

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*,
2015 NSCA 38

Date: 20150422
Docket: CA 429620
Registry: Halifax

Between:

Her Majesty the Queen in right of Nova Scotia
(Public Prosecution Service)

Appellant

v.

The Estate of Gordon Howard FitzGerald represented by his Executrices,
L. Allison Jones and Kathleen D. FitzGerald

Respondents

Judges: The Honourable Justices M. Jill Hamilton, Joel E. Fichaud
and Cindy A. Bourgeois

Appeal Heard: February 2, 2015, in Halifax, Nova Scotia

Subject: Freedom of information and protection of privacy

Summary: In 1980, Mr. FitzGerald was convicted of having non-consensual sex with a female client. In 1980, the Court of Appeal dismissed his appeal. In 1981, the Supreme Court of Canada denied leave to appeal. In 1982 and 1983, the Federal Minister of Justice twice refused to intervene under the former “mercy” provision in the *Criminal Code*. In 2009, Mr. FitzGerald applied under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (“*Act*”) for disclosure of the file material of Nova Scotia’s Public Prosecution Service (“PPS”) that related to his criminal proceedings and mercy applications. He wished to make another application to the federal Minister of Justice for review under s. 696.1 of the *Criminal Code*. The PPS

provided much of the information but withheld or redacted some documents, citing prosecutorial discretion under s. 15(1)(f) and unreasonable invasion of third parties' privacy under s. 20 of the *Act*.

Mr. FitzGerald appealed to the Supreme Court of Nova Scotia under 41(1) of the *Act*. The judge of the Supreme Court ordered unredacted disclosure of many additional documents. The judge significantly restricted the PPS's claimed exemption based on prosecutorial discretion and determined that the documents were not an unreasonable invasion of third parties' personal privacy. The judge held the view that disclosure under the *Act* should resemble *Charter*-based *Stinchcombe* disclosure in a criminal proceeding. The PPS appealed. Mr. FitzGerald was deceased, and the executrices of his estate responded.

Issues: Did the judge commit an appealable error in his interpretation and application of ss. 15(1)(f) [prosecutorial discretion] and 20 [unreasonable invasion of a third party's personal privacy]?

Result: The Court of Appeal allowed the appeal. The judge erred in law in his interpretation of ss. 15(1)(f) and 20, and by equating disclosure under the *Act* to *Stinchcombe* disclosure, and committed palpable and overriding errors of fact as to the contents of the documents.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 32 pages.