

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the ministry's reconsideration decision dated August 17, 2018. In that decision the ministry approved the appellant's request for a nutritional supplement. The supplement was for a monthly supplement of nine 400gm units of infant formula "for GERD and newborn colic – type to be determined by mother". The supplier of the infant formula was to be the Product Distribution Centre (PDC).

The appeal is from the ministry's decision that, although the Appellant is approved for infant formula, the ministry is unable to provide the goat's-milk based infant formula requested because that infant formula is not subject to regulation by Health Canada.

**PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Schedule C, section 9.

## **PART E – SUMMARY OF FACTS**

The information before the ministry at reconsideration included the following:

- A prescription dated June 18, 2018, from a medical doctor prescribing “goats milk formula – 30 ounces per day --approx-- for 12 months” with a refill of “0” (zero) a start date of 2018-06-18 and an end date of 2018-06-18. Despite the title stating that the duration should be for 12 months, the start and end date are the same day. There is also no information regarding which goat’s-milk infant formula is prescribed.
- A letter dated July 30, 2018, from a medical doctor stating that when the Appellant is “on a goat’s milk formula [he] has significant improved overall function for both child and caregivers.” (sic)

### **Information provided on appeal:**

#### **Notice of Appeal**

In the Notice of Appeal dated August 24, 2018, the Appellant wrote under the heading Reasons for Appeal “Both suggested formula products – Nutramigen and Alimentum contain soy oil, my son has a soy allergy and we cannot use these products. He has been prescribed a goat milk base product & I feel the ministry should take the doctor recommendation.” (sic)

The Appellant also provided a letter, dated September 10, 2018, written by the same medical doctor that wrote the July 30, 2018 letter. This letter repeats the information from the previous letter with the addition of an explicit statement that: “The concern is that reintroduction of cow’s milk based products will result in worsening of symptoms and overall function of the child.”

The panel reviewed the statement in the Notice of Appeal for admissibility and determined it was admissible as argument.

The panel reviewed the September 10, 2018 letter for admissibility and determined it was admissible as it is in support of information before the ministry at the time of the reconsideration decision, including that there was a concern related to the Appellant consuming a cow’s-milk based infant formula.

## **PART F – REASONS FOR PANEL DECISION**

The issue in this appeal is whether the ministry's determination that EAPWDR Schedule C, subsection 9 only authorizes the ministry to provide infant formula that is approved by Health Canada is a reasonable application of the legislation in the circumstances of the appellant.

### **Applicable Legislation**

#### **EAPWDR**

**9** The minister may provide infant formula under section 67.1 of this regulation if

(a) a medical practitioner or nurse practitioner confirms in writing that

(i) the dependent child for whom a specialized infant formula is to be provided has a medical condition and the specialized infant formula is necessary to treat the medical condition, or

(ii) the dependent child for whom the infant formula is to be provided is at risk of contracting a disease that is transmissible through the mother's breast milk,

(b) in the case of a dependent child described by paragraph (a)(ii), the dependent child is under 12 months of age, and,

(c) the minister is satisfied that the infant formula is medically required to treat the medical condition or respond to the risk referred to in paragraph (a).

### **Appellant's Submissions**

The Appellant's submission was that the products offered through the Product Distribution Centre cannot be taken by the Appellant. Furthermore, that the family unit cannot afford to continue to purchase the infant formula that the Appellant is currently consuming because it needs to be purchased online.

The Appellant's mother informed the Panel that she had personally spoken with the Product Distribution Center and the Product Distribution Center confirmed to her that it did not stock the infant formula that the Appellant was currently consuming.

The Appellant's mother stated that she had tried the infant formulas available from the PDC and they made the Appellant throw up. The Appellant's mother theorized that these products have soya in them.

### **Ministry Submissions**

The ministry reaffirmed the reasoning articulated in the Reconsideration Decision. The ministry stated that it was sympathetic to the Appellant's situation. The ministry stated that it is satisfied that the Appellant is entitled to receive infant formula from the minister, but that the minister cannot provide an infant formula that is not regulated by Health Canada.

The ministry stated that the Canadian Food and Drug Regulations prohibit the selling or advertising of an infant formula that does not comply with the compositional requirements set out in the Food and Drug Regulations. It also stated that the ministry has been informed by the Product Distribution Center that it does not stock a goat's-milk based infant formula and that the infant formula requested by the Appellant's mother is manufactured in Europe, is distributed online and is not regulated by Health Canada.

### **The Panel's Decision**

The Employment and Assistance Act, section 24 provides legislative authority for the Panel to determine whether the decision being appealed is reasonably supported by the evidence and if it is a reasonable application of the legislation in the circumstances of the appellant.

The Panel acknowledges that the Appellant may have a legitimate medical need for a goat's-milk based infant formula.

The Panel also notes that EAPWDR section 9 provides authority for the minister to provide infant formula but does not specify which types of infant formula can be provided.

The Panel finds that the specific minimum and maximum nutrient requirements set out under Division 25 of the Canadian Food and Drug Regulations related to infant formula are intended to protect consumers. The Panel finds that the legislature, when providing authority to the ministry to provide infant formula, did not intend to avoid the protection provided by Division 25 of the Canadian Food and Drug Regulations.

Consequently, the Panel finds that the ministry reasonably applied section 9 of EAPWDR when it determined that the ministry (through the Product Distribution Center) could not provide infant formula that was not subject to regulation by Health Canada.

### **Conclusion**

The Panel finds that the ministry's determination that section 9 of the EAPWDR did not authorize the ministry to provide infant formula that was not subject to regulation by Health Canada was a reasonable application of the enactment in the circumstances of the person appealing the decision. The Panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

**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) 

and

Section 24(2)(a)  or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Trevor Morley

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/Sep/16

PRINT NAME

Sean Carberry

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Sep/16

PRINT NAME

Carman Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Sep/16