



Date: 20251208

Docket: A-33-25

Citation: 2025 FCA 222 ID 129

CORAM: WEBB J.A.
WOODS J.A.
LEBLANC J.A.

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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE
December 8, 2025	
Abbie Abe (MM)	
Calgary, AB	72

BETWEEN:

FRANCESCO GABRIELE QUALIZZA, JOEL THOMAS WILLIAM ELLIS,
PATRICK MERCIER, JILL LYNE DUCHESNEAU, JOSEPH BENJAMIN STEWART,
ERIC DAVID FAUCHER, SCOTT PETER BACON, STEPHEN TROY CHLEDOWSKI,
AMANDA LEIGH BENHAM, JOSHUA MARTIN MCCULLOCH, KYLE CORRIVEAU,
JOSEPH DANIEL ERIC LOUIS MONTGRAIN, DUSTIN SHANE WIEBE,
STEPHEN WJ MORRIS, DAVID GARCIA VARGAS, MICHAEL JOSEPH LIS,
NATASHA KATRINA LIS, SOLANGE SINE DJOUECHE, PETER VLASSOV,
FREDERIC VILLENEUVE-NORMAND, ESTATE OF JONATHAN EMMERSON
JENKINSON, VALENTIN LAVROV, MARIE-EVE LABONTE, JESSE DALE FRIESEN,
TANIA CATHERINE NORDLI, ANDRZEJ SKULSKI, DENNIS JOHN PAUL
TONDREAU, EMMY-LOU LAURIE FORGET, DALLAS ALEXANDER FLAMAND,
CHELSEA ELAINE ROGAL, BARON HORDO, TAYLOR MICHAEL HARVIE,
VANESSA RAE LAROCHELLE, JACQUELINE MARIE FRANCE BOEHME, JAMES
PAUL DANIEL FORMOSA, KAITLYN E CAMPBELL, LUCAS TIMOTHY
VANCUREN, JERMAINE SHERIDAN BURRELL, ANTHONY DAVID HIATT,
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RECO SKIE, THOMAS L. EDWARDS, LINDSAY ANNE MACKENZIE, SARAH
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ANDREW BENSON, BRANDON JOHN ARMSTRONG, REJEAN BERUBE,
JEAN-PHILIPPE JOSEPH BOUCHARD, DHILLON DAVID COLE,

**PIERRE-OLIVIER COTE-GUAY, IAN M MENZIES, ERIC MONNIN, ELLIOT
GAMACHE, NICHOLAS NEIL LLOYD CROCKER, ROBERT ALLAN HENDERSON,
GABRIEL GILLES RJ RAMSAY, DEVIN JAMES MCKENNA**

Appellants

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA, CHIEF OF THE DEFENCE
STAFF GENERAL WAYNE EYRE, VICE CHIEF OF DEFENCE STAFF
LIEUTENANT-GENERAL FRANCES J ALLEN, LIEUTENANT GENERAL JOCELYN
J M J PAUL, VICE ADMIRAL ANGUS L TOPSHEE, and LIEUTENANT GENERAL
ERIC J KENNY, MINISTER OF NATIONAL DEFENCE, THE HONOURABLE ANITA
ANAND, FORMER DEPUTY MINISTER OF NATIONAL DEFENCE JODY THOMAS,
SURGEON GENERAL MAJOR-GENERAL JGM BILODEAU, CHAPLAIN GENERAL
BRIGADIER- GENERAL JLG BELISLE, JUDGE ADVOCATE GENERAL REAR-
ADMIRAL GENEVIEVE BERNATCHEZ, and BRIGADIER GENERAL LIAM WADE
RUTLAND**

Respondents

Heard at Calgary, Alberta, on December 8, 2025.

Judgment delivered from the Bench at Calgary, Alberta, on December 8, 2025.

REASONS FOR JUDGMENT OF THE COURT BY:

LEBLANC J.A.

Federal Court of Appeal



Cour d'appel fédérale

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Appellants

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ADMIRAL GENEVIEVE BERNATCHEZ, and BRIGADIER GENERAL LIAM WADE
RUTLAND**

Respondents

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Calgary, Alberta, on December 8, 2025).

LEBLANC J.A.

[1] The appellants, who are all current or former members of the Canadian Armed Forces (CAF), appeal from an order of the Federal Court (*per* Mason J) (the Judge), dated January 14, 2025 (the Order), refusing to extend the time that would have allowed them to appeal an order of an Associate Judge of that Court, dated November 13, 2024 (2024 FC 1801), striking their amended Statement of Claim, without leave to amend, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[2] The amended Statement of Claim asserts causes of action under various provisions of the *Canadian Charter of Rights and Freedoms*, and various alleged actionable torts, including the tort of misfeasance in public office, arising from the vaccination requirements for CAF members set out in a series of Directives issued by the CAF's Chief of Defence Staff during the COVID-19 pandemic.

[3] The Associate Judge was satisfied that the Statement of Claim lacked basic elements of a proper pleading and failed to disclose a reasonable cause of action. She was satisfied as well that the Federal Court ought to decline jurisdiction over the appellants' claims and defer to the grievance process established under the *National Defence Act*, R.S.C. 1985, c. N-5.

[4] According to Rule 51 of the Rules, the appellants had 10 days from the date of the Associate Judge's order to appeal it to a judge of the Federal Court. They failed to do so. It is only on December 12, 2024, that is 29 days after the date of the order, that the appellants brought a motion seeking: (i) "leave for an extension of time to apply for Appeal of a[n] [associate judge] order"; and (ii) "leave to commence an application for Appeal under Federal Courts Act (*sic*) Section 51(1)" (the Motion).

[5] In dismissing the Motion, the Judge first noted a number of issues with the notice of motion and concluded that the only valid request before him was the request for an extension of time to appeal the Associate Judge's order under Rule 8 of the Rules. The Judge also noted that the affidavit filed in support of the Motion (the Affidavit), which speaks to the steps allegedly taken to explain the delay in bringing the Motion, was that of the appellants' counsel. Quoting

Rule 82 of the Rules, the Judge held that to the extent the Affidavit was providing evidence in respect of a contentious matter, it was improper and should be disregarded.

[6] On the actual merits of the request for an extension of time, the Judge determined that the appellants had failed to satisfy any of the jurisprudential criteria that must be considered on such motions, as set out in *Canada (Attorney General) v. Hennelly*, 1999 167 FTR 158 (*Hennelly*), that is: (i) a continuing intention to pursue an appeal of the Associate Judge's order; (ii) that their proposed appeal had some merit; (iii) that the respondents would not be prejudiced by the delay; and (iv) that there was a reasonable explanation for the delay.

[7] In particular, the Judge held that there was no evidence supporting an intent to appeal, even when considering the Affidavit (Order at paras. 12-13). He further held that both the Affidavit and the appellants' written submissions in support of the Motion failed to address how the appeal might succeed (Order at para. 15). On prejudice, the Judge found that although the respondents did not claim to be prejudiced by the delay in bringing the Motion, they were "certainly going to be prejudiced" by the fact the appellants were seeking an additional delay – that is up to the end of January 2025 – to file a "full motion record for an Appeal" (Order at paras. 19-21). According to the Judge, the respondents, in such context, were facing "indefinite delay going forward". Finally, the Judge determined that both the 29-day delay and the additional 6-week delay sought to create a "full motion record for an Appeal", were not explained in any rational sense, even, again, when considering the Affidavit (Order at paras. 22-23).

[8] The Judge concluded that the interests of justice did not “justify the Court allowing poorly prosecuted litigation to proceed forward when there is no likelihood of success” (Order at para. 24).

[9] It is trite that whether to grant an extension of time is a discretionary decision (*Koch v. Borgatti Estate*, 2022 FCA 201 at para. 39). It is trite as well that discretionary decisions made by Federal Court judges are reviewable by this Court under the appellate standard of review, meaning that questions of law are reviewable on the correctness standard whereas findings of fact and findings of mixed fact and law can only be overturned in the presence of a palpable and overriding error (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Housen v. Nikolaisen*, 2002 SCC 33; *Spectrum Brands, Inc. v. Schneider Electric Industries SAS*, 2021 FCA 51 at para. 6 (*Spectrum Brands*)). A palpable error means an error that is “obvious” whereas for an error to be overriding, it must go “to the very core of the outcome of the case”. That standard is “highly deferential” and is “not easily met” (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46; *Spectrum Brands* at para. 7; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2021 FCA 24, at para. 11).

[10] Bearing these general principles in mind, we are all of the view that the present appeal cannot succeed. First, there is no dispute that in applying the *Hennelly* test, the Judge identified and applied the correct legal test to the appellants’ request for an extension of time. There is no legal error there. Then, the question becomes whether the Judge committed a palpable and overriding error in applying that test to the facts that were before him. We see none.

[11] The appellants contend that the Order is undermined by two fatal flaws. First, they say that it rests on an unduly formalistic application of procedural rules that fails to give due weight to the seriousness of the constitutional issues raised in the amended Statement of Claim. This contention has no merit as nothing in the dismissal of the Motion turns on the procedural deficiencies identified by the Judge, including the impropriety of the Affidavit. The Judge did consider the merits of the appellants' request for an extension of time and did so by considering the content of the Affidavit.

[12] Second, the appellants contend that the Judge erred in concluding that their proposed appeal had no likelihood of success. In fact, the bulk of the appellants' submissions in this appeal focuses on the merits of some aspects of the Associate Judge's order. The appellants contend in this respect that the Associate Judge erred: (i) in treating their claim as improperly bypassing the CAF grievance system; (ii) in concluding that that system was an adequate alternative remedy; and (iii) in striking the amended Statement of Claim without leave to amend.

[13] One major problem with these submissions is that nothing of that sort was put to the Judge. As the Judge correctly noted, both the Affidavit and the appellants' written submissions in support of the Motion are silent as to how the appeal of the Associate Judge's order might be successful (Order at para. 15). This problem is exacerbated by the fact that these submissions are based, in large part, on documents, mostly directives and reports on reviews of the *National Defence Act* and the CAF, that were not before the Judge and that were appended, in e-versions, to the appellants' Memorandum of Fact and Law in this appeal.

[14] As the respondents correctly point out in their written submissions, the Judge cannot be faulted for not considering documents and submissions that were not put to him. Further, this Court cannot consider these documents either, especially the Directives and the reports, and the submissions that rely on them, as they are not properly before this Court. To the extent that these documents are new evidence, they could only be added to this Court's record with leave of the Court pursuant to Rule 351 of the Rules. No such leave application, which can only be granted in "special circumstances", was sought by the appellants in this appeal. As this Court stated in *Kahnpace v. Canada (Attorney General)*, 2010 FCA 70, at paragraph 4, evidence cannot be put before the Court by means of a memorandum of fact and law.

[15] This, in and of itself, is fatal to the appellants' argument that the Judge erred in concluding that they had not established that their proposed appeal of the Associate Judge's order had some merit.

[16] At the hearing of this appeal, the appellants insisted that the *Hennelly* test was applied too restrictively by the Judge, given the potential merit of their claims. However, it is important to underscore that it is not the role of this Court to proceed with its own assessment of the *Hennelly* test and to do so, moreover, based on a significantly different – improperly constituted – record than the one that was before the Judge. Our role, again, is to determine whether the Judge committed a palpable and overriding error in concluding that the appellants had not established that their claims, based on the record before him, had merit. We find that he did not commit such an error.

[17] One other major problem with this appeal is that the appellants, at best, only superficially address the Judge's application of the other *Hennelly* criteria (intent to appeal, delay and prejudice) to the circumstances of the case. There is nothing for us, therefore, to conclude that the appellants have met the highly deferential palpable and overriding error standard on these issues.

[18] For all these reasons, the appeal will be dismissed with costs to the respondents fixed in the all-inclusive amount of \$2,340.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-33-25

STYLE OF CAUSE: FRANCESCO GABRIELE
QUALIZZA et al. v. HIS MAJESTY
THE KING IN RIGHT OF
CANADA et al.

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: DECEMBER 8, 2025

REASONS FOR JUDGMENT OF THE COURT BY: WEBB J.A.
WOODS J.A.
LEBLANC J.A.

DELIVERED FROM THE BENCH BY: LEBLANC J.A.

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