IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Eggberry v. British Columbia (Minister of Social Development and Poverty Reduction),* 2022 BCSC 424

Date: 20220315
Docket: S-211422
Registry: Victoria

Between:

George Eggberry

Petitioner

And:

Minister of Social Development and Poverty Reduction and Employment and Assistance Appeal Tribunal

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 51, 54, 58, 59, 71, 72 and 82 on April 6, 2022.

Before: The Honourable Justice Punnett

On judicial review from: An order of the Employment & Assistance Appeal Tribunal, dated March 5, 2021

Reasons for Judgment

Counsel for the Petitioner:	A. Robb
Counsel for the Respondent Minister:	F. Zaltz P. McLaughlin
Counsel for the Respondent Tribunal:	A.K. Harlingten
Place and Date of Hearing:	Victoria, B.C. November 2 and 12, 2021
Place and Date of Judgment:	Victoria, B.C. March 15, 2022

Introduction

[1] This is a judicial review of a decision of the Employment & Assistance Appeal Tribunal (the "Tribunal") released March 5, 2021 (the "Decision") upholding a reconsideration decision of the Minister of Social Development & Poverty Reduction (the "Minister") that concluded the petitioner was ineligible for income assistance as of April 2, 2020.

[2] In issue is the Ministry of Social Development and Poverty Reduction's (the "Ministry") "reporting cycle" policy for income and disability assistance and its relationship to certain income exemptions for the *Canada Emergency Response Benefit* ("CERB") and the *Canada Recovery Benefit* ("CRB").

[3] Specifically, the question before the Minister was whether the petitioner was eligible for income assistance as of April 2, 2020, such that the CERB and, later, the CRB received by the petitioner was "exempt income" for the purposes of provincial income assistance eligibility. The Tribunal upheld the Minister's decision on this question. The issue before this Court is whether the Tribunal's decision is patently unreasonable.

Background

Legislative Scheme

[4] The Minister administers the *Employment and Assistance Act*, S.B.C. 2002, c. 40, the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, and associated Regulations including the *Employment and Assistance Regulation*, BC Reg. 263/2002, and the *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg. 265/2002. I will set out the specific sections of these Acts and Regulations at issue in this case later in my reasons, but it is helpful to set out at the outset the general mechanics of the legislative scheme.

[5] The *Employment and Assistance Act* and *Employment and Assistance Regulation* provide for monthly income assistance payments to eligible persons. The *Employment and Assistance for Person with Disabilities Act* and *Employment and*

Assistance for Persons with Disabilities Regulation provide for monthly income support payments to eligible persons with disabilities, known as disability assistance. Disability assistance payments are higher than income assistance payments. The Minister issues income and disability assistance payments to eligible recipients on the third Wednesday of each month, for the following month.

[6] The *Employment and Assistance Regulation* requires individuals receiving income assistance to report all income received in a month, by the fifth day of the month following when they earned the income. Unless such income is specifically exempted by the *Employment and Assistance Regulation*, the income assistance they are eligible to receive the month following when they reported the income is reduced by the amount of said non-exempt income, dollar for dollar. A similar reporting and eligibility schedule is set out in the *Employment and Assistance for Persons with Disabilities Regulation*, although particulars of the income exemptions differ.

[7] An example of how this reporting scheme operates is clarifying. If a recipient of income assistance earns $500 of employment income in February, they must report this to the Ministry by March 5th. The recipient's next income assistance payment, paid to them by the Ministry on the third Wednesday of March, will then be reduced by $500. Although received in March, this payment is the recipient's April income assistance.

Facts

[8] In January 2020, the petitioner applied for income assistance under the *Employment and Assistance Act* as a sole recipient and received his first income assistance payment for February 2020 later in January.

[9] As a recipient he was required by s. 11 of the *Employment and Assistance Act* and s. 33 of the *Employment and Assistance Regulation* to file a monthly report of other income. He submitted the required monthly report in March 2020 disclosing that he earned $2,748.26 of employment income in February 2020.

[10] As his February net income, reported in March, exceeded the monthly income assistance rate of $760 for a sole recipient, the Ministry found the petitioner ineligible for April income assistance.

[11] The petitioner, however, had stopped working on March 17, 2020 due to his disability. He has not worked since then. In early April 2020 he reported his employment income for March 2020 to the Minister. It being much lower than the amount earned in February, he was again found eligible for assistance and received an income assistance payment for May in late April. It was lower than the January and February assistance payments because his employment income for March was deducted.

[12] In April 2020, at the beginning of the COVID-19 pandemic, the federal government introduced the CERB, a monthly payment for eligible people whose income was affected by the pandemic. Around September 2020, CERB was replaced by the CRB, which continued to provide monthly income support payments for eligible people whose income was affected by the pandemic.

[13] After learning about the CERB in April 2020, the petitioner contacted the Ministry and a representative told him receipt of the CERB would not affect his eligibility for income assistance. The petitioner applied for and received the CERB, a $2,000 monthly payment from April to October 2020, when the CERB ended.

[14] In May 2020, the *Employment and Assistance Regulation* was amended in response to the pandemic. The amendment (s. 2.1) provided that if a person was eligible for income assistance on April 2, 2020, then the CERB/CRB income would be exempt from the calculation of their income for the purpose of the *Employment and Assistance Regulation* and they would be entitled to receive both income assistance and CERB/CRB income, with no deduction. If the recipient was not eligible for income assistance on April 2, 2020, then their CERB/CRB income would be clawed back from their income assistance.

[15] Since monthly CERB/CRB payments were higher than income assistance payments, CERB/CRB recipients who were not eligible for income assistance on April 2, 2020, were ineligible for income assistance as long as they were receiving CERB/CRB.

[16] The petitioner received income assistance payments from the Ministry from May 2020 to August 2020 totaling $3,255.

[17] On August 20, 2020, the Ministry reviewed the petitioner's file and noted that, based on s. 2.1 of the *Employment and Assistance Regulation* and s. 2.01 of the *Employment and Assistance for Persons with Disabilities Regulation* (although the petitioner was not at this time designated a person with a disability by the Minister), his CERB income was not exempt because he had not been eligible for Income Assistance, disability assistance, or hardship assistance on April 2, 2020. Since his CERB income exceeded the monthly rate of $760, the Ministry concluded the petitioner should not have received income assistance benefits between April and August 2020. The Ministry advised the petitioner of this determination when he contacted them on September 1, 2020 to inquire why he had not received his income assistance payment. On September 29, 2020, the Ministry advised that it would not be seeking repayment of the May to August 2020 payments.

[18] On September 24, 2020, the petitioner submitted a request for reconsideration of the decision that he was ineligible for income assistance in April 2020 and he was therefore not entitled to receive both CERB/CRB and income assistance. He also requested an extension of time for his submissions.

[19] In October 2020, the petitioner was designated as a Person with Disabilities under the *Employment and Assistance for Persons with Disabilities Act* effective November 1, 2020. He has not received any disability assistance because his monthly CRB payment of $1,800 exceeds the Ministry monthly disability assistance rate for a sole recipient of $1,183.42, and because he was not eligible for income, disability, or hardship assistance on April 2, 2020, his CRB income is not exempt.

[20] On November 30, 2020, the petitioner provided his submissions for reconsideration. He argued that his February 2020 employment income (reported in March) should have affected his eligibility for income assistance in February, not April. The petitioner argued that rather than denying him the exemption for his CERB income from April 2020 onwards, the Ministry should merely have treated his February income assistance benefits (paid to him at the end of January 2020) as an overpayment, which the Ministry could have collected by deducting a small amount from each subsequent month pursuant to s. 10 of the *Employment and Assistance Regulation* and ss. 27 and 28 of the *Employment and Assistance Act*.

[21] The Ministry provided its reconsideration decision on January 5, 2021. It decided that (a) since the petitioner's February net income was more than the rate of assistance for his family unit size, he was not eligible for April 2020 income assistance under ss. 10(2) and 33 of the *Employment and Income Assistance Regulation,* and (b) since the petitioner was not eligible for Income Assistance, disability assistance or hardship assistance on April 2, 2020, his CERB and CRB income was not exempt.

[22] The petitioner sent a notice of appeal of the reconsideration decision to the Tribunal on January 22, 2021. A hearing of the appeal took place on February 19, 2021. The Tribunal issued its decision on March 5, 2021, upholding the reconsideration decision.

[23] The Tribunal confirmed the petitioner was not eligible for income assistance as of April 2, 2020, and therefore the money he received from the CERB and, later, the CRB, was not "exempt income" under the *Employment and Assistance Act* and the *Employment and Assistance Regulation*. The Tribunal held that the income assistance paid to the petitioner in February 2020 was not an overpayment and the repayment provisions of the *Employment and Assistance Regulation* did not apply.

Preliminary Issues

Standard of Review

[24] It is not disputed that the *Employment and Assistance Act* contains a privative clause at ss. 24(6) and (7) and directs at s. 19.1 that s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applies to decisions of the Tribunal. As a result, s. 58 governs the standard of review, not the common law: *Lavender Co-operative Housing Association v. Ford*, 2011 BCCA 114 at para. 40. Under s. 58, the standard of review is patent unreasonableness.

[25] A decision is patently unreasonable if it is "openly, clearly, evidently unreasonable", "obviously untenable", "clearly irrational" or "so flawed that no amount of curial deference can justify letting it stand". A patently unreasonable defect has also been described as one that "almost border[s] on the absurd": *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2021 BCSC 86 at paras. 31-35, 46; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paras. 28-29; *Cariboo Gur Sikh Temple Society (1979) v. British Columbia Employment Standards Tribunal*), 2019 BCCA 131 at para. 24.

[26] The Court then is to give the decision maker the greatest degree of deference when applying the patent unreasonableness standard. The Court is not to substitute its own opinion on the interpretation of a legislative provision as that would eliminate the Tribunal's decision-making autonomy and specialized expertise: *Victoria Times Colonist*, *a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G,* 2009 BCCA 229, at para. 7, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 19; *Domtar Inc. v. Quebec (commission d'appel en matiere de lesions professionnelles*), [1993] 2 S.C.R. 756 at 774-775, per L'Heureux-Dube J.

[27] The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 has not changed the law regarding the meaning of patent unreasonableness: *Halvarson v. Workers' Compensation Appeal Tribunal*, 2021 BCSC 71 at para. 30.

New Evidence not before the Tribunal

[28] The Minister seeks to provide new evidence not before the Tribunal consisting of the May 21, 2021, Affidavit #1 of Samantha Lawrence. In that affidavit Ms. Lawrence deposes the Ministry, in making its decision, relied on the legislation and three publicly available policy documents not contained in the record of either the reconsideration or the appeal decision.

[29] The Court has before it the record before the decision-maker at the time of the hearing. Section 1 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, defines "record of proceeding" as:

> (a) a document by which the proceeding is commenced;
>
> (b) a notice of a hearing in the proceeding;
>
> (c) an intermediate order made by the tribunal;
>
> (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
>
> (e) a transcript, if any, of the oral evidence given at a hearing;
>
> (f) the decision of the tribunal and any reasons given by it;

[30] In *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, the Court addressed the record:

> 33 In some situations, a chambers judge will have to evaluate the factual matrix of the case in order to determine whether evidence is admissible. In the result, questions of admissibility are not necessarily pure questions of law; they can also be questions of mixed fact and law. They are not, however, matters of discretion.
>
> 34 The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. For that reason, judicial review normally concerns itself only with evidence that was before the tribunal: see *Albu v. The University of British Columbia*, 2015 BCCA 41 (particularly at paras. 35-36); and *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 (particularly at paras. 51-53).
>
> 35 It is often said (as the B.C. Supreme Court did in *Dane Developments*) that judicial review is based on the record that was before the administrative decision maker. In principle, that is a sound observation.

It is important, however, to recognize that we cannot use the narrow traditional concept of a "record" as the standard; rather, a court must be allowed to look at the material that was considered by the tribunal, whether or not that material would, historically, have formed part of the tribunal's "record": see *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353.

36 A court must also recognize that, particularly in the case of tribunals operating in specialized domains and tribunals that are not adjudicative in nature, the tribunal's own expertise and experience will inform its decisions. Courts are generally required to defer to a tribunal's expertise, not ignore it. For that reason, there must be mechanisms available that allow a court to gain an understanding of the foundation from which a tribunal approaches problems in front of it. Appropriately circumscribed affidavits explaining that foundation can be proper on judicial review.

37 A court must also be allowed to fully consider the question of whether the proceedings of a tribunal met standards of procedural fairness. Evidence that casts light on the procedures followed by the tribunal will, therefore, generally be admissible.

38 ...

39 In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court. Evidence that was before the tribunal is clearly admissible before the court. Evidence that casts light on the manner in which the tribunal made its decision will also be admissible within tight limits. Factual evidence setting out the procedures followed by the tribunal, or providing information showing that the tribunal was not impartial will also be admissible.

40 With respect to "general background information", such information will be admissible only if it is confined to what the tribunal actually knew or acted upon. Thus, an affidavit may educate the court on matters that are within the specialized expertise of a tribunal, or which form the common understanding of those who operate in a particular field. Courts must be vigilant, however, not to accept affidavits that simply seek to shore up weakness in the record, or serve to provide a revisionist version of the tribunal's reasons.

41 With respect to "general background information", *Delios v. Canada (Attorney General*), 2015 FCA 117, cited by the chambers judge, provides considerable guidance. In that case, Stratas J.A. endorsed the practice of admitting "general background" affidavits. He was, however, careful to limit the scope of such affidavits:

> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of

> documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy -- that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> 42 Such affidavits have long been accepted in judicial review proceedings, and, particularly where the record is voluminous, help make the tribunal process more accessible to the court and to the parties. Such affidavits do not, however, supplement the record; rather they serve to summarize or condense it in a neutral manner.

[31] The Minister submits those policy documents provide general background information of assistance to the Court in understanding the issues on the judicial review. The Minister argues such are admissible as new evidence on the judicial review as information provided for that purpose is a limited exception to the general rule that the record consists of the material before the administrative decision-maker. Recently, in *Beaudoin v. British Columbia* 2021 BCSC 512 at para. 82, Chief Justice Hinkson summarized the law on the admissibility of new evidence on judicial review:

> [82] In *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2015 BCSC 1663, Mr. Justice Bracken conveniently summarized three categories of exceptions to the rule that all evidence on judicial review must have been in the record before the decision maker:
>
> > [46] The court adopts a supervisory role on judicial review. Among other things, this means that the reviewing court must conduct the proceedings based on the record that was before the administrative decision maker: *Albu v. University of British Columbia*, 2015 BCCA 41, at paras. 35-36. Thus, a general rule precludes the receipt of new evidence on a judicial review, subject to certain exceptions respecting materials which tend to facilitate or enhance the court's supervisory task. Those exceptions contemplate evidence which:
> >
> > - provides "general background" information which will assist the reviewing court in understanding the issues on the judicial review;
> > - brings to the court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision maker; or,
> > - identifies or reconstructs the record that was before the administrative decision maker. This includes materials which demonstrate the "complete absence of evidence" before the administrative decision maker with respect to a particular finding.

> [83] While these categories provide useful guidance, the court must ultimately take a principled approach in determining whether evidence not before the decision maker is admissible on judicial review: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 [Air Canada], at para. 38.

[32] The petitioner submits none of the three policy documents sought to be introduced refer to the reporting cycle policy, nor do they purport to authorize the policy relied on by the Minister. Accordingly, the petitioner submits they should not be admitted.

[33] I agree with the Minister that the three policy documents provide general background as they explain the monthly reporting requirements, the types of assistance that may be recovered from overpayments, and the application of the defence of estoppel. They are public documents available on the Ministry's website. They explain the procedures applied by the Ministry and in so doing, assist this Court. I am satisfied they are admissible for that purpose under the limited exceptions referred to above.

Positions of the Parties

Position of the Petitioner

[34] The petitioner submits the primary issue in this dispute is whether he was eligible for income assistance on April 2, 2020. If he was, then he would be eligible to continue receiving those payments, without deductions, while also receiving pandemic-related support payments from the federal government. The petitioner says the Tribunal's decision to confirm the Minister's decision that he was not eligible for income assistance on April 2, 2020 was patently unreasonable for two reasons.

[35] The petitioner submits the Minister's "reporting cycle" is inconsistent with ss. 27 and 28 of the *Employment and Assistance Act* and s. 89 of the *Employment and Assistance Regulation* and therefore, the Tribunal's conclusion that this policy is a reasonable application of the legislative scheme is patently unreasonable. The petitioner says the two-month lag between reported income and eligibility disregards and conflicts with the clear language of the *Employment and Assistance Act* and the

Employment and Assistance Regulation. He argues that nowhere in the legislation is it set out that reported income from one month shall be deducted from income assistance paid in a subsequent month.

[36] In the petitioner's submission, the Minister should have applied the process for recovering overpayments set out in ss. 27 and 28. Following this procedure, the petitioner's income assistance payment for April 2020 would have been reduced by $10.00, because of the overpayment in February 2020, but he would still be eligible for income assistance on April 2, 2020. The petitioner submits that the Minister does not have discretion to apply the overpayment provisions or not. Alternatively, the Minister has the discretion to select which month to claw back funds from and should have exercised that discretion in favour of the petitioner.

[37] Further, the petitioner states that because the Minister's reconsideration decision relied on s. 10(2) of the *Employment and Assistance Regulation*, which is expressed in the present tense, it must be interpreted in light of s. 7 of the *Interpretation Act*, R.S.B.C. 1996 c. 238:

> 7(1) Every enactment must be construed as always speaking.
>
> (2) If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.

[38] Section 10(2) of the *Employment and Assistance Regulation* provides:

> A family unit is not eligible for Income Assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of Income Assistance determined under Schedule A for a family unit matching that family unit.

[39] The petitioner submits the effect of s. 7 of the *Interpretation Act* is that he was ineligible to receive income assistance in the month when his eligibility arose, namely, February 2020, even if the Minister has not confirmed that ineligibility. As a result, he argues the two month "reporting cycle" is unauthorized.

[40] In the alternative, the petitioner says that if the Tribunal found the "reporting cycle" did not violate the overpayment provisions of the *Employment and Assistance*

Act and the *Employment and Assistance Regulation*, the *Employment and Assistance Regulation* gives the Minister discretion as to when to apply a period of ineligibility caused by excess income. By applying a period of ineligibility two months after the month when the excess income was received the petitioner submits the Minister fettered his discretion by refusing to consider applying the period of ineligibility to a different month and that to do so was patently unreasonable.

[41] The petitioner also disputes the Minister's assertion that his interpretation of the scheme would cause the entire system to break down. He submits his interpretation entails a system no more cumbersome than the current system.

[42] In the petitioner's submission the "reporting cycle" contradicts the intention of the *Employment and Assistance Act* and the *Employment and Assistance Regulation*, which he characterizes as being to protect recipients from abrupt decreases or unexpected expenses in income support. He urges the Court to recognize that any ambiguity in the legislative scheme, given its benevolent purpose, must be resolved in his favour and that the Tribunal's failure to do so was patently unreasonable.

Position of the Minister

[43] The Minister emphasizes that a review by the Court of the Tribunal's findings of fact, law, and mixed fact and law is based on the highly deferential patent unreasonableness standard.

[44] The Minister's position is that under s. 11 of the *Employment and Assistance Act* and s. 33 of the *Employment and Assistance Regulation*, as well as the Ministry's Monthly Income Reporting Requirements Policy, clearly establish that income received by a recipient in February must be reported by March 5th and then used to determine eligibility for April. The Minister submits this is consistent with the intention of the legislature as the legislature could not have intended to establish an impracticable scheme. The Minister says that using the income reported in March to determine eligibility for income assistance in February or March is impractical as by then income assistance has been paid for both of those months and the petitioner's

proposed interpretation would require the Ministry, upon receipt of income reports, to recalculate the income assistance for prior months and either top-up the payment made or commence a repayment program.

[45] The Minister submits the two-month lag between receipt of income and its effect on eligibility for assistance is a necessary and reasonable approach to administering the *Employment and Assistance Act* and *Employment and Assistance Regulation* given the reporting requirements in those enactments.

[46] The Minister notes the question on this judicial review is not whether the petitioner's proposed interpretation of the legislation is preferable. Rather the question is whether the decision of the Tribunal to uphold the reconsideration decision was patently unreasonable. The Minister submits the Tribunal's decision was not patently unreasonable.

Position of the Tribunal

[47] The Tribunal takes no position on the merits of the petitioner's judicial review as it is established under s. 19 of the *Employment and Assistance Act* and participates in this application pursuant to s. 15 of the *Judicial Review Procedure Act*, meaning it is limited to providing submissions regarding the legislative scheme, the record of proceedings, standard of review, available remedies, and costs: *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44.

[48] The Tribunal also submits that should the Court conclude it erred in its decision the appropriate remedy is to set aside the decision and remit the matter to the Tribunal for reconsideration.

[49] The Tribunal opposes any order for costs against it because nothing in the grounds or circumstances of this judicial review support an exceptional award of costs against the decision-maker: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494.

Applicable Statutory Provisions

[50] The obligation of the Tribunal in an appeal hearing is addressed in s. 24 of the *Employment and Assistance Act*:

> 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.
>
> (2) For a decision referred to in subsection (1), the panel must
>
> (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
>
> (b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.
>
> (3) The panel must provide written reasons for its decision under subsection (2).

[51] Section 11 of the *Employment and Assistance Act* and s. 33 of the *Employment and Assistance Regulation* address how and when a person must report information to the Minister to receive income assistance:

> Reporting obligations
>
> 11 (1) For a family unit to be eligible for Income Assistance, a recipient, in the manner and within the time specified by Regulation, must
>
> (a) submit to the minister a report that
>
> (i) is in the form specified by the minister, and
>
> (ii) contains the prescribed information, and
>
> (b) notify the minister of any change in circumstances or information that
>
> (i) may affect the eligibility of the family unit, and
>
> (ii) was previously provided to the minister.
>
> (2) A report under subsection (1) (a) is deemed not to have been submitted unless the accuracy of the information provided in it is confirmed by a signed statement of each recipient.

[52] Section 33 of *the Employment and Assistance Regulation* states:

> Monthly reporting requirement
>
> *33* (1) For the purposes of section 11 (1) (a) *[reporting obligations]* of the Act,
>
> (a) the report must be submitted by the 5th day of each calendar month, and
>
> (b) the information required is all of the following, as requested in the monthly report form specified by the minister:
>
> (i) whether the family unit requires further assistance;
>
> (ii) changes in the family unit's assets;
>
> (iii) all income received by the family unit and the source of that income;
>
> (iv) the employment and educational circumstances of recipients in the family unit;
>
> (v) changes in family unit membership or the marital status of a recipient;
>
> (vi) any warrants as described in section 15.2 (1) of the Act.

[53] Income that can be earned while on income assistance is capped by regulation:

> Limits on income
>
> 10 (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 Income Assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of Income Assistance determined under Schedule A for a family unit matching that family unit.

[54] If a person receives income assistance they were not entitled to receive, they must repay the amount of the overpayment. Specifically, s. 27 of the *Employment and Assistance Act* states that if income assistance is provided to or for a family unit that “is not eligible for it”, the recipients “are liable to repay to the government the amount or value of the overpayment for that period”.

[55] Section 28 then addresses the liability of a recipient for and recovery of such debts:

> Liability for and recovery of debts under Act
>
> 28(1) An amount that a person is liable to repay under this Act is a debt due to the government that may be
>
> (a) recovered in a court that has jurisdiction, or
>
> (b) deducted, in accordance with the regulations, from any subsequent income assistance, hardship assistance or supplement for which the person's family unit is eligible or from an amount payable to the person by the government under a prescribed enactment.

[56] Section 89 of the *Employment and Assistance Regulation* addresses the procedures to recover overpayments and includes in the definition of "overpayment":

> Deductions for debts owed
>
> 89 (1) In this section and sections 89.1 and 89.2:
>
> ...
>
> "overpayment" means
>
> (a) an overpayment described in section 27 (1) [overpayments] of the Act or section 18 (1) [overpayments] of the Employment and Assistance for Persons with Disabilities Act,
>
> ...

The Reconsideration Decision

[57] The relevant portions of the reconsideration decision of the Minister state:

> Section 2.1 of the EA Regulation and Section 2.01 of the EAPWD Regulation apply when providing assistance for a calendar month after April 2020 and before September 2021. It states (in part) that Section 1(a) of Schedule B is to be read as employment insurance, income support payments received under the *Canada Emergency Response Benefit Act*, and a benefit under the *Canada Recovery Benefits Act* are exempt from income calculations, ***if*** the family unit (or someone in the family unit) was eligible for income assistance, disability assistance or specified types of hardship assistance on April 2, 2020.
>
> Decision:
>
> You do not dispute your February income exceeded your assistance rate, making you ineligible for assistance for one month. However, you dispute which month that ineligibility should occur.
>
> As noted above, Section 11 of the EA Act and Section 33 of the EA Regulation explains how and when recipients must report income or changes that may affect their eligibility. It is reasonable to apply the reporting cycle,

with February income reported in March affecting April assistance, because EA Regulation Section 33 requires that information be reported to determine eligibility for that same month. A recipient could earn income or experience a relevant change after the 5th of the month, and they would not have an opportunity to report the information.

...

The Tribunal's Decision

[58] The Tribunal stated:

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 lA 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 the 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 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 rales.

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.

[59] The Tribunal then concluded:

> 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.

Discussion

[60] The nub of the issue arises from the Ministry's long-standing practice of providing assistance on the third Wednesday of every month to cover the recipient's expenses in the following month. The amount provided is subject to the deduction for income earned in the month before the month when the cheque is issued. That is, in this case April income assistance would be issued in late March 2020 but

reduced by income earned in February. Therefore, the timing of periods of ineligibility and eligibility have significant practical impact. At issue here is whether this reporting cycle is consistent with the *Employment and Assistance Act* and the *Employment and Income Assistance Regulations*.

[61] To reiterate the administrative context in which this judicial review proceeds, s. 58 of the *Administrative Tribunals Act* provides:

> 58(1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[62] As noted earlier, a decision is patently unreasonable if it is “openly, clearly, evidently unreasonable", “obviously untenable”, "clearly irrational” or “so flawed that no amount of curial deference can justify letting it stand". A patently unreasonable defect has also been described as one that “almost border[s] on the absurd”.

[63] The core of the petitioner’s submission is that the reporting cycle is not consistent with a plain reading of the *Employment and Assistance Act* and *Employment and Assistance Regulation*. He says that if an income assistance

recipient earns income exceeding their income assistance payment in that month, they are ineligible for income assistance in that same month. To interpret the relevant provisions in any other way is, he says, patently unreasonable. He says assistance paid to a recipient who later was found ineligible should be treated as an overpayment to be repaid gradually rather than disqualifying them from any payment at all.

[64] The petitioner relies on ss. 27 and 28 of the *Employment and Assistance Act* which he emphasizes do not state that a person who receives income in one month shall have that amount deducted from the income assistance payment of a subsequent month:

> Overpayments
>
> 27(1) If Income Assistance, hardship assistance or a supplement is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period.
>
> (2) The minister's decision about the amount a person is liable to repay under subsection (1) is not appealable under section 17 (3) *[reconsideration and appeal rights]*.
>
> Liability for and recovery of debts under Act
>
> 28(1) An amount that a person is liable to repay under this Act is a debt due to the government that may be
>
> (a) recovered in a court that has jurisdiction, or
>
> (b) deducted, in accordance with the Regulations, from any subsequent Income Assistance, hardship assistance or supplement for which the person's family unit is eligible or from an amount payable to the person by the government under a prescribed enactment.
>
> (2) Subject to the Regulations, the minister may enter into an agreement, or accept any right assigned, for the repayment of an amount referred to in subsection (1).
>
> (3) An agreement under subsection (2) may be entered into before or after the Income Assistance, hardship assistance or supplement to which it relates is provided.
>
> (4) A person is jointly and separately liable for a debt referred to under subsection (1) that accrued in respect of a family unit while the person was a recipient in the family unit.

[65] In support of this position the petitioner relies on s. 10(2) of the *Employment and Assistance Regulation* and s. 7 of the *Interpretation Act*.

[66] Under the *Interpretation Act*, enactments are "always speaking" (s. 7(1)) and, where "expressed in the present tense, the provision applies to the circumstances as they arise" (s. 7(2)). Hence a legislative enactment's meaning may change over time: (*Selkirk Mountain Forest Ltd. v. British Columbia (Registrar of Timber Marks (Ministry of Forests)*, 2019 BCSC 1226 at paras. 92 & 93).

[67] The petitioner's submission is that applying s. 7(2) of the *Interpretation Act* requires the relevant sections to be read as meaning that income earned in a particular month should apply to the income assistance payment for that month. That is, assistance paid to a recipient who later was found ineligible should be treated as an overpayment to be repaid gradually rather than disqualifying them from any payment at all. The petitioner's reliance on s. 7(2) does not accord with the meaning of "always speaking", which is intended to ensure that legislation does not become ossified, limiting the procedural and policy decisions available to the Ministry in implementing legislation.

[68] Section 10(2) of the *Employment and Assistance Regulation*, quoted earlier, provides:

> [a] family unit is not eligible for Income Assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of Income Assistance determined under Schedule A for a family unit matching that family unit.

[69] It does not expressly say that a family unit is not eligible for income assistance if the net income of the family unit equals or exceeds the amount of income assistance the unit is entitled for the same month in which the income is earned, the interpretation the petitioner advances.

[70] Section 10(2) must be read in its entire context, its grammatical and ordinary sense and in a manner that is harmonious with the scheme of the *Employment Assistance Act*, its object, and the intention of the Legislature. Section 11 of the

Employment and Assistance Act provides that "[f]or a family unit to be eligible for Income Assistance, a recipient, in the manner and within the time specified by Regulation, must (a) submit to the registrar a report". Section 33 of the *Employment and Assistance Regulation* requires that report be submitted monthly and that it "must be submitted by the 5th day of each calendar month...".

[71] The Tribunal addressed the issue of the amount of income assistance which for convenience I repeat as follows:

> **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 is 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 on 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.

[72] The Tribunal then stated:

> 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 the EAAR.

> The earliest point at which the Ministry as 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.

[73] The petitioner argues that the Tribunal's interpretation of s. 28 of the *Employment and Assistance Regulation* as authority for the reporting cycle policy is patently unreasonable because the Tribunal considered s. 28 in isolation from the rest of the statutory scheme governing income assistance payments.

[74] The difficulty with the petitioner's argument is that it ignores certain sections of the Act and Regulation. Section 11 of the *Employment and Assistance Act* and s. 33 of the *Employment and Assistance Regulation* require that income received in February must be reported by March 5th. This requirement to report all qualifying income by the 5th of the following month is also set out in the Ministry's Monthly Reporting Requirements Policy. As the Minister notes, using income reported in March to determine whether a person is eligible for income assistance during February or March is impractical. By the time the reporting occurs, the Ministry will have already paid income assistance in both of those months. The petitioner's proposed interpretation would require the Ministry, upon receipt of income reports, to recalculate the amount paid to income assistance recipients for prior months and either top-up or commence a repayment program for all whose reported income does not match the amount paid to them.

[75] I accept that the two-month lag between receipt of income and its effect on eligibility for assistance is both a reasonable and necessary approach to administering the *Employment and Assistance Act* and *Employment and Assistance*

Regulation overall given the reporting and eligibility requirements. To say there is no authority in the legislation for such a policy is incorrect.

[76] Regarding the submission that ss. 27 and 28 of the *Employment and Assistance Act* for the recovery of overpayments to ineligible individuals should be applied instead of the reporting cycle is not practical. To do so would mean that if assistance was paid to an individual later found to be ineligible, and that overpayment could be gradually repaid rather than disqualifying them from further payments would mean a continuation of their payments even though not qualified.

[77] The petitioner submits that his interpretation would permit individuals who work sporadically to receive ongoing assistance payments. However, as the Minister notes the question on this judicial review is not whether the petitioner's interpretation of the legislation is preferable. The question for this Court is whether the Tribunal's decision to uphold the reconsideration decision is patently unreasonable.

[78] The Tribunal concluded that the income received by the petitioner in February 2020 was not an overpayment of February income assistance, hence s. 89 of the *Employment and Assistance Regulation* did not apply. This was not patently unreasonable.

[79] I turn to the petitioner's second ground of patent unreasonableness, the Tribunal's finding that the Minister had no discretion to find the petitioner was ineligible for income assistance on April 2, 2020, because it disregarded the facts and the applicable principles of interpretation. The petitioner submits in fact he was eligible for and actually received income assistance in April 2020 because his ineligibility expired when his income assistance scheduled for late March 2020 was withheld under the "reporting cycle" policy.

[80] Section 2.1 of the *Employment and Assistance Regulation* and 2.01 of the *Employment and Assistance for Persons with Disabilities Regulation,* state:

> 2.1(1) This section applies in relation to the provision of assistance for a calendar month after April, 2020 to or for

> (a) a family unit that was eligible on April 2, 2020, or includes a person who was in a family unit that was eligible on April 2, 2020 for
>
> (i) income assistance...

[81] To be eligible to treat CERB and CRB income as exempt for the purposes of income assistance eligibility, a person must have been eligible for income assistance on April 2, 2020. The Tribunal's conclusion that the Minister was reasonable in deciding the Petitioner was not eligible for income assistance on April 2, 2020, and hence not entitled to CERB and CRB income exemptions is not patently unreasonable. Sections 2.1 and 2.01 are clear and no alternative interpretation is available.

[82] Based on both law and policy, when the Minister determined the petitioner had received erroneous information from the Ministry regarding his right to the CERB and CRB exemptions, the Minister concluded the petitioner had a strong estoppel defence in relation to any collection proceeding.

[83] The Tribunal's decision was not patently unreasonable. It was well within the reasonable possibilities to conclude that the Ministry was not exercising discretion but rather recognizing an estoppel defence when the Minister permitted him to retain the overpayments from June to August 2020. That the legislation does not give the Minister a discretion to find the Petitioner eligible for income assistance on April 2, 2020, nor does it provide a discretion to find the CERB and CRB income exempt if not eligible for assistance on April 2, 2020, were appropriate considerations for the Tribunal.

Conclusion

[84] In sum, the petitioner asks this Court to interpret the legislative scheme in a manner he finds preferable. However, that is not the role of the Court on a judicial review. The Court's role is to determine if the decision of the Tribunal is patently unreasonable. The issues the petitioner raises respecting problems with the existing reporting cycle and the Tribunal and the Ministry's interpretation of the scheme does not establish that the Tribunal's decision is patently unreasonable.

[85] I am satisfied the Tribunal's decision is not patently unreasonable. The petition is dismissed.

Costs

[86] As noted earlier the Minister does not seek costs of this application. The Parties shall each bear their own costs.

"The Honourable Justice Punnett"