

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision of August 13, 2018 (the “Reconsideration Decision”), which determined that the CPP Disability (“CPPD”) that the that Appellant received in May was unearned income that must be included in the calculation of her net income for May and deducted from her July disability assistance in accordance with section 1 of Schedule B and Section 24 of the *Employment and Assistance For Persons With Disabilities Regulation* (“EAPWDR”) .

### **PART D – RELEVANT LEGISLATION**

Sections 1, 9, and 24 of the EAPWDR

Sections 1, 2, and 4 of Schedule A to the EAPWDR

Sections 1, 3, 6, 7, 8, and 11 of Schedule B to the EAPWDR

Section 19.1 of the Employment and Assistance Act (“EAA”)

Section 44 of the Administrative Tribunals Act (“ATA”)

## PART E – SUMMARY OF FACTS

The Appellant is a sole recipient of disability assistance.

The information before the Ministry at the time of the Reconsideration Decision included the following:

- Letter from the Appellant, dated July 12, 2018 requesting that she be provided with a Request for Reconsideration (“RFR”);
- Letter from Service Canada to the Ministry, dated April 19, 2018, confirming that \$10,416.53 would be reimbursed to the Ministry for disability assistance paid from February 2017 through March 2018 and that \$805.99 would be reimbursed for the month of April, 2018 on account of the Appellant having been approved for a CPPD;
- Letter from the Ministry to Service Canada confirming the amount paid by the Ministry to the Appellant between February 2017 and April 2018;
- The appellant received a monthly amount of \$805.99 in CPPD in May;
- The RFR from the Appellant, dated July 27, 2018;
- Letter from the Appellant, attached to her RFR in which she states:
  - The Legislative framework in which the Ministry is limited is the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”), and the EAPWDR and applicable schedules which prescribe the assistance rates and exemptions from income;
  - The practice of distinguishing between earned and unearned income is discriminatory and contravenes the equality provisions set out in section 15(1) of the *Charter of Rights and Freedoms* (the “Charter”); and
  - That it is her belief that the “flat rate income exemption level should be applied based on family unit only”.

In her Notice of Appeal, filed August 22, 2018, the Appellant reiterated her Charter arguments.

On September 13, 2018, the Appellant filed a release of information which included a 10 page submission from her authorized representative. The submission argued that :

- distinguishing between earned and unearned income is discriminatory and contravenes the equality provisions set out in section 15(1) of the Charter, as it permits disability recipients who are able to work to receive an annualized income exemption of up to \$12,000.00 in earned income that is not available to recipients who are not able to work to supplement their disability assistance;
- the Ministry’s treatment of CPP disability benefits as unearned income is inconsistent with their treatment by other agencies, such as Canada Revenue Agency (“CRA”);
- although the Ministry made the right decision under the EAPWDR as it is currently written, the Lieutenant Governor in Council, having the authority to make regulations under section 26 of the EAPWDA, has the authority to correct “errors” in regulations which it makes under this authority;
- a number of online sources describe “unearned income” and
- under the *Income Tax Act*, the definition of earned income expressly includes “a disability pension under the Canada Pension Plan.”

The panel accepts the Appellant’s submission as argument, setting out her position in this appeal.

The Ministry submission, dated September 17, 2018, sets out that the Ministry relies on the Reconsideration Decision in respect of this appeal.

## PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry reasonably determined that the monthly CPPD, in the amount of \$805.99, that the Appellant received in May, 2018 was unearned income that must be included in the calculation of her net income for that month, in accordance with section 1 of Schedule B and was deductible from her July disability assistance, in accordance with Section 24 of the EAPWDR.

### *Statutory Framework*

Section 9 of the EAPWDR sets out limits on income which may be received by a recipient in a given month as follows:

#### **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 24 of the EAPWDR governs the maximum amount of disability which may be paid to a recipient in a given month:

#### **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.

Section 1(1)(f) of the EAPWDR expressly provides that all classes of CPP benefits are categorized as "unearned income":

**"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;

...

Sections 1, 2, and 4 of schedule A to the EAPWDR set out the maximum amount of disability assistance and shelter allowance payable each month before accounting for deductions of net income:

**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.

(2) Despite subsection (1), disability assistance may not be provided in respect of a dependent child if support for that child is provided under section 8 (2) or 93 (1) (g) (ii) of the *Child, Family and Community Service Act*.

**Monthly support allowance**

**2** (0.1) For the purposes of this section:

**"deemed dependent children"**, in relation to a family unit, means the persons in the family unit who are deemed to be dependent children under subsection (5);

**"warrant"** has the meaning of warrant in section 14.2 [*consequences in relation to outstanding arrest warrants*] of the Act.

(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

(a.1) Repealed. [B.C. Reg. 193/2017, s. 9 (a).]

(b) the amount calculated in accordance with subsections (2) to (4) for each dependent child in the family unit.

...

| Item | Column 1<br><b>Family unit composition</b>           | Column 2<br><b>Age or status of applicant or recipient</b> | Column 3<br><b>Amount (\$)</b> |
|------|--|--|--------------------------------|
| 1    | Sole applicant / recipient and no dependent children | Applicant / recipient is a person with disabilities        | 758.42                         |

...

## Monthly shelter allowance

4 (1) For the purposes of this section:

**"family unit"** includes a child who is not a dependent child and who resides in the parent's place of residence for not less than 40% of each month, under the terms of an order or an agreement referred to in section 1 (2) of this regulation;

**"warrant"** has the meaning of warrant in section 14.2 [*consequences in relation to outstanding arrest warrants*] of the Act.

(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                | Column 2                       |
|------|-------------------------|--------------------------------|
|      | <b>Family Unit Size</b> | <b>Maximum Monthly Shelter</b> |
| 1    | 1 person                | \$375                          |

Section 1 of Schedule B to the EAPWDR set out what income must be included and what types of income are exempt from inclusion in the calculation of a family unit's net income. Subsection (a) of Schedule B to the EAPWDR provides an exhaustive list of specific items that are exempt from inclusion in the calculation. Subsections (c) and (d) of section 1 of Schedule B to the EAPWDR set out what must be included in the calculation of a family's net income:

### 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,

...

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

Section 3 of Schedule B to the EAPWDR sets out annual exemption limits for qualifying income and defines qualifying income as follows:

**"qualifying income"** means

- (a) earned income, except the deductions permitted under section 2, and
- (b) unearned income that is compensation paid under section 29 or 30 of the Workers Compensation Act;

Sections 6, 7, and 8 of Schedule B to the EAPWDR describe specific items that are either deducted from unearned income and list what types of unearned income is exempt:

#### **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:

- (a) the portion of interest from a mortgage on, or agreement for sale of, the family unit's previous place of residence if the interest is required for the amount owing on the purchase or rental of the family unit's current place of residence;
- (b) \$50 of each monthly Federal Department of Veterans Affairs benefits

paid to any person in the family unit;

(c) a criminal injury compensation award or other award, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 10 [*asset limits*] of this regulation;

(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;

(d.2) money expended by 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 from an intended registered disability savings plan or trust if the money is applied exclusively to or used exclusively for disability-related costs;

(d.3) any of the following if applied exclusively to or used exclusively for disability-related costs to promote independence:

(i) a payment made from a trust to or on behalf of a person referred to in section 12 (1) of this regulation;

(ii) a structured settlement annuity payment that, subject to subsection (2), is made to a person referred to in section 12 (1) of this regulation;

(iii) money expended by a person referred to in section 12.1 (2) of this regulation from an intended registered disability savings plan or trust;

(e) the portion of Canada Pension Plan Benefits that is calculated by the formula  $(A-B) \times C$ , where

A = the gross monthly amount of Canada Pension Plan Benefits received by an applicant or recipient;

B = (i) in respect of a family unit comprised of a sole applicant or a sole recipient with no dependent children, 1/12 of the amount determined under section 118 (1) (c) of the *Income Tax Act* (Canada) as adjusted under section 117.1 of that Act, or

(ii) in respect of any other family unit, the amount under

subparagraph (i), plus 1/12 of the amount resulting from the calculation under section 118 (1) (a) (ii) of the *Income Tax Act*(Canada) as adjusted under section 117.1 of that Act;

C = the sum of the percentages of taxable amounts set out under section 117 (2) (a) of the *Income Tax Act* (Canada) and section 4.1 (1) (a) of the *Income Tax Act*;

(f) a tax refund;

(g) a benefit paid under section 22, 23 or 23.2 of the *Employment Insurance Act* (Canada) to any person in the family unit.

(2) Subsection (1) (d.1) and (d.3) (ii) 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.

(2.1) Repealed. [B.C. Reg. 204/2015, App. 2, s. 4 (b).]

(3) Repealed. [B.C. Reg. 197/2012, Sch. 2, s. 13 (f).]

### **Minister's discretion to exempt education related unearned income**

**8** (1) In this section:

**"day care costs"** means the difference between a student's actual day care costs and the maximum amount of child care subsidy that is available under the *Child Care Subsidy Act* to a family unit matching the student's family unit;

**"education costs"**, in relation to a student and a program of studies, means the costs, including the costs of tuition, student fees, books, equipment, supplies and transportation, that, in the opinion of the minister, are reasonably required for the student to participate in the program of studies.

(2) The minister may authorize an exemption for a student up to the sum of the student's education costs and day care costs, for a period of study, from the total



amount of student financial assistance received by the student for the period of study.

Finally, section 11 of Schedule B of the EAPWDR provides that backdated CPP is treated as unearned income:

### **Backdated CPP treated as unearned income**

**11** (1) In this section, "**pension benefit**" means a pension or other payment under the *Canada Pension Plan* (Canada).

(2) If

(a) disability assistance is provided to a family unit for a calendar month or any portion of a calendar month that would not have been provided if a pension benefit had been paid for that calendar month, and

(b) subsequently a pension benefit becomes payable or payment of a pension benefit may be made under the *Canada Pension Plan* (Canada) to a recipient in the family unit for that calendar month or any portion of that calendar month

the amount of the pension benefit that becomes payable for that month or portion of that month must be treated as unearned income and is considered to have been received by the recipient in that month.

### *Panel Decision*

The Appellant argues that the provisions in the EAPWDR that treat unearned income differently from earned income for exemption purposes are in violation of section 15 of the Charter because of the unequal impact that they have on persons receiving disability assistance who are physically capable of working to earn income and those who are not.

This panel's jurisdiction to consider constitutional questions is governed by section 19.1 of the EAA which sets out which provisions of the ATA apply to the tribunal:

### **Application of *Administrative Tribunals Act***

**19.1** The following provisions of the *Administrative Tribunals Act* apply to the tribunal:

(a) Part 1 [*Interpretation and Application*];

(b) Part 2 [*Appointments*], except sections 7 (3) [*remuneration and benefits after expiry of term*] and 10 [*remuneration and benefits for members*];

(c) Part 3 [*Clustering*];

(d) section 30 [*tribunal duties*];

(e) section 44 [*tribunal without jurisdiction over constitutional questions*];

(f) section 46.3 [*tribunal without jurisdiction to apply the Human Rights Code*];  
(g) Part 8 [*Immunities*];  
(h) section 58 [*standard of review with privative clause*];  
(i) section 59.1 [*surveys*];  
(j) section 59.2 [*reporting*];  
(k) section 60 (1) (g) to (i) and (2) [*power to make regulations*];  
(l) section 61 [*application of Freedom of Information and Protection of Privacy Act*].

In particular, section 44 of the ATA reads as follows:

**Tribunal without jurisdiction over constitutional questions**

- 44** (1) The tribunal does not have jurisdiction over constitutional questions.  
(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Put simply, the determination of a constitutional issue is beyond the jurisdiction of the panel.

Likewise, it is beyond the jurisdiction of the panel to make a finding that the legislature has defined “earned income” in a manner that is inconsistent with other legislation and to adopt definitions of “earned income” and “unearned income” that are consistent with such other legislation.

Pursuant to sections 2 and 4 of Schedule A to the EAPWDR, the Appellant, as a sole recipient, is entitled to receive disability assistance in the amount of \$758.42 per month. The Appellant is also eligible for a monthly shelter allowance of \$375.00 per month.

Section 24 of the EAPWDR provides that a recipient’s monthly net income must be deducted from the recipient’s monthly disability assistance.

Pursuant to section 1 of the EAPWDR, the Appellant’s CPPD is unearned income, which does not fall under any of the express exemptions described in subsections (i) through (lviii) of section 1(b) of Schedule B to the EAPWDR.

Pursuant to section 1 of Schedule B to the EAPWDR, in calculating a recipient’s monthly net income all unearned income must be included, other than the exemptions and deductions expressly provided for in sections 3, 6, 7, and 8 of Schedule B to the EAPWDR.

The CPPD received by the Appellant is not compensation paid under the *Workers Compensation Act* and, as such, does not meet the definition of “qualifying income” under section 3.

Additionally, the CPPD does not fall within any of the categories of exemptions or deductions set out in sections 6, 7, and 8 of Schedule B to the EAPWDR.

The Appellant’s CPPD is neither tax deducted at source from insurance employment benefits nor is it an operating cost of renting a self contained suite. As such, it is not deductible from income under section 6.

The Appellant’s CPPD is also not education related income that is exempt under section 8.

Finally,, section 7 of Schedule B to the EAPWDR does provide an exemption for a portion of Canada Pension Plan benefits determined by the formula in section 7(1)(e) in order to account for the monthly

portion of such benefits that are taxable. However, the Appellant's income falls below the minimum threshold for income tax under the *Income Tax Act* and, in the result, no exemption is available to the Appellant in this regard.

In the result, the legislation requires that the Appellant's CPPD for the month of May, 2018 be included in the calculation of her net monthly income for May, 2018 and no portion of it is either deductible or exempt from inclusion under Schedule B, making it deductible from her July, 2018 disability benefits, pursuant to section 24 of the EAPWDR. In view of the foregoing, the panel finds that the Reconsideration Decision was a reasonable application of the relevant statutory provisions in the Appellant's circumstances. The Appellant is not successful in her 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

Adam Shee

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/10/09

PRINT NAME

Susan Mackey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/10

PRINT NAME

Jane Nielsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/09