Federal Court of Appeal | Cour d'appel fédérale

Date: 20260211

Docket: A-230-25

Citation: 2026 FCA 28

CORAM: **WEBB J.A.**
GLEASON J.A.
PAMEL J.A.

BETWEEN:

JORDAN ASH

Appellant

and

CANADA (MINISTER OF HEALTH)

Respondent

Heard at Toronto, Ontario, on February 3, 2026.

Judgment delivered at Ottawa, Ontario, on February 11, 2026.

REASONS FOR JUDGMENT BY: PAMEL J.A.

CONCURRED IN BY: WEBB J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PAMEL J.A.

[1] In April 2023, the appellant, Jordan Ash, made a request to Health Canada under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act) for all individual reports of death associated with COVID-19 vaccinations. Following a reasonable search of its records, Health Canada disclosed 236 reports responsive to Mr. Ash's request. However, Health Canada went one step further; it advised Mr. Ash that the Public Health Agency of Canada (PHAC), a separate

government institution under Schedule I of the Act, would likely possess additional records responsive to his request and suggested he make a separate access request to that agency.

[2] Although Mr. Ash readily admits that he could have filed a separate access request with the PHAC, he did not do so. Rather, Mr. Ash filed a complaint with the Office of the Information Commissioner, claiming that Health Canada did not conduct a reasonable search in response to his request, thereby refusing access to requested records in breach of paragraph 30(1)(a) of the Act. Mr. Ash based his complaint on publicly available information which suggested that the Federal Government was in receipt of 427 individual reports of death possibly linked to the COVID-19 vaccines.

[3] In March 2024, the Information Commissioner issued her final report in which she concluded that Mr. Ash's complaint was not well founded. In short, the Information Commissioner was satisfied that Health Canada had conducted a reasonable search of the records under its control and that those responsive to Mr. Ash's access request were provided to him. The Information Commissioner also found that Health Canada had demonstrated that the additional records sought by Mr. Ash were in fact under the control of the PHAC and that Health Canada satisfactorily explained why it did not have control of them.

[4] Mr. Ash's application for review of the Information Commissioner's final report pursuant to subsection 41(1) of the Act was dismissed by the Federal Court on May 20, 2025 (2025 FC 914, *per* Gleeson J.) It is this decision which forms the subject matter of the present appeal.

[5] The appellate standards of review apply: correctness for any question of law and palpable and overriding error for any question of fact or mixed fact and law from which a legal error cannot be extricated (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191 at paras. 32–33; *Export Development Canada v. Canada (Information Commissioner)*, 2025 FCA 50 at paras. 31–32). As such, decisions on whether the requested documents were in fact under the control of a government institution are entitled to deference as questions of mixed fact and law, provided they are not premised on a wrong legal principle (*Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (*National Defence*) at para 23).

[6] Before the Federal Court, Mr. Ash did not dispute that Health Canada undertook a reasonable search of its records and disclosed to him the records responsive to his request that were under its control. Rather, Mr. Ash argued that Health Canada's mandate of monitoring vaccine safety and safeguarding public health imposed upon the government institution a legal duty to maintain under its control all the records responsive to his access request, including those purportedly under the control of the PHAC. As such, according to Mr. Ash, Health Canada's duties of disclosure included obtaining and disclosing to him records from other institutions that he believes Health Canada should possess. Accordingly, Mr. Ash sought relief in the nature of *mandamus* to compel Health Canada to obtain the missing records from the PHAC and to thereafter release the documents to him in response to his existing access request.

[7] I should mention that Mr. Ash also sought a declaration to the effect that government institutions, when responding to access requests, are required to obtain documents that under law

should be under their control. Although the Federal Court refused to grant the declaratory relief which he sought, Mr. Ash does not challenge that part of the judgment below in the present appeal.

[8] Recognizing that its authority under section 41 of the Act was limited to determining whether access to records responsive to Mr. Ash's access request had been denied to him by Health Canada and, if so, to order the release of those records as was held in *Blank .v Canada (Justice)*, 2016 FCA 189, the Federal Court concluded that with limited exceptions which do not apply in this case, it was not for the Federal Court to order and supervise Health Canada in how it conducted its review of its records or, as Mr. Ash was requesting that it do, to determine the scope of Health Canada's mandate in order to assess what records the agency should maintain under its control when considering an access request under subsection 41(1) of the Act.

[9] The Federal Court noted the evidence of Health Canada to the effect that it had entered into a shared services agreement with the PHAC that covered many internal services, including the provision of services under the Act, but that the processing and treatment of access requests submitted to Health Canada and the PHAC nonetheless remained separate and independent. In other words, access requests received by those government institutions within the Health Portfolio are limited to a review of records under the control of the specific government institution.

[10] Before us on appeal, Mr. Ash adds a new wrinkle to his argument: he cites *National Defence* in support of the proposition that one must give the term "control" a broad and liberal

meaning in order to create a meaningful right of access to government information, and that because Health Canada and the PHAC share responsibility of monitoring the safety of vaccines in Canada, Health Canada has *de facto* control over the records which the Federal Court determined to be under the control of the PHAC for the purposes of the application of subsection 4(1) of the Act.

[11] Justice Gleeson of the Federal Court concluded that the records which Mr. Ash was seeking were not under the control of Health Canada, a conclusion that was open to him on the record and thus entitled to deference. I cannot fault the Federal Court for not having addressed the concept of *de facto* control now being argued before us on appeal. In any event, I cannot agree with Mr. Ash on this issue. There is unequivocal affidavit evidence from Health Canada that the agency does not have access to the adverse effects following immunization reports submitted to the PHAC and that the PHAC does not share the reports it receives with Health Canada. On the other hand, Mr. Ash could only point to a chart on a Government of Canada website which, at best, only suggests that there is information sharing between Health Canada and the PHAC. The Attorney General of Canada (AGC) does not dispute that the two institutions share information but argues that there is a significant difference between the sharing of information and a finding that Health Canada has *de facto* control over the immunization reports held by the PHAC for the purposes of responding to an access request. I would agree with the AGC; Mr. Ash has not pointed to any evidence that Health Canada "has some power of direction or command over" the records which he seeks (*National Defence* at para 48). He thus has not met his burden of establishing that Health Canada had the necessary level of control to require it to disclose records that are under the control of the PHAC which he now seeks.

[12] Moreover, unlike the situation in *National Defence*, there seems little risk here that another government institution such as the PHAC could be turned "into a 'black hole' to shelter sensitive records that should otherwise be produced to the requester in accordance with the law." (*National Defence* at para 52). There was no intention to shield from Mr. Ash the reports found by the Federal Court to be under the control of the PHAC, as Health Canada itself suggested that he proceed with making a separate access request to obtain them. Mr. Ash refused to do so for his own reasons.

[13] Having considered the arguments of Mr. Ash, and as stated, I am not convinced of any reviewable error on the part of the Federal Court on the issue of *de facto* control. I agree with the Federal Court that Health Canada and the PHAC are distinct government institutions whose officials have separately been delegated authority under the Act. In any event, I cannot see how the *National Defence* case is of assistance to Mr. Ash. I agree that the notion of "control" must be given a broad and liberal meaning, however the documents in question in *National Defence* were purportedly in a ministerial office and not, as is the case here, under the control of a separate government institution under Schedule I of the Act. Although it shares with Health Canada the monitoring of the safety of vaccines as part of Canada's Health Portfolio, the PHAC undertakes its statutory duties under a different ministerial mandate and a distinct surveillance program. In line with the Court's conclusions in *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 98 at paragraph 15, institutions separately enumerated in Schedule I of the Act cannot be treated as one amalgamated government institution for access to information purposes just because they are placed under the same minister as part of a portfolio. I therefore cannot agree with Mr. Ash that Health Canada somehow retained *de facto* control over the

records that may be held by another government institution—albeit under the same portfolio—for the purposes of subsection 41(1) of the Act.

[14] With respect to the question of whether relief in the nature of *mandamus* should have been issued, the Federal Court correctly noted that the underlying application for review was brought under subsection 41(1) of the Act while extraordinary remedies such as *mandamus* are only available in applications for judicial review made under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (FCA) (see subsection 18(3) of the FCA); the nature and scope of these two distinct proceedings should not be conflated. There is no reviewable error in the Federal Court's reasoning on this issue. In any event, Mr. Ash has not convinced me that Health Canada was under a public legal duty to seek the documents from the PHAC, a prerequisite to the extraordinary remedy of *mandamus* (*Apotex Inc v. Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (FCA) at 744 and 766, aff'd 1994 CanLII 47 (SCC), [1994] 3 SCR 1100).

[15] I also disagree with Mr. Ash's proposition that the Federal Court erred in equating the review process under subsection 41(1) of the Act with an appeal to the Federal Court and improperly invoked section 18.5 of the FCA. Relying on the Court's decision in *Canadian National Railway Company v Scott*, 2018 FCA 148 (*Scott*), the Federal Court determined in paragraph 37 of its decision that the term "appeal" in section 18.5 of the FCA "is not limited to judicial appeals but extends to and includes any available and meaningful remedy allowing a decision to be challenged" (*Scott* at para. 45). An application for review under section 41 of the Act is unquestionably a meaningful remedy and is one that allows for a full review by the

Federal Court of the response to an access request. Thus, the Federal Court was correct in finding that section 18.5 of the FCA would bar an application for relief in the nature of *mandamus*.

[16] Moreover, Mr. Ash's request for relief in the nature of *mandamus* undermines his argument of *de facto* control by Health Canada over the records he seeks. Had Mr. Ash made out a case for *de facto* control, which he did not, it seems to me that he would not have required such relief for the Court to order the disclosure of the records.

[17] Finally, Mr. Ash challenges the Federal Court's refusal to consider as part of the record approximately 450 pages of additional documents which, as confirmed by both parties, was served upon the AGC and filed one hour prior to the hearing of the matter below, in support of his argument regarding the mandate of Health Canada. In coming to its decision, the Federal Court determined that the late filing was not supported by an affidavit addressing the relevance of the material, would be unfair to the AGC and would undermine the Court's ability to perform its role. The Federal Court also found that the documents were of limited relevance, particularly because the issue of Health Canada's mandate was not properly before the Federal Court on the underlying application. I find no reason to interfere with the Federal Court's exercise of discretion on this issue.

[18] For the reasons provided, I would dismiss the appeal. As no costs are sought by the AGC, none should be awarded.

"Peter G. Pamel"
J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-230-25
STYLE OF CAUSE:	JORDAN ASH v. CANADA (MINISTER OF HEALTH)
PLACE OF HEARING:	TORONTO, ONTARIO
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REASONS FOR JUDGMENT BY:	PAMEL J.A.
CONCURRED IN BY:	WEBB J.A. GLEASON J.A.
DATED:	FEBRUARY 11, 2026

APPEARANCES:

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