

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Education and Child Care (the Ministry) reconsideration decision (the Decision), dated October 5, 2023, which determined that the Appellant is not eligible for the Affordable Child Care Benefit (the Benefit) for the period between February 1, 2023 to June 30, 2023.

Part D – Relevant Legislation

Child Care Subsidy Act (the Act), sections 4 and 5(1)(a)

Child Care Subsidy Regulation (the Regulation), sections 4(1) and 13

Employment and Assistance Act, section 22(4)

Employment and Assistance Regulation, sections 85(2) and 86(b)

A full text of the relevant legislation is provided in the Schedule of Legislation after the Reasons in Part F below.

Part E – Summary of Facts

The ministry did not attend the hearing. After confirming the ministry was notified of the hearing, the hearing proceeded under sections 85(2) and 86(b) of the Employment and Assistance Regulation.

According to the Decision, the Ministry provided the following summary of key dates and information related to the Appellant's request for reconsideration:

- The appellant has been receiving the Affordable Child Care Benefit (the Benefit) for two of her children. As noted on her Benefit Plan dated November 29, 2022, her previous authorization expired on January 31, 2023.
- On December 19, 2022, a message was sent to the appellant via her (My Family Service) MyFS account by the ministry's Child Care Service Centre (CCSC) advising, "Our [ministry] records show you have a Benefit Plan ending in approximately 30 days. You may request to continue your benefit by using the link on your dashboard to renew or report changes. No action is required if you no longer require a benefit or have already renewed your Benefit Plan."
- On February 1, 2023, the appellant contacted the CCSC advising her benefit plan expired January 31, 2023, and she requested information on how to renew. The appellant was advised a new CF2900 form (the Application Form) is required to renew her benefit plan. During the call, she stated she is locked out of her MyFS account. The CCSC advised the lockout would reset in 15 minutes. The appellant was advised that if she continued to have problems with the portal after that time, she might require a new BCeID and that she should contact the CCSC again for portal support.
- The ministry notes there was no further contact from the appellant by telephone, mail, fax or via the MyFS online service portal. On July 1, 2023 her file was closed.
- On July 5, 2023, the appellant contacted the CCSC with her care provider requesting information on how to access MyFS. The appellant was advised a new application was required to reapply and that a request for the MyFS support team would be sent to assist her. She called the CCSC later this date advising she was locked out of her MYFS account, and she needed to upload an ACCB Child Care Arrangement form CF2798 (the Arrangement Form). She was advised a MyFS portal support call request would be completed. During the call, the appellant indicated she had submitted everything but the Arrangement Form and enquired if the process could be expedited. Additionally, she explained she has 3 children but only requires care for one child. She was advised the CCSC requires a completed Application Form, completed ACCB Medical condition form (CF2914) as well as identification for her child in care. During the call, the appellant expressed frustration stating she was

previously advised she was only required to submit an Arrangement Form to reopen her case.

- On July 6, 2023, the appellant contacted the CCSC advising she has 3 children and has been paying out of pocket for childcare since February. She stated she is unable to afford this expense and has made several attempts to submit her application but has had many technical difficulties. Additionally, she states “juggling” a third child and a medical condition has created medical and financial hardship for her. Later this date, she submitted an Application Form to the CCSC via MyFS that was signed and dated on July 6, 2023.
- On July 7, 2023, the portal support team contacted the appellant and she advised she would submit identification for the children via MyFS.
- On July 10, 2023, the CCSC found the appellant eligible for subsidy and issued her a Benefit Plan for the period beginning July 1, 2023.
- On August 23, 2023, the appellant contacted the CCSC to inquire about back pay for the Benefit prior to July 2023, and she indicated she was unsure of the dates back pay would be needed and advised she would call back to confirm the month required for back dating. Additionally, the appellant explained she was previously advised back dating of her application could be considered because she had been locked out of her MyFS account. After the call, the appellant’s file was reviewed and the CCSC determined she was not eligible to receive a back dated Benefit. A denial letter was sent to the appellant on this date.
- On August 24, 2023, the appellant contacted the CCSC advising she requires back dating of her application to February 2023. She was advised that because her file had been closed, she was not eligible for the Benefit for the period between February 1, 2023, and June 30, 2023. The appellant requested a call back from a supervisor because the decision to deny her request for back dating was not disclosed to her during her phone call on August 23, 2023.
- In Section 3 of the Request for Reconsideration form, the appellant supported her position, stating that:
 - Her income is income assistance, and she is in the process of applying for Person with Disability assistance due to having multiple medical issues and the struggles she faces daily.
 - She would like the decision of refusal that was made reconsidered due to many circumstances such as she was unable to access and was locked out of her account from January-July 2023, and no mail was received, indicating the need for renewal, or closing of the account was a possibility, or what information was needed.
 - She has mental health and daily life struggles, with no support and she was not aware she could get support locally.

- Her child’s daycare made her aware that she needed to apply, which was confusing because she got nothing from child care or the information that child care was looking for to complete the renewal. She never knew she needed a child care plan to be sent in until she called child care subsidy on Feb 1, 2023, and mentioned how she was confused about what was needed.
- Until she contacted the Ministry on February 1, 2023 for assistance in signing in to MyFS, she had not been notified by the ministry in writing that she would need to renew her application by January 31, 2023 when she was previously approved for the Benefit in April 2022. She never got a letter that her account was closing, she wasn’t aware that the file would close and that there was such a timeline.
- She fights with anxiety, depression, and PTSD. She also been dealing with problems with her pulmonary heart valve and a pituitary gland tumor in her brain. With her medical conditions it can impact her ability to be able to accomplish the things she needs to get completed. Some days she cannot leave her house, other days she can’t remember the most common thing, or she has placed something where she wouldn’t normally and unable to find it for days. She has had over 20 bank cards in the last 9 months. She also has difficulties with technology she does not know how to use.

Other evidence the ministry had when it made the Decision included:

- A letter from the ministry to the appellant dated July 10, 2023 in which the ministry confirms the appellant’s eligibility for the Benefit for the 12 month period from July 1, 2023 through June 30, 2023 in the amount of \$280.00 per month for 20 full days per month for one child in care (the July 10 Letter).
- A partially completed Application Form dated and “provided” electronically by the appellant on July 6, 2023.

Evidence Presented at the Hearing

At the hearing, the appellant relied on the evidence in the appeal package documents, and especially reiterated the contents of her letter dated September 20, 2023:

- The appellant said she had been told by the ministry that their policy was to require a new Arrangement Form, signed by the child care provider and confirming the child’s attendance, once every 12 months. The appellant noted that in her case, it

had not been twelve months since the most recent Arrangement Form had been submitted.

- The appellant never received any email, letter or contact of any nature about the need to renew her benefit every 12 months, or what she needed to do to renew.
- The panel confirmed that the appellant's address used by the ministry is correct.
- It was only when the appellant phoned the CCSC on February 1, 2023 that she had any communication.
- The appellant is not equipped to deal with the information technology used by the CCSC to communicate and she was blocked out of the portal utilized by the department to communicate. She had to phone the CCSC many times to resolve the issue.
- Due to the appellant's challenges with information technology, she asserts that this message sent on December 19, 2022, was never received by her as she was persistently locked out of the system.
- The appellant at no time gave her authority to accept messages via the CCSC portal to communicate and could not understand why the CCSC would not send letters, except the one dated August 24, 2023.
- The appellant also noted that on several occasions when she telephoned the CCSC, she was given inconsistent information about whether CCSC would reimburse her for the daycare fees she had paid between February and June 2023.
- The appellant reiterated that it is simply wrong to not send a letter to advise her:
 - of the need to renew her benefit
 - what is required of her to renew the benefit, and
 - that her file was being closed.
- The appellant acknowledged that she does bear some responsibility for failure to follow up with the CCSC about renewing her benefit, however her mental health and other difficulties impaired her ability to do so.

In response to a question from the panel, the appellant confirmed that she has three children, the eldest of which has aged out of child care and the youngest of which is not yet in child care, leaving one child who requires and is receiving it. The appellant also confirmed that she had applied for and received the benefit for the child in care in April 2022.

Additional Evidence After Reconsideration

In the Notice of Appeal, the Appellant says she awaits an opportunity to speak with an ACCB worker and disagrees with the decision.

Admissibility of Additional Evidence

The Panel finds that there was new evidence provided at the hearing, namely, these verbal statements of the appellant:

- 1) she was told by the ministry that it is policy to require a new application every 12 months, and
- 2) she has one child in care and was approved to receive the Benefit in April 2022.

The panel finds that this additional evidence is reasonably necessary for full and fair disclosure of all matters relating to the decision under appeal. Therefore, the panel finds that the evidence is admissible under section 22(4) of the Employment and Assistance Act. The panel assigns this new evidence moderate weight. With the absence of substantiating evidence in the appeal record, and the inability of the panel to confirm the new information at the hearing because the ministry didn't attend, the panel could not give full weight to this new evidence.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that the appellant was not eligible for the Benefit for the period between February 1, 2023 to June 30, 2023 was reasonably supported by the evidence, or a reasonable application of the legislation in the appellant's circumstances.

Appellant's Position:

The appellant acknowledges that she does bear some responsibility for failure to follow-up with the CCSC about renewing the Benefit, however her mental health and other difficulties impaired her ability to do so. Over the past year she has been overwhelmed by her family circumstances, including "juggling" a third child and a medical condition which has created medical and financial hardship for her.

She also acknowledges that she did not provide the needed information requested by the ministry on a timely basis. However, she never received any email, letter or contact of any nature about the need to renew her benefit every 12 months, what she needed to do to renew, or why the ministry was requiring a new application when it was less than twelve months since the previous one had been provided.

She is not equipped to deal with the information technology used by the CCSC to communicate and she was blocked out of the portal the ministry uses to communicate. She had to phone the CCSC many times to try to resolve the issue. Further, she did not understand the CCSC's application and renewal processes and requirements, and she was told inconsistent information about whether her benefit would be backdated to the date she began using child care. The appellant asks the ministry to exercise discretion and provide the subsidy backdated to February 1, 2023 on compassionate grounds.

Ministry's Position:

The ministry maintains that, while the appellant contacted the CCSC on February 1, 2023, at which time she was advised of the need to renew her benefit, and what was required for the renewal, she made no further contact by telephone, mail, fax or via the MyFS online service portal. When she did not provide the information and did not contact the ministry to ask for more time to provide it, her file was closed due to inactivity. Not until July 5, 2023, did the appellant contact the CCSC to pursue renewing her benefit. She failed to respond to the ministry's request for additional information under section 5(1)(a) of the Act. On July 10, 2023, the CCSC found the appellant eligible for subsidy and issued her a Benefit Plan for the period beginning July 1, 2023. Under section 13(1) of the Regulation, the subsidy can be paid from the first day of the month the parent completes the

application, which is July 1, 2023. The ministry could backdate the subsidy for 30 days before the date of the application if there was an administrative error by the ministry. There is no evidence of such an error by the ministry, and under the legislation, the ministry does not have discretion to backdate the subsidy for any other reason, including on compassionate grounds.

Panel Decision:

The legislation does not permit a panel to make a new decision. The legislation says that a panel's authority is limited to an assessment of whether a decision meets a standard of reasonableness. The standard applied in this appeal is whether the Decision reasonably applies applicable laws and is reasonably supported by the evidence, including any new admissible evidence.

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. Therefore, the threshold question is whether the decisions leading through to the appeal affect the rights, privileges, or interests of the appellant.

In the current circumstance, the appellant has been seeking to renew the Benefit, which expired on January 31, 2023. While the ministry says that it sent a message to the appellant on December 19, 2022, via her MyFS account, this message was not received by the appellant, according to information provided by the appellant. The panel also notes that the appeal record does not include a copy of the December 19 MyFS message the ministry says was sent to the appellant. As a result, the panel has no concrete evidence to support the ministry's contention. In addition, no evidence has been provided to show that the ministry sent the appellant a letter with this information in it, as would have been reasonably be required.

Hence, the panel finds that the available evidence supports the appellant's assertion that she had no idea that renewal of her benefit was necessary, or what she would have to do to get a renewal. From February 1, 2023, she had to pay for day care services out of her own pocket and she believes these payments should be reimbursed because these payments arose from the lack of notice and communication from the CCSC.

Backdating on Compassionate Grounds:

The appellant asks that her eligibility for the child care subsidy be backdated to February 1, 2023 on compassionate grounds. She faced difficult and challenging circumstances in her family, compounded by her own mental health issues and a longstanding difficulty in managing and working with the ministry's information management system. She says she also was not aware that her benefit needed to be renewed or what was required for that application. While the panel is sympathetic to the appellant's circumstances, the legislation does not give the ministry or the panel the discretion to backdate the Benefit beyond the first day of the month in which the parent completes an application under section 4 of the Act. The only exception is when the ministry has made an administrative error. When that happens, the ministry may pay the subsidy for child care provided in the 30 days before the parent completes the application.

Application and Eligibility under the Act and Regulation:

The Act and Regulation contemplate that the ministry may require additional information to determine eligibility for the subsidy. Under section 5(1)(a) of the Act, the ministry may "direct a person who has applied for the subsidy...to supply the minister with information within the time and in the manner specified by the minister." No evidence has been presented to suggest that such a directive under section 5(1)(a) was ever received by the appellant, as stated previously.

In addition, Section 4(1)(a) of the Regulation says that a person must "complete an application in the form required by the minister" to be eligible for the Benefit. The legislation does not specify whether an application must be submitted only once, or periodically, and if periodically, how often. Section 4(1)(b) requires that the applicant provide their social insurance number, which the panel notes does not change and must have already been provided to the ministry when the appellant originally applied for the Benefit. Section 4(1)(c) says that an applicant must "supply the minister with proof of the identity of each member of the family and proof of eligibility for a child care subsidy". In this case, the panel must reasonably assume that proof of the identity of each family member was previously provided. Regarding proof of eligibility, the panel is unable to determine based on the available evidence what proof would reasonably be required, but that proof would presumably include confirmation of the applicant's family income and the hours and days that the child was in care, as confirmed by the care provider.

Since the ministry did not send a representative to the hearing, and both the appeal package and the legislation are silent on what is required to renew a benefit plan, the panel was operating in the dark on these requirements. In addition, was it only because the CCSC closed the appellant's account that a new Application Form was deemed to be

required by the ministry under Section 4 of the Regulation? What else, if anything, did the CCSC require? The panel was unable to find answers to these questions in the appeal package or to ask the ministry at the hearing as the ministry did not attend. The fact that the ministry decided to have the appellant and the care provider fill out a new Arrangement Form (and possibly a new application too) only 10 months after the previous one was (apparently) provided, strongly supports the appellant's argument that the ministry's decision was unreasonable.

The panel finds that due to the lack of communication from the CCSC, the appellant was given neither notice nor the opportunity to respond to the CCSC's requirements to submit her renewal application on a timely basis. She was therefore deprived of the opportunity to re-establish her eligibility under the Act and Regulation on a timely basis if she was reasonably required to do so.

Procedural Fairness considerations:

The question then is what is procedurally fair in the circumstances and was the Decision "reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision" (per the Employment Assistance Act section 24(2)(a)). That quoted provision requires an analysis of whether it is a reasonable application of enactments to the appellant if the decision is made in the absence of procedural fairness.

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 may 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, and it might reasonably be considered an administrative error.

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 in this case is one that relates to a parent’s eligibility to receive a child care subsidy derived from information from the parent, and affecting the appellant and her child. The process followed in this case was a chain of decisions made by the ministry without notice to the appellant.

The statutory scheme makes the entitlement to the subsidy a benefit, and there are obligations under common law to provide notice of information requirements.

The choice of the procedure in which the ministry made decisions in this case deprived the appellant of the ability to affect the decision and address her child’s and her own interests with the ministry.

A decision that there was no entitlement to the Benefit for the period from February 1, 2023 to June 30, 2023, effectively changes the rights and interests between the appellant and the child care provider and creates a billing/payment issue between them.

The panel considered the implications of the 5-month period when the appellant did nothing to follow up with the CCSC. The panel feels these factors are relevant to its decision:

1. Based on our understanding of ministry policy to seek information to reconfirm eligibility once a year, which is unconfirmed because the ministry did not attend the hearing, the ministry would not normally have required a new application be submitted by the appellant before January 31, 2023; it was only 10 months since the last confirmation in April 2022. This 12-month policy is arguably confirmed by the information in the July 10 Letter, which resulted in approval in July 2023 for a 12-month period through the end of June 2024.

2. According to all available evidence, the appellant was not properly advised of the February 1 renewal date. Further, she was provided incomplete and conflicting information about what was required during the February 1, 2023 phone conversation with the CCSC.

3. The decision to require a new application after only 10 months, with no evidence presented by the ministry to explain why they did this, might reasonably be considered an administrative error. Though the term "administrative error" is not defined in the legislation, this procedure certainly appears to be an administrative error.

4. The appellant says she has disabilities and was preoccupied with the birth of her third child in the February through June timeframe. While we do not have third party evidence to confirm her disabilities, we do know she had her third child in March 2023.

Considering the totality of circumstances discussed above, the panel finds that the applicable enactments require procedural fairness which has not been provided to the appellant by the ministry in making the Decision. 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 Decision.

Conclusion:

The panel rescinds the 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 appellant.

Therefore, the appellant is successful in her appeal.

Schedule of Legislation

Child Care Subsidy Act

Child care subsidies

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

Information and verification

s. 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;

...

How to apply for a subsidy

s. 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.

...

s.13 Will a subsidy be paid for child care provided before completion of the application?

- (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.

Employment and Assistance Act

Panels of the tribunal to conduct appeals

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.

Employment and Assistance Appeal Regulation

Time period for scheduling and conducting hearing

s. 85 ...(2) The chair of the tribunal must notify the parties of the date, time and place of a hearing described in subsection (1) at least 2 business days before the hearing is to commence.

Employment and Assistance Regulation

s. 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;

...

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

Bill Farr

Signature of Chair

Date (Year/Month/Day)

2023/11/29

Print Name

Simon Clews

Signature of Member

Date (Year/Month/Day)

2023/11/29

Print Name

Kulwant Bal

Signature of Member

Date (Year/Month/Day)

2023/11/29