

Federal Court



Cour fédérale

Date: 20251002

Docket: T-1436-22

Citation: 2025 FC 1623

Ottawa, Ontario, October 2, 2025

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**BERNARD ALBERT, MARIE ALLCHURCH,
JULIA ALVAREZ, JASON AMARO,
VANESSA APOSTOLOVSKI, MARIA
ARENA, ALI BAHRI, RAYMOND. S. BAKER,
DAVID BAKHUYZEN, KIM BANDO, ADILA
BASIC, ANJA BATTIE, KELLI BATTYANYI,
MICHAEL BECKER, JASON MATTHEW
BERARD, WANDA BERG, LAURIE BERNES,
ANDREA BIALOWAS, THERESA BICKLE,
ANGELLA BLIER, MARK BOIKOVITIS,
ERIK BOUCHARD, ROBERT
BOURBONNIERE, BROOKE BOUTANG,
VERONIQUE BRETON, NATASHA BUDY,
JENNIFER-LYNN BULLICK, MARY BURKE,
CATHERINE
CABRAL-MCKEAND, EDUARDO CAETANO,
ANTHONY CAETANO, JENNIFER
CAUDRON, TRACY CHASE, NATACHA
CHEVARIE, MIMI CHOO, WILLIAM CHOW,
CHERYL CHOW, ANGELINA CLARK, PAUL
CLEMENTS, SANDRA COLE, JENNIFER
COMIN, ANTHONY COMMISSO, TANYA
DOCANTO CORDEIRO, ESTERINA COSTA,
ROCCO COTUGNO, FRANCESCO "FRANK"
COTUGNO, RICHARD
COUTURIER, WAYNE COWAN, KENTON
CROOK, MICHAEL CURRIE, SELENA
CVITAN, MARK DAGGETT, MARCO
DALL'ANTONIA, JANA DANCAKOVA,
AMANDA
DEMPSEY, JASON DENTINGER, MARLICE**

DEPTUCH, ANTHONY DEROSE, LORRAINE
DESCHAMPS, GISELE DESHARNAIS,
KAREN DESROSIERS, JOHN DEVINE,
SUSAN DEWALD, EZIO DIFONZO, DONALD
WAYNE DUNHAM, BRANDY DUPAS,
TERESA ELLISON, JOHN EMMANOUIL,
JOHANNA EMMANOUIL, SHELLEY
ESCOBAR, JOY ESDAILLE, WILLIAM
FAUSTINO, RAQUEL FERREIRA, SHERRY
FERREIRA, PAXTON FIRTH, MICHELINE
FLEURY, SARAH FRANGIONE, ERIN
FULLER, MICHAEL GAIREY, JESSICA
GASKIN, KAREN GIBEAULT, SHEILA RAE
GOW, JAYDE GRAVEL, MICHAEL
GRIGORATOU, URVASHI GURUNG, RYAN
HAMER, CHARLENE HANSON, JASMIN
HARRISON, CARLY HART, TAMMY
HAYES, JAYSON PETER JAMES
HEIDEBRECHT, DENISE HERBERT,
JORGIE HIDALGO, TIMOTHY HIEBERT,
DONNA HISCOCK, DENISE HOHN, ELAINA
HUDYMA, KATHRYN (KATIE) HUNT,
TANYA HUTCHINSON, ZDZISŁAW
JABŁOŃSKI, MARTINE
JARRY, CARLA JENKINS, STEPHANIE
KATHLEEN JOHNSTON, NICHOLAS
JOHNSTON, RIINA KAPP, RUDY KERN,
MARK KILLEEN, SABRINA KINCAID,
MARIETTA KIRBY, SANDRA KOSTENKO,
CALVIN KOTOWICH, DAMIR KRAMARIC,
SANDRA KRASINKIEWICZ, ROCKY
KUJALA, HELENE LA ROCHELLE,
AVINASH LALOO, MEGAN LANE-KARRAS,
MARTINE LAROCQUE, LINE LAVALLEE,
KEVIN LAWRES, CHUNG LE, LUC
LEBLANC, DONNA LEEDER, PATRICK
LESSARD, LISA LEVESQUE, LORRAINE
LIGHT, GISELE LIRETTE, RANDY LOGAN,
SANDRA M LOPES, KIM LUMSDEN,
WENDY LUNDVALL, PAUL LUSSIER, PAUL
LYNN, NICOLA MACDONALD, MICHAEL
MAFILOVSKI, VIJAY MAHARAJ,
CAROLINE MAHEUX, TANYA MANDEL,
TRACY MA-PRICE, MARIE MARCOTTE,
ANNA MARRO, DEVANMARSHALL, JUDY
MARTENS, JOSYANNE MARTIN, JENNA

MATHIES, TRACEY MATLOCK, DANIEL
MATTI, WILLIAM GRANT MAYER,
BOZENA MAZUR, DAWN
MCFARLANE, MARGARET MCGEACHIE,
CHRIS MCGRATH, LUCAS MCIVOR,
KAREN MCQUADE, SZILVIA MERTL,
ROCCO MESSERE, ANNA MIASIK, SARAH
MICKALKO, JASON MIELKE, LAWRENCE
(LARRY) MILLSON, SERGIO A MOLINA C,
JAMES MORRIS, JAMES MORRISON,
RACHEL MULLARKEY, PAUL NAHIRNIAK,
DIDI (PREVIOUSLY DANIELLE) NAVALES
(PREVIOUSLY FREEMAN), MARGARET
NEB, AMANDA NEIL, SCOTT NEIL,
TRACEY NELLIS, JOCELYN NELSON,
GEORGE NICOLAIDES, LISA NICOLL,
JULIE NOBLE, CHAD NORMANDEAU,
CHERISE O'CONNOR, GERALDINE OLSON,
MARC ORICHEFSKY, RYAN ORYDZUK,
STEVEN OVERHOLT, KRISTY PACHOLKA
FORD, FANY PELLETIER-GOUGEON,
CHRIS PILLON, LESLIE J POLLOCK,
ELZBIETA PONIKIEWSKA, KIMBERLEE
PRIEST, NATHAN RAE (AKA ADAN EDEY),
TRACEY RALSTON, KARL
RATCHINSKY, DANIEL RAYO, ANTONIO
REDA, JULIE REEVES, CORELEI
REICHERT, DOLORES RELIC, AMBER
RICARD, LENA (HELENE) RICCI, SHEILA
RIDDELL, BREEANNE RIDGE, KEENAN
ROBINSON, MICHAEL ROBITAILLE, MYRA
ROBITAILLE, ROBERT ROBSON, JODI
RODDY, DJ (DEBBY) RODNEY, AMANDA
(GOOD) ROOSMETS, JEAN FRANCOIS
ROSA, SANDRA ROSSETTO, ANGELA
RYCKMAN, STEPHANIE SAMSON, JOSHUA
SAMUELSON, RUSSEL "RUSS" SAWCHUK,
JUSTIN SCHEFFER, DEREK
SCHOENFELDT, AARON SCHROEDER,
CARMEN SCHVARCZINGER, SHAUNA
SCOTT, STEPHEN SEE,
JACQUELINE(JACKIE) SELK, FLAMUR
SELMANI, MARION SERINK, JOHN-LUIS
GABRIEL SERRAMBANA, DEWITT C.
SHAINLINE, SHRIKANT (SHRE) SHARMA,
DEBORAH SHAW, ALAN SHUM, WANITA

SIKLENKA, NATHANIEL SLEDZ,
BENJAMIN BRADLEY, ARTHUR SMITH,
KARINE SOLAKIAN, JULIE SRIGLEY,
DAVID STEEVES, KAREN STEVENS,
MICHELENE STEWART, JAMES STEWART,
SUSAN STEWART, ROBERTA
STRICKLAND, MARTYNA STYRCZULA,
LINDSAY SUNTHGOLAM, PAWEL SZOPA,
ANTHONY PALOZZI, STEVEN TANNER,
LORI
TAYLOR, SINA TEHRANCHI, HOLLY
THIBODEAU, CHRISTOPHER THOMPSON,
JENNIFER TOBIN, VANESSA TOEWS,
ZVONIMIR TOMAS, JOSHUA DON TORRES,
ENRIQUE TOSI, ERIC TOUPIN-SELINGER,
TIMOTHY DOUGLAS TRACY, CATY TRAN,
HUGO TREJO, LARA TRENAMAN, MELISA
TREPANIER, CAROL-ANNE VALCOURT,
LEONARDO VASQUEZ, MELANIE
VENDRYES, LUIZA VISIC, CARRIE VISSER,
JENNIFER VOGELGESANG, SHANDA
VORRATH, MARY VUK, PAMELA
WAGNER, MARIAM WALI, HEIDI
WANJON, JOEL WAZNICKY, CORY WEGE,
ELVIN WEGNER, NANCY WHITCOME,
WARREN WHITE, JOHANN WILSON,
JAMES WINNING, LINDEN WRIGHT,
SHANE YAWORSKI, YVONNE YUTUC,
CARSON ZORGET, MICHAEL ZOTTOLA,
MARCIA HEWETT-HICKS

Plaintiffs

and

CANADA POST CORPORATION,
HIS MAJESTY THE KING IN RIGHT OF
CANADA

Defendants

ORDER AND REASONS

[1] The Plaintiffs bring this motion pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] seeking to appeal the order of Associate Judge Cotter, dated May 2, 2025 [the Order]. The Order dismissed the Plaintiffs' motion for an extension of time to file an appeal of the order of Associate Judge Coughlan, dated March 31, 2024, which struck out the Plaintiffs' claim without leave to amend.

[2] The motion is dismissed. The Court finds that Associate Judge Cotter did not make any error of law or palpable and overriding error on a question of mixed fact and law in exercising his discretion and refusing to grant the extension of time.

I. Background

[3] The Plaintiffs are current or former unionized employees of Canada Post Corporation [Canada Post] who allege that they were forced to resign or retire under duress due to their non-compliance with Canada Post's COVID-19 vaccination policy (described by Canada Post as the "Vaccination Practice"). Canada Post implemented the Vaccination Practice on October 22, 2021, and suspended it on July 6, 2022. It appears that the Plaintiffs were placed on unpaid leave during that period. Canada Post subsequently invited the affected employees to return to work.

[4] The Plaintiffs filed a Statement of Claim on July 12, 2022, alleging among other things, tortious conduct, the infliction of mental suffering, discrimination, and *Charter* violations against both Canada Post and His Majesty the King in Right of Canada [Canada]. On March 13, 2024, Associate Judge Coughlan granted the Defendants' motion and struck the Plaintiffs' Amended Amended Statement of Claim in its entirety without leave to amend. Associate Judge Coughlan

struck the claim against Canada finding that the Plaintiffs failed to plead any material facts to establish a relationship between the Plaintiffs and Canada. Associate Judge Coughlan also struck the claim against Canada Post finding that it was plain and obvious that the action could not succeed; the Court did not have jurisdiction over Canada Post in the circumstances. Associate Judge Coughlan further found that the essential character of the claim raised employment issues, which were within the exclusive jurisdiction of adjudicators, and that the plaintiffs had failed to show that the grievance process was inadequate; therefore, the court lacked the residual discretion to take jurisdiction.

[5] The Plaintiffs did not pursue their appeal of Associate Judge Coughlan's order within the 10-day period required by Rule 51(2) of the *Rules*. The Plaintiffs ultimately filed their motion for an extension of time to appeal that order on November 15, 2024, which was 234 days past the 10-day time limit to appeal.

II. The Order of Associate Judge Cotter

A. *The chronology*

[6] Associate Judge Cotter noted the chronology of events following the decision of Associate Judge Coughlan, which was provided to the plaintiffs by their former counsel on March 14, 2024.

[7] Associate Judge Cotter acknowledged, among other things, that the plaintiffs communicated their collective intention to appeal the decision to their former counsel on April 8, 2024, which was already past the 10-day deadline of March 25, 2024. Karine Solakian

[Ms. Solakian] (one of the instructing plaintiffs and an affiant) attested that she believed that the deadline to appeal was 30 days, but also suspected that it might be 10 days. Former counsel advised the Plaintiffs in late April 2024 that the deadline was in fact 10 days.

[8] Former counsel wrote to the Court on April 18, 2024, indicating that they were instructed by the Plaintiffs to bring a motion to extend the timeline for filing a motion for appeal and sought further directions from the Court. The Court's Direction, dated April 23, 2024, stated that "if the Plaintiffs wish to file a motion for an extension of time to appeal, they are free to do so." No such motion was filed at that time.

[9] On May 14, 2024, Ms. Solakian requested an update from former counsel. Former counsel responded that they were in the process of finalizing the motion.

[10] On June 6, 2024, June 19, 2024, and July 3, 2024, Ms. Solakian requested further updates.

[11] On July 4, 2024, former counsel advised Ms. Solakian that a new lawyer in the firm was now handling the matter, and that they would aim to provide a draft by that weekend.

[12] On July 17, 2024, former counsel provided draft motion materials to Ms. Solakian. She provided comments on July 22, 2024.

[13] On July 29, 2024, Kim Priest, also an instructing plaintiff, sent an email to former counsel setting out a chronology of the Plaintiffs' communications since April 8 and noting that they were waiting for the motion to be filed.

[14] On September 4, 2024, former counsel advised the Plaintiffs that they were no longer able to act for them. Ms. Solakian acknowledged on cross examination that at this point in time, she and the other Plaintiffs were aware that they were five months late in pursuing the appeal.

[15] The Plaintiffs retained their current counsel on September 22, 2024.

[16] On November 14, 2024, current counsel served a notice of change of solicitor and the notice of motion seeking an extension of the time to appeal. The motion was filed in this Court on November 15, 2024.

[17] Associate Judge Cotter noted that Ms. Solakian attested that the eight-week delay by current counsel in filing the motion was due to the Law Society of British Columbia's requirement for lawyers to verify the identity of new clients and also due to the need for current counsel to research the legal issues and prepare the motion. However, no other details were provided to explain how or why it took eight weeks to do so.

B. *The test applied by Associate Judge Cotter*

[18] Associate Judge Cotter noted the well-established jurisprudence that guides whether to grant an extension of time, as stated by the Federal Court of Appeal in *Canada (Attorney*

General) v *Hennelly*, 1999 CanLII 8190 (FCA) at para 3 [*Hennelly*], and subsequently in *Canada (Attorney General)* v *Larkman*, 2012 FCA 204 at para 61 [*Larkman*] and many other cases, and recently reiterated in *Citizen for My Sea to Sky v Canada (Environment and Climate Change)*, 2023 FC 1721 at para 14 [*Citizen for My Sea to Sky*]. The determination is guided by the following questions or considerations:

- a) Did the moving party have a continuing intention to pursue the application?
- b) Does the moving party have a reasonable explanation for the delay?
- c) Is there some potential merit to the application?
- d) Is there prejudice to the other party from the delay?

[19] Associate Judge Cotter noted that the jurisprudence establishes that the criteria are not exhaustive, nor does each criteria need to be satisfied. The criteria (generally referred to as the “*Hennelly* factors”) inform whether “on balance” the interests of justice would be served by granting the extension (*My Sea to Sky* at para 15, citing *Larkman* and *Hennelly*, among other cases).

[20] Associate Judge Cotter provided a summary of his determination at para 31, which he then further explained at paras 32-44:

I have considered the four questions set out in the case law, and conclude that it is not in the interests of justice to grant an extension of time. The prejudice from the delay, and the lack of a reasonable explanation for the delay, both auger heavily against the Moving Plaintiffs. While the Moving Plaintiffs did have a continuing intention to appeal the Decision, even if I assume there is some merit in the appeal, it is not in the interests of justice to grant the extension. Stated differently, even if there is merit in the appeal, that combined with the Moving Plaintiffs’ continuing intention to pursue the appeal, is not sufficient to conclude that it is in the interests of justice to grant an extension of time, having

regard to the prejudice from the delay, and the lack of a reasonable explanation for the delay.

[21] Associate Judge Cotter accepted that the Plaintiffs had a continuing intention to appeal, given the steps described by Ms. Solakian. However, he found that there was no reasonable explanation for either the initial six-month delay or the subsequent 53-day delay from the date current counsel was retained, or for the cumulative eight-month delay. He found that the significant length of this delay was in itself significantly prejudicial to the Defendants. He also found that the length of the delay constituted an additional factor given that the *Hennelly* factors were not exhaustive.

[22] Associate Judge Cotter noted, among other things, that despite initially following up with former counsel, the Plaintiffs knew the appeal deadline had been missed and that the filing of the motion for an extension of time was “lagging considerably”, yet did not diligently follow up.

[23] With respect to the subsequent 53-day delay, Associate Judge Cotter found that, given there was already a delay of almost six months when current counsel was retained, it was incumbent on the Plaintiffs to act quickly. He found that the Plaintiffs’ general explanations about the time required for new counsel to verify each plaintiff’s identity, execute retainer agreements, and draft the motion materials was not a reasonable explanation.

[24] Associate Judge Cotter found that the total 234-day delay was inherently prejudicial to the Respondents, relying on *Ouellette v Law Society of Alberta*, 2021 ABCA 99 at para 31 [Ouellette], where the Alberta Court of Appeal found that significant delay in bringing an appeal

by itself causes prejudice to a respondent. He further noted that this finding is consistent with the principle of finality of decisions (citing *Canada v Grenier*, 2005 FCA 348 at paras 27-28 [Grenier]; *Citizen for My Sea to Sky* at paras 16-17, 66).

[25] He added that even if the length of the delay did not by itself constitute prejudice, the significant length of the delay was an additional factor in assessing the interest of justice, noting that the list of factors is not exhaustive.

III. Overview of the Plaintiffs' Position

[26] The Plaintiffs submit that Associate Judge Cotter erred in law by misapplying the legal test for granting an extension of time or, alternatively, made palpable and overriding errors in balancing the respective interests. They argue that the overarching principle of the interests of justice should have guided the analysis and that each factor should have been balanced between the Plaintiffs and Defendants (citing *Koch v Borgatti Estate*, 2022 FCA 201 at paras 58-59 [Koch]).

[27] The Plaintiffs argue that Associate Judge Cotter erred in three ways:

- by improperly balancing the interests of the parties;
- by inferring prejudice to the Defendants without any evidence; and,
- by finding that there was no reasonable explanation for the delay.

IV. Overview of the Defendants' Position

[28] The Defendants submit that Associate Judge Cotter did not err; he applied the correct legal test and principles, considered each of the four *Hennelly* factors, weighed the interests of both parties, and concluded, as guided by the factors, that overall, it was not in the interests of justice to grant the extension.

[29] The Defendants note that Associate Judge Cotter found that even if there were some merit to the appeal, which would weigh in favor of the Plaintiffs, the other factors still did not support finding that the extension was in the interests of justice.

V. Standard of Review for the Appeal of the Order

[30] The appellate standard of review established by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*], applies to discretionary orders made by a motions judge (*Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215). Questions of law are reviewed on the correctness standard. Factual questions or questions of mixed fact and law can only be reviewed for palpable and overriding error (*Housen* at paras 19-37).

[31] A motions judge exercising their discretion to grant or refuse an extension of time applies the legal tests and principles to a set of facts; this is a question of mixed fact and law, which can only be set aside on the basis of palpable and overriding error unless an error on an extricable question of law or legal principle is present (*Tetrault v Boishriand (City)*, 2023 FC 168 at para 23; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 72-74; *Seymour v*

Canada, 2021 FCA 180 at para 3 [*Seymour*]; *Patel v Dermaspark Products Inc*, 2025 FCA 145 at paras 6-8 [*Dermaspark*]).

[32] As noted by the Federal Court of Appeal in *Seymour*, at para 3, “[t]hus, this Court can only interfere with the Order if the Motions Judge exercised his discretion on wrong principles or misapprehended the evidence (*Hospira* at para. 54).”

VI. The Motion/Appeal is Dismissed

[33] The Court finds no errors of law or palpable and overriding errors of mixed fact and law in Associate Judge Cotter’s decision. Although the Plaintiffs attempt to characterize certain findings as questions of law, Associate Judge Cotter correctly stated the guiding jurisprudence and correctly applied it. With respect to findings of mixed fact and law, as noted in *Dermaspark*, at para 11, palpable and overriding error is a difficult standard to meet and is a highly deferential standard of review. The Federal Court of Appeal provided some examples at para 13:

[13] Examples of things that can qualify under this difficult-to-meet standard include a number of different types of errors: “obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received [not] in accordance with the doctrine of judicial notice [*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458], findings based on improper inferences [*Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 168-170] or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence”: *Mahjoub* at para. 62. But, as said before, only errors on central points that can change the result of the case will qualify.

[34] No such errors arise in Associate Judge Cotter’s order.

[35] Associate Judge Cotter clearly understood the law and applied it. He considered all the evidence and concluded based on that evidence that there was no reasonable explanation for the significant delay and that this delay caused prejudice to the Defendants. He gave the Plaintiffs the benefit of the merit factor, without deciding whether the appeal had any merit. He understood that the guiding factors were not exhaustive, and that the overall consideration was the interests of justice. He exercised his discretion in accordance with the law and declined to grant the extension.

A. *Associate Judge Cotter did not err by misstating the legal test or by improperly balancing the interests of the parties*

[36] The Plaintiffs submit that Associate Judge Cotter erred in law by applying the *Hennelly* factors selectively and without considering the need to balance the interests of both the Plaintiffs and Defendants for each factor.

[37] The Plaintiffs submit that the *Hennelly* factors are not determinative, and that the overarching principle is that the interests of the parties should be balanced (citing *Koch* at paras 58-59).

[38] The Plaintiffs further submit that Associate Judge Cotter erred by failing to consider the prejudice to the Plaintiffs if the extension were not granted, because this would terminate their claim. The Plaintiffs submit that this prejudice outweighed any prejudice to the Defendants, who could continue to oppose the appeal. The Plaintiffs assert that they had a strong case for an appeal, which was not considered by Associate Judge Cotter.

[39] Contrary to the Plaintiffs' submission, Associate Judge Cotter did not err in law in his application of the *Hennelly* factors. He noted that the four factors were not exhaustive nor determinative, but rather guided whether, on balance, the interests of justice would be served by granting the extension of time.

[40] In *Koch*, relied on by the Plaintiffs, the Federal Court of Appeal states the overriding principle in a slightly different way, at para 58, noting, "...the overarching consideration and real test is whether justice will be done between the parties if the extension is not granted."

[41] In *Koch*, the Federal Court of Appeal found that the motions judge erred in finding that there was no prejudice to the plaintiffs, noting that the consequences to the plaintiffs were prejudicial as they would otherwise be barred from pursuing a wrongful death claim arising from tragic circumstances, which the court found to have potential merit. The Court of Appeal stated at para 62:

[62] In my view, the *Hennelly* factors and the overarching principle that justice be done between the parties support no other conclusion than that Mr. Brudek should have been granted an extension of time. It is the only way that his claims can be heard and determined on the merits, so that justice is done between the parties.

[42] I do not regard *Koch* as inconsistent with the jurisprudence that the non-exhaustive factors guide the overall determination of whether it is in the interests of justice to grant the extension of time.

[43] In *Koch*, the Court of Appeal endorsed the *Hennelly* factors and the well-established principle that “no *Hennelly* factor is determinative” (para 58). In *Oleynik v Canada (Attorney General)*, 2023 FCA 162 at para 36 [*Oleynik*], the Federal Court of Appeal similarly stated:

However, no [*Hennelly*] factor is determinative. Rather, they are intended to assist the Court in determining whether an extension of time is in the interests of justice between the parties: *Alberta v. Canada*, 2018 FCA 83 at para. 45. That is the heart of the matter.

[44] The reference to “between the parties” does not suggest that there is some assignment of points to each party for each factor, which then determines whether the extension should be granted. The determination calls for the consideration of the factors and the overall assessment or balancing to determine whether the extension is in the interests of justice in the particular circumstances, which includes the “interests of justice between the parties”.

[45] Associate Judge Cotter considered and addressed all four factors and found that even if there were merit to the appeal (giving the benefit of that factor to the Plaintiffs), the length of the delay, the absence of a reasonable explanation for the delay and the prejudice to the Defendants did not support finding that, overall, it was in the interests of justice to grant the extension.

[46] Although the Plaintiffs argue that the prejudice to them was not considered by Associate Judge Cotter, this overlooks that the *Hennelly* factors refer to the prejudice to the “other party”.

[47] That is not to say that the relative prejudice to the Plaintiffs was ignored by Associate Judge Cotter, as this was the very reason the Plaintiffs sought the extension of time.

[48] Nor would it be an error to consider the impact or prejudice to the party seeking the extension as an additional factor and, as the Federal Court of Appeal described in *Oleynik* at para 36, "...whether an extension of time is in the interests of justice between the parties". It is part of the context underlying the motion for an extension, which was clearly considered by Associate Judge Cotter.

[49] Moreover, prejudice on its own is not determinative and the weight attributed to each factor is within the discretion of the decision maker. As repeatedly noted, the overall consideration remains whether it is in the interests of justice to grant an extension.

[50] The Defendant, Canada Post, also notes that the only evidence of prejudice to the Plaintiffs is their own evidence which demonstrates that they are not prejudiced. This was addressed in the order of Associate Judge Coughlan, who found that, based on the Plaintiffs' own evidence, the Plaintiffs continue to have remedies pursuant to their grievance process, which have not been exhausted.

B. *Associate Judge Cotter did not err by finding that the length of the delay was prejudicial to the Defendants*

[51] The Plaintiffs argue that Associate Judge Cotter erred in law by relying on *Ouellette* and by inferring prejudice to the Defendants based only on the length of the delay and without any evidence of prejudice having been adduced by the Defendants.

[52] The Plaintiffs submit that specific evidence must be provided to support a claim of prejudice (relying on *Canada (Attorney General) v Burnell*, 1997 CanLII 5362 (FC) [*Burnell*]);

and that the Defendants’ failure to provide such evidence — even though the Defendants were given time to do so — satisfies that *Hennelly* factor by “default” (relying on *Tanczos v Canada (Attorney General)*, 2024 FC 232 at para 7 [*Tanczos*]; *Singh v Canada (Immigration, Refugees and Citizenship)*, 2023 CanLII 113232 (FC) [*Singh*]). The Plaintiffs further argue that delay does not necessarily cause prejudice (relying on *Budget Steel Ltd v Seaspan 175 (The)*, 2003 FCT 390 at para 39 [*Budget Steel*]).

[53] Contrary to the Plaintiffs’ submission, Associate Judge Cotter did not err by relying on *Ouellette*, a decision of the Alberta Court of Appeal that considered factors analogous to the *Hennelly* factors.

[54] In *Ouellette*, the Alberta Court of Appeal considered whether an extension of time should be granted with respect to a two-month delay in filing a notice of appeal. The Alberta Court of Appeal noted that the overriding consideration is whether it is in the interests of justice to do so and articulated the questions to be considered to guide this determination, which are analogous to the *Hennelly* factors (adapted to the particular context) (paras 18-24). The Court also noted the relevant provisions of the *Alberta Rules of Court*, Alta. Reg. 124/2010, setting out time limits and the purpose of the time limits (para 65).

[55] The Alberta Court of Appeal stated at para 31:

[31] The applicants also failed to establish that their late filing has not caused the Law Society significant prejudice. A favourable judicial outcome is a valuable commodity. A respondent is entitled to expect that it will be able to rely on that benefit if an adverse party does not act in a timely manner to challenge it. The

applicant's delay by itself causes recognizable prejudice to the Law Society.

[Emphasis added.]

[56] Associate Judge Cotter found that the approach articulated in *Ouellette* was consistent with the importance of the principle of finality described in *Grenier* at paras 27-28, and in other cases, including *Larkman*, which highlight that the need for certainty and finality underly the deadlines set out in the *Rules*.

[57] There is no error in relying on jurisprudence from other courts that is analogous, and moreover consistent with the jurisprudence of this court and the Federal Court of Appeal. Associate Judge Cotter did not err in relying on this jurisprudence to find, as did the Alberta Court of Appeal in *Ouellette*, that the delay was “itself” prejudicial. While delay does not “necessarily” constitute prejudice (*Budget Steel*), Associate Judge Cotter assessed the delay and found that in this case, it did cause prejudice to the Defendants.

[58] The jurisprudence relied on by the Plaintiffs in support of their submission that the failure of the Defendants to adduce specific evidence of prejudice gives the benefit of the prejudice factor to the Plaintiffs “by default” is not persuasive.

[59] In *Tanczos*, the motions judge considered whether to grant an extension of time to permit the filing of an application for judicial review. The motions judge considered the four *Hennelly* factors, noting at para 7, “[t]he Respondent has not led any evidence of prejudice arising from the Applicant’s delay. Accordingly, by default, the Applicant meets the third part of

the *Hennelly* factors.” This statement is not supported by any authority and appears to reiterate a similar statement of the motions judge in *Singh* where the motions judge stated that “[t]he Respondent has not led any evidence of prejudice arising from the Applicants’ delay. Accordingly, by default and not through any action on the part of the Applicants, the Applicants meet that part of the *Hennelly* factors.” Again, that statement is not supported by any authority. The Court regards those statements as findings on the facts before the motions judge and not new general principles. The Court also notes that in both cases, the extension of time was not granted, based on finding that overall, it was not in the interests of justice to do so.

[60] The notion that “by default” the prejudice factor would favour the party seeking the extension in the absence of specific evidence by the other party does not reflect the established and binding jurisprudence. The party seeking the extension bears the onus of establishing that the extension should be granted, and to do so, should address each of the well-established factors.

[61] There is extensive jurisprudence regarding motions for the extension of time in various contexts, including initiating applications for judicial review and appealing other orders, which supports the proposition that without a reasonable explanation for a delay, granting an extension of time would result in prejudice to an opposing party (see for example, *Cheng v Canada (Attorney General)*, 2024 FC 1909 at para 28; *Isinguzo v Canada (Citizenship and Immigration)*, 2024 FC 392 at para 9; *McLean v Canada (RCMP)*, 2021 FC 1148 at para 17; *Pingault v Canada (Citizenship and Immigration)*, 2021 FC 1044 at para 20; *Cossy v Canada Post Corporation*, 2021 FC 559 at para 21; *Mayow v Canada (Citizenship and Immigration)*, 2021 FC 278 at para

41; all citing *Collins v Canada (Attorney General)*, 2010 FC 949 at para 6 [*Collins*]). In *Collins*, the Court stated at para 6:

Finally, I agree with the respondent that there is a public interest in the expectation that parties to a judicial review application move the matter forward as expeditiously as possible. Where time limits are not complied with, a respondent is entitled to expect that extensions of such time limits will not be granted where the non-compliance with the time limits lacks a reasonable explanation. To grant an extension of time in such circumstances can only result in prejudice to an opposing party.

[62] Associate Judge Cotter applied the same reasoning in citing *Ouellette, Grenier*, and *My Sea to Sky*, which link the need for certainty and finality in decisions to the *Rules* establishing time limits and to the considerations guiding whether an extension of time should be granted.

[63] The Plaintiffs' submission that the Defendants were not prejudiced because they were alerted to the Plaintiffs' intention to pursue the appeal by the Court's Direction on April 18, 2024, which stated "if the Plaintiffs' wish to file a motion for an extension of time, they are free to do so", overlooks that the Plaintiffs did not file any motion in any reasonable time after that Direction. Seven months elapsed before the motion was filed, apparently without any conversations between the Plaintiffs and Defendants regarding the Plaintiffs' intentions. The Defendants cannot be expected to remain indefinitely in a state of uncertainty regarding whether Associate Judge Coughlan's order is final or whether further litigation will ensue.

[64] The Plaintiffs' reliance on *Burnell* in support of their argument that specific evidence must be adduced to support "a claim of prejudice" overlooks that *Burnell* was an application for judicial review where the issue was not whether to extend a missed timeline for the proceeding in

this Court, but whether the decision maker (the Canadian Human Rights Commission) erred in accepting and investigating a complaint that had been filed late. As the Defendant Canada Post notes, this case does not apply. Moreover, the Federal Court of Appeal addressed an applicant's reliance on *Burnell* in *Richard v Canada (Attorney General)*, 2010 FCA 292 at para 17 [*Richard*], finding that "...the passage of time, long periods of time, is not without incidence. The more remote the events in issue, the easier it is to find evidence of prejudice, to the point where there arises what has been called a rebuttable presumption of prejudice". With respect to the relative prejudice between parties, the Court of Appeal in *Richard* further noted, at para 19, that "...limitation periods, by their very nature, contemplate that claimants can be deprived of their remedy by the passage of time."

[65] Contrary to the Plaintiffs' submission that it was an error to find that the length of the delay was a factor without providing an explanation, Associate Judge Cotter's reasons convey his explanation: he states that he considered the significant length of the delay in itself to be an additional factor — correctly noting that the jurisprudence establishes that the *Hennelly* factors are not an exhaustive list — and that this additional factor also guides the overall assessment of whether it is in the interests of justice to grant the extension.

C. *Associate Judge Cotter did not err by finding that there was no reasonable explanation for the delay*

[66] The Plaintiffs submit that Associate Judge Cotter made a palpable and overriding error by misapprehending the evidence and finding that their follow-ups with former counsel did not constitute a reasonable explanation for the initial six-month delay. The Plaintiffs explain that

their former counsel caused the delay. The Plaintiffs also submit that Associate Judge Cotter erred by not taking into account that their current counsel required sufficient time to prepare the motion for an extension of time, which in their view is a reasonable explanation for the further eight-week (53-day) delay.

[67] The Plaintiffs assert that Associate Judge Cotter took an “unforgiving approach” to their explanation for both periods of delay.

[68] The Court rejects the Plaintiffs’ submission that Associate Judge Cotter was influenced by jurisprudence in the immigration context, and the Plaintiffs’ assertion that deadlines are enforced with more rigour in immigration cases because in many instances a delay works to the benefit of the applicant immigrant, which the Federal Court would aim to avoid. The Federal Court’s efforts to manage the high volume of litigation in the immigration context, including the Practice Direction relied on by the Plaintiffs for their premise, does not suggest in any way that the court applies different principles to extensions of time in the immigration context. Each motion for an extension of time, regardless of the type of case, is determined on a case-by-case basis in accordance with the very same jurisprudence that guides the Court in this matter.

[69] Associate Judge Cotter squarely addressed the Plaintiffs’ contention that the jurisprudence finding that errors of counsel are not a reasonable explanation for delay are prevalent in the immigration context, and not in other contexts. Associate Judge Cotter found that the same analytical framework was applied in the immigration cases cited by the Plaintiffs as in non-immigration matters.

[70] The Plaintiffs continue to argue that, outside the immigration context, the court has found that a party will not be held responsible for a delay caused by their counsel where they establish that they clearly instructed counsel to proceed on a timely basis and the failure to do so was solely caused by counsel (relying on *Washagamis First Nation v Ledoux*, 2006 FC 1300 at para 33 [*Washagamis*]).

[71] Associate Judge Cotter considered the different approaches in the jurisprudence: that errors or inadvertence of counsel is generally not (or never) a reasonable explanation for delay; and the approach that considers the behaviour of the applicants who seek to point to counsel as the cause of the delay.

[72] Associate Judge Cotter did not err in finding that even on the less strict approach of considering the Plaintiffs' behaviour, the Plaintiffs were not diligent in following up with former counsel over the initial six-month period.

[73] The Plaintiffs' reliance on *Washagamis* overlooks that the Court's assessment of the impact of the conduct of counsel was more nuanced than the passages relied on by the Plaintiffs.

In *Washagamis*, the Court found at para 34:

It is not obvious from the affidavits filed on behalf of *Washagamis* that it was completely uninformed about its counsel's apparent failure to follow its instructions. Where the delay is lengthy and the litigant has been actively engaged in the conduct of a case and the furtherance of a litigation strategy such as that adopted here, the case for shifting complete responsibility to counsel for a filing error is weakened. A litigant cannot be wholly excused where it chooses to sit idly on the sidelines and fails to hold its counsel accountable.

[74] In the present case, the Plaintiffs were aware of the missed deadlines for filing their notice of motion to appeal by at least April 2024. Their engagement in their litigation is apparent from their inquiries to their former counsel over several intervals of two to four weeks, spanning a six-month period. Yet they continued to wait for their former counsel to deliver. Associate Judge Cotter acknowledged that the Plaintiffs made some inquiries of former counsel but also noted that they did not take any other steps.

[75] As the Defendants note, there is no evidence that the Plaintiffs made any complaint to the Law Society of British Columbia nor is there evidence elaborating why former counsel could not continue to act, other than vague references to lawyers leaving the firm. The Plaintiffs' affiant stated that draft motion materials were sent to her on July 17, 2024, and that she provided comments on July 22, 2024, yet the motion was not filed at that time and the Plaintiffs did not seek to obtain new counsel until September when former counsel advised that they could no longer act.

[76] The Defendants point to *Petre v Canada (Royal Canadian Mounted Police)*, 2024 FC 1768, where the applicants argued that an extension of time should be granted because their delay was caused by their counsel's error. The Court found at para 53, "[i]t is illogical for the Applicants to choose to continue to be represented by an individual who, in their submission, caused them to miss the deadline for bringing this motion by six weeks."

[77] The same can be said of the Plaintiffs. They had countless signals that their former counsel was not diligently pursuing the appeal or the motion for an extension of time to do so yet continued to rely on the former counsel.

[78] In advancing their argument that there was a reasonable explanation for the subsequent 53-day delay, the Plaintiffs submit that the context cannot be overlooked. They assert that they had a strong case for their appeal, which they set out in the Draft Memorandum of Fact and Law submitted in support of their motion for the extension of time. The Plaintiffs explain that current counsel required sufficient time to develop the arguments for the appeal because they were new to the file and the work of former counsel, including the Amended Amended Statement of Claim that was struck, was poorly articulated and rambling. The Plaintiffs now state that they proposed to pursue the appeal on a *Charter* issue not previously addressed, which took time to develop. The Plaintiffs argue that Associate Judge Cotter erred by not considering that the need for current counsel to conduct the necessary research and prepare the material, including the Draft Memorandum of Fact and Law for the appeal, is a reasonable explanation for the delay. They submit that the timelines in the *Rules* contemplate the continuity of counsel, and they did not have such continuity.

[79] Associate Judge Cotter was well aware of the context and the history of this litigation. With or without delving into the Plaintiffs' assertion that their appeal had merit, Associate Judge Cotter gave the benefit of the merit factor to the Plaintiffs, but it simply was not enough. He stated this clearly several times: for example, at para 31, "...even if I assume there is merit in the appeal it is not in the interests of justice to grant the extension" and "...even if there is merit in

the appeal, that combined with the Moving Plaintiffs' continuing intention to pursue the appeal, is not sufficient..." and, at para 44, "...even if there were some merit to the appeal, it would not be sufficient to conclude that it is in the interests of justice to grant an extension of time."

[80] The *Rules* provide for a 10-day period to file a Notice of Appeal. As the Defendants note, whether representing themselves or represented by counsel, litigants are expected to and routinely comply with the 10- day period, even in complex cases. This does not appear to be a complex case.

[81] The Plaintiffs did not elaborate on their written submission or their evidence on cross examination that the 53-day delay was also due to the need for current counsel to verify the identity of the Plaintiffs and to seek instructions from Plaintiffs across the country.

[82] The Court agrees with Associate Judge Cotter that the general assertions regarding the need for counsel to prepare and the need to liaise with Plaintiffs do not constitute a reasonable explanation for the delay. As Associate Judge Cotter noted, at the time current counsel was retained, the delay was already six months, and it was incumbent on the Plaintiffs to act quickly. The Court also observes that this large group of plaintiffs, if eager to pursue the motion, would have been ready to cooperate with any process requirements.

[83] The Plaintiffs' current submissions that Associate Judge Cotter took an unforgiving approach to their delay, yet the Defendants were granted extensions of time to file their responding material once the Plaintiffs' motion was filed in November 2024, is without any

merit and irrelevant to whether it was in the interests of justice to grant the Plaintiffs an extension of time. First, the onus is on the party seeking the extension of time to persuade the Court that it is in the interests of justice to do so. Second, the Plaintiffs were already in non-compliance—234 days late in filing their motion—and the only clue the Defendants had that the Plaintiffs might bring the motion was the court’s Direction in April 2024, more than seven months in the past. Third, the Defendants were not in non-compliance with the *Rules*; rather, they proactively sought a short extension to file their responding material. In addition, as noted by the Defendants, the extension was also due to the need to conduct cross-examination of the Plaintiffs’ affiants located in different regions of the country and over the Christmas season.

[84] In conclusion, the motion seeking to appeal the Order is dismissed. Associate Judge Cotter clearly stated the governing law and applied it. As noted in *Dermaspark*, at para 11, and in many other cases, “palpable” means an error that is obvious and “overriding” means an error that goes to the very core of the outcome of the case. No errors of law or palpable and overriding errors can be found.

VII. Costs

[85] The Plaintiffs requested costs, if successful, in the amount of \$1000 from each Defendant. The Defendants each requested costs, if successful, of \$5000 each.

[86] Having regard to Rule 400, which provides that the Court has discretion to determine whether costs should be awarded and in what amount, and the non-exhaustive factors set out in Rule 400(3), which guide the determination of costs, whether in accordance with the Tarriff or

lump sum costs, costs are awarded to each Defendant of \$3500 payable by the Plaintiffs, jointly and severally.

ORDER

THIS COURT'S ORDER is that:

1. The motion to appeal the Order of Associate Judge Cotter dismissing the Plaintiffs motion for an extension of time is dismissed.
2. Costs are awarded to each of the Defendants in the amount of \$3500, payable jointly and severally by the Plaintiffs.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1436-22

STYLE OF CAUSE:

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PLACE OF HEARING:

BY VIDEOCONFERENCE

DATE OF HEARING:

SEPTEMBER 23, 2025

JUDGMENT AND REASONS: KANE J.

DATED: OCTOBER 2, 2025

APPEARANCES:

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