APPEAL

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated February 16th, 2012 in which, pursuant to ss. 10(2) and 24 of the *Employment and Assistance for Persons with Disabilities Regulation*, the ministry determined that between August, 2009 and October, 2011 the appellant had been overpaid disability assistance in the amount of $11,541.42

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act ("EAPDA"), s. *11(1).*

Employment and Assistance for Persons with Disabilities Regulation ("EAPDR"), ss. *1(1), 10(2), 24 and 29 and Schedule B. s. 3.*

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PART E – Summary of Facts

The evidence before the ministry on reconsideration was comprised of the following documents:

(a) comments of the appellant contained in Section 3 of the Employment and Assistance Request for Reconsideration;
(b) undated 1-page Bank Customer Profile prepared by appellant's bank;
(c) 17 pages of documents relating to appellant's bank account, TFSA and RDSP during the period January, 2009 through September, 2011 prepared by appellant's bank;
(d) 17 pages of documents relating to appellant's employment during the period January, 2009 to August, 2011 prepared by appellant's employer and by payroll contractor;
(e) 4-page Overpayment Chart prepared by the ministry on December 7, 2011; and
(f) 4-page affidavit sworn by the appellant's brother on February, 2012.

The appellant was accompanied at the hearing by her brother and by an advocate. The appellant's brother attended to support the appellant but, given his significant personal involvement in the matters under appeal, also to give evidence. The advocate advised the panel that she was a practicing lawyer.

The ministry representative attended by teleconference and participated fully in the hearing.

Both parties indicated that they would introduce new, written evidence during the hearing but, as result of the manner in which the hearing proceeded, neither party found it necessary to do so.

The factual evidence with respect to the amount of the overpayment of disability assistance to the appellant was not in dispute. The total amount as calculated by the ministry was $11,541.42. The appellant agreed that, applying the legislation literally, this figure was correct.

The overpayment was made up of two amounts, one attributable to excess, unreported income, the other to excess assets. From August, 2009 to December 2010 (except for April and November, 2010 during which months the appellant did not earn in excess of $500.00) the appellant's employment income was in excess of $500.00. However, she did not report this to the ministry as required by to s. 11(1) of the EAPDA. This resulted in the receipt by the appellant of disability assistance in those months in excess of the amount calculated in accordance with s. 24 of the EAPDR. In addition, from December, 2010 until October, 2011 the appellant was not eligible for disability assistance in any amount, but not because of excess employment income. Rather, the ineligibility arose because the appellant's brother, in an effort to provide long term financial security for the appellant, on two occasions - September, 2009 and December, 2010 - gifted her moneys that he deposited into a Tax Free Savings Account ("TFSA") in the appellant's name. The second of these gifts increased the value of the cash assets owned by the appellant to an amount greater than $3,000.00. Since this resulted in the appellant having assets which exceeded the asset limit set out in s. 10(2) of the EAPDR, that is $3,000.00, this gift rendered the appellant ineligible for disability assistance, a consequence entirely unintended by the appellant's brother.

The evidence of the appellant's brother in his affidavit, confirmed orally at the hearing, was that he

created the TFSA for the appellant using his own funds. Though he maintained a measure of control over this TFSA, in part by means of a limited power of attorney and in part by not fully explaining to the appellant what he had done – as he stated in his affidavit, "I did not fully explain to [the appellant] that these monies were hers ... as I did not want her to withdraw any of the monies..." - he nonetheless considered the TFSA to be the property of the appellant. When questioned as to whether or not the purported gift of the funds in the TFSA to the appellant had been perfected, that is that he no longer had any beneficial interest in the funds, the appellant's brother agreed that it was indeed a perfected gift. The advocate agreed with this characterization of the funds in the TFSA.

Accordingly, the panel found as a fact that the TFSA was a cash asset, as that term is defined in s. 1 of the AEPDR, owned by the appellant notwithstanding that she might not have known this nor known how to access it.

In late 2010 the appellant's brother learned of the existence of the investment vehicle known as a Registered Disability Savings Plan ("RDSP"). He realized it was an appropriate long-term financial planning program for persons such as the appellant. In December, 2010 the appellant's brother set up an RSPD for the appellant and transferred $1,500.00 from the appellant's TFSA to her RDSP. Again, because the appellant's brother knew that the appellant would not understand the nature of an RDSP, he did not explain to her what he had done and why he had done it. Since the appellant's brother did not know about the $3,000.00 limit on assets, this transfer did not reduce the appellant's assets below the $3,000.00 threshold. He said that he had transferred this amount, rather than a larger sum, because this was the amount needed to qualify for the maximum government contribution to the appellant's RDSP. His plan was to make a similar transfer from the appellant's TFSA to the RDSP in each succeeding year in order to maximize the matching government contribution.

In August 2011 the ministry initiated a routine review of the appellant's eligibility for disability assistance. In the course of that review, which took place over several months, the ministry discovered the above-described excess employment income and excess assets. Upon being apprised of the consequence of the appellant having assets valued at in excess of $3,000.00 - that is, that it rendered the appellant ineligible for disability assistance - the appellant's brother forthwith transferred the funds from the appellant's TFSA to the RDSP, thereby reducing the value of the appellant's assets to less than $3,000.00.

To buttress the argument based on, to use the advocate's terminology, fairness and equity, the advocate and the appellant's brother provided background information to assist the panel in understanding how more than two years passed (from August, 2009 to October, 2011) before it was discovered that the appellant had received disability assistance significantly in excess of her entitlement. In or about 1985 the appellant was designated a person with disabilities. This meant, the advocate submitted, that she was a person whom the minister was satisfied had "a severe mental or physical impairment" as a result of which she required help to perform daily living activities (see s. 2(2) of the EAPDA). Notwithstanding her impairment (agreed by the parties to be a mental impairment), the appellant was able to find part-time employment. Initially in that employment she earned less than $500.00 per month so for a time she remained eligible for disability assistance without reduction.

Eventually, in or about 2006, the appellant found employment through which she earned an income

sufficient to render her ineligible for disability assistance. Then, in mid-2009, her hours were reduced so that her income in some months was again less than $500.00. About that time she again applied for disability assistance and, since at the time of her reapplication her income was less than $500.00 per month, she was informed by the ministry that she was eligible for the maximum disability assistance. The appellant's brother said that the appellant told him after she had met with the ministry that she was advised that so long as her income was less than $500.00 per month it would not be necessary for her to file the monthly reports that were required under s. 11(1) of the EAPDA.

The appellant's brother said at the hearing that he accepted the accuracy of the appellant's comments regarding the reporting requirements. It seemed sensible to him, he said, and he saw no reason to contact the ministry to discuss whether or not the appellant's understanding of the reporting requirements was accurate. He volunteered that he was entitled to do so, and the ministry representative agreed, because he was on the appellant's file with the ministry as the appellant's contact person and a person with a right to be informed of the appellant's personal information. Indeed, in the past he had always been involved in the appellant's dealing with the ministry in connection with her disability assistance. He had completed and filed the appellant's monthly reports – each month the report form to be submitted for the following month came attached to the stub for the disability assistance cheque for the present month – over a period of many months. Each monthly report sought information that the ministry used to verify the appellant's entitlement to disability assistance for the following month and the quantum of that assistance.

By the time the ministry review of the appellant's finances was concluded in December, 2011 and the overpayment calculated, the appellant's employment income and her total asset value was such that she was once again eligible for disability assistance for a person in her circumstances. But by then the financial damage to the appellant had been done.

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PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision on reconsideration is reasonably supported by the evidence, that is did the evidence before the ministry reasonably support its determination that, pursuant to sections 10(2) and 24 of the EAPDR, between August, 2009 and October 2011 the appellant was overpaid disability assistance in the amount of $11,541.42.

The legislation relevant to this appeal is excerpted below:

EAPDA

11 (1) For a family unit to be eligible for disability assistance, a recipient, in the manner and within the time specified by regulation, must

(a) submit to the minister a report that

(i) is in the form prescribed by the minister, and

(ii) contains the prescribed information, and

(b) notify the minister of any change in circumstances or information that

(i) may affect the eligibility of the family unit, and

(ii) was previously provided to the minister.

(2) A report under subsection (1) (a) is deemed not to have been submitted unless the accuracy of the information provided in it is affirmed by the signature of each recipient.

EAPDR

1 (1) In this regulation:

"asset" means

(a) equity in any real or personal property that can be converted to cash,

(b) a beneficial interest in real or personal property held in trust, or

(c) cash assets;

"cash assets" in relation to a person, means

(a) money in the possession of the person or the person's dependant,

(b) money standing to the credit of the person or the dependant with

(i) a savings institution, or

(ii) a third party

that must pay it to the person or the dependant on demand,

(c) the amount of a money order payable to the person or the dependant, or

(d) the amount of an immediately negotiable cheque payable to the person or the dependant;

10 (2) A family unit is not eligible for disability assistance if any of the following apply:

(a) a sole applicant or recipient has no dependent children and has assets with a total value of more than $3 000;

(b) an applicant or recipient has one or more dependants and the family unit has assets with a total value of more than $5 000.

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

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

(a) the report must be submitted by the 5th day of the calendar month following the calendar month in which there is a change that is listed in paragraph (b), and

(b) the information required is all of the following, as requested in the monthly report form prescribed under the Forms Regulation, B.C. Reg. 315/2005:

(i) change in the family unit's assets;

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

(iii) change in the employment and educational circumstances of recipients in the family unit;

(iv) change in family unit membership or the marital status of a recipient.

EAPDR, Schedule B

3 (1) The amount of earned income calculated under subsection (2) is exempt for a family unit if

(a) a recipient in the family unit has been receiving continuously for the 3 calendar months immediately preceding the calendar month for which the exemption is claimed

(i) disability assistance under the Act,

(ii) income assistance under the *Employment and Assistance Act*,

(iii) disability assistance or income assistance under a former Act,

(iv) a youth allowance under the *BC Benefits (Youth Works) Act*, or

(v) any combination of the assistance and allowances referred to in subparagraphs (i) to (iv).

(b) Repealed. [B.C. Reg. 369/2002.]

(2) The exempt amount for a family unit that qualifies under subsection (1),

(a) in the case of a family unit that is composed of one recipient who is designated as a person with disabilities, is calculated as the lesser of

(i) $500, and

(ii) the family unit's total earned income in the calendar month of

calculation, or

(b) in the case of a family unit that is composed of two recipients, both of whom are designated as persons with disabilities, is calculated as the lesser of

(i) $750, and

(ii) the family unit's total earned income in the calendar month of calculation.

The appellant took no issue with the determination of the ministry that the strict application of the legislative framework set out in the EAPDA and EAPDR led inevitably to the conclusion that the appellant had been overpaid some $11,000.00 in disability assistance in the period August, 2009 to October, 2011. The panel noted that the precise calculation of the quantum of the overpayment was not, by virtue of s. 18(2) of the EAPDA, a matter over which the panel had jurisdiction. Accordingly, the panel did not engage in a detailed examination of the calculations leading to the quantum of the overpayment other than to observe that the reconsideration adjudicator confirmed the accuracy of the figure and, further, the appellant's advocate advised that she had no objection to the figure.

The position of the appellant on appeal was that the overpayment had come about through understandable inadvertence on the part of the appellant and the appellant's brother and that had the ministry been more diligent, particularly since it knew that the appellant was not capable of managing her own affairs, and had the ministry been proactive in initiating its review in a more timely way, the inadvertent errors would have been more quickly discovered and the bulk of the amount sought to be recovered would never have accumulated in the first place. This was true, the appellant's advocate argued, in respect of the excess income but, much more significantly, with respect to the excess assets. The excess assets had come into existence primarily because of the appellant's brother's altruism, his concern and caring for the appellant. Ironically, the advocate observed, the appellant's brother had provided the appellant with an asset, in the form of the TFSA, which quite perversely transformed an intended benefit into a significant debt (the overpayment claim). Moreover, had the appellant's brother known that there was available an alternate investment strategy, an RDSP, he could have provided a comparable benefit to the appellant without impairing her eligibility for disability assistance. In these circumstances, the advocate argued, common sense and fairness should come into play to relieve the appellant of most, if not all, the debt that the ministry now sought to recover.

The panel concluded that the appellant's brother - though it accepted his statement that he had never reviewed the legislation that authorized the monthly report form and the information required to complete it - must necessarily have known that the ministry relied upon the monthly report to calculate the appellant's entitlement to disability assistance. Moreover, the panel was satisfied that the appellant's brother must necessarily have known, given the appellant's history of having been entitled over time to differing amounts of disability assistance (ranging from a maximum amount to zero), that her entitlement to disability assistance depended on her employment earnings and that it was only by means of the monthly report that the ministry could determine the amount.

In considering the appellant's brother's explanation for not filing the monthly reports – that the appellant had told him that the ministry had said it would not be necessary to submit them so long as her employment income was less than $500.00 - the panel concluded that whether or not the ministry had in fact made such a statement to the appellant, the actual employment income of the appellant

over the ensuing months rendered this explanation largely irrelevant. The panel did not, however, doubt that appellant had so informed the appellant's brother and that he relied upon that statement in good faith.

Additionally, the advocate submitted that the ministry had a duty to ensure that monthly reports were filed. Had the ministry fulfilled that duty by contacting the appellant and insisting that the reports be filed, the problem of the excess income would quickly have come to light. This duty, the advocate argued, followed from the mandatory language of s. 11(1) of the EAPDA (see excerpt above). In response to this submission the ministry representative stated that the ministry procedure was to not insist on a report if there had been no change in the items listed in the report form. Indeed, the ministry said, the absence of a report was treated as confirmation that there had been no changes in any of the matters enumerated on the form. Such a procedure seems at first glance to be inconsistent with the mandatory language of s. 11(1). However, the panel referred also to s. 29 of the EAPDR (see excerpt above) which qualifies s. 11(1) in a way that accords with the ministry practice. This section of the Regulation states that a report must be submitted following a month "in which there is a change" and goes on to identify the categories of information in respect of which such change is relevant. Those categories include the two which are germane to this appeal, namely: "change in the family unit's assets" and "change in income received by the family unit". Accordingly, the panel concluded that, absent some matter coming to the attention of the ministry that there was a need to require the submission of a monthly report, the ministry had no duty to contact the appellant to require that she submit a monthly report during the period germane to this appeal. There was no evidence in this appeal that any such matter came to the attention of the ministry. On the other hand, it is the panel's view that, given the evidence of the appellant's brother that the blank report form was attached to each cheque stub that the appellant would have received during the period in question, both the appellant and the appellant's brother would have received a monthly, written reminder to consider the matter of whether or not to submit a report. It follows that any duty during this time in regard to the issue of submitting a report in any month shifted to the appellant and the appellant's brother.

Without conceding the appellant's advocate's submission that any error the appellant made was caused, encouraged or, perhaps, simply allowed to persist by the ministry, the panel considered the question of how, in the appellant's circumstances, the ministry could reasonably have known, or even suspected, that the appellant's income or her assets had increased to the point that the appellant was no longer entitled to disability assistance or disability assistance in an amount less than the maximum. The panel accepts the advocate's submission that the ministry could not assume that the appellant was capable of managing her own affairs in this regard. However, that was not the appellant's situation. The appellant's brother was involved in assisting her and the ministry knew this. He was on the appellant's file as being the contact person and he had always been, as he stated, intimately involved in her financial affairs, including her dealings with the ministry.

The appellant's brother's assistance took a number of forms but most relevant to this appeal, he took on the task of completing and submitting the monthly reports, at least during the time that the appellant complied with this requirement. He knew, or ought reasonably to have known, the contents and significance of the items on the report form. One part dealt with changes in the appellant's assets and another with changes in the appellant's income. In dealing with the income part of the form he must necessarily have from time to time recorded changes in the appellant's employment

income. Indeed, since that income changed from month to month this was a matter to which he must have regularly turned his mind. He stated that after the appellant's income was less than $500.00 he understood there was no need to file further reports but he continued to receive the appellant's pay slips. It must be presumed that he looked at these slips.

It is significant in this regard to note that in most of the months following the time the appellant's hours of employment were reduced (in mid-2009) the appellant's monthly income continued to exceed $500.00, not by much but in excess nonetheless. Since he knew that employment income in excess of $500.00 was a trigger point, he should have been alert to the need to file monthly reports whenever that threshold was exceeded. Had this happened, the panel is confident that the overpayments based on excess income would have been dealt with in a timely way.

Accordingly, it is the panel's view that in the appellant's circumstances, absent any matter specifically brought to the attention of the ministry by the appellant, her brother or a third party, the ministry had no independent duty during to contact the appellant during the time germane to this appeal to inquire as to her employment status and her employment income. The panel concluded that this result is consistent with the applicable legislation but also, responding to the major thrust of the appellant's submission, is consistent with the notions of common sense and fairness.

The panel's conclusion regarding the duty of the ministry to initiate contact with the appellant in connection with her employment – that is, that there was no such duty - applies equally, indeed perhaps more strongly, in connection with the appellant's asset limits. In the first place, the monthly report that the appellant's brother filled out on numerous occasions required that he check a box in response to the inquiry "has your family unit received or disposed of any assets?". In the panel's view there is nothing ambiguous about that question and, further, in the panel's view a TFSA is obviously an asset within the meaning of the relevant question on the monthly report. Had the appellant's brother turned his mind to this, he would have come to the same conclusion. The appellant's brother stated that he was not aware of the $3,000.00 limit set out in s. 10(2) of the EAPDR. The panel accepts that statement but it is not relevant. What is relevant is that the question is designed to alert the person completing the form to the concept of an asset and to the notion of receiving or disposing of an asset. While the report form does not require that the asset be described, it does ask whether or not an asset has been acquired. Had the appellant's brother checked the "yes" box in response to this question, the panel is of the view that this would have triggered an inquiry from the ministry as to the nature and value of the asset, not necessarily immediately but certainly in a timely way time. The panel noted that the first contribution to the appellant's TFSA was in an amount that did not cause the appellant's assets to reach the $3,000.00 threshold. Accordingly, the inevitable follow-up inquiry from the ministry at the time of the first gift would more likely than not have led to a discussion of this threshold and the second, larger gift to the appellant's TFSA would not have been made several months later.

The panel concludes that the reconsideration decision which held that the appellant received an overpayment of disability assistance in the amount set out in that decision was a reasonable application of EAPDA, s. 11(1) and EAPDR ss. 1, 24 and 29 and Schedule B, s. 3 in the circumstances of the appellant. The panel confirms the decision of the ministry