

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Lincoln Dinning

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Veterans Affairs Canada

Respondent

Decision

Member: Edward P. Lustig

Date: November 25, 2011

Citation: 2011 CHRT 20

Table of Contents

	Page
I. The Complaint	1
II. Facts	8
III. The Mootness Issue.....	17
IV. Analysis.....	21
V. Order	27

I. The Complaint

[1] This is a decision respecting a complaint by Lincoln Dinning that was filed on September 17, 2007. Mr. Dinning's son, Corporal Matthew Dinning was tragically killed in Afghanistan in April of 2006 in his 23rd year, while on duty as a soldier with the Canadian Forces ("CF") in the service of his country. Upon the sudden service related death of a CF member, a lump sum death benefit of \$250,000.00 (with yearly adjustments for inflation), may be payable by the Minister of Veterans Affairs under s. 57 (1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (the "New Veterans Charter") on an application being made, to the CF member's "spouse" or "common-law partner" as "survivors" or to a "dependent child", as defined in the New Veterans Charter. No other persons, including family members, are entitled to the payment of the death benefit if there is no spouse, common-law partner or dependent children at the time of death of the CF member. The following provisions of the New Veterans Charter are relevant:

Interpretation

2. (1) The following definitions apply in this Act.

"Canadian Forces" means the armed forces referred to in section 14 of the National Defence Act, and includes any predecessor naval, army or air forces of Canada or Newfoundland.

"common-law partner", in relation to a member or a veteran, means a person who is cohabiting with the member or veteran in a conjugal relationship, having so cohabited for a period of at least one year.

"dependent child", in relation to a member or a veteran, means their child, or a child of their spouse or common-law partner who is ordinarily residing in the member's or veteran's household, who is

(a) under the age of 18 years

(b) under the age of 25 years and following a course of instruction approved by the Minister; or

(c) over the age of 18 years and prevented by physical or mental incapacity from earning a livelihood, if the incapacity occurred

(i) before the child attained the age of 18 years, or

(ii) after the age of 18 years and before the age of 25 years while the child was following a course of instruction approved by the Minister.

“member” means an officer or a non-commissioned member of the Canadian Forces, as those terms are defined in subsection 2 (1) of the National Defence Act.

“survivor”, in relation to a deceased member or a deceased veteran, means

(a) their spouse who was, at the time of the member’s or veteran’s death, residing with the member or veteran; or

(b) the person who was, at the time of the member’s or veteran’s death, the member’s or veteran’s common-law partner.

(2) For the purposes of this Act, a spouse is deemed to be residing with a member or a veteran, and a person does not cease to be a member’s or a veteran’s common-law partner, if it is established that they are living apart by reason only of

(a) one or both of them having to reside in a health care facility;

(b) circumstances of a temporary nature; or

(c) other circumstances not within the control of the member or veteran or the spouse or common-law partner.

(3) A reference in this Act to a member’s or a veteran’s spouse is a reference to a member’s or a veteran’s spouse who is residing with the member or veteran.

(4) This Act does not apply to a member’s or a veteran’s surviving spouse if the member or veteran dies within one year after the date of the marriage, unless

(a) in the opinion of the Minister, the member or veteran was at the time of that marriage in such a condition of health as to justify their having an expectation of life of at least one year; or

(b) at the time of the member’s or veteran’s death, the spouse was cohabiting with the member or veteran in a conjugal relationship, having so cohabited for a period of at least one year.

Death Benefit

Eligibility — service-related injury or disease

57. (1) The Minister may, on application, pay, in accordance with section 59, a death benefit to a member's survivor or a person who was, at the time of the member's death, a dependent child if

- (a) the member dies as a result of a service-related injury or disease; and
- (b) the member's death occurs within 30 days after the day on which the injury occurred or the disease was contracted.

58. (1) The amount of the death benefit payable in respect of a member shall be the amount set out in column 2 of item 3 of Schedule 2.

59. If a death benefit is payable to a survivor or a person who was, at the time of a member's death, a dependent child, the following rules apply:

- (a) if there is a survivor but no person who was a dependent child, the survivor is entitled to 100% of the death benefit;
- (b) if there is a survivor and one or more persons who were dependent children,
 - (i) the survivor is entitled to 50% of the death benefit, and
 - (ii) the persons who were dependent children are entitled, as a class, to 50% of the death benefit, divided equally among them; and
- (c) if there are one or more persons who were dependent children but no survivor, each of those children is entitled to the amount obtained by dividing the death by the number of those dependent children.

[2] When the Complainant filed his Complaint, the opportunity to collect the death benefit payment was not available to the Complainant as a parent, or to his remaining son Brendon Dinning, as the brother of Corporal Dinning, as they did not fit within the definitions of the persons eligible to receive the death benefit under the New Veterans Charter as referred to above. As no determination had been made that Corporal Dinning had a common-law partner or dependent child at the time of his death, no family members of Corporal Dinning stood to

receive the death benefit. If Corporal Dinning had died leaving a spouse, common-law partner or dependent child, those persons could have qualified for payment of the death benefit.

[3] The Complainant alleged that by not providing him, as a parent of a single fallen soldier, with the opportunity under the New Veteran's Charter to collect the death benefit, the Respondent was treating his family (none of whom could collect the death benefit) adversely different than the family of a married fallen soldier, (some of whom could collect the death benefit) thereby engaging in discriminatory practices, based upon the prohibited grounds of family status and marital status under s. 3 of the *Canadian Human Rights Act* (the "CHRA"), contrary to both s. 5 and s. 10 of the CHRA. The following provisions of the CHRA (*with emphasis I have added*) are relevant:

Proscribed Discrimination

General

Prohibited grounds of discrimination

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

Orders regarding discriminatory practices

4. A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.

Discriminatory Practices

Denial of good, service, facility or accommodation

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any **individual**, or

(b) to differentiate adversely in relation to any **individual** on a prohibited ground of discrimination.

Discriminatory policy or practice

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Retaliation

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the **individual** who filed the complaint or the alleged **victim**.

Exceptions

15. (1) It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an **individual** is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a **victim** of any adverse differentiation and there is bona fide justification for that denial or differentiation.

Discriminatory Practices And General Provisions

Complaints

40. (1) Subject to subsections (5) and (7), any **individual** or group of **individuals** having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Consent of victim

(2) If a complaint is made by someone other than the **individual** who is alleged to be the **victim** of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged **victim** consents thereto.

Investigation commenced by commission

(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

Commission to deal with complaint

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged **victim** of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available.

Complaint dismissed

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate.

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16 (1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the **victim** of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the **victim** as a result of the practice;

(c) that the person compensate the **victim** for any or all of the wages that the **victim** was deprived of and for any expenses incurred by the **victim** as a result of the discriminatory practice;

(d) that the person compensate the **victim** for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the **victim** as a result of the discriminatory practice; and

(e) that the person compensate the **victim**, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the **victim** experienced as a result of the discriminatory practice.

Special Compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the **victim** as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[4] The Complaint included the following statements by the Complainant:

I am filing this Human Rights complaint to your Commission with regards to the Federal Government, in particular Veterans Affairs. I believe they discriminate against the families of SINGLE fallen Soldiers.

In short, when a married Soldier is killed in Afghanistan, their families, (spouse & children) receive a lump sum death benefit of \$250,000.00. Yet when a SINGLE Soldier is killed, Veterans Affairs doesn't pay any death benefit to their families, (parents and/or siblings).

In closing, I ask that you please investigate this matter and determine if Veterans Affairs is discriminatory in this particular practice and if so urge them to rectify this situation and treat ALL fallen Soldiers, (when married or single) equally.

I have reasonable grounds for believing that I have been discriminated against.

II. Facts

[5] No particular individual, other than the Complainant, was identified in the Complaint as a victim of discrimination.

[6] No consent to the making of the Complaint was obtained by the Commission from any other individual alleged to be a victim of the discrimination in this matter.

[7] No authorization to the making of the Complaint or to taking any steps in this matter in support of the Complaint was obtained by either the Commission or the Complainant from any other individual alleged to be a victim of the discrimination.

[8] The Commission did not initiate a complaint in this matter.

[9] The Complaint, as described in paragraph 4 above, was never amended and was referred to the Tribunal by the Commission on March 8, 2010 pursuant to s. 44 (3) (a) of the *CHRA* to institute an inquiry.

[10] Statements of Particulars were filed by the Complainant on July 13, 2010, by the Commission on July 30, 2010 and by the Respondent on September 20, 2010. In the Complainant's and the Commission's Statement of Particulars the material facts on which they relied were limited to the personal circumstances of the Complainant not anyone else.

[11] The hearing took place in London, Ontario for 9 days during the end of March and the beginning of April of 2011. During this time, the Tribunal received 14 binders of exhibits containing 328 documents as well as a handful of loose exhibits. Ten witnesses were called by the Respondent to give evidence including two expert witnesses. The vast majority of exhibits and evidence were obtained for production and produced by the Respondent.

[12] The Complainant represented himself at the hearing and gave evidence himself. He was the sole witness for the Complainant and he did not call any other witnesses to give any evidence or produce any statements from any family members of any deceased CF member. Mr. Dinning's wife Laurie and their son Brendon attended parts of the hearing but did not give evidence.

[13] The Commission appeared at the hearing but did not call any witnesses to give evidence and did not produce any statements from any family members of any deceased CF member.

[14] The only family members of deceased CF members who appeared or gave evidence at the hearing, other than the Complainant, were three witnesses called by the Respondent in support of its case.

[15] The Complainant's evidence was extremely emotional to everyone who heard it as much of it was directed towards the all too short life and tragic death of a beloved son. The incredible joy of watching and participating in the growth from boy to man of a wonderful gifted son was courageously and sorrowfully contrasted by Mr. Dinning with the unspeakable grief experienced by him and his wife after Matthew's death. Not surprisingly, he described the birth of Matthew as the best day of his life and his death as the worst. His evidence brought home, in chilling and graphic detail, how fleeting, precarious and precious life is; how special the relationship between a parent and child can be; and how devastating the death of a child is. No one who heard Lincoln Dinning's testimony about his son Matthew and the impact of his death was unmoved by it or unimpressed by him in the dignified way he presented it. I was grateful to have met Mr. Dinning and hope he, his wife Laurie and son Brendon find ways to cope with their loss. I have exactly the same feelings about the testimony of the son and two spouses of fallen soldiers who gave evidence at the hearing on behalf of the Respondent. They spoke of the terrible grief they suffered and the great difficulties they encountered in readjusting to civilian life as a result of the death of a father and spouses.

[16] In his evidence at the hearing, the Complainant spoke about the impact on him, his wife Laurie and his son Brendon as a result of Matthew's death. This evidence was given within the context of one of the central issues of the case involving the legislative purpose behind the provision of the death benefit in the New Veterans Charter. This particular benefit is part of a new "suite" of benefits introduced with the coming into force of the New Veterans Charter on April 6, 2006, to improve conditions for CF members and their families. It was common ground among the parties at the hearing that, while the term is not defined, the death benefit is a lump sum payment to recognize and compensate a survivor and dependent child of a CF member for the non-economic impacts of the member's sudden service related loss of life, such as the resulting loss of guidance, care and companionship and the impact of the member's death on the functioning of the household. The evidence that the Complainant gave in this regard was as follows:

The whole fabric of the family is destroyed after the death of a child.

We're supposed to have Mum, Dad and children, and when your child dies, your idea of family dies.

Our family pictures always had four people in them, now they only have three.

Loss of future hopes and dreams. Not being able to see Matthew grow up, get married, have children, be a dad, granddad. I know he would have been a great one.

Christmas, birthdays, anniversaries, parties are not the same since Matthew isn't here to share them.

Matthew's friends are getting married and having children and we won't have that now.

Memory lapses, sleepless nights, feeling guilty.

As parents, it's your job to protect your children. Whether they are 3 or 23, you want to protect them, and in Matthew's case, we didn't.

We laugh less. We cry more.

Loss of a son, grandson, brother, friend.

His only brother Brendon won't have Matthew as a best man at his wedding, if he gets married.

Every repatriation ceremony brings back a flood of memories and our hearts go out to the newly-bereaved families.

Hearing a song, seeing a movie, looking at a picture, watching a kids' hockey game or rugby game brings back memories of how things used to be.

Fighting with the government has only added stress to our everyday lives. It makes us feel like second-class citizens. All the talk the government does about supporting the troops and their families doesn't seem to cut it when it's a single soldier that is killed.

Studies have shown that parents who have had children die live shorter lives.

Family and friend relationships are different and some are non-existent. People who were friends don't know what to say, so they choose to stay away. This is apparently quite common after the death of a child.

Grief counselling is still ongoing. Laurie still goes five years after Matthew's death and travels two hours each way for her appointments.

Always wondering, "What could have been?"

We miss his laugh, his smile, his voice. No phone calls, no emails, no stories of his adventures, no teasing his brother. No beer on the back porch and hearing all the plans he had for his life.

Having a child die is the worst kind of loss a person can experience. When you get married, you say, "Til Death do us part". You know and expect that one day your spouse will die. But you don't expect to have your child die. Parents shouldn't have to bury their children.

When your parent dies, you lose your past.

When your spouse dies, you lose your present.

If you child dies, you lose your future.

Your Honour, I wouldn't wish this experience on my worst enemy.

So when Veterans Affairs think that parents and siblings don't need to be recognized for the loss of guidance, care and companionship, and that our household will function just fine without Matthew, I beg to differ.

[17] The Complainant testified that he and his wife were not financially dependent on Matthew at the time of his death. However, they did depend on Matthew in other ways. As the Complainant wrote in his December 27, 2009, submissions in response to the Commission's investigation report:

I could depend on Matthew to do anything I asked of him. I would depend on him to cut the grass, blow the driveway when he was home. I could depend on him to put a smile on my face when he told me stories of his career and his many accomplishments. I could depend on him to listen to me as a fellow policeman, when I had a particularly hard day at work and needed someone to talk to. In the future I was depending on Matthew to provide me with grandchildren and to look after me in my old age. So you see, dependence comes in many, many ways. I look no further than my widowed 82-year old mother who lives in the back half of my brother's house where they provide each other with guidance, care and companionship.

[18] The Complainant and the Commission did not provide any evidence at the hearing with respect to the impact of the death of any other CF member on their families. As noted, neither Laurie nor Brendon Dinning gave evidence at the hearing and neither of them was mentioned as a victim of discrimination on the Complaint form filed. The Complainant indicated at the hearing that he wanted Brendon included in his Complaint because of his concern that if he succeeded with his Complaint but was unable to collect the death benefit as a result of his own death, he would want it to be paid to his surviving son Brendon so that someone in the Dinning family collected the death benefit as a result of Matthew's death. The Commission did not support the inclusion of a sibling in the Complaint.

[19] The Complainant did not provide any evidence or submissions with respect to s. 10 of the *CHRA* and the Commission did not support the Complaint in respect of s. 10.

[20] Throughout this matter (including after the hearing as will be described later) the Complainant consistently maintained the position that his concern related to the different treatment, as he saw it, accorded to his son, Corporal Dinning, as a single fallen soldier, whose

family could not collect the death benefit, and a married fallen soldier, certain members of whose family could collect the death benefit under s. 57 of the New Veterans Charter. In this regard, he referred in his evidence to examples as follows:

Two soldiers are driving along in a Jeep and it gets blown up by a roadside bomb and both are killed. The driver who is married gets the death benefit. The passenger who is single does not. How is that equal?

When our fallen soldiers came home to CFB Trenton, the funeral cortege proceeds north to the 401. The married soldiers don't turn right and the single soldier turn left.

They all go down the Highway of Heroes to be welcomed home equally.

He felt that this difference in treatment was inequitable and disrespectful and suggested to him that the Respondent treated the life of his late son as being worth less than the life of a married fallen soldier.

[21] The Complainant testified that money was not the point of his complaint but rather it was based on principle. He stated that he will never be able to replace his son but he feels that it is fundamental that the Government treat equitably all soldiers who die as a result of a service related injury, whether married or single and that it be governed in this regard by generosity not regulatory logic, no matter how coherent or justifiable. So focused was the Complainant on this theme that the only question he asked virtually every one of the 10 witnesses called by the Respondent was whether they agreed that the Government ought to treat single fallen soldiers and married fallen soldiers equally.

[22] Further, the Complainant testified that he did not file his complaint to deprive any spouse, common-law partner or dependent child of a married fallen soldier of the death benefit presently available under the New Veterans Charter or to reduce the payment to such persons in any way. He also stated during the hearing and since that if there had been such survivors or dependent children of Corporal Dinning he would not have brought a Complaint or been at the hearing. He

did not share the Commission's contention that the relevant legislation was discriminatory in failing to include parents of married fallen soldiers as possible beneficiaries of the death benefit. In this regard the following exchange took place with me during his testimony the hearing:

The Chairperson: Mr. Dinning, just a question. Whether it's a – a married or a single soldier who has fallen, the parents in both cases and the siblings are treated the same. They don't get a benefit presently?

Mr. Dinning: Correct, yes.

The Chairperson: Okay. And you would suggest that, well, that treatment is the same, the parents are treated the same whether a parent of a married or a single person, your position, I would assume, would be that they – in both cases, they should be provided with a benefit the parents of a married as well as a parent --

Mr. Dinning: No, I'm not saying that at all. No, what I'm saying is keep it the same it is. If you have a wife, she gets paid. If you have dependent children, they get paid, okay. But if there's no common-law spouse or no wife, right, then the parents get paid because they are the next – next of kin, the next immediate family.

The Chairperson: So in the case of the married soldier --

Mr. Dinning: Mmhhh.

The Chairperson: – there wouldn't be a payment to a parent, there wouldn't be a - -

Mr. Dinning: No, no, the wife gets it by all means, yes, yes. No, I'm not saying take anything away, no, no, no. They get it, they keep it, the wife gets it, the common-law spouse if you've lived together for the year and met all the criteria, she gets it. If there's no wife, like for some single soldiers, single as though they're no married but they have children, well, then the children get it, okay. But if there's no – if a single soldier doesn't have a wife or children, the parents would be eligible to get it or should get it, and I'll take it a step further. If there's no parents, then the sibling gets it. And if there's nobody, absolutely nobody, then the estate gets it, okay.

Because one of the gentlemen killed with Matthew, William Turner, didn't have a mother. He was 40 years old, didn't have a mother and father, they had already died. He had one sister, okay. Again, single, he doesn't get it. So in her case, she would be the beneficiary.

The Chairperson: Do you anticipate that if that was done, that the parents of married fallen soldiers would be concerned that they weren't being treated the same way as the parents of single fallen soldiers?

Mr. Dinning: I don't think anticipate at all because if – had Matthew been married and had kids, the wife would have got the benefit and we wouldn't have said a word. I mean, that's the way it should be. No, there – I don't think – I don't think you'll have parents grumble at that. I mean, they're married.

That – once you become married and you have kids, then he's got a different immediate family, right? He'll still have a mother and father obviously, but if the death benefit goes to them, I don't think you'd get parents grumble. I certainly wouldn't grumble.

[23] In his closing submissions, the Complainant argued that the Respondent had discriminated against him and his son by not providing the same opportunity to receive the death benefit under the New Veterans Charter as the parent and brother of a single fallen soldier as would have been the case had he and his son been a spouse, common-law partner or dependent child of a married fallen soldier.

[24] In its closing submissions, the Commission argued that the Respondent had engaged and was engaging in a discriminatory practice by failing to pay a death benefit to parents of soldiers who suffer service related deaths, regardless of the marital or family status of the deceased soldier. As noted above, the Complainant did not agree with the Commission's position that the legislation was under inclusive with respect to a married fallen soldier. There was no evidence that the Commission's position with respect to the alleged under inclusiveness of the legislation for the parents of married fallen soldiers was ever made part of the Complaint or was ever investigated by the Commission or was referred to the Tribunal in this matter.

[25] It was common ground among the Parties at the hearing that the interpretation of the legislative intent behind the death benefit in the New Veterans Charter was key to the determination of the case on its merits. As pointed out in paragraph 16, the death benefit is not a defined term under the New Veterans Charter but is intended to recognize and compensate a surviving spouse, common-law partner and dependent child of a Canadian Forces member for

the non-economic impact of the member's sudden service related death, which includes the member's loss of life and the resulting loss of guidance, care and companionship and the impact of the member's death on the functioning of the household.

[26] In its submissions at the hearing, I was asked by the Respondent to interpret the purpose of the death benefit as part and parcel of a whole "suite" of benefits in the New Veterans Charter, all of which had been carefully considered, designed and targeted by the Federal Government, as a re-establishment to civilian life program, to assist those particular family members (spouses, common-law partners and dependent children) who normally joined Canadian Forces members in their careers and become part of the "military family" and who are most impacted in terms of their need to re-establish their lives following the sudden service related death of a member. This, in the view of the Respondent, was a perfectly rational and legitimate exercise by Government of properly allocating funds to aid family members most in need and was not a discriminatory practice of excluding other family members such as parents who did not have the same needs. According to the Respondent, in designing and implementing the death benefit legislation, there was no indication either through focus groups or current literature it consulted that parents needed this help.

[27] Conversely, I was asked by the Commission to interpret the purpose of the death benefit as a lump sum non-economic benefit specifically related to the grief suffered by various surviving family members of fallen soldiers that was clearly distinguishable and different from a re-establishment to civilian life economic benefit provided for by various benefits and programs in other parts of the New Veterans Charter to target the re-establishment needs of a limited group of surviving family members (spouses, common-law partners and dependent children) following the sudden service related death of a member. In the view of the Commission, it was a discriminatory practice to exclude from the payment of the death benefit family members such as parents who also suffer grief from the loss of a son or daughter in the military who dies as a result of a sudden service related injury.

III. The Mootness Issue

[28] During the hearing, I was advised by the Parties of the existence of a pending application to the Respondent by a Ms. Tanya Lowerison for the death benefit on the basis that she was the common-law partner of Corporal Dinning when he died. I was advised that Ms. Lowerison had previously unsuccessfully made an application for the death benefit but subsequently, as a result of a change to the rules involving the required term for co-habitation during deployment, Ms. Lowerison's had been allowed to submit a new application that was then under consideration. I advised the parties that the pending application by Ms. Lowerison would have no impact on my deliberations unless, prior to issuing a Decision in this matter, I was informed that Ms. Lowerison's application was successful.

[29] On June 10, 2011, the Respondent ruled for the first time that (i) Ms. Lowerison was a "common-law partner" and "survivor" of the late Cpl. Dinning, (ii) her daughter was a "dependent child" of the late Cpl. Dinning, and (iii) a death benefit would therefore be paid to Ms. Lowerison and her daughter, apportioned in accordance with the applicable legislation

[30] On June 17, 2011 the Complainant wrote to the parties as follows:

Even though my specific case may be "out the window" there are still 75 single fallen soldiers who will be impacted by his decision. It would also save you going through the same thing all over again should another family pick up where I left off and having a whole new tribunal later on down the road deciding the exact same thing just with a different complainant. (I know at least 3 families who will take up the cause).

At no time was evidence adduced in this matter that established the existence of any particular or individual fallen soldier, other than Corporal Dinning, or any particular family members of any such soldier who had indicated to anyone that they would be impacted by a Decision in this matter or who felt that the Respondent was engaging or had engaged in discriminatory behaviour in relation to the death benefit.

[31] A case conference meeting was held with the parties by telephone on July 13, 2011 to consider submissions with respect to the admission into evidence of the ruling of the Respondent with respect to Ms. Lowerison and her daughter and to receive submissions on the issue of mootness, in the event that the ruling of the Respondent was admitted into evidence.

[32] At the case management meeting I admitted the ruling of the Respondent into evidence. As a consequence, at the date of Corporal Dinning's death, he had a survivor under the New Veterans Charter being his common-law partner Ms. Lowerison and a dependent child. As such, the Complainant and his son Brendon were not, as at the date of Corporal Dinning's death, the father and brother respectively of a single fallen soldier as alleged by the Complainant for the purposes of this case. This does not in any way suggest that the Complainant, at any time, mislead anyone about his or his son's status since until June 10, 2011, no determination had been made that would have caused Mr. Dinning to believe anything other than what he had alleged in this regard.

[33] Following the case management meeting on July 13, 2011 the Tribunal wrote to the parties requesting submissions on the following two questions:

(1) Whether the Complainant's case for liability against the Respondent is now moot?, and (2) If the answer to question (1) above is yes, whether there can be a finding of liability against the Respondent in this matter in favour of any other person?

[34] As a result, the Parties provided written submissions to the Tribunal. The Complainant responded on July 17, 2011, the Commission responded on September 9, 2011, the Respondent responded on September 13, 2011. The Commission also provided Reply submissions on September 19, 2011.

[35] The Complainant's submissions are summarized in paragraph 30 above.

[36] The Commission's submissions are summarized as follows:

(a) The case on liability is not moot. Under the CHRA, the question referred to the Tribunal for resolution is whether a Respondent has engaged or is engaging in a discriminatory practice. The statute does not require that the Complainant be a "victim" of the discriminatory practice. Here, the Complainant alleges that the Respondent engages in a discriminatory practice by failing to pay a death benefit to parents and siblings of soldiers who suffer service related deaths, and are single and have no children. The Commission alleges that the Respondent engages in a discriminatory practice by failing to pay a death benefit to parents of soldiers who suffer service related deaths, regardless of the marital or family status of the soldiers. These allegations are unaffected by the Respondent's decision to pay a death benefit to Tanya Lowerison and her daughter. They are live disputes that can give rise to meaningful public interest remedies, if liability is found.

(b) In the alternative, if the Tribunal concludes that recent events have rendered the case on liability moot, it should nevertheless exercise its discretion to proceed with the public interest aspects of the case. This is appropriate because, among other things, the case has been fully argued in an adversarial context, involves quasi-constitutional rights of public importance, and relates to specific and ongoing legislation and government action. In addition, deciding the public interest component of the case would support judicial economy by eliminating or reducing the possibility of future legal challenges. It would also respect the principles that human rights laws should be given a broad purposive interpretation, and human rights disputes should be resolved quickly and efficiently.

(c) While the recent death benefit award should not affect the case for liability or public interest remedies, it does affect the availability of personal financial remedies. In light of the changed circumstances, the Commission now withdraws its prior request for

an order that the death benefit be paid, and instead submits that the appropriate order for the Tribunal to make on its theory of the case would be one that (i) finds that the death benefit provisions discriminate on the basis of family status by excluding parents, (ii) orders the Respondent to cease and desist from applying the discriminatory aspects of the provisions, (iii) delays the effect of the inoperability, to allow the Respondent to take steps in consultation with the Commission to address the problem, (iv) leaves the Tribunal seized to supervise implementation of the remedy, and (v) directs that once Parliament has amended the scheme in accordance with the Tribunal's decision, the Respondent pay to the Dinnings whatever benefit the new scheme makes available to parents in their circumstances.

[37] The Respondent's submissions are summarized as follows:

(a) The Complainant's discrimination allegations may be moot in part or in their entirety depending on what the Tribunal decides is the scope of the complaint.

(b) If the Tribunal interprets the Complaint in the same way as one having been brought on behalf of the parents and siblings of single CF members who have suffered a sudden service related death, the death benefit award to Corporal Dinning's common-law partner only renders part of the complaint moot. No longer in controversy is whether Mr. Dinning is a victim of discrimination as the father of a single CF member. The parties agree that, for the purposes of the administration of the death benefit, Mr. Dinning's son has a common-law partner. However, still in dispute are all the factual and legal questions related to the allegation that other parents and siblings of single CF members have suffered discrimination.

(c) If the Tribunal concludes, however, that the Complaint is limited to the allegation that the Complainant (or even his wife and son Brendon) has been discriminated against, then the death benefit award renders the Complaint moot in its entirety.

(d) The Respondent opposes the exercise of the Tribunal's discretion to decide a moot issue. None of the three criteria justifying the exercise of discretion apply:

(i) First, there is no longer an adversarial relationship between the parties. The death benefit award to the common-law partner of Corporal Dinning put an end to it. All parties agree that Corporal Dinning is not single for the purposes of the administration of the death benefit.

(ii) Second, the need for judicial economy does not favour deciding the moot issue. No special circumstances exist to make it worthwhile for the Tribunal to continue to apply its scarce resources to deciding this issue. A Tribunal decision would have no practical effect on the rights of the parties. There is also no indication that this issue is a reoccurring one that evades review. The death benefit has been enacted for many years and this has been the only complaint on behalf of the parent of single CF member who suddenly died in service. Even if a case arises in the future, it will be preferable to wait until then to decide the issue.

(iii) Finally, pronouncing on this moot issue will be viewed as the Tribunal intruding on the role of the legislative branch. The Tribunal should not interfere lightly with Parliament's enactment without the existence of a live dispute which requires adjudication.

IV. Analysis

[38] The classic description and definition of the doctrine of mootness comes from the Supreme Court of Canada's judgment in *Borowski v. Canada* [1989] 1 S.C.R. 342:

15 The Doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the

rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

In *Collins v. Abrams et al* 2002 British Columbia Supreme Court 1774, the Court discusses the 3 rationales underlying the policy and practice of applying the mootness doctrine:

(1) A court's competence to resolve legal disputes is rooted in the adversary system, and in the absence of an adversarial context the issues may not be well and fully argued (recognizing that an adversarial context can arise where there are collateral consequences flowing from an already completed cause of action);

(2) Judicial resources should be conserved for where they are needed (thus, where the court's decision will have some practical effect on the rights of the parties, where the court's decision is necessary to ensure that an important question evasive of review will be determined, or where there is an issue of public importance of which a resolution is in the public interest, the expenditure of judicial resources might be justified);

and

(3) Courts must remain within their proper law-making function, and pronouncing judgments in the absence of disputes affecting the rights of parties may be viewed as intruding on the sphere of the legislative branch.

The case was upheld on appeal by the British Columbia Court of Appeal in *Collins v. Abrams et al* 2004, BCCA 96. See also *OHRC v. Burrows and Ontario* 2004 HRTO 6.

[39] It is clear to me that the Complainant's Complaint on his own behalf and on his son Brendon's behalf was that the Respondent had engaged in a discriminatory practice by not permitting him or his son the opportunity to claim the death benefit under s. 57 of the New Veterans Charter, as a parent or sibling, on the death of Corporal Dinning, while hypothetically permitting certain family members (spouses, common-law partners and dependent children) of married fallen soldiers the opportunity to collect the death benefit. He obviously did not know at the time that he filed his Complaint or even after the conclusion of the hearing that when Corporal Dinning died he had a common-law partner - Ms. Lowerison and a dependent child. This fact was established by the Ruling of the Respondent of June 10, 2011 under s. 84 of the New Veterans Charter that was accepted into evidence following the hearing. The effect of this Ruling is that neither the Complainant nor his son Brendon is the parent or sibling of a single fallen soldier for the purposes of the New Veterans Charter. As noted earlier, the Complainant's evidence was that he would not have filed this Complaint or engaged in the hearing if he had known that Corporal Dinning had a common-law partner or a dependent child at the time of his death. His evidence was that his Complaint under s. 5 of the *CHRA* related to the situation under s. 57 of the New Veterans Charter of a single fallen soldier not to a married fallen soldier.

[40] In my opinion, a decision by the Tribunal on the merits of this case cannot now have the effect of resolving some controversy which affects or may affect the rights of the Complainant himself and his son Brendon. Events have occurred which affect the relationship of the parties such that no present live controversy exists which affects the rights of the Complainant himself

and his son Brendon. As such, I find that the Complainant's Complaint, on behalf of himself and his son, is now moot.

[41] As a consequence of my finding in paragraph 40, the question then becomes whether there still is a live controversy to support proceeding with a decision on the merits in this matter in relation to any allegation in the Complaint that the Respondent is engaging in or has engaged in a discriminatory practice contrary to s. 5 of the *CHRA*, in respect of any other individual or victim, by virtue of the denial of a service (the death benefit) under s. 57 of the New Veterans Charter or is the matter entirely moot?

[42] Reference in this paragraph should be made to the extracts in paragraph 3 of the *CHRA*. While purely public interest remedies are available under s. 53 (2) (a) of the *CHRA*, in addition to the personal remedies in the section, the *Act* is complaint driven. In the case of a complaint respecting s. 5 of the *CHRA*, there must first be a complaint filed that alleges that a person has engaged in or is engaging in a discriminatory practice under that section against an individual or victim. This is so, whether the Complainant is the individual or victim (as was previously alleged in this case) or some other individual or victim referred to (though not necessarily identified as a particular individual) on behalf of whom the Complainant has filed the complaint. This is so whether or not consent has been obtained from such other individual or victim under s. 40 (2) of the *Act*. Only if liability is established in such a complaint, can the public interest remedies be imposed in appropriate circumstances whether or not personal remedies are also sought and imposed. A challenge to the validity or operability of legislation and the application of public interest remedies related thereto as is being pursued in this case, is not permissible under the *CHRA*, except within the context of this complaint driven process.

[43] In this case I am being asked to make a decision respecting the validity or operability of important legislative action under s. 57 of the New Veterans Charter in that it is alleged that this section currently is under inclusive with respect to beneficiaries and allows the Respondent to deny a service to individuals on the basis of family or marital status in a discriminatory manner

contrary to s. 5 of the *CHRA*. However, in this case there is now an absence of a dispute affecting the rights of the Complainant himself. As such, a decision would have no practical effect on the rights of the Complainant himself. In such circumstances, based upon the cases referred to above, one must be very careful not to intrude into the role of the legislative branch or waste scarce judicial resources.

[44] I agree with the Respondent's submission that in the absence now of a live controversy involving the Complainant himself, the Complaint must be examined carefully to determine whether it sufficiently includes a live controversy involving some other individual or victim allegedly discriminated against by the Respondent in this matter. This is especially important in view of the fact that the validity or operability of legislation is what is now left to be determined in this case.

[45] In this regard, the Complaint, as quoted from in paragraph 4, refers only to the "families of SINGLE fallen Soldiers" who are being discriminated against. Is this reference sufficient to allow me to proceed with a decision on the merits of this case, involving a challenge to the validity and operability of legislation where the Complainant's own Complaint is now moot, in view of the following findings of fact?

- (i) Until the Ruling by the Respondent described in paragraph 29, the Complainant focused his case on his own circumstances that he believed to be true - namely, that he was the parent of a single fallen soldier. He did not file the Complaint on the basis that he was an individual unaffected by the legislation who was simply filing a complaint on behalf of unidentified parents or families of single fallen soldiers who were affected by the legislation. In fact, he stated that he would not have filed the Complaint or appeared at the hearing if he had known that his son Corporal Dinning had a common-law partner at the time of his death. It is quite conceivable, under the circumstances, that the Commission in investigating his Complaint did not obtain the consent of other

individuals or victims under s. 40 (2) of the *CHRA* because it too believed that the Complainant was himself a victim.

(ii) The Complainant did not agree with the Commission's position respecting the under inclusiveness of s. 57 of the New Veterans Charter *vis-a-vis* the families of married fallen soldiers. The Complaint was not amended to recognize this allegation and was therefore not part of what was referred to the Tribunal by the Commission and it did not itself commence a complaint on behalf of the families of married fallen soldiers.

(iii) The Complaint was not brought with the support/authorization or consent from any family member of any fallen soldier who identified himself as a victim of discrimination as a consequence of the death benefit provision in the New Veterans Charter contrary to s. 5 of the *CHRA*. The only witnesses other than the Complainant, who appeared at the hearing who were family members of fallen soldiers, gave evidence in support of the Respondent's case respecting the impact of the death of their father or spouse as immediate family members in a military family. As such, it is unknown whether there are any family members of fallen soldiers who feel that they have been or are being discriminated against or feel that the New Veterans Charter is under inclusive in its definition of survivors and should be amended.

[46] Based on the foregoing facts and the cases referred to in paragraph 38, I am not satisfied that there is sufficient evidence to conclude that there are any parties in this matter for whom there is a live controversy now that the Complaint in respect of the Complainant himself is moot. A decision under these circumstances would not have the effect of resolving some controversy which affects or may affect the rights of any party as events have occurred which affect the relationship of the parties such that no live controversy exists. There is a need to ration scarce judicial resources. The mootness doctrine is not applied in situations where to do so would permit certain questions to evade review - not a likely possibility in this case where the legislation has been in place for some time and there is nothing preventing live disputes with

respect to it arising which would allow other persons to challenge the impugned provisions. Pronouncing judgments, in the absence of a dispute affecting the rights of the parties, as would be the case here if I were to proceed, would intrude into the role of the legislative branch. This is especially relevant in this case where legislative action is being challenged and it is not clear that there is a public interest.

V. Order

[47] For the foregoing reasons, I find that the Complaint is not substantiated as the matter has become entirely moot. The Complaint is therefore dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
November 25, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1463/0910

Style of Cause: Lincoln Dinning v. Veterans Affairs Canada

Decision of the Tribunal Dated: November 25, 2011

Date and Place of Hearing: March 21 to 25, 2011
March 28 and 29, 2011
April 4 and 5, 2011

London, Ontario

Appearances:

Lincoln Dinning, for himself

Brian Smith and Samar Musallam, for the Canadian Human Rights Commission

Marie Crowley and Korinda MacLaine, for the Respondent