Federal Court  Cour fédérale

**Date: 20230606**

**Docket: T-189-19**

**Citation: 2023 FC 791**

**Ottawa, Ontario, June 6, 2023**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**PREVENTOUS COLLABORATIVE HEALTH**

**Applicant**

**and**

**CANADA (MINISTER OF HEALTH)**

**Respondent**

**PUBLIC ORDER AND REASONS**
**(Identical to Confidential Order and Reasons dated May 3, 2023)**

[1] The Applicant, Preventous Collaborative Health [Preventous], has brought two motions that are presently before the Court. The first is a motion brought pursuant to Rule 51 of the *Federal Courts Rules* [*Rules*] appealing the amended order of Associate Judge Coughlan dated February 1, 2023 [Order], in which she dismissed Preventous' motion for production of three categories of documents on the basis that the motion was not timely and the requested documents are irrelevant to the underlying application. The second motion is a motion for leave, pursuant to Rule 351 of the *Rules*, to permit Preventous to present fresh evidence in the form of the affidavit of Angie Champoux sworn January 9, 2020 and the affidavit of Sarah Budjack sworn March 1, 2023.

[2] For the reasons that follow, the motion for leave to rely on fresh evidence is granted in part and the motion appealing the Order is dismissed.

## I. Background

[3] On March 13, 2017, Health Canada received a request for records under the *Access to Information Act*, RSC 1985, cA-1 [*Act*], which request included:

- Copies of all audits performed by Alberta Health and shared with Health Canada on private primary health-care clinics that charge patients annual enrollment and membership fees, including three audit reports that Alberta Health shared with Health Canada in January of 2015 and any new audits of those clinics and a fourth clinic.

- Copies of all correspondence between January 1, 2015 and March 13, 2017 between Health Canada and Alberta Health concerning the cessation of charges for insured services at the audited clinics and the processes that were in place to reimburse patients who had been inappropriately charged at the audited clinics.

[4] 108 pages of responsive records were sent to the ATIP Division by the *Canadian Health Act* Division [CHAD] of the Strategic Policy Branch of Health Canada, including Audit Reports of Preventous and two other clinics and correspondence between Health Canada and Alberta Health.

[5] Preventous was provided with an opportunity to provide Health Canada with representations, pursuant to section 28 of the *Act*, regarding whether the Audit Report or part thereof should not be disclosed to the requestor. Between July 19, 2017 and December 17, 2018, Preventous provided Health Canada with representations objecting to the disclosure of the Audit Report in its entirety pursuant to sections 13, 14 and 20 of the *Act*.

[6] On January 11, 2019, Health Canada notified Preventous that it would be releasing a redacted version of the Audit Report to the requestor, with certain information being exempted pursuant to subsection 19(1) and paragraph 20(1)(b) of the *Act*.

[7] On January 25, 2019, Preventous commenced this application pursuant to section 44 of the *Act* seeking a review of the matter. Similar application were commenced by two other applicants in Court File Nos. T-190-19 and T-191-19.

[8] In its Notice of Application, Preventous seeks an order directing that the Audit Report and any subsequent audits or any correspondence about same between Health Canada and Alberta Health not be disclosed in whole or in part, and an order directing that the initial disclosure of the Audit Report by Alberta Health to Health Canada was contrary to law such that Health Canada is not in lawful possession of the Audit Report and therefore is not lawfully permitted to disclose same under section 4 of the *Act*.

[9] With respect to the grounds of review, Preventous asserts two main arguments for the relief sought:

A. The release of the Audit Report would be a breach of section 20 of the *Act* as it would reveal Preventous' trade secrets (contrary to paragraph 20(1)(a)), would reveal Preventous' confidential financial, commercial, scientific or technical information (contrary to paragraph 20(1)(b)), would reveal information which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of Preventous (contrary to paragraph 20(1)(c)), would reveal information which could reasonably be expected to interfere with

Preventous' contractual and other negotiations (contrary to paragraph 20(1)(d)) and that disclosure of the Audit Report is not in the public interest or in the alternative, any public interest is outweighed by the potential financial loss to, prejudice to the competitive position of and interference with the contractual and other negotiations of, Preventous (contrary to paragraphs 20(6)(a) and (b)).

B. The Audit Report should not be released as it is not "under the control" of Health Canada within the meaning of section 4 of the *Act* because Health Canada did not legally obtain the Audit Report.

[10] The Notice of Application pleads that the application will be supported by materials requested pursuant to Rule 317 of the *Rules*. However, no Rule 317 request was included in the Notice of Application.

[11] On July 24, 2019, the Respondent served the affidavits of Lisa Praine and Pamela Martin in response to the application. For the purpose of these motions, it is of note that the affidavit of Ms. Praine provides evidence regarding Health Canada's response to the ATIP request, the identification of responsive records, the solicitation of submissions from Preventous and their responses and context of the responsive records and the application of the *Act*. In particular, she provides evidence as to how Health Canada came into possession of the Audit Report and exhibits to her affidavit a copy of the correspondence from Alberta Health transmitting the Audit Report.

[12] On November 7 and 8, 2019, both Ms. Praine and Ms. Martin were cross-examined. During their cross-examination, Preventous sought undertakings to produce seven categories of documents. The Respondent took the undertakings under advisement and subsequently advised

that the Respondent objected to the undertaking on the basis that the documents sought were not relevant and that Preventous was not entitled to undertakings during a cross-examination on an affidavit. Preventous brought a motion in relation to the Respondent's refusals.

[13] By order dated March 25, 2020, the Case Management Judge dismissed Preventous' refusals motion.

[14] By direction issued June 16, 2020, the Case Management Judge directed Preventous to serve and file its application record by July 16, 2020.

[15] On June 22, 2020, Preventous served a Rule 317 request seeking the same documents sought on the cross-examination of Ms. Praine and Ms. Martin, as well as additional material before the Health Canada decision-maker who determined that the Audit Report should be released. The Respondent objected to the entirety of the Rule 317 request.

[16] On July 15, 2020, Preventous brought a motion pursuant to Rule 318 of the *Rules* seeking production of the Rule 317 documents. By order dated October 20, 2020, the Case Management Judge dismissed the motion on the basis that Rule 317 does not apply to applications brought pursuant to section 44 of the *Act*. Preventous appealed the order.

[17] By order dated March 25, 2021, Justice Bell overturned the Case Management Judge and found that Rule 317 does apply on a section 44 application. Justice Bell referred the matter back to the Case Management Judge for a determination of the issues of the timeliness of Preventous' Rule 317 request and the alleged overbreadth of the Rule 317 request. The Respondent appealed Justice Bell's decision.

[18] By order dated September 6, 2022 [FCA Order], the Federal Court of Appeal allowed the appeal, quashed the order of Justice Bell and reinstated the order of the Case Management Judge, finding that Rule 317 does not apply on a section 44 application. In the FCA Order, the Federal Court of Appeal provided the following guidance as to how the evidentiary record is to be developed on a section 44 application:

> [17] Part 5 of the Rules sets out the procedure for applications: see Rule 300(b) ("proceedings required or permitted by or under an Act of Parliament to be brought by application..."). Under Part 5, the parties are entitled to serve affidavits under Rules 306-307, conduct cross-examinations under Rule 308, and file records under Rules 309-310.
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> [18] As well, the Federal Court, on motion brought on notice to all affected parties, may order the production of evidence necessary to allow the application to be meaningfully heard and determined: see generally Tsleil-Waututh Nation, above. The application under section 44 cannot be meaningfully heard and determined unless the Court has this power: by analogy, see Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609. Alternatively, the authority for such an order may found in the Federal Court's powers under Rule 313, its general supervisory power in administrative matters (Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385), its plenary jurisdiction to make orders necessary for the conduct of proceedings (see, e.g., Dugré v. Canada (Attorney General), 2021 FCA 8 and cases cited therein), and its powers to compel evidence under other provisions of the Federal Courts Rules or by analogy to them under Rule 4. In oral argument, the parties seemed to agree that many tools exist by which evidence can be obtained in a section 44 application.
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> [19] The backdrop against all of this is that applications under section 44 of the Act must proceed in a "summary" way: section 45. To fulfil this, the parties must work quickly, diligently and cooperatively, communicating with each other to determine how they can jointly best ensure that a complete evidentiary record is placed before the Court.

[19] The Federal Court of Appeal went on to note that while disclosure of the documents sought by Preventous was not available pursuant to Rule 317, disclosure may be potentially available pursuant to the means set out above. However, as Preventous had not pursued production pursuant to those means, the Federal Court of Appeal declined to rule on whether the material sought is relevant to the section 44 application and whether Preventous had "been timely", noting that these were issues for the Case Management Judge on any future motion brought by Preventous.

[20] On November 4, 2022, Preventous brought a motion, pursuant to Rules 4 and 313 and the plenary jurisdiction of the Court to control its own process, to compel production of the following documents:

A. Any inquiries made by Health Canada to the Alberta Ministry of Health regarding private health care clinics in Alberta;

B. Any communications or records of communications between the Minister of Health, Alberta Health and CHAD discussing or relating to the Audit Report; and

C. Any communications or records of communications between the Minister of Health, Alberta Health and CHAD relating to private health care clinics in Alberta.

[collectively, the Requested Documents].

[21] In her Order, the Case Management Judge dismissed the motion on the basis that the motion had not been brought in a timely manner, stating:

> [20] As noted in the procedural history section of this Order, this is the third attempt by the Applicant to secure production of the Requested documents. Section 44.1 is a summary proceeding and as

> cautioned by Justice Stratas, must be undertaken quickly. The reason for that is obvious, the ATIA is quasi-constitutional legislation and its purpose "is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society…" (ATIA section 2(1)). It is axiomatic that as long as the proceeding remains outstanding, the Requestor's request goes unanswered.
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> [21] The present Application was filed in January 2019, some four years ago. The history of this proceeding does not reflect any sense of urgency. Indeed, it was only on June 22, 2022, 18 months after the Notice of Application was filed and 3 months after Associate Judge Ring's March 25, 2020 Order, that the Applicant served its Rule 317 request. The Federal Court of Appeal issued its Reasons for Judgment on September 6, 2022, but the present motion was not filed until November 4, 2022, and only after this Court sought a status update.
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> [22] While the Federal Court of Appeal declined to rule on whether the materials are relevant to the section 44 application and whether the Applicant has been timely, it reserved that decision to this Court (Preventous at para 22).
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> [23] In all of the circumstances, I am not satisfied that the motion has been brought in a timely manner and on that basis alone, I would dismiss the motion.

[22] The Case Management Judge nonetheless went on to consider whether the Requested Documents were relevant, in the event that she was wrong on the issue of timeliness. She held:

> [25] The parties devoted considerable argument in their written representation to the meaning of "control" and whether the Respondent is in control of the audit report for the purposes of disclosure of the report to the Requestor. That is the central issue on the section 41 application and is a matter for the Applications Judge. It is not a matter for this Court to address and it is not germane to the issue of disclosure.
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> [26] For present purposes, the parties have availed themselves of the opportunity to present a fresh record for the reviewing Court. Each side filed affidavits, cross-examinations were conducted and records have been served and filed. Indeed, a Requisition for Hearing was filed by the Applicant on August 31, 2020. While the Applicant baldy asserts that the Requested documents are central to its

> argument concerning the lawfulness of the Respondent's possession of the audit report, it does not address how the record that is currently before the Court is deficient. The Applicant's Reply Representations, citing the Supreme Court of Canada in *Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48 argues that evidence which is crucial to a central issue in a case must be disclosed in the interests of a fair trial. I agree. Nevertheless, I am not persuaded, based on the material before me that all of the relevant evidence is not already before the Court.
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> [27] As a final point, and as referred to in the October 20, 2020 Order of Associate Judge Ring, section 46 of the *ATIA* provides that the Applications Judge may examine any record for the purposes of an application under section 44. If the Applications Judge is persuaded that the record is deficient, the Applicant's remedy lies in that section.

[23] On the present motions, Preventous asserts that the Case Management Judge erred by: (a) concluding that Preventous had been guilty of delay in the face of a total absence of evidence to support that conclusion; (b) concluding that delay could form the basis for a decision to refuse Preventous' application for disclosure of the Requested Documents; and (c) imposing upon Preventous the onus of establishing the relevance of the Requested Documents when the Requested Documents were not in the possession of Preventous or before the Case Management Judge.

## II. Issues and Standard of Review

[24] As stated by the Federal Court of Appeal in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, the standard of review on an appeal of a decision of an Associate Judge is correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law for which there are no extricable questions of law [see also *Housen v Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 36, 83; *Rodney Brass v Papequash*, 2019 FCA 245].

[25] The standard of palpable and overriding error is high and difficult to meet. It was described by the Federal Court of Appeal in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46 in these terms:

> Palpable means an error that is obvious. Overriding means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[26] In considering this appeal, I am also mindful that as the Case Management Judge was very familiar with the particular circumstances and issues of the underlying proceeding and that, as a result, any intervention on appeal should not come lightly. This does not mean, however, that errors, factual or legal, should go undetected [see *Hospira Healthcare, supra* at para 10].

[27] These motions raise the following issues:

A. Whether Preventous should be permitted to rely on fresh evidence on this appeal;

B. Whether the Case Management Judge erred in dismissing the motion to compel for timeliness; and

C. Whether the Case Management Judge erred in determining that the Requested Documents are not relevant.

## III. Analysis

[28] Notwithstanding the order in which the parties addressed the issues, I will deal with the issue related to relevance first.

**A.** ***The Case Management Judge did not err in determining that the Requested Documents are not relevant***

[29] Preventous asserts that the Case Management Judge erred both in identifying and applying the test for determining whether the Requested Documents are relevant. The determination regarding the test to assess relevance is reviewable for correctness, whereas the determination of whether the Requested Documents are relevant is reviewable on a palpable and overriding error standard.

[30] With respect to the test for relevance, the Respondent asserts that Rule 222(2) of the Rules codifies what constitutes a relevant document – namely, a document is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case. However, Rule 222 has no application in this proceeding as it is found in Part 4 of the *Rules* and therefore only applies to actions.

[31] The Respondent also points to the Federal Court of Appeal's decision in *Apotex Inc v Canada*, 2005 FCA 217 at paragraphs 15 and 16, where the Court of Appeal adopted the "train of inquiry" test for relevance – namely, that a document is relevant where it either directly or indirectly advances the case of one party or damages that of its adversary, or the document can fairly be said to lead to a train of inquiry that might have either of those two consequences. Preventous also asserted at the hearing of the motions that the train of inquiry test was the correct test for determining the relevance of the Requested Documents. However, the principles enunciated in *Apotex* have no application here as the test for relevancy addressed in *Apotex* was expressly for the purpose of discovery. The relevance principles applicable to examinations for discovery do not apply to applications.

[32] In this proceeding, relevance is determined with reference to the issues as defined in the Notice of Application and the onus lies on Preventous to demonstrate the relevance of the Requested Documents.

[33] As such, I turn to examine the Notice of Application. As noted above, Preventous seeks to prevent the disclosure of the Audit Report based on two grounds: (a) the release of the Audit Report would be a breach of section 20 of the *Act*; and (b) the Audit Report is not "under the control" of Health Canada within the meaning of section 4 of the *Act* because Health Canada did not legally obtain the Audit Report. The first ground is not at issue on this motion.

[34] With respect to the second ground, the Notice of Application pleads no further material facts and contains no further particulars as to Health Canada's alleged illegal possession of the Audit Report. Rather, it is only in its written representations on this motion that Preventous articulates its theory. Preventous asserts that in determining whether a requested record is "under the control of a government institution", possession of the record by a government institution can equal control provided that the possession is exercised in a lawful fashion. Preventous asserts that Health Canada was not lawfully in possession of the Audit Report for the following reasons:

A. The laws of Alberta governing healthcare information and billing impose privacy conditions upon Alberta Health. Section 22 of the *Alberta Health Care Insurance Act* [*AHCIA*] - the legislation that gave Alberta Health the power to conduct the audit - states that "the Minister or a person employed in the administration of this Act and authorized by the Minister may disclose health information acquired under this Act…only in accordance with the Health Information Act" except as permitted or required under the *AHCIA*.

B. The Affidavit of Ms. Martin states at paragraph 10 that Health Canada obtained a copy of the Audit Report for the purposes of administering the *Canada Health Act* [*CHA*]. Permitted disclosures of health information are enumerated in subsections 22(2) to (25) of the *AHCIA*. None of these subsections permit the disclosure of the Audit Reports to Health Canada by Alberta Health for the purpose of administering the *CHA*. Disclosures permitted for the purpose of administration of the *CHA* are addressed at subsection 2(7) of the *AHCIA*. This subsection lists the information that may be disclosed for this purpose as follows:

> …information pertaining to the date on which health services were provided and a description of those services, the name and address of the person who provided the services, the registration number of the person who received the services, the benefits paid for those services and the person to whom they were paid…

The Audit Reports are not limited to this information, and as such Preventous alleges that its disclosure was therefore not permitted under subsection 22(7) of the *AHCIA*.

C. Disclosure of the Audit Report was not permitted by the *Health Information Act*, RSC 1985, c C-6 [*HIA*]. Alberta Health is a custodian of health information under the *HIA*. Section 31 of the *HIA* states that no custodian shall disclose health information except in accordance with *HIA*. Permitted disclosures under *HIA* are discussed in Part 5 of *HIA*. No disclosure permitted by this Part would permit the disclosure that occurred in this case. In particular, there was no agreement in place under subsection 35(f) of *HIA*.

D. As Alberta Health is the custodian of the Audit Report, whether the Audit Report can be disclosed is a question to be determined by the Alberta legislature and by the privacy

commissioner in Alberta. Disclosure by Health Canada would violate the *Constitution Act, 1867*.

E. Health Canada has no constitutionally sound reason to have the Audit Reports in the first place. The Audit Report came into possession of Health Canada outside the course of fulfillment of a statutory function, such that it is not lawfully in the possession of Health Canada and therefore its disclosure by Health Canada would contravene section 92 of the *Constitution Act, 1867*.

[35] Whether or not Health Canada was in lawful possession of the Audit Report and whether or not unlawful possession has any bearing on the issue of whether the record at issue is under the control of a government institution for the purpose of section 4 of the *Act* were not the issues before the Case Management Judge. They are issues to be addressed on the hearing of the application on the merits. Rather, the issue before the Case Management Judge was whether Preventous had demonstrated the relevance of the Requested Documents based on the issues as identified in the Notice of Application.

[36] The Case Management Judge determined that Preventous had failed to demonstrate how the record before the Court is deficient and she was not persuaded that all relevant evidence was not already before the Court. Put differently, she held that the Requested Documents were not relevant. Given that Preventous had brought the motion pursuant to Rule 313 (which permits the Court to order that other material be filed where the Court considers that the application records of the parties are incomplete), the Case Management Judges' focus on any deficiency in the record is understandable. However, the Case Management Judge's reasons do not detail the test that she applied to assess the issue of relevance and provide little insight as to the basis for why she

determined that the Requested Documents are not relevant. That said, I see no error in the conclusion that she reached.

[37] In that regard, in support of its assertion that the Requested Documents are relevant, Preventous asserts that:

> [53] Documents relating to how and why Health Canada came into possession of the Audit Reports, such as the [Requested Documents], relate to the means by which and the reasons underpinning why Health Canada came to possess the Audit reports. It is Health Canada's means of and purpose in procuring the Audit Reports that will establish the legality or illegality of Health Canada's possession of the Audit Reports, which will also establish whether Health Canada is in "control" of the Audit Reports for the purposes of the [Act]. The [Requested Documents] are therefore relevant to the issues in dispute in the Applications and must be disclosed.

[38] Preventous has asserted very specific arguments in its written representations (yet, problematically, appearing nowhere in its pleading) as cited in detail at paragraph 34 above as to why Health Canada is allegedly in unlawful possession of the Audit Report. However, no attempt was made by Preventous before the Case Management Judge (or before me) to demonstrate how the Requested Records are relevant to those very specific arguments. Taken as articulated by Preventous, I fail to see how the Requested Documents would be relevant to those arguments, which are grounded primarily in statutory interpretation and constitutional arguments.

[39] Moreover, Preventous has made no attempt to demonstrate how: (a) any Health Canada inquiries regarding clinics (not limited to Preventous) providing uninsured services in Alberta; (b) any communications about such clinics (which would not be limited to the Audit Report); and (c) any communications discussing or relating to the Audit Report (as opposed to those related to the manner or authority by which Health Canada came into possession of the Audit Report) could

possibly be relevant to the issues raised on this application. I find that the overbreadth of the request and the absence of any plausible explanation for the breadth thereof demonstrates that Preventous is engaged in an improper fishing expedition.

[40] At the hearing of the motion, Preventous asserted that the fact that Ms. Praine referred to the 108 pages of responsive records in her affidavit but did not produce all 108 pages, leads to the supposition that the 108 pages may contain information relevant to this application. I reject this assertion. As a starting point, Preventous' request for the Requested Documents is not framed as a request for the balance of the 108 pages beyond the pages already in Preventous' possession (namely, the Audit Report and the correspondence from Alberta Health transmitting the Audit Report to Health Canada). In any event, the mere fact that the 108 pages of documents referenced in Ms. Praine's affidavit are responsive to the request for records made by the requestor does not automatically render all such documents relevant on this application, which is focused only on the Audit Report. Preventous still bears the burden of demonstrating the relevance of the Requested Documents to the specific grounds advanced on this application, which it has not done.

[41] Preventous also asserted at the hearing of the motion that it could be that there was a "colourable attempt" by Health Canada and Alberta Health to get around any constitutional limitations that would prevent the transmission of the Audit Report and it is only by reviewing the Requested Documents that Preventous and the Court can be satisfied that that did not occur. I find no merit to this assertion as it is based entirely on speculation. Preventous had an opportunity to cross-examine Ms. Praine and Ms. Martin and has pointed the Court to no evidence arising from those cross-examinations (or otherwise in the record) that supports this assertion or any other potential abuse by Health Canada or Alberta Health in relation to the Audit Report.

[42] Preventous asserts that the Case Management Judge erred by reversing the applicable onus by denying the motion on the basis that Preventous had failed to prove the relevance of documents that Preventous has never seen. In holding that the relevant evidence was already before the Court, without having reviewed the evidence and in the face of Preventous' evidence in respect of the missing Requested Documents, Preventous asserts that the Case Management Judge erred. I reject this assertion. The onus was on Preventous to demonstrate the relevance of the Requested Documents and they did not do so. The fact that the Case Management Judge did not review the documents is immaterial, as one would not expect such documents to be before the Court on a motion to compel. Moreover, I note that there was no request made by Preventous that the Respondent be compelled to place the Requested Documents under seal and before the Court for the Case Management Judge's review as part of her determination of the motion.

[43] I am not satisfied that Preventous demonstrated before the Case Management Judge that Health Canada is withholding any relevant documents or, put differently, that the record on this application is incomplete. Accordingly, I find that the Case Management Judge did not err in finding that the Requested Documents need not be produced. While this was a secondary basis upon which the Case Management Judge rejected the motion, my determination of this issue is sufficient to dispose of this appeal.

**B.** ***Preventous should be permitted to rely on a portion of the fresh evidence on this appeal***

[44] The jurisprudence of this Court establishes that new evidence may be admitted on a Rule 51 motion to appeal an Associate Judge's order in exceptional circumstances [see *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at para 16]. In order to demonstrate exceptional circumstances, the moving party must establish that the fresh evidence: (a) could not have been

made available earlier; (b) will serve the interests of justice; (c) will assist the Court; and (d) will not seriously prejudice the other side [see *Suzuki*, *supra* at para 37; *Graham v Canada*, 2007 FC 210; *Carten v Canada*, 2010 FC 857].

[45] Preventous seeks leave of the Court to rely on fresh evidence on this appeal in the form of the affidavit of Sarah Budjak sworn March 1, 2023 and the affidavit of Angie Champoux sworn January 9, 2020 [collectively, the Fresh Evidence]. Preventous asserts that the purpose of the Fresh Evidence is to provide evidence on the issue of the timeliness of the motion to compel the Requested Documents. Preventous asserts that exceptional circumstances are established as:

A. The Fresh Evidence could not have been made available earlier as the issue of the timeliness of the motion was not raised as an issue on the motion by Preventous, by the Respondent in its responding motion record or in the case law. While the Federal Court of Appeal in the FCA Order had noted that timeliness would be referred to the Case Management Judge on a fresh motion, it was not a live issue on the fresh motion and it was only once Preventous received the Case Management Judge's reasons for her Order that the importance of evidence as to the timeliness of the motion came to light.

B. The Fresh Evidence is relevant to the issue of timeliness in that it demonstrates the proactive steps taken by Preventous to advance or otherwise resolve the motion to compel.

C. The Fresh Evidence is credible in the sense that both affidavits are sworn documents attesting to the truth of their contents and the statements made therein.

D. The Fresh Evidence could reasonably have affected the result in that the Fresh Evidence addresses the concerns of the Case Management Judge in respect of why the motion to compel was filed approximately six weeks after the FCA Order.

E. The Fresh Evidence will not seriously prejudice the Respondent.

[46] With respect to the affidavit of Ms. Champoux, the affidavit provides a chronology of any significant procedural steps taken on this application from the commencement of the application in January of 2019 until the establishment of a timetable for the filing of the refusals motion in December of 2019. None of the evidence contained in Ms. Champoux's affidavit is disputed and it is all readily apparent from a review of the Court file. In the circumstances, I do not find that this evidence is necessary or of assistance to the Court, particularly given that, in her Order, the Case Management Judge did not point to any events in 2019 as underpinning her timeliness finding.

[47] With respect to the affidavit of Ms. Budjak, the affidavit provides evidence as the steps taken by counsel for Preventous to advance the motion to compel and/or its resolution from the date of the FCA Order. The Respondent opposes leave being granted to Preventous to rely on the affidavit of Ms. Budjak on a number of grounds. First, the Respondent asserts that the evidence could have been made available before the Case Management Judge as Preventous was alive to the timeliness issue when the motion was filed. I reject this assertion. While the Federal Court of Appeal certainly raised an issue of timeliness and suggested it would be addressed on any fresh motion before the Case Management Judge, a review of the motion materials filed by the parties demonstrates that neither party raised any arguments related to the timeliness of the motion. Moreover, as there was no hearing of the motion, the issue of timeliness could not have been raised

at a hearing and the Court file reveals no direction from the Case Management Judge asking for submissions on the issue of timeliness. As such, I am satisfied that Preventous has provided a reasonable explanation as to why this evidence was not before the Case Management Judge.

[48] Second, the Respondent asserts that the affidavit of Ms. Budjak will not serve the interests of justice and will not assist the Court as it is irrelevant and would not have affected the outcome of the motion. The Respondent asserts that the delay in filing the motion to compel was not the decisive issue with respect to timeliness. Rather, the Respondent asserts that the decisive issue was that a section 44 application is to proceed in a summary manner and this application has not so proceeded. The Respondent asserts that the core issue underpinning the timeliness finding is that this application has not proceeded to a hearing on the merits due to Preventous' repeated failed attempts to obtain the Requested Documents. I reject this assertion. The Case Management Judge held that the motion had not been brought in a timely manner on the express basis of the delay in filing the Rule 318 motion and the delay in filing the motion to compel (albeit in the overall context of a four-year delay). The affidavit of Ms. Budjak speaks directly to the rationale for the delay in filing the motion to compel.

[49] The Respondent further asserts that the affidavit of Ms. Budjak would not have been expected to change the result as the Case Management Judge's finding was based on the totality of the delay in the section 44 application and not just the delay in bringing the motion to compel following the release of the FCA Order. I also reject this assertion. The delay in bringing the motion to compel is part of the overall delay in this application moving forward to a hearing on the merits and thus is relevant and could have impacted the Case Management Judge's finding.

[50] I am also satisfied that the Respondent is not prejudiced by Ms. Budjak's fresh evidence.

[51] In the circumstances, I am satisfied that leave should be granted to Preventous to rely on Ms. Budjak's affidavit on this appeal.

**C.** ***Whether the Case Management Judge made an error in dismissing the motion to compel for timeliness***

[52] Having found that the Case Management Judge did not err in dismissing the motion to compel on the basis that the Requested Documents are not relevant, I need not make a determination as to whether the Case Management Judge erred in dismissing the motion to compel on her primary ground – namely, due to a lack of timeliness. However, I do wish to make a number of observations.

[53] Contrary to the assertion of Preventous, this Court retains the jurisdiction to dismiss any motion for delay, regardless of whether delay is an express requirement of the test to be applied in considering the specific relief sought on a motion. This power comes from the Court's plenary jurisdiction to regulate its proceedings and restrain any abuses of its procedures. Moreover, in case managed proceedings, a Case Management Judge is granted the power, pursuant to Rule 385(1)(a), to make any order that is necessary for the just, most expeditious and least expensive outcome of a proceeding, which would include dismissing a motion for delay. These powers permit a Case Management Judge to take a more active posture, including of their own initiative, to regulate the parties' conduct fairly with a view to progressing a proceeding to a prompt hearing on the merits [see *Mazhero v Fox*, 2014 FCA 219 at paras 2-6]. Accordingly, I find that it was open to the Case Management Judge to consider whether the motion to compel should be dismissed on a preliminary basis for being untimely.

[54] However, the Court's plenary jurisdiction and the powers vested in Case Management Judges by Rule 385(1) must be exercised in accordance with procedural fairness [see *Mazhero, supra* at para 5]. In this case, the timeliness of the motion was not raised by the parties in their motion materials. In order to make a determination on an issue not raised by the parties, it was incumbent upon the Case Management Judge to put the issue to the parties and provide them with an opportunity to make submissions thereon. Having failed to do so, I find the parties were denied procedural fairness. However, this denial of procedural fairness is immaterial to the outcome of this appeal in light of my determination regarding the relevance of the Requested Documents.

## IV. Costs

[55] As there was a mixed result on the motion for fresh evidence, I decline to make any cost award on that motion.

[56] On the appeal motion, the Respondent seeks their costs in the amount of $2,500.00 payable forthwith on the basis that Preventous should never have brought the motion. Preventous asserts that the appeal motion raises a novel issue and therefore no costs should be awarded to either party. I am not satisfied that there was anything sufficiently novel regarding the appeal motion such that the Court should depart from the usual practice that costs are payable by the unsuccessful party to the successful party. As the Respondent was successful in resisting the motion, I find that the Respondent is entitled to its costs. I further find that the quantum requested by the Respondent is reasonable, although I am not satisfied that the circumstances of this motion warrant a cost award made payable forthwith.

**THIS COURT ORDERS that:**

1. The Applicant is granted leave to rely on the affidavit of Sarah Budjack sworn March 1, 2023 on the Rule 51 appeal motion.

2. The Rule 51 appeal motion is dismissed.

3. The Applicant shall pay to the Respondent their costs of this motion fixed in the amount of $2,500.00 payable in any event of the cause.

4. A copy of this Order shall be placed in Court File Nos. T-190-19 and T-191-19.

"Mandy Aylen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-189-19 |
| **STYLE OF CAUSE:** | PREVENTOUS COLLABORATIVE HEALTH v CANADA (MINISTER OF HEALTH) |
| **PLACE OF HEARING:** | VIDEOCONFERENCE |
| **DATE OF HEARING:** | MAY 1, 2023 |
| **REASONS FOR ORDER AND ORDER:** | AYLEN J. |
| **DATED:** | JUNE 6, 2023 |

**APPEARANCES:**

| | |
|---|---|
| D. Bronwhyn Simmons<br>Gerald D. Chipeur | FOR THE APPLICANT<br>PREVENTOUS COLLABORATIVE HEALTH |
| Kerry Boyd<br>Andrew Cosgrave | FOR THE RESPONDENT<br>CANADA (MINISTER OF HEALTH) |

**SOLICITORS OF RECORD:**

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| Miller Thomson LLP<br>Barristers and Solicitors<br>Calgary, Alberta | FOR THE APPLICANT<br>PREVENTOUS COLLABORATIVE HEALTH |
| Department of Justice<br>Barristers and Solicitors<br>Edmonton, Alberta | FOR THE RESPONDENT<br>CANADA (MINISTER OF HEALTH) |