

**Part C – Decision Under Appeal**

The decision under appeal is the reconsideration decision of the Ministry of Education and Child Care (Ministry) dated July 24, 2023, in which the Ministry determined that the Appellant was ineligible for the amounts of Affordable Child Care Benefit (the Benefit) received between May 3, 2021 and December 31, 2022, resulting in an overpayment of \$12,698.24.

**Part D – Relevant Legislation**

Child Care Subsidy Act (Act), sections 4 and 7  
Child Care Subsidy Regulation (Regulation), section 5  
Employment and Assistance Act, section 22(4)  
Financial Administration Act, section 87

Full text of the Legislation is in the Schedule of Legislation at the end of the Reasons.

**Part E – Summary of Facts**

The hearing took place in person, with the Ministry and an interpreter attending by telephone. The Appellant attended with an Advocate.

Evidence Before the Ministry at Reconsideration:

The Appellant applied for the Benefit on April 30, 2021, for daycare for one of his children, as his spouse was returning to work full time after a one year maternity leave. On the application form, he indicated that his Social Insurance Number would expire on March 31, 2023. He gave the Ministry copies of his passport from another country, as well as Canadian work permits for himself and his spouse, expiring on January 18, 2023. The work permits stated that the Appellant and his spouse were citizens of another country and had Temporary Resident status in Canada.

On May 20, 2021, the Ministry approved the Appellant's application in error, telling the Appellant that he was eligible for the Benefit from May 3, 2021 to December 31, 2021.

The Appellant applied to renew the Benefit three times between May 2021 and February 2022. Each time, the Appellant reported his Social Insurance Number with an expiry date of March 31, 2023. Each time, the Ministry approved the application, telling the Appellant that they had reviewed his eligibility and approved a Benefit Plan.

After the Appellant applied to renew the Benefit a fourth time, in November 2022, the Ministry reviewed his file, noted the work permit and temporary Social Insurance Number, and contacted the Appellant about his citizenship status. The Appellant told the Ministry that he and his spouse had been approved for Permanent Resident status but had not received their cards. The Appellant gave the Ministry an email from Immigration and Citizenship Canada (IRCC) confirming that the Appellant had applied for Permanent Resident status on August 19, 2021.

On December 7, 2022, the Ministry reviewed the Appellant's file and determined that the email from IRCC did not confirm that the Appellant had been granted Permanent Resident status, only that his application had been received. In a letter dated January 4, 2023, the Ministry told the Appellant he was not eligible to receive the benefit because he did not meet the citizenship requirement under section 5 of the Regulation. The Verification and Audit Unit determined that the Appellant had received Benefits to which he was not entitled, in the amount of \$12,698.24.

Additional Evidence:

The Appellant submitted the following documents:

1. Emails from the Ministry to the Appellant dated May 20, December 7 and 14, 2021, March 18 and November 30, 2022, each stating:  
“We have reviewed your eligibility for the Affordable Child Care Benefit and we have approved a Benefit Plan.”
2. Letter from the Ministry to the Appellant dated December 7, 2021, stating: “ the Ministry has reviewed the information you have submitted regarding your Affordable Child Care Benefit. The Ministry has determined you are eligible for a reduced amount of Affordable Child Care Benefit beginning January 1, 2022” due to a change in the number of family members.
3. Bank statements for the Appellant and his spouse from March 1, 2021 to December 31, 2022.

At the hearing, the Appellant said:

- He applied for the Benefit because the daycare told him he could apply; they filled out the form for him, and he signed it.
- In January 2023 the daycare told him he was not eligible for the Benefit; he did not hear from the Ministry that he was ineligible until he received the letter from the Verification and Audit Unit in March 2023.

In answer to questions from the Panel, the Appellant said:

- The daycare told him that he could apply for the Benefit if he had lived in Canada for one and one-half years and filed a tax return.
- He did not understand that he needed to be a Permanent Resident to be eligible for the Benefit until he was told by the daycare that he was not eligible, in January 2023.
- When he learned he was not eligible for the Benefit, he withdrew his child from the daycare until he had Permanent Resident status and could re-apply for the Benefit.
- If the Ministry had not made an error and told him he was eligible for the Benefit in May 2021, his spouse would not have returned to work after their maternity leave and would have stayed home to look after their children.

Admissibility of Additional Evidence:

The Ministry did not object to the admissibility of the additional written and oral evidence.

The Panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal, and therefore is admissible under section 22(4) of the Employment and Assistance Act.

## **Part F – Reasons for Panel Decision**

The issue on appeal is whether the Ministry's reconsideration decision was reasonable in determining that the Appellant was not eligible to receive the Benefit between May 1, 2021 and December 31, 2022, and therefore was liable to repay \$12,698.24.

### Appellant's Position:

The Appellant accepts that he was not eligible to receive the Benefit from May 1, 2021 to December 31, 2022 because he did not yet have Permanent Resident status in Canada. However, he argues that the Ministry is estopped from recovering the overpayment. He maintains that he meets the three criteria for the defence of estoppel:

- He received assistance that he was not eligible to receive;
- The Ministry represented to him three times that he was eligible to receive the Benefit;
- He relied on the Ministry's representation to his detriment.

The Appellant says that the bank statements show that, each month, the deposits and withdrawals are either about equal, or withdrawals are more than deposits. He maintains that, without the Benefit, he and his spouse would not have been able to have a child in daycare and live within their means.

The Appellant also questions why the Ministry says he is responsible to repay the overpayment, when the money was paid to the daycare and not to him.

### Ministry's Position:

The Ministry says that the Appellant was assessed as eligible by mistake, although the Ministry cannot explain why the Ministry did not note that the Appellant had a temporary Social Insurance Number and Temporary Resident status as disclosed on repeated applications.

The Ministry says that the Appellant, not the daycare, is liable to repay the overpayment, because the Benefit was paid to the daycare on behalf of the Appellant.

The Ministry says there was no estoppel review of the overpayment to the Appellant, and they take no position on the estoppel defence.

Panel Reasons:*Eligibility:*

Under section 5 of the Regulation, an applicant is eligible to receive the Benefit only if they meet the citizenship requirement. They must be:

- a Canadian citizen
- a Permanent Resident, or
- a refugee or person in need of protection, as determined under the Immigration and Refugee Protection Act.

The Appellant was a Temporary Resident of Canada when he received the Benefit between May 1, 2021 and December 31, 2022. Therefore, the Panel finds that the Ministry correctly determined that he was not eligible to receive the Benefit between those dates.

*Party Liable to Repay:*

The Panel also finds that, although the funds were paid to the daycare, not to the Appellant, it is the Appellant who would be liable to repay any overpayment. Under section 7 of the Act, if the Benefit 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." [emphasis added] The funds were paid to the daycare for the benefit of the Appellant. If the Ministry had not paid the funds directly to the daycare, the Appellant would have had to pay the full daycare fee himself. Therefore, the Appellant, not the daycare, is the person who would be liable to repay the Benefit if he was not entitled to it.

*Estoppel Defence:*

Under section 87 of the Financial Administration Act, if the government seeks to recover an overpayment of money paid to a person contrary to an enactment, the person may rely on a defence of estoppel.

The Supreme Court of Canada set out the principles of promissory estoppel in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R 50:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

The Ministry apparently does not have an estoppel review process or policy for overpayments of the Benefit. The Ministry of Social Development and Poverty Reduction has published a policy for “Overpayments that may meet an estoppel defence”, to which the Panel has referred. While that policy is not specific to the Ministry, and refers to income assistance rather than the Benefit, the Panel finds the policy helpful in setting out the criteria to be met when considering an estoppel defence where the government seeks repayment of benefits. The three criteria are:

- A recipient received assistance they were not entitled to receive
- The ministry represented to the recipient that they were eligible for the assistance
- The recipient relied on the funds to their detriment.

These criteria align with the well-established principles of promissory estoppel set out by the Court above. The Panel finds that the three criteria are met in the Appellant’s circumstances.

The Appellant does not dispute that he received the Benefit when he was not eligible because he did not meet the citizenship requirement in section 5 of the Regulation. He was not aware of the requirement but he provided all the documents and information that the Ministry requested, each time he applied. The documents clearly show that he was a citizen of another country, in Canada on a work permit as a Temporary Resident, with a temporary Social Insurance Number. The Ministry’s application forms do not ask the applicant to declare their citizenship or residency status directly, but it is obvious on the documents that the Appellant did not meet the section 5 requirement. The Ministry cannot explain how the error happened.

Nevertheless, each time the Appellant applied for the Benefit, the Ministry said that they had reviewed his eligibility and approved a Benefit Plan. The Appellant has provided emails showing that the Ministry made this unequivocal statement five times. He has also provided a letter from the Ministry, reducing the amount of the Benefit, but again stating that he is eligible to receive it. Although the Ministry determined on December 7, 2022 that the Appellant was ineligible to receive the Benefit, the Ministry did not tell the Appellant he was ineligible until January 2023. The Panel finds that, between May 1, 2021 and December 31, 2022, the Ministry repeatedly represented to the Appellant that he was eligible to receive the Benefit.

Further, the Panel finds that, if the Ministry had not represented to the Appellant that he was eligible to receive the Benefit, the Appellant would not have placed his child in daycare and would not have incurred the expense. The Panel notes that the Appellant’s bank statements do not indicate significant income in excess of expenses. When the Appellant found out that he was not eligible to receive the Benefit, he removed his child from the daycare. The Appellant did not enroll his child in the daycare again until he had

Permanent Resident status and was eligible to receive the Benefit. The Panel accepts the Appellant's evidence that, if the Ministry had told him in April or May 2021 that he was ineligible to receive the Benefit, he would not have placed his child in daycare and his spouse would have stayed at home to care for the child, not returned to full time employment. Therefore, the Panel finds that the Appellant relied, to his detriment, on the Ministry's representations that he was eligible to receive the Benefit, by placing his child in the daycare and incurring the monthly expense between May 1, 2021 and December 31, 2022.

The Panel finds that, while the Appellant received a Benefit when he was not eligible to receive it, the Ministry is estopped from recovering the overpayment. The Panel finds that three criteria are met:

- The Ministry paid a Benefit to which the Appellant was not entitled. The Ministry admits it paid the Benefit due to its own error, though it cannot explain how it apparently missed the clear information of ineligibility.
- The Ministry made explicit representations to the Appellant that he was entitled to receive the Benefit between May 1, 2021 and December 31, 2022.
- The Appellant relied on those representations to his detriment.

The Panel finds that it would be unfair for the Ministry now to recover the overpayment, particularly when the Appellant always disclosed his residency status, and the temporary nature of his Social Insurance Number.

### Conclusion:

The Panel finds that the Ministry's reconsideration decision was not a reasonable application of the legislation in the Appellant's circumstances. The Panel rescinds the reconsideration decision. The Appellant is successful in the appeal.

### Schedule of Legislation

#### Child Care Subsidy Act

##### *Child care subsidies*

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

##### *Overpayments, repayments and assignments*



- s. 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).

Child Care Subsidy Regulation

*Citizenship requirements*

- s. 5 An applicant is eligible for a child care subsidy only if
- (a) the applicant
    - (i) is a Canadian citizen,
    - (ii) is authorized under an enactment of Canada to take up permanent residence in Canada, or
    - (iii) is determined under the *Immigration and Refugee Protection Act* (Canada) to be a Convention refugee or a person in need of protection.

Employment and Assistance Act

- s. 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.

Financial Administration Act

*Defences to action for recovery of public money*

s. 87 (1) If public money is paid to a person by the government

- (a) in excess of the authority conferred by an enactment,
- (b) without the authority of an enactment, or
- (c) contrary to an enactment,

and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may, subject to subsection (2), rely on any matter of fact or law, including estoppel, that would constitute a defence in a proceeding brought to recover the payment as if it had been made under a mistake.

(2) Subsection (1) does not enable a person to rely on a defence that a payment made by the government was made under a mistake of law, and the right of the government to recover the money paid by it is not impaired merely because the payment was made under a mistake of law.

**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  
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)  
2023/09/19

Print Name  
Kulwant Bal

Signature of Member

Date (Year/Month/Day)  
2023/09/19

Print Name  
Emily Drown

Signature of Member

Date (Year/Month/Day)  
2023/09/19