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PART C – Decision under Appeal

The decision under appeal is the Ministry of Children and Family Development (the ministry) reconsideration decision dated July 15, 2015 which found that the appellant was not entitled to child care subsidies received, and is liable to repay these amounts, because the family's actual monthly net income exceeded the child's threshold or was more than the income used to calculate the child care subsidy for the period March 1, 2011 to February 28, 2014, when adjusted to the income reported to the Canada Revenue Agency (CRA) and the amount of undeclared income from the appellant's spouse, pursuant to Sections 7 and 9 of the *Child Care Subsidy Regulation* (CCSR).

PART D – Relevant Legislation

Child Care Subsidy Act (CCSA), Section 7

Child Care Subsidy Regulation (CCSR), Sections 1, 7, 8, and 9

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

1) Print outs of ministry file notes for February 6, 2012 indicating a telephone call from the appellant where she said there was "no spouse" since December 31 and the ministry advised her to notify as soon as circumstances change; for July 19 to August 21, 2012 indicating that the appellant confirmed that she and her spouse did not actually separate;
2) Child Care Subsidy Overpayment Calculation Statement dated May 19, 2015 setting out the eligible amount for child care subsidy for the appellant's two children and the overpayment amount for each month from March 2011 through February 2014, and indicating a total overpayment amount of $9,175.61;
3) Employee detail for the appellant's spouse over the period January 15, 2013 through December 31, 2013, indicating a gross amount of $64,008.71 and net pay of $46,716.30 with handwritten notes added, which state in part that the appellant and her husband "split the business";
4) Letter dated May 19, 2015 to the appellant in which the ministry wrote that a review was conducted of the appellant's self-employment income and her spouse's employment income and the net family income has been recalculated for 2011 as $40,975.35, for 2012 as $48,721.23 and for 2013 at $52,342.18. A copy of the Overpayment Calculation form was enclosed. The appellant is invited to submit any additional information that may affect the ministry's decision; and,
5) Request for Reconsideration dated June 18, 2015 with attached Notice of Assessment for 2013 tax year which shows total income of $2,000 from UCCB [Universal Child Care Benefit], pages 2 and 3 of T1 General and Part 6 of T2125 indicating net income of $3,337.01.

In her Request for Reconsideration with attached letter, the appellant wrote that:

- She advised the ministry that in January 2012 she split from her husband and divided the house: she was in the basement and he remained in the top floor.
- For some unknown reason, the ministry removed her husband's income from the family total and re-adjusted their subsidy.
- It never occurred to her then or at any point that this was a mistake as she assumed the ministry would calculate the subsidy properly since this was their job.
- At no time did the ministry mention that, regardless of a separation, a family net income is never split as well.
- The ministry should charge the missing funds to the person who removed her husband's income from the family income.
- She must adjust her personal net income for the 2013 tax year from the amount stated by her husband of $3,337.01 less $55.73 for meals and entertainment, for a total of $3,281.28, since her personal net income was 0 as seen on her NOA [Notice of Assessment].
- She proposed a settlement of $3,000 to be paid within 20 business days.

Prior to the hearing, the appellant provided an additional document, being a blank Child Care Subsidy Application form.

In her Notice of Appeal dated August 7, 2015, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- At the time, she had separated from her husband and the ministry did not include her husband's income for the calculation of her child subsidy allowance.

- Three years later, during an audit, the investigator informed her that regardless of her marital status her husband's income should not have been removed from that calculation.
- She feels that this is the ministry's mistake and she should not have to pay for the ministry's negligence.

At the hearing the appellant's husband stated that:

- The appellant indicated on the Child Care Subsidy Application form that her marital status was "single, separated, divorced or widowed" and then she followed the direction to go to Section 6 and completed information about her income only.
- The investigator with the ministry told each of them that it does not matter if the parents are separated or not, whether he lived in a different community, and that both of the incomes must be considered. She said that his income would be included "regardless."
- If the income of both parents must be considered, whether they are separated or not, why would the ministry not follow up to get information about his income, which had been provided before?
- In July 2012, the appellant advised the ministry that her marital status had changed and they received a letter asking them to confirm when he had moved back into the home, but he had always been there. He lived in the top floor of the house and the appellant lived in a bedroom in the basement. They did not want to disrupt the children's lives so they were free to move throughout the house and the kitchen was on the main floor. They each paid half for the children's activities, such as swimming lessons.
- The appellant does not make any money in her business. He made a mistake when he advised the ministry that her income in 2013 was $3,337.01 since the calculation actually yields a net income of zero. Only half of the figure is included for the appellant because he is half owner of the business and half of the income is attributed to him.
- It seemed that the ministry made a clerical error in not including his income, even if it was based on an estimate from the previous information the ministry would have had. They were still married and he did not die.
- They are not objecting to the ministry's assertion that there was "undeclared income" from him, but the ministry went ahead and upped the subsidy amount without checking the information from the Application and without using an estimate of his income from previous years.
- They did not receive a letter at any point saying that there was a problem with using just the appellant's income and they "let it ride" for 3 years before the ministry came after them for the difference. He questions why there was no "red flag" prior to now.
- The appellant filled out the Application to the best of her knowledge at the time. When his income is added, there is no question that it is over but in the years prior to 2012 his income was included.

At the hearing the appellant stated that:

- Several years ago her children had been home with her all day. Three years ago it was suggested that it might be good for the children to go to day care so she filled out the forms and they qualified for the child care subsidy. The cheques were sent directly to the day care and they advised her which days each week the children would attend day care.
- In January 2012, she and her husband went through a rough time and they separated but they could not afford to live in two separate houses. They were going to counseling. They agreed to split the bills for food and activities for the children. There is only one kitchen in the house so she and the children would have meals there too. She would get them something to eat

before they went to day care.

- In August 2012 they got back together and then the ministry sent a letter saying that they had overpaid for child care. When she called the ministry, she was told not to worry because everything was resolved.
- She does not understand what she and her husband did wrong. The ministry asked if she could prove that they had been separated and she realized that there was no separate unit or address and no other way to show that they had lived separately during that time.
- It is frustrating for them because they were not trying to hide anything and no one from the ministry explained how they determine whether they are separated. They feel like they are being punished for what they see as the ministry's error.

The ministry relied on its reconsideration decision. The facts included:

- The appellant was part of a 2-parent, 4-unit family, and child care subsidy was received for 2 children.
- The appellant submitted an application for Child Care Subsidy on March 8, 2011 and indicated that she was married or in a marriage-like relationship.
- The appellant was self-employed and her husband was employed and the combined family net income was used to calculate their eligibility.
- The appellant submitted a renewal application dated January 30, 2012 in which the appellant indicated her marital status as single, separated, divorced or widowed and no information regarding her spouse was included with her application.
- In a conversation on February 6, 2012, the appellant informed the ministry that she and her husband had separated effective December 31, 2011.
- On July 13, 2012 the ministry received the appellant's renewal application, signed on July 10, 2012, which indicated the marital status as married or living in a marriage-like relationship. The appellant reported she was self-employed in her own business and her spouse was an employee with a business. The combined income was used to assess eligibility. The ministry requested the appellant contact the ministry to clarify what date the spouse moved back into the household and for her to contact the ministry regarding any changes to circumstances, and advised her of a subsidy reduction due to increased income and a change in child care arrangement.
- In a telephone conversation on August 21, 2012, the appellant informed the ministry that she and her husband did not actually separate and the ministry noted the appellant understood the need to contact the ministry of any changes in circumstances.

At the hearing, the ministry clarified that:

- Parents can live in separate places and still be considered a couple and their incomes considered together, such as the case where one parent is in the military and living somewhere else. This may have been what the investigator was referring to when she said that both parent's incomes are considered even when they are living in separate places.
- If parents are actually separated and not residing together, the other parent's income is not considered. For example, where there are separate addresses or a separate self-contained suite within a residence and there is no confusion about what is being shared. A question may then be raised about which parent has assumed responsibility for the children, where they reside, and whether there is still a need for child care.
- The appellant advised the ministry that she and her spouse did not actually separate and the investigator's review established that the appellant's spouse continued to live in the family

home during the entire period that they received subsidy.

- When the information was received from the appellant's Application indicating she was separated, it was processed properly because her husband's income was not considered. The appellant's actual living arrangements were not understood until later and perhaps some clarification could have been asked for, but it does not change anything. The normal ministry practice does not include asking further as to where the other parent is residing.
- The appellant's situation is a bit different and the ministry considered that she and her husband had never separated as they continued to reside together in the same house, and were only separated in their own minds. Where they sleep is not important for the ministry's decision. They shared the same kitchen and responsibility for the children. Perhaps if they were legally separated, they might be considered separated from the ministry's perspective, but that would still be questionable.
- There is no claim that there was anything dishonest, inaccurate or incorrect, but simply that the information provided by the appellant that she was separated did not in fact meet the ministry's requirements.
- The overpayment calculation lists the amount of child care subsidy the appellant was eligible for and the amount she received over the entire period and includes the difference as a result of including her husband's income when they were not considered separated as well as the discrepancy with the information from the Canada Revenue Agency.

Admissibility of Additional Information

The ministry did not raise an objection to admitting the blank Child Care Subsidy Application form or to the oral testimony on the appellant's behalf. The panel considered the Application form and the oral testimony to be information that corroborates the appellant's application process for the child are subsidy, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act.*

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PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which found that the appellant was not entitled to child care subsidies received and is liable to repay these amounts pursuant to Sections 7 and 9 of the *Child Care Subsidy Regulation* (CCSR), was reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the family's actual monthly net income exceeded the child's threshold or was more than the income used to calculate the child care subsidy for the period March 1, 2011 to February 28, 2014, when adjusted to the income reported to the Canada Revenue Agency (CRA) and the amount of undeclared income from the appellant's spouse.

Section 7 of the CCSA provides:

Overpayments, repayments and assignments

7 (1) If a child care subsidy is paid to or for a person who is not entitled to it, that person is liable to repay to the government the amount to which the person was not entitled.

(2) Subject to the regulations, the minister may enter into an agreement, or may accept any right assigned, for the repayment of a child care subsidy.

(3) A repayment agreement may be entered into before or after a child care subsidy is paid.

(4) An amount that a person is liable to repay under subsection (1) or under an agreement entered into under subsection (2) is a debt due to the government and may

(a) be recovered by it in a court of competent jurisdiction, or

(b) be deducted by it from any subsequent child care subsidy or from an amount payable to that person by the government under a prescribed enactment.

(5) The minister's decision about the amount a person is liable to repay under subsection (1) or under an agreement entered into under subsection (2) is not open to appeal under section 6 (3).

Section 1(1) of the CCSR provides:

Definitions

1 (1) In this regulation:

"dependant", in relation to a parent, means anyone who resides with the parent and who

(a) is the spouse of the parent,

(b) is a dependent child of the parent,

(c) shares with the parent income or assets or any necessities of life obtained with the income or assets, or

(d) indicates a parental role for the parent's child;

"family" means a parent and the parent's dependants;

"family's monthly net income" means the monthly net income calculated for a family under section 9;

"self-employment income" means any income earned from self-employment but does not include any amount deducted for permitted operating expenses;

"permitted operating expenses" means costs, charges and expenses incurred by a person in self-employment for the following:

(a) purchase of supplies and products;

(b) accounting and legal services;

(c) advertising;

(d) taxes, fees, licences and dues incurred in self-employment;

(e) business insurance;

(f) charges imposed by a savings institution on an account and interest;

(g) maintenance and repairs to equipment;

(h) gross wages paid to employees of a person who is self-employed, other than wages paid by that person to his or her family;

(i) motor vehicle expenses;

(j) employer contributions to an employee benefit program;

(k) rent and utilities;
(l) office expenses;

"spouse", in relation to a parent, means anyone who
(a) is married to the parent, or
(b) is living with the parent in a marriage-like relationship;

Section 7(1) of the CCSR provides:

Income test

7 (1) An applicant is not eligible for a child care subsidy for a child receiving a type of child care if
(a) the family's monthly net income exceeds the child's threshold, and
(b) the result of the calculation under section 8 (2) for the child is not more than zero. . . .

Section 8 of the CCSR provides in part:

Amount of subsidy

8 (1) If a family's monthly net income does not exceed a child's threshold, the amount of child care subsidy for the child in respect of a type of child care is the amount set out in Schedule A or the parent fee, whichever is less, for the type of child care.

(1.1) If a parent is eligible for a subsidy for more than one type of child care set out in Schedule A, the minister may determine which subsidy rate applies.

(2) If a family's monthly net income exceeds a child's threshold, the amount of child care subsidy for the child in respect of a type of child care is

A - B

where

A = the amount set out in Schedule A or the parent fee, whichever is less, for the type of child care;

B = the amount of A for the child, divided by the sum of the amounts of A for all children in the family receiving child care described in section 2, multiplied by 50% of the amount by which the family's monthly net income exceeds the child's threshold. . . .

Section 9(1) of the CCSR provides:

How monthly net income is calculated

9 (1) The monthly net income of a family is calculated by adding the income that each person in the family receives per month, including, but not limited to, the following:
(a) employment income;
(b) self-employment income;
(c) spousal or child support paid to a spouse or child in the family;
(d) employment insurance benefits;
(e) workers' compensation benefits;
(f) training allowances;
(g) investment income, including interest;
(h) tips and gratuities;
(i) money earned by providing room and board, less essential operating costs;
(j) rental income of any kind, less essential operating costs;
(k) grants, bursaries or scholarships, except
(i) the amount for tuition or books, and
(ii) with respect to grants provided under the British Columbia Student Assistance Program, $50 for each week covered by the grant. . . .

(3) If the monthly net income of the family varies during a calendar year, the minister may calculate their monthly net income by
(a) estimating the annual net income that everyone in the family, other than a dependent child, will receive in the calendar year, and
(b) dividing the estimated annual net income by 12.

Ministry's Position
The ministry's position is that the appellant was not entitled to a portion of the child care subsidies received over the period March 1, 2011 to February 28, 2014, pursuant to Sections 7 and 9 of the CCSR. The ministry argued that the family's actual monthly net income exceeded the child's threshold or was more than the income used to calculate the child care subsidy when adjusted to the income reported to the CRA and the amount of undeclared income from the appellant's spouse. The ministry argued that although the appellant reported that she was separated from her spouse, the ministry determined that he continued to reside in the home and that his income was to be included during the period of December 31, 2011 to August 2012. The ministry argued that a reassessment of the combined family income using tax documents from CRA during the period March 2011 to February 2014 shows the family's income was higher than that used to calculate their eligibility. The ministry argued that the new monthly net income is used to calculate subsidy eligibility and, when compared to the amounts of subsidy that the appellant received during the period, resulted in a total overpayment to the appellant of $9,175.61, which she is liable to repay.

Appellant's position
The appellant's position is that she believes she is being penalized for something that she completed accurately and that was approved by the ministry at the time of her application. The appellant argued that she considered at the time that she had separated from her husband and the ministry made the decision not to include her husband's income in the calculation of her child subsidy allowance. The appellant argued that the ministry did not send them a letter or indicate there was any problem and then, three years later, the audit investigator informed her that regardless of her marital status her husband's income should not have been removed from that calculation. The appellant argued that this is the ministry's mistake and she should not have to pay for the ministry's negligence.

Panel decision
Section 7(1) of the CCSA stipulates that if a child care subsidy is paid to or for a person who is not entitled to it, that person is liable to repay to the government the amount to which the person was not entitled. The issue to be considered by the panel on this appeal is whether the ministry reasonably determined that the appellant received child care subsidies at any time over the period March 1, 2011 through February 2014 for which she was not entitled since, pursuant to Section 7(5) of the CCSA, the ministry's decision about the amount a person is liable to repay is not open to appeal.

Pursuant to Section 9 of the CCSR, the monthly net income of a family is calculated by adding the income that each person in the family receives per month, and the monthly net income of a family is used to determine the amount of the child care subsidy for which the family is eligible under Section 8 of the CCSR. "Family" is defined in Section 1(1) of the CCSR to mean a parent and the parent's dependants, and a 'dependant,' in relation to a parent, is "...anyone who resides with the parent" and "who is the spouse of the parent" [Section 1(1)(a) of the CCSR]. The normal meaning of 'reside' is to have one's permanent home in a particular place. While the appellant argued that she completed the Child Care Subsidy Application form as accurately as possible, the ministry pointed out that it was only upon a review of the appellant's living circumstances that it was determined that the appellant was never separated from her husband because they continued to reside together, and there is no punitive element to the subsequent adjustment made.

The appellant does not dispute that she and her husband continued to live at the same address throughout the relevant period. While the appellant argued that she and her husband considered themselves to be separated for a period of time during which they used separate bedrooms and

mostly remained on separate levels of their home, she also acknowledged that there is no wall dividing the living spaces into distinct self-contained units, such as the case of a separate suite with its own entrance, and she used the kitchen on the same floor as her husband and their two children were not restricted in their movements throughout the home. The panel finds that the ministry reasonably determined that the appellant's husband continued to "reside" with the appellant because he lived in the appellant's residence and at the same address. Therefore, the panel finds that the ministry reasonably concluded that the appellant's husband was her dependant, part of the "family," and that his income was to be included to arrive at the monthly net income of the family for the purposes of calculating the amount of the child care subsidy for which the appellant was eligible. The panel also finds that the ministry reasonably relied on the amounts claimed by the appellant and her husband in the personal income tax returns filed with CRA as indicating the total income actually received by them for the 2011, 2012 and 2013 tax years.

The ministry Child Care Subsidy Overpayment Calculation Statement dated May 19, 2015 sets out the eligible amount for child care subsidy for the appellant's two children and the overpayment amount for each month from March 2011 through February 2014, and indicates a total overpayment amount of $9,175.61. The panel finds that the ministry reasonably concluded that the appellant is liable to repay child care subsidy amounts paid to her in the months that the family's actual monthly net income exceeded the child's threshold or was more than the income used by the ministry to calculate the child care subsidy for the period March 1, 2011 to February 28, 2014, when adjusted to the income reported to the CRA and the amount of undeclared income from the appellant's spouse, pursuant to Sections 7(1) of the CCSR and 7(1) of the CCSA.

Conclusion

The panel finds that the ministry's decision, which found that the appellant was not entitled to child care subsidies received and is liable to repay these amounts pursuant to Sections 7 and 9 of the CCSR, was a reasonable application of the applicable enactment in the appellant's circumstances. The panel therefore confirms the ministry's reconsideration decision.