PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated September 14, 2017 in which the ministry found that the appellant was ineligible for disability assistance for the month of June 2017, pursuant to Section 9 of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), due to rental income received in April 2017 as unearned income and included in the appellant's net income, which exceeded the appellant's disability assistance rate.

The ministry found that the appellant was eligible to deduct the essential operating costs of renting the self-contained suites from the unearned income, pursuant to Section 6(b) of Schedule B of the EAPWDR.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Sections 1, 9, 24, and Schedules A and B

PART E – SUMMARY OF FACTS

With the oral consent of the Committee for the appellant, two ministry observers attended but did not participate in the hearing.

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

1) Letter to the Committee for the appellant dated May 18, 2017 in which the ministry advised that the appellant's file had been reviewed for the purpose of determining eligibility for assistance and the trust arrangement has been reviewed. The ministry determined that the rental income from the appellant's property is unearned income and the only deductions that are permitted are essential operating costs of renting self-contained suites. Information about the rental income, along with evidence to support the income and the essential operating costs must be submitted before the ministry is able to determine eligibility for the appellant's June 2017 assistance;
2) Letter to the ministry dated June 12, 2017 in which the Committee for the appellant outlined the April 2017 essential operating costs for the property, including $250 for property tax, $157.30 for property insurance for the house, $87.53 for property insurance for the cottage, $72.75 for water, and $402 for hydro, and enclosed a monthly reporting form showing $2,300 in rental income and evidence to support the income and essential operating costs; and,
3) Request for Reconsideration dated July 8, 2017, with attached "Appendix A", Reasons for the Request, and followed by a letter dated July 10, 2017 from the Committee for the appellant requesting an extension of time to allow the lawyer to provide argument. The Committee wrote that she has been advised that transferring the appellant's property to a trust would trigger significant amounts of property transfer tax and capital gains tax, which the appellant is not in a position to pay.

In the Request for Reconsideration- Written Submissions, the lawyer for the Committee for the appellant wrote:

- These submissions replace the "Appendix A" reasons previously provided.
- The accountants have advised that transferring the appellant's property to a trust would likely trigger capital gains tax between $100,000 to $150,000, with an additional amount for property transfer tax of approximately $20,000, which neither the appellant nor any of his family is able to pay.
- Had either the court of the Public Guardian and Trustee (PGT) been aware that this would become an issue when the property was initially acquired, the property could have easily been registered in the name of the trustee at that time. The appellant is now faced with either significant tax costs or the loss of his entire monthly PWD [Persons With Disabilities] benefits. Had the ministry advised of this issue when the appellant first began to receive PWD benefits, the amount of taxes would have been significantly less before the large increases in the property's value.
- It is perverse and inconsistent with the intention of the legislature that a wealthy family with a member who is a patient under the *Patients Property Act* (PPA) could avail itself of

sophisticated legal advice and establish a trust to enable the patient to receive PWD benefits in the full monthly amount, while the appellant is faced with the prospect of paying significant taxes or losing his PWD benefits entirely on account of a technicality.
- The legal basis for the appellant's position will be reviewed under Part F, Reasons for Panel Decision, below.

Additional Information

In his Notice of Appeal dated September 26, 2017 the appellant expressed his disagreement with the ministry's reconsideration decision and his advocate wrote that the ministry's decision to withhold the appellant's monthly PWD payments was not reasonable or correct.

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

1) Order of the BC Supreme Court dated February 28, 2007 including provisions appointing a Committee for the appellant, prohibiting disposal or encumbrance of the real property of the appellant without the prior written consent of the PGT, and providing a property management fee of $700 per month and a care giving fee of $1,900 per month for the Committee, to be paid from the appellant's estate;

2) Request for Reconsideration dated July 24, 2014 with Reasons dated August 21, 2014; and,

3) Decision of the Federal Court in *Singh v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1869.

Prior to the hearing, the appellant provided an Affidavit sworn December 14, 2017 in which the statements by the Committee for the appellant included the following:

- She is the appellant's mother. The appellant sustained brain damage during his birth in 1987 and continues to require constant personal and healthcare support.

- For the first two years of his life, the appellant lived at home with his family. In March 1990 the appellant was moved to a hospital until November 1997.

- In September 1993, the appellant received a settlement of approximately $1,318,000 for the injuries he sustained at birth, which was held in a trust fund by the PGT. She has worked together with the PGT to manage the appellant's finances.

- In December 1994, she and her husband proposed using funds from the settlement to purchase a home that would accommodate the appellant's healthcare needs so the appellant could leave the hospital and live with his family.

- In March 1995, an Order of the BC Supreme Court approved the use of $739,000 of the settlement monies to purchase a 4.5 acre property, with title registered in the name of the

appellant as to 639/739 and the names of the appellant's mother and her husband as to 100/739, as joint tenants, with a mortgage of their interest in the property in favour of the appellant in the amount of $100,000. Over time, the appellant's mother and her husband were to repay the appellant $100,000 as an amount equal to the equity in the property they were to receive.

- The appellant's mother and her husband were not able to make the mortgage payments and the PGT reassured them that the property was being held as a "family trust" and transferring the property back to the appellant and cancelling the mortgage would not limit their right to live on and utilize the property. The PGT agreed that they were not required to pay occupational rent and were permitted to keep any rental income generated from renting the cottage.

- In April 1997, an Order of the BC Supreme Court transferred the interest of the appellant's mother and her husband in the property back to the appellant and cancelled the mortgage. The appellant has held 100% interest in the property since the date of the Order. The PGT Affidavit filed March 1997 included a personal financial plan for the appellant dated May 1995 (Exhibit "D") that reviewed income tax planning, possible deemed disposition of assets with accrued capital gains, and a statement at page 8 that "there are a number of other issues related to the real property that should be addressed and it is recommended that a lawyer with real property experience be retained to look at all issues related to the property."

- In November 1997, after necessary renovations were completed, the appellant was moved from the hospital to the property. While living at the property from 1997 to 2008, the appellant received around-the-clock support. The appellant's mother acted as one of his care givers, along with hired care givers.

- In March 2002, the appellant's mother and her husband separated and divorced in 2008.

- In 2006, the appellant's mother applied for and obtained PWD benefits for the appellant to assist with paying for his care. The PGT encouraged her to apply so that the appellant's care would not have to be paid out of the settlement funds since they were mostly depleted.

- The appellant received PWD benefits every month from August 2006 until June 2017. The amount has varied over the years and when the appellant was moved into the group home in 2008, his PWD benefits were sent directly to the group home.

- In February 2007, the appellant's mother filed a petition seeking an Order appointing her as the appellant's Committee.

- In July 2007, the Committee obtained funding from Community Living BC, which enabled her to hire care givers for approximately 11 hours per day while the appellant remained at the property. When the appellant moved to the group home, the payments stopped.
- During 2007 and 2008, the appellant condition worsened and it was determined that he needed surgery. In May 2008, the appellant underwent surgery and was subsequently moved to a group home to recover and rehabilitate. The group home is in close proximity to the property. It became apparent that the appellant's best interests would be served by remaining at the group home where 24-hour care could be provided.
- The Committee converted parts of the main house located on the property into two rental suites to generate rental income to benefit the appellant by helping to offset the expenses of maintaining the property, such as property taxes and repair and maintenance costs.
- In June 2010, she created a one-bedroom suite rented for $950 per month.
- The income from the two rental suites is deposited into a bank account that the Committee operates in trust for the appellant. The account was set up in 1995 with assistance from the PGT and is a holdover from a type of informal trust account.
- In November 2011, the appellant's PWD benefits first came under review by the ministry. The ministry claimed that rental income generated by the property was income to the appellant, not to a trust, since the property was registered in the appellant's name and, therefore, such income should be deducted from the appellant's PWD benefits. The ministry was aware that the property was registered in the appellant's name since 2006 when she applied on behalf of the appellant.
- In June 2014, the appellant's PWD benefits came under review for a second time by the ministry. The review was settled in the appellant's favour when the ministry issued a reconsideration decision, which concluded that the property is held within a trust and, therefore, the rental income is exempt because it was earned by the trust and not by the appellant.
- In January 2016, the PGT filed a petition to remove the appellant's mother as his Committee. The Committee agreed to a number of concessions that were seen at least equal to fair market rent for her suite that she occupies on the property and, as a result, the PGT determined she would not be in a conflict of interest.
- In the Response to the Petition in March 2016 (Exhibit "L"), the Committee stated that the cottage on the property has been rented since 2008 and is leased for $1,350 per month. There are two rental suites in the main house: a one-bedroom suite on the main floor rented for $950 per month and a basement suite rented for $700 per month, for a total of

$3,000 per month for the appellant's estate. The Committee provides a number of services to the estate that take 20 hours per week, including lawn mowing, weeding, watering, pruning, fertilizing, and removal of trash, leaves, and snow.

- In July 2016, the Committee began receiving social assistance benefits and, in January 2017, she began to receive PWD benefits.
- In January 2017, the appellant's PWD benefits came under review by the ministry for a third time and the ministry decided that the rental income from the property was unearned income exceeding the amount allowable under the EAPWDR. The ministry stopped the appellant's PWD benefits in June 2017. Every month since June 2017, the net monthly rental income generated by the property has exceeded the amount of PWD benefits that the appellant would otherwise be entitled to and, as a result, he has received no benefits from the ministry since June 2017.
- The monthly fee for the appellant to remain at the group home is currently $921.13 plus additional expenses, which have been covered by the appellant's PWD benefits.
- As of November 2017, the appellant still owed $4,202.23 in outstanding monthly fees and additional expenses for the group home. She does not know what action the group home will take if the appellant's outstanding amount is not paid. She is concerned that the appellant's ability to remain at the group home may be at risk.
- Even if the appellant's net rental income is sufficient to pay the expenses which the PWD benefits would otherwise cover, all such payments will reduce the liquid funds that would otherwise be available to the appellant if an emergency were to occur or other unforeseen needs were to arise.

At the hearing, the Committee for the appellant stated:

- There was no discussion by the PGT about putting title to the property in trust for the appellant at the time of the purchase in 1995. She is not aware of any advice given to put the property into trust.
- She places the rental income into her own account and pays the property maintenance expenses from the account. She then makes an online transfer once per year of the rental income, net of expenses, into the account set up in trust for the appellant.

The advocates for the appellant made oral submissions at the hearing and provided an Outline for the Oral Argument, and also provided a Book of Authorities in support of their submissions, which will be reviewed under Part F- Reasons for Panel Decision, below.

The ministry relied on its reconsideration decision and also made oral submissions, relying on the decision of the federal court in *Singh v. Canada (Minister of Citizenship and Immigration),* which will be reviewed under Part F- Reasons for Panel Decision, below.

Admissibility of Additional Information

There were no objections by either party to the additional documents submitted and no objections raised by the ministry to the oral testimony provided on behalf of the appellant. The panel considered the Order of the BC Supreme Court dated February 28, 2007 appointing a Committee for the appellant, the Request for Reconsideration dated July 24, 2014 with Reasons dated August 21, 2014, and the Affidavit by the Committee for the appellant sworn December 14, 2017 as providing information about the nature of the appellant's interest in the property and the ministry's characterization of the income generated from the property, and was in support of information provided in the appellant's Request for Reconsideration, which was before the ministry at reconsideration. Therefore, the panel admitted the additional documents 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.*

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision, which found that the appellant was not eligible for disability assistance for the month of June 2017 pursuant to Section 9 of the EAPWDR due to rental income received in April 2017 as unearned income, which exceeded the appellant's disability assistance rate, was reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant.

The relevant sections of the legislation are as follows:

Section 1 of the EAPWDR defines "earned" and "unearned" income as:

"earned income" means

(a) any money or value received in exchange for work or the provision of a service,

(b) Repealed. [B.C. Reg. 197/2012, Sch. 2, s. 1 (a).]

(c) pension plan contributions that are refunded because of insufficient contributions to create a pension,

(d) money or value received from providing room and board at a person's place of residence, or

(e) money or value received from renting rooms that are common to and part of a person's place of residence.

"unearned income" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

(a) money, annuities, stocks, bonds, shares, and interest bearing accounts or properties;

(b) cooperative associations as defined in the Real Estate Development Marketing Act;

(c) war disability pensions, military pensions and war veterans' allowances;

(d) insurance benefits, except insurance paid as compensation for a destroyed asset;

(e) superannuation benefits;

(f) any type or class of Canada Pension Plan benefits;

(g) employment insurance;

(h) union or lodge benefits;

(i) financial assistance provided under the Employment and Assistance Act or provided by another province or jurisdiction;

(j) workers' compensation benefits and disability payments or pensions;

(k) surviving spouses' or orphans' allowances;

(l) a trust or inheritance;

(m) rental of tools, vehicles or equipment;

(n) rental of land, self-contained suites or other property except the place of residence of an applicant or recipient; . . .

Section 9 of the EAPWDR provides:

Limits on income

9 (1) For the purposes of the Act and this regulation, "income", in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Section 10 of the EAPWDR provides:

Asset limits

10 (1) The following assets are exempt for the purposes of subsection (2):

(a) clothing and necessary household equipment;

(b) one motor vehicle generally used for day to day transportation needs;

(c) a family unit's place of residence; . . .

(1.1) Despite subsection (1), assets described in subsection (1) (x) (ii) (A) are not exempt under subsection (1) (i), (j), (k), (l) or (m).

(2) A family unit is not eligible for disability assistance if the family unit has assets with a total value of more than the following:

(a) in the case of a family unit that includes one applicant or recipient who is designated as a person with disabilities, other than a family unit to which paragraph (b) applies, $100 000;

(b) in the case of a family unit that includes one applicant or recipient who is designated as a person with disabilities, and another applicant or recipient who has applied for and has not been denied designation as a person with disabilities, $200 000;

(c) in the case of a family unit that includes 2 applicants or recipients who are designated as persons with disabilities, $200 000.

(3) The minister may authorize one or more of the following:

(a) that the total cash surrender value of an uncashed life insurance policy of an applicant or recipient is not to be included as an asset of the family unit for the purposes of subsection (2) for the period specified by the minister;

(b) that saleable acreage and buildings owned by an applicant or recipient are to be treated as though they were the place of residence of the applicant's or recipient's family unit for the period specified by the minister.

Section 12 of the EAPWDR provides:

Assets held in trust for person with disabilities

12 (1) In this section, "disability-related cost" means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

(a) devices, or medical aids, related to improving the person's health or well-being,

(b) caregiver services or other services related to the person's disability,

(c) education or training,

(d) any other item or service that promotes the person's independence, and

(e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,

(i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and

(ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to $200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows:

(a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus

(b) any capital subsequently contributed to a trust referred to in paragraph (a),

is exempt for the purposes of section 10 (2) [asset limits].

(3) If the minister is satisfied that, because of special circumstances, the lifetime disability-related costs of a person referred to in subsection (2) will amount to more than $200 000, the minister may authorize a higher limit for the person for the purposes of subsection (2).

(4) A person referred to in subsection (2) who has a beneficial interest in one or more trusts must keep records of the following and make the records available for inspection at the request of the minister:

(a) for a trust created before April 26, 1996, the capital of the trust on that date;

(b) for a trust created on or after April 26, 1996, the capital of the trust on the date the trust was created;

(c) the amount of capital contributed in each subsequent year to a trust referred to in paragraph (a) or (b);

(d) all payments made after April 26, 1996 to or on behalf of the person from a trust in which that person has a beneficial interest.

(5) For the purposes of this section, the real or personal property of a "patient", as defined in the Patients Property Act, who is a person with disabilities is to be treated as if the real or personal property were held in trust for the patient by the patient's committee.

Section 24 of the EAPWDR provides:

Amount of disability assistance

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

Schedule A of the EAPWDR sets out the total amount of disability assistance payable as the sum of the monthly support allowance for a family unit matching the family unit of the applicant or recipient plus the applicable shelter allowance. In calculating the net income of a family unit under Schedule B, various deductions and exemptions from income are provided for but, otherwise, all earned and unearned income must be included.

Section 1 of Schedule B of the EAPWDR provides as follows:

When calculating the net income of a family unit for the purposes of section 24 (b) *[amount of disability assistance]* of this regulation, . . .

(b) any amount garnished, attached, seized, deducted or set off from income is considered to be income, except the deductions permitted under sections 2 and 6 of this Schedule,

(c) all earned income must be included, except the deductions permitted under section 2 and any earned income exempted under sections 3 and 4 of this Schedule, and

(d) all unearned income must be included, except the deductions permitted under section 6 and any income exempted under sections 3, 7 and 8 of this Schedule.

Section 6 of Schedule B of the EAPWDR provides as follows:

Deductions from unearned income

6 The only deductions permitted from unearned income are the following:

(a) any income tax deducted at source from employment insurance benefits;

(b) essential operating costs of renting self-contained suites.

Panel's decision

Although the appellant holds title to real property with an appraised value as of February 2016 of $1,450,000, the ministry's reconsideration decision does not relate to an excess of assets, but rather to net income derived from rental of portions of the subject property which exceeds the appellant's disability assistance rate. Pursuant to Section 1(d) of Schedule B of the EAPWDR, all unearned income must be included in the calculation of net income unless there is an allowed deduction or an amount is specifically exempted and, according to Section 1(n) of the EAPWDR, "unearned income" is defined to include "…rental of land, self-contained suites or other property except the place of residence of an applicant or recipient." The appellant does not dispute that the subject property is registered on title in his name and not in the name of the Committee or any other party as trustee, that rental income was generated from the rental of self-contained suites on the property, and that the property is not the appellant's place of residence as he resides in a care facility, or a group home.

The appellant argued in the Request for Reconsideration and at the hearing that, while the title to the property is in the appellant's name outright, in substance the property is held in a trust and, therefore, the income generated is income to the trust and not to the appellant, as was previously concluded by the ministry in the 2014 reconsideration decision. The panel finds that the ministry's interpretation of Section 12(5) of the EAPWDR in the reconsideration decision was reasonable, with a corollary conclusion that the previous 2014 reconsideration decision was founded on an erroneous interpretation of this section. As discussed in more detail below, the panel finds that the ministry is not bound by its own previous decisions by virtue of its statutory mandate to review the ongoing eligibility of recipients, which provides discretion to the ministry to come to different conclusions on similar facts at different times, or to correct a previous decision.

Section 12(5) of the EAPWDR stipulates that "for the purposes of this section," or for the purposes of exempting assets from the asset limit in Section 10 (2) of the EAPWDR, which specifies the value limits over which a person becomes ineligible for disability assistance, the real or personal property of a "patient", as defined in the PPA, who is a PWD, is to be "treated as if" the real or personal property were held in trust for the patient by the patient's Committee. The ministry wrote that the wording of Section 12(5) specifies that the property is to be treated as if it were held in trust, not that it is "deemed" to be held in a trust or that it "is" held in trust for the patient, and that this provision applies only for the purposes of considering the asset limit. The ministry wrote that the appellant's property, with a value of approximately $1,450,000, has been treated as if it were held in trust so that the appellant is not ineligible for disability assistance due to having assets with a value in excess of the applicable limit. There would be no need for this provision to treat the property "as if" it were held in trust for the purposes of the asset limit if the property were held in an actual trust simply by being owned by a patient.

Although the appellant argued that the ministry does not set out what the ministry considers a "true trust" to be, in the reconsideration decision the ministry wrote that the legal title to the property intended for the trust must be transferred to the trustee to hold on the terms of the trust in order for the property to be held in an actual trust, i.e. the "terms of the trust" would be set out in a written agreement for certainty of the trust provisions. The ministry acknowledged that the role of the Committee is to act on the patient's behalf, and includes making decisions on behalf of the patient, but the ministry argued that this is not sufficient to constitute a trust over real property.

The appellant argued that the ministry's approach is too narrow a view and that the language of the PPA and the common law demonstrate that a Committee in control of, or who holds or manages, a patient's property is in essence a trustee, which means that the patient's property is held in an actual, implied or constructive, trust even if the legal title to property is not in the trustee's name. The appellant argued that the management of the property has been overseen by the PGT, the PGT has been in possession and control of the property, since the property was purchased. The appellant argued that the court, in the decision in *Ng v. Ng, 2013 BCSC 97,* discussed the Committee being in essence a trustee for a person found to be incapable of managing his affairs and, in *Canada Permanent Trust Co. v. BC (Public Trustee*) 1984 CarswellBC 122, found that a guardian of the property of a person who is under an incapacity is a "trustee" in the broad sense of the term. While these decisions support finding that a Committee has fiduciary responsibilities to act in the best interests of the patient and, in this way, is like a trustee in a broad sense, the court also found that the Committee is not a trustee in a strict sense (*Canada Permanent* at paragraphs 8 and 14).

In the reconsideration decision, and in the oral submissions at the hearing, the ministry emphasized a crucial feature of the creation of a trust is for the legal title to the property to be transferred into the name of the trustee to be managed for the benefit of the beneficiary. In the Request for Reconsideration, the appellant argued that the management of the property by the PGT since it was acquired, and by the Committee since she was appointed in 2007 is in effect a trust even though the property has been held in the appellant's name throughout. However, when the property was acquired in 1995 from the settlement funds disbursed by the PGT, title to the property was in the name of the appellant and also in the name of the appellant's mother, who had not yet been appointed as the Committee, and her husband, with a mortgage for the amount of the interest of the appellant's mother and her husband in the property. At acquisition, only a portion of the property was in the appellant's name and it was not until the court order in1997 that the interest of the appellant's mother and her husband was transferred to the appellant.

The appellant argued that accountants have recently advised that to transfer the property to a trust at this time, capital gains tax between $100,000 to $150,000 would be triggered, as well as an additional $20,000 in capital gains tax, which neither the appellant nor his family is able to pay. The appellant wrote in the Request for Reconsideration that had the court or the PGT

been aware that the capital gains tax would become an issue when the property was initially acquired, the property could have easily been registered in the name of the trustee at that time. The panel notes that at the time of the purchase of the property in 1995 and again with the transfer into the appellant's name in 1997, there was an opportunity for the PGT and those caring for the appellant to obtain the specialized advice regarding the property that had been recommended as part of the financial plan for the financial settlement awarded to the appellant. The Affidavit of the PGT filed in support of the order transferring the interest in the property of the appellant's mother and her husband into the appellant' s name included a personal financial plan for the appellant dated May 1995 (Exhibit "D") that reviewed tax planning considerations with respect to the settlement amount of $1,425,000, and a statement at page 8 that "there are a number of other issues related to the real property that should be addressed and it is recommended that a lawyer with real property experience be retained to look at all issues related to the property." The appellant did not apply for PWD benefits until 2006 and the ministry emphasized at the hearing that, in any event, the ministry does not purport to give advice to applicants or recipients about establishing trusts and recommends that independent legal advice is obtained.

In the reconsideration decision, the ministry found that the income generated from rental of the appellant's property is not "earned income" as the appellant resides in a care facility and the property is not his place of residence. Section 1 of the EAPWDR defines "earned" income to include money or value received from providing room and board at a person's place of residence, or money or value received from renting rooms that are common to and part of a person's place of residence. While the appellant acknowledged that he does not live at the property, he argued that the ministry unreasonably failed to exercise the discretion provided by Section 10(3)(b) of the EAPWDR to consider the property to be the appellant's place of residence even though he no longer lives there. However, "earned income" must also be included in the appellant's net income and deducted from his disability assistance, although additional exemption amounts are available for earned income.

In the context of the asset limits of Section 10 of the EAPWDR, which specify the value limits over which a person becomes ineligible for disability assistance, sub-section (3)(b) stipulates that the ministry may authorize that "saleable acreage and buildings" owned by an applicant or recipient are to be treated "as though they were the place of residence" of the applicant's or recipient's family unit for the period specified by the ministry. The panel finds that this discretion allows the ministry to provide a time-limited exemption to the value of saleable acreage and buildings that might otherwise be considered to not fall within the exemption in Section 10(1)(c) of the EAPWDR for a "family unit's place of residence," the discretion is limited to the consideration of eligibility due to asset value, and the discretion is not applicable to the characterization of the type of income received from the property. The panel finds that the ministry was reasonable in not applying a provision for the exemption of an asset in order to change the characterization of the income from the property. If the legislature intended to grant the discretion to the ministry to modify the type of income received, appropriate wording could

be added to the definitions of "earned" and "unearned" income in Section 1 of the EAPWDR.

At the hearing, the appellant argued that the ministry did not provide adequate reasons in the reconsideration decision as it is legislatively required to do. The appellant referred to Section 72 of the EAPWDR and the requirement that the ministry provide a "written determination" and, in particular, the ministry did not address the appellant's request at reconsideration that the ministry's discretion be exercised under Section 10(3)(b) of the EAPWDR. The appellant argued that the ministry decision involves a serious matter as the appellant relies on the PWD benefits to pay the costs of his group home. The appellant relied on the court decision in *Via Rail Canada Inc. V. National Transportation Agency 2000 CarsellNat 2531,* as an articulation of the general requirement for the sufficiency of reasons for a decision maker to: set out the findings of fact and the principal evidence upon which those findings were based, address the major points in issue, set out the reasoning process followed, and show consideration of the main relevant factors (at paragraph 22). The appellant argued that the ministry having discretion is a major point and, by not addressing this issue in the decision, the ministry failed to give adequate reasons.

At the hearing, the ministry argued that the ministry met these requirements and covered the major points in issue, that the ministry's silence on the exercise of discretion under Section 10(3)(b) of the EAPWDR does not result in the reasons being inadequate. The ministry argued that Section 10(3)(b) was properly not considered in the reasons given the facts of the appellant's situation, the major point at issue was the appellant's argument based on trust law, and the right of appeal to the Tribunal to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the applicable enactment in the appellant's circumstances, pursuant to Section 24 of the *Employment and Assistance Act*. The panel notes that while Section 72 of the EAPWDR requires the ministry to provide a "written determination" of the ministry's reconsideration of a previous ministry decision referred to in Section 16(1) of the EAPWDA, there are no further requirements set out in the legislation for the content of the "determination" and it is not a final decision. The ministry wrote in the reconsideration decision that the subject property had previously been determined by the ministry to be an exempt asset pursuant to Section 12(5) of the EAPWDR, and the panel finds that the ministry reasonably concluded that it was not necessary, in this context, to also consider its discretion to temporarily exempt the asset under Section 10(3)(b) of the EAPWDR.

The appellant also argued that this is at least the third time that the issue has been decided by the ministry and the ministry should be estopped from re-deciding this matter again based on the doctrine of issue estoppel. The appellant argued that the first decision was in November 2011 when the ministry sent a letter to the Committee claiming the appellant had failed to declare rental income, which was subsequently dropped by the ministry, without the need for reconsideration. The appellant stated that the ministry made the same decision again in 2014 but reversed the decision through reconsideration and found that the subject property is held in

trust and the rental income is exempt as income earned by the trust and not by the appellant.

The appellant relied on the court decision in *Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44* as setting out the initial requirements for a judicial decision having been made, that: 1) the administrative authority is an institution capable of receiving and exercising adjudicative authority; 2) as a matter of law, the particular decision was one required to be made in a judicial manner; and, 3) as a mixed question of law and fact, the decision was made in a judicial manner. The appellant argued that the reconsideration officer, like the Employment Standards Officer in *Danyluk*, had adjudicative as well as investigative responsibilities since the decision must be based on a finding of fact and the application of the law, and the decision was made in a judicial manner notwithstanding the fact that there was no notice or an opportunity to be heard. The panel notes that, unlike the Employment Standards Officer in *Danyluk*, the ministry reconsideration officer is not an independent third party investigating and/or adjudicating two potentially adversarial sides to a dispute but, rather, is another representative of the ministry reconsidering an initial decision made by the ministry. The appellant also argued that the three preconditions to the operation of issue estoppel, set out in *Danyluk*, were satisfied since the August 26, 2014 reconsideration decision decided the same issue decided in this matter, the decision of the reconsideration officer was final, and the same parties are involved, namely the ministry and the appellant.

At the hearing, the ministry argued that rather than exercising a judicial function, the ministry reconsideration officer operates in an investigative or administrative capacity. The ministry referred to Seciton 10 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA), which provides an ongoing responsibility for the ministry to determine and audit eligibility for disability assistance and, in performing this inquisitorial role, the ministry may take various forms of action, including seeking or directing the supply of verification of any information previously provided to the ministry. The ministry emphasized that as the circumstances of a recipient may change over time, the ministry is entitled to perform periodic reviews to audit ongoing eligibility and this is an inquisitorial, not an adversarial role, that may yield different results at different points in time.

At the hearing, the ministry argued that the decision of the court in *Singh v. Canada (Minister of Citizenship and Immigration)[2006] F.C.J. No. 1869* is more applicable on the facts since the role of the federal Visa officer is more analogous to that of the reconsideration officer. The court found that, rather than being a party to the earlier decision, the role of the Visa officer was to assess each application on its merits regardless of what may have transpired in a previous application and was under no obligation to follow a previous Visa Officer's decision. The court found that although representatives of the same ministry, "...they are unique individuals who were called upon at a certain time and space to consider the Applicant's submissions" (at paragraph 19) and, therefore, the factors for issue estoppel were not present. The ministry argued that the decision with respect to the issue is not final because circumstances change and even the decision granting PWD designation can be reviewed every 2 to 3 years to ensure

that assistance is available to those persons who are eligible. The panel finds that the ministry reasonably determined that the previous reconsideration decision in 2014 is the result of an investigative function, is not a judicial decision, and issue estoppel does not apply to prevent the ministry from making a different determination at another point in time.

The appellant argued that the reconsideration decision amounts to an abuse of process, which doctrine is available where issue estoppel or cause of action estoppels might otherwise have applied but are inapplicable because of a failure to satisfy one or more of the technical requirements of these branches of *res judicata*, as established by the court in *Erschbamer v. Wallster, 2013 BCCA 76* (at paragraph 12). The appellant argued that it is an abuse process for the ministry to repeatedly revisit the same decision when the material facts have not changed and doing so would cause any reasonable person to conclude that the ministry has acted and continues to act in a capricious, inconsistent manner regarding the affairs of a person who is incapacitated and vulnerable, and is deserving of society's protection rather than administrative harassment every few years. The ministry argued that the abuse of process doctrine is an extraordinary consideration where the result is manifestly unfair and the ministry decision is in accordance with the ministry's administrative function of reviewing and auditing eligibility, as set out in the ministry's published policy and the legislation, and is not manifestly unfair. The panel notes that the facts in *Erschbamer* involved two court actions, by petition followed by a claim, and the court found that "abuse of process by relitigation" has sometimes been described as a rule against "litigation by instalment" (at paragraph 30), which is distinguishable from the present case, which involves two administrative decisions by the ministry in 2014 and in 2017. The panel finds that the ministry reasonably concluded that the reconsideration decision is not an abuse of process but rather the ministry correcting a prior decision.

The appellant argued that it is inconsistent with the intention of the legislature that a wealthy family with a family member who is a patient under the PPA, and with financial capacity to care for the patient entirely with its own resources, could avail itself of sophisticated legal advice, establish a trust and thus enable the patient to receive PWD benefits in the full monthly amount, while the appellant is faced with the prospect of either paying significant taxes neither he nor his family can afford, or losing his PWD benefits entirely on account of a technicality. The appellant argued at the hearing that if the members of the public had knowledge that the ministry brought the same matter up three times, with everything except the ministry players being the same, they would find that the administration of justice is being brought into disrepute. However, the appellant also wrote in the Request for Reconsideration that had the court or the PGT been aware that the capital gains tax would become an issue when the property was initially acquired, the property could have easily been registered in the name of the trustee at that time. Although asked at the hearing about the advice given at the time, the Committee did not offer an explanation for why a lawyer with real property experience was not retained to look at all issues related to the property, as was recommended in 1995 as part of the financial plan for the appellant's settlement of approximately $1,318,000.

The appellant did not dispute that the total amount of the rental income received from the property in April 2017 ($2,675), less a deduction for the essential operating costs of renting self-contained suites pursuant to Section 6 of Schedule B of the EAPWDR ($987.57), yielded a total net income of $1,687.43, which exceeded the appellant's assistance of $1,238.42. The appellant did not dispute that the exemptions in Sections 3 and 8 of Schedule B do not apply to the appellant's circumstances. Section 7 of Schedule B of the EAPWDR provides detailed exemptions that include payments from a trust that has been constituted with the formality required for real property, as previously discussed. The panel finds that the ministry reasonably determined that the exemption in Section 7 of the Schedule B does not apply in the appellant's circumstances as the subject property is owned by the appellant and is not held in an actual trust.

The panel notes that the use of the word "must" in Section 1(d) of Schedule B of the EAPWDR requires the ministry to include all unearned income in the calculation of the net income of a family unit, except for permitted deductions and applicable exemption amounts as specifically set out in the Schedule, and does not give the ministry the discretion to do otherwise. The panel finds that the ministry reasonably concluded that the amount of the appellant's net income exceeded the amount of assistance determined under Schedule A for the appellant's family unit and that, therefore, the appellant is not eligible for disability assistance for the month of June 2017, pursuant to Section 9 of the EAPWDR.

The panel finds that the ministry conclusion that the appellant is not eligible for disability assistance under section 9 of the EAPWDA is a reasonable application of the applicable enactment in the appellant's circumstances and confirms the decision pursuant to Section 24(1)(b) of the *EAA.* The appellant is therefore not successful in his appeal.