APPEAL

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated March 5, 2012 in which the Ministry of Social Development held that the appellant was not eligible for income assistance for the months of December, 2011 and January, 2012 because the appellant failed to submit the required application for financial assistance form to the Ministry until February 15, 2012 and, pursuant to subs. 4.2(3) of the *Employment and Assistance Regulation*, the submission of the form is a precondition to eligibility for income assistances and, pursuant to subs. 26(2) of the Regulation, payment does not begin until the application has been submitted.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), s. 4.2 and subs.26(1) and (2)

APPEAL

PART E – Summary of Facts

The appellant did not attend the hearing. He was represented by an advocate who was authorized by the appellant to attend the hearing (q.v. *Release of Information* dated 23/05/12). Prior to the commencement of the hearing the advocate advised the panel that the appellant had indicated to him a few days before the hearing that he likely would not attend. Having verified that the appellant had received notice of the hearing, the panel proceeded in the absence of the appellant pursuant to subs. 86(b) of the EAR.

The ministry representative attended the hearing by teleconference.

The evidence that was before the ministry on reconsideration was contained in the Employment and Assistance Request for Reconsideration although it was summarized in a somewhat different, though essentially consistent, version in the Reconsideration Decision. In addition the appeal record included a 1-page, handwritten letter from the appellant that appeared to be dated February 12, 2012 and which the panel deemed to have been before the ministry on reconsideration. The evidence of the ministry was essentially as follows:

1. The appellant was restricted from dealing directly with the ministry and was required to do so through a third party.
2. The ministry strongly encouraged the appellant to use the Elizabeth Fry Society (the "Society") as the third party as the Society had experience in the role of intermediary between the ministry and persons who required ministry services but who were denied direct contact.
3. The said restriction was a ministry policy.
4. The reason for the policy was to protect ministry personnel from clients whose behaviour, in the opinion of the ministry, raised concerns for the safety of such personnel.
5. The appellant had received financial assistance during a period or periods prior to the time germane to this appeal and, in particular, from January through September, 2011.
6. In September and October, 2011 the ministry received information that the appellant had moved to Alberta. This change of residence rendered the appellant ineligible for income assistance in B.C.
7. Early in December, 2011 the appellant returned to B.C.
8. On December 20, 2011 the appellant contacted the ministry for the purpose of applying for income assistance. He was told that he had to apply through the Society. He told the ministry that he refused to do so.
9. The ministry telephoned the appellant on December 20, 2011 and twice left a message advising him to contact the ministry to pursue the application for financial assistance. He did not make contact.
10. On December 28, 2011 the appellant contacted the ministry and inquired about making an on-line application for financial assistance. He was again advised that he had to pursue this through the Society.
11. On January 17, 2012 a second community support agency inquired on the appellant's behalf regarding an on-line application. That agency was advised that the appellant had to do this through the Society.
12. On January 19, 2012 a third community support agency contacted the ministry and advised the ministry that the appellant had completed the on-line application. The ministry advised the agency that the appellant would have to sign the application form at the offices of the Society

"once the application had been completed". [At the hearing of the appeal the panel was advised by the ministry that the completion of the process included a requirement that the appellant be interviewed by the ministry.]

13. On February 13, 2012 the application interview was completed by telephone between the appellant and the ministry.
14. On February 15, 2012 the signed application was faxed to the ministry. On February 21, 2012 the ministry confirmed that the appellant was eligible for income assistance and a cheque was issued for the period commencing that day.
15. On learning that the financial assistance that he would receive would not commence as of the date of his return to B.C., the appellant sought reconsideration.

The evidence of the appellant contained in Section 3 of the *Employment and Assistance Request for Reconsideration* form and in his aforementioned letter dated February 12, 2012 does not contradict the 15-point summary set out above. Essentially the appellant's evidence describes his exasperation with the process to which was subjected, reiterates his disagreement with the requirement that his dealing with the ministry had to be through an intermediary, and apprises the ministry of his financial difficulties and expectations. He was particularly distressed that he was required to avail himself of the assistance of an entity that exists primarily to assist persons who have been imprisoned. He had no criminal record. He thought dealing with that agency was inappropriate and personally demeaning. The appellant's evidence before the ministry on reconsideration also confirmed that he had spent September until early December, 2011 in Alberta during which time he had worked briefly and also had received some financial assistance. The panel took particular notice of this evidence because the advocate insisted that the appellant had not gone to Alberta and that he had probably made up this story. The panel concluded that the advocate was not properly informed by the appellant in this matter.

In early July, 2012, the Tribunal assembled communications that it had received from the appellant subsequent to the reconsideration decision for consideration by the panel at the hearing, namely:

1. An email dated July 7, 2012 from the appellant to the Tribunal in which the appellant expresses his concerns about his financial circumstances in general.
2. A fax message received by the Tribunal on June 25, 2012 inquiring about the date the hearing would be set down and attaching a document titled Payment History dated May 5, 2012. That document appeared to be a summary of moneys owed by the appellant to a facility in which his furniture was stored.
3. An email dated June 16, 2012 from the appellant to the Tribunal in which the appellant again inquires about the date of the hearing and discusses some of his expenses which he expected the ministry to cover including those incurred for storing his furniture.
4. A second email dated June 16, 2012 from the appellant to the Tribunal in which he quantifies his claim for income assistance for December, 2011 and January, 2012 and then goes on to discuss claims for compensation for earlier periods including the time he was in Alberta in 2011.

The panel admitted into evidence that portion of the email identified in item 4 which referred to the income assistance for December and January though, since the quantum of assistance was not an issue on this appeal, the panel made no further reference to this evidence. The balance of the contents of these documents was either in relation to purely procedural matters, and hence not

evidence, or irrelevant to the subject matter of this appeal. As such, that evidence was not admitted.

One day before the hearing the panel received a lengthy submission from the appellant's advocate. It was comprised of documents of three sorts:

1. court decisions and Tribunal decisions,
2. several pages of brief comments written by the advocate on some of the decisions referred to above, and
3. new evidence, namely a 4-page document titled "Daily Living Activities Checklist" which had been completed, the advocate advised, to document the appellant's barriers to such activities.

The documents included in items 1 and 2, being in the nature of submissions or argument, were accepted by the panel. The new evidence referred to in item 3 was not admitted. The provenance of this document was not explained but, from the handwriting, it appeared to the panel to be a self-assessment by the appellant. It formed the basis of the advocate's argument that the panel should take notice of the appellant's disabilities and be prepared to declare that he was a person with disabilities or as a person with persistent multiple barriers to employment as those terms are used in the *Employment and Assistance Act*. The panel did not agree that those were issues before it on this appeal nor did the panel have jurisdiction to consider them.

As a preliminary matter in connection with the late submission, the panel asked the ministry if it had reviewed the submission and, whether or not it had, did it wish to seek an adjournment to provide it more time to consider its position. The ministry said that it had cursorily reviewed the submission and did not wish an adjournment. However, the ministry questioned the admissibility of the materials in the submission, arguing that they were irrelevant to the matter under appeal in this hearing. As discussed above, other than the 4-page document, the panel did not view the submission as evidence and, accordingly, an analysis as to admissibility under subs. 22(4) of the *Employment and Assistance Act* did not arise.

The advocate urged the panel to conclude, looking at the evidence as a whole, that the appellant was a person with significant disabilities that entitled him to income assistance under the relevant legislation. The difficulty that the panel had with this submission, and which the advocate did not seem fully to appreciate, was that the appellant's eligibility for financial assistance was not in dispute. The ministry did not suggest otherwise and, as the ministry representative pointed out, that was precisely the reason that he received income assistance as soon as the application procedure had been concluded.

In the absence of any contradictory evidence or challenge, the panel accepted as fact those statements set out in items 1 through 14, above.

However, in regard to item 4 (of the 15-item summary of evidence before the ministry on reconsideration), the panel noted that there was no evidence regarding the conduct of the appellant which had resulted in him being denied the right to deal directly with the ministry. The panel invited the ministry representative to advise it of the reason for the denial and to indicate when the policy was first applied to the appellant. The representative was unable to do so other than to confirm that there was a notation to that effect on the appellant's file. In the absence of any such evidence the panel was unable to conclude that the ministry's refusal to deal directly with the appellant was

reasonable. The panel noted that the ability to deal effectively with difficult persons would seem to be a prerequisite to the task of administering programs of assistance for persons who had a variety of physical, mental and emotional difficulties and disabilities.

The discussion in the foregoing paragraph is not a mere cavil. It goes to the heart of the inquiry as to whether or not the appellant should have been found to be a person eligible for financial assistance shortly after his return to B.C. from Alberta in December, 2011. But for the policy requiring that he apply through the Society, it is the opinion of the panel that he would have dealt directly at that time with the ministry and the decision that was made in late February, 2012 would have been made in mid-December, 2011. Without having any evidence from the ministry as to why he was barred from direct contact with the ministry – and the panel noted that this was not, in fact, the case since he did deal directly with the ministry on several occasions only to be redirected to the Society – the panel was unable to conclude that the application of the no contact policy to the appellant was reasonable in the circumstances of the appellant.

The panel was at pains to note that it expressed no opinion as to the reasonableness, in general, of the no contact policy itself. If properly drafted, such a policy might well be within the competence of the minister pursuant to the discretionary powers contained in subs 10(1) of the *Employment and Assistance Act*. Rather, the panel found that it was the failure of the ministry to provide any evidence whatsoever as to the reason for the application of the policy to the appellant that was prima facie unreasonable. The exercise of a ministerial discretion in a policy matter that had the effect of denying or delaying a benefit to which the appellant was otherwise entitled carried with it a corresponding expectation and requirement that the ministry be able to provide some evidence specifically related to the appellant that led rationally to the minister's decision to apply the no contact policy to the appellant.

In the absence of any evidence from the ministry, the evidence before the panel that related to the reason for the application of the no contact to the appellant was indirect ... and largely not in support of the ministry position. At the hearing of the appeal the advocate offered anecdotal evidence that he suggested made the application of the policy to the appellant unreasonable. He described the appellant as a person who "would tax the patience of anyone ... certainly he does me" but he did not suggest that the appellant was a physical threat, merely a difficult person. The advocate also advised the panel that the appellant attended a social club for members who spoke another language (English was not the appellant's first language) where "he was well liked." The panel noted that in his written submissions to the ministry - which are marginally legible and syntactically confusing - the appellant used salty and sometimes intemperate language, but that did not seem to the panel to explain or justify the ministry's unwillingness to deal directly with him. Further, the panel noted that the ministry's evidence established that the appellant dealt successfully with two community support agencies in addition to the Society

The panel admitted the anecdotal evidence of the advocate under subs. 22(4) of the Employment and Assistance Act as being in support of the evidence that *should* have been before the ministry on reconsideration in connection with the issue of whether the application of the ministry's no contact policy to the appellant was reasonable in the circumstances of the appellant. The panel attached little weight to this evidence but concluded that it, in conjunction with the evidence of the appellant's dealing with the Society and the other two community support agencies, what little evidence as there

was suggested that the no contact policy may well have been inappropriate during the appellant's dealings with the ministry in December, 2011. However, this evidence was more in the nature of rebuttal evidence and, in the absence of any evidence from the ministry, there was nothing to rebut. The panel was of the opinion that it was not for the appellant to demonstrate that the application of the policy to him was not justified; rather, it was for the ministry to demonstrate that it was justified. This it did not do or attempt to do.

APPEAL

PART F – Reasons for Panel Decision

The ministry's March 5, 2012 reconsideration decision to deny the appellant financial assistance for December, 2011 and January, 2012 was based on the provisions of ss. 4.2 and 26 of the EAR which provide that the completion of an intake interview and provision of a signed application for financial assistance form were preconditions to eligibility for income assistance and, once eligibility had been established, such assistance was payable from the date of establishment. The issue on this appeal, therefore, is whether the ministry's reconsideration decision to deny income assistance for the two months in question was reasonably supported by the evidence or was a reasonable application of the applicable regulations in the circumstances of the appellant.

The relevant legislation is as follows:

EAR

Application for income assistance — stage 2

4.2 (1) In this section, **"applicant orientation program"** means a program established by the minister to ensure that applicants are provided with information about their rights and obligations under the Act, including but not limited to information about all or any combination of

(a) rules about eligibility for income assistance or supplements,

(b) the process of applying for disability assistance,

(c) required employment search activities, community based job search resources and ministry and community programs,

(d) mutual obligations of the minister, applicants and recipients,

(e) employment plans,

(f) the minister's authority to collect and verify information, and

(g) the availability of alternate resources, such as, federal programs and other Provincial programs.

(2) The second stage of the process for assessing the eligibility of a family unit for income assistance is fulfilling the requirements of subsection (3).

(3) On completion of the first stage process provided for in section 4.1, the applicants for income assistance in the family unit must complete and submit to the minister an application for income assistance (part 2) form and must include as part of the application

(a) proof of the identity of the persons in the family unit and of their eligibility under the Act,

(b) subject to subsection (4), proof that the applicants have each completed an applicant orientation program within the 60 day period immediately preceding the date of the submission of the application for income assistance (part 2) form, and

(c) the information, authorizations, declarations and verifications specified by the minister as required in the application for income assistance (part 2) form.

(4) Subsection (3) does not affect the minister's powers under section 10 of the Act.

(5) Subsection (3) (b) does not apply to a person who

(a) Repealed. [B.C. Reg. 48/2010, Sch. 1, s. 1 (b).]

(b) has reached 65 years of age,

(c) is not described in section 7 (2), or

(d) has a physical or mental condition that, in the minister's opinion, precludes the person from completing an applicant orientation program.

Effective date of eligibility

26 (1) Except as provided in subsection (2), (2.1) or (3.1), a family unit is not eligible for income assistance or supplements in respect of a period that occurred before the date the minister determines the family unit is eligible for the income assistance or supplements, as applicable.

(2) A family unit becomes eligible

(a) for a support allowance under sections 2 and 3 of Schedule A on the date of the applicant's submission of the application for income assistance (part 2) form,

(b) for a shelter allowance under sections 4 and 5 of Schedule A on the first day of the calendar month that includes the date of the applicant's submission of the application for income assistance (part 2) form, but only for that portion of that month's shelter costs that remains unpaid on the date of that submission, and

(c) for income assistance under sections 6 to 10 of Schedule A on the date of the applicant's submission of the application for income assistance (part 2) form.

The appellant does not say that he provided the application for income assistance to the ministry prior to February 15, 2012. Nor does he contend that the clear language of subs. 26(2)(a) stipulates that the date he became eligible for income assistance was also February 15, 2012 (or perhaps February 21, 2012 when the ministry confirmed his eligibility). Rather, the appellant says that the decision as to eligibility should have been when he first contacted the ministry in December, 2011. Rather than begin the process of determining the appellant's eligibility at that time the ministry advised the appellant that he was not permitted to deal directly with the ministry and directed him to a third party agency which would act as an intermediary or conduit for the application process. In response, through his actions as much as his statements, the appellant said that such a procedure was unreasonable, first, because it treated him in a discriminatory fashion and, second, because no reason was provided for him to have been singled out as a person prohibited from dealing directly with the ministry.

The ministry, when questioned by the panel, was unable to provide any information that would shed light on, much less justify, why the appellant had been identified as a person who was to have no direct contact with the ministry. The ministry representative opined that it would have been over a concern for the safety of the ministry staff but, without more, this opinion lacked factual grounding. It is the view of the panel that when dealing with persons who have significant physical, mental and emotional disabilities such as the appellant, it is incumbent on the ministry that it be able to explain and justify a no contact order. If it cannot, or is unwilling, to do so then that is, without more, evidence of discriminatory treatment which could lead, as it did in the present case, to a decision prejudicial to the person affected.

It follows that though it is clear that the appellant did not comply with the requirements

of s. 4.2 of the EAR in a timely way, the fundamental reason that he did not do so is because the ministry, no doubt in good faith as it viewed the circumstances, erected a barrier in the way of this obstinate, and perhaps obstreperous, man that it did not explain or justify either in the reconsideration decision or at the time of the appeal.

There remains only for the panel to comment on the substantial volume of documents that the advocate delivered to the Tribunal two days before the hearing (and which the members of the panel did not receive until the day before the hearing). As stated above, all but a few pages were decisions of Canadian courts and of the Employment and Assistance Appeal Tribunal. The panel reviewed these decisions, albeit not in depth. It was immediately apparent that the submission of these decisions was based upon a misapprehension on the part of the advocate of the panel's role on an appeal of the March 5, 2012 reconsideration decision. The advocate argued that the panel had jurisdiction to assess the disabilities of the appellant and then determine the nature and kind of financial assistance to which the appellant was entitled under the *Employment and Assistance Act* and EAR. The advocate started from the rather ambitious proposition that access to financial assistance was a charter-guaranteed right of the appellant and from that it followed, for example, that the panel could decide that the appellant was a person with disabilities or a person with persistent multiple barriers to employment. Further, the advocate argued that the panel had jurisdiction to order that expenses incurred by the appellant, in particular the cost of storing his furnishings, be paid by the ministry as a crisis supplement. The panel explained to the advocate that none of these issues arose on an appeal of the reconsideration decision and that the jurisdiction the advocate attributed to the panel did not exist. Accordingly, the panel informed the advocate that it found the decisions reproduced in his authorities to be of very limited, if any, assistance.

Given the panel's finding that the failure of the appellant to fulfill the requirements of s. 4.2 of the EAR in a timely way was attributable to the refusal of the ministry to deal directly with appellant, the panel has concluded that the decision of the ministry to deny the appellant financial assistance for (the latter part of) December, 2011 and January, 2012, while a correct reading of the relevant statutory provision, was not reasonable in the circumstances of the appellant. The ministry decision is rescinded.