PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated August 8, 2016, which held that pursuant to section 5 of the *Employment and Assistance Regulations* (EAR) the appellant was not eligible for income assistance as a sole recipient with a dependent child, because he had not applied on behalf of his family unit which includes his spouse, who is his "spouse" and "dependant" as defined in sections 1(1) and 1.1(1)(a) of the *Employment and Assistance* Act (EAA).

PART D – RELEVANT LEGISLATION

EAA sections 1(1) and 1.1

EAR, section 5

PART E – SUMMARY OF FACTS

The information before the ministry at the time of reconsideration included the following:

- Standard Residential Tenancy Agreement dated October 30, 2011 for the appellant and his former spouse (the "spouse") indicating monthly rent of $1,450
- Email from the spouse to a physician dated April 5, 2014 indicating that her post-partum depression had worsened, that she had thought about harming herself, and inquiring about the status of the referral previously made to a psychiatrist
- The spouse's utility bill dated July 2, 2015
- Notice of Motion dated July 21, 2015 indicating that the appellant was seeking a protection order and Affidavit of the appellant sworn July 21, 2015
- Supreme Court of British Columbia Notice of Family Claim filed by the spouse July 29, 2015 (the "Notice") indicating that the appellant and the spouse began to live together in a marriage-like relationship on December 1, 2011, were married on August 20, 2011 and separated on July 29, 2015. The Notice indicates that the spouse was seeking an order for divorce, an order respecting the child, an order relating to family property and family debt and another order. In Schedule 1 of the Notice, the spouse indicates that the appellant and the spouse have lived separate and apart in the family residence since July 29, 2015
- Letter from the spouse's lawyer to the appellant dated July 31, 2015 indicating that the spouse intended to bring a short-notice application the following week to set parenting arrangements for the child. Schedule 1 also indicates that the child resides with both the appellant and the spouse in the family home
- Joint bank account for the appellant and the spouse from July 14 to September 1, 2015 (the "Joint Account")
- Letter from a bank manager dated September 1, 2015 indicating that the appellant holds two accounts with attached statement for the Joint Account from June 30 to August 21, 2015 and advising that the other account was opened on September 1, 2015 so no transactions had occurred to date
- Notification to the appellant from an electric company dated September 2, 2015 indicating that the appellant registered for an online account;
- Appellant's Application for Income Assistance dated September 9, 2015 for family type single person with dependant indicating that the appellant is separated with a date of separation being July 29, 2015
- Appellant's confirmation of permanent residence status
- Letter from a bank manager dated September 10, 2015 confirming that the appellant no longer holds the Joint Account with the spouse
- Letter from the ministry to the appellant dated November 4, 2015 requesting various information and documentation for eligibility review;
- Letter from the appellant dated November 8, 2015 attaching the appellant's rent receipts for October 1 and November 1, 2015 in the amount of $725 each; utility bills dated October 1 and November 2, 2015, cell phone account information, bank account activity from September 1 to November 6, 2015;
- Letter from the ministry to the appellant dated November 23, 2015 indicating that the information requested on November 4, 2015 had not been received
- Letter from the appellant dated November 30, 2015 confirming delivery of an 18 page response letter on November 20, 2015
- Letter from the ministry to the appellant dated December 10, 2015 requesting further information for eligibility verification including statements for all bank accounts, sole or joint, for the period of September 1, 2015 to current for the appellant's bank account
- Letter from the ministry to the appellant dated February 19, 2016 indicating that income verification is required
- Appellant's Canada Child Benefits Application dated March 29, 2016 indicating that the appellant is separated and has one child
- Letter from the appellant to the ministry dated April 22, 2016 advising that he does not have any pension from another country, that he has not applied for Canada Pension Plan (CPP) and that he seeks a reconsideration of the ministry's decision. The appellant also attached his 2015 income tax return indicating his marital status was separated
- Email from the appellant's landlord to the ministry dated May 21, 2016 attaching a copy of the lease and advising that 3 people were living there since December 2011 which included 2 adults (the appellant and one other) and a child
- Appellant's May 2016 rent receipt in the amount of $725

- Appellant's bank account activity from March 24 to June 3, 2016
- Letter from the appellant to the ministry, undated indicating that he is separated and preparing for divorce proceedings from his former spouse and stating that he has had not physical or emotional relationship with his former spouse since August 2015 and that he is the full-time carer of his daughter. The appellant states that he has attached his bank account activity for the last 60 days and that he only has two accounts being a bank account and a new prepaid Visa card which was activated around May 3, 2016
- Ministry notes dated May 26, 2016 regarding communications between the appellant and the ministry regarding the appellant's June 2016 income assistance benefits;
- Bank Profile form dated June 3, 2016 indicating that the appellant had one personal chequing account
- Letter from a bank manager dated July 7, 2016 indicating that the appellant was removed as an account holder from the Joint Account on September 10, 2015 and the Joint Account was formally closed by the spouse on November 12, 2015
- Appellant's Request for Reconsideration form (RFR) dated July 22, 2016 and letter explaining the reasons he disagreed with the ministry's decision that he was ineligible for income assistance on the basis that he was in a dependency relationship

Additional information provided

In his Notice of Appeal dated August 19, 2016 the appellant states that the ministry has not given full and due consideration to the facts and circumstances in which the appellant finds himself.

Prior to the hearing, the appellant provided three further submissions as follows:

- Submission dated October 4, 2016 (the "Submission") (5 pages) with attached Safety Plan dated September 12, 2016, Canada Revenue Agency form titled "View and update children in my care", document titled "Source: Canadian Legal Maxims", and a document tilted "Words and Phrases"
- Submission, (one page) undated ("Additional Submissions")
- Submission provided March 4, 2018 (the "2018 Submission"), 12 pages, and the appellant's Affidavit #2 made December 9, 2016 with copies of the Notice of Motion and Affidavit made July 21, 2015

Email from the ministry dated October 7, 2016 including the previous policy (Living Arrangements) and the current policy (Family Composition) effective September 21, 2016 outlined on the BCEA Policy and Procedures Manual (the "Ministry Submission").

At the hearing, the appellant's counsel argued the appellant's position on his behalf as set out in the Submission, the Additional Submissions and the 2018 Submission. The appellant also provided oral testimony regarding his circumstances, restating the information provided before reconsideration and as set out in the Affidavit #2. The appellant stated that the spouse moved out in September 2016 as per the Safety Plan and has not returned. He stated that there is a 7-day trial to take place in March 2018 where he and the spouse are seeking final parenting and support orders and a divorce order. The appellant stated that he and the spouse lived separate and apart with him and the child living in the upstairs level of their home. The appellant stated that he had a large wardrobe area in his room upstairs and he turned that into a room for the child. The appellant stated that he used a locked gate to separate the upstairs and downstairs living spaces and that the gate kept the child in the upstairs level. The appellant's counsel stated that the locked gate also represented the symbol of separation.

The appellant stated that prior to their separation, he and the spouse paid their rent together by one cheque but after their separation, as of August 2015, he would provide one cheque for his half of the rent and the spouse would provide her own cheque for her half of the rent. The appellant stated that when they separated, the spouse unilaterally shut down their joint account and his access to that account, requiring his application for income assistance. The appellant stated that he re-applied for income assistance in September 2016 after the spouse moved out pursuant to the Safety Plan and that he has been receiving income assistance ever since. The appellant stated that the context of his living situation is important as he was totally dependent on the spouse, that he was subjected to physical and emotional abuse from the spouse, all of his family were in another country, and he could not work to earn income and move out with the child to another residence.

Admissibility of New Information

The ministry did not object to the appellant's new evidence and the appellant did not object to the Ministry Submission.

The panel has admitted the Ministry Submission as argument.

The panel has admitted the information in the appellant's Notice of Appeal, the Submission, the Additional Submissions, the 2018 Submission and the oral testimony of the appellant and his advocate as argument. The panel has admitted the Safety Plan into evidence pursuant to section 22(4)(b) of the EAA as it is information in support of information that was before the ministry at the time of reconsideration. As the Notice of Motion and Affidavit made July 21, 2015 were previously provided, they are not new evidence.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision, which held that the appellant was ineligible for income assistance as a sole recipient with one dependent child, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. In particular, was the ministry reasonable in concluding that the appellant had not applied for income assistance on behalf of his family unit, including a dependant spouse, as required by EAR section 5, and as defined in sections 1(1) and 1.1(1) of the EAA?

Relevant Legislation

EAA

Interpretation
(1)In this Act:

"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;

"family unit" means an applicant or a recipient and his or her dependants;

(2)The Lieutenant Governor in Council may prescribe other circumstances in which a child is a dependent child of a parent for the purposes of this Act.

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.

EAR

Applicant requirements

5 (1)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.

Ministry's position

The ministry's position, as set out in the reconsideration decision, and as relied on by the ministry, is that the appellant's family unit included the spouse and the child. The reconsideration decision indicates that the spouse is considered part of the family unit under the EAA because the appellant and the spouse were residing together at the same home and were married to each other. The ministry's position is that EAA defines a "family unit" as a recipient and his "dependants", which includes a "spouse", meaning a person who resides with the appellant and is married to the appellant.

The reconsideration decision indicates that it reviewed the appellant's information provided in the RFR regarding his circumstances and reasons that the appellant states that the definition of a dependent as set out in the EAA does not apply to him. The ministry's position is that the residential tenancy agreement verifies that the lease is in both the appellant's and the spouse's names and that they are legal tenants despite the appellant's comments that they live independently and in separate living spaces within the residence with a gate in the staircase. The reconsideration decision notes that although the appellant states that he cannot force the spouse to move and the landlord would not agree to change the locks to prevent the spouse from entering because she is a legitimate tenant, this indicates to the minister that the appellant and the spouse both reside in living spaces that require a common key to enter. The reconsideration decision also indicates that the Notice confirms the appellant's daughter is a child of the marriage and "resides with both parties in the family home". The ministry's position is that based on the tenancy agreement, court documents, and the appellant's statements, the minister is satisfied that the appellant resides together with the spouse.

The reconsideration decision indicates that the Notice confirms that the appellant and the spouse were married on August 20, 2011 and that in the RFR the appellant does not dispute that he and the spouse are still married, and that he is awaiting his formal divorce. The ministry's position is that based on the court documents and the appellant's statements, the minister is satisfied that the appellant and the spouse are married to each other.

The ministry's position is that the appellant resides with the spouse and is married to her so their relationship meets the definition of a dependent spouse under sections 1(1) and 1.1(1)(a) of the EAA. The ministry's position is that as per section 5 of the EAR, the appellant is ineligible for income assistance as a sole recipient with a dependent child because he did not apply on behalf of his family unit, which includes the spouse.

Appellant's position

The appellant's position is that although he is still legally married to the spouse, they have been separated since July 29, 2015 and are waiting for a divorce. The appellant's position is that the spouse moved out of their home with the child on July 29, 2015 but moved back into the home in September 2015 against his wishes. The appellant did not believe he had legal grounds to evict the spouse and he could not afford to move elsewhere with the child, so they created separate living spaces in the family home to the greatest extent possible in their circumstances. The appellant's evidence is that the family home had two levels, with the upstairs containing two bedrooms and a bathroom and the downstairs level containing a kitchen, living room, and solarium. As set out in the 2018 Submission, the appellant and the child lived and slept in the upstairs level and the spouse lived and slept in the downstairs level, and that the two levels were separated by a locked gate. The appellant's evidence is that

he did not enter the downstairs living space except to use the kitchen and that he did not use the kitchen at the same time as the spouse. His evidence is that the spouse did not enter the upstairs living space except to use the bathroom and that she did not enter the bedrooms at all. The appellant's position is that he and the spouse separated their finances and the spouse stopped financially supporting him and refused to pay him child and spousal support.

The appellant's evidence is that the spouse continued to be physically, emotionally and verbally abusive towards him and the child so her parenting time was restricted to one hour each evening. Due to concerns regarding the spouse's behaviour the Ministry of Children and Family Development (MCFD) became involved with the family starting October 2015 and on September 12, 2016 the appellant and the spouse agreed to an MCFD Safety Plan pursuant to which the spouse moved out of the family home and has not returned since. The appellant's position is that he and the spouse have a 7-day trial commencing in the near future to obtain final parenting and support orders, as well as a divorce order.

The appellant's position is that at the time of the reconsideration decision, the term "residing together" was not defined in the legislation, regulations, or policy. The ministry's Living Arrangements Policy applied to the definition of the family unit generally. The appellant argues that the ministry's reliance on the dictionary definition of "residing together" was unreasonable because it did not comply with the principles of statutory interpretation found in the common law and the *Interpretation Act* as the ministry did not construe the enactment as being remedial or give the legislation the fair, large and liberal construction and interpretation as required.

The appellant's position is that since the interpretation of "residing together" determines whether married persons are treated as each other's dependent, it should be interpreted so that it only captures true dependency relationships. The appellant's counsel argued, as set out in the 2018 Submissions, that it cannot be assumed that a person can rely on their estranged spouse for financial support just because they are married and living at the same address. The reality is that married persons often sever their social and economic interdependence upon separation, not divorce. The appellant also argues that the ministry should interpret the term "residing together" in a similar manner to its approach to determining whether unmarried persons are in a dependency relationship, which is when the information indicates that there is sufficient social and economic interdependence.

The appellant's position is that the way other benefits-conferring regimes treat estranged spouses also provides important context to the interpretation of the term "residing together". The 2018 Submissions indicate that regimes such as the *Family Law Act*, the *Divorce Act*, the *Income Tax Act*, and the Canada Pension Plan treat married persons living "separate and apart" under the same room as single persons for important policy reasons including:

a. Estranged spouses often cannot afford to maintain two households;
b. It is difficult to legally evict a spouse except in exceptional circumstances;
c. Estranged spouses often sever their social and economic interdependence upon separation, not divorce and that one spouse may completely withdraw financial support from the other, as occurred in the appellant's situation
d. It takes a minimum of one year (and often much longer) to obtain a divorce order in our current justice system; and
e. The assumption that one spouse will support the other spouse until divorce, because of moral/religious obligation, is antiquated and does reflect lived experience. Where that assumption is used to deny a benefit, it exacerbates the adverse economic impacts of marital breakdown.

The appellant's position is that although the Determination of Residing Together Policy was not in effect at the time of the reconsideration decision, it should be given significant weight in interpreting the term "residing together", and that it supports the nuanced definition found in the policy, which distinguishes between multiple scenarios where married persons are living "separate and apart" under the same roof. The appellant's position is that as he and the spouse maintained separate living areas to the greatest extent possible, had the intent of maintaining separate living areas, were sharing accommodation temporarily because of an emergency (family crisis including his inability to evict the spouse despite her abuse), and awaiting a divorce, the ministry's reconsideration decision did not adequately consider all of his circumstances.

The appellant's position is that the EAA, as social welfare legislation, is remedial in nature and should be given such a fair, large and liberal interpretation as to achieve its purpose and that any ambiguity should be resolved in

the appellant's favour as per *Hudson v British Columbia (Employment and Assistance Appeal Tribunal),* 2009 BCSC 1461 and *Abrahams v. Canada (Attorney General)*, 1983 CanLII 16 (SCC).

Panel Decision

In this case, there is no dispute that the appellant and the spouse are "spouses" as defined in section 1.1(1) of the EAA as they were still married at the time of reconsideration. The issue is whether the spouse is a spouse who "resides with" the appellant and is therefore a dependant as defined in section 1(1) of the EAA.

At the time of reconsideration, the term "residing together" was not defined in the legislation, regulations, or policy. The Living Arrangements Policy does not specify how the term "residing together" should be assessed as between married persons but states that "...*when two persons live together and there is no acknowledgement that a dependency, spousal, or marriage-like relationship exists, staff must assess the nature of the relationship to determine if a marriage-like relationship exists*". The ministry's Determination of Residing Together Policy became effective September 21, 2016 and it states that "resides with" refers to sharing the same living space, and includes a person who ordinarily resides with the applicant or recipient but is away from the home for periods of time for employment. The Determination of Residing Together Policy also states that a person living at the same address but in a separate living area (such as a self-contained suite) is not considered as residing with the applicant or recipient. The Determination of Residing Together Policy also provides a few examples of what a separate living space may include, such as a basement with separate living or sleeping quarters or a separate structure on the same property, both of which are spaces created with the intent of maintaining a separate living space.

Counsel for the appellant argued that while the Determination of Residing Together Policy was not in effect at the time of the reconsideration decision, it should be given significant weight in interpreting the term "residing together". Counsel for the ministry agreed that the panel could consider the Determination of Residing Together Policy and recognize that the ministry was applying the factors considered in the Determination of Residing Together Policy even though it was not yet in effect, but that the panel should find that the decision was reasonable. Although both the appellant and the ministry indicated that the Determination of Residing Together Policy should be considered, the panel is of the view that it does not have the jurisdiction to consider this policy as it was not in effect at the time the reconsideration decision was made.

Counsel for the appellant argues that the ministry applied a strict dictionary definition of the term "resides with" to limit the interpretation of that term to refer to a physical presence in the same building but counsel for the ministry argued that the ministry considered the issue based on the evidence before it at the time of reconsideration. In particular, counsel for the ministry argued that the ministry was reasonable in placing a lot of weight on the fact that the appellant and the spouse had a co-equal right to the townhouse.

The panel finds that the ministry was not reasonable in determining that the spouse was the appellant's "dependant" and that she resided with the appellant as defined by EAA section 1(1). While the reconsideration decision reviews the information provided by the appellant regarding his living arrangements, it concludes that based on the tenancy agreement, court documents and the appellant's statements, the ministry is satisfied that the appellant resides together with the spouse. The reconsideration decision specifically points to the fact that the Notice indicates that the child "resides with both parties in the family home" and relies on that to support its conclusion that the appellant and the spouse reside together. The ministry representative argued that the ministry placed a lot of weight on the appellant and the spouse's co-equal right to the family home and that the reliance on the information in the Notice that the child "resides with both parties in the family home" was reasonable to determine that the spouse was the appellant's dependent as defined in EAA section 1(1).

However, the reconsideration decision does not indicate that it considered the other information in the Notice which indicates that the appellant and the spouse were married on August 20, 2011, separated on July 29, 2015, and seeking an order for divorce and an order relating to family property and family debt. In addition, the reconsideration decision does not indicate that it considered the information in Schedule 1 of the Notice, which also indicates that the appellant and the spouse have lived separate and apart in the family residence since July 29, 2015. The panel finds that the ministry was unreasonable in selecting one piece of information in the Notice (being the information that the child "resides with both parties in the family home" to support a finding of ineligibility for income assistance but not giving equal weight to the other information in the Notice which clearly indicates that the appellant and the spouse have lived separate and apart in the family residence since July 29, 2015. The

information in the Notice also supports the other information provided by the appellant in the RFR and Affidavit #2, in which he sets out all the ways in which the intention to live separate and apart in the same residence was created by separating the living spaces to the greatest possible extent possible.

The reconsideration decision summarizes some of the information provided by the appellant but it does not provide an explanation of why the appellant's evidence as to his efforts to live separate apart in the same residence, sever marital obligations (including filing income tax return as separated), and separate finances (including rent and bank accounts), were not considered in the determination of whether the appellant resides with the spouse.

The panel finds that as the term "resides with" in section 1(1) of the EAA is not defined, it must be interpreted in a fair and liberal manner. In the Submission, the appellant provided the document titled "Source: Canadian Legal Maxims" with various maxims pertaining to the phrases "residing with spouse", "living separate and apart", "living with", "as a spouse", "spouse" and "separation". The document indicates that in *Caplette v Saskatchewan Government Insurance* 2011 SKCA 69, 2011 the court held that the *"[t]he word 'residing' in the definition of spouse must be read as meaning that are 'not living separate and apart' as is intended to convey the continuity of the marriage relationship*". The appellant provided considerable evidence indicating that he made reasonable efforts to respond to the ministry's requests for information and documentation regarding his living situation, which demonstrated that he and the spouse were not continuing the marriage.

The panel finds that as the term "resides with" is not defined in the legislation and is considered broadly in the context of other legislation, the ministry's decision was unreasonable and that it did not interpreted the term in a broad and liberal manner that included consideration of the nature of the relationship between the appellant and the spouse rather than simply physical occupancy. Although the appellant and the spouse had a co-equal right to the family home as per the tenancy agreement, the panel finds that the ministry did not reasonably take into account the information in the Notice combined with the appellant's other evidence as to how the separate living spaces were created in reaching its decision. The panel finds that the ministry did not apply the legislation in a fair, large and liberal manner as required, particularly when there is no indication that the ministry did not accept or believe the information provided by the appellant.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for income assistance as a sole applicant with one dependent child as he had not applied on behalf of his family unit as required by section 5 of the EAR was not reasonably supported by the evidence and was not a reasonable application of the applicable enactment, and therefore rescinds the decision. The appellant is successful in his appeal.