NOVA SCOTIA COURT OF APPEAL
Citation: ***Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)***, 2005 NSCA 158

Date: 20051208
Docket: 228257
Registry: Halifax

Between:

Shannex Health Care Management Inc.

Applicant/Appellant

v.

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

Respondent

Judges:	MacDonald, C.J.N.S.; Freeman and Bateman, JJ.A.
Application Heard:	November 18, 2005, in Halifax, Nova Scotia
Held:	Application granted per reasons of Bateman, J.A.; MacDonald, C.J.N.S. and Freeman, J.A. concurring.
Counsel:	Harvey Morrison, Q.C. and Julie Cameron, for the applicant/appellant Catherine Lunn, for the respondent, not participating

Reasons for Decision:

[1] The appellant, Shannex Health Care Management Inc., has applied to this Court for an order permanently sealing certain evidence. The respondent, Attorney General of Nova Scotia (Health) (the "Department") takes no position on the application. At the instance of the Court, notice of the application was provided to the media. No media representative has sought to intervene.

[2] The timing of this application is unusual and unfortunate. The order sought is "retrospective" in that the appeal of the matter has been heard and judgment issued (see **Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)** (2005), 231 N.S.R. (2d) 324, N.S.J. No. 112 (Q.L.)(C.A.)).

[3] The background to the application is set out in this Court's 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.

[4] The "records in dispute" were government prepared summaries of the approved budgets for the nursing homes operated by Shannex as well as a long term care memorandum.

[5] We found no error by the Supreme Court judge and dismissed the appeal. In the appellate materials filed by Shannex was a book of documents titled "Confidential Documents and Sealed Affidavits". It contained the records in dispute and two affidavits of Shannex principals, Jason Shannon and Karen Scott. The affidavits were those filed by Shannex on its appeal to the Supreme Court from the decision of the FOIPOP Review Officer.

[6] There had been no application to either the Supreme Court nor to this Court asking that this material be sealed. FOIPOP appeals to the Supreme Court are governed by Supreme Court Practice Memorandum No. 28. Provision 9 of that Memorandum states:

> Practice Memorandum No. 28
>
> Freedom of Information and Protection of Privacy Appeals
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> ...
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> 9. Any documents or records to be filed with the court following the pre-hearing conference are to be placed in a brown manila envelope and SEALED. The following notation is to be placed by counsel on the envelope: "CONFIDENTIAL DOCUMENTS PRODUCED TO THE COURT ONLY PURSUANT TO THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY APPEAL. THESE DOCUMENTS ARE FILED BY _____ (name of the lawyer and the party they represent)". This brown manila envelope is to be kept separate from the court file and is to be held by the Prothonotary and given to the judge who will hear the appeal.

[7] It is unclear whether ". . . Any documents or records . . ." as used in Provision 9 is intended to mean only the records in dispute, or is to be more broadly interpreted. Here, both the records in dispute and the affidavits were presented to the Court in a sealed envelope and remained sealed until viewed by the Supreme Court judge hearing the application.

[8] The Order dismissing the appeal provided, *inter alia*:

> IT IS FURTHER ORDERED that the sealed documents comprising six pages of records filed by the Respondent [Department of Health] and the affidavits of Jason Shannon sworn the 2nd day of February, 2004 and Laura Scott sworn the 17th day of February, 2005 filed by the Appellant shall remain sealed.

> If the Appellant does not file a Notice of Appeal within the appeal period or such further period as may be allowed, the sealed documents shall be returned to the solicitors for the parties on whose behalf they were filed within 10 days of the expiry of the aforesaid appeal period or such further period as may be allowed. If a Notice of Appeal is filed by the Appellant, the Prothonotary shall retain the sealed documents keeping them separate from the court file pending further order of the Court of Appeal.

[9] Counsel for Shannex assumed the above "sealing" Order of Edwards, J. would remain in effect throughout the further appeal to this Court and would survive our disposition. Consequently, there was no reference at the appeal to that Order nor request for its continuation.

[10] After the decision of this Court had been delivered, we directed that the formerly sealed material be placed in the public Court file, there having been no confidentiality directive from this Court. Shannex registered its objection to the affidavits and records in dispute forming part of the public appeal file and has made application to this Court for an order permanently sealing both the records and the material parts of the affidavit evidence.

[11] Provision 11 of the Memorandum provides:

> 11. Following the hearing the judge will determine in which manner any sealed documents or records are to be handled - whether they remain sealed or not. All sealed documents are to be given by the judge to the Prothonotary and retained by the Prothonotary until such time as all appeal periods have passed. Where no appeal is made of the decision of the Supreme Court judge to the Nova Scotia Court of Appeal - the Prothonotary will return to the solicitor who has filed the sealed documents all the sealed documents after 45 days have passed following the date of the issuance of the Order for Judgment by the Supreme Court.

[12] Obviously, an interpretation of Provision 11 which required both the records in dispute and the affidavit evidence to be removed from the Court file and returned to counsel would be problematic. The Court must retain a record of its proceedings. Shannex does not ask for return of the material but says it should not be open to the public and must be sealed if it is to remain in the Court file.

[13] In seeking this sealing order Shannex's position is two-fold:

(1) The affidavits filed by Shannex in the Supreme Court contain detailed confidential information about its business operations, the disclosure of which would harm its competitive position in the marketplace.

(2) The records in dispute, which were the subject of the application and have been ordered disclosed, should not form part of the public record and should only be available to the party that originally applied for their disclosure under the **FOIPOP Act**. Others seeking disclosure of the same information should comply with the requirements outlined in the **FOIPOP Act**. That process would be circumvented if these records are available to the public through the Court file.

THE LAW:

[14] The open court principle is a hallmark of a democratic society. Openness is required "both in the proceedings of the dispute, and in the material that is relevant to its resolution". (**Sierra Club of Canada v. Canada (Minister of Finance)**, [2002] 2 S.C.R. 522, 2002 SCC 41, at para. 1, *per* Iacobucci, J.)

[15] Clearly, the order sought by Shannex conflicts with the "open court principle". It is recognized, however, that the principle must sometimes yield to the need for confidentiality (**R. v. Mentuck**, [2001] 3 S.C.R. 442, 2001 SCC 76 at para. 31). Courts, therefore, retain the discretion to grant confidentiality orders. This discretion is exercised within the general framework of the *Dagenais/Mentuck* test developed by the Supreme Court of Canada (**Dagenais v. Canadian Broadcasting Corp.**, [1994] 3 S.C.R. 835; **R. v. Mentuck**, **supra**), and summarized in **Sierra Club, supra** at para. 45 as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

ANALYSIS:

[16] The analytical approach to the exercise of discretion here must respect the principles developed in **Dagenais**, **Mentuck** and **Sierra Club** but is a contextual one tailored to the specific rights and interests engaged in this case. It is key to the analysis that this request arises under the **FOIPOP Act** where confidentiality is not merely incidental but is the subject matter of the litigation. In none of the Supreme Court of Canada cases from which the principles are distilled, was confidentiality of the material sought to be sealed the very issue in the dispute.

[17] In recognition of the often sensitive nature of the information which is sought to be produced under the **FOIPOP** process, the **Act** requires the Court to respect the private nature of such appeals:

> 42(3) The Supreme Court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the Supreme Court or any person of
>
> > (a) any information or other material if the nature of the information or material could justify a refusal by a head of the public body to give access to a record or part of a record; or
> >
> > (b) any information as to whether a record exists if the head of the public body, in refusing to give access, does not indicate whether the record exists

[18] It is helpful to consider the request to seal the affidavit material separately from that to seal the documents in dispute.

(a) The Affidavit Material:

[19] In the main proceeding, the section of the **FOIPOP Act** under which Shannex opposed disclosure of the records in dispute is:

> **21 (1)** The head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, implicitly or explicitly, in confidence; and
>
> (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,
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> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

[20] On the appeal before Edwards, J. the Department took the position that the budget summaries were the work product of the government and not information provided by Shannex, therefore, not subject to s. 21(1). It was Shannex's submission that the budget summaries were derived from the information it provided and their disclosure would reveal details of its actual financial operations. To demonstrate that the summaries were directly linked to the financial

information Shannex had furnished to the Department, the Shannon and Scott affidavits included actual operations data. The judge was satisfied that the budget summaries were based upon the operations information and caught under s. 21(1)(a). He found, as well, that the information had been provided to the Department implicitly in confidence (s. 21(1)(b)). Sections 21(1)(a) and (b) of the **FOIPOP Act** being satisfied, the only remaining issue for Edwards, J. was whether release of the information could be expected to significantly harm the competitive position of Shannex (s. 21(1)(c)). Although accepting that a competitor could use the budget summaries to discern actual operating data about Shannex, because there was no evidence that a competitive bidding process was currently in effect, the judge was not satisfied that its release would harm the company's competitive position.

[21] In **Sierra**, **supra**, at para 46, the Court gives further guidance on the analysis required under the first branch of the *Dagenais/Mentuck* test:

> ¶ 46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

[22] Shannex says, without assurance that the information contained in the affidavits would be kept confidential, it would have opted not to pursue the appeal from the decision of the **FOIPOP** Review Officer. The inability to present this evidence in confidence would have hindered Shannex's right as a civil litigant to present its case (**Sierra Club** at para. 50). Narrowly construed, the goal of the sealing order is to ensure that Shannex is not put at a competitive disadvantage in the marketplace, as would be the case should a competitor have access to its private financial information. More broadly stated, however, the "risk" at stake, should the order not be granted, is Shannex's right to a fair trial. Without a confidentiality order, in exercising its right of appeal, Shannex would suffer the very harm it was seeking to prevent by opposing release of the budget summaries. The confidential information contained in the affidavits would be available to the public. This would be even more damaging to its competitive position, says Shannex, than disclosure of the records in dispute. Choosing not to include the operating data

from the affidavits was not a viable alternative as, without it, Shannex would be unable to fully present its case. I am satisfied that impairment of the right to a fair trial is an affront to the proper administration of justice. This is a risk in which the public has an interest (**Sierra Club** at para. 55).

[23] I have identified the risk to the administration of justice as a serious one, well grounded in the evidence and in which the public has an interest. Is there a reasonable alternative to the sealing order?

[24] While the judge was satisfied that the budget information, although dated, could prove useful to competitors in future bidding situations, he was not persuaded that Shannex had met the burden of establishing that the disclosure could reasonably be expected to significantly harm its competitive position or result in undue financial loss or gain to the company (s. 21(1)(c)(i and ii). He opined that "many factors, other than getting budget figures, would dictate the ability of other competitors to "copy the success of Shannex" (Supreme Court decision, para. 45). For the purposes of our inquiry into the necessity of a sealing order, the issue is not the potential harm to Shannex's competitive position should the information be revealed, but the protection of the public interest in the proper administration of justice.

[25] The evidence establishes that Shannex is a privately held company which treats its financial information as confidential. The information contained in the affidavits is substantially more detailed than that in the records which were the subject of the dispute. The disclosure of the budget summaries does not reveal the same depth of information as is contained in the affidavits.

[26] Although Shannex, by presenting this further information, did not succeed in preventing the disclosure of the records in dispute, I accept that it was reasonable for Shannex to provide that evidence in an effort to satisfy the requirements of s. 21 of the **FOIPOP Act**, in view of the position taken by the Department.

[27] If we were hearing this application before the disposition of the appeal, we would be required to consider whether there were acceptable alternative measures open to Shannex short of producing the information that was contained in the affidavits. In other words, could Shannex have advanced its case without disclosing such financial details? As discussed above, it was Shannex's argument

that from the government budget summaries some details of the company's financial operations could be derived and, therefore, that disclosure of the budget summaries would harm its competitive position. The government did not agree. In order to demonstrate that such was the case, Shannex elected to provide information about those actual operations. The judge, although not finding in favour of Shannex in the result, was persuaded that the budget information would be useful to potential competitors. I am not satisfied that there was an alternative to Shannex producing this information. I note, however, that this analysis is somewhat moot at this late stage. Assuming the affidavit evidence would be held confidential by the court without any formal request on Shannex's part, the affidavits were filed and Shannex cannot now elect not to proceed with the appeal(s).

[28] I would find that, at the time of commencement of the appeal, there was no less intrusive alternative to a sealing order which would have enabled Shannex to present its case. Shannex has satisfied the first branch if the *Dagenais/Mentuck* test by demonstrating that a sealing order is necessary to prevent a serious risk to the proper administration of justice.

[29] I now turn to the second branch of the *Dagenais/Mentuck* test. Before granting the order we must be satisfied that the beneficial effect of the confidentiality order would outweigh its adverse impact on the open court principle, thus balancing the protection of the fair trial interest against the principle of open and accessible court proceedings. As the Court said in **Sierra Club**, **supra**:

> 52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

[30] The benefit from the order is obvious. A fair trial for all litigants is a fundamental principle of justice (**Sierra**, para. 70). The confidentiality order would protect that interest.

[31] In terms of negative effect, should the order issue the public would be denied access to significant parts of the affidavit evidence. Blunting that negative effect is the fact that, but for these appeals, this evidence would not be available to the public. It is financial information about a privately held company which is ordinarily kept confidential. It is not information in which there is a general public interest. The information is, however, likely to be of significant interest to those who would compete with Shannex in the health care field but is information to which those competitors would not ordinarily have access.

[32] Had the confidentiality order been requested at the outset of the litigation and refused, Jason Shannon deposes that Shannex would have chosen not to pursue the appeal. In that case, the public would not have had access to the affidavit information which Shannex now seeks to seal.

[33] It is relevant, as well, that this is an appeal from a decision to release information under the **FIOPOP** regime. That is a process which guards the confidentiality of the information in dispute. As mentioned above, the **Act** expressly directs the Court to take precautions to avoid the unnecessary disclosure of sensitive information (s. 43(2)).

[34] Weighing these factors, I am satisfied that the benefits to the fair trial process outweigh the negative effect a sealing order would have on the principle of open justice. Accordingly, I would grant a confidentiality order but only in relation to the parts of the affidavit evidence which would reveal the sensitive information. Excluded from the public record will be paragraphs 17, 22 and 23 and Exhibit B of the Affidavit of Jason Shannon sworn to February 2, 2004 and paragraphs 6, 7, 9 and 10 and Exhibits B, C and D of the Affidavit of Laura Scott sworn to February 17, 2004.

(b) The Records in Dispute:

[35] Shannex also asks that the records which were in dispute be kept confidential from the public. It submits the **FOIPOP** order should only benefit the entity that applied for disclosure - that the records should not be available to the public at large through the court file. Had the Reviewing Officer's decision not been appealed, any other party seeking access to the records would be required to make fresh application under the **FOIPOP Act**. If the disputed documents remain in the open

Court file, they will be available to the public without the protections afforded by the **FOIPOP** regime.

[36] Here the records in dispute are integrally connected to the affidavit evidence. Edwards, J. found that from these records it is possible to ascertain information about Shannex's operations. But for the appeal from the Review Officer's decision to release the records, this information would not be publically available. A litigant who chooses to appeal the decision of the Reviewing Officer should not have to face the additional risk that in so doing the records in dispute will become part of the public record. Those records, although now available to the original applicant under the **FOIPOP Act**, should remain subject to that process.

[37] In the event there is a further application for access to the same records, absent a change in circumstances, Shannex may face an abuse of process argument if it objects to disclosure. On the other hand, circumstances may have changed such that it would be appropriate for Shannex to again oppose release of the information. That must be assessed if and when another application for access to the same material arises.

DISPOSITION:

[38] I would grant the application and would issue an order sealing from the public record the parts of the affidavits identified in paragraph 34 above as well as the record in dispute.

[39] There shall be no order for costs.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Freeman, J.A.