PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated 2015 Sept 03 which held that the appellant is not eligible for income assistance because she does not meet the two year financial independence criteria under Section 8 of the *Employment and Assistance Act* (EAA) and Section 18 of the *Employment and Assistance Regulation* (EAR). The appellant was not employed for remuneration for at least 840 hours in each of the two consecutive years or has not earned remuneration for employment of at least $7,000 in each of the two consecutive years, and does not fall within any of the excluded categories under Section 18(3) of the EAR, or the exemption under Section 18(4) of the EAR.

PART D – Relevant Legislation

Employment and Assistance Act (EAA), Section 8

Employment and Assistance Regulation (EAR), Section 18

PART E – Summary of Facts

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

1) A letter from the appellant's sister dated 2015 Aug 19 informing that the appellant is the full caregiver of the child, however because the appellant did not have identification the sister was receiving funding for him, but appellant is caregiver on a daily basis;
2) A letter from the appellant's daughter 2015 Aug 17 verifying that the appellant lived in her home from July 2013 – Nov 2014 caring for the child, and that the appellant then moved in with her sister caring for him full time in that home since January 2015;
3) A letter from Child and Youth mental Health Services dated 2015 Aug 18 confirming that the appellant has been bringing the child to his appointments. It indicates that as the child's primary caregiver she is working hard to provide a consistent and safe environment for him;
4) Page 12 of a Safety Plan from Ministry of Children and Family Development dated 2015 Aug 24 which the child's mother signed. In it she confirmed she will clean her home, child will stay with the appellant until a Ministry of Children and Family Development (MCFD) social worker approves her home for child to return to, and she will keep open lines of communication with social worker;
5) A letter from a Family Support Worker dated 2015 Aug 18 indicating that the appellant has not been receiving any form of Income Assistance for the past 2 years as she has been caring for her grandson. She notes that the appellant does not have guardianship through the court, however he has been placed in her care through the Ministry of Children and Family Development; and
6) Request for Reconsideration dated 2015 Aug 19.

In her Request for Reconsideration, the appellant states that she is requesting assistance for herself as well as her grandson who she is caring for full time. She is trying to obtain photo ID, which is a difficult process without an income to pay for it. She has not been on assistance since July 2013 and has not been working, as she has been caring for her grandson because his mother was not meeting his needs. She writes that MCFD is fully aware she is his primary caregiver and he will be in her home as soon as she receives help with ID.

In her Notice of Appeal, the appellant adds that she is caring for her grandson full time and is doing all she can to meet his needs, that she is doing so in her sister's home, and that she believes she is entitled to Income.

At the hearing, the appellant had an advocate with her and gave verbal approval for her to be there.

The appellant stated that she had not been employed for the last 2 years as she has been caring for her grandson and that MCFD is well aware of that. She stated it was difficult to work as the child often has issues at school and daycare and she is basically 'on call' in the event he has to go home. She is living in her sister's home and her sister is receiving funds for his care, but that doesn't take care of her needs. She stated that MCFD placed the child with her but the money goes to her sister. MCFD wants the appellant and grandson to be in their own home and she would receive funding.

The panel sought clarification around the placement arrangement. The appellant stated she has been the primary caregiver, that she does all the work, and her sister gets the pay. She stated this is because she is having trouble getting her identification. She lost her Citizenship card and has

reapplied but it takes time to come in. The advocate stated that MCFD has placed the child with appellant and her understanding is that it was a placement by Agreement. Instead of going through a court process, they can go through the Child in Home of Relative program rather than a child going into a foster home.

The panel sought clarification from the appellant regarding the 2 years of employment requirement as she had stated she had not worked for the past 2 years. The appellant stated that she had previously cared for her children, and that she had not worked outside the home. The appellant stated that she had applied for Income Assistance for herself and not for her grandson as MCFD was paying money to her sister for his care.

At the hearing, the ministry relied on the Reconsideration Decision and emphasized that under Appendix B an applicant must work for 2 consecutive years and if they haven't done that there are exemptions that may be considered, in particular Section 18(3)(d) applicants with dependent children; (f) applicants who have a foster child; (o) applicants who are providing care for a child under an agreement referred to in section 8 of the Child, Family and Community Service Act (CF&CS Act); and (p) applicants who are providing care for a child under an agreement referred to in Section 93(1)(g) of the CF&CS Act. She noted that in Appendix A the ministry worker called an MCFD social worker and he advised the only barrier impeding the appellant having guardianship of the grandson is the lack of her photo ID; that the sister has guardianship and is receiving extended family supports through the CIHR program and once the appellant receives guardianship she will receive funds to support him.

The ministry explained that the appellant does not have legal custody, so they cannot add the child as a dependent and that she has no identification to get guardianship, so if not a formal guardian then the appellant doesn't meet any of the exemption criteria. The ministry reviewed all of the categories listed under Section 18(3), and stated that if the appellant met any of the exemptions to bring in proof of meeting any of these. The ministry states there is no doubt she is caring for her grandson, but MCFD has said she does not have legal guardianship and there is no document to support that.

The panel sought clarification from the ministry on exemption (o) as to what Section 8 of the CF&CS Act was referencing and the ministry did not have this information. The ministry clarified that they had confirmed with the social worker that the appellant is caring for him, but the Agreement is with the sister and she receives the funds.

The panel sought clarification from the ministry on exemption (d) and asked what legislation specifies the definition of an applicant with dependent children. The ministry response was that anyone could claim guardianship, and to avoid any duplicate payments their legislation required legal documentation to prove guardianship but was not able to point to the specific provision in the legislation that set out this requirement.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry reasonably concluded that the appellant was not eligible for income assistance because she does not meet the two year financial independence criteria under Section 8 of the EAA and Section 18 of the EAR, and does not fall within any of the excluded categories under Section 18(3) of the EAR, or the exemption under Section 18(4) of the EAR.

Section 8(1) of the EAA provides that a family unit is not eligible for income assistance unless at least one applicant in the family unit has:

(a) been employed for remuneration for at least the prescribed number of hours in each of two consecutive years,

(b) earned remuneration for employment in at least the prescribed amount in each of two consecutive years, or

(c) been employed for remuneration for a portion of two consecutive years and for the balance of those years either

(i) served a waiting period in respect of, or received benefits under, a claim under the *Employment Insurance Act* (Canada), or

(ii) received income under a public or private income replacement program or plan.

Section 18(1) of the EAR provides that for the purposes of Section 8(1)(a) of the EAA, an applicant must have been employed for remuneration for at least 840 hours in each of the two consecutive years.

Section 18(2) of the EAR provides that for the purposes of Section 8(1)(b) of the EAA, an applicant must have earned remuneration for employment of at least $7,000 in each of the two consecutive years.

Section 18(3) of the EAR provides that Section 8 of the EAA does not apply to the family units of the following categories of applicants:

(a) applicants who have not reached the age of 19;

(b) applicants who are pregnant;

(c) applicants who have a medical condition that, in the opinion of the minister,

(i) will prevent the applicant from working for at least the next 30 days, or

(ii) has prevented the applicant from working for a total of at least six months of the 2 years immediately preceding the date of the applicant's submission of the application for income assistance (part 2) form;

(d) applicants with dependent children;

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

(f) applicants who are providing care to a foster child;

(g) applicants who were supported by an employed spouse for at least 2 years;

(h) applicants who were supported by an employed spouse for a portion of a two year period and met a requirement of section 8 (1) of the Act for the balance of the two year period;

(i) applicants who were incarcerated in a lawful place of confinement for at least 6 months of the 2 year period immediately preceding the date of application for income assistance;

(j) applicants who were in the care of a director under the *Child, Family and Community Service Act* or who

had an agreement with a director under section 12.2 of the *Child, Family and Community Services Act* until the applicant's 19th birthday;

(k) applicants who

(i) have separated from an abusive spouse, or

(ii) changed place of residence to flee an abusive relative, other than a spouse,

within the past 6 months if, in the minister's opinion, the applicant's ability to work is consequently impaired;

(l) applicants who have been awarded a 2 year diploma or certificate, a bachelors degree or a post-graduate degree from a post-secondary institution;

(m) applicants who have persistent multiple barriers to employment;

(n) applicants who reside with and care for a spouse who has a physical or mental condition that, in the minister's opinion, precludes the applicant from leaving home for the purposes of employment;

(o) applicants who are providing care for a child under an agreement referred to in section 8 of the *Child, Family and Community Service Act*;

(p) applicants who are providing care for a child under an agreement referred to in section 93 (1) (g) (ii) of the *Child, Family and Community Service Act*.

Section 18(4) of the EAR provides that Section 8 of the EAA does not apply to family units of applicants if, in the minister's opinion,

(a) the applicant, due to circumstances beyond the applicant's control, has been prevented from searching for, accepting or continuing employment, and

(b) the family unit will otherwise experience undue hardship.

The ministry's position is that the appellant does not meet the 2 year independence criteria nor any of the exemptions listed under EA Regulations Section 18(3). The ministry argues that the appellant does not have dependent, foster or in-care children so does not meet exemption (d) as the child is not a dependent; (f) the child is not in foster care; nor (o) or (p) which requires that an agreement under the CF&CS Act must be in place and the appellant does not have a formal agreement. The ministry argues that because the appellant is not a legal guardian none of the exemptions apply.

The appellant's position is that she has not been able to work for 2 consecutive years but that because she cares for her grandchild and has been asked by MCFD to care for the child, and because of the amount of care the child takes she is not able to work.

The panel finds that the appellant did not dispute not meeting the 2 years of consecutive work requirement of the legislation so the exemptions of EA Regulations Section 18 were reviewed.

Section 18(d) is for applicants with dependent children. The definition of dependent child is found in Section 1 of the Employment Assistance Act to be " 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". The Employment Assistance Regulations defines the definition of "parent" which is, in relation to a dependent child, *includes* the following (a) guardian of the person of the child (b) a person legally entitled to custody of a child and (c) if the child is a dependent child of a parenting depending child.

The panel finds that unlike the definition of "dependent child" in Section 1 of the EAA which uses the word "means" to set out a closed list of who qualifies, the definition of the word "parent" in Section 1 of the EAR uses the word "includes" to set out an open list which includes "a guardian of the person of the child" and "a person legally entitled to custody of a child," but can also include other persons as determined through application of the ministry's discretion. The panel reviewed these definitions closely and interpreted the definition of parent to potentially include other persons as the legislation uses the word "includes", which leaves room for interpretation that there could be other categories of persons who may be considered. There was information provided by the appellant that could be reviewed by the ministry in applying its discretion to determine whether the appellant otherwise qualifies as a "parent." In the appellant's situation, the Ministry for Children and Family Development have placed the child with her (per the Family Support Worker document); and have asked her to care for the child, which she has been doing since July 2013. During a phone call between the ministry worker and the MCFD worker, they readily admit that once she obtains her photo identification they will switch the Agreement for Child in Home of Relative to her directly, rather than to her sister. The panel interprets this to mean that the appellant is being treated as the authorized caregiver and that the ministry was unreasonable in not giving the appellant's situation additional consideration to determine whether she might fit within the definition of a "parent".

Asked at the hearing about applying its discretion in this definition of "parent", the ministry restated that the only way a person can qualify as a parent in this definition is by being a guardian of the child or legally entitled to custody of the child and that while the child has been placed by MCFD with the appellant and she is applying for guardianship, the appellant currently has no legal status under either part of the definition.

The panel finds that by not applying its discretion to consider whether the appellant's circumstances and relationship with the child might bring her within the definition of "parent" in Section 1 of the EAR, the ministry's determination that she did not fit within the exemption from the requirement for 2 years employment as an applicant with a dependent child, under Section 18(3)(d) of the EAR, was not a reasonable application of the legislation in the appellant's circumstances and the panel rescinds the ministry's reconsideration decision. Therefore, the ministry's reconsideration decision is overturned in favour of the appellant.