



See also: *Administrative Law*

ACCESS TO INFORMATION

Appeal from Federal Court decision (2019 FC 1455) allowing application of respondent pursuant to *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act), s. 44 objecting to disclosure of parts of records related to respondent's submissions to Health Canada for approval of a certain veterinary medicine — Following third party request made under Act, s. 6, Health Canada proposed release of 166 pages of information — Debate concerning Federal Court of Appeal's role in reviewing decision of Federal Court in application under s. 44 at heart of present appeal — Do principles set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*) apply, i.e. Court steps into shoes of Federal Court, or do standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*) apply, i.e. findings of fact, mixed fact, law made by Federal Court reviewed using palpable, overriding error standard; questions of law reviewed using correctness standard — Records in question submissions made by respondent for approval of Fortekor — S. 20 providing that certain third-party information within control of government institution not to be disclosed — Health Canada initially agreed that parts of information exempt from disclosure but, prior to hearing before Federal Court, reversed its position — Federal Court agreed with respondent's position, found that portions of record submitted by respondent exempt from disclosure, not to be disclosed — Federal Court intended only to order that Health Canada not disclose information identified by respondent as exempt from disclosure, not that Health Canada prohibited from disclosing entire 166 pages — Act, s. 44(1) providing third party (respondent in this case) right to apply to Federal Court to review decision of head of government institution to disclose information — S. 44.1 providing that, for greater certainty, application under s. 44 to be heard, determined as new proceeding — S. 44.1 added to Act prior to hearing of present application by Federal Court — Crown (appellant) maintained its position that *Agraira* still applying, that any findings of fact or mixed fact and law made by Federal Court to be reviewed on standard of correctness — Asserted, *inter alia*, that Federal Court made error of law in only applying one part of test prescribed for confidentiality under Act, s. 20(1)(b) — Respondent submitting principles in *Housen* applying — Main issue standard of review to be applied herein — Principles as set out in *Housen* applying in this appeal — Clear from wording of s. 44.1 that Federal Court not reviewing decision of Minister *per se* but rather making its own determination of whether exemptions from disclosure as set out in Act, s. 20 are applicable — Appeals from such decisions subject to appellate standards of review as set out in *Housen* — However, s. 44.1 only applying to application to Federal Court, not to appeal from decision of Federal Court — When expression "stepping into the shoes of the lower court" read in context, clear that this description used in relation to "classic" appeal of judicial review decision, not to appeal from decision arising from application made under s. 44 — Addition of s. 44.1 ending any dispute with respect to applicable standard

of review to be applied on appeal from decision of Federal Court on application under s. 44 — Crown could not succeed in appeal herein based on any alleged error of law in relation to Act, s. 20(1)(b) — Crown in this case asking Court to review all evidence, reach its own conclusions — This not role of Court — Crown's role to demonstrate where Federal Court made palpable, overriding error in making particular finding of fact or mixed fact and law — Federal Court committing palpable, overriding error — Paragraphs of reply affidavit Federal Court relying on not supporting finding that s. 20(1)(d) applying to exempt information — Federal Court also erring by not providing for disclosure of parts of records not exempt from disclosure — Appeal allowed.

CANADA (HEALTH) V. ELANCO CANADA LIMITED (A-468-19, 2021 FCA 191, Webb J.A., public reasons for judgment dated September 24, 2021, 25 pp.)