

**Date: 20061121**

**Docket: A-544-04**

**Citation: 2006 FCA 382**

**CORAM: LÉTOURNEAU J.A.  
PELLETIER J.A.  
MALONE J.A.**

**BETWEEN:**

**DENNIS NOWOSELSKY**

**Appellant**

**and**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Respondent**

Heard at Saskatoon, Saskatchewan, on November 21, 2006.

Judgment delivered at Saskatoon, Saskatchewan, on November 21, 2006.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

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**BETWEEN:**

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**Appellant**

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**CANADIAN HUMAN RIGHTS COMMISSION**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench, at Saskatoon, Saskatchewan, on November 21, 2006).**

**PELLETIER J.A.**

[1] These are the reasons which were delivered from the bench following the hearing of this appeal, but which have been edited for grammar and readability.

[2] We are all of the view that the appeal should be allowed.

[3] The order underlying the appeal is the prothonotary's order which required the appellant, no later than June 30, 2004, "to serve and file a motion to extend the time within which to serve and file his supporting affidavits pursuant to Rule 306 of the Federal Courts Rules together with

any further or other motion which he considers necessary to address any difficulty or deficiency in the style of cause in these proceedings.”

[4] The appellant complied with this order according to its terms. The prothonotary dismissed his motion on two grounds. The first is that the delay in pursuing the action had not been adequately explained. The prothonotary was critical of the appellant’s failure to address the issue of the style of cause and to move the matter forward.

[5] The second ground upon which the prothonotary dismissed the appellant’s motion was his failure to submit his proposed affidavits so as to permit the Court to determine if there was relevant admissible evidence in support of the appellant’s application for judicial review.

[6] With respect, we are of the view that the prothonotary erred in principle. The issue of delay was disposed of when the prothonotary decided to allow the matter to proceed as a specially managed proceeding. The delay which the appellant was called upon to explain in responding to the notice of status review was the delay in filing the affidavits required by Rule 306 (“the Rule 306 affidavits”). Having accepted the appellant’s explanation, and having put the matter into case management, the prothonotary erred in requiring the latter to address a question which she had already decided.

[7] This entire episode illustrates the deficiencies of the current status review system, which gives the applicant no indication of the steps which need to be taken to regularize his proceeding.

Further, it gives the appearance of requiring the applicant to meet different tests as to delay, when in fact, there is only one test: why has the applicant not taken the next step required by the Rules to move his or her file forward.

[8] That is why the Rules Committee is currently considering an amendment to the Rules to make the process more intelligible to litigants, particularly those who are unrepresented.

[9] As for the prothonotary's second ground for dismissing the appellant's motion, it is apparent that the prothonotary did not credit the appellant for having complied with her order according to its terms. The appellant's interpretation of what the order required him to do was not unreasonable. In the face of the appellant's compliance with the order as drafted, the prothonotary ought to have exercised her discretion, in the spirit of Rule 3, to allow the appellant to file his Rule 306 affidavits so as to allow her to dispose of the motion on the merits. The brief hiatus which this would have caused would perhaps have avoided the much longer delay caused by this appeal.

[10] We take this opportunity to point out that this entire chain of events was the result of the Commission's raising the issue of the style of cause informally by means of a letter to the Registry. If the Commission believed that it was not properly named as a respondent, then it was for the Commission to bring a motion pursuant to Rule 58 to have itself struck from the style of cause. By proceeding as it did, the Commission cast upon the appellant a burden which was not his. It was for the Commission to bring a motion; its failure to do so had a significant effect upon subsequent events.

[11] The order under appeal before us is that of the Federal Court judge. While he asserts that he exercised his discretion anew, we have no indication, other than the result, as to how he may have done so. In our view, the exercise of the Federal Court judge's discretion should have led him to recognize the need to intervene.

[12] We will therefore allow the appeal with costs fixed at \$2,000 inclusive of disbursements.

[13] The decision of the reviewing judge will be set aside and, proceeding to render the decision that he ought to have rendered, the decision of the prothonotary dated August 5, 2004 dismissing the appellant's motion for an extension of time to file his affidavits and documentary evidence pursuant to Rule 306 of the Federal Courts Rules will be set aside.

[14] The matter will be remitted to the prothonotary for a new determination as provided in this order.

[15] The appellant will serve and file with the Court, within 45 days of the present order, the affidavits and documentary evidence required by Rule 306 and the jurisprudence to enable the prothonotary to assess whether there is relevant and admissible evidence in support of the pending application for judicial review.

[16] The style of cause of these proceedings will be amended to substitute for the Canadian Human Rights Commission for the Attorney General of Canada as the respondent. A copy of the present order shall be sent to the Attorney General of Canada by the Registry.

[17] The appellant's affidavits and documentary evidence shall be served on the Attorney General of Canada as the respondent within the time limits provided by this order.

\_\_\_\_\_  
"Denis Pelletier"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLLICITORS OF RECORDS**

**(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED SEPTEMBER 30, 2004, DOCKET NO. T-1595-03)**

**STYLE OF CAUSE:** DENNIS NOWOSELSKY v.  
CANADIAN HUMAN RIGHTS COMMISSION

**PLACE OF HEARING:** SASKATOON, SK

**DATE OF HEARING:** NOVEMBER 21, 2006

**REASONS FOR JUDGMENTS  
OF THE COURT BY:** LÉTOURNEAU, J.A.  
PELLETIER, J.A.  
MALONE, J.A.

**DELIVERED FROM THE BENCH BY:** PELLETIER, J. A.

**APPEARENCES:**

Mr. Dennis Nowoselsky FOR THE APPLICANT

Mr. Giacomo FOR THE RESPONDENT

**SOLLICITOR OF RECORDS:**

(not applicable ) FOR THE RESPONDENT

Canadian Human Rights Commission FOR THE RESPONDENT  
Legal Services  
Ottawa, On