

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. A.(B.J.)*, 2024 NSSC 199

**Date:** 20240301

**Docket:** CR No. 510773

**Registry:** Halifax

**Between:**

B.J.A.

Applicant

v.

His Majesty the King

Respondent

**Restriction on Publication of any information that could identify the victim or witnesses: Sections 486.4 486.5 *Criminal Code***

**D E C I S I O N**

**Section 278 CC Application – Stage 1 – *IN CAMERA***

**Judge:** The Honourable Justice James L. Chipman

**Heard:** March 1, 2024, in Halifax, Nova Scotia

**Written Decision:** March 8, 2024

**Counsel:** Christa Thompson, for the Applicant  
Nicholas Comeau, for the Respondent  
Carbo Kwan, for the Complainant  
Tina Kaye, for Record Holder, Homewood Health Centre Inc.  
Nasha Nijhawan and Chloe Jardine, for Record Holder,  
Avalon Sexual Assault Centre  
Tamara Adderley-Rolle, for Record Holder, Nova Scotia  
Health Authority

### **Order restricting publication — sexual offences**

**486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

### **Order restricting publication — victims and witnesses**

**486.5 (1)** Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

**By the Court (orally):**

**INTRODUCTION**

[1] The accused plead not guilty to the two-count indictment which reads:

1. that he, between the 1st day of February, 2010 and the 31st day of March, 2010 at or near Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the Criminal Code.
2. AND FURTHER that he at the same time and place aforesaid, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the Criminal Code.

[2] During the pre-trial conferences counsel advised the Court that an application pursuant to s. 278 of the *Criminal Code*, R.S.C., 1985, c. C-46 was not required. The trial got underway on January 2, 2024 and during cross-examination of the complainant it became apparent that a s. 278 application would indeed be necessary. In the result, the stage one hearing was scheduled for February 5, 2024.

[3] The scheduled date proved to be problematic as a major winter storm caused havoc. Further, during a telephone conference (which went ahead in place of the stage one hearing on that date) the Court inquired about the production of the transcript of the complainant's trial testimony and learned that (other than the Crown) the respondents had not been provided with a transcript. In the result, the hearing was re-scheduled to today's date.

[4] In advance of today's hearing the Court reviewed these materials:

- January 25, 2024 – Notice of Application (Notice), brief and authorities filed by the applicant.
- January 26, 2024 – brief and authorities filed by the Crown.
- January 31, 2024 – brief filed by the complainant.
- February 2, 2024 – letter filed by the Nova Scotia Health Authority (NSHA).
- February 2, 2024 – correspondence filed by Avalon Sexual Assault Centre (Avalon).

- February 23, 2024 – brief filed by Avalon together with an affidavit sworn on the same date by Avalon’s Executive Director, Sarah Rodimon.

[5] Today I heard oral argument on behalf of the applicant, Crown, complainant and Avalon.

#### **GUIDING LAW**

[6] The applicant provided the Court with these eight cases:

1. *R. v. Mills*, [1999] 3 S.C.R. 668
2. *R. v. O’Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)
3. *R. v. Batte* (2000), 145 C.C.C. (3d) 449
4. *R. v. E.W.*, 2020 NSSC 19
5. *R. v. R.R.D.G.*, 2013 NSSC 371
6. *R. v. Martin*, 2010 NSSC 199
7. *R. v. Fones*, [2009] MBQB 65
8. *R. v. A.B.*, 2022 NSPC 19

[7] The Crown also provided *Mills*, along with these seven cases:

1. *R. v. J.J.*, 2022 SCC 28, 471 DLR (4th) 321
2. *R. v. N.K.*, 2021 NSSC 334
3. *R. v. D.(W.C.)*, 2020 NSSC 391
4. *R. v. Bonvie*, 2020 NSSC 342
5. *R. v. E.W.*, 2020 NSSC 191

6. *R. v. G. (R.R.D.)*, 2013 NSSC 371

7. *R. v. Googoo*, 2022 NSPC 28

[8] I have reviewed the submitted authorities along with the recent decision of the Ontario Court of Appeal in *R. v. M.C.*, 2023 ONCA 611. After reviewing the seminal authorities, Justice Paciocco nicely explains the procedure for making third-party record applications:

...An application under s. 278.3 is conducted in two stages. At stage 1, the applicant must establish that the application conforms with the statutory requirements, that the record is “likely relevant,” and that its production is “necessary in the interest of justice.” The third precondition requires the trial judge to inquire, without having seen the record, into the extent to which it is necessary to make full answer and defence and into its probative value. The judge must also consider opposing interests that might justify non-disclosure. If the stage 1 requirements are not met, the application must be dismissed. If the applicant meets the requirements, then, at stage 2, the trial judge reviews the documents and determines whether the record should be produced to the applicant.

## **EVIDENCE**

[9] On this application I have the unchallenged affidavit of Ms. Rodimon (exhibit 2) along with the transcript of the relevant trial testimony of the complainant (exhibit 1). With respect to exhibit 2, Ms. Rodimon attached Avalon’s confidentiality and record-keeping policies. The latter policy includes this paragraph, which is reproduced by Ms. Rodimon at para. 10(d) of her affidavit:

When specific trauma processing modalities provided to clients requires the recording of some trauma incident related themes and aspects, this documentation is intended for therapeutic exploratory purposes and ensuring a coherent flow within processing work only. This limited recording does not serve as a full and detailed account of sexual abuse/assault incidents for the purpose of corroborating an external investigative process. Trauma therapy approaches often incorporate therapeutically recognized symbolic processing techniques. Therefore, due to the highly specialized nature of recognized trauma therapy approaches, Avalon therapeutic counselling notes, terminology and/or scales require interpretation by an expert in the field to ensure informed understanding and comprehension;

[10] With respect to exhibit 1, it is entitled “partial transcript,” and is a portion of Ms. R.’s evidence elicited during cross-examination on January 2, 2024 beginning at 13:46 p.m. and ending at 14:17 p.m. This 31-minute excerpt comprises 37 pages.

## POSITIONS OF THE PARTIES

### Applicant

[11] Given the complainant's testimony, the applicant seeks the production of these records:

1. Homewood Health Centre Inc. – Records, notes, written, electronic or otherwise relating to the treatment, counseling and all forms of treatment provided to C.R. through her contact with Wellness Together Canada, online and by phone, from January 1, 2020, until the Application date;
2. The Nova Scotia Health Authority – Records, notes, written, electronic or otherwise relating to the treatment, counseling and all forms of treatment provided to C.R. at Abbie J. Lane Outpatient Program, located at the Abbie J. Lane Memorial Building, 5909 Veterans Memorial Lane, Halifax, NS, from January 1 until December 31, 2018;
3. The Avalon Sexual Assault Centre – Records, notes, written electronic or otherwise relating to the treatment, counseling and all forms of treatment provided to C.R. at the Avalon Sexual Assault Centre, located at 1526 Dresden Row, Halifax, NS, from February 1, 2010, until the Application date.

[12] In his Notice the applicant states the following grounds in support of his request for the records:

1. The applicant is charged with two counts of sexual assault against C.R., contrary to section 271 of the Criminal Code;
2. The complainant is C.R.;
3. The records are believed to, or probably, exist;
4. The records relate to the complainant, C.R.;
5. That in September of 2018, C.R. reported to police that she had been sexually assaulted, two times, by a friend identified as B.A.;
6. On January 2, 2024, C.R. testified at trial and confirmed the following:
  - a. That between January 1 and December 31, 2018, C.R. contacted Wellness Together Canada, a service initiated online and provided by phone. C.R. initiated contact with Wellness Together Canada during

the pandemic because she had difficulty differentiating between difficult memories and bad dreams.

- b. That at some point in 2018, C.R. attended a 6-week outpatient program at the Abbie J. Lane Memorial Building, in Halifax, NS. C.R. participated in both group and individual therapy and indicated that the program assisted in clarifying details related to the allegation, to make them clearer in her mind. Further she reviewed notes with service providers.
  - c. That C.R. attended at the Avalon Sexual Assault Centre, in Halifax, NS, in 2013-2014, and became eligible for 20 therapy sessions. C.R. relied on this service to help her with coping. She reviewed notes with service providers.
7. That the treatment from all three providers was directly related to trauma said to have occurred as a direct result of the allegations against the applicant;
  8. The records are likely relevant to the credibility of C.R.;
  9. The records are likely relevant to the reliability of C.R.;
  10. The records are likely relevant to the incident that is the subject matter of these proceedings;
  11. The records are required for B.A. to make full answer and defence;
  12. The records will disclose evidence that is probative to the material issues in this case;
  13. Such further and other grounds as they arise during the course of this application.

[13] In his brief Mr. A. argues that the records are likely relevant, noting as follows:

31. In reference to Wellness Together Canada, C.R. testified that she accessed this service because she was having difficulty differentiating between her actual memories related to the allegations against Mr. A. versus her “PTSD nightmares”. Further, she confirmed that she was able to recall additional details following treatment, noting that it was not until she was questioned at trial that she realized this.
32. In reference to the Abbie J. Lane Outpatient Program, C.R. testified that she crafted notes related to the allegations which were in turn reviewed with the

psychologist and psychiatrist who facilitated the program. Her participation in this program predated reporting Mr. A. to police. Further, C.R. indicated that group therapy helped her to clarify details to make them clearer in her mind, bringing clarity to her allegations against Mr. A..

33. In reference to the Avalon Sexual Assault Centre, C.R. indicated that this service was not aimed at enhancing her memory. That said, C.R. confirmed that during her sessions the service provider took notes. Eventually the therapist's notes were reviewed with C.R. as a part of the therapy. Her interaction with this service provider pre-dated her reporting Mr. A. to the police.

### **Crown**

- [14] The Crown concedes the likely relevance threshold of stage one.

### **Complainant**

- [15] The complainant takes the following positions outlined in her brief:

Homewood Health Centre Inc – **concedes** that the Applicant has met the likely relevance test for production of these records for judicial review as long the production is restricted to notes pertaining to discussions about the Applicant and the allegations before this Court.

Abbie J Lane Outpatient Program (NSHA) – **opposes** the production of this record on the following reasons:

- The Complainant was mandated by the Department of Community Services to partake in this six week intensive program and therefore, was not entirely participating by choice.
- The participants of this program were also mandated by DCS to participate.
- There are additional privacy concerns with respect to the other participants – who if known, may have standing in this application.
- Notes that she made as part of her participation were not retained by the program providers nor did she retain a copy for herself.
- While the Complainant acknowledged that this program had assisted her in clarifying details of the allegations against the Applicant, the Applicant has not articulated what those clarifying details were.



- There appears to be no suggestion (direct or implied) that the Complainant gave inconsistent evidence between her direct and cross-examination that are linked to her use of therapy.

Avalon Sexual Assault Centre – **opposes** the production of this record on the following reasons:

- The Applicant has not offered any further case-specific foundation to tie these records to an issue at trial.
- The therapy was aimed at coping with PTSD and did not enhance her memory.
- The therapy had no role in reviving, refreshing or shaping her memory of the incidents.
- The foundation for this record is based strictly on the fact that the Complainant had used therapy in the past, had discussed her allegations regarding Mr. A. years before her police statement and that they were treatment for her PTSD do not meet the likely relevance test.
- There is no indication that this treatment precipitated or contributed to the Complainant's decision to go to police.

### **Homewood Health Centre Inc.**

[16] Homewood did not file any written materials. Asked for an oral submission, counsel advised that her client was prepared to receive the Court's decision.

### **NSHA**

[17] This entity took no position regarding production of their records. Their representative asked for guidance in the event NSHA's relevant records were ordered to be produced.

### **Avalon**

[18] Avalon vigorously opposes the application arguing that Mr. A. has not met the burden to establish the likely relevance of any therapeutic records in the possession of Avalon, or that the production of such records would be in the interest of justice.

[19] Avalon submits that the application is a “fishing expedition” which does not meet the threshold requirements for production of Avalon’s records. Avalon says that there is minimal evidence offered in support of the application and it does not establish the likely relevance of the records in order to satisfy the first stage of the *Mills* test.

[20] Avalon argues that the applicant has not established that the Avalon records contain specific information about the alleged assaults. Avalon submits that the evidence before the Court is the complainant’s testimony that she did not recall any new information about the allegations during her treatment with Avalon and her treatment was focussed on coping with trauma and PTSD.

[21] Alternatively, Avalon submits that should the likely relevant threshold is found to have been met, that ordering the production of Avalon’s records is not in the interests of justice, especially given the importance of confidentiality for organizations such as Avalon in providing support services for those affected by sexualized violence and Parliament’s expressed intention to advance society’s interest in encouraging the reporting of sexual offences.

#### **ANALYSIS AND DISPOSITION**

[22] Having regard to the relevant *Criminal Code* provisions and authorities, I must determine at stage one whether the requested records are likely relevant and if they are, that their production is necessary in the interests of justice. Having regard to the evidence, I have determined that the Homewood and NSHA records ought to be provided to the Court but that the Avalon records should be kept confidential and not produced.

[23] With respect to the compellable records, I refer to exhibit 1 at page 19 where Ms. R. acknowledges that the NSHA (Abbie Lane) group sessions helped her recall details of the alleged sexual assaults. Later, on the same page she says that she worked with the group and “did recall things that I didn’t prior recall”.

[24] As for Homewood (Wellness Together Canada) sessions, Ms. R. testified that she did bring up the “incident” in sessions (p. 27) and that there were details that she recalled that she had not remembered before the sessions (pp. 28-29).

[25] Whereas the above testimony clearly demonstrates that Ms. R. found that the Abbie Lane and Wellness sessions assisted her with her memory of the alleged sexual assaults, there is no such evidence concerning Avalon. In this regard, she

makes it clear at page 36 that from her 20 sessions she did not recall anything new. Further, she rules out “any new details [coming] to surface during her time at Avalon”. She adds that the sessions did not involve attempts to improve her memory, but rather to “cope with the trauma and the PTSD”.

[26] In the result, I have determined that the applicant has met the likely relevant threshold in respect of the NSHA and Homewood records. It is in the interests of justice for the Court to receive and review the requested documents. On the other hand, I have decided that the opposite is the situation regarding Avalon. The applicant has not met the likely relevant threshold and it is not in the interests of justice to compel Avalon’s records for review.

[27] I note that a tentative stage two hearing is set for March 21, 2024. Accordingly, I hereby order Homewood and NSHA to produce all of their records for the relevant timeframe pertaining to C.R. (whether written or electronic) in written form in a sealed envelope and directed to my attention on or before March 8<sup>th</sup>. The Homewood notes shall be from January 1, 2020 until March 1, 2024. The NSHA notes shall be from January 1, 2018 to December 31, 2018. The NSHA notes should not identify any other participant in the group sessions. Therefore, I order that NSHA’s representative must redact any notes that reveal the names or any other identifying features of any other group session participants. Upon receipt of the written notes on or before March 8, 2024, I will review them and provide a written inventory to the applicant, Crown and complainant on or before March 12, 2024. I will then receive any written submissions on or before March 15, 2024. The stage two hearing will proceed as scheduled at 9:30 a.m. on March 21, 2024.

Chipman, J.