APPEAL #

PART C – Decision under Appeal

The ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated 24 December 2013 determined the appellant was not eligible for the shared parenting allowance because the terms of a court order did not indicate his children, not dependent, resided with him for at least 40% of each month nor that the appellant would have his children with him for the Christmas break in 2013 under s. 4(1), Schedule A of the Employment and Assistance for Persons with Disabilities Regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), s. 1(1) and 3.
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), s. 1(2).
EAPWDR, Schedule A, s. 4(1).

PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- The appellant is a sole recipient of income assistance with Persons with Disabilities (PWD) designation.
- A copy of a Court Order from the Provincial Court of British Columbia dated 19 June 2013 under the Family Law Act and signed by a Judge of that court determined that the appellant and his children's mother are the guardians of those two children and that the appellant will have his children with him for parenting time as follows:
    - For June 2013 from after school on Friday 21 until Monday 24 June before school begins;
    - For the summer 2013: from 9:00 am on 1 July until 7:00 pm, 21 July;
  - Thereafter:
    - The second and fourth weekend of each month from the end of school on Friday until 9:00 am on the following Monday. If the day preceding or following any weekend on which the appellant is to have parenting time with the children is a statutory holiday or professional development day, the parenting time will be extended to include that day;
    - On weeks not ending in weekend access, the appellant will have an overnight access on Wednesdays after school until school begins on Thursday;
    - Commencing in the summer of 2014, summer access will be shared equally, divided into two week blocks;
    - Commencing spring break in 2014 and every year thereafter, each guardian shall have one week of parenting time with the children.
- A letter from the appellant with his request for reconsideration dated 4 December 2013 stating that he has parenting time with his children as per the court order and that amounts, over a year, to more than 11 days per month. Further he stated that he expected to have his children with him from 20 December 2013 until 5 January 2014. He explained that he needed extra funds for food and transportation for his children and a larger, 3 bedroom unit, given his son's and daughter's ages. He also mentioned his medical situation was difficult given recent surgery and that stress caused by this situation was affecting his health and recovery.

In his Notice of Appeal, signed and dated 7 January 2014, the appellant indicated he has his children more than the days allowed in the court order as he and their mother make arrangements accordingly, which is allowed by the order. He stated he had them for 2 weeks at Christmas and that the ministry failed to include those days in its calculation of the days they were with him.

At the hearing, the appellant provided evidence that the copy of the court order that was referred to in the reconsideration decision was not complete and presented the full order. Section 10 of the order included 3 more paragraphs that were omitted from the copy before the reconsideration officer and that state:

- Beginning Christmas of 2013, the appellant will have parenting time with the children for the school Christmas break in the odd years, commencing in 2013 while the children's mother will have them for the even years starting in 2014.
- The appellant will have telephone access each Wednesday he does not have the children between 5:30 and 6:30 and at other dates and times agreed by the parties.

- The children will spend Mothers' Day with their mother and Fathers' Day with the appellant.

The ministry did not object to the admissibility of this new evidence. The panel determined the additional documentary evidence was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration and particularly because the copy of the court order in the Record of Decision was obviously incomplete and this new evidence filled that gap.

PART F – Reasons for Panel Decision

The issue under appeal in this case is whether the ministry's decision that determined the appellant was not eligible for the shared parenting allowance because the terms of a court order did not indicate his children, not dependent, resided with him for at least 40% of each month nor that the appellant would have his children with him for the Christmas break in 2013 under s. 4(1), Schedule A of the EAPWDR was either a reasonable application of the legislation or reasonably supported by the evidence.

The applicable legislation in this matter is the following:
Section 1(1) of the EAPWDA:
1 (1) In this Act:
"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);
"family unit" means an applicant or a recipient and his or her dependants;

Section 1(2) of the EAPWDR:
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.

And section 4(1) of Schedule A of the EAPWDR:
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;

The appellant admits that the parenting time as determined in the court order did not meet the 40% threshold of the legislation for most months but that the minister should take into account the fact that the appellant is a responsible father that is dedicated to his children and wants to have the opportunity to have them with him without jeopardizing his ability to feed, care for and transport them. Further, he takes issue with a too formal interpretation of policy and that the ministry should be more flexible and with more funding from the ministry he could get a bigger, 3 bedroom unit, that would be able to accommodate his two children, a boy at puberty and a younger girl, with separate bedrooms. He argues that the ministry should take those special circumstances into consideration and have more leeway to provide such assistance even though the 40% threshold would not be met. Since the ministry determined that the children were with him for 33% of the time, the allowance should reflect this and be pro-rated accordingly.

The ministry argues that the 40% threshold is a matter that is determined by legislation, not policy, and that the ministry has no other option than to apply the legislation as is. For most months that are at issue, the appellant did not have his children with him for at least 40% of each month and thus was

not eligible for the allowance. However, the ministry acknowledges that the evidence shows that the appellant did have his children for at least 40% of each month in July and December 2013, in particular given the new evidence presented that include the full text of the court order. At the hearing, the ministry takes the position that the appellant could have had access to the shared parenting allowance for those 2 months if he had requested it. Further, the ministry indicates that the appellant does not need to have the court order changed if there is an agreement between him and the children's mother for them to spend more time with him; a letter with both parents' signatures confirming the agreement and in conformity to the court order would suffice.

The panel notes that it does not have jurisdiction to change legislation but only to determine whether the ministry's decision was a reasonable application of the legislation or reasonably supported by the evidence. Consequently, the panel finds the ministry reasonably determined the appellant was not eligible for the shared parenting allowance for the months where the court order shows he did not have his children with him for at least 40% of the month. However, while the determination by the ministry that the court order did not state that the appellant's children were to be with him from 20 December 2013 to 5 January 2014 was an error since the court order at section 10(e) did specifically mention that the appellant would have his children with him for the Christmas break, the panel finds the ministry reasonably determined the appellant needed to have his children with him at least 40% of each month on an ongoing basis. Thus, even though the court order, confirmed by the appellant's testimony, indicated that he had the children for more than 40% of the months of July and December 2013, it nonetheless did not indicate he had his children for at least 40% of the other months and thus, the ministry reasonably determined he was not eligible for the shared parenting allowance under s. 4(1) of Schedule A of the EAPWDR. In this matter it is immaterial to determine whether a letter from both parents would suffice as there is no such letter in evidence and the legislation clearly states that it has to be "under the terms of [a court] order or an agreement" filed in a court in British Columbia (sections 4(1) of Schedule A of the EAPWDR and 1(2) of the EAPWDR) and the court order presented in evidence by the appellant clearly states the appellant's share of parenting time does not amount to 40% of each month for the period of time at issue.

Therefore, the panel finds the ministry's decision was a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the decision.