

APPEAL NUMBER
2021-00021

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 January 5, 2021, in which the Ministry decided that the Appellant was not eligible for income assistance because the money the Appellant received from the Canada Emergency Response Benefit (CERB) and Canada Recovery Benefit (CRB) programs was more than the amount of the monthly income assistance benefit under the Employment and Assistance Act (EAA) or the Employment and Assistance for Persons with Disabilities Act (EAPWDA). The Ministry decided that the CERB and CRB money was not exempt income under the Employment and Assistance Regulations (EAR) section 2.01 or the Employment and Assistance for Persons with Disabilities Regulations (EAPWDR) section 2.01 because the Appellant was not eligible to receive income assistance, hardship assistance or disability assistance on April 2, 2020.

PART D – RELEVANT LEGISLATION

EAA : sections 11, 27, 28,
EAR: sections 2.01, 10(2), 28, 33, 89, Schedule A sections 1(1), 2(1) & 4(2) & Schedule B
EAPWDA: sections 11, 27, 28
EAPWDR: sections 2.01, 11, 24, 29, Schedule A section 2(1) & Schedule B
Interpretation Act [RSBC1996] c.238: sections 2(1), 7, 8

PART E – SUMMARY OF FACTS

With the consent of the Appellant, a Ministry observer attended the hearing. The Appellant attended the hearing with a legal advocate. The Tribunal granted an adjournment from the original hearing date of February 10, 2021 based on the advocate's availability.

Evidence before the Ministry at Reconsideration:

The Appellant applied for income assistance in January 2020 and on January 29, 2020, he received an income assistance payment, as a sole recipient, for February 2020. (Monthly income assistance benefits for a given month are issued at the end of the previous month based on the Ministry's cheque issue schedule.)

When the Appellant applied for income assistance, the Ministry told him he would have to seek employment as a condition of receiving income assistance. The Appellant worked 2 jobs in February 2020 and received income from employment that month in the amount of \$2748.26. The Appellant reported that income to the Ministry on March 12, 2020.

On March 17, 2020, the Appellant suffered a relapse of a medical condition and as a result he has been unable to work since then.

As a result of the reported income received in February 2020, the Ministry did not issue a cheque at the end of March for April income assistance. When the Appellant enquired with the Ministry about the absence of a benefit cheque, he was told that he was ineligible to receive April benefits because his February income exceeded the Ministry rate for a sole recipient, \$760 under EAR Schedule A.

After the government announcement that CERB benefits were exempt income for recipients of income assistance under the EAA, the Appellant contacted the Ministry and was advised to apply for CERB. The Appellant says that the Ministry told him that CERB payments would be exempt income. The Appellant applied for CERB and received payments of \$2000 per month beginning in April 2020, continuing through October 2020, when the CERB program transitioned to CRB. He has continued to receive CRB of \$1800 per month since then.

The Appellant also received income assistance benefits from the Ministry for the months of May through August 2020, in the total amount of \$3255. On August 20, 2020, the Ministry reviewed the Appellant's file and noted that because the Appellant had not been eligible for income assistance, disability assistance or hardship assistance on April 2, 2020, the CERB income was not exempt.

The Ministry has not sought repayment of income assistance benefits it paid to the Appellant from May to August 2020.

In October 2020 the Appellant was designated as a Person with Disabilities (PWD) under the EAPWDA, effective November 1, 2020. The Appellant has not received benefits under the EAPWDA because the Ministry determined his income of \$1800 per month from CRB benefits continues to exceed the Ministry disability assistance rate of \$1183.42 per month under EAPWDR Schedule B.

Written Submission:

The Appellant provided a written submission from the advocate less than 3 days before the hearing. The submission states that the Appellant has had a reduced earning capacity due to his medical condition since 2019. His earnings in February 2020 were unusually high compared to his pattern of earnings, which totalled \$6046.21 in 2019 and \$6114.96 for the whole of 2020.

In September 2020 the Appellant contacted the Ministry to ask why his estimated benefit amount for September was 'zero'. The Ministry told him that this amount was an error and that he would receive his

usual income assistance amount for September. When the Appellant did not receive September income assistance, he contacted the Ministry again and was told that he was not eligible for the CERB income exemption because he did not receive an income assistance payment from the Ministry in April 2020. The Appellant requested a reconsideration of this decision on September 24, 2020.

Evidence at the Hearing:

The Appellant stated that when he first applied for income assistance, the Ministry told him that he had to seek work and get off income assistance as soon as possible, and if he did not go out and look for work his income assistance would end. The Appellant said he worked 2 jobs in February 2020 but he did not find out how it would affect income assistance until after he had reported the income. He kept working in March 2020, but there were increased risks associated with Covid19 and his employer did not provide personal protective equipment or safety guidelines. The Appellant said he collapsed on March 17, 2020, triggered by stress resulting from trying to work 2 jobs under those conditions.

The Appellant said he has suffered severe stress as a result of losing income assistance, when it was the Ministry that told him to apply for CERB and that caused him to lose benefits under the EAA. Since he stopped receiving income assistance from the Ministry, he cannot afford rent payments for a home that is large enough to allow him to have his children staying with him, he has had to resort to food banks to survive, and he has declared bankruptcy.

Additional Evidence:

The Ministry had no objection to additional evidence provided by the Appellant in the appeal submission and at the hearing. The Panel determined that the oral evidence and the additional evidence in the written submission was admissible under EAA section 22(4) as it was reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

PART F – REASONS FOR PANEL DECISION

Issue:

The issue on appeal is whether the Ministry's reconsideration decision dated January 5, 2021, in which the Ministry decided:

1. that the Appellant was not eligible for income assistance because the money the Appellant received from the Canada Emergency Response Benefit ("CERB") and Canada Recovery Benefit ("CRB") programs was more than the amount of the monthly income assistance benefit under the EAA, and
2. that the CERB and CRB money was not exempt income under EAR section 2.01 because the Appellant was not eligible to receive income assistance, hardship assistance or disability assistance on April 2, 2020

was reasonably supported by the evidence, or was a reasonable application of the applicable enactment in the Appellant's circumstances.

Appellant's Position:

The Appellant agrees that his income in February 2020 exceeded the amount of income assistance for which he was eligible under EAR Schedule A ("excess income"), and that disentitles him to one month's benefit. However, the Appellant argues that he was ineligible for income assistance in February, when he received the excess income, not in April, when the benefit was withheld. Therefore, the Appellant says that the income assistance he received for February was an overpayment under EAA section 27 that he must repay to the Ministry in accordance with the legislation. The Appellant relies on EAR section 89 and argues that the overpayment should be repaid by a deduction of \$10 each month from his subsequent monthly income assistance benefits.

The Appellant maintains that, while it is the Ministry's practice to claw back benefits in the second month after the excess income is received, there is nothing in EAA section 11 and EAR section 33 that gives the Ministry authority or direction to declare a recipient ineligible to receive income assistance 2 months after the income was earned. While it might be more convenient for the Ministry to apply the excess income to the month after it is reported, the Appellant argues that convenience does not allow the Ministry to apply the legislation incorrectly.

The Appellant argues that the Interpretation Act supports the position that he has an overpayment for February 2020. The Appellant cites section 2(1) of the Interpretation Act (IA) which provides that the IA applies to every enactment. IA section 7 provides that if legislation is expressed in the present tense, it "applies to the circumstances as they arise." The Appellant notes that EAR section 10(2) is drafted in the present tense, and therefore, the correct statutory interpretation is that the Appellant was ineligible for income assistance in February, not in April, because February is when the "circumstances" arose; i.e., the receipt of excess income.

The Appellant states that the result of finding him ineligible for assistance in February 2020, when the excess income was received, rather than in April, the benefit month that followed the reporting of the income, is that the CERB and CRB payments would be "exempt income" under EAR section 2.01. In that case, the Appellant would be eligible to receive monthly income assistance in addition to the CERB/CRB benefit.

The Appellant says that he has met the reporting requirements in EAA section 11 and EAR section 33. The Appellant maintains that he was eligible to receive assistance on April 2, 2020.

The Appellant says that finding him ineligible in February and treating the February benefit as an overpayment would be consistent with the Ministry practice when individuals stop receiving income assistance. The advocate says that she is aware of situations where, if a recipient earns income that exceeds the amount of the monthly benefit in the final month they receive benefits, the Ministry takes steps to collect back that amount as an overpayment under EAR section 89 on the basis that the recipient was not eligible to receive benefits in that final month. The advocate argues that it is inconsistent for the Ministry to find ineligibility in the month the income was earned in that situation, but not in the Appellant's situation.

Lastly, the Appellant says that EAA section 28 gives the Minister discretion over how and when to recover assistance paid during a period of ineligibility. The Appellant argues that the Minister has a responsibility to exercise this discretion in a manner that does not unduly prejudice the Appellant, and that best supports the intent of the EAA. The Appellant says that the Minister either fettered the Minister's discretion or failed to exercise that discretion reasonably in the Appellant's case, by failing to take into account the Appellant's unique circumstances and the undue hardship the Ministry policy has caused him. The Appellant also argues that, if the Minister does not make any exceptions to the policy of clawing back overpayments in the second month after income is received, the Minister is fettering the Minister's discretion.

Ministry's Position:

The Ministry argues that it is reasonable for the Ministry to rely on the reporting cycle established by the EAA that has been in effect since 2002. The Ministry says that the EAA, read as a whole, supports the Ministry's practice of determining eligibility in the month immediately following the reporting of income.

The Ministry relies on EAA section 11 and EAR section 33. The Ministry notes that section 11 requires a recipient of income assistance to report income paid in a calendar month, by the 5th of the following month. The Ministry then uses that information to determine eligibility for the next benefit month. While the legislation does not specifically or explicitly state that reported income determines eligibility for the upcoming month, the Ministry states that reading all the provisions of the legislation together produces that result.

Section 33 provides that, for the purposes of section 11, income must be reported by the 5th of each month. The Ministry receives the monthly report and issues a cheque based on that report by the end of that month, which would be 10 days to 2 weeks after receiving the report. The Ministry notes that eligibility for assistance is determined month by month. Having an open file with the Ministry is not the same as being eligible to receive benefits.

The Ministry says it has no knowledge of a Ministry practice in which a final month of benefits is recovered as an overpayment if a recipient has earned income in excess of the benefit amount in that final month. The Ministry says that in their view there would be no legislative authority for collecting back the benefit as an overpayment on the basis that the recipient was not eligible to receive the benefit that month.

The Ministry says EAR section 2.01 is clear in that, in order for CERB and CRB income to be exempt, the Appellant would have to be eligible to receive income assistance, disability assistance or hardship assistance on April 2, 2020. The Ministry argues there is no room for interpretation or discretion in determining whether that income is exempt, if the person is not eligible to receive assistance on April 2, 2020. Further, the Ministry says it must administer the Act in a way that is fair to all its clients, and making an exception would compromise the fairness of the system for all the other clients.

The Ministry says that if it was obliged to administer the income assistance program as the Appellant advocates, the system would not function. If the recipient was found ineligible for assistance in the month the excess income was earned, the Ministry would have to render a separate decision about the overpayment, notify the recipient of the outcome and possibly go through reconsideration and appeal processes each time. The Ministry argues that process would be unduly cumbersome and ultimately unworkable.

Panel Decision and Reasons:

The Appellant did not receive an income assistance benefit in April 2020. This appeal turns on whether the Appellant did not receive benefits that month because he was ineligible to receive them (the Ministry position), or because he had received a benefit for which he was not eligible in February 2020, which would be an overpayment that the Ministry collected by withholding his April benefit (the Appellant's position).

The distinction is significant in this case because, under EAR section 2.01, CERB and CRB payments are only "exempt income" for purposes of determining net income under EAR Schedule B for recipients who are eligible for income assistance on April 2, 2020. If the Appellant was ineligible to receive benefits on April 2, 2020, his

subsequent CERB and CRB payments are not exempt income and he is ineligible to receive assistance from the Ministry because those payments are more than the Ministry's monthly benefit rate. If, instead, the Appellant was ineligible to receive benefits in February 2020 when he received excess income, then the CERB and CRB payments are exempt income and he would be eligible to receive income assistance from the Ministry in addition to CERB and CRB.

Section 28 of the EAAR says:

Amount of income assistance

28 Income 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.
- [emphasis added]

The section does not specify either the calendar month for which the income assistance is to be provided, or the month in which the income is received. Rather, it refers to net income "determined under Schedule B".

Income cannot be determined until it has been reported. The reporting system set out in the legislation says that income must be reported by the 5th day of the month after it is received. At that point, the Ministry determines eligibility for the next benefit month. The Panel finds that it is a reasonable application of the legislation for the Ministry to determine eligibility for the purposes of EAR section 28 in the month immediately following the reporting of income because net income for a month cannot be determined until income has been reported.

The Appellant submits that the decision of the Ministry is not reasonable because it does not address IA section 7. The Panel finds that it is not necessary for the Ministry to specifically mention IA section 7 as long as the reconsideration decision is a reasonable interpretation and application of the legislation.

On the issue of statutory interpretation, the Panel finds that the Ministry's interpretation and application of EAA section 10 and EAR sections 28 and 33 is reasonable and is consistent with the approach to statutory interpretation stated by McLachlin C.J. in *R. v. Sharpe*, [2001 SCC 2 \(CanLII\)](#), [2001] 1 S.C.R. 45 at para. 33, 194 D.L.R. (4th) 1:

Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, *Statutory Interpretation* (1997); R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994); P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

As the Appellant states, the EAA must be interpreted with its benevolent purpose in mind (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461). The EAA sets out a framework for alleviating poverty by providing income assistance to eligible recipients. It includes a system of reporting income to allow the Ministry to determine eligibility to receive benefits. The Ministry maintains that by reading the EAA in its entire context, the Ministry is following a reasonable application of the legislation, taking into account the reporting system set out in the EAA and EAAR.

The earliest point at which the Ministry has the information about income is the 5th of the month after the income has been earned. At that point, the Ministry assesses eligibility and applies that determination to the individual's next benefit period. Because income assistance is paid a few days before the month in which the recipient is

entitled to receive it, by the time February income is reported under the EAA, the individual has already received the income assistance benefit for both February and March. At the time those benefits were paid, based upon the information available to the Ministry under the legislated reporting system, the individual was eligible to receive them. When the Ministry receives income information, it then makes the determination of eligibility and the next month's benefit is not payable if the person's net income exceeds the Ministry rates.

The Panel recognizes that the result of applying EAR section 2.01 to the Appellant's situation has resulted in increased hardship for the Appellant, who has made his best efforts to follow the Ministry's instructions, and who worked, to the detriment of his health, during February, the only month that would make him ineligible to receive benefits on April 2, 2020 under the Ministry's payment schedule. However, the Panel finds that there is no discretion in the legislation for the Ministry to find the Appellant eligible for assistance on April 2, 2020, and therefore no discretion to find his CERB and CRB income exempt if he was not eligible for benefits on April 2, 2020.

The provisions of the EAPWDA and EAPWDR mirror those of the EAA and EAR, allowing CERB and CRB income exemptions only for those who were eligible to receive assistance on April 2, 2020. Therefore the Panel finds that the Ministry's decision that the Appellant continued to be ineligible for assistance after the Appellant was approved for PWD designation, is a reasonable application of the legislation in the Appellant's circumstances because the CRB payment is more than the disability assistance rate.

The Panel finds that, because the Ministry was reasonable in deciding that the Appellant was not eligible for income assistance on April 2, 2020, the income assistance paid in February 2020 was not an overpayment and the repayment provisions in EAAR section 89 do not apply.

The Appellant maintains that the fact that the Ministry is not looking for repayment of income assistance paid to the Appellant for the period between May and August 2020 shows that the Ministry has discretion to pay monthly assistance even if the individual was not eligible for assistance on April 2, 2020. The Panel finds that the Ministry did not exercise discretion to apply policy in that situation. The Panel accepts the Ministry's evidence that it recognized an estoppel defence to any claim for repayment. Foregoing a claim that it determined was unlikely to succeed in law is not the same as exercising discretion to apply policy.

The Panel makes no finding regarding the advocate's information about a Ministry practice of claiming back a final month of assistance as an overpayment of a benefit paid to a family unit that was not eligible to receive it. There was no direct evidence of such a practice, which in any event is outside the scope of this appeal.

The Panel finds that the Ministry applied the legislation reasonably in the Appellant's circumstances. The Panel confirms the Reconsideration Decision. The Appellant is not successful in the appeal.

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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

Susan Ferguson

SIGNATURE OF CHAIR

DATE(YEAR/MONTH/DAY)

2021-02-19

PRINT NAME

Susanne Dahlin

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2021-02-19

PRINT NAME

Margaret Koren

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2021-02-19