Part C – Decision Under Appeal

Under appeal is a decision of the Ministry of Education and Child Care (the "Ministry") dated May 30, 2023 (the "Reconsideration Decision") that determined that the Appellant was "liable to repay $3342.00 in Child Care Subsidy" that the Applicant was "not entitled to."

Part D – Relevant Legislation

Child Care Subsidy Act (the "*Act*")

Section 5(2) [Information and verification]

Section 6 [Reconsideration and appeal rights] [re appeal to this tribunal and time limits]

Section 7 [Overpayments, repayments and assignments]

Child Care Subsidy Regulation (the "*Regulation*"):

Section 14

Section 16(1) and (2)

Employment and Assistance Act (the "*EA Act*")

Section 24

Employment and Assistance Regulation

Section 86(b) [Procedures]

(See attached Appendix for text of the above)

Part E – Summary of Facts

The Appellant operates a facility providing a licensed child care setting that reserves 50% capacity for indigenous and vulnerable populations (especially those not eligible for Young Parents Program) and provides care beginning at Group Child Care (Under 36 Months). In 2020 the Appellant received a Community Care Facility license and also registered as a payee with the predecessor of the Ministry to directly receive Affordable Child Care Benefit payments (also called "subsidy payments").

The Ministry conducted an audit of the attendance of a certain child (the "child") at the Appellant's child care facility. The audit found that the Appellant was paid the full-time care subsidy payment (the child was registered for full time care at 20 days per month) but the child did not attend on a full-time basis during the audit period. Certain absences for certain durations are payable if recorded in the attendance record. The audit found that the attendance register disclosed the absences but did not record a reason for the absences. That made it impossible to distinguish between permitted absences and those ineligible for subsidy.

The Appellant advised that the parent and child were vulnerable, and that absences were for illness and vacation (as permitted), but also due to elements related to that vulnerable status of the child and parent including being the victim of criminal custodial interference/victimization/abuse, the details of which are withheld here. The Appellant advised of concern about recording such things in the register.

The auditors advised that there was no entitlement to the Affordable Child Care Benefit for the identified days and the Appellant was responsible to repay the amount of subsidy paid for the days that the child was absent without a recorded permitted absence. The Appellant was assessed to repay subsidy payments. The Appellant sought reconsideration. The Reconsideration Decision had the same outcome and was appealed to this tribunal.

The Reconsideration Decision found that during the audit period the Appellant "claimed full amounts of Affordable Child Care Benefit for [the child]" but "finds [the Appellant was] ineligible for amounts of Affordable Child Care Benefit [for the audit period], which resulted in an overpayment of $3342.00."

The Appellant was found liable to repay that amount that "you received … and were not entitled to" based upon section 7(1) of the *Act.* It also said that "your eligibility was affected by a discrepancy in service" for the child, based upon sections 15 and 16 of the Regulation.

The Ministry described that under section 16 of the Regulation subsidy payments may continue if a child is absent for a permitted reason and duration. It stated that without

additional evidence the Ministry was unable to establish whether any of the absences satisfied Section 16 (a) or (b).

The Ministry also stated under Regulation section 14 the Appellant was obligated to notify its Child Care Subsidy Service Centre "as soon as possible after any change in circumstances affecting the eligibility of the parent".

For the appeal before this tribunal the Appellant selected an in-person hearing. Only a representative of the Appellant attended. The call-in conference call number was active throughout the hearing for alternate remote attendance but the Ministry did not appear in person or on the call. After a waiting period the hearing proceeded without the missing party, as permitted by section 86(b) of the *Employment and Assistance Regulation*.

After the hearing the panel determined that it required further submissions and requested them from the parties in a letter stating:

> …During the panel's deliberations questions arose around the impact any final decision of the Tribunal might have on the parent that is the recipient of the child care subsidy benefit at issue in the appeal. Principles of natural justice and procedural fairness suggest that it may be appropriate for the panel to hear from the parent prior to making its final decision.
>
> Accordingly, I write to request both parties provide the panel with their written submissions, if any, concerning the following:
>
> a) Whether the parent has been notified of the appeal and if not, whether the appellant should be notified before a final decision is made;
>
> b) Whether the parent should be given an opportunity to be heard by the panel and if [so], what their participation should look like; and
>
> c) Whether the parent should be provided a copy of the panel's reasons for decision once a decision has been reached?

The deadline for response was extended twice at the request of the Ministry.

The Appellant and Ministry provided responses. The tribunal copied each to the other and advised that the panel would issue a written decision on the issue of notification. This decision embodies that decision.

Appellant Submissions

At the hearing the Appellant did not disagree with the Ministry's findings about the dates the child was absent or the overpayment calculations. The Appellant contested the fairness based upon not being informed of the requirements by the Ministry (beforehand), that the impetus for the audit was from third party interference, and the decision was unfair to it and the parent in all the circumstances. This included that neither could afford repayment, and that it would bankrupt the Appellant.

The Appellant's written submissions "confirm that the client was absent due to illness, vacation, or family obligation and was in no way abusing the affordable childcare benefit." The Appellant also described impediments to normal child care facility practices and attendance due to the pandemic. Specific to the client the Appellant described victimization of the parent and child involving police, courts, custodial interference and harassment at the daycare, the details of which are withheld here. The Appellant expressed concern about support for the client as well as the inability of the Appellant to continue operation stating:

> [We] continued to support this family as we believed that the child benefited tremendously from having social interactions with peers at daycare. Our team contributed to a sense of normalcy and place of belonging for the child, and provided the mother with support.
>
> We apologize for not marking the reason for [the child's] absence on our attendance forms. We were a new centre in 2020 and this was a minor administrative oversight which has since been rectified. Our attendance forms were approved by [the licensing authority]. That being said, we have since rectified this to … now have their attendance carefully documented with reason for absence.
>
> A bill of $3342.00 would bankrupt us. We do not make a profit and ran a deficit of [well in excess of that] in 2022 due to rising costs of inflation and the fee cap. [We] would not feel comfortable billing this client as [we] would not want to continue the cycle of … abuse …

At the hearing the Appellant described its service to vulnerable families, the licensing process, and the billing and payment process. The attendance register was described as modeled on other licensed child care facilities – in which absences were marked as "away"- and that they were approved by the licensing authority without being told of a deficiency or of the requirement that they record the reason for absence. The Appellant was also not told of this when signing up for online submission of subsidy payment filings. That online

process requires the Appellant to submit in the prior month, before attendance and with adjustments made afterward for unpaid absences.

In terms of informing the Ministry of the reasons for this child being absent the Appellant expressed confusion as to what qualified as being “ill” or “vacation”, and more so in the context of the vulnerability, status, and complex events affecting the child. The Appellant questioned which of the following absences satisfied those terms? i.e.:

- medical care, vaccination, dental appointment,
- meeting child care agencies,
- judicial events, attending court, court mandated evaluation,
- custodial interference/abduction,
- family crisis, attending a funeral, grieving period,
- lack of transportation, snow day, personal or public transportation crisis.

The Appellant described being unable to reliably inform the Ministry of the reason for specific absences without this.

In the circumstances of the child and parent the Appellant considered that it was providing child care and was compliant with the legislation, and government policy statements, when keeping the child’s spot open (making them unavailable for other children). This was the case even though the child was absent for a substantial period in 2 of the audited months. The Appellant considered that terminating the care would further victimize them and run counter to the intent of the legislation and “not congruent with sections 4 and 6 of the Indigenous Early Learning and Child Care Framework … providing flexible and adaptable programing.”

The Appellant also expressed that it could not force the parent to now pay because the parent had no ability, would be further victimized by the process and that it would be unexpected.

The Appellant stated a belief that the parent was unaware of the rejection of the parent’s eligibility to the subsidy payments for the undescribed absences. If the parent was aware and consented the Appellant felt that the reasons for specific absences could be identified.

In response to the panel’s request for written submissions the Appellant:

- undertook to notify the parent if a second hearing was called,
- asserted that the parent should have a copy of the ultimate decision,
- stressed the importance of the Ministry attending, and

- expressed not understanding questioning of the parent on Appellant records.

Ministry Submissions

The Ministry did not attend the hearing or provide submissions separate from within the Reconsideration Decision.

In response to the panel's request the Ministry provided a written submission stating:

> According to established practice, The Ministry of Education and Child Care sends overpayment notification letters and related communication solely to the party to which they are addressed. The parent has therefore not been notified. The party to which the communication is addressed may share the communication with third parties, including legal counsel and, where applicable, parents as they deem necessary and appropriate.

Admissibility of New Evidence

The Appellant made statements in the hearing that may be considered as testimony. Under section 22(4) of the *EA Act* the panel admits statements expressed as fact as testimony, and thus 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 purpose of the panel in appeals, such as this, is not to redo the Reconsideration Decision. It is to assess whether the Reconsideration Decision meets a standard of reasonableness. The standard applied is whether the Reconsideration Decision reasonably applies applicable laws and is reasonably supported by the evidence available then, but also to include and consider any evidence newly submitted as part of the appeal.

This appeal is the last step in a chain of decisions made by the Ministry that have been contested, then reconsidered, and finally appealed by the Appellant on entitlement to Affordable Child Care Benefit subsidy payments. This chain of decisions is established by legislation and has occurred without notice to the child's parent. This may be because the Ministry considers the parent a "third party" and it only sends notice letters to addressees.

The effect of the Ministry decisions on the parent is relevant and is an issue affecting this decision. A well-established common law principle, (applicable to this tribunal) is that there is a "duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 ("*Cardinal*") at para. 14 [emphasis added]. Therefore, the threshold question is whether the decisions leading through to the appeal affect the rights, privileges, or interests of the parent.

In the current circumstance, under the legislation the subsidy payments were paid to a person, for a person. In the decisions leading to this matter the Ministry has been seeking repayment from one of them on an entitlement that affects them both. If the day care operator is not entitled to receive the subsidy payment, then the parent is also not entitled to that Affordable Child Care Benefit, and leaves the parent as a debtor to the operator for the child care.

Key to that analysis is section 7(1) of the Act, which applies mutually to both parties. It states (in part):

> **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.

When broken down into its constituent parts it provides that:

- If a child care subsidy is paid **to a person** who is entitled to it, that person is liable to repay to the government the amount to which the person was not entitled; AND
- If a child care subsidy is paid **for a person** who is entitled to it, that person is liable to repay to the government the amount to which the person was not entitled.

Although section 7(1) states "that person is liable to repay" in the singular form the plural also applies as the *Interpretation Act* makes clear at section 28(3).

The Reconsideration Decision also cited that Section 5(2) of the Act says (emphasis added):

> **Information and verification**
>
> **5** … (2)A person to or for whom a child care subsidy is paid must notify the minister, within the time and in the manner specified by regulation, of any change in circumstances affecting their eligibility under this Act.

The Appellant was told of that obligation during the audit, and in the Reconsideration Decision reasons the Ministry cited Regulation Section 14 against the Appellant saying:

> … Regulation Section 14 outlines that notification must be given … as soon as possible after any change in circumstances affecting the eligibility of the parent to an employee in the Child Care Subsidy Service Centre. The ministry finds that [the child] was enrolled full time at [the Appellant, but subsequently] … did not attend full time. The ministry notes that under Section 14 of the Regulation, the CCSC should have been notified of the changes in circumstances to reassess the child's need for care.

Because Regulation section 14 does not say who must give the notice the obligation is owed by the "person to or for whom [the] child care subsidy is paid", which – like Section 7(1) of the Act discussed above – applies to the Appellant and parent.

Based on the foregoing the chain of decisions leading to this appeal may affect the parent's rights, privileges, or interests. Specifically, these are entitlement to the Affordable Child Care Benefit and liability to repay ineligible amounts, as well as vesting of a debt for child care not covered by a subsidy payment.

In the panel's view this merger of entitlement of parents to benefits with the obligations of notice and entitlement of a service provider to payment is recognized by the government and delineated in new legislation. This is seen in the *Early Learning and Child Care Act* that has received Royal Assent, but is not yet in force, where the delineation between them is clear where it addresses unearned payments as follows (emphasis added):

> **Overpayments**
>
> **10** (1) If the minister determines that an amount of a child care grant has been paid to a person who is not eligible for the amount under the grant agreement governing the child care grant or the regulations, the person is liable to repay that amount to the government.
>
> (2) If the minister determines that an amount of a child care benefit has been paid to or for a person who is not eligible for the amount, the person is liable to repay that amount to the government.

> (3) If the amount referred to in subsection (2) has been paid because of an error, omission or misrepresentation made by a child care provider, despite that subsection, the child care provider, and not the person, is liable to repay the amount to the government.

The question then is what is procedurally fair in the circumstances and was the Reconsideration Decision "reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision" (*EA Act* s.24(2)(a)).

That quoted provision invokes analysis of whether it is a reasonable application of enactments to the Appellant if the decision is made in the absence of procedural fairness to another interested party in the matter.

Again, it is well-established that, absent a statutory override, notice that a decision may be made must be given to all persons who may be affected by the decision. The purpose of notice is to alert persons whose interests may be affected by the decision so that they make take steps to protect those interests. This principle was summarized by Jones & DeVillars in the *Principles of Administrative Law* (2nd ed.) at p. 250 as follows:

> In the absence of a specific statutory prescription, the general rule is that an administrator must give adequate notice to permit affected persons to know how they might be affected and to prepare themselves adequately to make representations. Adequate notice has been held to require that the notice present an accurate description of the true nature and scope of the review and it must be timely … the effect of inadequate or no notice is to render the delegate's action void, it is more than an administrative irregularity.

This suggests that the decisions made to this point are void, or possibly void. Without an underlying decision this then is not an appeal as contemplated by the legislation. The panel leaves aside whether that applies to the Appellant and parent or only the parent. This is because the panel finds it to be determinative of this matter that the procedural unfairness also affected the Appellant.

In the Reconsideration Decision the Ministry stated that absence for a permitted reason and duration was allowed but "without additional evidence the Ministry was unable to establish" whether any of the absences satisfied Regulation Section 16 (a) or (b). There is no evidence of a deadline for correction of the attendance register that would not encompass the hearing of this appeal. Under *EA Act* section 22(4) this panel may admit and consider evidence that is not part of the record considered to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Together they indicate that up to the conclusion of the hearing the missing information could be

supplied and the attendance register corrected. In the circumstances the failure to notify the parent also deprived the Appellant of procedural fairness.

The Appellant expressed wanting to provide accurate information and correct the record upon being provided clarity of the Ministry's interpretation of "vacation" and "illness" generally, and in this circumstance, as well as the parent becoming informed of the matter to provide them both with the necessary information.

The panel heard and accepted that some of the absences were due to illness, and others possibly considered as "illness" or "vacation" dependant upon how the Ministry applied them, and information from the parent to support correcting of the attendance register.

This panel is not empowered to make a determination solely because the parent did not receive notice because the parent is not "the person appealing the decision" as required by the *EA Act* section 24. However, in the panel's view, it may do so where that procedural unfairness meaningfully affects the Appellant or is itself procedural unfairness to the Appellant.

The procedural fairness required in any circumstance is assessed while considering the non-exhaustive list of factors set out by the Supreme Court of Canada in *Baker* v. Canada, [1999] 2 S.C.R. 817 ("*Baker*"), including:

- the nature of the decision being made and the process followed in making it (*Baker* at para. 23),;
- the nature of the statutory scheme (*Baker* at para. 24),
- the importance of the decision to the individual affected (*Baker* at para. 25),
- the legitimate expectation of the individual challenging the decision (*Baker* at para. 26), and
- the choice of procedure made by the agency itself (*Baker* at para. 27).

The nature of the decision is one that relates to a parent's eligibility to receive a child care subsidy derived from information from the parent and the state of the Appellant's attendance register; all affecting both the Appellant and the parent. The process followed was a chain of decisions being made without notice to the parent, which now sits at an appeal from which further appeal is unavailable, except in very limited fashion. Merely including the parent now would deprive the parent, and Appellant, of the parent's participation and right of sequential review as established under the statutory scheme.

The statutory scheme also makes the entitlement to the subsidy as a benefit indistinguishable from entitlement to the subsidy as a payment, and thus the interests are not distinguished between the Appellant and the parent; nor are the obligations such as to provide notice of change and information.

The choice of the procedure in which the Ministry made decisions apparently believing them to only affect the Appellant (with the parent being a "third party") deprived the Appellant and the parent of the parent's ability to affect the decision, including by addressing joint and several interests with the Appellant.

A decision that there was no entitlement to the subsidy for certain days within the audit period effectively changes the rights and interest between the Appellant and parent and creates a billing/payment issue between them.

Considering the totality of circumstances discussed above the panel finds that the applicable enactments required procedural fairness which has not been provided to the Appellant by the Ministry in making the Reconsideration Decision. (Nor has it been provided to the parent.) As such the panel is unable to find that the decision being appealed is reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the person appealing the decision. Accordingly, in that absence, the panel must rescind the Reconsideration Decision.

Conclusion

The panel **rescinds** the Reconsideration Decision having found that it is:

1. **not** reasonably supported by the evidence, and
2. **not** a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Appendix – Relevant Legislation

Child Care Subsidy Act, SBC 1996, c 26

Definitions

1 In this Act:

"child care" means the care and supervision of a child in a child care setting ...

"child care setting" means any setting in which child care is provided, including

(a) a facility licensed under the *Community Care and Assisted Living Act* to provide child care, and

(b) the child's own home;

"**child care subsidy**" means a payment made under this Act to or for a parent to subsidize the costs of child care;

Information and verification

5 (1) For the purpose of determining or auditing eligibility for child care subsidies, the minister may do one or more of the following:

(a) direct a person who has applied for a child care subsidy, or to or for whom a child care subsidy is paid, to supply the minister with information within the time and in the manner specified by the minister;

(b) seek verification of any information supplied by a person referred to in paragraph (a);

(c) direct a person referred to in paragraph (a) to supply verification of any information supplied by that person or another person;

(d) collect from a person information about another person if

(i) the information relates to the application for or payment of a child care subsidy, and

(ii) the minister has not solicited the information from the person who provides it.

(2) A person to or for whom a child care subsidy is paid must notify the minister, within the time and in the manner specified by regulation, of any change in circumstances affecting their eligibility under this Act.

(3) If a person fails to comply with a direction under subsection (1) (a) or (c) or with subsection (2), the minister may

(a) declare the person ineligible for a child care subsidy until the person complies, or

(b) reduce the person's child care subsidy.

(4) For the purpose of auditing child care subsidies, the minister may direct child care providers to supply the minister with information about any child care they provide that is subsidized under this Act.

Reconsideration and appeal rights

6 (1) Subject to section 6.1, a person may request the minister to reconsider a decision made under this Act about any of the following:

(a) a decision that results in a refusal to pay a child care subsidy to or for the person;

(b) a decision that results in a discontinuance or reduction of the person's child care subsidy.

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified in the regulations.

(3) Subject to section 6.1, a person who is dissatisfied with the outcome of a request for a reconsideration under subsection (1) may appeal the decision that is the outcome of the request to the Employment and Assistance Appeal Tribunal appointed under section 19 of the *Employment and Assistance Act*.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in the *Employment and Assistance Act* and the regulations under that Act.

...

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).

No garnishment, attachment, execution or seizure

8 (1) Child care subsidies are exempt from garnishment, attachment, execution or seizure under any Act.

(2) Subsection (1) does not prevent a child care subsidy being retained by way of a deduction or set-off under this Act, the Financial Administration Act or a prescribed Act.

***Child Care Subsidy Regulation*, BC Reg 74/97**

Amount of subsidy

8 (1) In this section:

"full time child care" means child care for which the minister may pay a child care subsidy that is provided for the equivalent of at least 20 full days per month;

Notifying the minister of change in circumstances

14 The notification required by section 5 (2) of the Act must be given in writing or by telephone,

(a) as soon as possible after any change in circumstances affecting the eligibility of the parent, and

(b) to an employee in the Child Care Service Centre.

Accounts and payment

15 (1)Child care providers must submit billing for child care subsidies to the minister in the manner and form specified by the minister.

...

If a child is absent or is withdrawn

16 (1) The minister may continue to pay a child care subsidy for child care provided in a licensed child care setting, a registered licence-not-required child care setting or a licence-not-required child care setting as follows:

(a) for a period of up to 2 weeks in one month but not for more than 4 weeks in total in one calendar year if a child is absent because the child is on vacation;

(b) for a period of up to 2 weeks in one month if the child is absent because the child or parent is ill.

...

(2) Unless the child care is provided through a Young Parent Program, the child care provider must record the reason for the absence in an attendance register.

Employment and Assistance Act, SBC 2002, c 40

Panels of the tribunal to conduct appeals

22 ... (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Decision of panel

24 (1) After holding the hearing required under section 22 (3) *[panels of the tribunal to conduct appeals]*, the panel must determine whether the decision being appealed is, as applicable,

(a) reasonably supported by the evidence, or

(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

(2) For a decision referred to in subsection (1), the panel must

(a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and

(b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

Employment and Assistance Regulation, BC Reg 263/2002

Procedures

86 The practices and procedures of a panel include the following:

...

(b)the panel may hear an appeal in the absence of a party if the party was notified of the hearing;

APPEAL NUMBER 2023-0164

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 Kent Ashby	
Signature of Chair	Date (Year/Month/Day) 2023/09/14

Print Name Wes Nelson	
Signature of Member	Date (Year/Month/Day) 2023/09/16
Print Name Joe Rodgers	
Signature of Member	Date (Year 2023/09/16