

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision (the decision) dated 28 April 2022 where the ministry determined that the appellant was not eligible for the Affordable Child Care Benefit for the period between March 1, 2021, and January 31, 2022. The ministry determined the eligibility for the Affordable Child Care Benefit began on February 1, 2022, which is the first day of the month in which the application was completed. The ministry stated that payment of a child care subsidy may only be backdated 30 days from when the parent completes the application under section 4 if there has been an administrative error. The ministry, upon its own review, found no evidence to establish that the ministry made an administrative error.

Part D – Relevant Legislation

Child Care Subsidy Act (CCSA), Section 4
Child Care Subsidy Regulation (CCSR), Sections 4, 4.1, 12, 13, 17 and 22
Employment and Assistance Regulation (EAR) Section 84

Part E – Summary of Facts

The evidence before the minister at reconsideration included the information below:

- The appellant was previously in receipt of the Affordable Child Care Benefit for two children, and according to ministry records, the previous Benefit Plan ended on April 30, 2020.
- On March 23, 2020 a message was sent to the appellant by the Child Care Service Centre (CCSC) advising the ministry records show the Benefit Plan ending in approximately 30 days, and that the appellant may request to continue the benefit by using the link on your dashboard to renew or report changes, and that no action is required if the appellant no longer requires a benefit or has already renewed the Benefit Plan.
- The ministry notes no information was received at the CCSC and no contact was made by the appellant by mail, MyFS, fax or telephone, regarding the renewal of the benefit until November 26, 2021. Due to months of inactivity, the file had been closed.
- On November 26, 2021, the appellant contacted the CCSC by telephone to inquire about applying for subsidy and what documents were required. The ministry advised the appellant to use the online portal, MyFS and to fill out all portions of the application and submit the required documents.
- On January 31, 2022, the appellant contacted the CCSC by telephone to inquire about the status of the documents submitted on November 26, 2021. The CCSC advised that the file was closed, and no documents were on file since February 2020. The appellant stated that the online portal indicates that "Document Checklist" was submitted and that the Affordable Child Care Benefit Application, CF2900 and Affordable Child Care Benefit Child Care Arrangement form, CF2798 were attached. The call was forwarded to the Portal Support Team.
- In a telephone conversation on January 31, 2022, with the Portal Support Team regarding a CF2900 submitted on November 26, 2021, the ministry noted that the appellant's portion of the application was completed on November 26, 2021, but the Spousal Consent was not completed on the CF2900. Therefore, the application was incomplete and not submitted to the CCSC. The ministry advised that to have the file re-opened and assessed, the ministry requires a completed CF2900 by both the appellant and spouse. The appellant further stated to being under the impression of having the Benefit Plan backdated to March 2021, forward.
- On February 9, 2022 the appellant submitted via MyFS an Affordable Child Care Benefit Application, CF2900 to the CCSC that was signed and dated by both appellant and spouse on February 9, 2022.
- The CCSC found the appellant eligible for the benefit beginning February 1, 2022.
- On February 23, 2022 the appellant contacted the CCSC by telephone to inquire about the backdating of the subsidy to March 1, 2021. The CCSC advised that the appellant would not be eligible for backdating since the file was not re-opened until February 15, 2022.
- On February 24, 2022 the Community Liaison and Quality Assurance Officer with the CCSC contacted the appellant by telephone to discuss backdating of the subsidy. The appellant stated that they are always late in submitting and renewing the application and

have always received backdating. The appellant explained that both parents work very hard and are self-employed and the family's schedule is all over the place. The appellant advised that the spouse did not do his part (Consent) due to lengthy work hours and that the family cannot afford to pay for child care fees that have accumulated over the last few months. At this time the appellant requested a reconsideration of the decision to deny backdating your subsidy to March 1, 2021.

- On February 24, 2022, the CCSC sent the appellant a denial letter advising that the appellant is ineligible for the ACCB for (one named child) for the period March 1, 2021, to January 31, 2022.
- On March 22, 2022, in a telephone conversation with the CCSC, the appellant advised receiving a denial letter and Request for Reconsideration form. However, both the letter and form address the denial of backdating for only one child, and not (another named child).
- On March 23, 2022, the CCSC sent the appellant a corrected denial letter and Request for Reconsideration.
- On April 14, 2022, the appellant's Request for Reconsideration was received by the ministry. The ministry noted that no information was provided in Section 3 of the Request for Reconsideration.

Hearing

The hearing was held as a videoconference. The appellant had provided a release of information form authorizing the appellant's spouse as her representative with authority to attend the hearing and make decisions on her behalf. The representative attended the hearing.

The ministry did not attend the hearing. Section 86(b) of the Employment and Assistance Regulation permits a panel to hear an appeal in the absence of a party if the party was notified of the hearing. Section 85(2) of that Regulation requires the chair of the tribunal to notify the parties of the date, time and place of a hearing at least 2 business days before the hearing is to commence.

Tribunal records confirm that the ministry was notified of the date and time of the teleconference hearing by email on 16 March 2022, and a delivery receipt was obtained by the tribunal. Therefore, being satisfied that the ministry was notified of the hearing in accordance with the requirements of section 85(2), and with the concurrence of the appellant's representative the hearing proceeded without the ministry.

Appellant

In response to a question from the panel the representative clarified that the notice of appeal had been completed and signed by him. The notice provided a reason for appeal which states "The previous year we submitted same way and were reimbursed".

At the hearing the representative stated that neither he nor the appellant had been informed in March 2020 of the upcoming end of the previous benefit plan. They had resubmitted documents in November 2021 and were informed the ministry will not reimburse the fees paid by the family unit for daycare.

The appellant had attempted to contact the ministry 20 to 30 times and spoke to someone different each time, who did not know their situation. The family has three children and both parents are self-employed. The appellant wants the ministry to look at the situation as, if they are eligible, why is there a problem with backdating the benefit for a year. The representative wants the benefit repaid like in the past; the first time they applied the ministry backdated the benefit.

The representative noted that he is here today, and the ministry is not – that is a slap in the face.

During questioning by the panel, the representative could not confirm that the initial start date for benefit was in 2016 but thinks so, for one child. The representative could not recall any process for annual reapplication for years 2017, 2018 etc. and could not specifically recall receiving benefits for definitive years, advising the appellant would have that information.

In answer to a question to confirm that the previous plan terminated in April 2020 and to not receiving benefits during the period May 2020 until applying for new benefits in November 2021 – a period of 18 months or so, the representative believes they reapplied last year and are receiving benefits now. He stated he believed the date of 2020 is incorrect and should read 2021. When prompted to consider any changes during the period of the Covid 19 pandemic and school closures the representative did recall the daycare being shut down for 6 to 8 months and the daycare calling to ask to keep a child home from school to allow spaces to be made available to critical workers' kids. The panel finds the previous benefit ran out in April 2020.

When asked for further information on the actual details and timing of the reported backdated payments, the representative advised of the daycare provider receiving a \$4500 payment and repaying the appellant for daycare fees paid. The representative stated his expectation that as the ministry had backdated payments before they should do so again.

The representative clarified that the repayment period was not in fact 2020 or 2021, but was possibly the first year of benefit and was a different ministry.

In answer to a question regarding the November 2021 application and the supposed missing information the representative advised that the application was done online with a confirmatory email of receipt received. However, this email went to junk mail and he did not notice for several months until the ministry advised that no application had been received. The email, when found, stated that the application had been received.

In answer to a question about any receipt of notification that the application was not complete, the representative stated that they had never received any emails or phone calls advising the application was incomplete.

When asked what information was apparently missing, the representative advised it was a signature or authorization using a button. The representative felt that information that they had uploaded had been deleted, including T4 information slips.

Ministry

The ministry did not attend the hearing or submit any additional information.

Admissibility of new information

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based on all admissible evidence.

In this case the appellant provided information on the costs provided as backdated support payments and provided more information on the timeline for this payment.

The panel finds that this information is relevant because it relates directly to the appellant's original testimony discussed in the reconsideration decision and to the request for funding support.

The panel admits the new information under section 22(4) of the Employment and Assistance Act ("EAA") as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Part F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the ministry's decision that the appellant was not eligible for the Affordable Child Care Benefit (ACCB) for the period between March 1, 2021, and January 31, 2022, including, was the ministry reasonable in its assertion that no administrative error had occurred in the processing of the application.

The relevant legislation is provided in Appendix A.

Appellant Position

At reconsideration and hearing the appellant argues that the Ministry should backdate the recently approved benefit to March 2021 as they have done so in the past. In perhaps the first application year the ministry refunded \$4500 to the daycare centre who in turn reimbursed the appellant for fees paid for child care. The appellant reported having been late in submitting and renewing the application in the past and having always received backdating.

Ministry Position

The ministry states the appellant's previous authorization ended on April 30, 2020. A completed application was signed and dated by the appellant and spouse on February 9, 2022, and that the eligibility for the Affordable Child Care Benefit began on February 1, 2022.

It goes on to say that in a telephone conversation on November 26, 2021, the ministry walked the appellant through the process of applying for the ACCB and advised of all the required documents needed to assess eligibility.

The ministry argued that on November 26, 2021, the appellant completed her portion of the ACCB application online, however the spousal consent was not completed and therefore the application was not submitted to the CCSC for assessment.

The ministry states that in a telephone conversation on February 24, 2022, the appellant provided the reason for the incomplete application was due to lengthy work hours for her spouse.

The ministry states payment of a child care subsidy may only be backdated if there has been an administrative error under Section 13(2) of the Regulation and that it would be limited to 30 days from when the parent completes the application. The ministry argues that upon review of the information, the ministry finds that there is no evidence to establish that the ministry made an administrative error.

Panel Decision

Section 4 of the Child Care Subsidy Regulation (CCSR) sets out the process for applying for a subsidy. To be eligible for a child care subsidy, a parent must complete an application in the form required by the minister, and supply the minister with the social insurance number of the

parent and the parent's spouse, if any. Further, section 4.1 requires both the appellant and spouse to provide certain authorizations.

The testimony by the appellant at reconsideration and at appeal clearly stated an email was received from the ministry on 26 November 2021 indicating an application had been received by the ministry that same day.

The panel notes the ministry's assertion that the application was not complete and could not be processed as it was missing certain spousal authorizations; the appellant's contention in oral testimony that they thought it was complete and that certain information had gone missing; and the ministry comments regarding statements made by the appellant on 24 February 2022 to the community liaison officer with CCSC that the spouse did not do his part (Consent) due to lengthy work hours. The appellant was not able to provide a copy of the 26 November 2021 application as evidence. On a basis of probabilities the panel finds the 26 November 2021 application was submitted but incomplete.

The ministry's argument that the 26 November 2021 application was not forwarded to the Child Care Service Centre (CCSC) is countered by other ministry written testimony that the appellant spoke to the CCSC on 26 November 2021 who provided information on how to complete the application that same day, and again, that on 31 January 2022 the appellant called the CCSC and was advised the file was closed and no documents were on file since February 2020. The appellant was then transferred to a 'portal support team' to discuss what was a missing authorization. Lastly, the ministry states in written testimony that "On February 9, 2022, you submitted via MyFS an Affordable Child Care Benefit Application, CF2900 to the CCSC that was signed and dated by you and your spouse on February 9, 2022...".

The panel reasons the ministry seems to be arguing that an online application must pass a first level review on completeness before being passed for file reopening and detailed review to the CCSC as to eligibility.

The panel is unaware of any process flow of the electronic submissions and as to whether such a requirement of multistage review exists either as ministry policy or as a simple administrative process. However, the panel notes the requirements in section 4 and 4.1 for application in forms required by, and to, the minister, and notes that multistage reviews and the CCSC are not mentioned in the legislation.

This also raises a question as to whether the appellant, thinking that the application had been submitted to the appropriate authority and having received a confirmation email, had a right to an expectation that they would be contacted if further information was required, or the application was incomplete. Factors the panel could consider include: how could someone know their application isn't complete or that nothing would be done if the minister deemed information to be missing? After reviewing the copy of the completed CF2900 form in the evidence the panel sees no information on how the appellant would be expected to know that and given the receipt of a confirmatory email, finds on a basis of probabilities that the appellant believed the application had been received.

Based on the evidence and this reasoning the panel finds that the 26 November 2021 application, albeit incomplete, was submitted to the minister and therefore to the CCSC.

This then raises the question, is it reasonable to expect a government agency to go through every application, complete or not, and contact the applicant?

Section 12 of the CCSR states that the minister must notify the applicant as to whether or not the application is approved, and if the application is not approved, the notification must be in writing and must include the minister's reason for refusing to pay a child care subsidy.

The panel notes the process in sections 4 and 4.1 for determining eligibility requires the completion of forms required by the minister and the provision of certain authorizations. The panel therefore finds that in the circumstances of the appellant, not completing the forms correctly or failing to provide the required authorizations, in this case the spousal consent, meant she was not eligible for the child care subsidy. The panel finds therefore the ministry was required to notify the appellant in writing that the application was not approved and to provide the reasons for that refusal.

The panel notes the ministry presented no evidence to indicate it provided any written notification to the appellant that the 26 November 2021 application was either incomplete, or that the application was therefore not approved, until the telephone call on 31 January 2022.

The panel notes that once the appellant became aware of the missing information on 31 January 2022 the fully compliant application was filed on 9 February 2022, and that if the required notification had indeed been provided to the appellant in early December 2021 the appellant may have been found eligible for the benefit several months earlier.

The panel notes that only providing notification for fully completed applications did not provide the appellant with an opportunity to address any missing information at the time of submittal. Consequently, any rights to request reconsideration under section 17 of the CCSR, and appeal under section 84 of the Employment and Assistance Regulation (EAR) at that time were also lost. The panel finds both outcomes to be procedurally unfair.

Once the appellant had been found eligible for the subsidy, she questioned the CCSC on 23 and 24 February about backdating the subsidy. It appears to the panel that the appellant has asked a question that would require a response from the ministry in that it covers items specific to the application, that of a subsidy to cover child care costs for the two children named in the CF2900 application form.

The ministry sent first one letter denying eligibility for one of the children, dated 24 February 2022, and then after a conversation on 22 March where the appellant pointed out the error, a second letter was sent on 23 March 2022 denying backdating eligibility for both children.

The panel finds in meeting the requirements of section 12, after receiving a properly completed application, the ministry again failed to notify the appellant in writing of ineligibility, in this case the eligibility of the second child for the period of March 2021-January 2022.

The term administrative error is not defined in the legislation and the ministry has not provided one in the decision. One dictionary definition of administrative error means an error attributable to department staff such as calculating, clerical, procedural, typing, misapplication of policy, failure to take action, or using the wrong benefit amount table.

The panel considered the question of whether a particular failure to comply with an express legislative condition is of a magnitude which has resulted in damage to the finding of eligibility of the subsidy. In other words what is the materiality of the error - is the error one which affected the actual making of the decision and affected the decision itself?

The panel therefore finds the first error, in November 2021 to be material to the outcome in that a corrected application could have resulted in earlier eligibility, but that the second error, in February 2022 did not result in any material affect in that the eligibility for backdating has been found by the panel not to exist.

The panel therefore finds the ministry erred when it did not meet the legislated requirement to provide written notification in the first instance and was therefore not reasonable in its finding that no error had occurred.

Section 13 of the legislation provides for whether a subsidy will be paid for child care provided before completion of the application. It states that a child care subsidy may be paid from the first day of the month in which the parent completes an application under section 4, and if an administrative error has been made, a child care subsidy may be paid for child care provided in the 30 days before the parent completes an application.

The appellant testifies that the ministry has provided backdated benefits in the past. The panel notes the comments in the ministry letter dated 24 February 2022 whereby the ministry must receive the application within 60 days of the date of signing the application or renewal. The panel notes that payments to daycare providers may therefore take several months to be issued for services, backdated to the eligibility date.

The question arises is this a backdating such as claimed by the appellant. The panel notes no evidence in the form of cancelled cheques by the appellant or commentary by the ministry to demonstrate backdating before the date of eligibility. It was once all of the requisite information was provided to the ministry on 8 February the ministry deemed the application complete. The panel finds the ministry has not set any precedent with the appellant to backdate monies for daycare services provided before eligibility and that the child care subsidy may only be paid from the first day of the month in which the parent completes an application under section 4, that being February 2022.

The panel therefore finds the ministry reasonably determined the appellant is only eligible to receive the benefit from the first day of the month the application was completed.

Summary

The panel has found that the original application was submitted in November 2021, that the application was not complete, and that the ministry erred, first in the acceptance phase of the

application and secondly in the processing of the application by only advising of eligibility of backdating for one child. The first error was material to the outcome of the eligibility. Therefore, the panel finds that in accordance with section 13 of the CCSA a child care subsidy may be paid for child care provided in the 30 days before 9 February 2022.

Conclusion

Based on all available evidence the panel finds that the ministry's reconsideration decision where the ministry determined that the appellant was not eligible for the Affordable Child Care Benefit for the period between March 1, 2021, and January 31, 2022, to be a reasonable interpretation of the legislation but that the ministry determination that it had not made an error was not a reasonable application of the legislation in the circumstances of the appellant, and that child care subsidy may be paid for child care provided in the 30 days prior to 9 February 2022.

The ministry's reconsideration decision is rescinded and sent back to the ministry for determination of amount. The appellant is partially successful on appeal.

Appendix A

CHILD CARE SUBSIDY REGULATION

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 the parent's spouse, if any, 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.

Authorizations required

- 4.1 (1) To be eligible for a child care subsidy for a child other than a child described in section 7 (2), an applicant and the applicant's spouse, if any, must supply the minister with authorizations for

- (a) the disclosure to the Canada Revenue Agency of the full name, birth date and social insurance number of the person,
- (b) the disclosure by the Canada Revenue Agency of the personal information of the person that is relevant to the person's income, and that the minister needs for the purposes of sections 9 [*calculation of family's adjusted annual income*] and 9.1 [*income review*], for the 2 years previous to the current calendar year, in accordance with the MOU For Income Verification between the Canada Revenue Agency and the minister, regardless of whether the person completed an income tax return for those years, and
- (c) the indirect collection by the minister of the information described in paragraph (b).

(2) To be eligible for a child care subsidy for a child other than a child described in section 7 (2),

- (a) an applicant must supply the minister with authorizations for the disclosure to the applicant's spouse, if any, of personal information of the applicant used in determining the family's adjusted annual income, and
- (b) an applicant's spouse, if any, must supply the minister with authorizations for the disclosure to the applicant of personal information of the applicant's spouse, if any, used in determining the family's adjusted annual income.

(3) To be eligible for a child care subsidy for a child, an applicant and the applicant's spouse, if any, must supply the minister with authorizations for

- (a) the disclosure by a third party of the personal information of the person that the minister needs for the purpose of determining or auditing the applicant's eligibility for a child care subsidy, and
- (b) the indirect collection by the minister of the information described in paragraph (a).

Applicant must be notified of outcome

12 (1) The minister must notify the applicant as to whether or not the application is approved.

(2) If the application is not approved, the notification must be in writing and must include the minister's reason for refusing to pay a child care subsidy.

Will a subsidy be paid for child care provided before completion of the application?

13 (1) A child care subsidy may be paid from the first day of the month in which the parent completes an application under section 4.

(2) If an administrative error has been made, a child care subsidy may be paid for child care provided in the 30 days before the parent completes an application under section 4.

Child care subsidy during COVID-19 emergency

22 (1) In this section:

"COVID-19 emergency" means the emergency that is the subject of

(a) the notice provided on March 17, 2020 by the provincial health officer under section 52 (2) of the *Public Health Act*, and

(b) the declaration of a state of emergency made on March 18, 2020, and any extension of that declaration, under section 9 of the *Emergency Program Act*;

"eligible child" means any of the following:

(a) a child in respect of whom a child care subsidy is being paid;

(b) a child in respect of whom a child care subsidy ceases to be paid for the month of March, April or May 2020;

(c) a child in respect of whom a child care subsidy is not being paid, if

(i) an application for the child care subsidy has been received by the minister, and

(ii) at the time the application was received, the requirements set out in sections 3 to 7 were met;

"end of the COVID-19 emergency" means the later of the following:

(a) the date on which the provincial health officer provides notice under

section 59 (b) of the *Public Health Act* that the COVID-19 emergency has passed;

(b) the date on which the last extension of the declaration of a state of emergency, referred to in paragraph (b) of the definition of "COVID-19 emergency", expires or is cancelled.

(2) Subsection (3) applies if the minister is satisfied that, for a reason related to the COVID-19 emergency,

(a) an eligible child is or has been absent, for any period of time, from a child care setting described in section 2 (a), (b) or (b.1), or

(b)an eligible child's parent or parents, as the case may be, ceased to meet the requirements set out in section 3 on or after March 17, 2020.

(3)Despite section 3, the minister may, in respect of an eligible child, pay or continue to pay a child care subsidy for child care provided in a child care setting described in section 2 (a), (b) or (b.1) as follows:

(a)for a child referred to in paragraph (a) or (b) of the definition of "eligible child" in subsection (1) of this section, the minister may pay an amount based on the number of full days or number of half days, as defined in section 8 (1), in relation to child care the child was receiving immediately before a circumstance described in subsection (2) (a) or (b) of this section arose;

(b)for a child referred to in paragraph (c) of the definition of "eligible child" in subsection (1) of this section, the minister may pay an amount based on the number of full days or number of half days, as defined in section 8 (1), in relation to child care the child would have received but for a circumstance described in subsection (2) (b) of this section.

(4)Despite section 15 (5), no child care subsidy will be paid to a child care provider for child care provided in a child care setting described in section 2 (a), (b) or (b.1) for any day on which the child care setting is closed if the minister is satisfied that the closure is related to the COVID-19 emergency.

(5)This section ceases to apply as follows:

(a)if the end of the COVID-19 emergency occurs on or before the 15th day of a month, at the end of the month;

(b)if the end of the COVID-19 emergency occurs after the 15th day of a month, at the end of the following month.

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Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name
Don Stedeford

Signature of Chair

Date (Year/Month/Day)
2022/06/02

Print Name
Erin Rennison

Signature of Member

Date (Year/Month/Day)
2022/06/02

Print Name
Bill Haire

Signature of Member

Date (Year/Month/Day)
2022/06/02