<u>SUPREME COURT OF NOVA SCOTIA</u>
<u>FAMILY DIVISION</u>
Citation: *RC v. Nova Scotia (Community Services),* 2022 NSSC 216

Date: 20220729
Docket: SFHCFSA No. 113675
Registry: Halifax

Between:

RC

Applicant

v

Minister of Community Services

Respondent

Judge: The Honourable Justice Theresa Forgeron

Heard: March 16, 2022, in Halifax, Nova Scotia

Decision: July 29, 2022

Counsel: Megan Longley for the Applicant
Megan Roberts for the Respondent

By the Court:

Introduction

[1] RC applies to have his name removed from the child abuse register. He states that he no longer poses a substantial risk to children. In support of his position, RC notes that the offences which led to his registration occurred over 28 years ago. Since that time, he has not been charged or convicted of any other offence. He also received a pardon for his criminal convictions. RC states that he turned his life around by attending counselling and having the love and support of a wife and family. He states that it is time for his name to be removed from the register.

[2] The Minister objects. The Minister states that RC did not prove his case for three reasons. First, RC lacks insight into the reasons why his name was placed in the register. Second, RC provided no proof that he successfully completed therapy to mitigate the protection risks. Third, RC refused to participate in a sexual offender risk assessment. From the Minister's perspective, the passage of time is not a decisive factor where there is a lack of insight and a refusal to participate in a risk assessment.

Issues

[3] The only issue which I must decide is whether RC's name should be removed from the child abuse register.

Background

[4] Before analysing the issue, I will review background information to provide context to my decision.

[5] RC was born in 1962 in a small community in Cape Breton. As a youth, RC experienced trauma because he was sexually abused by a neighbour. During his youth, RC also struggled with alcohol and drug addictions. On one occasion, RC attempted suicide.

[6] When he was 15 years old, RC left home. A year later, he joined the Navy, where he served for about three years. He retired because of mental health issues.

[7] Between1986 and 1990, RC was charged and subsequently convicted of four sexual offences involving children. He pled guilty to all offences and then successfully completed his sentence - incarceration and parole.

[8] In December 1994, RC was placed on the child abuse register. An earlier registration attempt in 1991 was not successful because the Minister was unable to locate RC's address for service, as notice is required under the *Children and Family Services Act*, SNS, 1990, c 5.

[9] After being charged, RC began a long term relationship with SR, who he eventually married. RC also attended counselling services and, for the most part, stopped drinking alcohol. He no longer consumes drugs. RC has three children and one grandchild. RC has a good relationship with two of his children and his grandchild.

[10] After being released from prison, RC found employment with the Canadian Coast Guard. Unfortunately, he was injured in a workplace accident and now receives workers compensation benefits.

[11] On July 21, 2008, RC received a pardon of all his criminal convictions.

[12] RC states that in 2018, when applying to be on the Board of Directors of the Native Council of Nova Scotia, he discovered that his name was on the child abuse register. Initially, RC was not allowed to be a Director because he was named in the register. The Native Council later reversed this decision. RC is now an acting director.

[13] On March 13, 2019, RC applied to have his name removed from the child abuse register. To assess RC's current risk to children, the Minister asked RC to participate in a sexual offender risk assessment with a qualified professional. RC refused. The Minister asked RC to sign a consent authorizing the Minister to speak with his mental health providers/counsellors. RC refused.

[14] RC's application was assigned to a number of judges before being placed on my docket. On June 29, 2021, the parties first appeared before me during a chambers conference. I immediately scheduled the contested hearing.

[15] After affidavits were filed, the Minister's filed a motion to strike portions of RC's affidavits and to obtain directions about some pretrial evidentiary issues. I

granted the Minister's motion to strike and provided directions in advance of the March hearing.

[16] On March 16, 2022, the contested hearing proceeded as scheduled. Five affidavits were tendered as exhibits – two from RC, one from his wife, SC, and two from Jill Barkhouse on behalf of the Minister. The Minister cross-examined RC and SC. Counsel provided written and oral submissions. I considered all of the evidence and submissions.

Analysis

[17] Should RC's name be removed from the child abuse register?

Position of RC

[18] RC states that his application should be granted because he proved that he does not pose a substantial risk to children: ***GVA v Nova Scotia (Community Services),*** 2017 NSSC 14, paras 8 and 34-35. RC advanced the following four arguments in support of his position:

- RC has been incident free for over 28 years and was pardoned nearly 14 years ago. Being incident free is a relevant factor when assessing substantial risk. In ***GVA v Nova Scotia (Community Services)***, *supra,* the applicant's name was removed from the register after being incident free for 29 years. In ***KRMW v Nova Scotia (Community Services)***, 2010 NSFC 27, the application was refused as premature because only three years had passed since the incident arose.

- RC has a proven record of rehabilitation and good behaviour. After being released, RC successfully parented his children and regularly interacted with other children. He is a father and grandfather. His interaction was always appropriate. No new charges were ever filed. Rehabilitation and good behaviour are relevant factors when assessing substantial risk. In ***RCC v Nova Scotia (Community Services)***, 2008 NSFC 8, the application to be removed from the register was granted because the one sexual assault incident was deemed an isolated event given the passage of time (24 years), the applicant's successful completion of probation, and the applicant's adoption of a prosocial lifestyle.

- RC has a stable family life. His spousal relationship is a strong and supportive one that spans over thirty years. He has positive relationships with family members. RC undertook counselling and improved his lifestyle. He does not consume alcohol or drugs. He volunteers in his community. Stability is a relevant factor when assessing substantial risk. In ***AGC v Nova Scotia (Minister of Community Services),*** 2006 NSFC 17, the court granted the applicant's request to be removed from the register where the applicant was convicted of sexual abuse 22 years prior, but, since that time, had formed a stable marital relationship, improved his education, and received a pardon.

- RC received a pardon for all criminal convictions. A pardon is a relevant factor when assessing substantial risk, as noted previously in ***AGC v Nova Scotia (Minister of Community Services),*** *supra.* Further, RC argues that leaving an applicant's name on the register after the granting of a record suspension has the unintended effect of re-sanctioning the individual for the conduct for which they were pardoned.

[19] In addition, RC states that his failure to admit the facts as posed by the Minister is not fatal to his application. For example, in ***GVA v Nova Scotia (Community Services)***, *supra*, the court granted the application despite its findings that the applicant was not truthful, that he rationalized what happened, and that he did not admit the role he played in the child's death in the way assessors and the Minister required. In so doing, the court held that the applicant's denial was not proof of a substantial risk.

[20] Further, RC referred me to s. 19.4(2) of the Manitoba *Child and Family Services Act*, CCSM, c C-80, and s. 15(2) of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, to underscore the importance of elapsed time and pardons as pivotal factors when determining whether to remove an applicant's name from the child abuse register.

[21] In summary, RC states that he is negatively affected because his name is on the child abuse register. He does not pose a substantial risk to children. The offences happened over 28 years ago. He has not been charged with any further offences. He was granted a pardon over 14 years ago. He made permanent and positive lifestyle changes. He has a supportive family. He volunteers in the community. He proved that his name should be removed from the child abuse register.

Position of the Minister

[22] The Minister opposes RC's application. The Minister notes that there is no burden on the Minister. Rather, RC must prove that he does not pose a substantial risk to children. The Minister states that RC has not done so for the following reasons:

- RC failed to take responsibility for his sexual abuse of children. Instead, he blamed the victims. RC lacks insight into the nature of his sexual assaults on children.

- RC provided no evidence of rehabilitation. He provided no evidence from his counsellors. He refused to participate in a sexual offender risk assessment by a qualified professional.

- All of RC's contact with children has been supervised. RC has not been provided with an opportunity to reoffend.

[23] In addition, the Minister distinguished the case law submitted by RC as follows:

- In ***GVA v Nova Scotia (Community Services)***, *supra*, the applicant was not convicted of four counts of sexual abuse, but one count of manslaughter. In ***GVA***, the court highlighted the distinction between physical and sexual based offences, noting that "[e]xpert help may be required to learn how to control a desire to have sexual relations with children": para 43. In ***GVA***, the applicant was convicted because he was present when the mother physically harmed the child. Further, in ***GVA***, the applicant provided expert evidence that he did not pose a significant risk to children. RC provided no such evidence. Finally while incarcerated, the applicant in ***GVA*** successfully completed various courses and services. RC provided no such evidence.

- ***KRMW v Nova Scotia (Community Services)***, *supra,* does not suggest that the passage of time alone addresses risk. Instead, the court considered other factors including the services engaged in by the applicant and services that were recommended by the treating physician. RC would not allow the Minister to speak with his counsellor. RC did not call the service providers as witnesses.

- In ***RCC v Nova Scotia (Community Services)***, *supra*, the applicant was guilty of one sexual offence, while RC was guilty of four counts. Further, the applicant in ***RCC*** provided expert evidence about rehabilitation while RC did not.

[24] The Minister also argues that a criminal pardon is not a decisive factor in my determination. Child protection is not about blame or penalty, but rather protecting children from harm and assuring their best interests. The Minister's focus is not on sanctions, but on protection.

[25] In summary, the Minister states that the passage of time is but one factor that must be considered, in combination with other factors, including the number of offences, the seriousness of the offences, the applicant's level of insight, services undertaken by the applicant as recommended by the treating professionals, and expert evidence to confirm alleviation of risk.

Decision

[26] Section 64(2) of the *CFSA* provides me with the jurisdiction to remove RC from the child abuse register:

> **Notice of entry in and application to remove name from Child Abuse Register**
>
> (2) A person whose name is entered on the Child Abuse Register may, upon providing written notice to the Minister, 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. 1990, c. 5, s. 64; 2015, c. 37, s. 52.

[27] The applicant bears the burden of proving that he does not pose a substantial risk to children: ***GVA v Nova Scotia (Community Services),*** *supra*, paras 8 and 34-35. Proof is based on a balance of probabilities; there is no heightened standard: ***FH v McDougall***, 2008 SCC 53.

[28] In ***MJB v Family & Children Services of Kings County,*** 2008 NSCA 64, Bateman JA discussed the meaning of substantial risk:

> [77] The **Act** defines "substantial risk" to mean a real chance of danger that is apparent on the evidence (s. 22(1)). In the context here, it is the <u>real chance</u> of sexual abuse that must be proved to the civil standard. That future sexual abuse

> will actually occur need not be established on a balance of probabilities (**B.S. v. British Columbia (Director of Child, Family and Community Services)** (1998), 160 D.L.R. (4th) 264, [1998] B.C.J. No. 1085 (Q.L.) (C.A.) at paras. 26 to 30). [Emphasis in original]

[29] In ***HAN v Nova Scotia (Minister of Community Services),*** 2013 NSCA 44, Fichaud, JA refined the standard and also confirmed that expert evidence, though helpful, is not essential:

> [39] Section 22(2) of the *Act* states that a child is in need of protective services in a number of situations, including a "substantial risk" of harm. Section 22(1) says that "substantial risk" means "a real chance of danger that is apparent on the evidence". **The standard does not require that the judge be satisfied the future risk will materialize. But the judge must be satisfied, on the balance of probabilities from the evidence, that there exists a real possibility the risk will materialize**: *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64, para 77. *G.M. v. Children's Aid Society of Cape Breton-Victoria*, 2008 NSCA 114, para 37**. Expert evidence, though often helpful, is not essential to satisfy the standard:** *Nova Scotia (Minister of Community Services) v. B.M.*, [1998] N.S.J. No. 186 (C.A.), para 80; *J.G.B. v. Nova Scotia (Community Services)*, 2002 NSCA 86. In this proceeding, Judge Comeau made no error in his appreciation and application of these legal principles. [Emphasis added]

[30] Section 64(2) of the *CFSA* does not state the criteria I must consider to assess risk. The *Act* itself must be interpreted in a child-centric fashion, in keeping with its listed purposes, which are to promote the integrity of the family, to protect children from harm, and to ensure the children's best interests. However, in my decision, I must focus on the *Act*'s paramount consideration, which is noted in s. 2(2) as the children's best interests.

[31] When determining a s. 64(2) application in a child-centric fashion, courts must review the unique facts of each case against all relevant factors. The factors which I consider relevant to my determination of this case are as follows:

- The number and nature of the offences which resulted in the applicant's name being entered on the child abuse register.
- Whether the applicant has gained insight into the child abuse concerns.
- Whether the applicant successfully engaged in rehabilitative services as recommended by a treating physician or counsellor to address the protection risks.

- Whether any expert evidence was introduced to confirm that the applicant is at a low risk of reoffending.
- Whether the applicant affected permanent lifestyle changes that mitigate the prior protection risks.
- The number of years which have passed since the applicant's name was entered on the register.
- Whether the applicant was pardoned for any criminal convictions associated with the applicant's name being entered on the register.

[32] The above list is neither exhaustive nor definitive. No one factor is determinative. I will now apply the listed factors to RC's application.

Number and nature of the offences

[33] The number and nature of the offences raise serious protection concerns because RC was convicted of four sexual offences involving three different children. In 1986, RC was convicted of one sexual offence involving his eight-year-old niece. He was sentenced to two years and six months of imprisonment. In 1990, RC was convicted of two sexual offences involving a 13-year-old babysitter. RC was sentenced to two months of imprisonment and a period of probation. In 1994, RC was convicted of a sexual offence involving his girlfriend's 11-year-old daughter. He was sentenced to 15 months of imprisonment and a period or probation. The sexual offences involved young and vulnerable girls with whom RC stood in a position of trust.

Insight into the child abuse concerns

[34] RC has not gained insight into the child abuse concerns. RC did not even admit he committed a sexual offence. For example, RC blamed his sister when describing his 1986 sexual assault of his niece:

> 38. In 1986, my sister I** accused me of touching her daughter M** in a sexual manner. M** was nine years old at the time.

[35] In contrast, agency records indicate that eight-year-old M** was interviewed without I** being present. During the interview, M** said RC put his "peanut in her birdie" and that RC said he would beat M** with a belt if she told.

[36] RC described his 1990 sexual assaults on the 13-year-old babysitter as involving the tapping of her foot:

> 45. When we returned, Gerald told me to go wake the babysitter and tell her to leave. The girl was approximately thirteen years of age at the time.
>
> 46. I agreed to do so and tapped the girl on her foot until she woke.
>
> 47. A short time later, the RCMP arrested and charged me with two counts of sexual interference under s. 151 of the Criminal Code.

[37] The agency was unable to locate records associated with these assaults. RC must have done more than tap the child's foot to be convicted of two counts of sexual interference.

[38] When describing his fourth sexual assault, RC blamed his girlfriend's daughter:

> 52. One day, C**'s daughter jumped on my lap. There were stitches in my leg at the time, so [I] decided to push her away.
>
> 53. I was subsequently charged and convicted of sexual interference under s. 151 of the Criminal Code.

[39] In contrast, agency records indicate that RC waited until his girlfriend was at work, and then he sexually assaulted her daughter by kissing her and touching her breasts.

[40] RC lacks insight. He minimized his conduct. He does not accept fault. For example, while testifying, RC said he is never alone with children because "if you look at someone the wrong way, you're accused of something." RC's criminal conduct involved the sexual assaults of young, vulnerable girls. RC has no insight into his conduct. RC has no insight into the impact that his sexual assaults had on the young victims. Without insight, RC will continue to view young, vulnerable girls as a commodity to be sexually exploited.

Successful engagement in rehabilitative services

[41] Although RC states that he participated in counselling and therapy, he did not call his therapist and counsellor to testify about the nature of the therapy and whether therapeutic goals were successfully achieved. RC refused to provide a consent so that the Minister could speak directly with the therapist and counsellor.

I have insufficient evidence that RC successfully completed rehabilitative services to mitigate the risk he poses to children.

Lack of expert evidence showing a low risk of reoffending

[42] The Minister asked RC to participate in a sexual offender risk assessment. RC refused. RC provided no expert evidence that he does not pose a substantial risk to children.

Permanent lifestyle changes

[43] RC showed some positive lifestyle changes. He has a loving and supportive relationship with his wife and he is involved in volunteer work with his community.

Passage of time and pardon

[44] Over 28 years have passed since RC was last convicted of a sexual offence involving young girls. Over 14 years ago, RC received a pardon.

Summary

[45] In the circumstances of this case, I find that the passage of time, the receipt of a pardon, and a stable family life are insufficient to prove that RC no longer poses a substantial risk to children because:

- RC does not accept responsibility for his sexually abusive conduct.
- RC lacks insight into why his sexual abuse of young girls was wrong.
- RC minimizes the protection concerns.
- RC presented no independent evidence that he successfully completed rehabilitative services to eliminate or reduce child protection risks.
- RC refused to participate in a sexual offender risk assessment to confirm that he has addressed the issue of risk.

Conclusion

[46] RC failed to prove that he does not pose a substantial risk to children. To the contrary, the evidence confirms a real possibility that sexual abuse will occur in the

future if RC is given the opportunity to be alone with young girls. RC did not provide evidence that he learned to control his sexual impulses towards young girls through rehabilitative services. RC did not provide evidence that he even understands the enormity of the harm that he caused to the young girls whom he sexually assaulted. His lack of insight is most problematic, especially when coupled with a lack of rehabilitative services to address his sexual attraction to young girls.

[47] I deny RC's application. His name will not be removed from the child abuse register.

[48] Counsel for RC is to draft and circulate the order.

[49] Counsel are thanked for their capable and professional representation.

Forgeron, J.