

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision of February 20, 2012 which held that the appellant received child care subsidy overpayments totaling \$12,932.50 for the period between October 2006 and August 2010. In reaching its decision, the ministry found that the appellant notified the ministry in her reapplication process in December 2010 that, during the above time period, her child did not reside with her full time but rather half of the time pursuant to a 50/50 shared custody agreement with the child's father; therefore, the ministry's rationale is that there is no need for child care under section 3 (1)(a) of the Child Care Subsidy Regulation for 50% of the time the child was not in the care of the appellant. As a result the ministry has determined the appellant was entitled to half the amount of payments she received and must repay the amount overpaid pursuant to Child Care Subsidy Act s.7.

PART D – Relevant Legislation

Child Care Subsidy Act (CCSA) – Section 1 (definition of "parent"); Sections 4 and 7
Child Care Subsidy Regulation (CCSR) – Section 1(definition of "family"), 3, 4, 7 and 8

PART E – Summary of Facts

Evidence before the ministry at the time of reconsideration included:

1. Copies of the Child Care Subsidy Overpayment Calculation sheets dated March 15, 2011 which determined overpayment in the amount of \$12,932.50;
2. Child Care Subsidy Renewal forms prepared by the appellant dated December 4, 2009, November 25, 2008, December 7, 2007, August 22, 2007 and June 6, 2007;
3. Child Care Subsidy Application dated June 6, 2007;
4. Correspondence from the appellant to the Ministry of Children and Family Development dated March 23, 2011;
5. Copies of Child Care Investigation System notes dated February 22, 2011 and March 22, 2011 which summarize communications with ex-spouse of the appellant;
6. A letter from the child's father, and confirmed by the appellant, to the Ministry of Children and Family Development dated February 21, 2011 stating that effective September 1, 2010 the child's father had custody of the child normally 2 days each week and normally on weekends;
7. Copy of Ministry telephone log notes dated December 16, 2010 where the Appellant advised the Ministry of the shared custody agreement on a 50/50 basis with the child's father;
8. Court Order dated February 2, 2007 containing specific child custody access dates for the appellant and the child's father.

The following additional information is provided in the appeal record package:

1. A court order dated March 4, 2005 and filed May 18, 2005 ordering joint custody of the appellant's child with the child's father. The court order also states that "primary residence (for the child) is to be with the appellant" and "grants reasonable access" to the child's father;
2. Child Care Subsidy Application with the notation of "Original Application," dated June 18, 2006;
3. Letter from the appellant to the Ministry of Children and Family Development dated March 23, 2011 where the appellant states that in actuality there was not a 50/50 custody arrangement in terms of the time the child spent with her father;
4. Income tax return copies of the appellant for 2006, 2007, 2008, 2009 and 2010;
5. Copies of dental care invoices for the appellant's child;
6. A memorandum from the appellant's doctor dated April 10, 2012 providing supporting comments that the appellant is the primary care giver for the child;
7. Copies of the Appellant's calendars with notations of the days the child was in the care of the child's father. The calendar copies provided were from October 2006 to April 2007;
8. An interim court order dated March 3, 2006 and filed March 7, 2006 specifying the continuation of reasonable access to the child's father along with specific short term dates for access;
9. A letter from the appellant's advocate supporting the appellant's position that she is the primary caregiver for the child;

The panel admitted the above additional information as it was in support of the evidence before the ministry at reconsideration.

The appellant is a single mother who received child care subsidy payments for her child from October 2006. In June 2011, a Verification and Audit was completed which determined that the appellant held only a 50/50 child custody arrangement for the period from October 2006 to August 2010 and was entitled to only one-half of the child care benefit received in that period. It was therefore determined that the appellant had received \$12,932.50 in excess of the actual eligibility from October 2006 to

August 2010.

In December 2010, when completing the Child Care Subsidy Renewal Application, the appellant advised Child Care Subsidy Service Centre staff that she shared custody of her child on a 50/50 basis with the child's father. That statement resulted in further investigation by the ministry.

In a letter dated February 21, 2011 provided by the child's father, and confirmed by the appellant, the father stated that from September 1, 2010 the child was in his custody only an average of 2 days and nights per week, of which the vast majority of the time was on the weekends. This shows the child was with her mother Monday to Friday during day time hours when the mother required daycare so she could attend work.

The panel notes that the Child Care Subsidy Renewal Application dated December 16, 2010, referred to in the Summary of Facts in the Reconsideration Decision was not attached or included in the appeal documents. However, the December 16, 2010 notes from the Ministry's "Information System" were included.

PART F – Reasons for Panel Decision

The issue to be determined is the reasonableness of the ministry's decision that the appellant received child care subsidy overpayments pursuant to Section 3 (1)(a) of the Child Care Subsidy Regulation and Section 7 of the Child Care Subsidy Act totaling \$12,932.50 for the period between October 2006 and August 2010 while her child did not reside with her full time but rather half of the time pursuant to a 50/50 shared custody agreement with the child's father .

Relevant legislation:

Child Care Subsidy Regulation

Definitions

1 (1) In this regulation:

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

Circumstances in which subsidy may be provided

3 (1) The minister may pay a child care subsidy only if

(a) the minister is satisfied that the child care is needed for one of the reasons set out in subsection (2),

(b) the child care is arranged or recommended under the *Child, Family and Community Service Act*, or

(c) the child care is recommended under the *Community Living Authority Act* in respect of a child who has a parent approved for or receiving community living support under the *Community Living Authority Act* and the minister is satisfied that the child care is needed.

(2) For the purpose of subsection (1) (a), the child care must be needed for one of the following reasons:

(a) in a single parent family, because the parent

(i) is employed or self-employed,

(ii) attends an educational institution,

(iii) is seeking employment or participating in an employment-related program, or

(iv) has a medical condition that interferes with the parent's ability to care for his or her child;

(b) in a two parent family, because

(i) each parent is employed or self-employed, attends an educational institution or participates in an employment-related program,

(ii) one parent is engaged in an activity listed in subparagraph (i) and the other is seeking employment,

(iii) one parent is engaged in an activity listed in subparagraph (i) and the other parent has a medical condition that interferes with that parent's ability to care for his or her child, or

(iv) Repealed. [B.C. Reg. 57/2002, s. 2 (b).]

(v) each parent has a medical condition that interferes with their ability to care for their child.

(3) Repealed. [B.C. Reg. 57/2002, s. 2 (b).]

(4) The restriction in subsection (1) (a) does not apply in respect of child care provided in a licensed preschool unless the child care is provided to a child of school age.

How to apply for a subsidy

4 (1) To be eligible for a child care subsidy, a parent must

(a) complete an application in the form required by the minister,

(b) supply the minister with the social insurance number of the parent and each adult dependant, and
 (c) supply the minister with proof of the identity of each member of the family and proof of eligibility for a child care subsidy.

(2) Only one parent in the family may apply for a child care subsidy.

(3) Repealed. [B.C. Reg. 187/2007, s. (b).]

(4) A parent ceases to be eligible for a child care subsidy on the date that is 12 months after the date of application under subsection (1) or this subsection, as applicable, unless, before that date, the parent completes an application referred to in subsection (1) and otherwise complies with that subsection.

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.

(2) Subsection (1) does not apply to an applicant if the child care is for a child

(a) in relation to whom the applicant has entered into an agreement with a director under section 8 of the *Child, Family and Community Service Act*,

(b) in relation to whom the applicant, by agreement under section 94 of the *Child, Family and Community Service Act*, exercises a director's rights or carries out a director's responsibilities,

(c) of whom the applicant has custody under an order of the court under section 35 (2) (d), 41 (1) (b), 42.2 (4) (c) or 49 (7) (b) of the *Child, Family and Community Service Act*,

(d) of whom the applicant has custody under an order of the court under section 42.2 (4) (a) of the *Child, Family and Community Service Act*, if the applicant is the other person referred to in section 42.2 (4) (a) (i), or

(e) who is receiving assistance under section 6 of the Employment and Assistance Regulation and the applicant is the relative, within the meaning of that section, with whom the child resides.

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.

(2.1) Repealed. [B.C. Reg. 388/2004.]

(2.2) The child care subsidy for a child described in section 7 (2) is the amount set out in Schedule A

or the parent fee, whichever is less, for the type of child care the child is receiving.

(3) If child care is required for less than 20 days per month, the child care subsidy will be prorated based on the daily rate set out in Schedule A or the daily parent fee, whichever is less.

(4) If the child care is

(a) arranged or recommended where a risk assessment and written risk reduction plan have been completed by staff delegated under the *Child, Family and Community Service Act*, or

(b) recommended under the *Child, Family and Community Service Act* for a parent participating in a Young Parent Program,

the minister may pay any increase in the amount of the child care subsidy that the minister considers necessary to ensure that the child care is provided.

(5) In this section, "parent fee" means the payment made by the parent for a child care space.

Child Care Subsidy Act

Definitions

1 "parent" includes a person with whom a child resides and who stands in place of the child's father or mother.

Child care subsidies

4 Subject to the regulations, the minister may pay child care subsidies.

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).

The ministry's position is that because the appellant's child was in her custody 50% of the time, pursuant to a court order, under section 7 (2)(c) of the CCSR, from October 2006 to August 2010, she was eligible only for child care subsidy payments for half of the time that the child required child care and must pay back to the ministry the amount she received for the time when the child was in the custody of the child's father. The August 2010 date was established from a February 21, 2011 letter to the ministry from the child's father, confirmed by the appellant, that effective September 1, 2010 the child was in his custody on 2 days and 2 nights per week and the majority of the time it is on weekends. The Appellant was therefore eligible for the full amount of the Child Care Subsidy from September 1, 2010.

The appellant argues as follows:

- a) she accurately completed the ministry's Child Care Subsidy Application form and renewals, and

- b) according to these forms, the total amount of the Child Care Subsidy payments were paid to an independent daycare service for the care of her child for each week day during daytime hours when she worked, and
- c) while various court orders provided for a shared custody relationship with the child's father, she provided the primary residence for her child, ensured that daycare services were provided so that she could work, took total responsibility for the health care of the child, and was the primary caregiver for her child, and
- d) the child's father had custody of the child not more than 10 days each month on a sporadic basis, most often on weekends and because the child's father had a full time job, that the appellant worked with the child's father to ensure that he could have custody for as many days as possible, and that these days were never more than 10 each month, and
- e) the appellant's position of being the primary caregiver is supported by a memorandum from their family physician which stated that all visits are made by the appellant and the child's father has never attended any appointments with the child.
- f) the total amount of the Child Care Subsidy received was paid to the independent child care and kindergarten services.

After reviewing the legislation and the evidence, the panel notes the following:

1. The definition of "family" is set out in section 1(1) of the CCSR with the meaning - a parent and the parent's dependants. In the circumstance of the Appellant, this means the Appellant and her child, and
2. Section 4(2) of the CCSR provides that only one parent in the family may apply for a child care subsidy. In the case of the Appellant, she is eligible to apply for child care subsidy for her child, and
3. The need for child care is set out in section 3(2) of the CCSR, specifically, the child care must be needed for one of the following reasons:
 - (a) in a single parent family, because the parent
 - (i) is employed or self-employed,
 - (ii) attends an educational institution,
 - (iii) is seeking employment or participating in an employment-related program, or
 - (iv) has a medical condition that interferes with the parent's ability to care for his or her childIn the circumstances of the Appellant, she required child care because she was employed, and
4. The ministry accepted the reported income of the Appellant to be acceptable under Section 7 of the CCSR.
5. The calculation of the amount of child care subsidy is contained in Section 8 of the CCSR. The ministry determined that the amount of child care subsidy paid was in compliance with Section 8 of the CCSR.
6. On December 16, 2010 the Appellant submitted a Child Care Subsidy Renewal Application and informed the ministry that she shared custody with her child's father on a 50/50 basis. A Verification and Audit (V&A) of this 50/50 sharing evidence was commenced on December 30, 2010 and was concluded on June 23, 2011. The V&A considered court orders and verbal and

written evidence provided by the Appellant and the child's father. The ministry points out that an applicant's eligibility is assessed based on the number of days the child/ren are in his or her care and custody and if the child is not with the applicant, there is no need for child care. The determination of the V&A was that the Appellant and the child's father shared custody of the child on a 50/50 basis from October 2006 to August 2010.

7. Section 7(1) of the CCSA provides 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. As a result, the Ministry has determined that the Appellant received excess child care subsidy payments of \$12,932.50.

The panel notes that the critical dates in the court order directives are summarized as follows:

1. Dated March 4, 2005 and filed May 18, 2005: orders joint custody and joint guardianship of the child and primary residence is to be with the Appellant;
2. Dated March 6, 2006 and filed March 7, 2006; orders reasonable access to the child's father with the following specific dates – every second weekend from Saturday at 1:00 p.m. through to Sunday at 5:00 p.m. commencing March 11, 2006 and continuing every second weekend thereafter; on weekend's off from Sunday at 8:00 a.m. to 8:00 p.m.; every Wednesday from 5:00 p.m. to 8:00 a.m. on Thursday; each Father's Day (a Sunday); when the child reaches age 24 months of age, the weekend schedules are to change to Friday at 5:00 .m. through Sunday at 8:00 p.m.;
3. Dated February 2, 2007 and filed February 2, 2007 – court order granted March 3, 2006 remains in effect with access being further specified as – regular alternating weekend access to the child; other specific dates for only February and March 2007.

In considering the evidence before the panel, the central issue that must be evaluated is the existence of a 50/50 joint custody arrangement from October 2006 to August 2010. The panel has relied on documentary evidence in coming to a decision. The most significant documentary evidence is the above court orders, and the panel notes the following:

- a) These court orders are a statement of fact as they relate to the joint custody and guardianship of the child and the access provided to the child's father, and
- b) These court orders state that the primary residence of the child is with the Appellant, and
- c) These court orders have essentially been in effect for the period prior to September 2010, and
- d) These court orders continue to be in effect subsequent to August 2010.

The other documentary evidence available to the panel is the February 21, 2011 letter to the Ministry from the Child's father and confirmed by the Appellant. This letter confirms that from September 1, 2010, the child was in his custody an average of 2 days and nights per week, the vast majority of the time on weekends. The panel notes that the child access times expressed in this letter result in a departure from the court ordered access dates of "from Wednesday 5:00 p.m. - Thursday 8:00 a.m." to the weekends and notes further that the times specified in the custody agreements do not include

daytime hours from Monday to Friday where the mother would be attending work.

The panel makes the following findings of fact:

- 1) that the appellant received child care subsidy payments as a single parent requiring child care because she is employed (Section 3(2) of the CCSR), and
- 2) that child care subsidy payments were required for the period from Monday to Friday each week, and
- 3) that the wording of the court orders provide "joint custody and guardianship" of the child, however the documentary court evidence states that the child was in the custody of the Appellant each week for the majority of the time from Monday to Friday, and
- 4) that based on an April 10, 2012 letter from the child's physician, the Appellant was the primary care giver and child's father had never attended with the child to an appointment.

The panel finds that the Appellant's participation in the joint custody arrangement with the child's father has been reasonably consistent in the period prior to September 2010 and subsequent to August 2010. The primary residence of the child is with the Appellant and court ordered access to the child's father has primarily been on weekends with the exception of Wednesday's from 5:00 p.m. to Thursday's 8:00 a.m. (prior to September 2010), all times that are outside the working hours of the Appellant. The child care subsidy payments were required for the Appellant to be able to work on weekdays.

The panel rescinds the ministry's reconsideration decision as it was not reasonably supported by the evidence and was not a reasonable application of the CCSA and CCSR in the circumstances of the appellant. The decision is overturned in favor of the Appellant.