

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Children and Family Development (the ministry) reconsideration decision dated May 22, 2014 which found that the appellant was not entitled to child care subsidies received, and is liable to repay these amounts, because the family's monthly net income exceeded the child's threshold when adjusted to the amount reported to the Canada Revenue Agency (CRA) for 2011 and 2012, 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

**PART E – Summary of Facts**

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

- 1) Statement of Business or Professional Activities for the appellant for the 2011 calendar year showing in part gross sales of \$29,127, total expenses of \$19,903 and net income after adjustments of \$9,224 and net income of 'nil';
- 2) Notice of Assessment for 2011 for the appellant showing total income of \$4,443;
- 3) Child Care Subsidy Self-Employment form dated April 28, 2011 for the appellant's business, covering the 6 month period to June 30, 2011 and showing gross income of \$9,900, total Permitted Operating Expenses of \$10,070 and net loss of -\$170;
- 4) Child Care Subsidy Self-Employment form dated June 29, 2011 for the appellant's business, covering the 6 month period to June 30, 2011 and showing gross income of \$9,900, total Permitted Operating Expenses of \$9,743 (reduced business insurance by \$40 and decreased motor vehicle expense by \$289) and net income of \$157;
- 5) Child Care Subsidy Self-Employment form dated November 1, 2011 for the appellant's business, covering the 8 month period to October 31, 2011 and showing gross income of \$11,200, total Permitted Operating Expenses of \$10,915 and net income of \$285;
- 6) Child Care Subsidy Self-Employment form dated November 15, 2011 for the appellant's business, covering the 10 month period to October 31, 2011 and showing gross income of \$17,253, total Permitted Operating Expenses of \$12,503 and net income of \$4,751;
- 7) Statement of Business or Professional Activities for the appellant for the 2012 calendar year showing in part gross sales of \$39,364, total expenses of \$26,111 and net income after adjustments of \$13,253 and net income of 'nil';
- 8) Child Care Subsidy Self-Employment form dated May 28, 2012 for the appellant's business, covering the 6 month period to May 31, 2012 and showing gross income of \$20,443, total Permitted Operating Expenses of \$12,979 and net income of \$7,464;
- 9) Child Care Subsidy Self-Employment form dated June 1, 2013 for the appellant's business, covering the 12 month period to May 31, 2013 and showing gross income of \$39,369, total Permitted Operating Expenses of \$37,566 and net income of \$1,798;
- 10) Child Care Subsidy Self-Employment form dated June 19, 2013 for the appellant's business, covering the 13 month period to June 30, 2013 and showing gross income of \$27,974, total Permitted Operating Expenses of \$20,021 and net income of \$7,953;
- 11) Handwritten note to the revised statement dated June 19, 2013 stating in part that for the appellant's spouse, deducting an amount for taxes and HST, that she got this amount from the accountant, and the capital loss that was claimed on taxes and "not sure if usable but included as it is a business expense/loss that incurred." For the appellant's statement, "car has been adjusted from 100% to 50%" and "utilities and rent have been adjusted to 50% of phone, cable, internet and rent as use half for daycare."
- 12) Statement of Business or Professional Activities for the appellant's spouse for the 2011 calendar year showing in part gross sales of \$83,758, total expenses of \$44,795 and net income after adjustments of \$38,962 and net income of \$36,679;
- 13) Notice of Assessment for 2011 for the appellant's spouse showing total income of \$37,158;
- 14) Child Care Subsidy Self-Employment form dated April 28, 2011 for the business of the appellant's spouse, covering the 6 month period to June 30, 2011 and showing gross income of \$36,400, total Permitted Operating Expenses of \$11,781 and net income of \$24,619;
- 15) Child Care Subsidy Self-Employment form dated June 29, 2011 for the business of the appellant's spouse, covering the 6 month period to June 29, 2011 and showing gross income of \$32,915, total Permitted Operating Expenses of \$27,912 (added \$5,488 for HST and taxes paid and increased rent and utilities by \$4,320) and net income of \$5,003;

- 16) Child Care Subsidy Self-Employment form dated November 1, 2011 for the business of the appellant's spouse, covering the 8 month period to October 31, 2011 and showing gross income of \$33,098, total Permitted Operating Expenses of \$24,866 and net income of \$8,222;
- 17) Statement of Business or Professional Activities for the appellant's spouse for the 2012 calendar year showing in part gross sales of \$88,069, total expenses of \$33,495 and net income after adjustments of \$43,459 and net income of \$39,464;
- 18) Notice of Assessment for 2012 for the appellant's spouse showing total income of \$39,953;
- 19) Child Care Subsidy Self-Employment form dated June 1, 2012 for the business of the appellant's spouse, showing gross income of \$37,379, total Permitted Operating Expenses of \$25,079 and net income of \$12,301;
- 20) Child Care Subsidy Self-Employment form dated June 1, 2013 for the business of the appellant's spouse, covering the 12 month period to May 31, 2013 and showing gross income of \$76,954, total Permitted Operating Expenses of \$59,320 and net income of \$17,634;
- 21) Child Care Subsidy Self-Employment form dated June 19, 2013 for the business of the appellant's spouse, covering the 13 month period to June 30, 2013 and showing gross income of \$58,574, total Permitted Operating Expenses of \$30,170 and net income of \$28,404;
- 22) Child Care Subsidy Claim- Licensed Child Care form dated February 1, 2014
- 23) Eligibility Calculator for Child Care Subsidy for July 2011 through December 2011 and January 2012 through June 2012 plus September 2012 through December 2012;
- 24) Child Care Subsidy Payments July 1, 2011 to December 31, 2012;
- 25) Print Outs of Day Care Claims for an Authorization for the periods July 4, 2011 through June 30, 2012;
- 26) Print out of Invoice Lines for the period January 1, 2012 through January 31, 2014;
- 27) Monthly Child Care Subsidy Payment Totals versus Eligibility Amount from July 2011 through December 2012 showing total subsidy paid of \$7,939.44 and total subsidy eligible of \$125.39 and total overpayment of \$7,814.05;
- 28) Ministry Reconciliation Statements for information from Statement of Business or Professional Activities and from amounts reported for Self-Employment Income and Permitted Operating Expenses; and,
- 29) Request for Reconsideration dated March 10, 2014.

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

- She believes she is being penalized for something that she completed accurately and approved by subsidy at the time of her application.
- She requested help from an advocacy agency and they went over her tax information from what the accountant had provided to her and filled out the forms.
- After she submitted the forms, she was called and asked questions about her application which she answered and she was asked to change some information on the form. She made adjustments according to the requests and her application was approved.
- She wonders why she was not told previously that some write offs could not be used.
- She was informed by both subsidy and [the advocacy agency] to apply in her lowest earning period.
- After working with the advocacy agency and subsidy directly, having changed her forms multiple times, she is confused as to why she would now owe money when it had been originally approved.
- Her husband's earnings included HST/GST which is not being taken into consideration. He has to pay it back and does not get to keep it.

In her Notice of Appeal, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she had help by a reliable source [the advocacy agency] to help fill out all the forms from her taxes and assistance papers. She wonders why, after 3 years, things have changed. She talked to many staff and everything was shown on the forms and nothing was hidden.

At the hearing the appellant stated that:

- She went to the advocacy agency right from the beginning. She took her tax papers and the advocacy agency assisted her with preparing the application based on her tax return. She relied on the advocacy agency as a reliable source for information.
- The appellant pointed out that some of the forms are marked "corrected" or "revised" because she was asked by the ministry to remove certain things or adjust other things. The ministry called her and told her that there were certain things that were no longer allowed and she explained what items were included in each total. One example is that her husband's office is upstairs in the house and her day care is downstairs but she could not submit her husband's rent. Another item was the capital cost allowance (CCA). They would talk her through each change requested.
- The figures were based on the tax papers given, being the Statement of Business Activities for 2010 and then 2011.
- She asked if the changes were okay and she was told that it looked good.
- She thinks it is unfair, after 3 years, to say she cannot write some things off. Since HST/GST is not her husband's money and he has to pay it back, it should not be included in the total.
- They are struggling to make ends meet and if the information was not okay, they should not have been approved. They have done everything that was asked of them, and she is frustrated that the ministry is now "back-tracking."
- She does not agree with the amount of monthly family net income stated by the ministry.

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

- In 2011 and 2012 the appellant was part of a 2-parent, six unit family, and child care subsidy was received for 2 children.
- Both the appellant and her husband are self-employed and the appellant reported the income and expenses on variable Child Care Subsidy Self-Employment forms throughout 2011 and 2012.
- The base income threshold level for the family of 6 is \$1,704, which is increased to \$2,219 when the 2 children are assessed at the F2 and F3 care rate, and is further increased to \$3,204 when the 2 children are assessed at the N1 rate of care.
- In January 2014, a review of the appellant's file was conducted and, in February 2014, the appellant provided Canada Revenue Agency (CRA) tax documents for the 2011 and 2012 tax years.
- The ministry advised the appellant that the income and expenses reported to the ministry did not match the information reported to the CRA from July 2011 to December 2012 and resulted in an overpayment of \$7,814.05.

At the hearing, the ministry stated that:

- When there is variable income through self-employment, an estimate is made of the income that will be received in the year, and there is a provision in the CCSA [Section 9(3)] that the estimate is then divided by 12 to arrive at the monthly income.
- The previous year's income tax information is not a guide and the Child Care Subsidy Self-

Employment form has a statement under "Declaration and Consent", to the effect that information contained in the form may be reviewed, audited and verified.

- When an estimate is made, there is an audit conducted when the final information is available. With the reconciliation of amounts, there is usually an adjustment, whether it is in favour of the ministry or in favour of the appellant.
- There is no claim that there was anything dishonest, inaccurate or incorrect, but simply that the final information regarding income and expenses did not correspond with the estimate that was made for the year.
- This is not an uncommon occurrence when the family unit's income is variable and the final numbers are higher than those estimated.
- It is also the case that the amounts considered as included in income are not always received by the family unit.
- One option for avoiding an adjustment is to provide the actual costs to the ministry, to provide the actual invoices and receipts each month, but this involves a lot of time.
- It is acknowledged that it may be difficult to handle that an adjustment has to be made but it does not change the final result that the information from CRA is different than that supplied to the ministry.
- The recommendation to the appellant to apply for the child care subsidy in her lowest earning period does not make sense since it could result in a larger adjustment at the end of the year.
- The ministry does not have the ability to reduce the income reported by allowing deductions that are not set out as "permitted operating expenses" in the CCSR.

## 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, because the family's monthly net income exceeded the child's threshold when adjusted to the amount reported to the CRA for 2011 and 2012, 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.

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 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.

Section 1(1) of the CCSR provides:

**Definitions**

1 (1) In this regulation:

**"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;

***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 July 1, 2011 through December 31, 2012, pursuant to Sections 7 and 9 of the CCSR, because the family's monthly net income exceeded the child's threshold when adjusted to the amount reported to the CRA for 2011 and 2012. The ministry argued that the new monthly net income for the family, as an average of the income figures reported to the CRA, is \$4,238.08 per month in 2011 and \$4,797.07 for 2012. 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 \$7,814.05. The ministry argued that there is no discretion given to the ministry to grant a subsidy if the family's monthly net income is higher than the threshold amounts set in the Regulation.

*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 did everything that was asked of her in terms of changes to the forms and she requested help from an advocacy agency and relied on their advice. The appellant argued that she was informed by both the ministry and the advocacy agency to apply for the child care subsidy in her lowest earning period. The appellant argued that her husband's earning included HST/GST which is not being taken into consideration since he has to pay it back and does not get to keep it. The appellant argued that it is not fair that an adjustment is being made 3 years after she had been approved to receive the child care subsidy.

*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 July 1, 2011 through December 31, 2012 for which she was not entitled. While the appellant argued that she had the advice of an advocacy agency and she tried to complete the Child Care Subsidy Self-Employment form forms as accurately as possible, the ministry pointed out that with variable self-employment income, an estimate is made of yearly income that often does not correspond with the actual figures as filed with CRA once those are made available, and there is no punitive element to the subsequent adjustment made. The panel 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 and 2012 tax years, as well as the total amounts claimed for various expenses and any adjustment for GST/HST included in gross sales. While those figures were relied on by the ministry, the panel finds that the ministry also reasonably determined that some expenses allowable for tax purposes are not included in Section 1 of the CCSR as "permitted operating expenses", such as CCA, and, therefore, cannot be deducted from self-employment income for child care subsidy purposes.

The ministry statement of Monthly Child Care Subsidy Payment Totals versus Eligibility Amount from July 2011 through December 2012 showed total subsidy paid to the appellant of \$7,939.44 and total subsidy eligibility of \$125.39 over that same period, with a total overpayment of \$7,814.05. 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 monthly net income exceeded the child's threshold, pursuant to Sections 7(1) of the CCSR and 7(1) of the CCSA, when adjusted to the amount reported to the CRA for 2011 and 2012, and that there is no discretion given to the ministry to waive the requirement to repay.

*Conclusion*

The panel finds that the ministry's decision, which found that the appellant was not entitled to, and is liable to repay, child care subsidies received because the family's monthly net income exceeded the child's threshold, 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.