

APPEAL NUMBER:

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated July 29, 2019, in which the ministry found the appellant is not eligible for disability assistance ("DA") for April 2019 under section 9(2) of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"). The ministry determined the appellant had unearned income from spousal support in excess of her DA rate as calculated under section 24 and Schedules A and B of the Regulation. The ministry determined there is no exemption for spousal support under section 7 of Schedule B. The ministry further found that the appellant's request for a preliminary ruling on *Charter* issues is outside the scope of the reconsideration decision.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 16

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - sections 1, 9, 29, and 72 and Schedules A and B

Employment and Assistance Act - EAA - sections 19 to 24

Administrative Tribunals Act, section 44(1)

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's reconsideration decision indicating the appellant was advised of the ministry's initial decision on May 31, 2019 and submitted her Request for Reconsideration ("RFR") on June 28, 2019. The ministry approved the appellant's request for an extension of time to provide submissions and completed the review of the RFR on July 29, 2019.

The ministry record includes the following background information:

- The appellant is a sole recipient with Persons with Disabilities ("PWD") designation; her file has been open since 2012.
- The appellant receives \$1,235.42 per month DA. This amount includes \$808.42 for a support allowance, \$375 for a shelter allowance and \$52 for a transportation supplement.
- On February 25, 2019, the appellant declared \$18,000 from a separation agreement and on April 11, 2019, the ministry requested confirmation of the payment.
- On April 15, 2019, the appellant provided a copy of the separation agreement confirming that she received \$18,000 in February 2019 as a lump sum for spousal support.
- On May 31, 2019, the ministry confirmed the appellant was not eligible for April 2019 DA because spousal support is unearned income that must be deducted dollar for dollar from the recipient's assistance. The ministry notes that income received in the month of February is used to calculate eligibility for assistance for the month of April. The ministry explains the process for requesting reconsideration and asking for an extension of time to provide submissions.
- On June 28, 2019, the appellant submitted the RFR, with a letter from her lawyer ("the advocate") requesting a 60-day extension to the reconsideration period to prepare a written submission. The advocate stated that the decision to deny or reduce the appellant's DA is inconsistent with *Charter* values, specifically section 15 of the *Canadian Charter of Rights and Freedoms* which prohibits discrimination based on disability and gender.
- On July 15, 2019, a senior reconsideration officer left a voicemail message for the advocate, providing information about the reconsideration process and informing the advocate that the request for an extension was approved until July 29, 2019, the most time permitted under EAPWD legislation.
- On July 23, 2019, the advocate submitted a letter requesting the ministry to provide "a written preliminary ruling" about its jurisdiction to consider *Charter* issues. The advocate requested a further extension of time to provide submissions if the ministry indicates it has jurisdiction over *Charter* issues.
- In the reconsideration decision the ministry notes that where an extension is granted, the ministry must render the reconsideration decision within 20 business days, in this case by the end of the day on July 29, 2019. The ministry states that the reconsideration decision is based on EAPWD legislation and a preliminary ruling on *Charter* issues is outside the scope of the decision.

2. The RFR, signed by the appellant on June 28, 2019, with two letters from the advocate outlining her argument for the reconsideration.

- In her June 28, 2019 letter, the advocate requests "a preliminary ruling on whether the ministry has jurisdiction to address *Charter*-based arguments" as well as a 60-day extension of time if the ministry has the jurisdiction to hear *Charter* arguments.
- In her July 23, 2019 letter, the advocate indicates she received a voicemail message from a ministry staff person on July 15, 2019 regarding the advocate's June 28th letter. The advocate states that the staff person indicated the deadline for RFR submissions was June 29, 2019 and did not answer the question about the ministry's jurisdiction to hear *Charter* issues.

3. The appellant's *Monthly Report* to the ministry dated February 25, 2019, declaring \$18,000 for "separation agreement settlement" under *all other income or money received*.

4. A copy of the appellant's *Separation Agreement* dated February 5, 2019, stating that the appellant will receive lump sum spousal support in the amount of \$18,000.

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Additional information

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act* ("EAA"). Subsequent to the reconsideration decision neither party filed any new evidence requiring an admissibility determination in accordance with section 22(4) of the EAA. The appellant filed a *Notice of Appeal* with a typed statement that the panel accepts as argument.

In addition, the advocate provided the following submissions on appeal:

- A written submission dated August 22, 2019, summarizing the appellant's *Charter* argument as well as procedural fairness arguments regarding the ministry's procedures for the reconsideration.
- A letter to the ministry from the advocate dated May 3, 2019, requesting a reconsideration package to be sent to the advocate's office.
- A *Consent to Disclosure of Information* signed by the appellant on April 22, 2019, consenting to disclosure (to the advocate) of all information relevant to determining eligibility for DA.
- An email to the ministry from the advocate dated July 29, 2019, requesting a copy of the reconsideration decision. The advocate indicates the decision was sent directly to the appellant rather than the advocate per the *Consent to Disclosure* that was signed by the appellant.
- An email exchange between the advocate and the ministry dated May 30, 2019. The advocate requests follow-up on the RFR and the ministry indicates a response from the supervisor is forthcoming and to advise by email if the supervisor does not respond.

The panel accepts the submissions as argument in support of the appellant's position at the reconsideration.

In a letter to the Tribunal dated August 28, 2019, the ministry states that the reconsideration decision is the ministry's written submission on appeal. The letter states that the ministry has reviewed the appellant/advocate's submission on appeal and the ministry reiterates that the reconsideration decision is based on the EAPWDR and the request for a preliminary ruling on *Charter* issues is outside the scope of the decision.

ATTACH EXTRA PAGES IF NECESSARY

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's determination that the appellant is not eligible for DA for April 2019 under section 9(2) of the EAPWDR, is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. Was the ministry reasonable in finding that the appellant had unearned income from spousal support in excess of her DA rate as calculated under section 24 and Schedules A and B of the Regulation and there is no exemption for spousal support under Schedule B? Further, was the ministry reasonable in finding that the appellant's request for a preliminary ruling on *Charter* issues is outside the scope of the reconsideration decision?

The ministry based the reconsideration decision on the following legislation:

EAPWDR**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:

(p) maintenance under a court order, a separation agreement or other agreement;

Limits on income

9 (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.

Reporting requirement

29 For the purposes of section 11 (1) (a) [*reporting obligations*] of the Act,

(a) the report must be submitted by the 5th day of the calendar month following the calendar month in which one or more of the following occur:

(i) a change that is listed in paragraph (b) (i) to (v)...and

(b) the information required is all of the following, as requested in the monthly report form prescribed under the Forms Regulation, B.C. Reg. 87/2018:

(ii) change in income received by the family unit and the source of that income;

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Schedule A

Disability Assistance Rates

(section 24 (a))

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,

Item	Column 1 Family unit composition	Column 2 Age or status of applicant or recipient	Column 3 Amount (\$)
1	Sole applicant/recipient and no dependent children	Applicant/recipient is a person with disabilities	808.42

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
1	1 person	\$375

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:

(xiv) child support;

[Panel note: amounts for dependents, government benefits, injury settlements/awards, and other sources of income/ monies are the other exemptions listed in clauses i to ix]

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 (1) The following unearned income is exempt:

[Panel note: amounts for interest payments, government benefits, injury settlements/awards, trust funds, and disability-related costs are the exemptions listed in subsections a to g]

The following legislation is relevant to the appellant's arguments:

EAPWDA

Reconsideration and appeal rights

16 (1) Subject to section 17, a person may request the minister to reconsider any of the following decisions made under this Act:

- (c) a decision that results in a reduction of disability assistance or a supplement provided to or for someone in the person's family unit;

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.

(3) Subject to a regulation under subsection (5) and to sections 9 (7) [employment plan], 17 and 18 (2) [overpayments], a person who is dissatisfied with the outcome of a request for a reconsideration under subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in the Employment and Assistance Act and the regulations under that Act.

EAPWDR

Time limit for reconsidering decision

72 The minister must reconsider a decision referred to in section 16(1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71(1) [how a request to reconsider a decision is made],

- (a) within 10 business days after receiving the request, or
- (b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

EAA**Employment and Assistance Appeal Tribunal**

19 (1) The Employment and Assistance Appeal Tribunal is established to determine appeals of decisions that are appealable under

(b) section 16 (3) [*reconsideration and appeal rights*] of the *Employment and Assistance for Persons with Disabilities Act*.

Application of Administrative Tribunals Act

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

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

Panels of the tribunal to conduct appeals

22 (1) If a person commences an appeal in accordance with section 21 (1), the chair must appoint a panel consisting of up to 3 members of the tribunal to hear and determine the appeal.

Decision of panel

24 (1) After holding the hearing required under section 22 (3) [*panels of the tribunal to conduct appeals*], the panel must determine whether the decision being appealed is, as applicable,

(a) reasonably supported by the evidence, or

(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

(6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.

Administrative Tribunals Act

Tribunal without jurisdiction over constitutional questions

44 (1) The tribunal does not have jurisdiction over constitutional questions.

Analysis

Appellant not eligible for April 2019 DA

Arguments and panel's decision

The ministry's position is that the appellant is not eligible for DA for April 2019 because her net income of \$18,000 (from spousal support in February 2019) exceeded her assistance rate of \$1,235.42 and there is no exemption for spousal support under the legislation. The ministry explains that spousal support is considered unearned income under section 1(1) of the EAPWDR ("maintenance under... a separation agreement"). The ministry further explains

that section 9(2) of the Regulation states that a family unit is not eligible for assistance if their net income as determined under Schedule B equals or exceeds the rate of assistance determined under Schedule A for the corresponding family unit size.

The ministry explains the reporting requirement under section 29 of the EAPWDR: income must be reported by the 5th of the month after the month in which it is received. The appellant's monthly report indicates she reported the spousal support lump sum to the ministry on February 25, 2019. The appellant therefore fulfilled the reporting requirement that required her to report the lump sum by March 5, 2019.

The ministry explains that the income the appellant reported before March 5th was used to calculate her next month's assistance; i.e., DA for April 2019. Based on the calculation, the ministry found the appellant was not eligible for any DA for April because the \$18,000 lump sum she received for spousal support exceeded her DA rate. The ministry explains that under Schedule B of the Regulation, the only deduction that applies to unearned income is in relation to EI benefits [income tax deducted at source - section 6(a) of the Schedule], and the only type of family maintenance that is exempt as income is child support [section 1(a)(xlvi)]. The ministry argues that it has no discretion under the legislation to exempt spousal support.

The appellant does not disagree with the ministry's calculation of her April 2019 income, nor does she dispute that spousal support meets the definition of unearned income under section 1(1) of the EAPWDR or that Schedule B does not exempt spousal support. The appellant's position is based on *Charter* arguments regarding the constitutionality of the legislation and procedural fairness arguments regarding the ministry's process for the reconsideration.

The advocate argues that the ministry must "exercise its discretion consistently with Charter values" when determining whether to treat the appellant's spousal support payment as unearned income, but the panel notes that the deduction and exemption rules in Schedule B of the EAPWDR are not at the ministry's discretion. Maintenance under a separation agreement is specifically included as unearned income and the only allowable exemption for family maintenance pertains to child support. Therefore, based on the ministry's explanation of the calculations under the EAPWDR and allowable exemptions from unearned income which don't apply to spousal support, the panel finds that the ministry reasonably applied the legislation in finding that the appellant is not eligible for April 2019 DA.

Appellant's Charter arguments

Position of each party

Appellant

In the Notice of Appeal, the appellant argues that the ministry's decision "to rely on its own legislation and regulations...to deny disability benefits" discriminates against her "based on sex, disability and marital status contrary to section 15 of the Charter." In her letter to the ministry of June 28, 2019, the advocate argues that the ministry's decision to reduce the appellant's DA based on lump sum spousal support or the ministry's application of discretion in applying the legislation violates the appellant's *Charter* rights, in particular, section 15 which prohibits discrimination on the basis of disability and gender.

In her subsequent letter of July 23, 2019, the advocate expresses frustration with the ministry who still "did not address our request for a preliminary ruling on the ministry's jurisdiction to adjudicate on *Charter of Rights and Freedoms* issues." The advocate argues that section 16(4) of the EAPWDA may give the minister *Charter* jurisdiction because the "other requirements" referenced in that section "may not be sufficiently clear to make section 44 of the *Administrative Tribunals Act* applicable."

The advocate argues that it is also not clear that section 19.1(e) of the EAA applies to appeals under the EAPWDA. The advocate submits that it is insufficient for the ministry to simply state that a preliminary ruling on *Charter* issues is "outside the scope of the reconsideration decision" as the ministry has not provided an analysis or cited any case law with respect to whether it has jurisdiction over the *Charter*.

Ministry

In its submission on appeal, the ministry argues that the appellant's request for a "preliminary ruling on *Charter* issues" is outside the scope of the reconsideration decision. The ministry reiterates that the reconsideration decision is based on the EAPWD legislation. This is also stated in the reconsideration decision.

Panel's decision

The panel determines it does not have the authority to decide the reasonableness of the ministry's decision to not make a ruling on *Charter* issues. The advocate argues that the minister has jurisdiction over *Charter* issues under the EAPWDA or EAA but the panel considers a question of whether and how the ministry applies the Charter to ministry decisions to be an issue which is clearly excluded from the jurisdiction of the Tribunal. The panel's statutory authority is under the EAA; specifically, sections 19-24 set out the jurisdiction of the Employment and Assistance Appeal Tribunal including the role of the panel.

Under section 19(1) of the EAA, the Tribunal has the mandate to determine appeals of ministry decisions that are appealable under the EAPWDA and other specified legislation. Under section 19.1 of the EAA, certain provisions of the *Administrative Tribunals Act* ("ATA") apply to the Tribunal including section 44 of the ATA which states that the Tribunal does not have jurisdiction over constitutional questions. Under section 24(6) of the EAA, the Tribunal has the exclusive jurisdiction to determine questions of fact and law arising from the appeal under section 19 but pursuant to section 19.1 the Tribunal does not have the statutory authority to decide the constitutional validity of EAPWD legislation.

Section 22(1) of the EAA indicates that panels of the Tribunal, appointed by the Tribunal chair, will hear and determine the appeal. Section 24(1) requires the panel to determine whether the decision being appealed is, as applicable, reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision. In this case, the applicable enactment is the EAPWDR and as explained earlier, the panel finds that the ministry reasonably applied that legislation in determining that the appellant was not eligible for DA for April 2019.

Appellant's procedural fairness arguments

In the submissions for the reconsideration and appeal, the advocate argues that the time limit (extension to July 29, 2019) to provide submissions was unreasonable "in light of the complexity and procedural requirements of raising a *Charter* claim." The advocate further argues that it was unreasonable for the ministry to continue to communicate with the appellant directly after the appellant had provided the *Consent to Disclosure of Information* form to authorize the ministry to send communications to the advocate. The advocate submits that the ministry's failure to communicate directly with the advocate resulted in "unnecessary distress and hardship" for the appellant in light of her disabilities.

The panel notes that the ministry addressed the issue of the time limit in the reconsideration decision and explained the process for requesting an extension of time and that the 20 day deadline is a legislated time limit under section 72(b) of the EAPWDR. In any event, the advocate was only insisting on additional time (beyond the 20 days) to provide submissions if the ministry has jurisdiction to hear *Charter* arguments. The ministry determined that *Charter* issues are outside the scope of the reconsideration decision.

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Regarding the ministry's communications with the appellant versus the advocate, the panel acknowledges the advocate's frustration in light of the consent form the appellant provided. The panel also notes the ministry's efforts to rectify the situation in its email communications with the advocate. In the May 30, 2019 email exchange, the ministry staff asks the advocate to let her know if there is no response directly from the supervisor. While the ministry's communication process was not very efficient, the record indicates the advocate received the reconsideration decision from the ministry.

Conclusion

The panel finds that the ministry reasonably determined the appellant is not eligible for DA for the month of April 2019 under the EAPWDR because her income exceeds the assistance rate for her family unit, the deductions or exemptions set out in Schedule B do not apply in her circumstances, and the ministry has no discretion in whether to treat spousal support as unearned income. The panel further finds that it does not have the authority to determine whether the ministry was reasonable in refusing to make a ruling on *Charter* issues. The panel confirms the reconsideration decision. The appellant is not successful on 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

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/13

PRINT NAME

Julie Iuvancigh

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/13

PRINT NAME

Rabinder (Rob) Nijjar

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/13