

**Date: 20081125**

**Docket: A-231-08**

**Citation: 2008 FCA 365**

**CORAM: RICHARD C.J.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**KARI STEVEN LYLANDER**

**Respondent**

Heard at Toronto, Ontario, on November 24, 2008.

Judgment delivered at Toronto, Ontario, on November 25, 2008.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**RICHARD C.J.  
SHARLOW J.A.**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

[1] This is an application for judicial review by the Attorney General of Canada to set aside a decision by Umpire Goulard (CUB 70206) who had allowed an appeal by Kari Steven Lylander from a decision of a Board of Referees, dated May 30, 2007.

[2] In that decision, the Board had dismissed Mr Lylander’s appeal from a decision by the Canada Employment Insurance Commission that he was not entitled to receive employment insurance benefits paid to him while in prison during the weeks of October 3-7, 2005, and October 14-December 8, 2005. The Commission requires Mr Lylander to repay the overpayments of approximately \$1,600, but without a penalty.

[3] The following provisions of the *Employment Insurance Act*, S.C. 1996, c. 23, are relevant to this proceeding.

37. Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(a) is an inmate of a prison or similar institution; or

...

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

...

(b) to which the claimant is not entitled.

37. Sauf dans les cas prévus par règlement, le prestataire n’est pas admissible au bénéfice des prestations pour toute période pendant laquelle il est :

a) soit détenu dans une prison ou un établissement semblable;

[...]

43. La personne qui a touché des prestations en vertu de la présente loi au titre d’une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n’est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.

[4] The Commission renewed Mr Lylander’s claim for employment insurance benefits, effective August 1, 2005, and deposited them directly into his bank account, as he had requested. Until his incarceration, Mr Lylander filed his weekly reports to the Commission by telephone by using a Temporary Access Code (“TAC”).

[5] The Commission continued to deposit the benefits in Mr Lylander's account after he had been incarcerated, although he states that he telephoned the Commission and advised an official that he was in prison. The Commission says that it has no record of such a conversation.

[6] Mr Lylander's evidence before the Board of Referees was that he had not filed weekly reports while in prison and that, when he was released, he discovered that his bank account was empty. He surmised that his girlfriend, with whom he had been living before his arrest, may have obtained his TAC from his wallet (which, he stated, he was subsequently unable to find), filed weekly reports in his name by telephone, and withdrawn the funds from his account. He stated at one time that he had given her access to this account so that she could buy necessities for their baby, but denied that he had given anyone his TAC or authorized the filing of reports on his behalf while he was in prison.

[7] In its reasons for decision, the Board found that Mr Lylander had "supplied the means for the alleged fraud to be committed by not protecting his identity" and that if a fraud had occurred "the means to defraud or apply for the benefits would have had to come from the Appellant, directly or indirectly." The Board also noted that Mr Lylander stated that he had given a third party access to the bank account in which the Commission had deposited his benefits. On the basis of these considerations, the Board decided that Mr Lylander was not entitled to the benefits while he was in prison, and dismissed his appeal.

[8] On appeal, Umpire Goulard found that there was no evidence that Mr Lylander had provided his TAC to his girlfriend. The Umpire relied on *Fournier v. Canada (Human Resources Development)* 2002 FCA 138, for the proposition that a person is not liable to repay benefits which were obtained fraudulently by another person without the knowledge or consent of the claimant. He held that the facts of the present case were “analogous” to those in *Fournier* and allowed Mr Lylander’s appeal.

[9] Umpire Goulard concluded his reasons for decision by stating:

The evidence established that the claimant had not filed his reports and had not received his benefits for the periods relevant to the appeal. The benefits had been obtained fraudulently by a third party without the claimant’s knowledge and consent. In accordance with the Federal Court of Appeal decision in *Fournier (supra)*, he could not be responsible to reimburse these benefits.

[10] I agree with the Umpire that the Board of Referees’ decision cannot stand, although not for the reasons that he gave. In my view, the problem with the Board’s reasons is that they do not make it clear whether the Board found as a fact that the benefits were obtained fraudulently by a third party and, if they were, whether it was with Mr Lylander’s knowledge and consent.

[11] The Board’s statements that Mr Lylander provided the means, indirectly or directly, for the third party’s fraud by not protecting his identity is not sufficiently responsive to the question which *Fournier* requires to be answered: namely, did a third party fraudulently cause the Commission to make the overpayments and, if so, was the fraud committed with Mr Lylander’s knowledge and consent?

[12] In my opinion, the Umpire, too, was in error in making his own finding of fact that Mr Lylander was the innocent victim of fraud, even though the Umpire had not shown that the Board had made findings of fact that were erroneous and made in a perverse or capricious manner or without regard to the material before it: see *Employment Insurance Act*, paragraph 115(2)(c). In the employment insurance appeal system, boards of referees are the primary finders of fact. For Umpires to make independent factual findings, absent an unreasonable finding by a board, is incompatible with their limited role with respect to the facts.

[13] Because he was satisfied that Mr Lylander was the innocent victim of fraud, the Umpire allowed the appeal from the Board of Referees, set aside its decision, and allowed the appeal from the Commission's decision. In my view, the Umpire should have allowed the appeal on the ground that the Board failed to make findings of fact as to whether a third party fraudulently caused the Commission to make the overpayments and, if so, whether the fraud was committed with Mr Lylander's knowledge and consent. Consequently, having allowed the appeal, the Umpire should have remitted the matter for determination by a differently constituted board of referees.

[14] For these reasons, I would allow the Attorney General's application for judicial review, set aside the Umpire's decision, and refer the matter to the Chief Umpire or his Designate to set aside the board of referees' decision and remit the matter to a differently constituted board of referees for determination in accordance with these reasons.

“John M. Evans”  
\_\_\_\_\_  
J.A.

“I agree  
J. Richard C.J.”

“I agree  
K.Sharlow J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-231-08

**(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE  
HONOURABLE MR. JUSTICE GOULARD, UMPIRE, DATED 14-APR-2008 IN FILE  
NO. CUB70206.)**

**STYLE OF CAUSE:** *ATTORNEY GENERAL OF  
CANADA v. KARI STEVEN  
LYLANDER*

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** November 24, 2008

**REASONS FOR JUDGMENT BY:** EVANS J.A.

**CONCURRED IN BY:** RICHARD C.J.  
SHARLOW J.A.

**DATED:** November 25, 2008

**APPEARANCES:**

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