

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated June 22, 2018 which found that a monthly annuity that the Appellant received as a result of an ICBC settlement met the definition of unearned income under section 1 of the Employment and Assistance for Persons With Disabilities Regulation (EAPWDR) and was not exempt from disability assistance and therefore must be deducted in accordance with Section 24 of the EAPWDR.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 5
EAPWDR Sections 1, 12(1) and 24, Schedule A Sections 1, 2, and 4, and Schedule B Sections 1, 6, and 7

PART E – SUMMARY OF FACTS

The Appellant is a disability assistance recipient with a dependent spouse who has a Persons with Disabilities (PWD) designation and one dependent child.

The evidence before the Ministry at the time of the Reconsideration Decision included:

1. Request for Reconsideration, dated May 25, 2018, in which the Appellant:
 - asked the Ministry to consider his disability payments to be exempt as the annuity is payment for personal injury and not wage loss;
 - stated that the annuity is part of a settlement agreement with a defendant in relation to a claim for damages;
 - stated that, unlike Canada Pension Plan (CPP) payments, which are taxable and therefore qualify as unearned income, these annuity payments are not subject to income tax and should therefore be considered exempt;
 - stated that the annuity, which is “owned by the (Insurance corporation of British Columbia) [ICBC]” can be collapsed at any time;
 - pointed out that not all Workers Compensation Board (WCB) unearned income is treated the same by the Ministry as some WCB temporary wage loss replacement payments are exempt from income;
 - argued that the Ministry has decided not to make the annuity payments exempt because he was in the process of applying for PWD status but had not yet been designated as a PWD; and,
 - argued that the legislation must be followed but there are exemptions to every rule and he should qualify for an exemption to the rules in this instance.
2. Three page document dated September 14, 2007 and written by the Appellant explaining how his disability has affected his life;
3. Three page medical diagnosis prepared on April 2, 1997 by a Psychologist in the Psychology Department of a rehabilitation society;
4. Letter from a structured settlement company dated April 24, 2015 advising the Appellant that ICBC has purchased an annuity to pay his disability benefits monthly in the amount of \$1,014.50 commencing on May 1, 2015 for the duration of his disability or until he reached the age of 65; and
5. Structured annuity payment schedule dated March 27, 2015 showing the monthly, yearly and cumulative amounts of a 22 year annuity in the amount of \$1,014.50 per month, with a final lump sum payment of \$958.75 at the end of the 22 year period.

Additional Information

In his Notice of Appeal (NOA) dated June 26, 2018, the Appellant did not indicate why he disagreed with the Ministry's Reconsideration Decision. In a separate submission received by the Employment and Assistance Appeal Tribunal on July 17, 2018 and provided to the Ministry on that date (the Subsequent Submission), the Appellant stated that he disagreed with the Ministry's Reconsideration Decision for a number of reasons, including the following:

- The annuity was considered by the Ministry to be exempt for almost one full year before the Ministry decided that it was not exempt and considered unearned income;
- Deduction of the annuity from the Appellant's disability assistance amount was a breach of his human rights which caused his family unit undue hardship;
- While the legislation requires that an annuity must be non-transferrable, non-communicable and non-assignable to be exempt from unearned income, the annuity in question is not owned by the Appellant, is only communicable and assignable by ICBC, and had to be transferable for ICBC to set up an annuity in the first place;
- The Appellant is receiving an income stream from an annuity to facilitate non-pecuniary loss or the cost of future care and as such should not be considered “income”;

- ICBC chose to purchase a structured annuity from a life insurance company for the Appellant as part of his disability benefit. He did not receive a lump sum payment at the time of his accident and the Appellant has no control over the funds or how they are dispersed, as ICBC can collapse the annuity at any time;
- While legislation allows for a Registered Disability Savings Plan and a disability savings account to be considered exempt in determining the disability allowance available to a PWD, the annuity is not exempt;
- Without the exemption the family unit does not have sufficient financial resources to cover its living costs;
- In 2016 the Provincial Government allowed single parents to continue to include employment insurance maternity benefits among the payments that are excluded from the calculation of income for the purpose of determining assistance eligibility and annuity payments should also be excluded;
- The Appellant has no financial resources other than the structured annuity and he will never be able to apply for CPP benefits;
- The legislation allows money to be considered an exempt asset if it is equity in the form of an investment or other financial asset and there is no way to know what the Appellant's future disability-related costs will be; and
- The legislation allows for the exemption of lump sum ICBC payments or settlements for PWD, but not monthly disbursements, which makes no sense.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "oral and written testimony in support of the information and records" before the Ministry when the decision being appealed was made, i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of a panel established under section 24 of the EAA: to determine whether the Ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the Ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Ministry did not object to the admissibility of the information contained in the Subsequent Submission. The Panel considered the information in the Subsequent Submission to be argument.

Oral Evidence Presented at the Hearing

At the hearing, the Appellant was represented by his spouse (the Spouse). The Spouse noted that the Ministry's Reconsideration Decision indicated that it had completed its review of the annuity on September 14, 2017 "and wrote a letter to (the Appellant)" notifying him that "all payments made from the annuity ... are within the definition of 'unearned income' and as the annuity is assignable, commutable and transferable at ICBC's request, do not fall within the scope of the exemption for structured settlement payments set out in section 7(2) of Schedule B of the (EAPWDR) ...". Despite the statement that a letter was written on September 14, 2017, the Spouse indicated that the Appellant did not receive notification of the Ministry's decision until May 2018.

The Spouse explained that following the motorcycle accident in 1990, the Appellant's mother had made a decision on behalf of the Appellant, who was in a coma for 18 days following the accident, that he would receive a structured settlement rather than a lump sum payment. The Spouse stated that 95 percent of these types of settlements are for wage loss, but in this case the annuity was meant to be compensation for pain and suffering as the Appellant had not worked and will never be able to work, and that as a result he will never qualify for CPP benefits. The Spouse also emphasized that the annuity payments were not taxable and that, except for one adjustment of approximately \$0.50 per month received a number of years ago, the monthly payments were not indexed for inflation. The Spouse

explained the difficulties the family unit experienced because the annuity payments were not considered by the Ministry to be exempt from unearned income, and that every month they had to “scramble for food” as they ran out of funds after three weeks, and did not qualify for food bank benefits.

She also stated that the annuity payment was considered a personal injury claim, but that no other party was deemed to be at fault and that the settlement was reached a year after no fault insurance was introduced in BC. She stated that they had asked ICBC if there was any way to make the structured settlement non-assignable, non-commutable or non-transferable, and was told that it would not be possible because it had to be in the form of an annuity with the underlying asset owned by ICBC “to protect” the Appellant. The Spouse also explained that the annuity was only payable to the Appellant until he turns 65, and that none of his heirs would receive any payments in the event of his death before the age of 65.

At the hearing, the Ministry relied on its Reconsideration Decision and explained the reason for the delay in notification of the Ministry’s original decision. The Ministry stated that it had neglected to mail the letter to the Appellant following its decision in September 2017 and that it was not until May 2018 that the Ministry realized that it had not notified the Appellant of its decision. The Ministry also stated that there would be no recovery of the amounts that were not deducted from the Appellant’s assistance paid between September 2017 and May 2018 as the overpayment was the result of an error on the Ministry’s part and that Ministry policy was to not “clawback” payments to clients resulting from Ministry errors.

The Ministry also emphasized that the settlement was considered unearned income and not the Appellant’s asset because its review had determined that ICBC owned the asset based on the information provided by the structured settlement company in its letter dated April 24, 2015, i.e. “This structured settlement is owned by (ICBC) with payments directed to (the Appellant). This policy is assignable, commutable and transferable at ICBC’s request.” The Ministry also stated that it did not have discretion to vary the legislation.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's decision, which found that the monthly annuity that the Appellant received as a result of an ICBC settlement met the definition of unearned income under section 1 of the EAPWDR and was not exempt from disability assistance and therefore must be deducted in accordance with Section 24 of the EAPWDR, is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the Appellant.

The relevant Section of the EAPWDA is as follows:

Disability assistance and supplements

5 Subject to the regulations, the minister may provide disability assistance or a supplement to or for a family unit that is eligible for it.

The relevant Sections of the EAPWDR are as follows:

Definitions

1(1) In this regulation: ...

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

- (a) ... annuities ... ; ...
- (d) insurance benefits, except insurance paid as compensation for a destroyed asset; ...
- (t) any other financial awards or compensation; ...

Temporary exemption of assets for person with disabilities or person receiving special care

12.1(1) In this section, "**person receiving special care**" means a person who is receiving accommodation or care in a private hospital or special care facility, other than a drug or alcohol treatment centre.

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

Disability Assistance Rates

(section 24 (a))

Maximum amount of disability assistance before deduction of net income

1(1) Subject to this section and sections 3 and 6 to 9 of this Schedule, the amount of disability assistance referred to in section 24 (a) [*amount of disability assistance*] of this regulation is the sum of

- (a) the monthly support allowance under section 2 of this Schedule for a family unit matching the family unit of the applicant or recipient, plus
- (b) the shelter allowance calculated under sections 4 and 5 of this Schedule ...

Monthly support allowance

2(1) A monthly support allowance for the purpose of section 1 (a) is the sum of

- (a) the amount set out in Column 3 of the following table for a family unit described in Column 1 of an applicant or a recipient described in Column 2, plus
- (b) the amount calculated in accordance with subsections (2) to (4) for each dependent child in the family unit.

Item	Column 1 Family unit composition	Column 2 Age or status of applicant or recipient	Column 3 Amount (\$)
6	Two applicants / recipients and one or more dependent children	One applicant / recipient is a person with disabilities, the other is not a person with disabilities and is under 65 years of age	1,021.56

Monthly shelter allowance

4(2) The monthly shelter allowance for a family unit to which section 14.2 of the Act does not apply is the smaller of

- (a) the family unit's actual shelter costs, and
- (b) the maximum set out in the following table for the applicable family size:

Item	Column 1 Family Unit Size	Column 2 Maximum Monthly Shelter
3	3 persons	\$660

Schedule B
Net Income Calculation
(section 24 (b))

Deduction and exemption rules

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

- (a) the following are exempt from income:

- (i) any income earned by a dependent child attending school on a full-time basis; ...
- (iv) a family bonus, except the portion treated as unearned income under section 10 (1) of this Schedule;
- (iv.1) the Canada child benefit, except the portion treated as unearned income under section 10 (1) of this Schedule;
- (v) the basic child tax benefit;
- (vi) a goods and services tax credit under the Income Tax Act (Canada);
- (vii) a tax credit under section 8 [refundable sales tax credit], 8.1 [low income climate action tax credit] or 8.2 [BC harmonized sales tax credit] of the Income Tax Act (British Columbia);
- (viii) individual redress payments granted by the government of Canada to a person of Japanese ancestry;
- (ix) individual payments granted by the government of Canada under the Extraordinary Assistance Plan to a person infected by the human immunodeficiency virus;
- (x) individual payments granted by the government of British Columbia to a person infected by the human immunodeficiency virus or to the surviving spouse or dependent children of that person;
- (xi) individual payments granted by the government of Canada under the Extraordinary Assistance Plan to thalidomide victims;
- (xii) money that is
 - (A) paid or payable to a person if the money is awarded to the person by an adjudicative panel in respect of claims of abuse at Jericho Hill School for the Deaf and drawn from a lump sum settlement paid by the government of British Columbia, or
 - (B) paid or payable to or for a person if the payment is in accordance with the settlement agreement approved by the Supreme Court in Action No. C980463, Vancouver Registry;
- (xiii) the BC earned income benefit;
- (xiv) money paid or payable under the 1986-1990 Hepatitis C Settlement Agreement made June 15, 1999, except money paid or payable under section 4.02 or 6.01 of Schedule A or of Schedule B of that agreement;
- (xv) a rent subsidy provided by the provincial government, or by a council, board, society or governmental agency that administers rent subsidies from the provincial government; ...
- (xvii) money paid or payable to a person in settlement of a claim of abuse at an Indian residential school, except money paid or payable as income replacement in the settlement;
- (xviii) post adoption assistance payments provided under section 28 (1) or 30.1 of the Adoption Regulation, B.C. Reg. 291/96;
- (xix) a rebate of energy or fuel tax provided by the government of Canada, the government of British Columbia, or an agency of either government;
- (xx) money paid by the government of British Columbia, under a written agreement, to a person with disabilities or to a trustee for the benefit of a person with disabilities to enable the person with disabilities to live in the community instead of in an institution; ...

(xxii) payments granted by the government of British Columbia under section 8 [agreement with child's kin and others] of the Child, Family and Community Service Act;

(xxiii) payments granted by the government of British Columbia under the Ministry of Children and Family Development's At Home Program; ...

(xxv) payments granted by the government of British Columbia under an agreement referred to in section 93 (1) (g) (ii) of the Child, Family and Community Service Act, for contributions to the support of a child;

(xxvi) a loan that is

- (A) not greater than the amount contemplated by the recipient's business plan, accepted by the minister under section 70.1 of this regulation, and
- (B) received and used for the purposes set out in the business plan;

(xxvii) payments granted by the government of British Columbia under the Ministry of Children and Family Development's

- (A) Autism Funding: Under Age 6 Program, or
- (B) Autism Funding: Ages 6 — 18 Program; ...

(xxix) payments made by a health authority or a contractor of a health authority to a recipient, who is a "person with a mental disorder" as defined in section 1 of the Mental Health Act, for the purpose of supporting the recipient in participating in a volunteer program or in a mental health or addictions rehabilitation program;

(xxx) a refund provided under Plan I as established under the Drug Plans Regulation;

(xxxi) payments provided by Community Living BC to assist with travel expenses for a recipient in the family unit to attend a self-help skills program, or a supported work placement program, approved by Community Living BC;

(xxxii) a Universal Child Care Benefit provided under the Universal Child Care Benefit Act (Canada);

(xxxiii) money paid by the government of Canada, under a settlement agreement, to persons who contracted Hepatitis C by receiving blood or blood products in Canada prior to 1986 or after July 1, 1990, except money paid under that agreement as income replacement;

(xxxiv) money withdrawn from a registered disability savings plan;

(xxxv) a working income tax benefit provided under the Income Tax Act (Canada); ...

(xxxvii) the climate action dividend under section 13.02 of the Income Tax Act;

(xxxviii) money paid or payable to a person under the Criminal Injury Compensation Act as compensation for non-pecuniary loss or damage for pain, suffering mental or emotional trauma, humiliation or inconvenience that occurred when the person was under 19 years of age;

(xxxix) money that is paid or payable to or for a person if the payment is in accordance with the settlement agreement approved by the Supreme Court in Action No. S024338, Vancouver Registry;

(xl) payments granted by the government of British Columbia under the Ministry of Children

and Family Development's Family Support Services program;

(xli) payments granted by the government of British Columbia under the Ministry of Children and Family Development's Supported Child Development program;

(xlii) payments granted by the government of British Columbia under the Ministry of Children and Family Development's Aboriginal Supported Child Development program;

(xliii) money paid or payable from a fund that is established by the government of British Columbia, the government of Canada and the City of Vancouver in relation to recommendation 3.2 of the final report of the Missing Women Commission of Inquiry;

(xliv) payments granted by the government of British Columbia under the Temporary Education Support for Parents program;

(xlv) a BC early childhood tax benefit;

(xlvi) child support;

(xlvii) orphan's benefits under the Canada Pension Plan Act (Canada);

(xlviii) money or other value received, by will or as the result of intestacy, from the estate of a deceased person;

(xlix) gifts;

(l) education and training allowances, grants, bursaries or scholarships, other than student financial assistance;

(li) money withdrawn from a registered education savings plan;

(lii) compensation paid or payable under section 17 [compensation in fatal cases] or 18 [addition to payments] of the Workers Compensation Act to a dependant, as defined in section 1 of that Act, who is a child, as defined in section 17 of that Act;

(liii) money that is paid or payable by or for Community Living BC to or for a person if the payment is in accordance with an award in a legal proceeding or with a settlement agreement in respect of a claim for injury, loss or damage caused by Community Living BC, an employee of Community Living BC or a person retained under a contract to perform services for Community Living BC;

(liv) money that is paid or payable by the government of British Columbia to or for a person if the payment is in accordance with an award in a legal proceeding or with a settlement agreement in respect of a claim for injury, loss or damage caused by the minister, the ministry, an employee of the ministry or a person retained under a contract to perform services for the ministry;

(lv) a disabled contributor's child's benefit paid or payable under the Canada Pension Plan;

(lvi) payments granted under an agreement referred to in section 94 of the Child, Family and Community Service Act;

(lvii) money that is paid or payable, in respect of a child, from property that comes into the control of, or is held by, the Public Guardian and Trustee;

(lviii) money that is paid or payable from a settlement in respect of Treaty No. 8 agricultural benefits, ...

(d) all unearned income must be included, except the deductions permitted under section 6 and any income exempted under section ... 7 ...

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.

Exemptions — unearned income

7(0.1) In this section:

"disability-related cost" means a disability-related cost referred to in paragraph (a), (b), (c) or (e) of the definition of disability-related cost in section 12(1) [*assets held in trust for person with disabilities*] of this regulation;

"disability-related cost to promote independence" means a disability-related cost referred to in paragraph (d) of the definition of disability-related cost in section 12(1) of this regulation;

"intended registered disability savings plan or trust", in relation to a person referred to in section 12.1(2) [*temporary exemption of assets for person with disabilities or person receiving special care*] of this regulation, means an asset, received by the person, to which the exemption under that section applies;

"structured settlement annuity payment" means a payment referred to in subsection (2)(b)(iii) made under the annuity contract referred to in that subsection.

(1) The following unearned income is exempt: ...

(d) a payment made from a trust to or on behalf of a person referred to in section 12(1) [*assets held in trust for person with disabilities*] of this regulation if the payment is applied exclusively to or used exclusively for

- (i) disability-related costs,
- (ii) the acquisition of a family unit's place of residence,
- (iii) a registered education savings plan, or
- (iv) a registered disability savings plan;

(d.1) subject to subsection (2), a structured settlement annuity payment made to a person referred to in section 12(1) of this regulation if the payment is applied exclusively to or used exclusively for an item referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (d) of this subsection; ...

(2) Subsection (1)(d.1) ... applies in respect of a person only if

- (a) the person has entered into a settlement agreement with the defendant in relation to a claim for damages in respect of personal injury or death, and
- (b) the settlement agreement requires the defendant to
 - (i) make periodic payments to the person for a fixed term or the life of the person,

- (ii) purchase a single premium annuity contract that
 - (A) is not assignable, commutable or transferable, and
 - (B) is designed to produce payments equal to the amounts, and at the times, specified in the settlement agreement,
- (iii) make an irrevocable direction to the issuer of the annuity contract to make all payments under that annuity contract directly to the person, and
- (iv) remain liable to make the payments required by the settlement agreement ...

* * * *

The Ministry's position is that the monthly structured settlement annuity received by the Appellant meets the definition of unearned income under the EAPWDR and is not listed as a form of unearned income which is exempt. Specifically, the Ministry found that the annuity "does not fall within the scope of the exemption under Section 7(2) because the annuity contract is owned by ICBC and is assignable, commutable and transferable at ICBC's request". As a result, the \$1,041.50 monthly annuity is not exempt from disability assistance.

The Appellant's position is that, as the annuity is payment for personal injury and not wage loss, and because the payments are not subject to income tax, they should be considered exempt, similar to WCB temporary wage loss replacement payments and employment insurance maternity benefits.

The Panel's Decision

Section 1 of Schedule B of the EAPWDR identifies payments that are exempt from income when calculating the net income of a family unit for the purpose of determining the amount of disability assistance to which that family unit is entitled. The Panel notes that the payment which is the subject of this appeal is a structured settlement annuity payment and is not listed among the types of payments that are exempt under EAPWDR Schedule B Section 1.

Section 1(1) of the EAPWDR defines "unearned income" to include annuities, insurance benefits (except insurance paid as compensation for a destroyed asset) and any other financial awards or compensation. The Panel finds that the Ministry reasonably determined that the annuity payments in question met the definition of "unearned income".

Section 7(1) of Schedule B of the EAPWDR identifies payments that are exempt from unearned income. Among the payments identified as exempt are a structured settlement annuity payment, provided the payment is made to a person who is receiving accommodation or care in a private hospital or special care facility, other than a drug or alcohol treatment centre. The Panel notes that Section 7(2) specifies additional conditions which must be met for a structured settlement annuity payment to be exempt from unearned income, including that the person must have entered into a settlement agreement with a defendant in relation to a claim for damages in respect of personal injury or death and that an annuity contract is not assignable, commutable or transferable. As the Appellant is not receiving accommodation or care in a private hospital or special care facility, the Panel notes that the annuity payments are not exempt from unearned income under EAPWDR Section 12.1(1) and Section 7(1)(d.1) of Schedule B. The Panel further notes that the Ministry did not assess the eligibility of the annuity payments under EAPWDR Section 12.1(1) and Section 7(1)(d.1) of Schedule B, but rather based its reconsideration decision on its conclusion that the annuity payments did not satisfy another of the conditions specified in Section 7(2), namely that an annuity contract is not assignable, commutable or transferable. The Panel

finds that the Ministry reasonably determined that the requirement that a settlement agreement be not assignable, commutable or transferable under Section 7(2) of Schedule B of the EAPWDR was not met.

Conclusion

The Panel finds that the Ministry's decision that the Appellant is not eligible for disability assistance because he receives an annuity payment which meets the definition of unearned income under section 1 of the EAPWDR, that the payment was not exempt from unearned income under EAPWDR Section 12.1(1) or Section 7(1)(d.1) of Schedule B, and that the payment must therefore be deducted in accordance with Section 24 of the EAPWDR, was reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the Appellant. Therefore the Ministry's decision is confirmed. The Appellant is not successful in his appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:*Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/07/19

PRINT NAME

Tina Ahnert

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/19

PRINT NAME

David Handelman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/19