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PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated July 19, 2012 which found that the appellant is not eligible for :

- assistance as a single recipient with one dependent child since his child is not a 'dependant' and, therefore, not part of his family unit pursuant to Section 5 of the Employment and Assistance for Persons with Disabilities Regulation; and,

- shared parenting assistance (SPA) as the child is not part of his family unit pursuant to Section 4 of Schedule A of the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 5 and Schedule A, Section 4

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 1

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

1) Order of the provincial court dated April 5, 2007 stating in part that the appellant and the mother of the child shall share joint guardianship, that the mother, who has the primary responsibility for the day-to-day care of the child, will have the obligation to advise the appellant of any matters of a significant nature affecting the child. The appellant and the mother of the child shall share joint custody of the child, the mother shall not change the child's residence without agreement or further order of the court, and the appellant shall have reasonable and generous access to the child to be determined by the parties with at least 24 hour prior notice;
2) Fax dated May 30, 2007 from the appellant to the ministry attaching a copy of the court order and stating in part that the appellant now has shared joint custody of his son and he would like his file updated. Due to the friendly atmosphere between the child's mother and the appellant, the court did not want to jeopardize his status by putting down defined access. The child's mother has refused to provide any written proof of the appellant's access but he would agree to have the ministry check on his son's presence with him;
3) Letter dated April 27, 2010 from the minister for housing and social development stating in part that to be eligible for shared parenting assistance (SPA) the appellant and his ex-spouse must provide a court order or shared parenting agreement filed in court showing that the appellant has his son at least 40% of each month. Alternatively, if the appellant provides documentation showing that his son lives with him at least 50% of the time, his son could be added as a dependant to his file;
4) Excerpts from the oral reasons for judgment received March 28, 2012 in the provincial court between the appellant and the mother of their son, stating in part in paragraph 28 that both parents share the role of parenting and they are equals as partners and it is not accurate to try to set about accounting for the days/ hours that the child is with one parent or the other. Both parents consult one another, they discuss matters regularly and are dealing with their son during times when the child is with either parent. In effect, their parenting is constantly overlapping one another, so accounting does not properly describe how these two adults have conducted the parenting of their son. If a formula is resorted to, it misconstrues what is actually happening in the child's life and it is inaccurate to characterize the parenting in any mechanical way such as hours with one parent or the other;
5) Fax dated May 21, 2012 from the appellant to the ministry stating in part that he requests that his son be added to his file as a dependant so that they can receive the increased shelter and support allotted for a two-member family. He had requested that this be done in May of 2008 but was refused. A copy of the excerpts from the judgment of March 28, 2012 is attached and the appellant stated that the court indicated that he shares parenting responsibility 50-50 with the child's mother. He cannot afford to continue to maintain his parenting responsibilities for his son as he can no longer use his support to provide him with food. The child's mother has been told that if she agrees to put the shared agreement in writing the ministry will recoup the increased costs from her income; and,
6) Request for Reconsideration- Reasons.

In his Notice of Appeal, the appellant stated that the ministry has not treated him fairly and in accordance with the ministry's mission statement. The appellant stated that he has been treated unfairly by the ministry's refusal to understand the judgment of a family court judge.

In his Request for Reconsideration, the appellant stated that the ministry's mission, vision and principles includes fairness and transparency and the ministry's decision is unfair. The appellant stated that the judge clearly stated in the court order that the formula for proof is completely inappropriate to be applied to his situation. Because he is a good parent, he is being discriminated against by the insistence of a legal account of how much time his son spends with him. The appellant stated that his case is being heard by the BC Human Rights Commission as well as the BC Civil Liberties Commission. The appellant stated that the ministry told him that his son would be added to his file and within a week he was told that he would not be added. If he cannot afford to feed his son, then it is not acceptable to have his son with him so the ministry's decision has denied him the right to be an active parent for his son. He cannot get his son's mother to pay for his son's food and the ministry's approach of going after employed parents to recoup maintenance monies has

made it so she is hostile to providing proof as to his son's actual time with him. The judge stated that the appellant shares parenting with the mother 50-50 and that the use of a formula cannot be applied to his case.

At the hearing, the appellant's advocate stated that there is evidence that the child resides with the appellant more than 50% of the time. The advocate highlighted the terms of the court order dated April 5, 2007, including that the appellant has joint custody and guardianship of his son and that the mother has an obligation to advise the appellant of any significant matters affecting his son, and that the appellant is to have reasonable and generous access. The advocate highlighted the reasons for judgment dated March 28, 2012 which indicated that it is not accurate to try to set about accounting for the days/hours that the child is with one parent or another. The advocate stated that the appellant's parenting of his son is constantly overlapping with that of the child's mother and it is very difficult to determine how much time is spent each month with either parent.

The advocate stated that according to the agreement between the appellant and the child's mother, the child resided with the appellant for more than 50% of the month of December 2012. The child resides with the appellant every other weekend from Friday at 3:00 pm to Sunday at 4:00 pm. The child is at the appellant's residence for 2 1/2 to 3 1/2 hours every day after school. The child resides with the appellant on any day that he or his mother are sick and on professional development days at the school which is approximately one day per month. The child resided with the appellant from December 22 through the 28th since this was the appellant's year to have his son with him over the holidays. Deducting the hours that the child spends at school from 8:00 am to 3:00 pm, the advocate stated that the child was with the appellant for 324 hours of a possible 646 hours in the month, which is 50.15% of the month. The advocate stated that this will vary from month to month depending on the holidays and the child's sick days; that some months will be close but not quite 50% and other months will be over 50% of the time. The advocate stated that the child's mother is reluctant to sign an agreement to show that there is a 50-50 split of the time that the child resides with each parent as it has consequences for the child tax credit and support which she currently receives.

The advocate stated that, based on the current agreement between the appellant and the child's mother, the child is with the appellant well over 40% of each month if the time that the child is at school is deducted from the calculation. The shared parenting allowance provides an additional amount towards shelter but this amount would likely not result in a net benefit to the appellant. He is currently in a 2-bedroom unit but only being charged for a 1-bedroom by BC Housing given his single status. However, if he were to get an additional shelter amount, he would likely be charged an additional amount for the 2-bedroom unit.

The appellant stated that his son has sports lessons on Mondays and Wednesdays each week from 3:00 pm to 5:30 pm, and sometimes later, and the appellant provides him with dinner. The appellant stated that his son has a healthy appetite and goes straight to his fridge when he arrives from school each day. The appellant stated that he is proud of how well his son has done with his chosen sport and he wants to do everything possible to support him, but he cannot afford the extra food his growing son needs. The appellant stated there have been times he has had to tell his son he cannot come to his place because he does not have enough food. The appellant stated that his son's mother works full time during the week. From the end of June, over the summer months, the child resides with the appellant every day from 8:30 am to 5:30 pm Monday through Friday as well as every other weekend. The child also resides with him for 2 full weeks over the summer months. The appellant stated that he had initially been told by the ministry that his son would be added to his file, that this was prior to the Father's Day weekend, and that on Monday the ministry told him that he would not be added and this was difficult for the appellant to deal with. The appellant stated that he and the child's mother have a verbal agreement about the times that the child is with each of them and that the current arrangement has been ongoing for several years. The appellant stated that he asked the child's mother to provide confirmation that the child is with him more than 50% of the time and she "flipped out." The appellant stated that she will not provide him with any funding for their son but she packs a lunch for him each day in the summer although it is rarely enough food.

The ministry relied on the reconsideration decision.

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PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision, that the appellant is not eligible for assistance as a single recipient with one dependent child as his child is not a dependant and that he is also not eligible for shared parenting assistance (SPA) as the child is not part of his family unit, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the appellant's circumstances.

Section 5 of the Employment and Assistance Regulation (EAPWDR) provides:

Applicant requirements
For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless
(a) the family unit does not include an adult, or
(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Section 1(1) of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) defines

"family unit" to mean "...an applicant or recipient and his or her dependants"

and also defines:

"dependant", in relation to a person, to mean anyone who resides with the person and who:
(a) is the spouse of the person,
(b) is a dependent child of the person, or
(c) indicates a parental responsibility for the person's dependent child.

"dependent child", with respect to a parent, means a child, other than a child who is 18 years of age and is a person with disabilities, who resides in the parent's place of residence for more than 50% of each month and relies on that parent for the necessities of life, and includes a child in circumstances prescribed under subsection (2).

Section 4 of Schedule A of the EAPWDR provides in part:

Monthly shelter allowance
4 (1) For the purposes of this section:
"family unit" includes a child who is not a dependent child and who resides in the parent's place of residence for not less than 40% of each month under the terms of an order or an agreement referred to in section 1 (2) of this regulation ...

Section 1(2) of the regulation (EAPWDR) provides:

Definitions
1(2) For the purposes of the Act and this regulation, if a child resides with each parent for 50% of each month under
(a) an order of a court in British Columbia,
(b) an order that is recognized by and deemed to be an order of a court in British Columbia, or
(c) an agreement filed in a court in British Columbia,
the child is a dependent child of the parent who is designated in writing by both parents.

The ministry points out that Section 1 of the EAPWDA defines "family unit" to include an applicant or recipient and his or her dependants, and the definition of "dependant" includes a "dependent child". However, the definition of "dependent child" requires that the child reside with the parent more than 50% of each month.

The ministry points out that the Court Order dated April 5, 2007 indicates that the appellant currently shares joint custody and guardianship for his son and specifically outlines that the child's mother has primary responsibility for the day-to-day care of the child with an obligation to advise and discuss with the appellant any significant matters or decisions. The ministry argues that there is no statement provided in the court order or in an agreement supporting the appellant's claim that he and the child's mother share parenting 50-50, and the legislation requires that the dependant resides with the parent for more than 50% of the time. The ministry argues that the information submitted does not provide confirmation that the child resides with the appellant more than 50% of the time or that he relies upon the appellant for the necessities of life. At the hearing, the ministry clarified that the necessities of life would be food, shelter and securing medical care. The ministry argues that without confirmation the ministry cannot determine that the child meets the definition of a dependent child set out in Section 1 of the EAPWDA. Consequently, the ministry argues that the appellant is not eligible for assistance as a single recipient with one dependent child.

The appellant's advocate argues that the Court Order dated April 5, 2007 states that the appellant has joint custody and guardianship of the child and that the appellant shall have reasonable and generous access to the child to be determined by the parties. The advocate highlighted the reasons for judgment dated March 28, 2012 and argues that it is not accurate to try to set about accounting for the days/hours that the child is with one parent or another, that the appellant's parenting of his son is constantly overlapping with that of the child's mother and it is very difficult to determine how much time is spent with one parent or the other each month. The advocate argues that the ministry's vision and mission is to help people meet their potential and to apply the principles of fairness and transparency but, here, the ministry is applying a formula that the judge stated does not fit the appellant's situation. The advocate argues that the appellant and the mother of their child have agreed that the child reside with the appellant specified times, including alternating weekends, after school, on professional development and sick days, some holidays, two weeks in the summer, and every day during the summer months. The advocate argues that this arrangement often results in the child residing with the appellant more than 50% of the month including, for example, the month of December 2012. The advocate argues that the appellant's child is therefore the appellant's "dependent child" according to the definition in the legislation. Since the appellant's family unit includes his dependent child, the advocate argues, the appellant is entitled to assistance as a single recipient with one dependent child. The advocate argues that the child's mother is reluctant to sign an agreement to show that there is a 50-50 split of the time that the child resides with each parent as it has consequences for the child tax credit and support which she currently receives and that the information provided by the appellant on this issue is sufficient.

The Court Order dated April 5, 2007 between the appellant and the mother of their child provides that the appellant has joint custody and guardianship of their child with reasonable access to be determined by the parties. The panel finds that the appellant and the child's mother have worked out a verbal arrangement for when the child will reside with each parent at different times, including after the school day and on weekends, sick days and vacation time. The panel finds that, in comparison with the prescribed definition of a dependent child in Section 1(2) of the EAPWDR, the definition in Section 1(1) of the EAPWDA does not require that the child reside with the parent under the terms of a Court Order or an agreement filed in the court and it is, rather, a factual determination. However, the Court Order also provides that the primary residence of the child is with the mother and it is not to be moved from the current community without consent or further Order, and the mother is given primary responsibility for the day-to-day care of the child. The panel finds, therefore, that the evidence with respect to where the child resides must be clear. The appellant and his advocate meticulously calculated the hours that the child resided with the appellant for the month of December 2012 and found that it was 50.15% of the total available hours in the month, and this was not disputed by the ministry. However, it was also admitted by the advocate that some months in the year may result in the child residing with the appellant for slightly less than 50% of the total available hours in a month.

Although the evidence demonstrates that the appellant's parenting of his son is constantly overlapping with that of the child's mother and that it is a joint undertaking, as confirmed in the excerpts from the judgment dated March 28, 2012, the panel finds that the definition in Section 1(1) of the EAPWDA does not address the

issue of parenting *per se* but, rather, where the child resides. The appellant argues that it is unfair to apply a formula in view of the judge's comments, however the panel finds that the legislation must be applied in a fair and a consistent manner and in accordance with the statutory language used. The panel finds that the available evidence does not establish that the child resides in the appellant's place of residence for more than 50% of *each* month, as is specifically required in the definition set out in the legislation. Based on an interpretation of the necessities of life as being food, shelter and securing medical care, as clarified by the ministry, the panel finds that the child relies on the appellant to provide these for him during the times that he resides with the appellant, in accordance with the joint custody and guardianship Order. In conclusion, the panel finds that the ministry reasonably determined that there is currently not sufficient information to establish that the child is a dependent child of the appellant and, therefore, a "dependant" of the appellant and part of his "family unit" as defined in Section 1 of the EAPWDA. The panel finds that the ministry reasonably determined that the appellant is not eligible for assistance as a single recipient with one dependent child as the appellant did not apply on behalf of the appropriate "family unit" pursuant to Section 5 of the EAPWDR.

The ministry argues that under Section 4 of Schedule A of the EAPWDR a "family unit" includes a child who is not a dependent child and who resides in the parent's place of residence for not less than 40% of each month under the terms of an Order or an agreement filed in court. The ministry argues that there is no information provided to confirm by Court Order or shared parenting agreement that the child resides with the appellant for no less than 40% of each month. The ministry argues that as the child is not included in the appellant's family unit for the purposes of Section 4 of Schedule A of the EAPWDR, the appellant is not eligible for SPA.

The appellant's advocate argues that the Court Order dated April 5, 2007 awards the appellant with joint custody and guardianship of the child and that the appellant is to have reasonable and generous access to the child to be determined by the parties. The advocate argues that, based on the current agreement between the appellant and the child's mother, the child is with the appellant well over 40% of each month if the time that the child is at school is deducted from the calculation. The advocate argues, therefore, that the appellant is eligible for SPA.

The panel finds that the Court Order dated April 5, 2007, between the appellant and the mother of their child provides that the appellant is to have reasonable and generous access to the child, to be determined between the parties. Although the advocate for the appellant argues that the appellant and the mother of their child have agreed that the child reside with the appellant well over 40% of each month, the panel finds that the definition of family unit in Section 4 of Schedule A requires that the child reside in the parent's place of residence for not less than 40% of each month specifically under the terms of an Order of the court or an agreement filed in a court in British Columbia. Looking at this definition, the panel finds that the child's *de facto* presence at the appellant's residence is not evidence that it is in accordance with the terms of the Court Order dated April 5, 2007 in the absence of evidence of the mother's agreement to this arrangement. To meet the requirements of this definition, the panel finds that where there is an agreement between the parties, the agreement must be set out in writing and filed in the court. As it is not possible to determine, based on the available evidence, that the child has resided at the appellant's place of residence for more than 40% of each month under the terms of a Court Order which requires the further agreement by the parties, the panel finds that the ministry reasonably determined that the child is not properly included in the appellant's family unit for the purposes of Section 4 of Schedule A. Therefore, the panel finds that the ministry's conclusion that the appellant is not eligible for SPA pursuant to Section 4 of Schedule A of the EAPWDR is reasonable.

The Panel finds that the ministry decision was reasonably supported by the evidence and confirms the decision.