

**NOVA SCOTIA COURT OF APPEAL**

**Citation: Shannex Health Care Management Inc. v.  
Nova Scotia (Health), 2005 NSCA 52**

**Date:** 20050330

**Docket:** CA 228257

**Registry:** Halifax

**Between:**

Shannex Health Care Management Inc.

Appellant

v.

Attorney General of Nova Scotia representing the  
Nova Scotia Department of Health

Respondent

**Judges:** MacDonald, C.J.N.S.; Freeman and Bateman, J.J.A.

**Appeal Heard:** March 15, 2005, in Halifax, Nova Scotia

**Held:** **Appeal dismissed per reasons for judgment of  
Bateman, J.A.; MacDonald, C.J.N.S. and Freeman,  
J.A. concurring.**

**Counsel:** Harvey L. Morrison, Q.C., for the appellant  
Catherine Lunn, for the respondent

Reasons for judgment:

- [1] In 2003 the Nova Scotia Department of Health received a request under the **Freedom of Information and Protection of Privacy Act**, S.N.S. 1993, c. 5, s. 1, as amended, (the "**FOIPOP Act**") for access to financial information relevant to the determination of per diem rates for nursing homes licensed by the Province. The residents of licensed nursing homes consist of "private pay" persons and those who receive a government subsidy to offset the nursing home costs. The per diem rates dictate the limit on the amount charged to subsidized residents and, consequently, relates to the amounts paid by the taxpayers of Nova Scotia for the care of these persons. Licensed nursing homes are not constrained by the per diem rates in the daily amount they can charge a private pay resident. Over the objections of Shannex, an operator of several private, licensed, nursing homes, the Department determined to release the information. About 75% of the residents in the Shannex nursing homes are subsidized.
- [2] Shannex sought a review of that decision by the FOIPOP Review Officer, who agreed that the records be disclosed. Shannex appealed to the Supreme Court under s. 41 of the **FOIPOP Act**. Justice Frank Edwards dismissed the appeal. (Decision reported as **Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)** (2004), 224 N.S.R. (2d) 203; [2004] N.S.J. No. 153 (Q.L)). Shannex appeals that dismissal alleging error in both law and fact.
- [3] The standard of review on appeals from a judgment of the Supreme Court under the **FOIPOP Act** is the usual civil standard. The judge must be correct on matters of law. Findings of fact are reversible only where there is palpable or overriding error (**O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)** (2001), 197 N.S.R. (2d) 154; [2001] N.S.J. No. 360 (Q.L.) (C.A.)).
- [4] Shannex submits that the judge erred at law in applying the wrong standard of proof and, in any event, in finding that the evidence adduced by Shannex did not meet the requirements of s. 21(1)(c)(i) of the **FOIPOP Act**. That section provides, as relevant to this appeal:

21 (1) The head of a public body shall refuse to disclose to an applicant information

...

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

(iii) result in undue financial loss or gain to any person or organization . . .

- [5] Justice Edwards was not satisfied that the evidence proffered by Shannex met the requirements of the section. Shannex submits that the judge wrongly required its evidence to meet a “detailed and convincing” standard of proof.
- [6] While Justice Edwards referred at points in his decision to a need for “detailed and convincing” evidence, I am not satisfied that in so doing he was modifying the interpretation of the exemption or changing the standard of proof but simply describing the quality and cogency of the evidence required. (**Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)** (1998), 164 D.L.R. (4th) 129 (Ont. C.A.) at para. 26). Shannex’s allegation of harm was premised largely on its submission before Justice Edwards that a competitive bidding process for nursing home beds would likely be implemented by the Province in the near future. The judge was not satisfied that the evidence presented by Shannex established more than speculation that such would occur. Shannex enumerated several ways in which it would suffer harm, should the records be disclosed. The judge reviewed and discounted each of these alleged areas of damage. He was not persuaded that evidence offered by Shannex was sufficient to establish a reasonable expectation of harm through disclosure.
- [7] I am not persuaded that the judge applied the wrong test in his application of s. 21(1)(c)(i) of the **FOIPOP Act** to the issues before him nor that he made a palpable or overriding error of fact.
- [8] The appeal should be dismissed. The information should be disclosed but not until the appeal period for filing a Notice of Appeal with the Supreme Court of Canada has passed, or, if an appeal is filed, until the application for leave has been determined by that Court.
- [9] The appellant should pay costs to the respondent in the amount of \$2000 inclusive of disbursements.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Freeman, J.A.