Date: 20061013

Docket: A-546-05

Citation: 2006 FCA 327

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CHARLES SAVARD

Respondent

Hearing held at Montreal, Quebec, September 14, 2006.

Judgment delivered at Ottawa, Ontario, October 13, 2006.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
NADON J.A.

Date: 200610

Docket: A-546-05

Citation: 2006 FCA 327

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CHARLES SAVARD

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is the fifth time the Court has been asked to interpret section 7.1 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), which provides for the conditions for receiving benefits and the increase in the number of hours of insurable employment needed when a claimant has committed one or more violations under this section. The four previous applications were ruled on in *Canada (Attorney General) v. Geoffroy*, 2001 FCA 105; *Canada (Attorney*

General) v. Limosi, 2003 FCA 215; *Canada (Attorney General) v. Szczech*, 2004 FCA 366; and *Canada (Attorney General of Canada) v. Piovesan*, 2006 FCA 245.

[2] At issue in this case is the interpretation of subsection 7.1(4); the respondent submits that there can be no increase in the hours in his case since he did not receive the notice of violation that the Canada Employment Insurance Commission (the Commission) issued concerning him. It appears that the address to which the Commission sent it was incomplete and therefore non-existent because the Commission had failed to write the name of the city in which the street indicated on the envelope addressed to the respondent was located.

[3] For a better understanding of the issue, I set out the relevant provisions of the Act:

7.1 (1) **Increase in required hours**. The number of hours that an insured person, other than a new entrant or re-entrant to the labour force, requires under section 7 to qualify for benefits is increased to the number provided in the following table if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.	**7.1** (1) **Majoration du nombre d'heures d'emploi assurable requis**. Le nombre d'heures d'emploi assurable requis au titre de l'article 7 est majoré conformément au tableau qui suit, en fonction du taux régional de chômage applicable, à l'égard de l'assuré autre qu'une personne qui devient ou redevient membre de la population active s'il est responsable d'une ou de plusieurs violations au cours des deux cent soixante semaines précédant sa demande initiale de prestations.

Regional Rate of unemployment Taux régional de chômage	Minor Violation Violation mineure	Serious Violation Violation grave	Very serious Violation Violation très grave	Subsequent Violation Violation subséquente
More than 13% Plus de 13%	525	630	735	840
. . .		[…]		

(4) **Violations**. An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

(*a*) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;

. . .

(5) **Classification of violations**. Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

(*a*) if the value of the violation is
(i) less than $1,000, it is a minor violation,
(ii) $1,000 or more, but less than $5,000, it is a serious violation, or
(iii) $5,000 or more, it is a very serious violation; and

(*b*) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

(6) **Value of violations**. The value of a violation is the total of

(*a*) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and

(4) **Violations**. Il y a violation lorsque le prestataire se voit donner un avis de violation parce que, selon le cas :

a) il a perpétré un ou plusieurs actes délictueux prévus à l’article 38, 39 ou 65.1 pour lesquels des pénalités lui ont été infligées au titre de l’un ou l’autre de ces articles, ou de l’article 41.1;

[…]

(5) **Qualification de la violation**. À l’exception des violations pour lesquelles un avertissement est donné, chaque violation est qualifiée de mineure, de grave, de très grave ou de subséquente, en fonction de ce qui suit :

a) elle est mineure, si sa valeur est inférieure à 1 000 $, grave, si elle est inférieure à 5 000 $, et très grave, si elle est de 5 000 $ ou plus;

b) elle est subséquente si elle fait l’objet d’un avis de violation donné dans les deux cent soixante semaines suivant une autre violation, même si l’acte délictueux sur lequel elle est fondée a été perpétré avant cette dernière.

(6) **Valeur de la violation**. La valeur d’une violation correspond à la somme des montants suivants :

a) le versement excédentaire de prestations lié à l’acte délictueux sur lequel elle est fondée;

(*b*) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations.

b) si le prestataire est exclu ou inadmissible au bénéfice des prestations, ou si l'acte délictueux en cause a trait aux conditions requises au titre de l'article 7, le montant obtenu, sous réserve du paragraphe (7), par multiplication de son taux de prestations hebdomadaires par le nombre moyen de semaines à l'égard desquelles des prestations régulières sont versées à un prestataire, déterminé conformément aux règlements.

38. (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

38. (1) Lorsqu'elle prend connaissance de faits qui, à son avis, démontrent que le prestataire ou une personne agissant pour son compte a perpétré l'un des actes délictueux suivants, la Commission peut lui infliger une pénalité pour chacun de ces actes :

(*a*) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;

a) à l'occasion d'une demande de prestations, faire sciemment une déclaration fausse ou trompeuse;

(*b*) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;

b) étant requis en vertu de la présente loi ou des règlements de fournir des renseignements, faire une déclaration ou fournir un renseignement qu'on sait être faux ou trompeurs;

(*c*) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

c) omettre sciemment de déclarer à la Commission tout ou partie de la rémunération reçue à l'égard de la période déterminée conformément aux règlements pour laquelle il a demandé des prestations;

(*d*) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

d) faire une demande ou une déclaration que, en raison de la dissimulation de certains faits, l'on sait être fausse ou trompeuse;

(*e*) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

e) sciemment négocier ou tenter de négocier un mandat spécial établi à son nom pour des prestations au bénéfice desquelles on n'est pas admissible;

(*f*) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

f) omettre sciemment de renvoyer un mandat spécial ou d'en restituer le montant ou la partie excédentaire comme le requiert l'article 44;

(*g*) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

g) dans l'intention de léser ou de tromper la Commission, importer ou exporter, ou faire importer ou exporter, un document délivré par elle;

(*h*) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (*a*) to (*g*).

h) participer, consentir ou acquiescer à la perpétration d'un acte délictueux visé à l'un ou l'autre des alinéas *a*) à *g*).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(2) La pénalité que la Commission peut infliger pour chaque acte délictueux ne dépasse pas :

(*a*) three times the claimant's rate of weekly benefits;

a) soit le triple du taux de prestations hebdomadaires du prestataire;

(*b*) if the penalty is imposed under paragraph (1)(*c*),
(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and
(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

b) soit, si cette pénalité est imposée au titre de l'alinéa (1)*c*), le triple :
(i) du montant dont les prestations sont déduites au titre du paragraphe 19(3),
(ii) du montant des prestations auxquelles le prestataire aurait eu droit pour la période en cause, n'eût été la déduction faite au titre du paragraphe 19(3) ou l'inadmissibilité ou l'exclusion dont il a fait l'objet;

(*c*) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

c) soit, lorsque la période de prestations du prestataire n'a pas été établie, le triple du taux de prestations hebdomadaires maximal en vigueur au moment de la perpétration de l'acte délictueux.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

(3) Il demeure entendu que les semaines de prestations régulières remboursées par suite de la perpétration d'un acte délictueux visé au paragraphe (1) sont considérées comme des semaines de prestations régulières versées pour l'application

	du paragraphe 145(2).
40. A penalty shall not be imposed under section 38 or 39 if (*a*) a prosecution for the act or omission has been initiated against the employee, employer or other person; or (*b*) 36 months have passed since the day on which the act or omission occurred.	**40.** Les pénalités prévues aux articles 38 et 39 ne peuvent être infligées plus de trente-six mois après la date de perpétration de l'acte délictueux ni si une poursuite a déjà été intentée pour celui-ci.
41.1 (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).	**41.1** (1) La Commission peut, en guise de pénalité pouvant être infligée au titre de l'article 38 ou 39, donner un avertissement à la personne qui a perpétré un acte délictueux.
(2) Notwithstanding paragraph 40(*b*), a warning may be issued within 72 months after the day on which the act or omission occurred.	(2) Malgré l'article 40, l'avertissement peut être donné dans les soixante-douze mois suivant la perpétration de l'acte délictueux.
125. (1) An information or complaint under this Act, other than Part IV, may be laid or made by a member of the Royal Canadian Mounted Police or by a person acting for the Commission and, if an information or complaint appears to have been laid or made under this Act, other than Part IV, it is deemed to have been laid or made by a person acting for the Commission and shall not be called into question for lack of authority of the informant or complainant except by the Commission or by a person acting for it or for Her Majesty.	**125.** (1) Une dénonciation ou plainte prévue par la présente loi, à l'exception de la partie IV, peut être déposée ou formulée par un membre de la Gendarmerie royale du Canada ou toute personne agissant pour le compte de la Commission. Lorsqu'une dénonciation ou plainte est présentée comme ayant été déposée ou formulée en vertu de la présente loi, à l'exception de la partie IV, elle est réputée l'avoir été par une personne agissant pour le compte de la Commission et ne peut être contestée pour défaut de compétence du dénonciateur ou du plaignant que par la Commission ou une personne agissant pour elle ou pour Sa Majesté.
135. (2) No prosecution for an offence under this section shall be instituted if a penalty for that offence has been imposed under section 38,	**135.** (2) Il ne peut être intenté de poursuite pour une infraction prévue au présent article si une pénalité a été infligée pour cette infraction en vertu

39 or 65.1. de l’article 38, 39 ou 65.1.

[4] Of the five challenges that have been initiated, I must say this is the first in which, thanks to Quebec Legal Aid, the claimant is represented by counsel, *i.e.* Mr. Jean-Pierre Marcotte. We were therefore able to have the advantage of some enlightenment that had been absent up to the present, in the absence of adversarial proceedings. I have been convinced, in the light of new arguments made to the Court and of the new documentation filed by the respondent’s counsel, of the need to revisit the four other previous decisions. I am persuaded that three of these decisions, in some aspects, would not have been the same if this enlightening additional information could have been brought to the attention of the members of the various panels that rendered them. This is a situation that meets the test propounded in *Miller v. The Attorney General of Canada*, 2002 FCA 370, and it is warranted to make the necessary corrections to those decisions.

FACTS AND PROCEEDINGS IN THIS CASE

[5] The respondent lives in Northwestern Quebec where, during the periods in issue, the unemployment rate fluctuated around 16%. On February 11, 2005, he filed a claim for employment insurance. During his reference period, February 1, 2004 to January 22, 2005, he accumulated 428 hours of work between May 24, 2004 and August 27, 2004.

[6] Normally, he would have needed only 420 hours to qualify for benefits. But the Commission learned that the respondent had failed to report an income of $1,472 (for the period from July 2, 2001 to July 19, 2001) and $624 (for the period from August 6, 2001 to August 10,

2001) although he had declared he had not received any remuneration (Applicant's Record, at page 36).

[7] Since this was a first violation of section 38 of the Act, the Commission imposed a penalty on him of $1,632. In addition, it issued a notice of serious violation to the respondent, since the value of the violation amounted to $1,632. The notice was issued on October 17, 2003 (Applicant's Record, at page 38).

[8] Since the notice of violation referenced the 260 weeks preceding the initial claim for benefit made by the respondent on February 11, 2005, it entailed an increase in the number of hours of insurable employment under section 7.1 of the Act. Therefore, the respondent's entitlement to benefits depended on his ability to establish that he had worked 630 hours instead of the 420 that would normally have sufficed.

[9] The notice of penalty and the notice of serious violation were both issued on the same day and sent in the same envelope to the respondent, who says he did not receive them. However, there is no doubt that he was informed of their existence when the Commission denied him the benefits claimed in February 2005.

[10] The respondent appealed the Commission's decision refusing to establish a benefit period for him to the board of referees. We learn, from the letter he sent to the board of referees, and from the board of referees' decision, that he paid the amount of the penalty and reimbursed the

overpayment. However, there was no appeal of the decision finding him guilty of a serious violation, as allowed by section 114 of the Act. That appeal had to be filed within 30 days following the date when the decision was communicated to him.

[11] It is clear, and this fact is not in dispute, that the respondent was informed of the reasons for the refusal to establish a benefit period that were expressed by the Commission, namely, the insufficiency of insurable hours as a result of the notice of serious violation. His appeal instead addressed the fact that he had not been informed of the increase in the requisite hours and accordingly, although he does not use these words, that the notice of violation was unenforceable against him.

[12] The board of referees found that the increase in the number of insurable hours was inapplicable to the respondent, since he had not received the notice of violation.

[13] Relying on the French version of the judgment in *Canada (Attorney General) v. Szczech*, *supra*, the umpire ruled that this judgment required that a notice of violation be served on a claimant before taking effect. He dismissed the Commission's appeal on the ground that the board of referees had engaged in an assessment of the facts that was reasonably compatible with the evidence.

[14] In fairness to the umpire, I must say that, in the French version of *Szczech*, on which he relied, and which is a translation of the reasons written in English, there was a significant

mistake, repeated in more than one place in the decision. While Evans J.A. speaks in the English version of “the issue of a notice” (“l’émission d’un avis”), the concept was rendered in French by “the service of a notice” (“la signification d’un avis”). Subsection 7.1(4) of the Act also refers to the fact that the Commission “issues a notice of violation”. There is no mention of service of a notice in the English or French version.

SCHEME AND OPERATION OF THE PROVISIONS AT ISSUE

[15] In 1996, Parliament wanted to give more teeth to the Act by allowing a new form of administrative sanction for acts and omissions, by providing for an increase of the number of hours of insurable employment required to be entitled to benefits. This sanction was in addition to the traditional monetary penalties.

[16] Parliament acted rather clumsily by adopting a new concept, that of violation, that is superimposed on the concept of acts or omissions and that creates confusion. In this case, the violation is in fact an administrative sanction, a penalty imposed for the act or omission. And this violation may itself give rise to another form of sanction, an increase in hours of insurable employment. The fact that this sanction was not inserted in the part of the Act dealing with penalties (section 38 *et seq.*), but rather in the part pertaining to entitlement, hardly improves things; this is an understatement.

[17] The Court has complained on more than one occasion of the confusion generated by the terms chosen, but so far without success.

[18] In the light of the *Digest of Benefit Entitlement Principles – Chapter 18* (Digest), published by the Commission and brought to our attention for the first time in this case (and to which I shall return), I believe I am in a position to describe finally, with, I hope, some coherence, the system adopted by Parliament and how it works.

[19] The acts or omissions described in section 38 of the Act (the best known being the false or misleading statement) may entail, in addition to reimbursement of the overpayment, the imposition of one or another of the following penalties when, in the Commission's opinion, a sanction is warranted:

(a) the traditional monetary penalties described in subsection 38(2);

(b) a non-monetary penalty, either the section 41.1 warning or a violation provided for by section 7.1 which, depending on whether it is classified or not, will or will not entail an increase in the number of hours of insurable employment, or both; and

(c) the penal prosecutions provided in section 125.

[20] The table shown below illustrates the critical path in the suppression and deterrence of acts and omissions:

Critical path in the suppression and deterrence of acts or omissions

Acts/omissions:	Penal prosecutions, s. 125				
	Administrative sanctions – penalties:	monetary penalty, ss. 38 and 39			
		non-monetary penalty:	warning, s. 41.1(1)		
			violation:	classified, s. 7.1(5)	– increase in hours, s. 7.1(1)
				un-classified,	– no increase in hours s. 7.1(5)

[21] Just now, I disregard penal prosecutions, which are not at issue in this case. However, I note in passing that, under section 40 of the Act, no monetary penalty provided for in sections 38 and 39 can be imposed if a penal prosecution has been commenced. Similarly, and conversely this time, no penal prosecution shall be instituted if monetary penalties have been imposed under sections 38, 39 and 65.1 (see subsection 135(2)).

[22] From this table representing the critical path in the suppression and deterrence of acts or omissions, it can be seen that the Commission first determines the appropriateness of imposing a penal sanction or an administrative sanction. Both section 125, which provides for penal prosecutions, and section 38, which provides for administrative penalties, couch the Commission's authority in terms of a discretionary power.

[23] When the Commission opts for an administrative sanction, it then decides whether it will be a penalty that is monetary, non-monetary alone or a combination of both. In the case of a monetary penalty, the Commission will issue a notice of penalty under section 38 of the Act.

[24] If it is a non-monetary penalty, the Commission may, under subsection 41.1(1), issue a warning to the offender. Again, the Commission's power is conferred in discretionary terms by subsection 41.1(1).

[25] If the act or omission is serious enough, the Commission may decide it is appropriate to impose an additional sanction and find that there has been a violation within the meaning of section 7.1. This sanction takes the form of the issuance of a notice of violation under subsection 7.1(4). Where the violation is classified as minor, serious, very serious or subsequent, as the case may be, the hours of insurable employment are increased: see subsections 7.1(5) and 7.1(1).

[26] However, a letter of warning may also result in a notice of violation, but this is an unclassified violation which, by itself, does not entail an increase in the hours of insurable

employment: see subsection 7.1(5). I say by itself because if, after receiving a letter of warning, a classified violation occurs within five years of the warning, it will be mandatorily classified as subsequent and will thus result in a greater increase in insurable hours of employment. This is because the warning is a violation, if a notice of violation is issued (at paragraph 7.1(4)(*a*)), and because paragraph 7.1(5)(*b*) classifies the new violation as subsequent in these circumstances: see the Digest, ibid., at paragraph 18.4.1, “Application of violations”.

[27] The complexity of the model adopted by Parliament can be seen, and here I refrain from mentioning other refinements which would simply increase that complexity and add to the confusion. In this case, two notices were issued: a penalty notice under section 38 of the Act, and a notice of serious violation under section 7.1.

THE *LIMOSI* CASE

[28] I have already mentioned the fact that the use of the word “violation” to refer to a sanction or administrative penalty is unfortunate and confusing. As previously stated, this violation is superimposed on the alleged act or omission, but must not be confused with the latter as happened in *Limosi*, *supra*, at paragraph 14. In a subsequent decision, *Canada (Attorney General) v. Szczech*, *supra*, the Court dispelled the confusion by ruling, on the basis of the language in subsection 7.1(4), that a violation exists if (*lorsque*, in French) the Commission issues a notice of violation in relation to acts or omissions. According to the Digest, *supra*, in Chapter 18 on “False or Misleading Statements”, at paragraph 18.4.0 Violations, at page 1, “a

violation does not exist until a notice of violation is issued" and "The date of the violation is the date the notice of violation is issued." This Digest, which is not binding on the Court, not only states Parliament's intention in this regard but correctly reflects the substance of subsection 7.1(4).

[29] The board of referees and the umpire misunderstood that provision when they thought that liability under section 7.1 arises only when the notice of violation is served. Not only is this holding in conflict with the actual language of subsection 7.1(4) and *Szczech*, but, if it were to prevail, it would be unjustly and disproportionately punitive to the author of the violations. Indeed, the five-year period in subsection 7.1(1) would begin to run only from the day the notice of violation is brought to the knowledge of that person. If, for some reason, the notice of violation can be brought to his knowledge only two years later, that person then loses, for the purposes of the calculation of the section 7.1 period, the benefit of those two years during which he may have worked and paid his employment insurance contributions. The five-year period in subsection 7.1(1) becomes a seven-year period for him.

[30] The Act contains numerous provisions in which the English word "issues" or "issued" is used: see sections 7.1(4), 12(4.1), 23.1, 38(1)(*g*), 39(1)(*d*), 41.1(1), 54(4)(*f*), 77(2), 88, 102(13), 125, 126(11) and (12), 134(1)(*b*)(i), 135(1)(*f*), 138(4) and 190(3.1). This word has been rendered in French sometimes by "donné", sometimes by "délivré", sometimes by "décerner", sometimes by "prévu" and sometimes by "établi", but never by "signifié". In the case of subsection 46.1(5), the word seems to have been perceived as unnecessary since it is not used in the French version.

[31] Clearly, in all of these sections to which I refer, there is no question of "service" [signification] and the English word "issues" does not mean "serves". For example, when section 88 states that the judge "may issue a warrant" permitting entry to a dwelling house, it obviously does not mean that the judge may "serve" a warrant to the person who is being authorized to enter! And when Parliament intended that a notice be served, it said so explicitly: see subsection 85(5) "by notice served" (*par avis signifié*), subsections 102(6) and 125(6) "personal service of a notice" (*signification à personne d'un avis*), subsections 126(4) and (14) "by notice served personally" (*par avis signifié à personne*), subsection 126(18) "a third party on whom it is served" (*le tiers à qui un avis est signifié*).

[32] Finally, where Parliament intended that a person be informed of a notice or decision, it expressly provided so: see sections 48(3), 49(3), 52(2), 53, 85, 91 and 92 "notify the claimant of its decision" (*lui notifie sa décision*), "the person is notified of the ruling" (*il reçoit notification de cette décision*).

THE *GEOFFROY* AND *PIOVESAN* CASES

[33] In *Canada (Attorney General) v. Geoffroy*, *supra*, the Court held that the increase in the number of hours of insurable employment is automatic once a claimant commits one or more violations during the two hundred and sixty weeks preceding his initial claim for benefit.

[34] When this case was heard, the Court was not informed that the section 41.1 warning is a violation for the purposes of section 7.1 if a notice of violation is issued. Furthermore, there was no mention that it was an unclassified violation, which does not entail an increase in the hours required for entitlement. Had this important fact been pointed out, the Court would not have held that an increase is automatic solely by virtue of the fact that a notice of violation is issued.

[35] The very issue whether a warning issued to a claimant because of false statements he made entails the application of section 7.1 of the Act was raised in *Piovesan*, *supra*. The Court held that a warning issued in place of a monetary penalty and followed by a notice of violation was a violation within the meaning of section 7.1 and applied the principle identified in *Geoffroy*, *supra*, concerning an automatic increase in the requisite hours for entitlement. There is nothing either in that decision delivered from the bench to infer that the Court was alerted to the fact that a warning was not a classified violation and that it does not result in an increase, still less an automatic increase.

[36] I think it is worthwhile to summarize briefly my conclusions as to the scheme and operation of the provisions of sections 7.1, 38 and 41.1 of the Act.

[37] The Commission has discretion to impose sanctions when one or more of the acts or omissions set out in subsection 38(1) have been committed. It also has discretion, within the limits provided by the Act, to choose the deterrent measure(s) appropriate in the circumstances, should more than one punitive measure prove necessary to fulfill the purposes of the Act. Instead

of imposing a monetary penalty, it may choose, as section 41.1 allows it to do, to give the claimant a warning, which may be followed by a notice of violation as defined in section 7.1. This notice by itself does not entail an increase in the hours of insurable employment, but may serve to increase the classification of a new classified violation that will then be classified as subsequent and will entail a further increase in the hours of insurable employment, provided that this new violation occurs within five years of the warning.

[38] On the other hand, if the circumstances of the perpetration of the act or omission require, in the Commission's opinion, more than a monetary sanction, the Commission may reinforce or augment the monetary sanction by issuing a notice of violation pursuant to subsection 7.1(4). The violation then arises as of the day when the notice is issued and the date of this violation is the date on which the notice is issued.

[39] The five-year period under subsection 7.1(1) begins to run from the time the notice is issued: see *Szczech*, *supra*. This violation, when classified pursuant to subsection 7.1(5), entails an increase in the hours of insurable employment according to the table contained in subsection 7.1(1).

[40] The increase provided for in subsection 7.1(1) stems from the insured claimant's liability for one or more classified violations, and not from the knowledge he has of the notice of violation. Knowledge of such a notice is important in order to enable him to exercise his right to challenge the Commission's decision affecting him. Should he not challenge it, the

Commission's decision becomes enforceable and, if it is a classified violation, entails an increase in the hours of insurable employment: see *Limosi*, at paragraphs 16 and 17.

APPLICATION OF THESE PRINCIPLES TO THE FACTS OF THIS CASE

[41] In this case, the notice of violation was issued on October 17, 2003, and placed in the respondent's file. It was ruled that the violation was serious. In accordance with the principles in *Szczech*, the five-year period provided for in subsection 7.1(1) began to run as of that date, October 17, 2003. It follows that the hours of insurable employment increase if the insured claimant's violation occurs within the five years preceding his initial claim for benefit. That is precisely the case in this instance. In other words, as I said previously, the subsection 7.1(1) increase is based on the author's liability for the violations, and not on the knowledge he has of the notice of violation.

[42] I am therefore unable to accept the argument of the respondent's counsel that the increase in the hours cannot be used against his client since he was not informed of the notice of violation until February 15, 2005, four days after filing his initial claim for benefit.

[43] Since the respondent did not challenge on the merits the serious violation in question, but instead chose, as in *Limosi*, *supra*, to complain that he had not received the notice of violation, the Commission's decision holding him responsible for a serious violation remains in full force and effect and meets the requirements of subsection 7.1(1).

[44] The umpire should have intervened to correct the errors of law committed by the board of referees in the interpretation of section 7.1 of the Act.

[45] For these reasons, I would allow the application for judicial review, I would set aside the decision of the umpire and I would return the matter to the chief umpire, or to the person he designates, for redetermination on the basis that the respondent does not have the requisite number of insurable hours of employment under subsection 7.1(1) of the Act to establish a benefit period for himself.

[46] In the circumstances, I would award costs to the respondent's counsel in the amount of $2,000, including fees, disbursements and travel costs.

"Gilles Létourneau"

J.A.

"I agree
Robert Décary J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-546-05
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. CHARLES SAVARD
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 14, 2006
REASONS FOR JUDGMENT:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DÉCARY J.A. NADON J.A.
DATED:	October 13, 2006

APPEARANCES:

Carole Bureau	FOR THE APPLICANT
Jean-Pierre Marcotte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR THE APPLICANT
Chabot Marcotte & Paquin Amos, Quebec	FOR THE RESPONDENT