

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2022 CHRT 21

**Date:** July 12, 2022

**File Nos.:** T1898/12812; T1899/12912; T1901/13112

**Between:**

**Errol William Cushley, Jihan Falah, and Raynald Bouthillier**

**Complainants**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Veterans Affairs Canada**

**Respondent**

**Ruling**

**Member:** Jennifer Khurana

## Overview

[1] Errol William Cushley, Jihan Falah and Raynald Bouthillier are the complainants in these proceedings. They are all parents of soldiers killed in combat in Afghanistan between 2006 and 2009.

[2] The Tribunal wishes first to offer its condolences to the complainants for the loss of their sons. It also acknowledges the sacrifices their children made in service to the country.

[3] The complainants allege that the death benefit provision in the (now named) *Veterans Well-being Act*, SC 2005, c 21 (the “legislation”) is a discriminatory practice under section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the “Act”). None of the complainants qualified for the death benefit because, under the legislation, death benefits can only be paid to a member’s spouse, common-law partner or dependent children. There is no provision in the legislation that would allow for payment of a death benefit to any other surviving family member, such as a parent. The complainants’ sons were all single at the time of their death.

[4] The complainants challenge the respondent’s denial of death benefits and the eligibility criteria. They say it is discriminatory to pay a death benefit to a surviving spouse and/or dependent children, but not to the families of single soldiers. The complainants do not allege any discriminatory conduct by any individual or staff employed by the respondent, Veterans Affairs Canada (VAC).

[5] VAC filed a motion asking the Tribunal to dismiss the complaints because they have no reasonable prospect of success. VAC argues that the complaints do not fall within the scope of the Act because they challenge legislation which is not a “service” within the meaning of section 5.

[6] The Canadian Human Rights Commission (the “Commission”) agrees that the complaints should be dismissed. Mr. Bouthillier filed a response to the motion asking that the complaints be heard. The other complainants did not respond.

[7] For the reasons that follow, I find that the complaints must be dismissed. They are outside the scope of the Act and the Tribunal cannot proceed to hear them.

## **THE NATURE OF THE COMPLAINTS AND WHAT HAPPENED AFTER THEY WERE FILED**

[8] Errol Cushley's son Private Willian Jonathan James Cushley was killed in combat in 2006. His father alleges that it is discriminatory that VAC does not pay a death benefit for a single fallen soldier but does pay one to the spouse and dependent children of married fallen soldiers.

[9] Jihan Falah's son Marc Diab was killed in 2009 by a roadside bomb while on duty. Ms. Falah alleges that as the parent of a single soldier, she is the victim of discrimination due to her son's marital and/or family status.

[10] Raynald Bouthillier's son Jack Bouthillier died in combat in 2009. Mr. Bouthillier says that if his son had been married, his spouse would have received a death benefit. Yet Mr. Bouthillier cannot claim the benefit because his son was not married, which he alleges is discriminatory on the basis of marital and/or family status.

[11] The complaints were stayed, or suspended, pending relevant litigation in two other complaints before the Tribunal that also challenged federal legislation, namely, the *Indian Act*, RSC 1985, c I-5. The Tribunal dismissed those complaints and found that section 5 of the Act could not be used to directly challenge discrimination written into federal laws passed by Parliament (*Matson et al v. Indian and Northern Affairs Canada*, 2013 CHRT 13; *Andrews et al v. Indian and Northern Affairs Canada*, 2013 CHRT 21) [known together as *Matson/Andrews*]. In other words, law-making is not a "service" within the meaning of the Act and challenges to federal laws must be made in the courts. The Commission sought judicial review of the decisions, which were upheld by the Federal Court (*Canadian Human Rights Commission v. Canada (Attorney General)*, 2015 FC 398), on appeal to the Federal Court of Appeal (*Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200), and ultimately to the Supreme Court of Canada (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31).

[12] The Tribunal wrote to the parties after the Supreme Court of Canada released its decision upholding the Tribunal's findings in *Matson/Andrews*. While the complainants indicated that they wished to proceed with their complaints, the Commission and VAC stated that the complaints are beyond the scope of the Tribunal's jurisdiction and cannot proceed.

[13] VAC then filed this motion following the Tribunal's direction, requesting that the Tribunal dismiss the complaints. While the Commission does not believe the legislation is non-discriminatory, it agrees that challenges to legislation must be pursued in the court system and does not oppose the request for an order.

## ISSUES

[14] I must decide whether these complaints are within the scope of s. 5 or whether they should be dismissed as they have no reasonable prospect of success. I am not determining whether the legislation is discriminatory or whether it was unfair.

[15] To decide whether the Tribunal has the jurisdiction to hear these complaints, I must answer the following questions:

- 1. Do the complainants challenge legislation? If so, do they also allege discrimination in how a service was provided to them?**
- 2. If the complaints are a challenge to legislation only, do they fall within s.5 of the Act?**

## REASONS

[16] The Tribunal is master of its own procedure and has the authority to determine the process to be followed in deciding the issues raised by a human rights complaint. It does not always have to hold a full evidentiary hearing in relation to each and every issue raised by a complaint to decide substantive issues coming before it (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para 119) [*First Nations Child and Family Caring Society*]. The nature of the procedure to secure the just, fair and expeditious determination of each complaint coming before the Tribunal may vary from case

to case, depending on the type of issues involved (*First Nations Child and Family Caring Society* at para 128).

[17] The Tribunal may consider and grant preliminary motions to dismiss cases but must do so in a procedurally fair manner and cautiously, and only in the clearest of cases (*First Nations Child and Family Caring Society* at paras 132 and 140).

[18] In my view, this is a situation where it is appropriate for the Tribunal to decide this discrete threshold question on a preliminary basis. The parties were given the opportunity to file motion materials and submissions. It is not a situation where issues of fact and law are complex and intermingled (*First Nations Child and Family Caring Society* at paras 142-143) such that it would be more efficient to proceed to a full hearing on the merits.

**1. Do the complainants challenge legislation? If so, do they also allege discrimination in how a service was delivered to them?**

[19] Yes. The complainants see the effect of the legislation as discriminatory because they say it unfairly denies the death benefit to families of fallen soldiers who were single and did not have children simply because of their marital status and because they died without children.

[20] In other words, these complaints are directed at the legislation itself. The complainants do not allege that VAC staff behaved in a discriminatory way in their administration of the legislation. Rather, the complainants take issue with the fact that Parliament has made a choice in the legislation not to pay benefits to the families of single fallen soldiers.

**2. If the complaints challenge legislation only, do they fall within the scope of s.5 of the Act?**

[21] No. It is settled law that s.5 cannot be used to support a direct challenge to legislation. Section 5 of the Act requires that services customarily available to the general public be provided in a non-discriminatory manner (*Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1 at para 102) [Beattie]. However, law-making is not a

service customarily offered to the public and legislation does not in and of itself constitute a “service” (*Matson/Andrews*, at paras 57-62).

[22] In certain cases where government officials have discretion in implementing legislation, or where legislation is ambiguous and open to multiple interpretations, a case may well fall within the scope of the Act (*Beattie* at paras 99 and 102).

[23] But that is not the situation here. The complainants are challenging what they allege are the discriminatory impacts that flow from the application of the unambiguous eligibility criteria written into the legislation. They do not challenge the way VAC employees provided a service primarily available to the public, processed their claims for benefits or applied the legislation. Further, the respondent’s employees had no discretion to pay death benefits to the complainants according to the wording of the legislation.

[24] Considering the jurisprudence and the nature of the complaints, I agree with VAC and the Commission that these complaints have no reasonable prospect of success. They cannot proceed and must be dismissed.

[25] In his response to VAC’s motion, Mr. Bouthillier writes that his son Jack was misled into believing that the Canadian Armed Forces provided a life insurance policy for his beneficiaries, including his parents. His son thought his parents would be taken care of. Had he known that the benefits would only be paid out to a spouse or children, he would have taken other steps to protect his family. Mr. Bouthillier argues that there are other families in the same situation who are suffering after the loss of their children. He further suggests that the government has the duty to properly inform its most honourable citizens.

[26] Mr. Bouthillier submits that the case has its own merit and needs to be heard so that all soldiers are provided with the same opportunities and are well-informed. He feels that without hearing the case, justice cannot be served to our fallen soldiers.

[27] I emphathise with Mr. Bouthillier’s and the other complainants’ frustration. They have lost loved ones and find the limitations of the legislation governing death benefits for fallen service members to be unfair. They do not understand why as parents of children who served Canada and died in battle, they are not entitled to a death benefit as the ones who

parented and supported their children and who have suffered the tragedy of their children's deaths.

[28] I also acknowledge that the complainants want to challenge the substance of the legislation and are being told after several years of waiting and trying to advocate for themselves, that this Tribunal is not the place they can do so. This is a long and frustrating process, and for the Tribunal's own delay in addressing their claims, I apologise.

[29] However, as I have found that the complaints do not challenge the way a service was provided, and only target the legislation itself as discriminatory, the complaints are outside the Tribunal's jurisdiction to decide, and I am barred from proceeding.

[30] Finally, while I am bound to apply the law and dismiss these complaints, I again acknowledge the sacrifices made by the complainants' sons and their families. I express my sympathy to the complainants for their ongoing loss and all they continue to endure.

## **ORDER**

[31] For the reasons set out above, the respondent's motion is allowed. The complaints are dismissed.

*Signed by*

Jennifer Khurana  
Tribunal Member

Ottawa, Ontario  
July 12, 2022

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T1898/12812; T1899/12912; T1901/13112

**Style of Cause:** Cushley et al. v. Veterans Affairs Canada

**Ruling of the Tribunal Dated:** July 12, 2022

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Raynald Bouthillier, for himself

Brian Smith, for the Canadian Human Rights Commission

Sean Stynes, for the Respondent