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F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
December 17, 2024		
Charlotte Torgerson		
EDM	80	

Court File No.: T-1296-23

**FEDERAL COURT**

BETWEEN:

**FRANCESCO GABRIELE QUALIZZA, AND OTHERS**

Plaintiffs

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA, AND OTHERS**

Defendants

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**RESPONDENTS' MOTION RECORD**

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**DEPARTMENT OF JUSTICE**

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**WRITTEN REPRESENTATIONS OF THE  
ATTORNEY GENERAL OF CANADA**

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## **PART I – OVERVIEW AND STATEMENT OF FACTS**

### **A. OVERVIEW**

1. It is apparent that the Plaintiffs seek to appeal the decision of Madam Associate Judge Coughlan dated November 13, 2024. It is also clear that they are late to do so. It is not entirely clear how they seek to resolve this problem.
2. In any event, the Plaintiffs’ motion should be dismissed with costs.

### **B. STATEMENT OF FACTS**

3. On November 13, 2024 Associate Judge Coughlan struck out the within action without leave to amend (the “Judgment”).<sup>1</sup> In doing so, she found that the Amended Statement of Claim did not disclose a cause of action, and that the Court was without jurisdiction as the Plaintiffs were obliged to use the grievance system.
4. The deadline to appeal the decision of a “prothonotary” is 10 days as set out in Rule 51 of the *Federal Courts Rules*.
5. The Plaintiffs brought the within motion on December 12, 2024, 29 days after the Judgment was issued.

## **PART II – POINTS IN ISSUE**

- A. Preliminary Issues.
- B. Should the Plaintiffs be granted an extension of time.
- C. Costs.

## **PART III – SUBMISSIONS**

### **A. Preliminary Issues**

#### Improper Notice of Motion

6. The preamble to the Plaintiff’s Notice of Motion indicates that the “Applicants will make a motion to the Court in writing under Rule 51(1) of the Federal Court’s

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<sup>1</sup> *Qualizza v. Canada*, [2024 FC 1801 \(CanLII\)](#), (“Qualizza”).

Rules.”<sup>2</sup> Nowhere in their Notice of Motion do the Plaintiffs cite Rule 8, which is the operating Rule that would apply to an extension of time.

7. The Plaintiffs first seek “leave for the motion to be heard with written representations under *Federal Courts Act* Section 369.2(1).”<sup>3</sup> Assuming the Plaintiffs intend to rely on Rule 369.2(1) of the *Federal Courts Rules*, that rule applies to motions brought in the Federal Court of Appeal. It therefore is not applicable here.
8. Next the Plaintiffs seek “leave for an extension of time to apply for an Appeal of a prothonotary order.” It is not clear what ‘applying for an Appeal’ will involve. It does seem that the Plaintiffs are seeking an extension of time.
9. Finally, the Plaintiffs apply for “leave to commence an application for Appeal under the *Federal Courts Act* Section 51(1).”<sup>4</sup> Again, even assuming the Plaintiffs intend to rely on Rule 51(1) of the *Rules*, it is unclear what the Plaintiffs seek; leave is not required to appeal a decision of an Associate Judge.
10. In short, two of the three main requests made by the Plaintiffs should be dismissed. The only one that can be considered is the request for an extension of time to appeal the Judgment. This again assumes that the Plaintiffs are proceeding under Rule 8 (rather than Rule 51(1) which was indicated).
11. The result of the substantial deficiencies in the Plaintiffs’ motion record is that there is no clear path given to the Defendants and the Court as to what the Plaintiffs’ plan is here; if an extension of time is given, then how will the Plaintiffs proceed, and by when?
12. The Plaintiffs ought to have brought a motion under Rule 8 for an extension of time to file a motion seeking to appeal. They have not. They ought to have provided some

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<sup>2</sup> Plaintiffs’ Motion Record, MR11.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

kind of clarity as to how the appeal will proceed (under Rule 359 or 369). Instead, they have only mentioned that they will “provide the motion record for an Appeal by January 31, 2025.”<sup>5</sup> If the appeal is to proceed in writing, this appears to mean the Plaintiffs are applying for an extension of time not to sometime the week of December 16, 2024, but to January 31, 2025.

13. These fundamental problems should by themselves result in the dismissal of the Plaintiffs’ motion.

#### Improper Affidavit

14. In support of the Notice of Motion the Plaintiffs rely on an affidavit sworn by counsel for the Plaintiffs. This offends Rule 82, which reads:

#### **Use of solicitor’s affidavit**

**82** Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

15. This Rule has been interpreted to mean that lawyers “should not provide evidence in respect of contentious matters.”<sup>6</sup> As the affidavit here speaks to the steps supposedly taken in an attempt to explain the delay, it is evidence on a fundamental question in this motion, and the Affidavit should be disregarded.

#### **B. The Plaintiffs Should not be Granted an Extension of Time**

16. The Plaintiffs have properly identified the four factors the Court must consider in what is often referred to as the *Hennelly* test<sup>7</sup>.

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<sup>5</sup> Plaintiffs’ Motion Record, MR 31, at para 13.

<sup>6</sup> *Toys “R” Us (Canada) Ltd v Herbs “R” Us Wellness Society*, [2020 FC 682](#) at paras [10-11](#), and *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, [2006 FCA 133](#) at paras [4-5](#).

<sup>7</sup> *Canada (Attorney General) v. Hennelly*, [1999 CanLII 8190 \(FCA\)](#).

### Continuing Intention to Appeal

17. The only evidence put forward in support of this factor is the Affidavit, which should be disregarded. Further, even if the Affidavit is relied upon, as counsel was seeking instructions until December 11, 2024, it would appear that the intention to appeal did not manifest itself until very recently.<sup>8</sup>

18. Importantly, the Affidavit is silent on the intention to Appeal; there is no assertion from any of the Plaintiffs (or even their counsel) that they always intended to appeal, just that this decision was made by December 11, 2024.

19. This part of the test is not met.

### The Application has Some Merit

20. In this case, the Affidavit and Written Submissions of the Plaintiffs are totally silent as to how that the Appeal might be successful. The Respondents cannot argue with submissions that are not made.

21. However, it should be noted in the Judgment that the Court found two separate bases to strike the action. The Court found that the Amended Statement of Claim did not disclose a cause of action.<sup>9</sup> Further, the Judgment followed many other cases that found the Plaintiffs were obliged to follow the grievance process.<sup>10</sup> The Plaintiffs would need to convince a Justice that the Judgment contains palpable and overriding errors or errors of law<sup>11</sup> on both findings.

22. Clearly, the Plaintiffs have not met this element of the test.

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<sup>8</sup> Christensen Affidavit, MR 19, at para 5.

<sup>9</sup> *Qualizza* at para [55](#).

<sup>10</sup> *Ibid* para [67](#).

<sup>11</sup> *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, [2016 FCA 215](#).



### No Prejudice

23. The Defendants do not assert that they will suffer any prejudice from the delay that has occurred *so far*. However, it should be noted that it is unclear what the future delay will be. In written submissions the Plaintiffs state “the necessary documents for the Appeal require leave for a requested extension and provide the full motion record for an Appeal by January 31, 2025.”<sup>12</sup> This, along with the problems with the drafting of the Notice of Motion, do not explain how the Plaintiffs intend to proceed. Importantly, there is no explanation as to why the Plaintiffs cannot provide their motion record now, if they intend to proceed with the appeal in writing (as apparently they do), or what a “full motion record for an Appeal” will consist of.
24. In other words, the Plaintiffs do not seek leave to proceed immediately with the filing a motion seeking an appeal, but for some kind of motion record by the end of January.
25. The delay that has occurred to date will be overcome by a delay of at least until January 31, 2025. The Defendants are almost certainly going to be prejudiced.

### Reasonable Explanation for the Delay

26. As noted, the Affidavit is inadmissible. In any event, it does not explain the delay. The timeline under Rule 51 is tight, and presumably at least one of the Plaintiffs could have been contacted within the 10 days to obtain instructions to file a motion for an appeal. Alternatively, counsel could have filed a motion for the appeal within the 10 days as a protective step and then discontinued the motion before the Defendants incurred any costs. There was simply no need to speak to each of the Plaintiffs individually.
27. Further, as noted, there is no reasonable explanation for what the Plaintiffs intend to do, and why creating a motion record will take until January 31, 2025. This delay is completely unreasonable.

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<sup>12</sup> Plaintiffs’ Motion Record, MR 31.

Conclusion

28. Overall, the interests of justice do not justify the Court allowing poorly prosecuted litigation to proceed forward when there is no likelihood of success. The motion should be dismissed.

Costs

29. Rule 410(2) reads:

**Costs of motion to extend time**

**(2)** Unless the Court orders otherwise, the costs of a motion for an extension of time shall be borne by the party bringing the motion.

30. The motion should be dismissed, with costs to the Defendants in the amount of 6 units<sup>13</sup> x \$180 = \$1080.

31. Alternatively, if the motion is granted, the Plaintiffs should bear their own costs as per Rule 410(2).

**PART IV – ORDER SOUGHT**

32. The motion should be dismissed with costs payable by the Plaintiffs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**Dated** this 17<sup>th</sup> day of December, 2024, in the City of Edmonton, in the Province of Alberta.



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**Barry Benkendorf**  
Justice Canada on behalf of the Defendants

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<sup>13</sup> As per the Tarriff: Item 5, Prep and filing a contested motion, Column 3 (3-7 units)

## LIST OF AUTHORITIES

### Case Law

1. *Canada (Attorney General) v. Hennelly*, [1999 CanLII 8190 \(FCA\)](#).
2. *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, [2006 FCA 133](#).
3. *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, [2016 FCA 215](#).
4. *Qualizza v. Canada*, [2024 FC 1801 \(CanLII\)](#), (“Qualizza”).
5. *Toys “R” Us (Canada) Ltd v Herbs “R” Us Wellness Society*, [2020 FC 682](#).