

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 8, 2016 which found that the appellant is not eligible for assistance as a sole recipient with a dependent child because he is residing with a person to whom he is married and who is his “spouse” and a "dependant" with whom he must be assessed as one family unit, pursuant to Sections 1 of the *Employment and Assistance Act* (EAA) and Section 5 of the *Employment and Assistance Regulation* (EAR).

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), Section 5
Employment and Assistance Act (EAA), Sections 1 and 1.1

PART E – Summary of Facts

The hearing was adjourned to allow the ministry to submit a copy of the applicable ministry policy interpreting the relevant sections of the legislation, and for the advocate to provide her written submissions. The advocate did not attend the re-convened hearing but the appellant wanted to proceed on the basis of the advocate's previous oral submissions, the written submissions, and his additional oral submissions.

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

- 1) Undated note in which the appellant wrote that:
 - He does not have a "spouse" as he is separated and preparing divorce proceedings from the alleged dependant. The end of the required 12-month separation period will occur in August 2016.
 - He has had no physical or emotional relationship with the alleged dependant since August 2015.
 - He is the full-time care-giver for their young child.
- 2) Undated Monthly Rent Receipt confirming payment by the appellant of \$725 on October 1, 2015, November 1, 2015 and May 1, 2016;
- 3) Standard Residential Tenancy Agreement dated October 30, 2011 in the name of the appellant and the alleged dependant as tenants;
- 4) Confirmation of Permanent Residence dated June 26, 2012 for the appellant indicating the alleged dependant as his spouse and sponsor to Canada;
- 5) Copy of email dated April 5, 2014 from the alleged dependant regarding a referral to a psychiatrist;
- 6) BC Hydro account dated July 2, 2015 in the name of the alleged dependant;
- 7) Notice of Motion dated July 21, 2015 by the appellant for a protection order from the alleged dependant;
- 8) Notice of Family Claim dated July 29, 2015 indicating that the appellant and the alleged dependant married in 2011 and have lived 'separate and apart in the family residence since July 29, 2015';
- 9) Bank account statements for a joint account in the name of the appellant and the alleged dependant for the period July through September 2015;
- 10) Letter dated July 31, 2015 to the appellant in which counsel for the alleged dependant discussed legal proceedings and a parenting schedule for the child in her care;
- 11) Letter dated September 1, 2015 in which an account manager wrote that the appellant is a holder of two accounts with the credit union;
- 12) Letter dated September 2, 2015 confirming registration of an online BC Hydro account in the appellant's name;
- 13) Appellant's Application for Income Assistance dated September 9, 2015 indicating his marital status as "separated (previously married)" and the date of separation as July 29, 2015;
- 14) Letter dated September 10, 2015 in which an account manager wrote that the appellant no longer holds a joint account with the alleged dependant at the credit union;
- 15) First page of two-page BC Hydro invoice dated October 1, 2015 in the appellant's name;
- 16) Second page of a BC Hydro invoice dated November 2, 2015 in the appellant's name;
- 17) Letter to the appellant dated November 4, 2015 in which the ministry requested documentation to confirm his rent, his claim for custody of the child, bank statements, his application for child tax credits and a detailed written explanation of how he is paying rent in excess of his income assistance;
- 18) Print out dated November 6, 2015 for an Account Activity Statement;

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- 19) Letter dated November 8, 2015 in which the appellant enclosed various documents;
 - 20) Letter to the appellant dated November 23, 2015 in which the ministry requested documentation to confirm his rent, his claim for custody of the child, bank statements, his application for child tax credits and a detailed written explanation of how he is paying rent in excess of his income assistance;
 - 21) Letter dated November 30, 2015 in which the appellant wrote that he submitted an 18-page response on November 20, 2015 to the ministry's letter dated November 4, 2015;
 - 22) Letter to the appellant dated December 10, 2015 in which the ministry requested documentation relating to a particular bank account;
 - 23) Letter to the appellant dated February 19, 2016 in which the ministry requested documentation from the appellant confirming all sources of income and eligibility for foreign pensions and proof he has applied for early CPP benefits;
 - 24) Canada Child Benefits Application dated March 29, 2016 in which the appellant indicated that the date he became primarily responsible for the care and upbringing of his child was September 4, 2015;
 - 25) Print out dated April 18, 2016 of pages from the appellant's tax documents for 2015 indicating his marital status as of December 31, 2015 as "separated;"
 - 26) Letter dated April 22, 2016 in which the appellant acknowledged receipt of the ministry's correspondence dated April 13, 2016 and wrote that he will not apply for CPP as his future entitlements will be reduced;
 - 27) Copies of emails May 17 to 19, 2016 between the appellant and the landlord and the ministry regarding providing a copy of the lease agreement to the ministry;
 - 28) Copies of emails between the appellant and the ministry in May 2016 regarding a request for June appeal supplement;
 - 29) Copy of email dated May 21, 2016 attaching a copy of the lease for the appellant's address and stating that 3 people have been living there since December 2011, namely the appellant, the alleged dependant and a child;
 - 30) Bank account statements for the appellant's account for the period March through June 2016;
 - 31) Bank Profile for the appellant dated June 3, 2016;
 - 32) Letter dated July 7, 2016 in which an account manager wrote that the appellant has one account remaining at the credit union; and,
 - 33) Request for Reconsideration dated July 23, 2016.

In his Request for Reconsideration, the appellant wrote that:

- He and the alleged dependant separated from their marriage on July 29, 2015.
- He applied for a Protection Order from the alleged dependant on July 29, 2015 because of abuse.
- He remained at the residence while the alleged dependant relocated to halfway houses, friends' residences as well as extended family residences.
- He had no income since he had no work and was fully responsible for care of their child for the previous 6 months and was totally dependent on the alleged dependant for all living expenses.
- He was in receipt of income assistance starting in September 2015.
- The alleged dependant agreed to let the appellant take care of their child.
- The alleged dependant continued to pay her half share of the rent from October 1, 2015 onwards because she wanted to remain in contact with their child.
- He was legally unable to restrict the alleged dependant from access to their child as he had been unable to obtain a Protection Order.

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- He had no credit rating to gain access to any other rented property.
 - They agreed that he would live upstairs with their child and the alleged dependant would live separately downstairs on the ground floor by herself. They agreed to live separate lives.
 - They have separate bank accounts and split the hydro bills.
 - The alleged dependant continues to be physically and verbally abusive and they have had no conjugal physical or emotional connection as a couple since April 2015.
 - The alleged dependant left the marriage and the property on July 29, 2015 and took their child with her. She stayed away from the property for a significant period of time but returned their child to the property.
 - They are awaiting their formal divorce in August 2016 and are attempting to obtain alternate shelter in a highly unaffordable and low vacancy rental market.
 - He has no legal ability to push the alleged dependant from the entire residence as she is a co-signatory to the original lease and legally able to equally reside in the property.
 - The alleged dependant wants him to relocate and he wants her to relocate and this has been a stalemate situation for several months. It will be resolved in August 2016 when she relocates to her parents' basement apartment and he will remain in the residence.
 - He is not responsible and liable for the support and maintenance of the other spouse, as is required for married couples living together.
 - While they may still be married, they do not reside together as husband and wife.

Additional Information

In his Notice of Appeal dated August 19, 2016 the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that the ministry has not given full and due consideration to the facts and circumstances in which he finds himself.

The appellant provided the following additional documents:

- 1) Print out of a Canada Revenue Agency screen modified February 13, 2016 indicating the appellant's child is in the primary care of one parent with no shared custody;
- 2) Safety Plan dated September 12, 2016 in which the alleged dependant agreed, among other things, to "move out of the shared residence as soon as possible," to refrain from violent behaviors in front of their child, and parenting time is to be agreed upon by the parents;
- 3) Legal definitions as set out in various court decisions; and,
- 4) Two written submissions.

The ministry provided a copy of the ministry previous policies ("Living Arrangements"), effective March 29, 2007 and earlier, as well as the current policy ("Family Composition"), effective September 21, 2016.

At the hearing, the appellant stated:

- The purpose of looking at dependants as part of the family unit is to stop married couples from scamming the government, but that is not the case here. He has a genuine need for support since he is a single parent and the primary full-time caregiver for his young child.
- In July 2015, he and the alleged dependant separated and she has paid limited child support and no spouse support. He is fighting for his right to spouse support.
- He is over 60 years old, came to Canada from another country 5 years ago, and he is responsible to feed, clothe and educate a young child.

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- The alleged dependant experienced post-partum depression and she is still on anti-depressants. She admitted that she was suicidal. He had to call the police because of the behavior of the alleged dependant on 6 occasions in a 12-month period. He filed for a protection order from the court and believes he did not get it because it was hard to convince the court that this was a problem because of the stereotype for domestic violence.
 - They are waiting out the 12-month separation requirement to qualify for a divorce.
 - They have separate bank accounts and finances. Their social and domestic lives and living areas are separate. The alleged dependant lives downstairs and he and their child live upstairs and the spaces are separated by a lockable gate on the stairwell. The bathroom in the house is upstairs so the alleged dependant has to go through the gate and she has access to the upstairs.
 - The landlord only gave the ministry information that 3 persons were living at the property and did not state that the appellant was "living with his spouse." The ministry did not investigate the property to assess his living arrangements.
 - His life has been difficult since the alleged dependant has been physically and verbally abusive and has also engaged in financial abuse. The alleged dependant fled the residence and he did not know she had filed divorce papers before she left.
 - In August 2015, he applied for income assistance.
 - Although the alleged dependant had left the property, she realized that it was much easier living 1 ½ blocks from her work and she re-entered the property on the original 5-year lease on October 1, 2015. He had no legal power to stop her and he had no credit history to be able to rent another place. All financial applications had been made in the name of the alleged dependant and his good credit rating in his previous country did not follow him to Canada.
 - He has only been able to get three 3-month work contracts as he has no work colleagues in Canada.
 - When he made an audio tape of the verbal abuse by the alleged dependant, the ministry of children and family development (MCFD) got involved and the alleged dependant agreed to voluntarily enter into a Safety Plan in September 2016. There was always the reality that a judge could force her to leave the residence and she was ultimately forced to leave through an agreement with child protection.
 - The family law legislation provides that it is fine to be in the same property and the parties can still be considered "separated."
 - The ministry says he is not eligible for income assistance and he needs to re-pay the assistance that was previously paid. At \$950 per month, the appellant stated it will be around \$12,500 that will need to be repaid to the ministry and he will have nothing and will have to declare bankruptcy. It will have a devastating impact on him and his child. The ministry mandate is to provide a social safety net.
 - He applied for assistance as a single person with dependants because that was the only category that applied to him. He did not consider himself a "couple" with dependants. He wrote on the application that the alleged dependant left the marriage. He also indicated that his marital status was "separated (previously married)," and the ministry allows this category. There was no spouse on the property at the time of his application. There is no evidence that the alleged dependant was living on the premises at that time.
 - Although the Notice of Family Claim dated July 29, 2015 recited that their child "resides with both parties in the family home," that was only before the application was made since it also says that they separated on July 29, 2015.
 - When he applied for Canada Child Benefits on March 29, 2016, he indicated his marital status

as “separated.”

- In his Income Tax and Benefit Return for 2015, his marital status as of December 31, 2015 was indicated as “separated.”
- He acknowledges that prior to July 2015 they had financial interdependence and there was a dependency relationship. As set out in the letter from the Credit Union dated July 7, 2016, he was removed as an account holder on September 10, 2015.
- The alleged dependant returned to the premises October 1, 2015 until September 2016 when she agreed to leave. For the months of August and September 2015 the alleged dependant resided elsewhere.
- The alleged dependant has filed for divorce, she was absent from the residence, there has been withdrawal from the matrimonial relationship, a physical separation, separate household tasks, and he is the sole, primary care-giver to their child.
- The alleged dependant would leave for full-time work and he would spend the day with their child, getting himself and his child their meals and taking her to activities.

The ministry relied on the reconsideration decision, as summarized at the hearing. At the hearing, the ministry stated that:

- The Policy Manual is used to assist the ministry make decisions on a wide range of matters.
- The EAA and the EAR comprise the legal framework and the ministry does not refer to the policy in the normal course. The policy would be consulted where there is difficulty interpreting the EAA or the EAR.

Admissibility of Additional Information

The ministry did not object to admitting the additional documents submitted by the appellant. The panel considered the information in the additional documents as corroborating the previous information from the appellant regarding who resides in the home, which was before the ministry at reconsideration. The panel considered the ministry policy as applicable at the time of reconsideration and, therefore, being in support of the information and records before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel considered the appellant’s written submissions as argument on behalf of the appellant and not evidence.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for assistance as a sole recipient with a dependent child because he is residing with a "dependant" with whom he must be assessed as one family unit, pursuant to Sections 1 of the EAA and Section 5 of the EAR, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the appellant's circumstances.

Section 5 of the EAR sets out the following eligibility criteria:

Applicant requirements

5 For a family unit to be eligible for income assistance or a supplement, an adult in the family unit must apply for the income 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 EAA provides definitions as follows:

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

"dependant", in relation to a person, means 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 role for the person's dependent child.

"spouse" has the meaning in section 1.1

Section 1.1 of the EAA provides:

Meaning of "spouse"

- 1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if
- (a) they are married to each other, or
 - (b) they acknowledge to the minister that they are residing together in a marriage-like relationship.
- (2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if
- (a) they have resided together for at least
 - (i) the previous 3 consecutive months, or
 - (ii) 9 of the previous 12 months, and
 - (b) the minister is satisfied that the relationship demonstrates
 - (i) financial dependence or interdependence, and
 - (ii) social and familial interdependence, consistent with a marriage-like relationship.

Ministry's position

The ministry's position is that the appellant is not eligible for assistance because he has not applied for assistance on behalf of his family unit, including his spouse, as per Section 5 of the EAR. The ministry noted that Section 1 of the EAA defines "family unit" to include a recipient and his dependants, and the definition of "dependant" includes a person who resides with the person and is the spouse of the person [Section 1(1)(a)]. The meaning of "spouse" for the purposes of the EAA, as set out in Section 1.1(1)(a), includes two persons who are married to each other. At the hearing, the ministry argued that since the appellant is legally married, it is not necessary to apply the other

definitions of "spouse" as set out in section 1.1(1)(b) and 1.1(2).

The ministry argued that the residency requirement has been met as the lease for the appellant's current address is in the name of the appellant and the alleged dependant and the filed divorce claim confirmed that the child of the marriage "resides with both parties in the family home." The ministry argued that the appellant has stated that he lives in the same townhouse as the alleged dependant and, although he stated that they live independently and in separate living spaces with a gate in the staircase, the appellant acknowledged that he and the alleged dependant are the legal tenants, the alleged dependant cannot be forced from the entire townhouse because she is legally able to equally reside in the property, and there is a common key to enter the living space.

The ministry argued that the appellant and the alleged dependant are spouses of each other for the purposes of the EAA as they are legally married, as confirmed by reference to the marriage certificate in the court documents filed, the appellant does not dispute that they are still legally married as he stated that he is awaiting granting of a divorce, and there is no evidence that they are yet divorced. The ministry argued that the appellant did not apply for assistance on behalf of his entire family unit and, therefore, he is not eligible for income assistance as a sole recipient with a dependent child. The ministry clarified at the hearing that the reconsideration decision did not determine an overpayment, that this would be the subject of a separate decision, and that the only issue was the appellant's eligibility for income assistance as a sole recipient with a dependent child.

Appellant's position

The appellant's position is that the ministry made an unreasonable error in applying the law by finding that he is married to and is residing with the alleged dependant, given the appellant's circumstances at the time. The appellant argued that he represented to the ministry that he was separated in the marital status of his application for income assistance, as well as in his Canada Child Benefit application and his 2015 Income Tax Return. The appellant argued that he provided the ministry with a copy of the document filed in the court requesting a divorce which indicated that he and the alleged dependant separated on July 29, 2015, and the appellant separated himself from the alleged dependant to the greatest extent he believes was possible under his circumstances.

The appellant argued that since "married" is not defined under the EAA, it is open to interpretation and is ambiguous and should, therefore, be read in favour of the appellant. The appellant argued that the definition of marriage should have been read in concert with the hallmarks of a marriage-like relationship flagged under section 1.1(2) of the EAA, or with "financial dependence or interdependence and social and familial interdependence," or some actual dependence on each other. The appellant argued that to determine that "married" according to the EAA does not include these hallmarks and only includes the requirement of a marriage certificate absent a divorce order would render the concept of a marriage-like relationship unintelligible. The appellant argued that the EAA included spouses as dependants in order to ensure that recipients avail themselves of all reasonable sources of income and spouses should be financially responsible for each other where possible but the alleged dependant will not give the appellant financial support. The appellant argued that prior to the reconsideration decision, he made the ministry aware that he considered that he did not have a "spouse" and was separated and the ministry did not consider his circumstances, including that there had been physical and verbal abuse.

The appellant argued that the ministry made an unreasonable error in determining that the appellant resides with the alleged dependant as there is a gate separating the living spaces that he and his

child occupy from the space that the alleged dependant occupies. The appellant argued that there is no definition for “residing” in the EAA and a more purposive and liberal reading would have been reasonable in considering the appellant’s circumstances. The appellant argued that the ministry policy provides a discretionary power to determine whether the parties are “residing” together and the ministry did not exercise its discretion in his circumstances. The appellant argued that the ministry failed to consider any aspect of family violence when determining whether the appellant resides with the alleged dependant. The appellant argued that he indicated to the ministry that he was experiencing abuse and he did not wish for the alleged dependant to live at the residential address but she forced her way back into the unit after she moved out and he did not have the option to leave. The appellant argued that he tried to separate out their living spaces as much as possible as he did not have other alternative living arrangements.

Panel decision

Pursuant to section 5 of the EAR, for a family unit to be eligible for income assistance, an adult in the family unit must apply for income assistance on behalf of the family unit. "Family unit" is defined in Section 1(1) of the EAA as the applicant and his 'dependants' and the first part of the definition of "dependant" is "...anyone who resides with the person."

“Resides With”

The normal meaning of 'reside' is to have one's permanent home in a particular place and the appellant does not dispute that he and the alleged dependant lived at the same address until July 29, 2015, when the alleged dependant left to stay elsewhere. The appellant also does not dispute that he and the alleged dependant lived at the same address from October 1, 2015, when she “forced her way back into the unit,” until September 2016 when she voluntarily left as agreed in an MCFD Safety Plan. The appellant argued that he and the alleged dependant have separate spaces in the dwelling unit, with the bottom floor being occupied by the alleged dependant and the upper floor being occupied by the appellant and the child, with a lockable gate on the stairs between the floors. However, there was no evidence of a wall dividing the living spaces into distinct self-contained units with different addresses, such as the case of a separate suite with its own entrance, and the appellant stated that the alleged dependant had legal and actual physical access to the upper floor of the unit and used the bathroom located there.

Unlike the requirement in the definition of “spouse” in section 1.1(2)(a) of the EAA which stipulates that the parties “*reside together*” for a defined period of time, the requirement in the definition of “dependant” is different and is simply for the party to “*reside with*” the appellant, or in the same dwelling unit. The ministry referred to the lease agreement, which identifies both the appellant and the alleged dependant as tenants of the same townhouse unit, and the appellant’s acknowledgement that the alleged dependant is legally entitled to occupy the unit, that he was unable to bar her from entering and occupying the unit, and there is a common key to enter the living space, as evidence that they reside in the same dwelling unit. Although the appellant argued that the ministry failed to consider family violence when determining whether the alleged dependant resides with the appellant, the appellant acknowledged that he applied to the court for a protection order in July 2015 and the court did not grant his application, and there was no evidence of further applications by the appellant for a protection order. In the MCFD endorsed Safety Plan dated September 12, 2016, the alleged dependant agreed to move out of the residence that the parties themselves referred to in the Safety Plan as “shared.” The panel finds that the ministry reasonably determined that the alleged dependant “resided with” the appellant because she lived at the same “shared” residence, or at the same dwelling unit, from October 1, 2015 until September 2016.

“Spouse”

Section 1(1) of the EAA provides a definition of “spouse” to have the meaning for the purposes of the EAA as set out in Section 1.1, which includes three different options:

- two persons are married to each other [section 1.1(1)(a)], or
- two persons acknowledge to the ministry that they are *residing together* [emphasis added] in a marriage-like relationship [section 1.1(1)(b)], or
- two persons *reside together* [emphasis added] for a minimum specified period of time and the ministry is satisfied that the relationship demonstrates financial dependence or interdependence, and social and familial interdependence consistent with a marriage-like relationship.

These three options to be brought within the definition of “spouse” for the purposes of the EAA cover the scenario of two persons who are legally married, demonstrated by a registered marriage certificate, and with no requirement for the parties to be “residing together,” and the scenario of a marriage-like relationship where the parties are “residing together” that is either acknowledged by both persons or, if not acknowledged by both persons, demonstrates a level of interdependence that the ministry is satisfied is consistent with a marriage-like relationship.

In the appellant’s circumstances, the ministry reasonably did not explore the options of a marriage-like relationship, either acknowledged or unacknowledged, because the appellant and the alleged dependant became legally married, as demonstrated by a registered marriage certificate, and thereby publicly defined the nature of their relationship. The panel finds that the ministry reasonably relied on the marriage certificate as evidence that the appellant is married, without having to go behind the legal arrangement to investigate the quality of the marriage relationship or even if the parties were “residing together,” which is not a requirement of this part of the definition. Since the definition in section 1.1(1)(a) of the EAA does not require the parties to reside together to be “spouses,” the alleged dependant is reasonably considered to be the appellant’s spouse even if the parties consider themselves to be ‘separated’ and this arrangement has been accepted for other purposes, such as in the claim for divorce or the appellant’s federal income tax returns or Canada Child Benefit application. In his Request for Reconsideration, the appellant wrote that he and the alleged dependant are awaiting their formal divorce in August 2016; however, there was no further evidence provided of the divorce being granted, which would result in the appellant no longer being married. The panel finds that the ministry reasonably determined that the appellant and the alleged dependant are married to each other and are therefore “spouses” in accordance with Section 1.1(1)(a) of the EAA.

In summary, the panel finds that the ministry reasonably concluded that the alleged dependant resides with the appellant and is the appellant’s “spouse” according to the definition in Section 1.1(1)(a) of the EAA and, therefore, the alleged dependant is the appellant’s “dependant” for the purposes of the EAA and was reasonably included by the ministry as part of the appellant’s family unit.

Conclusion

The panel finds that the ministry’s reconsideration decision, which found that the appellant is not eligible for assistance as a sole recipient with a dependent child because he is residing with a “dependant” with whom he must be assessed as one family unit, pursuant to Sections 1 of the EAA and Section 5 of the EAR, was a reasonable application of the applicable enactment in the appellant’s circumstances. The panel confirms the decision and the appellant’s appeal, therefore, is not successful.