

**Part C – Decision Under Appeal**

The decision under appeal is the Reconsideration Decision dated March 15, 2024 of the Ministry of Education and Child Care (the “Ministry”). The Ministry found that the Appellant was not eligible for the Affordable Child Care Benefit (the “Benefit”) from July 1, 2019 to March 31, 2023 as a result of having been a parent, as defined in section 1 of the *Child Care Subsidy Act* (the “Act”), to the children in respect of whom the Benefit had been paid and that, in the result, the Appellant was liable to repay \$56,805.00, pursuant to section 7 of the Act.

**Part D – Relevant Legislation**

*Child Care Subsidy Act*- sections 1, 5, and 7

*Financial Administration Act*- section 87

A full text of the applicable provisions of the legislation is appended to the back of Part F of this decision.

**Part E – Summary of Facts**

The hearing proceeded as an in person hearing on July 10, 2024 with the Appellant and her advocate present and a representative of the Ministry in attendance by teleconference.

The information before the Ministry at the time of the Reconsideration Decision included the following:

- the Verification and Audit Request for Reconsideration dated November 26, 2023;
- the Ministry's letter to the Appellant, dated November 20, 2023, notifying the Appellant about the overpayment of the Benefit as a result of the Appellant not having been eligible to receive it and advising the Appellant of the amount of the overpayment;
- the Ministry's Child Care Subsidy Overpayment Calculation form, which identified the months for which the Appellant received the Benefit, the names of the children in respect of whom the Benefit was paid between July 2019 and March 2023, and calculated the total paid to the Appellant at \$56,805.00;
- a summary of the monthly amount of the Benefit paid to the Appellant between July 2019 and March 2023;
- the Appellant's Affordable Child Care Benefit Application, dated July 19, 2019, describing the two children in respect of whom the Benefit was being requested;
- copies of the Appellant's identification and the identification of the Appellant's husband;
- a typed Affordable Child Care Benefit Application, dated June 10, 2020;
- a typed Affordable Child Care Benefit Application, dated May 19, 2021;
- a typed Affordable Child Care Benefit Application, dated July 25, 2021;
- a typed Affordable Child Care Benefit Application, dated July 15, 2022;
- a handwritten Affordable Child Care Benefit Child Care Arrangement form (the "2019 Arrangement Form"), signed by the Appellant and dated July 19, 2019 with a portion of section 2 of the form under the heading "What type of child care do you provide" whited out;
- a handwritten Affordable Child Care Benefit Child Care Arrangement form, signed by the Appellant's husband and dated July 16, 2021;
- a handwritten Affordable Child Care Benefit Child Care Arrangement form, signed by the Appellant and dated June 7, 2022;
- a Referral to Affordable Child Care Benefit under the CFCS Act form (the "Referral Form"), completed by a Ministry social worker and dated June 4, 2019;
- a Referral Form, completed by a Ministry social worker and dated June 16, 2020;

- a Referral Form, completed by a Ministry social worker and dated June 17, 2020;
- a Referral Form, completed by a Ministry social worker and dated June 5, 2021;
- a Referral Form, completed by a Ministry social worker and dated May 25, 2021;
- a Referral Form, completed by a Ministry social worker and dated June 21, 2021;
- a Referral Form, completed by a Ministry social worker and dated July 15, 2022;
- a Business Summary for the Appellant's day care;
- e-mail correspondence between the Appellant and the Ministry's verification and audit officer, between March 20, 2023 and March 27, 2023, in which the Appellant answers a number of questions about the children in respect of whom the Benefit was paid and the names of employees who worked at the Appellant's day care;
- a letter from the Ministry to the Appellant requesting information pertaining the Appellant's day care business for the purpose of a review of the Appellant's eligibility for the Benefit;
- a letter from the Appellant, to the Reconsideration Officer, dated February 19, 2024, in which the Appellant explains the history of her application for the Benefit and describing her interactions with the social worker who indicated that she would be eligible for the Benefit;
- application for Temporary Placement or Retention Form, dated July 28, 2019;
- a copy of Temporary Placement or Retention Decision Forms, dated August 14, 2019, indicating five children approved for child care at the Appellant's day care starting on August 14, 2019;
- a copies of e-mail correspondence between the Ministry social worker and the Appellant, dated July 16, 2019 and July 22, 2019, in which the social worker advised the Appellant that a client could own a day care and still receive a child care subsidy so long as they were not directly supervising a child of their own; and
- a copy of the 2019 Arrangement Form with section 2 of the form not whited out and it being noted by the Appellant that "I am the foster mom and run the day care from home. My staff takes care of these kids at my day care."

In the Notice of Appeal, dated April 23, 2024, the Appellant wrote that the Ministry acknowledged that "it was never my fault" and included a typed letter, setting out that:

- she had always been honest, relied on the social worker, and gave true information when it was required over the years in which the Benefit was paid;
- she had always advised the Ministry that she was the foster mother for the children in respect of whom the Benefit was paid;
- the Ministry was aware of the arrangement all along and never indicated to the Appellant that it was not allowed; and

- she applied for renewals of the Benefit regularly which were also approved by the Ministry.

### *The Hearing*

No new documentary evidence was presented at the hearing by either party. The panel admits the oral evidence given at the hearing as evidence by both parties that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

### The Appellant

The Appellant stated that the two foster children in respect of whom the Benefit was initially paid were one year old when she applied for the Benefit. Subsequently, the Benefit was also paid in respect of a third child. She described having asked whether it was alright for the foster children to be in her day care and was advised to apply for the Benefit by a Ministry social worker. The Appellant, in fact, had concerns that she would not be eligible for the Benefit but was told by the social worker that she would be eligible if someone else in her day care was supervising the foster children. She was also told that the application for the Benefit could be made in the name of the Appellant's husband.

The Appellant described having completed the forms and specifically noting that the children in respect of whom the Benefit was being applied for were her own foster children and they would be in the care of her own day care. She noted that she later discovered that the form that was submitted on her behalf by the social worker had this part of the form deleted. She did not know how or why that happened.

As a result of the altered form, the Ministry initially told her that she had given them false information. Fortunately, she had kept a copy of the form that she originally completed and the Ministry later reversed their initial finding that she had misled the Ministry and admitted that the overpayment was due to Ministry error.

The Appellant also described having provided the Ministry with e-mails and documentation confirming the licensing status of her day care but those documents are not among the records before the panel.

The Appellant stated that she relied on the information provided by the social worker and that, at the time she received the Benefit, her licence allowed her to provide care for

seven children and that the day care spaces occupied by her foster children were ones that the Appellant did not use to provide care for other children but that she could have done so had she not used those licenced spaces for her own foster children. In effect, the Appellant lost the fees that could have been earned from the day care spots used by the foster children in respect of whom the Benefit was paid.

### The Ministry

The Ministry confirmed the history provided by the Appellant and conceded that the payment of the Benefit was the result of a Ministry error. In effect, the Ministry indicated that the error arose out of the fact that it made a mistake in not paying close enough attention to the fact that because the Appellant was the licensee, she was considered the caregiver of the foster children, even if an employee of the day care was the one supervising them and, as such, the Appellant was not eligible for the Benefit by virtue of having provided care to children in respect of whom she stood in the place of a parent.

The Ministry went on to note that the repayment provisions in section 7 of the Act are not contingent on fault and that repayment is required whenever an overpayment occurs, regardless of whether the repayment was caused by Ministry error, as was the case here.

While in the Reconsideration Decision the Ministry noted *"Your case may meet the criteria for an estoppel defense because your overpayment is a result of a ministry administrative error, and you relied on the subsidy to your detriment"*, the Ministry did not otherwise elaborate upon the Appellant's potential estoppel defence. In addition, the Ministry did not dispute the accuracy of the factual evidence given by the Appellant, as noted above.

**Part F – Reasons for Panel Decision***Issue on Appeal*

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for the Benefit between February 17, 2020 to December 31, 2021 because she was providing care to a foster child, in respect of whom she stood in the place of a parent, and is liable to reimburse the government the Benefit amount of \$56,805.00 paid to her erroneously.

*Appellant's Position*

The Appellant accepts that she was not eligible to receive the Benefit from February 17, 2020 to December 31, 2021 because she stood in the place of a parent to the children in respect of whom the Benefit was paid but asserts that she took all reasonable steps to alert the Ministry to the fact that she would be the one providing care to the children in respect of whom the Benefit was paid.

*Ministry's Position*

The Ministry concedes that the Appellant was assessed as eligible by mistake and, in fact, did alert the Ministry to the fact that her own day care would be providing care. The Ministry's position is that because the Appellant is the licensee of the day care, she is considered the care provider even if another worker was supervising the children in respect of whom the Benefit was being paid.

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

*Analysis*

Under section 1 of the *Act*, child care is defined as the care and supervision of a child in a child care setting, other than:

- by the child's parent, or
- while the child is attending an educational program provided under the *School Act*, the *Independent School Act* or a law of a treaty first nation in relation to kindergarten to grade 12 education;

Moreover, the term "parent" is defined expansively and "includes a person with whom a child resides and who stands in place of a parent of the child."

In this case, the Appellant, as a foster parent of the children in respect of whom the Benefit was paid, clearly stands in the place of a parent. In the result, the panel finds that the Ministry was reasonable in its determination that the Appellant was not eligible to receive the Benefit between those dates.

Likewise, section 7 of the Act requires the repayment of benefits paid erroneously, regardless of fault. As such, the panel finds that the Ministry's interpretation of the repayment provisions of the Act was also reasonable.

### Estoppel

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 ("*Maracle*"):

*"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. However, the Ministry of Social Development and Poverty Reduction, has a published policy for "Overpayments that may meet an estoppel defence", which can be found on the Ministry's website. While that policy overpayments generally and not specifically to the Benefit, the panel finds that the policy is helpful in setting out the criteria to be met when considering an estoppel defence where the government seeks repayment of benefits. The three criteria that must be met for an estoppel defence are:

- a recipient received assistance they were not entitled to receive;
- the ministry represented to the recipient that they were eligible for the assistance;
- and

- the recipient relied on the funds to their detriment.

The above criteria are consistent with the well-established principles of promissory estoppel set out by the Supreme Court of Canada in *Maracle*.

In the case of this Appellant, the panel finds that the three criteria have been met.

There is no dispute that the Appellant received the Benefit. Likewise, the definitions of “child care” and “parent” makes it clear that the Appellant was not eligible for the Benefit. As such, the panel finds that the first criteria for an estoppel defence is met. The Appellant received funds for which she was not eligible.

The e-mail correspondence between the Appellant and the social worker, immediately prior to the Appellant applying for the Benefit, clearly indicates that the social worker advised the Appellant that she could be eligible for the benefit. Moreover, the original application documents were submitted by the social worker and, for reasons that are not clear, were altered. A cursory review of the two 2019 Arrangement Forms clearly indicates that the form completed by the Appellant, in which her role as the child care provider was expressly disclosed, was altered to remove the reference to that important fact. Having made the disclosure on the form, the panel accepts the Appellant’s evidence that she did not alter the 2019 Arrangement Form and the Ministry has conceded that the Appellant did not deliberately provide misleading information to it. In view of the above, the panel finds that the second element of the criteria for an estoppel defence has been met. Namely, there was a representation made to the Appellant that she was eligible to receive the Benefit.

The third and final criteria for an estoppel defence is the requirement of reliance by the Appellant to her detriment. Here, the Appellant clearly relied on the representation from the social worker that she was eligible for the Benefit, both initially and on each of the subsequent occasions where the Ministry’s approval for the Benefit was renewed. The detriment that she suffered was twofold. First, the Appellant was put in the position of being liable to the Ministry for the overpayment. Secondly, the Appellant actually used day care spots, which could have been used to provide child care to other children, for the foster children. In effect, there was a possible loss of income to the Appellant in having relied on the advice of the social worker. As such, the panel also finds that the third element of the criteria for an estoppel defence has been met. The Appellant relied on the Benefit to her detriment.



*Conclusion*

Having regard to the principles of estoppel, the panel finds that the Reconsideration Decision was not a reasonable application of the legislation in the Appellant's circumstances. The panel finds that the Ministry unreasonably failed to consider the Appellant's estoppel defence. The Panel rescinds the Reconsideration Decision. The Appellant is successful in the appeal.

## *Child Care Subsidy Act*

### **Definitions**

**1** In this Act:

**"child care"** means the care and supervision of a child in a child care setting, other than

(a) by the child's parent, or

(b) while the child is attending an educational program provided under the *School Act*, the *Independent School Act* or a law of a treaty first nation in relation to kindergarten to grade 12 education;

...

**"parent"** includes a person with whom a child resides and who stands in place of a parent of the child.

### **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 Benefit, or to or for whom a child care Benefit 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 Benefit, 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 Benefit 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 Benefit until the person complies, or
- (b) reduce the person's child care Benefit.

(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.

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

7(1) If a child care 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.

(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 Benefit.

(3) A repayment agreement may be entered into before or after a child care Benefit 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 Benefit 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).

### *Financial Administration Act*

#### **Defences to action for recovery of public money**

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.

APPEAL NUMBER 2024-0154

**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

Adam Shee

Signature of Chair

Date (Year/Month/Day)

2024/July/16

Print Name

Mimi Chang

Signature of Member

Date (Year/Month/Day)

2024/July/16

Print Name

Simon Clews

Signature of Member

Date (Year/Month/Day)

2024/July/16