EXPOSING THE BARRIERS: ADMINISTRATIVE UNFAIRNESS AT THE MINISTRY OF HUMAN RESOURCES

Community Groups' Complaint to the Ombudsman of British Columbia

Sent to the Ombudsman on February 1, 2005

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1. INTRODUCTION

On behalf of a coalition of community groups across B.C., the B.C. Public Interest Advocacy Centre[1] is filing this systemic complaint about the Ministry of Human Resources (the "Ministry," or "MHR"), in response to concerns about unfair practices experienced by people who need assistance from the Ministry. This coalition includes the following organizations: [2]

- **The Action Committee of People with DisAbilities** (Victoria)
- **Active Support Against Poverty** (Prince George)
- **Advocacy Outreach Society** (Salmon Arm)
- **AIDS Vancouver** (Vancouver)
- **B.C. Coalition of People with Disabilities** (Provincial)
- **Downtown Eastside Residents Association** (Vancouver)
- **federated anti-poverty groups of B.C.** (Provincial)
- **First United Church** (Vancouver)
- **The Kamloops and District Elizabeth Fry Society** (Kamloops)
- **Kettle Friendship Society** (Vancouver)
- **Mental Health Empowerment Advocates Program** (Vancouver)
- **The Nelson Advocacy Centre** (Nelson)
- **Newton Advocacy Group Society** (Surrey)
- **North Island Advocacy Coalition Society** (Campbell River)
- **Together Against Poverty Society** (Victoria)

These organizations provide advocacy assistance to individuals who need access to government such as income assistance and disability benefits. Together, they assist thousands of individuals every year.

As lawyers and advocates, we often collaborate with MHR staff to resolve problems on a case-by-case basis. People who face unfairness at the Ministry are often marginalized and impoverished, and have difficulty making themselves heard. Many times, we find that instances of unfairness can be addressed when an individual has the assistance of patient Ministry staff, a lawyer or advocate, and the resources and the capability to pursue a matter through all levels of appeal. Sometimes, however, we see the same breaches of fairness occurring again and again.

To address fairness problems in a more efficient manner, over the past few years staff from many of the organizations that comprise our coalition have met and corresponded with Ministry representatives at the local, regional and provincial levels. We have communicated many of the concerns described in this complaint to the Ministry as individual advocates and as organizations.

[1] The B.C. Public Interest Advocacy Centre is a non-profit law office dedicated to advancing the interests of marginalized groups. For more information, please refer to our website at http://www.bcpiac.com.
[2] For descriptions of these organizations, please refer to Appendix A.

The groups that comprise our coalition are all non-profit organizations with very limited resources. We would like an independent investigation of the concerns raised in this complaint so that the issues are addressed in a systematic way, and have come together to pool our resources and knowledge. We submit our observations to the Office of the Ombudsman with the goal of resolving these issues in a manner that is efficient and effective both for complainants and for the Ministry.

In this complaint we address procedural unfairness related to the following:

(a) Lack of legal representation;
(b) Three week waiting period;
(c) Persons with Persistent Multiple Barriers designation;
(d) Ministry home visits;
(e) Medical and other documentation;
(f) Reconsiderations, appeals and administrative reviews; and
(g) Ministry office structures and practices.

Sections 10(1) and 23(1) of the *Ombudsman Act* contain key provisions about the Ombudsman's jurisdiction and the matters on which the Ombudsman must report if he finds problems in the administration of public agencies. These include circumstances in which a decision, recommendation, act or omission[3] was:

- made contrary to law;
- unjust, oppressive or improperly discriminatory;
- made under a law or practice that is unjust, oppressive or improperly discriminatory;
- based on a mistake of law or fact or on irrelevant grounds;
- related to arbitrary, unreasonable or unfair procedures;
- done for an improper purpose;
- made without giving adequate reasons;
- negligent; or
- made with unreasonable delay[4]

In addition, the *Code of Administrative Justice*[5] sets out more detailed guidelines on the Ombudsman's interpretation of the scope and meaning of fairness. The Ombudsman can investigate complaints of any kind that fall within his jurisdiction, whether they are individual or systemic in nature.

We submit that all of the problems described in this complaint fall squarely within the jurisdiction of the Ombudsman, and are clear cases of administrative unfairness on the part of

[3] s. 10(1), *Ombudsman Act* R.S.B.C. 1996 c. 340, online: http://www.ombud.gov.bc.ca/publications/Ombuds_Act/ombact.htm.
[4] s. 23(1).
[5] British Columbia, Office of the Ombudsman, *Public Report No. 42 / Code of Administrative Justice*, March 2003, online: http://www.ombud.gov.bc.ca/reports/index.htm.

the Ministry. For each issue we raise in this complaint, we outline why the problem we describe constitutes administrative unfairness. Where possible, we have described specific examples of our observations to clarify what is at stake.

The Ministry took several positive steps in 2004 towards improving the lives of people who rely on assistance in B.C:

- The Ministry recently increased support benefits for persons with disabilities by $70 per month;[6]
- In response to a court challenge, the Ministry introduced policy changes that promote greater fairness when the Ministry alleges overpayments against recipients of income assistance and disability benefits;[7] and
- In the spring of 2004, the Ministry modified its two out of five year welfare time limit.[8]

These measures and others make us optimistic that the Ministry will work closely with the Ombudsman to address our concerns and ensure fairness for applicants and recipients of social assistance benefits.

We are very confident that the Office of the Ombudsman will make recommendations that will provide important guidance to the Ministry, and look forward to its findings. We also look forward to the Ministry's compliance with those recommendations, and to a new era of administrative fairness for low-income people in British Columbia.

[6] British Columbia Ministry of Human Resources, Press Release 2004OTP0081-000926 "Higher rates for people with disabilities," 6 November 2004, online: http://www.gov.bc.ca/bvprd/bc/channel.do?action=ministry&channelID=-8388&navId=NAV_ID_province.
[7] For a summary of these changes, see Manual Amendment letter No. 1 2004/2005, April 19, 2004, online: http://www.mhr.gov.bc.ca/PUBLICAT/VOL1/MAL/2004-2005/01_April.htm.
[8] For a summary of these changes, see Manual Amendment letter No. 1 2004/2005, April 19, 2004, online: http://www.mhr.gov.bc.ca/PUBLICAT/VOL1/MAL/2004-2005/01_April.htm.

2. Summary of Recommendations

We recommend the following changes to Ministry of Human Resources laws, policies and practices:

1. Provide access to state-funded legal representation for poverty law matters.
2. Amend the legislation to end the three week work search as a precondition to eligibility for assistance.
3. Ensure that individuals and families wait no longer than is provided for in the legislation, and that receipt of assistance is not delayed by administrative procedures.
4. Ensure that procedures related to applying for expedited assistance evaluate whether a person will suffer "undue hardship," as required by the legislation, and that the policies do not impose a more stringent test.
5. Instruct and support Ministry staff in taking an active role in determining whether an individual may suffer undue hardship as a result of the three week wait.
6. Ensure that Ministry staff do not refer people to foodbanks or emergency shelters instead of assessing undue hardship.
7. Ensure that people are not required to wait an unreasonable amount of time for an appointment. In most cases, applicants should be able to have an ENA appointment immediately, and not more than 24 hours after their request.
8. Ensure that all policies and forms used to determine PPMB status accurately describe the requirements provided for by law, and do not further restrict access to this status.
9. Establish office structures that ensure fairness at all levels of decision making.
10. End the practice of "home visits" except with notice and prior written consent.
11. Ensure that Ministry workers only enter a person's home if the person has been provided with at least 72 hours notice, and informed of their right to have a witness present.
12. Prohibit Ministry workers from conducting unreasonable searches, including looking through intimate areas such as closets, or the rooms of individuals who are not Ministry clients.
13. Ensure that people who refuse to let Ministry staff enter their homes are never subject to adverse consequences for that reason.
14. Ensure that where a person properly documents a permanent medical condition, the Ministry does not require repeated proof.
15. Ensure that where a person documents a medical condition that is relevant for one purpose, this documentation is used for all other relevant purposes.
16. Ensure that applicants are never required to provide documentation that is impossible to obtain.

17. Evaluate all policies and practices in light of the realities faced by new immigrants and refugees. Ensure that refugee claimants and their families are never required to face personal risks in order to obtain documentation from other countries.

18. Promote access to information about appeal rights.

19. Distribute the Tribunal's brochure on "Your Right to Appeal" to everyone whose benefits are reduced or denied for any reason, orally or in writing.

20. Provide people with full reasons and documentation for decisions that are made about them. Ensure that this information is provided automatically, without request.

21. Ensure that the time period for making a reconsideration request does not begin to pass until after the person has received all information relevant to the appeal.

22. Adhere to all legal obligations in relation to reconsiderations and appeals, including the obligation to respond to reconsideration requests within 10 days.

23. Amend the legislation to require that benefits granted by the Tribunal are reinstated from the date of the reconsideration decision.

24. Remove the distinction between reconsideration and appeal, and administrative review. It must be possible, as a matter of practice, to appeal any decision to the Tribunal, and to have the Tribunal decide whether or not that issue falls within its jurisdiction.

25. Evaluate and amend policies and practices to ensure that all citizens of B.C., including marginalized groups, can access the benefits they are entitled to. Examples of these kinds of measures would include:
    (a) providing language interpretation
    (b) providing services for people who cannot read
    (c) making appointment times sufficiently flexible to make attendance possible and realistic
    (d) supplying funds for transportation
    (e) arranging for an appropriate place and method of contact for people with loud, aggressive, offensive or confusing behaviours
    (f) giving people a choice of completing an orientation session in person or online

26. Provide Ministry offices with sufficient staff levels.

27. Ensure that people who contact Ministry offices for assistance are never diverted away from the procedures that would assess their eligibility.

28. Change office structures to remove the "pod" system.

29. Instruct and support Ministry staff to make decisions with accountability and transparency.

3. SOCIAL CONDITIONS IN BRITISH COLUMBIA

The importance of administrative fairness at the Ministry of Human Resources is shaped by the context in which this government agency operates. The B.C. Ministry of Human Resources administers the income assistance programs the province provides to some low-income people, including persons with disabilities. These programs are primarily governed by the *Employment and Assistance Act (EA Act)*[9] and the *Employment and Assistance for Persons with Disabilities Act (EAPD Act)*[10]. There are extensive Regulations to each *Act*[11], and a Policy Manual that sets out the Ministry's interpretation of the law, and guides the actions of Ministry staff.[12]

The Ministry is responsible for implementing legislation that assists British Columbians who demonstrate extreme economic need. The manner in which the Ministry chooses to implement the *EA Act* and *EAPD Act* profoundly affects the lives of low-income people in B.C.

In order to understand the role of administrative fairness in relation to the Ministry and the people it serves, it is important to consider the following information about social conditions in B.C.:

- According to Statistics Canada's "Low-Income Cut-Off," 16.5% of individuals in B.C. spend a significantly higher than average proportion of their income on basic necessities.[13]
- According to the "Market Basket Measure" of poverty, 20% of individuals in B.C. live below a decent standard of living.[14]
- The Social Planning and Research Council of B.C. estimates that income assistance benefits in B.C. meet only 44-60% of minimum living costs. Individuals who live on income assistance in B.C. survive at a level far below an adequate standard of living, indeed far below all measures of the "poverty line."[15]
- The Dieticians of Canada have released several reports stating that income assistance levels in B.C. are insufficient to ensure food security.[16]

[9] *Employment and Assistance Act* SBC 2002 c. 40.
[10] *Employment and Assistance for Persons with Disabilities Act* SBC 2002 c. 41.
[11] *Employment and Assistance Regulation* B.C. Reg. 263/2002 and *Employment and Assistance for Persons with Disabilities Regulation* B.C. Reg. 265/2002.
[12] BC Employment and Assistance Manual, http://www.mhr.gov.bc.ca/PUBLICAT/VOL1/index.htm.
[13] Human Resources Development Canada, *Understanding the 2000 Low Income Statistics Based on the Market Basket Measure*, (Ottawa: Human Resources Development Canada, May 2003), online: http://www11.sdc.gc.ca/en/cs/sp/arb/publications/research/2003-000151/page00.shtml, at 21.
[14] HRDC, supra note 13.
[15] Andrea Long and Michael Goldberg, *Falling further behind: Falling further behind : a comparison of living costs and employment and assistance rates in British Columbia*, (Social Planning and Research Council of B.C. (Vancouver: SPARC BC, December 2002), online: http://www.sparc.bc.ca/research/falling_further_behind.pdf at ii.
[16] Dieticians of Canada, *The Cost of Eating in B.C.* (Vancouver, Dieticians of Canada, 2004), online: www.bcasw.org/currentnewsPDF/coeibc2004_fullreport.pdf.

- In the city of Vancouver, from 500 to 1,200 people sleep out of doors on any given night.[17]
- There are now 40,000 people living in 20,500 households in the city of Vancouver who are at risk of homelessness (people at risk of homelessness are defined as those being in 'core need' and spending more than 50% of their income on shelter).[18]

In recent years, there has been a significant increase in the number of British Columbians who are hungry and homeless:

- Since 2001, the number of individuals sleeping out of doors in the city of Vancouver has approximately doubled from 300-600, to 500-1200.[19]
- According to the Canadian Association of Food Banks, 84,317 people used food banks in B.C. in March 2004, an increase of 16% in one year. Almost 8,000 more children needed emergency food in 2004 than in 2003, an increase of 41.7%.[20]

In addition, people who live in poverty disproportionately come from marginalized groups, such as women, seniors, Aboriginal peoples, recent immigrants, and people with disabilities. For example, according to a report by the Canadian Council of Social Development, 29.8% of people with disabilities in B.C. live in poverty as compared with 18.4% of people without disabilities.[21] 42.1% of Aboriginal people in B.C. live in poverty, as compared with 19% of non-Aboriginal people.[22] In B.C., 43% of unattached seniors over the age of 65, and 48.2% of female lone parents are poor.[23]

Although levels of poverty have not decreased over the past few years, the number of individuals on income assistance has. Ministry caseload statistics show that the average number of people receiving assistance has been reduced by approximately half over the past several years, from 218,900 in 1995 to 110,150 in 2004.[24]

The Ministry appears to view reduced caseloads as a success or accomplishment, without reference to levels of poverty.[25]

[17] J. Graves, *Shelterless in Vancouver, 2004*, City of Vancouver, 2004, online: http://www.city.vancouver.bc.ca/ctyclerk/cclerk/20040224/rr1b.htm.
[18] City of Vancouver Housing Centre, *Homelessness Action Plan*, November 8, 2004, online: http://www.city.vancouver.bc.ca/commsvcs/housing/pdf/homelessactplan04nov8.pdf at 1.
[19] *Homelessness Action Plan*, *supra* note 18 at 1.
[20] Hunger Count 2004, online: http://www.cafb-acba.ca/english/EducationandResearch-ResearchStudies.html at page 13.
[21] David Ross, Katherine J. Scott and Peter J. Smith, *The Canadian Fact Book on Poverty* (Ottawa: Canadian Council on Social Development, 2000) at 76.
[22] *Canadian Fact Book on Poverty*, supra note 21 at 75.
[23] *Canadian Fact Book on Poverty*, supra note 21 at 171.
[24] British Columbia Ministry of Human Resources, BCEA Summary report January 5, 2005, online: http://www.mhr.gov.bc.ca/research/ at 1.
[25] For example, in an editorial of March 5, 2003, former Minister Murray Coell described as successes that Ministry studies showed that more than two-thirds of former clients left income assistance for paid employment, and that caseloads had declined by 22 per cent since June 2001. Although Minister Coell described the benefits of

This contextual information documents the extremely serious consequences of administrative unfairness on the part of MHR. Unfairness in relation to the fulfillment of basic needs has a life and death element.

4. COMPLAINT

For each item in this complaint, we set out the legislative and policy framework of the issue, outline our complaint, and propose solutions to the unfair practices we describe. These recommendations are focused on the narrow area of procedural fairness, and do not address all of our concerns about the benefits schemes. Rather, our recommendations are aimed at increasing the fairness of the Ministry's administration of these schemes, and ensuring that decisions affecting the rights of people in B.C. are made through an open, reasonable, and accountable process.

We urge the Office of the Ombudsman to keep in mind the context described above throughout its investigation. When a public agency engages in unfair practices, this is always an injustice to the citizens of B.C., and is properly subject to the scrutiny of the Ombudsman. When administrative unfairness results in hunger and homelessness for our most vulnerable citizens, in our submission the Ombudsman's duty to hold the government accountable and assist in finding a remedy could not be higher.

a) Lack of Legal Representation

In B.C., poverty is a reality for a significant number of individuals and families. The experience of poverty is made deeper and more harsh by the reduction in social services that has occurred over the past several years. Particularly important to the issue of administrative fairness is the absence of legal representation for poverty law issues. Many reports have been written over the last several years documenting the need for legal representation in poverty law matters. For example, a recent report by the Social Planning and Research Council of B.C. states:

> From the 1970s until 2002, the BC Legal Services Society (LSS) developed a method of poverty law service delivery that was admired for its quality, range of service, and numbers of clients assisted. Until August 2002, LSS relied primarily on the provincial government, along with some other small funding resources, to support the work of 27 full-time equivalent lawyers and 77 paralegals. Approximately 40,000 poverty law clients were assisted on an annual basis.
>
> On August 30, 2002, all LSS poverty law direct service delivery positions were eliminated. Despite the restoration of some poverty law advice and assistance

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employment enjoyed by some former clients, he did not mention the consequences for the one-third of former clients who left income assistance without paid employment, nor did he reference levels of poverty in B.C. Ministry of Human Resources, "Income Assistance Changes Support People in Need," online: http://www2.news.gov.bc.ca/nrm_news_releases/2003MHR0003-000229.htm.

> through an enhanced telephone service (Law Line), available options for poverty law assistance in BC are now scarce and fragmented. The impact of these changes is compounded by an overhaul of administrative tribunals that made these forums more legalistic, as well as concurrent funding and service reductions in other areas, including welfare advocates, the Ombudsman's office, and Women's Centres.[26]

The need for poverty law services throughout B.C. is so great that it cannot possibly be fulfilled by the Law Line and community advocacy services alone. There are some matters for which people need full legal representation. Some legal problems involving poverty, including matters involving the Ministry of Human Resources, are quite complex and put important rights and interests at stake. In these cases, individuals need access to legal representation.

In our submission, lack of legal representation services has very damaging consequences for low-income people who find themselves in an adversarial position with the government. This is confirmed by the fact that when people do have access to legal representation, the government often backs down and grants the relief sought or discontinues its claim.

The lack of legal representation as well as legal and advocacy services more generally reduces the capacity of individuals and families in B.C. to access their legal rights in relation to income assistance. We assert that some people in need cannot access or are no longer receiving benefits from MHR because they are unable to navigate the necessary procedural requirements. A report by the City of Vancouver on shelterless people states:

> About half of the shelterless people we wake at night tell us that they do not have any income because they have difficulty accessing the new welfare system. Before assistance is received, the system now involves several appointments, delays, and tasks they find overly challenging. This seems to have been a particular problem for people with head injury, mental illness, severe depression, young people who are trying to find work, prisoners following their release from incarceration, those raised in foster care in BC, and immigrants and refugees.[27]

A further Vancouver report states:

> In 2001, about 15% of the street homeless were not on welfare. By early 2004, this had increased to 50%, and by summer 2004, more than 75% of the street homeless reported they are not on welfare.[28]

This information speaks to the grave consequences of unfairness in relation to income assistance programs. It also speaks to the need for access to legal representation in poverty law matters in order to ensure that the legal rights of low income people are protected.

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[26] Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from BC and Abroad*, (Vancouver, Social Planning and Research Council of BC, August 30, 2004), online: http://www.sparc.bc.ca/supportitems/delivering_poverty_law_services.pdf at 9.
[27] *Shelterless in Vancouver, supra* note 17.
[28] *Homelessness Action Plan*, *supra* note 18 at 6.

Recommendation

1. Provide access to state-funded legal representation for poverty law matters.

b) Three Week Waiting Period

Legislative and Policy Framework:

Section 3 of the Regulations to the *EA Act* sets out the "pre-application requirements" for applicants:

> 3 (1) To be eligible to apply for income assistance, a person must satisfy the following conditions:
>
> > (a) complete a search for employment as directed by the minister for the 3 week period immediately following the date the person completed an enquiry form,
> >
> > (b) provide information about and verification of the search for employment in the form specified by the minister for that purpose.
>
> (2) If the minister is satisfied that compliance with subsection (1) would cause undue hardship to a person or a person's dependants, the minister may exempt the person from satisfying the conditions under subsection (1).

According to this section, when people first arrive at a Ministry office, they do not receive benefits right away. Instead, they are given instructions to complete a three week search for employment, and to return in three weeks with a completed "work search activities record."[29] After Ministry staff have determined that the individual has conducted an adequate work search, the enquirer will be given an appointment to apply for benefits.[30] With certain limited exceptions, during these three weeks people receive no financial assistance.[31]

(i) Administrative Delays in Excess of Three Weeks

Complaint:

The Regulations and policy surrounding the three week wait often result in much longer delays between the time people first arrive to apply for benefits, and the time they actually receive assistance:

[29] Policy Manual section 6.2.
[30] Policy Manual section 6.2.
[31] See *Employment and Assistance Regulation* s. 3, *Employment and Assistance for Persons with Disabilities Regulation*, s. 3.

- When a person returns to the office with evidence of their work search, an appointment to actually "apply" for benefits is not always available right away.
- It can take Ministry staff some time to evaluate the enquirer's evidence that they have conducted an adequate work search.
- If the Ministry finds that a person's work search is not adequate, they can be required to wait for additional "work search days" before making an appointment to apply for benefits.[32]

We have observed that people sometimes wait up to 6 or 7 weeks before receiving any assistance.

On occasion, single parents with children under three years old have been told to complete the three week work search or a "community resource search" even though they have no mandatory obligation to look for work under the *EA Act* until their youngest child turns three.[33] Further, refugee claimants must conduct the three week "work search" despite the fact that they are legally prohibited from working in Canada.[34]

We submit that the three week wait is unnecessary and unhelpful because it creates hardship and does not assist individuals to find work. In general, people who arrive at a Ministry office to seek help have already exhausted all other alternatives. People are asked to search for employment when they are often hungry, about to get evicted, and have no money for transportation, child care, or telephone service.

The 6 and 7 week waits that sometimes occur violate administrative fairness because this extended delay prevents individuals from accessing benefits. These long delays may generate significant hardship for individuals and their families, including children.

Recommendation

2. **Amend the legislation to end the three week work search as a precondition to eligibility for assistance.**
3. **Ensure that individuals and families wait no longer than is provided for in the legislation, and that receipt of assistance is not delayed by administrative procedures.**

[32] Policy Manual section 6.2.
[33] EA Regulation s. 29(4)(b)(i).
[34] We have been informed anecdotally that the Ministry has recently said it will no longer enforce the requirement for refugee claimants to conduct a three week work search, but to our knowledge the legislation and Policy Manual provide no exemption for these people.

(ii) Emergency Needs Assessment

Complaint:

Pursuant to s. 3(2) of the EA Regulation, "If the minister is satisfied that compliance with [the three week employment search] would cause undue hardship to a person or a person's dependants, the minister may exempt the person….." The policy implementing this section does not focus on the concept of "undue hardship," but rather on a mechanism called the "Emergency Needs Assessment," or "ENA." We are concerned that the ENA may require people to meet a more stringent test than demonstrating undue hardship, and therefore introduces requirements not authorized by legislation.

We are also concerned that ENAs do not always take place when they should. The Policy Manual states that when an individual "indicates that undue hardship will occur," Ministry staff will do an ENA. The Policy Manual indicates that this may be the case if the person has no food, is living in a shelter, is fleeing an abusive relationship, or has urgent medical needs.[35] However, we have observed that many people facing undue hardship are not given an ENA, even in cases where they do indicate that they are homeless, living in a shelter, have urgent medical needs, or have no food. We have spoken to single mothers who were refused an ENA until their landlord gave them an eviction notice. This requirement harms tenants' relationships with their landlords. Contrary to the Policy Manual, Ministry staff sometimes limit ENAs to those individuals who specifically request "an Emergency Needs Assessment," a request that is often made on the advice of an advocate.

The Policy Manual also states that:

> Enquirers who indicate an urgent need for food will not be required to access food banks as an alternative resource. … Enquirers who indicate an emergency need for shelter will not be required to consider emergency shelters or hostels as an alternative resource while conducting the three week work search.[36]

We have observed that, contrary to this specific direction, Ministry staff routinely refer individuals to food banks and emergency shelters, rather than conducting an ENA.

Even when the Ministry agrees to conduct an ENA, a person may have to wait for unreasonably long periods of time for an appointment. For example, in 2003, an individual with a life threatening lung disease who had just been released from hospital was told to wait several days before he could be evaluated for the expedited assistance he needed to fill an urgent prescription. Also, as of December 14, 2004, the Dockside Ministry Office in Vancouver was booking ENA appointments for December 29, 2004, a delay of 15 days. In our view, these delays are grossly unfair and contrary to the legislation, given that the entire purpose of an ENA

[35] Policy Manual section 6.1.
[36] Policy Manual section 6.1.

is to determine whether an individual would suffer undue hardship as a result of precisely that kind of delay.

In relation to ENAs, the Ministry's breach of administrative fairness results in individuals being denied the ability to apply for expedited assistance. People who need expedited assistance on an emergency basis are by definition some of the most vulnerable people in our province – they may be hungry, homeless, ill, or attempting to escape a violent situation. It is unacceptable for the Ministry to treat these individuals in such an arbitrary and unjust manner.

Recommendation

4. **Ensure that procedures related to applying for expedited assistance evaluate whether a person will suffer "undue hardship," as required by the legislation, and that the policies do not impose a more stringent test.**
5. **Instruct and support Ministry staff in taking an active role in determining whether an individual may suffer undue hardship as a result of the three week wait.**
6. **Ensure that Ministry staff do not refer people to foodbanks or emergency shelters instead of assessing undue hardship.**
7. **Ensure that people are not required to wait an unreasonable amount of time for an appointment. In most cases, applicants should be able to have an ENA appointment immediately, and not more than 24 hours after their request.**

c) Persons with Persistent Multiple Barriers

Legislative and Policy Framework:

In recognition of the designation, a person with Persistent Multiple Barriers to Employment (PPMB) may be eligible for:

- a higher support rate;
- medical coverage that includes general health supplements;
- dental supplements;
- an earnings exemption; and
- exemption from the operation of the 2 out of 5 year welfare time limits.[37]

To qualify for PPMB status, applicants must meet a long list of criteria, set out in s. 2 of the EA Regulation and summarized in the Policy Manual:

> Recipients who qualify for Persons with Persistent Multiple Barriers (PPMB) are those who have received assistance for at least 12 of the past 15 months and meet one of the following criteria:

[37] For a summary of relevant legislative provisions, see Policy Manual section 7.14.

- has severe multiple barriers to employment (that is, a score of 15 or greater on the Employability Screen) and has taken all reasonable steps to overcome these barriers and has a medical condition (excluding addictions) that has lasted for at least one year and is likely to continue or recur frequently for at least two years, and which is a severe barrier that seriously impedes the person's ability to search for, accept, or continue in employment, OR
- has a medical condition (excluding addictions) that has lasted for at least one year and is likely to continue or recur frequently for at least two years, and, in itself, precludes the person from searching for, accepting, or continuing in employment, regardless of their score on the Employability Screen (may or may not have severe multiple barriers to employment)[38]

<u>Complaint:</u>

People must generate a significant amount of documentation to be considered for PPMB status. With the assistance of an advocate and a patient Employment and Assistance Worker (EAW), individuals can sometimes pull together sufficient documents to establish their PPMB status. Increasingly though, we observe that applicants for PPMB are often denied because the Ministry argues that the applicants have not provided the necessary evidence, and must pursue all levels of appeal in order to have their status recognized. Even at the appeal stage, applicants are often unsuccessful. We are concerned that this pattern may be linked to administrative unfairness, including the lack of legal representation and advocacy services for appellants.

Ministry practices sometimes go beyond what is authorized by law, and impose additional, unfair requirements. Many requirements for PPMB are closely tied to a particular form or checklist that the Ministry has created, and Ministry staff are sometimes unable or unwilling to look beyond those forms and checkboxes to the rationale for PPMB status itself.

For example, the legislation requires that a person applying for PPMB who scores 15 or more on the employment screen must have "taken all steps that the minister considers reasonable for the person to overcome the barriers..."[39] This requirement does not apply to medical conditions. The form used to make a decision on PPMB status allows Ministry staff to check off "yes" or "no" in response to the question: "all interventions tried?" This form may impose requirements not authorized in law because it does not ask Ministry staff to consider whether those "interventions" are "steps that the minister considers reasonable."

Ministry policy and practices also impose requirements not authorized by law in relation to the criteria that a person with PPMB status must be unable to "search for, accept, or continue in employment." For example, the Policy Manual states:

[38] Policy Manual section 7.14.
[39] EA Regulation s. 2(3)(c).

> "A medical condition is considered to preclude the recipient's ability to search for, accept, or continue in employment when the recipient is unable to participate in any type of employment for any length of time."[40]

This approach is reflected in Ministry decisions, including recent PPMB denial letters mailed to applicants stating that "[y]our medical condition may preclude you from some types of employment but it doesn't preclude you from working at any employment for any amount of time". Another sentence in some denial letters says that "[i]n order to qualify for PPMB designation, your medical condition must be a barrier that prevents you from any kind of employment for any length of time".

In our submission, this policy and the resulting decisions are inconsistent with the legislation. A person may be able, for example, to participate in a specific kind of volunteer work for a few hours a week, but simply cannot "continue in" a regular full time job. Further, the legislation specifically contemplates that people with PPMB status may do some work, because it creates an earnings exemption for people with PPMB status, and permits them to participate in the self-employment program.[41] Notably, people classed as "employable" by the Ministry are no longer eligible for the self-employment program. Therefore, when the Ministry requires individuals to demonstrate that they are incapable of any sort of work at all, this condition stretches well beyond what is authorized by law.

We also have concerns about bias in PPMB reconsiderations. We understand that decisions about PPMB applications are made by one of two adjudicators at each regional office. If there is a request to reconsider a decision made by one of these adjudicators, the reconsideration is conducted by the other decision-maker. Therefore, two decision-makers with presumably identical job descriptions are required to make decisions about "appeals" from each others' decisions. We submit that this structure makes it difficult for these adjudicators to make decisions without considering irrelevant factors, such as their professional environment and relationships.

Further, if two adjudicators tend to reinforce each other's decisions, there is little opportunity to inject a new point of view. This structure may further reduce access to PPMB status.

Recommendation

8. Ensure that all policies and forms used to determine PPMB status accurately describe the requirements provided for by law, and do not further restrict access to this status.

9. Establish office structures that ensure fairness at all levels of decision making.

[40] Policy Manual section 7.14.
[41] EA Regulation, Schedule B, s. 3. The self-employment program and its authorizing legislation are described in Policy Manual section 7.8B.

d) Ministry Home Visits

Legislative and Policy Framework:

MHR conducts certain activities on an ongoing basis to verify the information provided by benefit recipients. We have observed that Ministry staff sometimes arrive unannounced at the homes of people who receive benefits. The Ministry justifies these home visits as part of the verification of information provided by recipients, such as where they live, whether they own valuable assets, with whom they reside, etc.[42] MHR staff on occasion look through bedrooms and closets, even those belonging to roommates who do not receive assistance from the Ministry. Home visits are listed as a possible verification technique in the Policy Manual,[43] however we can find no reference to "home visits" in the legislation.

Complaint:

In some instances, Ministry staff insist on entering the home. In many cases, people have no advance warning of the visit, and there may be no witnesses to this search. We have also learned of cases in which individuals who refuse to cooperate with a home visit, or who are simply not at home when the Ministry worker arrives, have been subject to consequences such as having a cheque withheld until they attend at an office.

A home visit of this nature constitutes a warrantless search of the premises, and is therefore a gross violation of the fundamental legal rights of individuals.[44] People have no genuine choice about whether to allow Ministry workers into their homes because they depend on the Ministry to meet their basic needs. In some cases, these searches lead directly to a criminal investigation, as the Ministry can recommend that Crown Counsel lay criminal charges such as fraud. In other cases, such a search can have severe consequences for the individuals concerned, leading to reduction or elimination of benefits.[45] At the very least, a search of this kind violates the privacy and dignity of people who receive income assistance or disability benefits. Given these consequences, the Ministry is obliged to follow the highest possible standards of procedural fairness.

Recommendation

10. End the practice of "home visits" except with notice and prior written consent.
11. Ensure that Ministry workers only enter a person's home if the person has been provided with at least 72 hours notice, and informed of their right to have a witness present.

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[42] Policy Manual section 6.6.
[43] Policy Manual section 6.6.
[44] Supreme Court of Canada jurisprudence on the common law and the *Canadian Charter of Rights and Freedoms* gives a very high value to the security and privacy of the home. See for example *R. v. Feeney* [1997] 2 S.C.R. 13.
[45] *EA Act* s. 15, EA Regulation, ss. 35-38, and *EAPD Act* s. 14, EAPD Regulation, ss. 31-34.

12. Prohibit Ministry workers from conducting unreasonable searches, including looking through intimate areas such as closets, or the rooms of individuals who are not Ministry clients.

13. Ensure that people who refuse to let Ministry staff enter their homes are never subject to adverse consequences for that reason.

e) Medical and other Documentation

Legislative and Policy Framework:

In many instances, applicants are required to submit a variety of documents to support their application for benefits. This might include forms completed by doctors to verify a medical condition or the need for a particular benefit, or identification documents.

Complaint:

We recognize that the Ministry must be able to require certain kinds of information from applicants in order to administer the benefit schemes. In our experience, however, some of the Ministry's current requirements for documentation exceed what is reasonable.

As an example in the medical context, people whose medical conditions require a particular kind of diet may be eligible for the monthly diet allowance.[46] The Policy Manual describes the documentation an applicant must produce as: "written confirmation of the diagnosis including the specific medical condition, the diet required, and the expected duration of the treatment from a physician or a qualified dietician."[47] However, individuals are only permitted to receive this allowance for 12 months. After 12 months, the need for the allowance must be reconfirmed and documented on an ongoing basis.[48] This is the case even where the medical condition in question will never change.

This type of unreasonable requirement has concrete detrimental effects. Constant requests for documentation require recipients to repeatedly approach their physicians to complete time consuming forms and re-send letters of medical opinion. This damages patient-doctor relationships, and, in our experience, causes frustration among medical professionals.

We have also seen that recipients are generally required to provide new medical documentation for each different benefit under the *EA Act* and *EAPD Act*. For example, a person who needs a monthly diet supplement in addition to medical transportation assistance might need to provide two different sets of medical opinions describing the same medical condition. Requiring multiple sets of medical documents containing the same information imposes an unreasonable and unnecessary burden on individuals and their medical service providers. In some instances,

[46] *EA Act* s. 73 and s. 8 of Schedule C to the Regulations, *EAPD Act*. s. 66 and s. 6 of Schedule C to the Regulations.
[47] Policy Manual section 14.4.
[48] Policy Manual section 14.4.

applicants for certain types of MHR benefits must pay their doctors to fill out MHR forms, and this cost can be a barrier to applying for the benefits. By reducing the number of medical opinions that applicants must submit to receive benefits based on the same medical condition, MHR clients could reduce those costs.

Ministry requests for non-medical documentation can also impose unfair burdens on applicants. For example, refugee claimants and Convention Refugees may be asked to provide documentation from their home countries that is difficult or impossible to obtain. There may be no functioning government or information gathering institution in that country, and refugees or their families may be exposed to risks if they are forced to collect information from institutions there. Even where it is possible for refugee claimants to pursue and obtain information from other countries, this process can take a long time. It is unfair for people to go without assistance until such time as they can produce these records.

Recommendation

14. **Ensure that where a person properly documents a permanent medical condition, the Ministry does not require repeated proof.**
15. **Ensure that where a person documents a medical condition that is relevant for one purpose, this documentation is used for all other relevant purposes.**
16. **Ensure that applicants are never required to provide documentation that is impossible to obtain.**
17. **Evaluate all policies and practices in light of the realities faced by new immigrants and refugees. Ensure that refugee claimants and their families are never required to face personal risks in order to obtain documentation from other countries.**

f) Reconsiderations, Appeals, and Administrative Reviews

Legislative and Policy Framework:

Part 3 of the *EA Act* and Part 3 of the *EAPD Act* set out the rights of individuals to appeal decisions made by the Ministry.

Section 17 of the *EA Act*, and s. 16 of the *EAPD Act* provide that an individual can request the Minister to reconsider the following kinds of decisions:

- A decision to deny benefits;
- A decision to discontinue benefits;
- A decision to reduce benefits;
- In some circumstances, a decision with respect to the amount of a supplement; or
- A decision about the conditions of an employment plan.

With several exceptions, the outcome of a reconsideration can be appealed to the Employment and Assistance Appeal Tribunal.[49]

The Ministry argues that the result of a request for reconsideration can only be appealed if it has involved the application of discretion. The Ministry argues that without the exercise of discretion, there has been no "decision" to appeal.[50]

The Ministry also argues that there are some kinds of decisions that cannot be reconsidered. In those cases, a person can ask the Ministry to conduct an "administrative review" of the decision.[51] According to the Ministry, the outcome of an administrative review cannot be appealed to the Tribunal.

(i) Information about Appeal Rights

Complaint:

Letting people know about their right to appeal a decision is an essential element of administrative fairness. However, individuals are not always told about their right to have a decision reconsidered or administratively reviewed, or about their rights to appeal to the Tribunal.

Although the Tribunal produces a brochure entitled, "Your Right to Appeal: The Employment and Assistance Appeal Tribunal Process," our experience is that the Ministry does not distribute this brochure to people who may have a right of appeal. Many people do not know that this sort of information exists, and will not know to look for it.

On occasion the Ministry closes client files without letting the clients know and without informing them of the right to appeal. When the client learns that their file has been closed, the Ministry tells them to reapply for benefits, which results in the client having to repeat the three week work search.

The Ministry can remedy these injustices and reduce confusion and delay by clearly informing clients of the right to reconsideration and appeal.

Recommendation

18. Promote access to information about appeal rights.

19. Distribute the Tribunal's brochure on "Your Right to Appeal" to everyone whose benefits are reduced or denied for any reason, orally or in writing.

[49] For more information about the Tribunal, refer to the Tribunal's website at http://www.gov.bc.ca/eaat/.
[50] EAAT decision 2003-18, following *Arnold v. British Columbia*, [1989] B.C.J. No. 1381.
[51] Policy Manual section 12.2.

(ii) Reasons for Decisions and Disclosure

<u>Complaint:</u>

When people ask to have decisions reconsidered, the Ministry does not always adequately describe its reasons for decision or reference relevant legislative provisions on the reconsideration form.

We have also observed a Ministry practice of failing to provide complete disclosure to individuals who are seeking reconsideration of a Ministry decision. We have noticed problems with fair disclosure surrounding many types of benefits, including:

- medical transportation
- medical equipment
- medical supplies
- PPMB status
- monthly nutritional supplements

For instance, we have learned of many problems surrounding disclosure of reasons related to the monthly nutritional supplement (MNS). The Policy Manual describes the purpose of the MNS as:

> To provide assistance to meet the extra nutritional needs of Persons with Disabilities (PWD) with a severe medical condition causing a chronic, progressive deterioration of health with symptoms of wasting.[52]

When a person with a disability is denied MNS, he or she can request to have this decision reconsidered. However, unless the person specifically requests it, they will not usually receive a copy of the "MNS case profile notes." The MNS case profile notes are essential to the reconsideration and appeal process, as they contain all of the information about why the person was denied a monthly nutritional supplement.

Administrative problems with MNS case profile notes compound the unfairness of the situation, because the EAWs must request these notes from Victoria. Therefore, a frequent scenario is as follows: An individual is denied an MNS. He or she asks for a reconsideration form, and leaves the Ministry office. Next, he or she goes to see an advocate for assistance in filling out the form. The advocate knows that the MNS case profile notes are necessary to properly fill out the reconsideration form, and sends the person back to the office to request the notes.

The person makes the request, and is told the notes will be requested, and will eventually be available to pick up, or sent to the advocate. The person then has to wait to receive the notes, meet again with the advocate, and then submit his or her reconsideration form. However, as discussed below, the reconsideration form must be submitted within 20 business of days of

[52] Policy Manual section 14.17.

being informed of the original decision.[53] Further, during all of this time, the individual is going without the supplements (such as food or vitamins) that would be covered by the MNS.

In the case of other benefits, there may be no succinct summary like the MNS case profile notes, requiring individuals and their advocates to chase down a whole set of documents such as investigation notes, letters and doctor's reports. The Ministry has ready access to these documents, but does not always provide copies to clients. It is often up to advocates to inform clients of their right to request these documents.

Instead, MHR should automatically disclose to applicants all the information needed for an appeal. For instance, when a person is denied PPMB, the Ministry should provide copies of the PPMB Medical Report, Client Employability Profile and Screen, and Employment Checklist, and any other supporting documentation to the client along with the Request for Reconsideration form.

MHR clients deserve to know the case to meet on reconsideration and appeal. Individuals should never have to demand to see reasons, or any other documentation that is essential to an appeal. By providing full reasons and disclosure, the Ministry would vastly improve procedural fairness in the appeal process.

Recommendation

20. **Provide people with full reasons and documentation for decisions that are made about them. Ensure that this information is provided automatically, without request.**
21. **Ensure that the time period for making a reconsideration request does not begin to pass until after the person has received all information relevant to the appeal.**

(iii) Time Limits for Reconsideration and Appeal

Complaint:

Section 79(2) of the EA Regulation states in part that "A request [for reconsideration] must be delivered within 20 business days after the date the person is notified of the decision…"[54]

Regarding appeals, the *EA Act*[55] provides:

> 21 (1) A person who has a right of appeal to the tribunal must commence the appeal in the prescribed manner within 7 business days of the date the person receives notice of the decision being appealed.

[53] EA Regulation s. 79.
[54] This Regulation also applies to persons with disabilities, pursuant to s. 16(4) of the EAPD Regulations.
[55] See also s. 16(3) of the *EAPD Act*.

(2) If a person who has a right of appeal to the tribunal does not commence an appeal within the period specified under subsection (1),

(a) the person is deemed to have accepted the minister's decision, and

(b) the minister's decision is final and conclusive and is not open to review in a court on any ground or to appeal to the tribunal.

…

These time limits are intended to make reconsideration and appeal processes progress efficiently. The Ministry, however, does not always follow these time limits. For example, EA Regulation s. 80 stipulates that the Ministry must respond to a request for reconsideration within 10 days of receiving it.[56] There is apparently no consequence for the Ministry's failure to adhere to this rule. In contrast, if a person does not commence an appeal of a reconsideration decision within 7 days, he or she is deemed to accept the Ministry's decision, and is denied the right to appeal.

When the Tribunal makes a finding in favour of a recipient, the Ministry's practice is to reinstate the benefit from the date of the Tribunal decision, not from the date of the overturned reconsideration decision. Once again, the Ministry's approach to the official time limits works unfairly in relation to individuals who are in need.

Recommendation

22. **Adhere to all legal obligations in relation to reconsiderations and appeals, including the obligation to respond to reconsideration requests within 10 days.**
23. **Amend the legislation to require that benefits granted by the Tribunal are reinstated from the date of the reconsideration decision.**

(iv) Reconsideration and Appeal vs. Administrative Review

Complaint:

When the Ministry believes that a decision cannot be reconsidered, it also asserts that the decision is not appealable to the Tribunal. In those cases, clients have great difficulty appealing a decision to the Tribunal because MHR refuses to provide the appeal forms and numbers necessary to proceed to the Tribunal. The same is true when clients try to appeal decisions to the Tribunal that the Ministry has "administratively reviewed."

In our submission, determinations about whether or not a decision can be appealed should be made by the Tribunal, not by the Ministry. This reflects the fundamental principle of administrative law in which government decisions that affect the rights of citizens are subject to review to ensure their compliance with the laws of procedural fairness. The Tribunal confirmed

[56] This Regulation also applies to persons with disabilities, pursuant to s. 16(4) of the EAPD Regulations.

in a 2003 decision that "[e]ither party may raise the issue of whether the Tribunal has jurisdiction in a particular appeal. The Tribunal alone has the authority to decide this issue."[57] For the Ministry to systematically remove issues from the purview of the Tribunal by refusing to conduct reconsiderations and by requiring any appealable decision to have a "reconsideration number," constitutes a violation of procedural fairness.

In addition, the distinction between decisions that are subject to reconsideration and appeal, and those that are subject only to administrative review, in our experience causes confusion for everyone. Clients, advocates, lawyers and Ministry staff are constantly required to sort out these categories, causing additional delays and anxiety.

Recommendation

24. Remove the distinction between reconsideration and appeal, and administrative review. It must be possible, as a matter of practice, to appeal any decision to the Tribunal, and to have the Tribunal decide whether or not that issue falls within its jurisdiction.

g) Office Structures and Practices

Legislative and Policy Framework:

Some issues of fairness relate to the overall structure of Ministry offices, and the general practices that Ministry staff employ. These include things like office hours, availability by telephone and appropriate behaviour by Ministry staff.

We have observed that many Ministry workers perform their jobs effectively and professionally, treating members of the public with respect and courtesy. We have also observed that some Ministry workers go beyond the call of duty, attempting to respond to the needs of their clients with great compassion. We always advise our clients to treat Ministry workers with respect, and not to direct towards Ministry staff any of the frustration they may feel. However, we have observed that Ministry office structures do not always facilitate interactions between staff and clients that are fair and respectful. We have seen that there are many pressures placed on fair procedures in Ministry offices that are related to government cutbacks and the way the income assistance regime is being implemented.

In our experience, Ministry workers face many challenges, including:

- While the needs of their clients have not decreased, Ministry staff have an increased workload.

[57] EAAT decision 2003-18.

- As the law and policies have rapidly changed over the past three years, Ministry staff have not always had access to adequate training or information on a timely basis, making it extremely difficult for them to perform their jobs effectively.
- While the number of people living in poverty in B.C. has not decreased, complex eligibility criteria have reduced the number of people who receive assistance. Ministry staff must face the ongoing psychological distress associated with turning away individuals in need, and facing the frustration and dissatisfaction of the public.

In our experience, the Ministry has failed to provide its staff with sufficient support and resources in order for staff to do their jobs effectively and without undue stress.

(i) Discrimination

Complaint:

The individuals who approach the Ministry for support may be marginalized in a number of overlapping ways. They live in poverty, and may live with mental and physical disabilities. They disproportionately come from vulnerable groups including women, seniors, Aboriginal peoples and recent immigrants. People who are seeking assistance may also face other challenges such as ill health, illiteracy and addictions.

In our submission, the Ministry is obligated by standards of procedural fairness to develop practices and procedures that are appropriate to the needs of its clients. However, we have observed many ways in which Ministry practices have a disproportionate and harmful impact on individuals who are most in need. Rules and procedures that may appear to be neutral on their face can have the effect of discriminating against certain groups.

Ministry practices that result in discrimination include:

- Closing the file of any person who fails to attend a single review appointment.[58] While on the surface, it may appear reasonable to require recipients to attend such meetings, in practice this policy discriminates against individuals who may be most in need. For example, individuals with brain injuries, mental illness, addictions, developmental delays or learning disabilities may find it extremely difficult to remember and attend appointments. Similarly, people who are homeless and live on the street usually have no access to clocks and may sleep during the day rather than at night, making it very hard to arrive on the right day and at the correct time. Ironically, factors such as mental illness or homelessness may increase a person's entitlement to assistance, but MHR administrative practices can prevent those people from demonstrating their need. People with brain injuries or mental illness may also face the most challenges in communicating their needs and concerns.
- Requiring individuals to deal with different issues at separate dates and times (for example, requiring a person to return to the office on Tuesday at 2:30 to discuss one

[58] Policy Manual section 6.7.

issue, and Friday at 10:00 to discuss another issue). This practice can be very disorienting for some individuals, particularly those with mental illness.

- Failing to provide adequate language interpretation. We have observed that the Ministry will often fund and arrange language interpretation when it wants to communicate with someone, but not when that person has something to communicate to the Ministry. This can be a significant problem, particularly given the onus on recipients of assistance to inform the Ministry of any changes in their circumstances.
- Requiring applicants to take part in an online orientation session. While we understand that some Ministry offices have computers available for applicants to use, this requirement still creates many unfair barriers, particularly for people who are not comfortable using computers.
- Failing to maintain offices throughout the province. People who live in rural areas may be limited to contacting offices hundreds of kilometres away by telephone. For example, people in the East Kootenays have to interact with the Ministry through a call centre in Kamloops. This magnifies any other difficulties they may have in communicating with the Ministry, and hinders their access to assistance. This is even more problematic for individuals who do not have access to a phone or cannot provide a number where they can be reached.
- "Zero tolerance" policies for loud, angry, or offensive behaviour. We support the Ministry's efforts to make its offices safe for workers and members of the public. However, we also assert that this goal cannot be achieved simply by removing any disruptive members of the public without considering the context of that person's behaviour. Individuals with addictions, mental health problems, or brain injuries may behave in ways that are unexpected or unpleasant. However, given that those individuals may be in great need, the Ministry should take measures to address their behaviour in a more nuanced and contextualized manner than is possible through "zero tolerance."
- Disrespectful treatment of individuals seeking government benefits. By treating individuals who seek assistance with disrespect, the Ministry abuses its power, and puts those individuals at an unreasonable disadvantage. This disadvantage is all the more unreasonable because of the fact that individuals who attend at Ministry offices are generally in extreme need.

Recommendation

25. Evaluate and amend policies and practices to ensure that all citizens of B.C., including marginalized groups, can access the benefits they are entitled to. Examples of these kinds of measures would include:

a) providing language interpretation
b) providing services for people who cannot read
c) making appointment times sufficiently flexible to make attendance possible and realistic

d) supplying funds for transportation

e) arranging for an appropriate place and method of contact for people with loud, aggressive, offensive or confusing behaviours

f) giving people a choice of completing an orientation session in person or online

26. Provide Ministry offices with sufficient staff levels.

(ii) Problems with Accountability

Complaint:

We have encountered a number of general practices at Ministry offices that reduce the Ministry's capacity to be accountable for its decisions. These include:

- When people make their first contact with a Ministry office (either in person, or by calling a 1-800 number in regions where there is no office), they are sometimes asked informal questions about their circumstances, and told that they will not be eligible for assistance. Those people may be turned away without being given an intake interview, never mind an appointment to "apply" for assistance. Those people may believe that they have been denied benefits, but in fact no actual "decision" has been made. This practice is unfair because it diverts applicants away from the procedures that legally assess their eligibility for assistance. This practice also affects accountability because it is impossible to know how many people have been "denied" assistance in this manner.
- At some offices, Ministry staff refuse to give their names to individuals seeking assistance or to advocates. In at least one instance, the worker explicitly acknowledged that this refusal was based on the worker's discomfort with being held accountable.
- In many offices across the province, EAWs have been reorganized according to a new structure in which individual workers no longer have their own caseloads. Instead, clients are organized into groups (sometimes called "pods," or "peer units"), and a group of Ministry staff are collectively responsible for that group (one worker will handle "intake," and another will handle "crisis requests," etc.) These roles also rotate on a weekly basis. People who are served by an office restructured into the pod system no longer have a specific worker to contact when issues arise.

When Ministry staff operate as anonymous, shifting parts of a confusing structure, it is extremely difficult to hold them accountable, or even to discover how the system operates. This task is daunting to lawyers and advocates, and may well be impossible for marginalized individuals who face additional barriers such as the lack of a telephone, difficulties understanding English, illiteracy or mental illness.

Further, when administrative fairness differs so widely from office to office, this constitutes arbitrary treatment on the basis of where a person happens to reside.

We submit that these administrative practices work against the capacity of the Ministry to respond to the needs and concerns of the public. These practices are unfair because they reduce the potential for mistakes to be discovered, or injustices corrected. Rather, these practices tend to render invisible any challenges faced by individual recipients, or individual Ministry staff members.

Recommendation

27. **Ensure that people who contact Ministry offices for assistance are never diverted away from the procedures that would assess their eligibility.**
28. **Change office structures to remove the "pod" system.**
29. **Instruct and support Ministry staff to make decisions with accountability and transparency.**

5. RELEVANT LEGAL PRINCIPLES

Section 23(1) of the *Ombudsman Act* describes the kinds of unfairness that the Ombudsman must report on if he discovers them in the administration of public authorities. However, the breaches of fairness set out in s. 23(1) are rooted in the positive legal rights of individuals. That is, pursuant to the common law and the constitution of Canada, individuals have the right to be treated fairly by public authorities, and public authorities have a duty to make decisions according to fair procedures.

In this section, we describe some of the key legal principles that help define the rights of individuals in relation to MHR. These principles are valuable to the Ombudsman's investigation of our complaint for three reasons.

First, the law on procedural fairness provides guidance on the importance of fairness to individuals and to the proper functioning of a just and democratic government. It illustrates the seriousness of the breaches we describe in the eyes of our courts, and reinforces the Ombudsman's duty to scrutinize the unfair actions of the Ministry.

Second, legal principles of fairness pursuant to administrative law and the *Canadian Charter of Rights and Freedoms* provide guidance on the content of fairness, and the minimum standards to which everyone in Canada is entitled.

Finally, legal principles present in the common law, the *Charter*, and international human rights instruments confirm that the rights of individuals must be understood in a contextualized manner. Here, the fact that individuals are marginalized, disabled or living in poverty is highly relevant to understanding the scope and meaning of their legal rights.

a) High standard of procedural fairness where important interests are at stake

In the case of *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada summarized the law on the duty to be fair.[59] The court describes some of the factors that influence the content of an authority's duty of fairness. These include:

- (i) the nature of the decision and the process followed in making it;
- (ii) the nature of the statutory scheme;
- (iii) the importance of the decision to the individual affected;
- (iv) the legitimate expectations of the person challenging the decision; and
- (v) the choices of procedure made by the tribunal itself.

While each case must be considered individually, the third factor listed above has a particular salience in virtually all of the examples discussed in this complaint. Decisions about providing for the basic needs of individuals carry a critical importance that raises the standard of fairness

[59] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, online: http://www.canlii.org/ca/cas/scc/1999/1999scc41.html.

required of the Ministry. As stated by the court in *Baker*, "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[60] Individuals who approach the Ministry for assistance are in extreme economic need, may have physical or mental disabilities and may be children or elderly adults. Government decisions in this context will affect the health, dignity, and indeed survival of those individuals. This calls for a very high standard of procedural fairness.[61]

It is important to note that the interests at stake (basic wellbeing and survival), are interests that are protected by constitutional and international human rights law. Section 7 of the *Charter* provides that

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[62]

Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* provides:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right….[63]

b) Individuals on income assistance as members of a protected group

Individuals in receipt of social assistance are protected from discrimination by section 15(1) of the *Charter of Rights and Freedoms*, which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the case *Falkiner v. Ontario (Minister of Community and Social Services)*[64], the Ontario Court of Appeal held that the findings before the court "support the conclusion that recognizing

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[60] *Baker*, *supra* note 59 at para. 25.
[61] In the case of *Napoli v. Workers Compensation Board* (1981), 29 B.C.L.R. 371, the B.C. Court of Appeal emphasized the importance of this principle in the context of decisions that affect the ability of individuals to provide for themselves. The Court held that the tribunal owed the worker a high standard of fairness because of the fact that his future would be largely shaped by the decision of the tribunal (para. 21).
[62] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[63] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (entry into force 3 January 1976), online: http://www.unhchr.ch/html/menu3/b/a_cescr.htm.
[64] *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services),* 212 D.L.R. (4th) 633, online: CanLII: http://www.canlii.org/on/cas/onca/2002/2002onca10233.html.

receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity."[65] The Court cited many reasons for this, including the following:

- There is significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers[66]
- Economic disadvantage often co-exists with other forms of disadvantage. The economic disadvantage suffered by social assistance recipients is only one feature of and may in part result from their historical disadvantage and vulnerability.[67]

The Ontario Court of Appeal's statements about people who receive income assistance provide important insight into the way governments should approach the legal rights of those individuals. To the extent that the practices we describe in this complaint discriminate against individuals who receive social assistance, they are not only unfair but also violate the *Charter*. The Ministry must ensure that its policies and practices work towards ending discrimination, marginalization and stigmatization of people on welfare.

c) Social welfare legislation is to be liberally construed

Principles of statutory interpretation have firmly established that social welfare legislation, such as the *EA Act* and the *EAPD Act*, should be "liberally construed so as to advance the benevolent purpose of the legislation."[68] For example, in the case of *Gray v. Ontario (Disability Support Program, Director)*[69], the Ontario Court of Appeal used this principle to help decide whether the claimant came within the statutory definition of a "person with a disability." Chief Justice McMurty wrote: "As remedial legislation, the ODSPA should be interpreted broadly and liberally and in accordance with its purpose of providing support to persons with disabilities…. It is my view that as social welfare legislation, any ambiguity in the interpretation of the ODSPA should be resolved in the claimant's favour."[70]

This principle is important because it provides an overarching guide to the Ministry as it interprets and implements the legislation. Rather than narrowing and constricting access to benefits under the legislation, procedures and practices should be designed to ensure that individuals receive the benefit of the law, liberally construed.

[65] *Falkiner, supra* note 64 at para. 87.
[66] *Falkiner, supra* note 64 at para. 86.
[67] *Falkiner, supra* note 64 at para. 88.
[68] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Ed. (Markham: Butterworths, 2002) at 404.
[69] *Gray v. Ontario (Disability Support Program, Director)* (2002) 212 D.L.R. (4th) 353, online: http://www.canlii.org/on/cas/onca/2002/2002onca10212.html.
[70] *Gray*, *supra* note 69 at paras. 9 and 11.

6. CONCLUSION

In *Baker*, Justice L'Heureux-Dubé states:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.[71]

We urge the Office of the Ombudsman to keep in mind this fundamental principle of justice when evaluating the fairness practices of the B.C. Ministry of Human Resources.

Respectfully submitted this 1st day of February, 2005

BC PUBLIC INTEREST ADVOCACY CENTRE

Original signed

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Patricia Cochran
Articled Student

Original signed

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Sarah Khan
Legal Counsel

[71] *Baker*, *supra* note 59 at para. 28.

APPENDIX A - DESCRIPTION OF COMPLAINANTS

The Action Committee of People with DisAbilities (Victoria) is a charitable cross-disability society located in Victoria. ACPD provides referrals, group and individual advocacy and outreach services, and assists all people, regardless of disability type. ACPD promotes the full participation, in community, of all people with disabilities.

Active Support Against Poverty (Prince George) is a local store front operation which provides support and assistance to lower income people dealing with various government agencies, including services for disabled. ASAP also provides management for a downtown emergency shelter.

Advocacy Outreach Society (Salmon Arm) provides community advocacy on a number of issues, including disability, welfare and child protection.

AIDS Vancouver (Vancouver) works to alleviate individual and collective vulnerability to HIV and AIDS through care and support, education, advocacy and research.

BC Coalition of People with Disabilities (Provincial) is a self-help, province-wide umbrella group representing all people with disabilities, providing group and individual advocacy, information and referral, and sponsors self-help projects. It assists people with disabilities with BC disability benefits and Canada Pension Plan disability benefits. Advocates also work with clients on appeals, tribunals and other disability-related issues including housing and equipment.

Downtown Eastside Residents Association (Vancouver) is an organization working towards improving the living conditions in Vancouver's Downtown East Side. DERA provides housing, advocacy, and community support programs and services. DERA assists the neighbourhood's residents with welfare rights issues, housing, pensions, and income tax.

federated anti-poverty groups of B.C. (Provincial) is an umbrella organization of over 130 anti-poverty groups as well as approximately 65 individual members concerned with poverty and social justice issues.

First United Church (Vancouver) provides crisis intervention, housing referrals, advocacy, and community programs to residents of Vancouver's Downtown Eastside. Advocacy workers are available weekdays to provide information and referral.

The Kamloops and District Elizabeth Fry Society (Kamloops) works in the field of justice, assisting people who are, or could be in conflict with the law, with an emphasis on the needs of women and youth. The Society also provides safe, secure and affordable housing for people on low incomes. The Society's Poverty Law Advocate program provides advocacy services in the areas of income assistance, CPP Disability, Employment Insurance and Residential Tenancy, for people on low incomes.

Kettle Friendship Society (Vancouver) offers referral, advocacy and outreach services for individuals with a mental health disability, regarding mental health issues, victim assistance, income support, residential tenancy, and child apprehension. The Society also runs a drop-in centre and social lounge offering recreational, social, and life skills community integration programs.

Mental Health Empowerment Advocates Program (Vancouver) provides one-to-one advocacy for individuals with a mental health disability. The organization offers direct assistance with obtaining benefits available through MHR and the Canada Pension Plan. It also educates clients about their rights, promotes self-help skills, and provides information and referral.

The Nelson Advocacy Centre (Nelson) offers advocacy and legal information to financially disadvantaged people who are involved in welfare disputes, separation, divorce, child apprehension, consumer problems, and more. The Centre also provides specialized victim services.

Newton Advocacy Group Society (Surrey) is a non-profit society which works to empower people with low incomes through education, advocacy, and community networks. NAGS provides advocacy for welfare, mental health consumers, and child protection; women's and single mothers' empowerment programs; income tax clinic; and a weekly pro-bono law clinic.

North Island Advocacy Coalition Society (Campbell River) is a lay advocacy program providing legal information and assistance to low income and disadvantaged people in the Campbell River area. Representation is available for administrative tribunals and arbitrations. Information is available regarding income assistance issues, landlord/tenant disputes, employment, housing, estates, debt, elder abuse, human rights and family law issues.

Together Against Poverty Society (Victoria) is a non-profit advocacy organization in the Greater Victoria area which provides information regarding advocacy and education on issues involving income assistance and tenancy rights. TAPS assists individuals to obtain legal rights and benefits, including negotiation and representation at appeal hearings. TAPS also offers training sessions in legal advocacy skills, community group presentations, information, and statistics on poverty issues.