PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (Ministry)'s reconsideration decision dated November 3, 2015, finding the Appellant is not eligible to receive a nutritional supplement because his application did not meet the requirements of section 74 or 76 of the *Employment and Assistance Regulation* (EAR).

PART D – Relevant Legislation

The relevant legislation is sections 74 and 76 of the EAR.

PART E – Summary of Facts

The appellant is in receipt of income assistance as a sole recipient.

On August 25, 2015, the appellant submitted a request for a short-term nutritional supplement of 6 cans per day of Ensure Plus in the form of a letter from a physician who wrote:

> *[The appellant] is undergoing extensive dental work … This work will be taking a minimum of 8 weeks (closer to 14 weeks) during which time [the appellant] will be unable to get sufficient nutrition without supplementation.*
>
> *[The appellant] requires Ensure Plus 6 cans/day x 2 weeks immediately.*
>
> *We will then get the appropriate application/paperwork completed for a longer duration to cover the time when he is unable to eat solid food.*

On August 26, 2015, the ministry denied this request because:

> *There is no information provided that the applicant is suffering from critical weight loss, or in need of additional calories above a normal diet while recovering from one of the [legislated] conditions. … Short Term Nutritional Supplementation is available to prevent critical weight loss in one or more of the acute situations listed [in the legislation] when required as supplementation while recovering, and is not intended as a meal replacement or an ongoing supplement for chronic conditions. … It is not indicated that the applicant is consuming a regular dietary intake (whether it be softened, solid or liquid format) and that supplementation over and above this dietary intake is required.*

The appellant applied for a reconsideration of the decision. There was some delay in this process so that the appellant asked for and the ministry granted an extension.

The appellant began his dental procedures on or about October 9.

On October 21, the ministry received a letter from a second physician stating:

> *[The appellant] has been our patient since August of this year; he is currently in the process of having his remaining upper teeth and some lower teeth extracted, once completed at the end of this month he will then await the fabrication of a new CUD and PLD, with healing time and fabrication process this will be accomplished by the end of January 2016.*
>
> *In the meantime [the appellant] is having great difficulty meeting his nutritional needs due to the absence of teeth to adequately chew. We would therefore humbly request that he be given an Rx for nutritional supplement, such as Boost.*

Also on October 21, the ministry sent the appellant a letter asking for more information, and specifically: (1) the appellant's medical condition and reason for his need; (2) prescribed product; (3) quantity required per day; and (4) expectation of duration of need.

On November 3, the following documents were submitted by the appellant to the ministry:

1. A Request for Reconsideration dated October 29 in which the appellant writes: " After all my dental surgery, I only have seven bottom teeth. All teeth from my upper jaw are gone, and all bottom molars. Several open wounds have exposed bone. Therefore, I am unable to chew anything. The only food that I am capable of eating is liquids or in a mush form. In the week since the last extraction, I've lost 5 lbs and have days where I only eat once. Therefore, I need food supplements."

2. A letter dated October 27 completed by a Client Service Worker with a local aid society which reiterates the appellant's dental conditions and stating that he "is struggling to obtain the nutrients that he needs from the extremely limited selection of food that he can consume," and argues that the original decision incorrectly finds that the appellant does not need "nutritional supplementation" and that the requirement that the appellant be suffering from "critical weight loss" could only be established after the fact, which would be too late.

In its reconsideration decision the ministry found the following:

1. The ministry does not have confirmation in writing from a medical or nurse practitioner that the appellant has an acute short-term need for the supplement, the supplement is needed for caloric supplementation to a regular dietary intake, and the supplement is needed to prevent critical weight loss while recovering from: (i) surgery, (ii) a severe injury, (iii) a serious disease, or (iv) side effects of medical treatment as required under section 74 because the only document it received from a medical practitioner is that of August 25 which was anticipatory so that it could not be determined that the appellant was recovering from surgery.

2. The evidence does not establish that the request is for "caloric supplementation to a regular dietary intake" as required by section 74. Rather, it appears that the prescription of 6 cans of Boost/day is to be used as a "meal replacement". The ministry also notes that the appellant's regular dietary intake "could be adjusted to include food in softened, blended or liquid form".

3. The evidence does not establish that the supplement is needed to "prevent critical weight loss while recovering from surgery" as required by section 74. There is no information regarding the appellant's current height and weight, the amount of weight lost or the period over which the weight has been lost to demonstrate that the appellant is at risk of *critical* weight loss.

4. The ministry also considered whether the appellant qualified for a supplement under section 76 as a "life-threatening health need". The ministry found that the appellant did not because: (a) he does not face a life-threatening health need, and (b) this section applies only to medical supplies, medical transportation and medical equipment and devices and not to nutritional supplements.

As part of his appeal application the appellant submitted a third letter from a second physician regarding his condition dated November 17, 2015. This letter states:

[The appellant] is unable to eat solid foods due to poor dentition – he has had dental surgery and multiple extractions and will be getting partial plates in late December. He is losing weight – 20 pounds to date – and cannot get sufficient calories from where he is staying ([social housing], where the food is prepared but not customized to his capacity to eat).

He requires four cans of Ensure per day until he has his teeth replaced (~4 weeks).

The panel considered the admissibility of this letter pursuant to section 22(4) of the EAA. In order for the letter to be admissible it must be in support of evidence before the ministry at the time the reconciliation decision was made, in which case the tribunal must also consider what weight to give the evidence. Otherwise, the evidence is new evidence and is not admissible. The panel finds that this letter contains the following new evidence which was not before the ministry at the time the reconciliation was made: (1) the appellant is losing weight and has lost 20 pounds to date, and (2) the appellant requires four cans of Ensure per day. Accordingly, the panel finds that this letter contains new evidence and is therefore not admissible.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration decision finding that the appellant is not eligible for a nutritional supplement because he does not meet the legislated criteria in section 74 and 76 of the EAR.

The relevant legislation is sections 74 and 76 of the EAR:

Nutritional supplement — short-term
74 The minister may provide a nutritional supplement for up to 3 months to or for a family unit in receipt of income assistance, if
(a) the supplement is provided to or for a person in the family unit who is not receiving another nutrition-related supplement, and
(b) a medical practitioner or nurse practitioner confirms in writing that the person has an acute short-term need for caloric supplementation to a regular dietary intake to prevent critical weight loss while recovering from
(i) surgery,
(ii) a severe injury,
(iii) a serious disease, or
(iv) side effects of medical treatment.

Health supplement for persons facing direct and imminent life threatening health need
76 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) *[general health supplements]* and 3 *[medical equipment and devices]* of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that
(a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,
(b) the health supplement is necessary to meet that need,
(c) a person in the family unit is eligible to receive premium assistance under the *Medicare Protection Act*, and
(d) the requirements specified in the following provisions of Schedule C, as applicable, are met:
(i) paragraph (a) or (f) of section (2) (1);
(ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

The ministry's position is that the appellant did not meet the legislated criteria to receive a nutritional supplement at the time the reconsideration decision was made because the evidence before the decision maker did not establish that the appellant:

(1) had an acute short-term need for the supplement because the August 25 letter is anticipatory while the legislation requires that the need be current;
(2) had a need for caloric supplementation to a regular dietary intake because the August 25 letter prescribes six cans of Boost which is meal *replacement* rather than *caloric supplementation*,
(3) needed the supplement to prevent critical weight loss while recovering from surgery, a severe injury, a serious disease, or side effects of medical equipment because there is no evidence of critical weight loss, and
(4) The appellant did not meet the criteria under section 76 because the evidence did not establish

that he faced an "imminent life-threatening health need", and this section does not include nutritional supplements.

The appellant's position is that the ministry is construing section 74 too narrowly and that if the section is read more broadly and to the benefit of the appellant, as it should be, the appellant does qualify for the nutritional supplement.

The panel finds the following:

(1) The ministry's decision not to take into consideration the letter from the appellant's dentist dated October 16 was reasonable as the legislation requires that the ministry take into consideration the opinion of a "medical practitioner" the applicable definition of which is found in the *Interpretation Act* reads: "a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine . . .", which definition does not include a dentist.

(2) Section 74 requires that the need be for "caloric supplementation to a regular dietary intake". This wording means that the need for the supplemental calories must be *in addition to* calories consumed from a regular dietary intake. To read the wording so broadly that the caloric supplementation can *replace* a regular dietary intake, or indeed any part of a regular dietary intake, ignores the words "to a regular dietary intake". In the case at hand, the appellant does not require "caloric supplementation to a regular dietary intake" but rather 'calories in liquid form to replace his regular dietary intake'. Unfortunately, these are two quite different things and section 74 specifies the former but not the latter. Therefore the ministry's determination that the appellant is not in need of caloric supplementation to a regular dietary intake was a reasonable interpretation of the legislation in the circumstances of the appellant.

(3) Section 74 requires that the supplement be needed to "prevent critical weight loss". In order to be eligible, then, the applicant's medical practitioner must confirm in writing that the supplement is required to prevent critical weight loss. The August 25 letter from the appellant's physician does not indicate that the supplementation is required to prevent critical weight loss. Even giving the requirement a broad interpretation, there was no evidence before the ministry at the time of the reconsideration decision to suggest that the appellant was in danger of *critical* weight loss, which would mean 'severe' or 'dangerous' weight loss. Therefore the ministry's determination that the appellant does not require the caloric supplementation in order to prevent critical weight loss was reasonably supported by the evidence.

(4) The ministry also considered whether the appellant qualified for the nutritional supplementation under section 76 to address an "imminent life-threatening health need". Whether or not the appellant had such a health need, the ministry correctly identifies that this section provides for only medical supplies, medical transportation and medical equipment and devices. Nutritional supplements are not included under any of these. Therefore the ministry's determination that the appellant's request did not qualify under this section was a reasonable interpretation of the legislation in the circumstances of the appellant..

Accordingly, the Panel finds that the ministry's decision that the appellant is not eligible to receive a

nutritional supplement was a reasonable application of the applicable enactment in the circumstances of the person appealing the decision and confirms the ministry's decision pursuant to sections 24(1)(b) and 24(2)(a) of the EAA.