

**Date: 20061114**

**Docket: A-463-05**

**Citation: 2006 FCA 371**

**CORAM: LINDEN J.A.  
NOËL J.A.  
EVANS J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**DANNY MAXWELL**

**Respondent**

Heard at Halifax, Nova Scotia, on November 14, 2006.

Judgment delivered from the Bench at Halifax, Nova Scotia, on November 14, 2006.

**REASONS FOR JUDGMENT OF THE COURT BY:**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Halifax, Nova Scotia, on November 14, 2006)**

**NOËL J.A.**

[1] This is an application for judicial review of a decision of an Umpire under the *Employment Insurance Act*, S.C. 1996, c.23 (the “Act”) allowing in part the respondent’s appeal from an earlier decision of the Board of Referees.

[2] In the case at bar, a warning was issued to the respondent instead of the imposition of a monetary penalty as a result of a false representation made by the respondent.

[3] Although this issue was not addressed by the Board of Referees, the Umpire queried whether such a warning could result in the accumulation of a violation pursuant to paragraph 7.1

(4)(a):

7.1 (4) 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 missions mentioned in section 38, 39 or 65.1;

...

7.1 (4) 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;

...

[4] The authority to issue a warning rather than imposing a penalty is provided in section 41.1(1):

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.

[5] The Umpire held that a person does not "accumulate[s] a violation" within the meaning of paragraph 7.1(4)(a) as a result of the issuance of a notice of warning under section 41.1(1).

According to the Umpire, only a monetary penalty can trigger the application of that paragraph and result in the accumulation of a violation.

[6] The applicant maintains that the Umpire erred in coming to this conclusion. Properly construed, the issuance of a notice of warning amounts to the imposition of a penalty for purposes of paragraph 7.1(4)(a) and must be treated as such.

[7] In a recent decision (*Attorney General of Canada v. Piovesan* 2006 F.C.A. 245) (*Piovesan*), this Court acknowledged that paragraph 7.1(4)(a) was poorly drafted, but held that the reference to section 41.1 in that provision led to the inescapable conclusion that a warning is to be treated as a penalty.

[8] Decary J.A. writing for the Court said at paragraph 4:

4 ...Section 41.1 empowers the Commission to issue a warning instead of setting the amount of a penalty and subparagraph 7.1(4)(a) states that a person accumulates a violation if the Commission issues a notice of violation to a person where a penalty is imposed under, among other, section 41.1. Paragraph 7.1(4)(a) is perhaps poorly drafted but interpreted in context it can only mean that a warning is a penalty for its purposes, albeit not a monetary penalty (see *Canada (A.G.) v. Geoffroy*, [2001] F.C.J. No. 545, 2001 FCA 105; *Canada (A.G.) v. Gauley*, [2002] F.C.J. No. 815, 2002 FCA 219 at paragraph 11 and CUB 58488).

[9] In our view, the reasoning in *Piovesan* is dispositive of the issue raised in this application.

[10] The application for judicial review will accordingly be allowed, the decision of the Umpire will be set aside and the matter will be referred back to the Chief Umpire or his delegate for redetermination on the basis that the appeal from the Board of Referees' decision must be dismissed in its entirety. No costs were sought.

"Marc Noël"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-463-05

**(APPEAL FROM A JUDGMENT OR ORDER OF THE (See comment in left margin)  
DATED (DATE), DOCKET NO. (DOCKET NUMBER)) if applicable**

**STYLE OF CAUSE:** The Attorney General of Canada v.  
Danny Maxwell

**PLACE OF HEARING:** Halifax, Nova Scotia

**DATE OF HEARING:** November 14, 2006

**REASONS FOR JUDGMENT OF THE COURT BY:** Linden J.A.  
Noël J.A.  
Evans J.A.

**DELIVERED FROM THE BENCH BY:** Noël J.A.

**APPEARANCES:**

Danny Maxwell FOR THE APPLICANT

Sandra Doucette FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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