

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated July 29, 2015 which denied the appellant's request for a supplement to cover the cost of internet and cellular coverage at the rate of \$100 monthly. The ministry found that the item requested is not listed as an eligible item in Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), specifically Section 3.11.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Sections 62, and Schedule C, Section 3.11

PART E – Summary of Facts

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

- 1) Excerpt of the ministry policy regarding Accessing Hearing Instruments and the Eligibility Criteria;
- 2) Excerpt of the ministry procedure for Medical Equipment- Hearing Instruments;
- 3) Ministry notice of a new Hearing Instruments service delivery pilot effective April 1, 2015 whereby the service provider works directly with Pacific Blue Cross (PBC) to start the process of determining eligibility, along with sample letter;
- 4) Information Sheet for 9-1-1 Text;
- 5) Reasons for Decision of the BC Human Rights Tribunal dated September 5, 1997 in the matter of *Christine Chipperfield v. Ministry of Social Services*;
- 6) Letter to the ministry dated May 14, 2015 in which the appellant requested \$100 per month to pay for internet and cell phone service;
- 7) Letter to the appellant dated May 29, 2015 in which the ministry denied his request for internet and cell phone service for \$100 per month;
- 8) Audiologic Report dated June 27, 2015;
- 9) Invoice from a hearing instrument service provider dated June 29, 2015 for a hearing test; and,
- 10) Request for Reconsideration dated June 30, 2015 with attached letter.

In his Request for Reconsideration, the appellant's advocate wrote:

- The appellant is deaf and since January 2015 has received disability assistance.
- The appellant requested \$100 per month to pay for internet and cell phone service so that he could effectively communicate.
- As he only receives \$906 per month, he cannot afford cell phone and internet service.
- He owns a cell phone and a laptop.
- He is unable to use the hearing instrument supplement as hearing instruments would not assist him to hear and, therefore, communicate. However, he has access to a cell phone and internet service and he is able to use his cell phone and laptop to communicate.
- He can use a cell phone to communicate through texting and instant messaging through programs such as Skype and Facetime.
- He also requires an internet connection so he can use email as it is difficult to type lengthy emails on his cell phone due to the small size of the keys.
- He also needs internet service so he can use his laptop to use Skype and Facetime to video message his service providers and friends who are deaf so they can communicate in ASL, his first language.
- It is difficult for him to video message on his cell phone using sign language as the screen is so small and it is difficult to see what they are signing to each other.
- He uses the texting, email, instant messaging and video functions on his cell phone and internet on his laptop to book and change appointments.
- He uses his cell phone and internet to look up services that he needs, routes and schedules for transit, and to keep in touch with friends and family.
- He also needs cell phone service to access T-9-1-1, the emergency texting service offered for deaf people.
- The appellant was tested by an audiologist on June 27, 2015 and her report indicated that the appellant has no functional hearing and is not a candidate for hearing aids. She also stated that cellular service is essential to his daily life, especially with the ability to now text 9-1-1 in the event of an emergency.

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- The ministry recently made it easier for people who require hearing instruments to access this supplement, up to \$2,000 per aid and a 3-year replacement period.
 - Ministry policy respecting the duty to accommodate supports the ministry providing the appellant with cell phone and internet service in order to allow him to communicate effectively as he is not a candidate for a hearing instrument.
 - Without access to cell phone service, the appellant is at risk of facing an emergency without having any ability to contact 9-1-1.

In his Notice of Appeal dated October 27, 2015 in which he expressed his disagreement with the ministry's reconsideration decision. In his Notice of Appeal, the appellant's advocate wrote:

- As the appellant is deaf and unable to use devices covered by the ministry's hearing supplement, the ministry should provide him with funding to purchase cell phone and internet services.
- These services would allow him to communicate and, therefore, perform a similar role to devices for people who are hard of hearing and able to use devices covered by the ministry's hearing supplement.
- Attached to the Notice of Appeal were copies of emails dated October 5, 9, 16, and 19, 2015 between the appellant's advocate and the ministry.

Prior to the hearing, the appellant provided the following additional documents:

- 1) Letter to the ministry dated July 8, 2015 in which a medical practitioner wrote that as a deaf individual, the normal forms of auditory communication are not available to the appellant and he communicates primarily via American Sign Language (ASL) and services that require telephone communications are not available to him. Mobile phones, in particular, text messaging and video communication applications such as Skype or Facetime allow deaf individuals to communicate and, therefore, access the same services available to other Canadians. In particular, a mobile phone is required to access T-9-1-1, the emergency texting services allowing deaf individuals access to emergency services and requires access to the internet;
- 2) Letter to the ministry dated July 13, 2015 in which his advocate wrote that the letter from the medical practitioner dated July 8, 2015 corroborates the audiologic evidence that the appellant is not a candidate for a hearing instrument and that cell phone and internet service would perform similar roles to that of a hearing instrument in terms of allowing him to communicate;
- 3) Copy of emails dated October 27 and November 2, 2015 between the ministry and the appellant's advocate;
- 4) Copy of emails dated November 16, 20 and December 11, 2015 between the Tribunal and the appellant's advocate in which the advocate wrote that the ministry stated that it will not re-open the reconsideration.

At the hearing, the appellant's advocate provided a written submission on the appellant's behalf.

At the hearing, the ministry provided a copy of the ministry policy regarding Accessing Hearing Instruments and the Eligibility Criteria, which had previously been provided by the appellant.

At the hearing, the appellant and his advocate stated:

- The ministry misplaced the advocate's letter to the ministry dated July 13, 2015, which enclosed the July 8, 2015 letter and had been submitted at reconsideration.

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- The appellant felt the process took so long and there was no follow up and he felt lost.
 - The appellant pays \$821 in rent plus electricity on top of that. That leaves \$40 for the month for food. He has applied for BC Housing but it may be a long time before a place opens up.
 - With a cell phone, he has to hold the phone with one hand and then he can only sign with one hand which makes it difficult to communicate. The laptop is better because then he can use both hands to sign.
 - The majority of his friends are also deaf as well as some of the staff at the Wellness Program. This program is for anyone who needs assistance and they provide counseling, feedback for life skills, mental health support in life with psychologists available, and they also have weekly social events. He has been attending the program for years.
 - It is easy for a hearing person to set up an appointment because they can just call and select a convenient time. He has to travel to the centre and often shows up when no one is available and then he schedules an appointment and has to go back.
 - With Skype or Facetime, he can be more like hearing people and just call up for an appointment.
 - The emergency 9-1-1 call started sometime last year.
 - The appellant needs internet and cell service to communicate. Otherwise, he will be “blocked”, he will not know about events in the world and he feels isolated. It is his right to have access to the community and he wants the same access as hearing people.
 - He cannot enjoy movies because he has to read lengthy subtitles, which is like having to read a script for an hour and a half. Hearing people can access things in a way that he cannot.
 - The service provided through Telus is much better than the “TTY Program” which is an out-dated technology that is expensive and not very good. It is like using a typewriter when a computer is available. It is an old machine. Everyone is now on the internet and the TTY machine costs \$800 or \$900 plus ongoing repairs. With the internet, if something were to happen to the modem, Telus will just come in and repair or replace it.

The ministry relied on its reconsideration decision, as summarized at the hearing. The ministry also clarified that:

- The advocate’s letter dated July 13, 2015 was received by the ministry but misfiled and not considered at reconsideration. The ministry decided not to re-open the reconsideration decision, despite an error having been made by misfiling the letter, because it was determined that the letter would not make a difference to the result and would delay the process.
- The ministry policy does include repairs for hearing instruments, but not batteries. An application is made through Pacific Blue Cross (PBC) and not through the ministry.

Admissibility of Additional Information

The ministry did not object to the admissibility of the additional information provided by the appellant in the additional letters and emails and in his Notice of Appeal, which included further detail of the circumstances surrounding his need for \$100 per month to pay for access to internet and cell phone service. The panel admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel considered the advocate’s written submission as argument on behalf of the appellant.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which denied the appellant's request for a supplement to cover the cost of internet and cellular coverage at the rate of \$100 monthly because the item requested is not listed as an eligible item in Schedule C of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and specifically not a "hearing instrument" under Section 3.11, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

Pursuant to Section 62 of the EAPWDR, the applicant must be a recipient of disability assistance, or be a dependent of a person in receipt of disability assistance in a variety of scenarios. If that condition is met, Schedule C of the EAPWDR specifies additional criteria that must be met in order to qualify for a health supplement for various items. In this case, the ministry has found that the requirement of Section 62 has been met in that the appellant is a recipient of disability assistance.

At issue is whether the requested internet and cellular coverage is an eligible item under Schedule C of the EAPWDR, including:

Medical equipment and devices

- 3 (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if
- (a) the supplements are provided to a family unit that is eligible under section 62 [general health supplements] of this regulation, and
 - (b) all of the following requirements are met:
 - (i) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;
 - (ii) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;
 - (iii) the medical equipment or device is the least expensive appropriate medical equipment or device. 3 (1)

Medical equipment and devices — hearing instruments

- 3.11 A hearing instrument is a health supplement for the purposes of section 3 of this Schedule if
- (a) the hearing instrument is prescribed by an audiologist or hearing instrument practitioner, and
 - (b) an audiologist or hearing instrument practitioner has performed an assessment that confirms the need for a hearing instrument.

Definitions

1 In this Schedule:

"hearing instrument" has the same meaning as in the Speech and Hearing Health Professionals Regulation, B.C. Reg. 413/2008;

"hearing instrument practitioner" means a hearing instrument practitioner registered with the College of Speech and Hearing Health Professionals of British Columbia established under the Health Professions Act;

Speech and Hearing Health Professionals Regulation

Definitions

1 In this regulation:

"hearing instrument" means an appliance or a device designed or offered for a hearing condition,

- (a) including any ear molds, boots or other acoustic couplers and any parts or accessories for the appliance or device intended to affect the sound pressure level at the eardrum, and
- (b) excluding direct audio input accessories, batteries and any accessories that are attachable to the appliance or device by the wearer and not intended to affect the sound pressure level at the eardrum;

Ministry's position

The ministry's position is that the appellant is eligible to receive health supplements under Section 62 of the EAPWDR but that the requested internet and cellular coverage is not an eligible item as medical equipment specifically set out in 3.11 of Schedule C of the EAPWDR. The ministry argued that the request for \$100 per month to cover the cost of internet and cellular coverage does not meet the definition of "hearing instrument" as it cannot be considered an 'appliance' or 'device' designed or offered for a hearing condition, including any ear molds or boots or other acoustic couplers and any parts or accessories for the appliance or device intended to affect the sound pressure level at the eardrum. The ministry argued further that as the request does not meet the definition of a "hearing instrument", it cannot be determined that monthly funds to cover the cost of internet and cellular coverage is a hearing instrument that has been prescribed by an audiologist or hearing instrument practitioner, and the ministry cannot determine an audiologist or hearing instrument practitioner has performed an assessment that confirms the need for a hearing instrument.

Appellant's position

The appellant's position, as set out in the advocate's written and oral submissions, is that the appellant is deaf and unable to use devices covered by the ministry's hearing supplement and the ministry should provide him with funding to purchase cell phone and internet services as these would allow him to communicate and perform a similar role to devices for people who are hard of hearing and able to use devices covered by the ministry's hearing supplement. The appellant argued that he receives \$906 per month for disability assistance and pays \$821 for rent plus he pays for utilities and he, therefore, cannot afford cell phone and internet service, although he owns a cell phone and a laptop so he is not asking for funds to purchase these. The appellant argued that the ministry's policy and procedures regarding hearing instruments allows for ministry clients to receive hearing instruments and some services such as repairs paid for by the ministry. The ministry recently provided notice that the ministry will fund hearing instruments up to \$2,000 per aid and specified a 3-year replacement period. The appellant argued that the ministry could potentially be providing some recipients with two hearing aids every three years, for a total cost of \$4,000, or in excess of \$1,000 per year plus repair costs and these combined costs could easily exceed the cost of providing the appellant with cell phone and internet service at \$100 per month. The appellant argued that the definition of "hearing instrument" is inclusive and does not specifically exclude cell phone and internet service.

The appellant argued that the ministry policy regarding the Duty to Accommodate supports the ministry providing the appellant with cell phone and internet service in order to allow him to communicate effectively as he is not a candidate for a hearing instrument as it would not assist him to hear. The appellant argued that he can use his cell phone to communicate through texting and

instant messaging with programs such as Skype and Facetime. The appellant argued that he requires an internet connection so that he can use email as it is difficult to type lengthy emails on his cell phone due to the small size of the keys, and to use his laptop for Skype and Facetime for video messaging. The appellant argued that he uses texting, email, instant messaging and video functions on his cell phone and with the internet on his laptop to book and change appointment, look up services that he needs, to keep in touch with family and friends, and in order to text 9-1-1 in case of an emergency.

The appellant argued further that the audiological and medical evidence supports the appellant's request. The appellant argued that the appellant was tested by an audiologist who found that the appellant has no functional hearing for speech understanding and is not a candidate for hearing aids. The appellant argued that the audiologist stated that cellular service is essential to the appellant's daily life, especially now with the ability to text 9-1-1 in the event of an emergency, and internet service would allow the appellant to access the IP Telus Relay Service which would be beneficial for all types of phone calls including medical or service providers. The appellant argued that a doctor with the Wellness Program wrote in his letter dated July 8, 2015 that the appellant requires cell phone and internet service in order to communicate and access the same services available to other Canadians.

The appellant argued that, despite the specific exclusions as a result of Section 44 and 46.3 of the *Administrative Tribunals Act*, the Tribunal does have the ability to consider principles of statutory interpretation and the values of the *Charter of Rights and Freedoms*. The appellant argued that Section 8 of the *Interpretation Act* and the court decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248 require a liberal construction to be applied to the EAPWDA as social welfare legislation for people with disabilities. The appellant argued that a strict interpretation of "hearing instrument" will result in the people who are hard of hearing receiving supplements to aid them to communicate while leaving people who are deaf without the means to communicate. The appellant argued that the *Charter* value at issue in this appeal is protection from discrimination on the basis of disability and the appellant's situation is similar to that in the case of *Chipperfield v. Ministry of Social Services*, [1997] BCHRTD No. 20, in which the BC Human Rights Tribunal found discrimination in the ministry's scheme of transportation subsidies for certain disabled persons. The appellant argued that while the Tribunal does not have the jurisdiction to apply the *Human Rights Code* or the *Charter*, it does have the ability to apply *Charter* values by asking how the value at issue will best be protected in view of the statutory objectives, as suggested Supreme Court of Canada in *Dore v. Barreau du Quebec*, 2-012 SCC 12. The appellant argued that for the appellant, cell phone and internet service would operate in the same way as an appliance or device designed or offered for a hearing condition.

Panel decision

Section 3(1) of Schedule C of the EAPWDR stipulates that the *medical equipment and devices* described in Sections 3.1 to 3.12 of Schedule C are the health supplements that may be provided by the ministry. Section 3.11 of Schedule C provides for one type of medical equipment and device, being a "hearing instrument," which is a health supplement for the purposes of section 3 of the Schedule if certain criteria are met. Section 1 of Schedule C provides a definition of "hearing instrument" to have the same meaning as in the *Speech and Hearing Health Professionals Regulation*, which "...means an appliance or a device designed or offered for a hearing condition," followed by a list of particular included items "...intended to affect the sound pressure level at the eardrum." The appellant argued that the definition of "hearing instrument" is inclusive and does not specifically exclude cell phone and internet service; however, Section 3 of Schedule C refers to

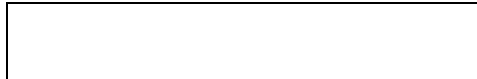
medical equipment and devices and the definition of “hearing instrument” specifies that a hearing instrument “...means an appliance or a device designed or offered for a hearing condition.”

The appellant did not request an appliance or device in his letter to the ministry dated May 14, 2015, but rather \$100 per month to pay for internet and cell phone *service*, which is neither an “appliance” nor a “device.” The advocate stated that the appellant already owns a cell phone and a laptop so he is not asking for funds to purchase this equipment. Further, the definition of hearing instrument specifically excludes direct audio input accessories, batteries and any accessories that are attachable to the appliance or device by the wearer “and not intended to affect the sound pressure level at the eardrum.” Section 3 of Schedule C and the ministry policy relating to hearing instruments provides for repairs to the medical equipment as a particular type of service for the eligible appliance or device.

The appellant argued that Section 8 of the *Interpretation Act* and the court decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248 require a liberal construction and interpretation to be applied to the EAPWDA as social welfare legislation; however, statutory “interpretation,” or relying on extra-textual considerations, is only required when a text is found to be ambiguous, or capable of two or more plausible meanings, in order to decide which of two or more plausible alternatives is better. The panel finds that the ministry reasonably concluded that internet and cell phone service does not fit within the definition of a “hearing instrument” as internet and cell phone service are not “an appliance or device designed or offered for a hearing condition” and, while the list is not exhaustive, they are not consistent with the list of included items, specifically: “...any ear molds, boots or other acoustic couplers and any parts or accessories for the appliance or device intended to affect the sound pressure level at the eardrum.”

Section 3.11 of Schedule C of the EAPWDR also provides additional criteria that must be met, specifically that a hearing instrument is a health supplement for the purposes of section 3 of the Schedule if (a) the hearing instrument is prescribed by an audiologist or hearing instrument practitioner, and (b) an audiologist or hearing instrument practitioner has performed an assessment that confirms the need for a hearing instrument. Although the appellant provided a report by an audiologist, the audiologist did not prescribe nor confirm the need for a “hearing instrument” as defined. Rather, in the Audiologic Report dated June 27, 2015, the audiologist concluded that the appellant is not a candidate for hearing aids and that his primary mode of communication is through visual language, such as ASL. The panel finds that the ministry also reasonably concluded that since the appellant’s request does not meet the definition of a “hearing instrument,” it cannot be determined that monthly funds to cover the cost of internet and cellular coverage is a hearing instrument that has been prescribed by an audiologist or hearing instrument practitioner and the ministry cannot determine an audiologist or hearing instrument practitioner has performed an assessment that confirms the need for a hearing instrument.

According to Section 19.1 of the EAA, Section 44 and 46.3 of the *Administrative Tribunals Act* apply to the Tribunal, and preclude the panel from applying the *Human Rights Code* or the *Charter of Rights and Freedoms*. The appellant argued that the Tribunal has the ability to apply *Charter* values by asking how the value at issue will best be protected in view of the statutory objectives, as suggested by the Supreme Court of Canada in *Dore v. Barreau du Quebec*, 2-012 SCC 12. However, the panel finds that its jurisdiction on appeal is limited by Section 24(1) of the EAA to assessing the reasonableness of the ministry’s decision in its application of the legislation as enacted by the Legislature and the available evidence. As discussed, the panel finds that the ministry reasonably determined that internet and cellular service is not included in Sections 3.11 of Schedule



C of the EAPWDR.

Conclusion

In conclusion, the panel finds that the ministry's decision to deny the request for a supplement to cover the cost of a internet and cellular coverage as not meeting the legislated criteria of Schedule C, Section 3.11 of the EAPWDR, was a reasonable application of the applicable enactment in the circumstances of the appellant. Therefore, the panel confirms the ministry's reconsideration decision.