PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated February 22, 2013 of the Ministry of Social Development (the "ministry"). Pursuant to subsection 27(2) of the EAA, the appellant has no right to appeal the amount he is required to repay under subsection 27(1) of the EAA and, accordingly, the panel has no jurisdiction to consider the issue of the amount of income assistance, if any, to be repaid by the appellant. Rather, the issue on this appeal is whether or not the ministry reasonably determined that the four payments the appellant received in the form of the July Earnings, the 2011 Refund, the Other Refunds and the Damages Award rendered him eligible for reduced income assistance pursuant to section 28 of the EAR (as regards the July Earnings) or rendered him ineligible for any income assistance pursuant to subsection 10(2) of the EAR (as regards the other three payments). [The description of the payments referred to above are defined in Part E, below.]

PART D – Relevant Legislation

Employment and Assistance Regulation ("EAR"), section 9, subsection 10(2), section 11(2)(b), section 28 and Schedule B, subsection 7(1)(c)
Ministry policy statement titled *Financial and Other Awards: May 1, 2012*

PART E – Summary of Facts

The evidence before the ministry on reconsideration included the following documents:

1. 6-page record prepared October 22, 2012 titled "Payroll History" (the "History") setting out payments made to the appellant by a former employer ("Employer A") for the period 01-01-2008 to 22-10-2012;
2. 1-page record dated October 22, 2012 titled "Confirmation of Earnings" (the "Confirmation") prepared by another employer ("Employer B") setting out particulars of the appellant's employment and in particular a payment of $1,843.74 on July 9, 2011;
3. 2-page letter dated November 1, 2012 from the ministry to the appellant setting out the documentary information the ministry required the appellant to produce as part of its audit of the appellant's entitlement to financial assistance;
4. 2-page summaries of the appellant's income tax returns for each of the taxation years 2006 through 2011 (the "IT Summaries");
5. 2-page letter dated December 18, 2012 from the ministry to the appellant informing the appellant of the amount of the overpayment calculated by the ministry to which was attached a 1-page document titled "Overpayment Notification" and a 2-page document titled "Overpayment Chart" (the "Overpayment Chart"); and
6. 2-page submission of the appellant's advocate comprised of a 1-page summary of evidence and argument and a 1-page reproduction of the ministry policy statement titled "Financial and Other Awards: May 1, 2012" (the "Policy Statement").

Neither party sought to introduce any additional documentary evidence at the hearing of the appeal. When it became apparent that the ministry had not included the appellant's banking records amongst the materials before the ministry on reconsideration, which records he insisted he had delivered directly to the ministry office sometime prior to the reconsideration decision, the appellant stated that he would have brought his copies of those documents had he known that the ministry had, or so it appeared, mislaid them or failed to consider them. The panel advised the appellant that they could consider only the documents that were before it at the hearing and that the appeal proceed on that basis.

At the hearing the appellant's oral evidence included the following:

1. He had been continuously in receipt of income assistance and/or shelter allowance since January 1, 2011 except for May, 2011 and September through November, 2011.
2. In the months September through November, 2011 he received Employment Insurance Sickness Benefits.
3. Although the Confirmation indicated that he had worked for Employer B from August 25, 2008 through September 5, 2010, he had actually started three months prior to that. August 25, 2008 was when his probation period ended.
4. Although he was employed by Employer B, most of his actual work was done for Employer A under a contractual arrangement between these employers.
5. In early 2011 he became seriously ill and was hospitalized. He has been unable to work since then though he tried once, on July 1, 2011, to work for Employer A. He was unable to finish his shift. Nonetheless, he was paid for the full day, $86.17, which amount he neglected to report to the ministry. (This amount is hereinafter referred to as the "July Earnings".)
6. In 2012 he realized that he was not receiving the GST credit for low-income earners such as himself. He spoke to the ministry about this and was told that to be eligible for the credit he had to file income tax returns. He said he had not filed returns for six years and so he went to

an income tax preparer and had his returns prepared and filed for the years 2006 through 2011.

7. In due course he received the IT Summaries, confirming that his income tax returns had been filed for 2006 through 2012. He provided the IT Summaries to the ministry. In or about the middle of 2012 he received an income tax refund in the approximate amount of $1,400.00 of which he had to pay approximately $600.00 to the income tax preparer. He presumed that the refund he received was the aggregate amount of the refunds set out in each of the returns.
8. He received $1,843.74 from Employer B in 2011. He explained that this amount was a settlement of his claim for damages for wrongful dismissal. He had filed a complaint with the Employment Standards Branch saying that the termination of his employment had come about because of his illness and, accordingly, it was without just cause. He succeeded with his complaint. (The payment of $1,843.74 is hereinafter referred to as the "Damages Award".)
9. The Confirmation states that he received the Damages Award on July 9, 2011. He agreed that he received this amount but said he did not receive it until September, 2011. He had specifically instructed the Employment Standards officer who handled his complaint that, since he was going to receive EI Sickness Benefits commencing September, 2011 and didn't want to receive the settlement funds while he was receiving financial assistance from the ministry, and since Employer B had requested a 30-day period in which to pay the settlement, he would give Employer B an additional 30 days to pay, that is, until September, 2012. That, he said, is when he received the Damages Award.

The panel was unable to reconcile some of the documentary evidence with the appellant's oral evidence. The Overpayment Chart indicated that the appellant received financial assistance in varying amounts from the ministry from March, 2011 through August, 2012 (except for May, 2011). This did not square with the appellant's evidence regarding EI Sickness Benefits which he stated replaced the financial assistance from the ministry for September through November, 2011. While the panel made no finding in regard to those Benefits, it had no basis to doubt that the payments made by the ministry to the appellant set out on the Overpayment Chart were made in the amounts and at the times set out on the Chart. When faced with a difference in the appellant's oral evidence and the Overpayment Chart, the panel preferred the documentary evidence over the somewhat uncertain recollections of the appellant. The panel found as facts the dates and payment amounts set out on the Overpayment Chart.

Further, the appellant questioned the timing and amounts of the payment to him of the income tax refunds. However, since the appellant had no reliable recollection of when he received the income tax refunds nor any documents to establish that date, the panel had no basis for questioning the dates or the amounts set out on the IT Summaries. Accordingly, the panel found as facts the dates and refund amounts set out on the IT Summaries

In addition to the findings set out in the previous paragraph, the panel found as facts:

1. The appellant worked on July 9, 2011 and received the July Payment from Employer A, which amount he did not report to the ministry.
2. The appellant was entitled to income tax refunds as follows:
   (a) for 2011, $884.23, assessed on April 30, 2012,
   (b) for 2006, $375.88, assessed on June 11, 2012,
   (c) for 2007, $774.69, assessed on June 14, 2012,
   (d) for 2008, $334.07, assessed on June 14, 2012,

(e) for 2009, $38.28, assessed on June 14, 2012, and
(f) for 2010, $173.46, assessed on June 14, 2012.

(The first of these refunds is hereinafter referred to as the "2011 Refund" and the latter four are hereinafter referred to as the "Other Refunds").

3. The appellant had the benefit of the 2011 Refund as of April 30, 2012. The appellant did not physically receive this refund because it was applied in its entirety to tax arrears
4. The appellant received the Other Refunds as a single payment on or shortly after the last assessment date, that is on or about June 14, 2012. The appellant did not physically receive the entire amount of these five refunds because $97.90 of it was applied to tax arrears. Accordingly, the amount he received was the balance, that is, $1,597.48
5. The appellant's employment with Employer B was terminated without just cause and, with the assistance of the Employment Standards Branch, Employer B was required to pay the Damages Award to the appellant. The appellant received the Damages Award in September, 2012.
6. The Damages Award was unearned income in accordance with the ministry Policy Statement.

PART F – Reasons for Panel Decision

Pursuant to subsection 27(2) of the EAA, the appellant has no right to appeal the amount he is required to repay under subsection 27(1) of the EAA and, accordingly, the panel has no jurisdiction to consider the issue of the amount of income assistance, if any, to be repaid by the appellant. Rather, the issue on this appeal is whether or not the ministry reasonably determined that the four payments the appellant received in the form of the July Earnings, the 2011 Refund, the Other Refunds and the Damages Award rendered him eligible for reduced income assistance pursuant to section 28 of the EAR (as regards the July Earnings) or rendered him ineligible for any income assistance pursuant to subsection 10(2) of the EAR (as regards the other three payments).

The relevant legislation is as follows:

EAR

Limits on income

10 (1) For the purposes of the Act and this regulation, **"income"** , in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for income assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of income assistance determined under Schedule A for a family unit matching that family unit.

Asset limits

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

(b) a sole recipient has no dependent children and has assets with a total value of more than $1 500;

Amount of income assistance

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

(a) the amount determined under Schedule A, minus

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

EAR, Schedule B

Exemptions — unearned income

7 (1) The following unearned income is exempt:

(c) a criminal injury compensation award or other award, except the amount that would cause the family unit's assets to exceed, at the time the award is received, the limit applicable under section 11 *[asset limits]* of this regulation;

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One time awards that are not specifically defined in regulations as exempt can be considered "other awards" under Schedule B, Section 7 and exempt up to the family's asset level. Some examples include land claim settlements, eviction compensation, criminal injury, insurance settlements and other lump sum payouts (see table below):

Director of Employment Standards Determinations//Unearned//Exempt up to the asset level for the family unit//Use 29 –

Other Unearned Income – for amounts over the asset level for the family unit.

On the appeal the appellant did not dispute that he received the amounts set out in the Overpayment Chart from Employers A and B. He did, however, think that the combined income tax refunds that he received totaled somewhat less the amount set out in the Chart and that the ministry must have known that he would not have received any refund for at least several weeks following the date of assessment. His major quarrel was with what he viewed as the ministry's mischaracterization of the Damage Award. This amount, he stated, represented an award settling his claim for damages for wrongful dismissal. It should not have been described by the ministry as employment earnings. But above all, he said, he just wanted to bring this matter to an end so that he would not have to contend with it during the time that he had left. He had done his best to provide the ministry with the information that it had requested and he thought that in doing so this matter would be concluded.

The position of the ministry was that the reconsideration decision was based on information the ministry had at the time of the reconsideration and the decision was reasonable. However, when questioned by the panel as to whether the ministry would have applied the Policy Statement to the Damage Award had it know that it was an amount in settlement of a claim for damages for wrongful dismissal that arose in the context of a complaint to the Employment Standards Branch, the ministry stated that it would have done so. That is, in the language of the Policy Statement, it would have deemed, pursuant to EAR, Schedule B, section 7(1)(c), that amount to have been unearned income exempt from consideration in determining the appellant's net income up to the asset limit that is set out in EAA, section 11(2)(b). For the appellant, that asset limit $1,500.00. Accordingly, as the ministry agreed at the hearing, only the amount in excess that limit, that is, $343.74, was unearned income that should have been considered in determining the appellant's net income.

On reconsideration the ministry had concluded that the Damages Award was "employment income" paid by Employer B to the appellant and that it was not exempt from the calculation of the appellant's net income. The task of the panel on this hearing was to determine whether in reaching this conclusion the ministry acted reasonably. Alternately stated, the panel had to determine whether the failure of the ministry to identify this amount as a payment to which the Policy Statement should have been applied was reasonable. The panel determined that the failure of the ministry to so conclude was unreasonable in the circumstances of the appellant. It came to this determination for the following reasons:

1. The document before the ministry on reconsideration that set out the payment of the Damages Award was the Confirmation. That document was prepared by Employer B on November 22, 2012 in response to a request from the ministry. It stated that the appellant had been fired on September 5, 2010 and that the payment had been made to the appellant on July 9, 2011, nearly one year after he was fired. The panel found that a payment to a former employee (in an amount equal to approximately three weeks of his former wage rate) nearly one year after he had been fired was so unusual that it immediately raised serious questions as to the true nature of such a payment. There is nothing in the reconsideration decision to indicate that the ministry considered this matter. There is nothing in the reconsideration decision to explain how the ministry concluded that it was a form of employment earnings.
2. The record before the ministry on reconsideration provided specific information from the appellant's advocate regarding the provenance of the Damages Award. In her written, submission the advocate wrote: "The client reports that he did not receive earnings from his employer, however it was an employment standards medication [editorial aside: the word is

"mediation"] and as a result he was awarded the funds." The advocate continued: "The client reports according to MSD policy and legislation, the Employment Standards awards are exempt and requests this policy be applied to his case." As part of her submission, the advocated appended a copy of the Policy Statement, the relevant portion of which is set out in the excerpts reproduced at the beginning of Part F of this decision.

The panel found that the failure of the ministry to deal responsively with the submission of the appellant's advocate in regard to the Damages Award rendered the decision with respect to the Damages Award unreasonable.

For the reasons given above, the panel concluded that:

1. the receipt of the July Earnings was reasonably considered by the ministry in calculating the appellant's income;
2. the receipt of the 2011 Refund and the Other Refunds was reasonably considered by the ministry in calculating the appellant's income; and
3. the receipt of the Damages Award was, as regards the first $1,500.00 of that payment, not reasonably used by the ministry in calculating the appellant's income, though the balance of that payment, namely $343.74, was reasonably so used by the ministry; Further, the panel found that the said balance was received by the appellant in September, 2011, not July 2011.

Accordingly, the panel found that the July Earnings and the 2011 Refund and the Other Refunds were reasonably considered by the ministry in calculating the appellant's income. However, the ministry's determination that first $1,500.00 of the Damages Award would be included in the calculations of the appellant's income was not reasonably supported by the evidence and neither was it a reasonable application of the relevant statutory provision in the circumstances of the appellant. Accordingly, the February 22, 2013 reconsideration decision is rescinded with respect to the first $1,500 of the Damages Award.