is “of a more social nature”. Counsel for the Minister didn’t comment on this but this information raised in my mind the possibility of a bias in Dr. Garvey’s report. That said, I say that I am conscious of this issue but that I am not prepared on that information and nothing more to discount Dr. Garvey’s report.

Dr. Garvey details that he “treated Mr. (C.) intensively, on a weekly or bi-weekly basis for two years” dealing with various factors including a “preoccupation with sexuality in a variety of forms”. Dr. Garvey continues that he

is “satisfied that Mr. (C.) has matured out of his personality difficulties, in a remarkable way, and that he has replaced his original obsession with sexuality for (*sic)* more acceptable adult interests.” He concludes: “I believe that the danger of his relapsing into his former ways of thinking and of behaving is now over, and I would support his application to have his name removed from the register.”

There is no denying that the offence of which Mr. C. was guilty and which led to his name being in the Register was serious and utterly unjustifiable. What mindset could lead someone to do such a thing is difficult to comprehend. That being the case, what would prevent them from repeating it is probably similarly difficult. There is no question that his name belonged in the Registry. But does it still belong there? Does he still “pose a risk to children”?

Mr. C. did not shrink from the enormity of his act and of his problems. He sought help, firstly from the Fundy Mental Health clinic for a year and then from Dr. Garvey and persevered through for two intense years of treatment that Dr. Garvey describes as sometimes “challenging and confrontational to a remarkable degree”. He has received a pardon. He has pursued further education and a different and apparently successful different career. His marital relationship is now stable. He believes and Dr. Garvey believes that he has changed his way of thinking and that the danger of relapse is now over.

I doubt that one can say with one hundred percent certainty of anyone that he or she poses “no risk”, and I trust that the statute does not require absolute certainty lest there be no way to get out of the Register save death. I also want to say that I am acutely aware that one cannot pretend to tell just from watching and listening to a person for an hour or so in court whether he poses a risk. The subtleties and complexities of the human psyche are too opaque for that. One looks, as best as one can at the whole picture: in this case his current circumstances, the history of the intervening years, and the opinion of a qualified professional.

Less evidence was presented than one might have expected or wished for. Nonetheless I accept that Mr. C., at age 56, is not the same man that he was almost half a lifetime ago. He has dealt with his faulty thinking and his personality difficulties that led to the offence. The danger has passed, in fact more than merely passed, rather, it was pro-actively and painfully expunged, staying with what sounds like grueling treatment dealing with unpleasant truths and coming out the other end. He presents as a mature, reflective person with the knowledge of what he was, and the sorrow for what he did, seared into his consciousness forever. He is in command of his thoughts and emotions. He asks to have the ‘Scarlet letter’ removed.

I accept that those factors that led to the offence and that led to him being a risk to children no longer exist. The removal of his name from the Registry would pose no risk to children.

Counsel for Mr. C. will please prepare the order.

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Bob Levy, J.F.C.