

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of February 2, 2012 wherein the ministry determined that the appellant was ineligible for disability assistance. The ministry applied the formula set out in s. 24 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) to determine that the appellant's income is in excess of the disability assistance for which he would otherwise be eligible, making him ineligible in accordance with s. 9(2) of the EAPWDR.

PART D – Relevant Legislation

EAPWDR s. 1 [*definitions of "earned income" and "unearned income"*]; s. 9 [*limits on income*]; s. 24 [*amount of disability assistance*]; Schedule A [*disability assistance rates*]; Schedule B [*net income calculation*]

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- As a result of being disabled while riding as a passenger in a vehicle involved in an auto accident in 1997, the appellant receives a monthly Canada Pension Plan disability payment (the CPP Benefit) in the amount of \$864.38, as well as a non-taxable contractual monthly Temporary Total Disability benefit in the amount of \$454.48 from the Insurance Corporation of British Columbia (the ICBC Benefit).
- The ministry had determined that neither the CPP Benefit nor the ICBC Benefit is exempt from the earnings limitations imposed by the EAPWDR. In a one-page written submission to the reconsideration officer, the appellant acknowledged that the CPP Benefit is not exempt. He submitted, however, that the ICBC Benefit is to compensate him for lost earnings and that if he was able to earn that monthly \$454.48 through paid employment it would fall within the \$500 earnings exemption provided by EAPWDR Schedule B, s. 3(2)(a).
- In a letter addressed to the appellant and date-stamped as having been received by the ministry on January 26, the Insurance Corporation of British Columbia (ICBC) confirmed that the ICBC Benefit is intended to compensate the appellant to some degree for lost earnings resulting from the disability he sustained in the auto accident. The appellant will continue to receive the ICBC Benefit until such time as he is no longer considered totally disabled from gainful employment or until age 65, whichever is the shorter period.
- The appellant submitted a copy of a 2010 decision of the Employment and Assistance Appeal Tribunal (EAAT) in the case of another appellant wherein the EAAT panel had determined that the Temporary Total Disability benefit from ICBC in that case was “a criminal injury compensation award or other award” within the meaning of s. 7(c) of Schedule B and thus exempt from the EAPWDR earnings limitations (the 2010 EAAT Decision). The panel's analysis was limited to a finding that “...it is not the intention of the legislation to deprive the Appellant of income she is entitled to earn...”. The appellant argued at reconsideration that he should be entitled to the same opportunities and rights as others in the same situations.

The appeal proceeded on the record, but during his submissions counsel for the appellant advised the panel that the reconsideration decision that is the subject of this appeal had been confirmed by a previous EAAT panel. On judicial review of that previous EAAT panel decision, the ministry and the appellant obtained a consent order on June 12, 2012 remitting the matter to be heard by a new panel of the EAAT. Counsel also said that the ICBC Benefit was part of a global settlement made under s. 80 of Part 7 of the Insurance (Vehicle) Regulation (the IVR). The information regarding the judicial review process is new information that is not in support of information that was before the ministry at the time of reconsideration, and it is not relevant to the issue to be decided. Accordingly, the panel has decided not to admit it as evidence. The evidence about the Part 7 benefit provides more detail regarding the legal and evidentiary foundation for, and the nature of, the ICBC Benefit. In the panel's view this is oral testimony in support of the information and records that were before the ministry and accepts it as evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry was reasonable in finding the appellant ineligible for disability assistance on the basis of excess income.

The relevant legislation is as follows:

EAPWDR

s. 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 dependant,
- (b) money standing to the credit of the person or the dependant with
 - (i) a savings institution, or
 - (ii) a third partythat must pay it to the person or the dependant on demand,
- (c) the amount of a money order payable to the person or the dependant, or
- (d) the amount of an immediately negotiable cheque payable to the person or the dependant;

"earned income" means

- (a) any money or value received in exchange for work or the provision of a service,
- (b) tax refunds,
- (c) pension plan contributions that are refunded because of insufficient contributions to create a pension,
- (d) money or value received from providing room and board at a person's place of residence, or
- (e) money or value received from renting rooms that are common to and part of a person's place of residence;

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

- (a) money, annuities, stocks, bonds, shares, and interest bearing accounts or properties;
- (b) cooperative associations as defined in the *Real Estate Development Marketing Act*;
- (c) war disability pensions, military pensions and war veterans' allowances;
- (d) insurance benefits, except insurance paid as compensation for a destroyed asset;
- (e) superannuation benefits;
- (f) any type or class of Canada Pension Plan benefits;
- (g) employment insurance;

- (h) union or lodge benefits;
- (i) financial assistance provided under the *Employment and Assistance Act* or provided by another province or jurisdiction;
- (j) workers' compensation benefits and disability payments or pensions;
- (k) widows' or orphans' allowances;
- (l) a trust or inheritance;
- (m) rental of tools, vehicles or equipment;
- (n) rental of land, self-contained suites or other property except the place of residence of an applicant or recipient;
- (o) interest earned on a mortgage or agreement for sale;
- (p) maintenance under a court order, a separation agreement or other agreement;
- (q) education or training allowances, grants, loans, bursaries or scholarships;
- (r) a lottery or a game of chance;
- (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;
- (t) any other financial awards or compensation;
- (u) Federal Old Age Security and Guaranteed Income Supplement payments;
- (v) financial contributions made by a sponsor pursuant to an undertaking given for the purposes of the *Immigration and Refugee Protection Act (Canada)* or the *Immigration Act (Canada)*.

Limits on income

- 9 (2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Amount of disability assistance

- 24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

- (a) the amount determined under Schedule A, minus
- (b) the family unit's net income determined under Schedule B.

Schedule B

Exemptions — unearned income

- 7 The following unearned income is exempt:

...

- (c) a criminal injury compensation award or other award, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 10 [*asset limits*] of this regulation; ...

In the reconsideration decision which is the subject of this appeal, the ministry determined that the ICBC Benefit was an "insurance benefit" within the meaning of paragraph (d) of the definition of "unearned income", and did not fall within any category of prescribed exemption. The ministry specifically considered whether the exemption in s. 7 (c) of Schedule B applied and, without providing any analysis, decided it did not. Accordingly, the ministry held that the appellant's monthly income of \$1,318.96 (the CPP Benefit plus the ICBC Benefit) was more than the amount of the disability assistance for which the appellant would otherwise be eligible as calculated under Schedule A (\$906.42), and thus found the appellant ineligible for disability assistance in accordance with EAPWDR s. 9(2).

At the appeal hearing, both the ministry and the appellant took the position that the ministry's reconsideration decision was "incorrect and unreasonable" and that the panel should rescind that decision.

The ministry said that the ICBC Benefit is a "financial award[] or compensation" within the meaning of paragraph (t) of the definition of "unearned income", and accordingly is an award that is an exemption from unearned income as per s. 7(c) of Schedule B. On questioning from the panel, the ministry was not able to provide any analysis to explain why the ICBC benefit should be considered an "award" rather than an "insurance benefit".

Counsel for the appellant ultimately provided three arguments as to why the reconsideration decision should be rescinded:

- (1) First, he stated that the ministry and the appellant both now agreed that the ministry had erred in determining that the ICBC Benefit was not exempt. He submitted that since the parties are now in agreement, there is no dispute and therefore the panel must rescind the reconsideration decision.

On questioning by the panel, the appellant provided these additional arguments:

- (2) Counsel said that the appellant was left a quadriplegic as a result of the 1997 car accident, and that the ICBC Benefit was part of a global settlement made under s. 80 of Part 7 of the IVR. He argued that Part 7 benefits are treated as part of an award under s. 83 of the *Insurance (Vehicle) Act* (the IVA), since an award granted by a court in respect of an action for damages under the IVA must be reduced by the amount of the Part 7 benefits to avoid double compensation. Relying on the principle of statutory interpretation that an interpretation favoring harmony among statutes should prevail, the ICBC Benefit should also be treated as an award under the EAPWDR. Counsel cited page 343 of *The Interpretation of Legislation in Canada* (Third Edition) by Côté: "Thus, interpretations favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislature. This presumption of coherence in enactments of the same legislature is even stronger when they relate to the same subject matter, *in pari materia*. On the other hand, apparent conflicts between statutes should be resolved in such a way as to re-establish the desired harmony." He said that this approach provides a full answer as to why the ICBC Benefit should be considered an award under both enactments.

- (3) Alternatively, counsel submitted that the EAPWDR is ambiguous. He said that the ICBC benefit could arguably be considered an insurance benefit within the meaning of paragraph (d)

of the definition of "unearned income", though he hastened to stress that that is an unreasonable interpretation. He said that the ICBC Benefit could also be considered an award within the meaning of paragraph (t). Therefore, counsel argued that the EAPWDR is ambiguous, and that being social welfare legislation any ambiguity should be resolved in favour of the appellant. Counsel referred to paragraph 35 of the decision in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, [2009] B.C.J. No. 2124 in support.

The panel's analysis of the issue is as follows:

The Effect of the Parties' Agreement

This panel's jurisdiction is set out in s. 24 of the *Employment and Assistance Act*:

- 24 (1) After holding the hearing required under section 22 (3) [panels of the tribunal to conduct appeals], the panel must determine whether the decision being appealed is, as applicable,
- (a) reasonably supported by the evidence, or
 - (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.
- (2) For a decision referred to in subsection (1), the panel must
- (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
 - (b) otherwise, rescind the decision, ...

The panel must assess the reasonableness of the reconsideration decision in terms of the evidence and the applicable legislation. That the ministry and the appellant now both agree in arguing that the reconsideration decision was unreasonable is not determinative of the issue that is before the panel. The panel must interpret the relevant legislation and apply it to the facts of the appellant's case.

The Effect of s. 83 of the IVA

The relevant portions of s. 83 of the IVA are as follows:

Liability reduced

83 ...

(4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.

(5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only...

Under s. 83 of the IVA, in an action in respect of personal injury caused by the use or operation of a vehicle, the amount of insurance benefits paid or payable must not be disclosed to the court until after an award of damages has been assessed, and then the amount of the damage award must be reduced by the amount of the benefits. The appellant argues that this means that the benefits are considered to be part of an award, so the ICBC Benefit is itself an award that is exempt under s. 7 (c) of Schedule B of the EAPWDR.

The panel cannot conclude that s. 83 of the IVA characterizes Part 7 benefits as an "award". The amount of an insurance benefit is simply one factor of many which ultimately determines the amount of an award for damages. By the express language of s. 83, the award must be reduced by the amount of the insurance benefit, and the insurance benefit does not form part of the judgment.

Is the EAPWDR ambiguous?

The appellant argues in the alternative that the EAPWDR is ambiguous, since the ICBC Benefit could be either an "insurance benefit" or an "award", and that any ambiguity must be resolved in favour of the appellant.

Paragraph (d) of the definition of "unearned income" in the EAPWDR refers to "insurance benefits, except insurance paid as compensation for a destroyed asset." In the panel's view, since the appellant is deemed to be an "insured" under s. 78 of Part 7 of the IVA as the occupant of an insured vehicle, and since the appellant's right to the ICBC Benefit ultimately arose because of the existence of a valid contract of insurance, the panel finds that the ICBC Benefit can be considered an insurance benefit within the meaning of paragraph (d) of the definition of "unearned income" in the EAPWDR. It is not "insurance paid as compensation for a destroyed asset", as the terms "asset" and "cash assets" are defined in the EAPWDR.

Can the ICBC Benefit also be considered to be a "financial award or other compensation" within the meaning of paragraph (t) of the definition of "unearned income"? Based on the plain meaning of the words, the ICBC Benefit may clearly be financial "compensation". To determine whether it may also be a financial "award" the panel examined that term in conjunction with the exemption for "a criminal injury compensation award or other award" provided in s. 7(c) of Schedule B. The panel notes that merely being an "award" is not sufficient to be an exemption – s. 7(c) of Schedule B exempts a criminal injury compensation award or "other award". The term "other award" can't literally mean every other type of award, since almost any dispute could be brought before the courts and result in an award. It would be unreasonable, for example, to expect that it was the intention of the legislation to exempt an award of damages for breach of a contract of purchase and sale of property. In the panel's view, the term "other award" must be modified by the phrase "injury compensation". Accordingly, the panel finds that the term "other award" means an award in the nature of an injury compensation award, and that the ICBC Benefit could be considered an injury compensation award.

Because the panel finds that the ICBC Benefit can reasonably be considered to fall within two categories of "unearned income", one of which is exempted by s. 7(c) of Schedule B, the panel concludes that there is sufficient ambiguity in the EAPWDR that the exemption provision must be read in favour of the appellant.

Conclusion

Based on the foregoing analysis the panel concludes that the ministry unreasonably determined that the ICBC Benefit is not exempt from income. Accordingly, the panel rescinds the ministry's decision as not being a reasonable application of the legislation in the circumstances of the appellant.