

PART C – Decision under Appeal

The decision being appealed is the Ministry's February 9, 2012 reconsideration decision in which the Ministry determined that the Appellant as a Person With Disabilities (PWD) had assets exceeding the \$3,000 asset limit in section 10(2) of the Employment and Assistance for Persons With Disabilities Regulation and that therefore he was no longer eligible for disability benefits. The Ministry decided that the Appellant's trust was not a valid trust under section 10(1)(y) of that regulation which would exempt him from that asset limit.

PART D – Relevant Legislation

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) Sections 1, 10, 12 and Schedule B Section 7.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. The following information from Ministry records:

- The Appellant is a Person with Disabilities (PWD) who has been receiving disability benefits since 1999.
- December 2005 the Appellant advised the Ministry that he had a registered trust; however, the Ministry had no information about such a trust and the Ministry had not approved it. The Appellant advised the Ministry that he received the trust several years ago and would submit documents.
- December 2007 during an annual review the Ministry noted that the trust documents were required.
- January 26, 2008 during a financial review the Ministry noted the Appellant had Guaranteed Income Certificates (GIC) in the amount of \$10,854.02.
- March 6, 2008 the Ministry advised an advocate for the Appellant that the GICs are not an established trust.
- March 7, 2008 the Ministry received trust documents which were forwarded to the Ministry's legal services branch; because the documents were still being reviewed on March 20, 2008 the Ministry granted the Appellant disability assistance and exempted the funds as an asset.
- April 25, 2008 the Ministry sent the Agreement to its legal services branch.
- April 30, 2008 the legal services branch advised that the Appellant had not established a discretionary or a non-discretionary trust, but that was not noted on the Appellant's file.
- August 26, 2011 the Appellant was asked for copies of all his trust disbursements and other documents which were not submitted.
- September 7, 2011 an investigative officer determined that the Appellant's trust was not a legal trust based on the 2008 information from legal services branch and that the Appellant had assets in excess of his allowable limit.
- October 18, 2011 the Ministry denied the Appellant disability benefits for failure to provide trust information about the amounts he has and his disbursements.

2. Handwritten note titled "Trust Monies" indicating receipt of \$17,500 in mid February 2002, that a lawyer set up a trust, what funds were disbursed, and that a balance of \$14,326 is to be held in trust.

3. Trust Agreement (Agreement) dated February 7, 2002 signed by the Appellant and witnessed by a lawyer. In that agreement the Appellant is named as the "Settlor" and the "Trustee". The Agreement states that the Settlor has transferred and delivered to the Trustee certain property; that is, monies from a settlement of a criminal injury claim. That Agreement further provides that the property shall be held by the Trustee under certain trusts, specifically that:

- The Appellant shall be the sole Trustee of the Trust Fund and shall have the power to appoint an alternate trustee.
- Notices of all changes in the trusteeship shall be endorsed as set out in the agreement.
- The Trustee shall invest and keep invested the trust fund or the amount from time to time remaining and shall pay to the beneficiary during his lifetime monies for the following expenses: (a) devices, or medical aids, related to improving the Appellant's health or well-being; (b) caregiver services or other services related to the Appellant's disability; (c) education or training; (d) renovations to the Appellant's principal residence to accommodate his needs resulting from his disability; (e) necessary maintenance for the Appellant's principal residence; (f) any other item or service necessary to promote the Appellant's independence;

and, (g) any other such item or service to advance the care, health, or education of the Appellant.

Other sections of the Agreement provide for the distribution of the trust funds upon the Appellant's death, to whom the Trustee may make any payments, how funds shall be invested by the Trustee and other legal rights and responsibilities conferred on the Trustee.

5. Copies of Ministry overpayment charts.
6. Undated copy of a transmittal sheet from a Ministry staff person to Legal Services Branch indicating that documents relating to the Appellant are attached to determine whether the trust is discretionary or non-discretionary.
7. Copies of the Appellant's bank investment statements indicating about \$16,927 on deposit in March 2008 and about \$14,300 still on deposit in November, 2011.
8. Copy of a criminal injury award decision in favour of the Appellant dated April 22, 1998.
9. Copy of the Appellant's March 2008 request for reconsideration of a March 2008 Ministry decision discontinuing his disability benefits.
10. Appellant's request for reconsideration together with a written submission from his advocate.

In that submission the Appellant's advocate reviewed the Appellant's circumstances, including his brain injury, when he started receiving PWD benefits and when he received a criminal injury award. The advocate also indicated that a lawyer drew up the Agreement for the Appellant in February 2002 to deal with the criminal injury award, that it is common practice for lawyers to submit trust documents directly to the Ministry for approval, and that this is what the Appellant asked and paid the lawyer to do. In 2008 an advocacy group submitted trust documents on behalf of the Appellant to the Ministry for its review. In March 2008 the Appellant was denied benefits on the basis that the trust was an asset which exceeded his asset limit. The Appellant applied for reconsideration but the Ministry set aside its decision and the reconsideration did not go forward. The Appellant started receiving disability benefits again in April 2008 and he continued to receive the benefits until September 2011.

The advocate submitted that the Appellant received no information from the Ministry about the Agreement until September 2011 when he was notified that he had to submit documents for a review. The Appellant has never received any documents or notices from the Ministry's legal services branch regarding the validity of the trust. He also disputes the Ministry's assertion that he did not advise them of the trust. The advocate argued that the fact that the Appellant had a lawyer draft the Agreement is proof that he intended to advise the Ministry. He assumed that the lawyer would forward the Agreement to the Ministry. He was trying to reasonably take care of the criminal injury award and to protect the money for his future needs from his brain injury.

The advocate stated that the Ministry's position is that because the Appellant is the settler, the trustee and the beneficiary of the trust, the trust is not valid. To support the Appellant's position that the Agreement created a valid trust, the advocate cited Water's Law of Trust in Canada, Third Edition. Referring to this authority the advocate submitted that a trust is valid if it has the following three required certainties: certainty of intention to create a trust, certainty of the subject matter covered by the trust, and certainty of the objects of the trust. The advocate argued these are all in the Agreement which established the trust objects and subjects, and was legally executed by a lawyer. In addition the advocate pointed to section 12 of the EAPWDR which the advocate argued allowed the Appellant to create a non-discretionary trust of less than \$100,000 with the help of his lawyer. Because of the Ministry's decision to deny him PWD benefits, the Appellant has had to make monthly withdrawals

from the trust to survive and the balance in the trust is diminishing. The advocate submitted this is not what the trust was set up for.

At the hearing the Appellant's advocate submitted that the Ministry's summary of facts in the reconsideration decision was incorrect in certain aspects, such as its contention that the Appellant did not advise the Ministry about a \$3,500 criminal injury award. The Appellant explained that in about 1998 he applied for disability because of injuries he sustained after an assault. Because of those injuries he also has difficulty remembering exact dates and events. At about the same time the Appellant also applied for an award under the province's *Criminal Injury Compensation Act*. He said that initially he was offered an award of \$3,500; however, after receiving advice from doctors and legal aid he rejected that sum. He was advised to appeal and to wait until the extent of his injuries was better known. The Appellant said he did not receive \$3,500 in 1998 because that sum was only an offer of an award and it was held in abeyance until his appeal was heard.

The Appellant submitted a decision from the Criminal Injuries Compensation Board indicating that on January 28, 2002 he was awarded a supplementary amount of \$14,000 to be added to the original offer of \$3,500 for a total award of \$17,500. The Appellant accepted this award. Therefore he pointed out that he received the award in early 2002, not in 1998 as the Ministry alleged. The Appellant also stated that he was advised by legal aid to put that award in a trust and he was referred to a lawyer who could set up a trust for him. The Appellant hired that lawyer and had her draw up the Agreement within less than a month of receiving the \$17,500. He also gave her that entire sum to be disbursed. From that \$17,500 the lawyer took her fees of \$175, gave the Appellant \$2,000 to pay lots of his bills and the lawyer also took the Appellant to a bank to invest the balance in term deposits.

The Appellant also said this lawyer told him she would tell the Ministry about the trust and that she would forward all the documents to the Ministry. He understood that she had done that. Also, when he signed the Agreement he believed, based on what his lawyer told him, that the Agreement created a legal trust from which he could take up to about \$5,400 a year for expenses related to his disability and which would make his life as a disabled person easier, such as renovations to his residence. He also expected to use some of those funds for medical and dental costs for which he has no coverage.

The Appellant identified the "Trust Monies" hand written note in the record as something he wrote so that he could remember how much he received, when he received it, that he had a lawyer set up the trust, that she received \$175 and he got \$2,200, and that the balance of \$15,326 was put in the bank on February 28, 2002. The note also indicates that in March 2002 he withdrew \$1,000 and the balance of \$14,326 was to be held in trust.

Over the last decade the Appellant stated that at different times he provided the Ministry with various documents. For example he submitted rent receipts, hydro and propane bills, and bank account statements. He said he was asked for trust documents a couple of times and he submitted them when asked. However, he was not sure if the first request was in 2005 because his memory is foggy about those dates and also his lawyer was supposed to have sent the trust documents to the Ministry in 2002. The Appellant stated that the first time the Ministry told him the trust was not valid was in 2008 and that decision by the Ministry was appealed by his advocate. However, the reconsideration of that Ministry's decision did not proceed because the Ministry withdrew its decision and then resumed his disability benefits.

The Appellant also said the next time he heard from the Ministry about the validity of his trust was in about August 2011 when the Ministry told him that his trust was not valid. At that time the Ministry also stopped paying his disability benefits and has not resumed them even though he has appealed that decision. He has been forced to use the money in his trust to live on instead of being able to save it for his old age or for specific needs related to his disability.

The Appellant's advocate testified about the Ministry's March 2008 decision because she was also helping the Appellant at that time. She stated that the Ministry's decision about the validity of the Appellant's trust was appealed, referring to the Appellant's March 2008 request for reconsideration in the record. Then, the Ministry dropped its inquiry and the Appellant continued to receive his disability benefits. The Advocate also said she personally provided the Ministry with various documents on behalf of the Appellant, including the trust document and the Appellant's "Trust Monies" note.

The Panel finds that the testimony from the Appellant and from his advocate all relate to information about his criminal injury award and his trust which were before the Ministry when it made its reconsideration decision. Therefore the Panel admits that testimony as being in support of the information before the Ministry pursuant to section 22(4) of the Employment and Assistance Act. As for the copy of the January 2002 criminal injury award, the Ministry did not object to having that admitted into evidence. The Panel finds that this document is also in support of information which was before the Ministry at the time of reconsideration and therefore the Panel admits it pursuant to section 22(4) of the Employment and Assistance Act.

At the hearing the Appellant's advocate also submitted oral argument on behalf of the Appellant. She stated that there are two issues in this appeal: whether the Agreement has a lawful, valid trust; and, whether the Appellant as a PWD has assets in excess of the limits allowed in the EAPWDR making him ineligible for disability benefits. The advocate also submitted that the Ministry did not correctly interpret and apply all of the information it had with the Appellant's request for reconsideration and prior to that time.

The advocate referred to Water's Law of Trusts as the Appellant's legal authority for his argument that in fact his trust is a legal, valid trust. She read from the following section of Chapter 1, Part II: "the trust is a means of managing wealth for the benefit of one or a number of persons. So far as it goes, that summary is correct, at least for the kind of family provision by way of a trust which is usually found in practice. But it does not reflect the various ways to which a trust may come into existence, and it fails to mention the possibly surprising fact that one person can be settlor, trustee, and a beneficiary of the same trust."

The advocate pointed out that the Agreement has an identified settlor, trustee and beneficiary, and the fact that one person, the Appellant, is all three does not invalidate the trust.

The advocate further argued that the Ministry has not set anything in regulations which stipulate what are invalid trusts. Just because the Ministry did not like the Appellant's trust because he is also the trustee does not invalidate that trust. The advocate argued that a correct interpretation of the Appellant's trust is that it is a means to protect the criminal injury award from 2002 so that the Appellant can access that money for his disability related costs.

The advocate also disputed the Ministry's position that the Appellant did not intend to protect the

award through a trust, but that it was his intention to create the appearance of a trust, not a trust. The advocate argued that the Appellant's intent to create a valid trust is strong and clear. He immediately went to a lawyer to draft the Agreement, to send the trust documents to the Ministry and for help with depositing the award in the bank. That lawyer even stipulated in the Agreement that the trust moneys shall be paid for expenses which mirror the disability-related costs defined in section 12(1) of the EAPWDR. In addition the advocate pointed out that until September 2011 the Appellant had almost the exact same amount of money in trust as in 2002. Now, because the Ministry discontinued his benefits the Appellant is exhausting the money in the trust to live on. From 2008 to September 2011 he was able to live on a fixed income.

The advocate further submitted that when the Appellant reported the trust the Ministry had a duty to advise the Appellant of the consequences if it decided the trust wasn't valid. The Ministry did nothing until 2011. The advocate also argued that any decision about the Appellant's asset should have been made first in 2002 and then every year after that until 2011. The only time the Appellant had assets in excess of the regulatory limit was for about a month in 2002, the time between receiving the award and creating the trust. Finally, the advocate submitted that as a matter of procedural fairness the Ministry has a duty to take care of the Appellant as a PWD, especially considering his brain injury.

The advocate stated that the Appellant was in the process of trying to set up another trust with a different trustee arrangement. She emphasized, however, that this was in no way an admission that the existing trust was invalid, but that the Appellant simply wants to avoid more difficulty with the Ministry in the future.

At the hearing the Ministry first admitted it made mistakes regarding the Appellant's case and it did not follow up on the information it received from the Appellant. The Ministry then explained what its records indicated regarding how it handled the Appellant's file. It noted, that according to its records, the Appellant told them about the trust in March 2005. Only when the Appellant appealed the Ministry's decision in March 2008 were the trust documents forwarded to its legal services branch for review. The Ministry took no further action on the Appellant's file pending the review and the Appellant was not penalized by having his benefits discontinued. That review was completed in 2008 and returned to the local Ministry office with a recommendation that the trust funds were not exempt as an asset. However, the Ministry did not act on that recommendation or the Appellant's file until 2011 when it stopped the Appellant's benefits because it decided at that point that he had assets in excess of allowable limits.

The Ministry submitted that because the Appellant is the sole trustee, the settlor and the beneficiary it decided that there was no difference between the Appellant having a trust and having the money. The issue was not whether the trust was a legal trust, but that the Appellant has full access to the money. The Ministry indicated that having a second person as a trustee could substantially change how the Ministry views the Appellant's trust. A change to the Agreement, however, would require another review. The Ministry also acknowledged that its legislation provides no definition of what is a legal trust or what is an exempt trust acceptable to the Ministry. The Ministry also acknowledged that a legal trust can have the same person as the trustee, the settlor and the beneficiary. The Ministry indicated that up to this point it had not calculated any overpayments in the Appellant's case.

The Panel finds that although there is some dispute between the parties about when the Appellant

notified the Ministry about the trust and when trust documents were or should have been received by the Ministry, there is no dispute between the parties about the following facts:

1. In January 2002 the Appellant was awarded a total of \$17,500 under the *Criminal Injury Compensation Act*.
2. In February 2002 the Appellant executed a trust agreement, prepared by a lawyer, to invest that award in a trust for his disability-related costs.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant's trust was not a valid trust under section 10(1)(y) of the EAPWDR exempting him from the \$3,000 asset limit in section 10(2) of the EAPWDR and therefore making him no longer eligible for disability benefits.

The following sections of the EAPWDR apply to the Appellant's circumstances:

1 (1) In this regulation:

"asset" means (a) equity in any real or personal property that can be converted to cash, (b) a beneficial interest in real or personal property held in trust, or (c) cash assets.

"cash assets" in relation to a person, means (a) money in the possession of the person or the person's dependent, (b) money standing to the credit of the person or the dependent with (i) a savings institution.

"unearned income" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

(s) awards of compensation under the *Criminal Injury Compensation Act* or awards of benefits under the *Crime Victim Assistance Act*, other than an award paid for repair or replacement of damaged or destroyed property.

10(1) The following assets are exempt for the purposes of subsection (2):

(y) assets exempted under section 11(2) [*asset development accounts*] or 12(2) [*assets held in trust for person with disabilities*].

(2) A family unit is not eligible for disability assistance if any of the following apply:

(a) a sole applicant or recipient has no dependent children and has assets with a total value of more than \$3,000.

12(1) In this section, "disability-related cost" means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre, (a) devices, or medical aids, elated to improving the person's health or well-being, (b) caregiver services or other services related to the person's disability, (c) education or training, (d) any other item or service the minister considers necessary to promote the person's independence, and (e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital, (i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and (ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to \$100,000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows: (a) the sum of the value of the capital of each trust on the later of April 26, 1999 or the date the trust was created, plus (b) any capital subsequently contributed to a trust referred to in paragraph (a), is exempt for the purposes of section 10(2) [*asset limits*].

(4) A person referred to in subsection (2) who has a beneficial interest in one of more trusts must keep records of the following and make the records available for the inspection at the request of the minister: (a) for a trust created before April 26, 1996, the capital of the trust on that date; (b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created; (c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b); (d) all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person

has a beneficial interest.

Schedule B

7. The following unearned income is exempt:

(d) a payment made from a trust to or on behalf of a person referred to in section 12(2) [*assets held in trust for person with disabilities*] of this regulation if (i) the payment is applied exclusively to or used exclusively for disability-related costs as defined in section 12(1) of this regulation, and (ii) the amount of the exemption under subparagraph (i) for all payments that, during a calendar year, are applied exclusively for the costs referred to in paragraph (d) of that definition does not exceed \$5,484.

The Ministry submitted somewhat different positions about the legality or validity of the Appellant's trust. In its reconsideration decision the Ministry wrote that trust documents received from the Appellant in 2008 were sent to the Ministry's legal services branch and later returned to the Ministry. The Ministry, however, did not act on the Appellant's file until 2011 when an investigative officer decided that the Appellant did not have a "legal" trust and therefore the amounts from his criminal injury award were a cash asset. The Ministry wrote that the Appellant's trust is not a "legal" trust because in the Agreement the Appellant is named as the settlor, the sole beneficiary and the sole trustee of the trust.

The Ministry found that the Agreement did not create a "valid" trust because it did not find an actual intention on the Appellant's part as settlor to divest himself of the property and hold it in trust for some other person. The Ministry stated that the Appellant remained in control of the property and may take it for his own use at will, and also that according to the Agreement he does not have to act in an even handed manner between himself and the beneficiaries. The Ministry also wrote that the Appellant as trustee has no responsibility to protect the interest of any beneficiary other than himself. Therefore the Ministry determined it was the intention of the Appellant as settlor to create the appearance of a trust, not to create a trust. The Ministry decided that the Appellant's trust property is an asset which is not exempt for the purposes of determining his eligibility for benefits and because that asset was more than \$3,000 the Appellant was not eligible for benefits as a PWD.

The Ministry also submitted that the issue is not whether the trust is a legal trust or not, and it acknowledged that a "legal" trust can have the same person as the settlor, the trustee and the beneficiary. However, in this case the Ministry determined that the Appellant's trust does not exempt the assets in the trust from being considered an asset by the Ministry because the Appellant has full access to the assets in the trust.

The Appellant's position is that he created a legal, valid trust to protect his injury award and his trust is an exempt trust within the provisions of the EAPWDR. The Appellant argued that the Agreement on its face creates a legal and valid trust because it names a settlor, a trustee and a beneficiary. He cited Water's Trust Law of Canada as the legal authority for his position that just because he is the settlor, trustee and beneficiary does not make his trust invalid.

The Appellant also submitted that it was always his intention to create a legal trust which would exempt his criminal injury award under section 10(1) of the EAPWDR and which would comply with section 12. He always wanted the trust monies to be available for his needs as a person with disabilities and for his old age. He pointed to the evidence demonstrating that within less than one

month of being awarded the criminal injury amount he used a lawyer to draft the Agreement and had the lawyer help him invest the majority of the award in bank deposits. He also left the balance of the trust funds largely untouched until September 2011 when the Ministry cut off his benefits. The Appellant pointed out that the Agreement states what expenses the trust money is to be used for. The lawyer even used language which mirrors the language in section 12(1) defining disability-related costs. The Appellant further submitted that there is nothing in the EAPWDR defining what types of trusts are not exempt and just because the Ministry does not like the Agreement does not mean that his trust is not an exempt asset under the EAPWDR. His trust is a legal, valid trust which is an exempt asset under the EAPWDR. Therefore he does not have cash assets over the \$3,000 limit for a PWD and he has continued to be and is still eligible for PWD benefits.

The Panel reviewed the EAPWDR and finds nothing in that regulation which defines what types of trusts are not "legal" or "valid" trusts or which defines what trusts are not exempt for the purposes of the EAPWDR. Specifically the Panel finds nothing in the legislation that states that the same person cannot be the settlor, the trustee and the beneficiary of a trust. The Ministry even acknowledged that "legal" trusts can be set up that way. The only restrictions in the EAPWDR affecting exempt trusts are those set out in section 12 which defines "disability-related costs", has provisions regarding trusts with less than or more than \$100,000, and has reporting requirements. Also Schedule B section 7 exempts certain payments from trusts from being considered unearned income. Therefore in the Appellant's case, the Panel finds that it was not reasonable for the Ministry to determine that just because the Appellant is the settlor, the trustee and the beneficiary of his trust the Appellant did not have a legal or valid trust.

As for whether the Appellant's trust qualifies as an exempt asset under section 10 of the EAPWDR, the Panel finds that the evidence demonstrates that almost immediately on the advice from legal aid the Appellant attended to having a trust set up to invest the criminal injury award for his disability-related costs. The Panel also notes that the Agreement, drafted by a lawyer, specifically states what expenses the trust funds will be spent on, expenses similar to those set out in section 12(1) of the EAPWDR. The Panel finds that there is in fact no evidence that the Appellant intended to use the money in the trust at will or in other than an even handed manner. In fact the evidence shows that for over a decade he guarded those funds for his disability needs and his old age, but then starting in September 2011 he had to use the trust money because the Ministry stopped his disability benefits. In November 2011 the Appellant still had over \$14,000 invested from the original \$17,500 award. The Panel also notes that section 12(4) enables the Ministry to review records of trust money disbursements, so if at any time it had questions about how the Appellant used the trust it could audit the Appellant's disbursements. Therefore, based on all of the evidence the Panel finds that it was not reasonable for the Ministry to determine that the Appellant did not intend to set up a valid trust, did not act in an even handed manner and did not intend to protect the assets in a trust for his disability-related costs.

In addition the Panel finds that the Ministry provided no evidence and cited no case law or legislative authority explaining why it determined that the Appellant's trust is not an exempt trust for the purposes of section 10(1), particularly given the Appellant's evidence about why he set up the trust, how it was established and how he has managed it for over a decade. The Panel therefore finds that it was not reasonable for the Ministry to determine that the Appellant's trust was not an exempt trust under section 10(1) of the EAPWDR. It was therefore also not reasonable for the Ministry to

APPEAL #

determine that the Appellant had cash assets in excess of the \$3,000 limit in section 10(2) of the EAPWDR and that the Appellant was no longer eligible for disability benefits.

The Panel finds that the Ministry's decision was not reasonably supported by the evidence and was not a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel overturns and rescinds that decision in favour of the Appellant.