



PRACTICE

APPLICATIONS

Motion under *Federal Courts Rules*, SOR/98-106, r. 51 to appeal Prothonotary's order dismissing applicants' motion for order for production of documents (requested records) under rr. 317, 318 — Prothonotary dismissing applicants' motion upon concluding that r. 317 not applying to *de novo* reviews conducted pursuant to *Access to Information Act*, R.S.C., 1985, c. A-1 — Applicants contending that due to novel nature of some of legal issues raised in underlying application, including argument regarding constitutional division of powers, it is in interests of administration of justice that they be provided access to requested records — Applicants each served respondent with request for material in possession of Tribunal pursuant to r. 317 — Such requests for material sought disclosure of number of documents relevant to each of their applications, brought pursuant to Act, s. 44 — Those documents had not been produced to applicants, were allegedly before Chief of the Access to Information and Privacy Division of Health Canada when she decided to release certain records (records) in response to specific access to information request (ATI request) — Later, respondent informed all parties of its objection to requests for material, pursuant to Rules, r. 318(2) — Applicants subsequently brought motion for order for production of requested records pursuant to r. 318 but motion dismissed — Whether Prothonotary erred in concluding that r. 317 not applying to Act, s. 44 review in circumstances. — In decision, Prothonotary concluded "untenable" that s. 44 review constituted application for judicial review because *de novo* review is not, according to established case law, judicial review — Applicants asserting that even though s. 44 review is *de novo* review, clear that administrative decision maker's decision is under review — Prothonotary relied upon *Philippe Nolin v. Attorney General of Canada*, (20 November 2015), Ottawa, Docket: T-1749-14 (FC) holding that r. 317 not applying to applications brought pursuant to Act, s. 41 — However, applicants right in contending *Nolin* internally inconsistent decision — *Nolin* case distinguishable from present appeal — S. 41 review permitting individuals seeking disclosure of records to bring matter before Court for review whereas s. 44 review permitting third parties affected by access to information requests to seek remedy from courts — Fact scenario implicit in s. 41 review providing compelling reasons to find that r. 317 not applying — However, under s. 44 review, no similar considerations militating in favour of conclusion that r. 317 not applying — *Nolin* decision silent on that issue — Decision of Health Canada under review in present appeal — R. 317 designed to obtain materials from tribunal in cases of judicial review of its decision — S. 44 review is judicial review — Nothing in r. 317 indicating that its application is limited to applications brought pursuant to *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 18.1 — Had Parliament intended same, it could easily have done so — Moreover, as matter of public policy, would be wrong to conclude that r. 317 not applicable to *de novo* review — Respondent in possession of evidence which applicants wishing to adduce — To insulate respondent from disclosure of such evidence would unfairly disadvantage applicants, would immunize respondent from effective review on basis of content of requested records — Prothonotary erred in concluding that r. 317 not applying to *de novo* judicial review under Act, s. 44 — Was in interests of administration of justice that requested records be produced — Without access to all relevant information, applicants prejudiced — Because no document production in s. 44 review, applicants requiring access to r. 317 in order to effectively review impugned decision — Matter referred back to Prothonotary with direction — Appeal allowed.

PREVENTOUS COLLABORATIVE HEALTH V. CANADA (HEALTH) (T-189-19, T-190-19, T-191-19, 2021 FC 253, Bell J., reasons for order dated March 25, 2021, 16 pp.)