



## 2002-174

Representative: Jane Michael, BPA  
Decision No: 100000446174  
Decision Type: Entitlement Appeal  
Location of Hearing: Charlottetown, Prince Edward Island  
Date of Decision: October 29, 2002

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As a result of the Entitlement Appeal hearing brought forward by the surviving spouse of the late appellant, held 29 October 2002, this Board rules as follows:

### RULING

#### ELIGIBILITY TO WIDOW'S PENSION

The review panel decision of 20 February 2002 is affirmed.  
Subsections 45(1) and 47(3), *Pension Act*.

Paragraph 29(1)(a), *Veterans Review and Appeal Board Act*

Original signed by:

\_\_\_\_\_ Presiding Member  
E.A. McNally

\_\_\_\_\_ Member  
Felipe Pascual

Original signed by:

\_\_\_\_\_ Member  
Robert Benoit

### ISSUES

An Entitlement Appeal hearing was held in Charlottetown, Prince Edward Island by way of written submission on 29 October 2002 as the surviving spouse of the late Veteran was dissatisfied with an Entitlement Review Decision of 20 February 2002. Ms. Jane Michael was the representative.

The question for the Panel to determine is whether the Appellant, as a separated and former spouse of the deceased Veteran, is entitled to a survivor's pension under subsection 47(3) of the *Pension Act*?

### EVIDENCE

The Advocate submitted the following exhibits as evidence:

EA-Attach-B1: Excerpt from Pension Policy Manual, Article 47 (1)(2)(3) - Pension to Divorced and Separated Widows.

### Eligibility to Widow's Pension

## FACTS AND ARGUMENT

The Appellant married the now deceased Veteran in April 1943. A child was born later in that same year. According to the Appellant, the deceased Veteran had a drinking problem and was not a responsible father or husband. The couple separated in February 1945. After separation, they did not reunite, nor did they divorce. The Veteran died in 1966.

The Appellant entered into a marital relationship with another partner in 1946. This relationship produced two children. The relationship with this partner ended in 1952.

On behalf of the Appellant, the Advocate argued in her submissions to the Appeal Panel that the evidence in this case would establish that a legal entitlement to support existed in the early post-separation period, and in the period immediately prior to death, based on laws relating to desertion in existence at that time.

The Advocate also argued that there may have been an unwritten agreement for support between the Veteran and the Appellant after the marriage breakdown, in that documents on the file - at page 2 of the Statement of Case - showed that the Veteran may have felt he was maintaining his wife nearly a year following their separation. The Advocate also argued that the deceased Veteran saw the Appellant once within two years of their separation, and then, three or four times over the next twenty years, before the Veteran's death in June of 1966. He also visited with his daughter child at these times and on one of these occasions, the deceased Veteran purchased clothes for their child.

The Advocate argued that when all this evidence was taken into account along with the provisions of Article 47.B.7 of the Department of Veterans Affairs Pension Policy Manual, the Panel could infer under subsection 47(3) of the *Act*, that had the Appellant made an application for alimony, support, or maintenance, from the deceased Veteran under due process of law in any jurisdiction in Canada, she would have been found to be entitled to an award of support or maintenance.

## REASONS AND CONCLUSION

In arriving at this decision, this Board has carefully reviewed all the evidence, medical records and the submissions presented by the Representative, and has complied fully with the statutory obligation to resolve any doubt in the weighing of evidence in favour of the Applicant or Appellant as contained in sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

In this appeal of the Entitlement Review decision of this Board dated 20 February 2002, the Appellant is seeking a pension under subsection 47(3) of the *Pension Act*. On behalf of the Appellant, the Advocate argued that this Appeal Panel could award a pension under the discretionary provisions contained in subsection 47(3) of the *Pension Act*, because the Panel would now have sufficient information to infer that had the Appellant made an application for spousal support, or maintenance, from the deceased Veteran under due process of law in any jurisdiction in Canada, she would have been found to be entitled to such support.

At the outset, the Appeal Panel notes that the main issue before this Panel is whether the facts and circumstances of this case suggest that the Appellant would have had a legally enforceable right to spousal support in the period between the break-down of the marriage and the Veteran's death in 1966. However, it should also be noted that in any application under subsection 47(3) of the *Pension Act*, there are several issues which would have to be favourably resolved, before the Minister would have a proper basis to exercise jurisdiction to award a survivor's pension. The most basic requirement of subsection 47(3) of the *Act* is that the Applicant must be in a "dependant condition." Subsection 3(1) of the *Pension Act*, defines "dependant condition" as the "condition of being without sufficient income or assets." Whether a person is in a "dependant condition" or not, is an issue which may change over time and so it must always be determined based on current financial information. The Panel notes that neither the Review Panel, nor this Appeal Panel dealt with this issue, as the Board had no current evidence on the Appellant's financial condition, and were therefore not in a position to make a determination on the issue of "dependant condition."

The issue being determined in this appeal relates to the substantive requirement in subsection 47(3) of the *Act*, that the Minister must have some reason or grounds upon which to form an opinion that the Applicant would have been entitled to support had he or she made application for support under due process of law in any jurisdiction in Canada. In order to raise the inference that there are grounds in the facts and

circumstances of this case upon which the Minister could exercise discretion under subsection 47(3) of the *Act*, there must be some evidence which suggests that the Appellant would have had a legally enforceable right to spousal support in the period between the breakdown of the marriage and the Veteran's death in 1966.

The Advocate argued that the evidence in this case would establish that a legal entitlement to support existed in the early post-separation period, and in the period immediately prior to death, based on laws relating to desertion in existence at that time. The Advocate also submitted that there was evidence which could show an intention on the part of the deceased Veteran to support the Appellant after their marriage ended in a permanent separation, and that this would also be capable of satisfying the requirements of subsection 47(3) of the *Pension Act*.

The first issue which will be dealt with by this Appeal Panel is whether the evidence suggests there was an unwritten, or implied agreement for support between the Veteran and the Appellant after their marriage broke-down. If the evidence could support such an inference, then this could provide a basis to reasonably draw the inference that the Appellant would have had a legally enforceable right to spousal support in the period between the break-down of the marriage and the Veteran's death in 1966.

**ISSUE No 1: Whether the evidence relating to the conduct of the spouses in this case would reasonably support the inference that there was an implied or oral agreement on the part of the deceased Veteran to support the Appellant, after their separation?**

In support of the argument that the Veteran may have been supporting the Appellant after their separation, the Advocate referred to documentation at page 2 of the Statement of Case and submitted that it could be taken to indicate that the Veteran may have felt he was maintaining his wife nearly a year following their separation. This document was an application for additional pension in respect of dependants which was signed by the Veteran on the 12<sup>th</sup> day of February 1946. In it, the Veteran indicated that he had been living with and maintaining his wife - continuously since their marriage.

This document shows that at the time that it was signed - 12 February 1946 - the Veteran did not acknowledge to the Department of Veterans Affairs that there had been a separation or break-down of the marriage in 1945. It is not clear why. However, the Veteran's statements in this document are contradicted by all of the other evidence on file, including the statements of the Appellant in hearings before this Board, and written statements on file which indicate that she was not living with, nor was she being supported by the Veteran in 1946. The written statements on the file from interviews with the Appellant indicate that by 1946, the marriage to the Veteran had in fact ended, and that she was receiving no support from the Veteran. That was also the year in which the Appellant had commenced a common-law relationship with another partner. In light of the contradictory evidence in file, this document is not capable of establishing that the deceased Veteran was in fact supporting the Appellant in 1946.

The Advocate also argued that the deceased Veteran had maintained some contact with the Appellant after their separation, in that he looked her up and visited her within two years after the separation. It was submitted that prior to the Veteran's death in June of 1966, the Appellant was visited by the deceased Veteran three or four more times. On one of these occasions, he purchased clothes for their child. The Advocate referred to Article 47 of the Department of Veterans Affairs Pension Policy Manual which provides in the section dealing with separated and divorced widows in part B.7 that an oral agreement to pay spousal support may be inferred from the conduct of the parties existed in that particular case. Article 47.B.7 of the Department of Veterans Affairs Pension Policy Manual was included as Attachment - B1 to the Advocate's submissions.

Article 47.B.7 of the Department of Veterans Affairs Pension Policy Manual indicates that in some situations after marriage breakdown, where a pensioner has made regular or uniform monthly payments to a wife or former wife, the Department could use this to infer that an oral agreement to pay spousal support existed in that particular case. The policy states that the inference in favour of an oral agreement could be raised even if there were no cash payments made directly to a former wife or partner, but the pensioner instead contributed to, or paid their spouse's or former partner's rent, mortgage, taxes, food, clothing and other expenses.

First, this Panel must note that Article 47.B.7 of the Pension Policy Manual appears to be applicable to the interpretation of subsection 47(1) of the *Pension Act*, rather than to subsection 47(3) of the *Act*, under which

this claim is being pursued. This is confirmed by the first sentence in paragraph B.7 which states that it applies to cases where "...an award under subsection 47(1) of the *Act* is dependant upon an 'oral agreement'. ...". The purpose of the policy in Article 47...B.7 of the Pension Policy Manual is to provide Adjudicators with information they would need in order to recognize whether an oral agreement to pay support was in existence, which can then lead to a pension being granted under subsection 47(1) of the *Act*. As this policy is intended to assist in the interpretation of subsection 47(1) of the *Act*, rather than 47(3) of the *Act*, it may not be capable of providing a great deal of assistance in this case.

In any event, the Panel has considered all the evidence and submissions to determine whether it could reasonably be inferred under section 39 of the *Veterans Review and Appeal Board Act* that the conduct or behavior of the parties after the marriage suggested an oral agreement to pay spousal support or maintenance, under section 47 of the *Pension Act*. The Panel finds that the evidence does not reasonably support this inference.

The Panel notes that Article 47.B.7 of the Pension Policy Manual refers to situations after marriage breakdown, where a pensioner would have made regular uniform monthly payments to a wife or former wife. Where evidence payments made with some regularity existed, this could be a factual basis upon which a Departmental Adjudicator could infer from the conduct of those parties that an oral agreement to pay spousal support existed in that particular case.

On the facts of this case, there was - unfortunately - no evidence of regular monthly or regular uniform payments. There was not even evidence to suggest an occasional payment from the deceased Veteran to the Appellant for her support. There was clearly no evidence of payments toward rent, mortgage, taxes, food, clothing, or other necessary expenses, being made to the Appellant, regularly or even irregularly for her support. Clearly, this provision of the Pension Policy Manual cannot apply to the facts of this particular case, given that the factual evidence relating to the conduct or behaviour of the parties are not facts from which an oral agreement to pay spousal support or maintenance could reasonably be inferred.

This Panel also notes that this conclusion is further supported by the testimony of the Appellant and evidence relating to the facts and circumstances of the marriage which were placed before this Board at the review hearing on 20 February 2002 in Kingston, Ontario. This Panel refers to the Review Panel's decision of 20 February 2002 which contained an outline of the facts - as stated by the Advocate who represented the Appellant in the Review Hearing - which were accepted by the Review Panel in the review hearing:

... At the hearing, the applicant's [now the appellant's] evidence will confirm that during the short term of the marriage the deceased Veteran literally paid for nothing. The applicant paid for the hospital bills relating to the birth of their daughter and also paid for all costs of living, including shelter and food during their marriage.

... During their entire marriage, the deceased Veteran carried on as a single man and really had no interest in the family or in their marriage. The applicant was forced to leave the room in which they were living on 6 February 1945 when the deceased Veteran told the applicant that he would never keep her and support her.

Given all that had transpired and the deceased Veteran's lack of interest in their marriage and in their family, the applicant had no choice but to leave, which she did. The applicant moved to \*\*\*\*\* where she was able to secure a job. **After 6 February 1945 the deceased Veteran made no attempt to provide for his family in any way even though he was still employed with the military and was able to provide for his family.** (emphasis added)

The only reasonable inference raised by all of the evidence is that no support was provided to the Appellant by the now deceased Veteran after their separation in 1945.

The Advocate also placed emphasis on the fact that the deceased Veteran had occasionally visited his daughter child and on one occasion, he bought clothing for her. However, the Panel is unable to find that this particular information or fact would establish entitlement to a survivor's pension for the Appellant under subsection 47(3) of the *Pension Act*. First, while this Panel accepts that the deceased Veteran paid for the child's clothing on one occasion, this evidence in this case does not indicate that the deceased Veteran paid support to the Appellant for the child.

However, even if the evidence showed payment of child support by the deceased Veteran to the Appellant, the Panel is unaware of any law or legal authority which would allow it to conclude that payment of child support, or the existence of a legal right to child support, establishes or constitutes evidence of a right to spousal support. These are separate legal issues and entitlement to one type of support, does not establish a legal claim for entitlement to the other. On this point, the Panel notes that the portion of the Department of Veterans Affairs Pension Policy Manual which was referred to earlier in this decision (Article 47.B.7) did not state that payment of expenses or items which go to make up the necessities of life for the support of a child, would be taken as evidence of an implied agreement to pay spousal support. Therefore, the Panel is unable to reasonably conclude that evidence of approximately four visits over 21 years or the purchase of clothing for the child of their marriage is a fact which would indicate that spousal support was paid from the deceased Veteran to the Appellant.

The facts and circumstances of this case can only reasonably support the inference that no support was provided to the Appellant - either for her own support, or the support of the child - by the Veteran after the separation. As a result, the argument that there was an unenforced or unenforceable oral agreement in existence here, which could then satisfy subsection 47(3) of the *Pension Act*, cannot succeed.

This leads the Panel into the second issue to be determined in the Appellant's case under subsection 47(3) of the *Pension Act*. In examining the next issue, the Panel will consider the entire set of facts and circumstances in the Appellant's case, and make the determination required under subsection 47(3) of the *Pension Act*, as to whether the Appellant may have possessed a legally enforceable right to payment of spousal support from the Veteran prior to his death.

**ISSUE NO. 2: Whether the particular facts and circumstances of the Appellant's case indicate that it is an appropriate case for the exercise of the Minister's discretionary authority to award a survivor's pension to a former spouse, under subsection 47(3) of the *Pension Act*?**

Subsection 47(3) of the *Pension Act* indicates that the Minister may award a pension to a separated or former spouse of a deceased Veteran, where the Minister is of the opinion that the person would have been found to be entitled to support had he or she made application for support under due process of law in any jurisdiction in Canada. The provision requires that the Minister - or other decision-maker - have some basis or grounds upon which to form an opinion that the Applicant in question would have been entitled to an award or order of support, had he/she applied for support under due process of law. Thus an Applicant for a pension under subsection 47(3) of the *Act* would have to show there is some basis on which one could reasonably conclude that an enforceable legal entitlement to spousal support may have existed, prior to the Veteran's death.

The Advocate argued in her submissions to the Appeal Panel that the evidence in this case would establish that a legal entitlement to support existed in the early post-separation period, and in the period immediately prior to death, based on laws relating to the rights of deserted wives, which existed at the time that the marriage broke down in 1945.

At the review level hearing in this matter, the issue of entitlement to alimony based on the desertion laws in effect around 1945, was fully canvassed. The Advocate who represented the Appellant on review, cited and referred to legislation which would have been in force after the breakdown of the Appellant's marriage to the deceased Veteran, as well as court cases dealing with husbands who had deserted their wives and were later found to be responsible for paying support to their deserted spouses.

In its decision of 20 February 2002, the Review Panel did not accept that the Appellant would have been entitled to spousal support under the laws of that time, based on the argument that she was a deserted spouse, because in its opinion, the facts of the case could not support the conclusion that the Appellant was in fact deserted by the deceased Veteran. The Review Panel noted in particular that the Appellant testified at the Review hearing, that the marriage ended when she left the marital living quarters in February of 1945. Although it was clear that the Appellant felt she had no choice due to the conduct of the deceased Veteran and his failure to support the family, the Review Panel did not conclude that a constructive desertion had occurred.

This Panel upholds the Review Panel's finding as it is reasonable in light of the evidence. While this Appeal Panel is left in little doubt that the marriage in question was a difficult and unhappy experience for the

Appellant, it must note that the majority of statements in the documentation on file, do not lend support to the argument that there was in fact a desertion of the Appellant and her child by the deceased Veteran.

However, it is important to note that the Appellant's case does not turn entirely or primarily on the issue of desertion. The Review Panel's reasons made this abundantly clear when it indicated in its reasons that the issue of entitlement to support, based on the grounds of desertion, was not the sole, or relevant consideration in the Appellant's case. In its Entitlement Review decision of 20 February, 2002, the Review Panel clearly stated that in exercising the legislative discretion granted under subsection 47(3) of the *Act*, that the entire set of facts and circumstances relating to the marriage, and the conduct of both parties after the marriage, should be taken into account. This Appeal Panel agrees with the Review Panel's reasoning in relation to the proper exercise of discretion under subsection 47(3) of the *Act*.

The Appeal Panel also notes that in the Advocate's submissions on appeal, it was submitted that the facts of the particular case are critical to the determination of whether the discretionary authority under subsection 47(3) of the *Act* should be exercised. This Appeal Panel concurs with this aspect of the Advocate's submissions, in that every decision made under subsection 47(3) of the *Act* will ultimately be based upon the specific facts of the specific case. On this point, it is important to note that many of the relevant facts relating to the question of whether a legally enforceable right to support existed after the marriage ended, will concern the circumstances, and conduct of the parties in the years following the breakdown of the marriage.

In cases where many years have elapsed since the marriage breakdown, without any spousal support actually being paid or claimed, the significant question which arises in making a determination under subsection 47(3) of the *Act* is: what particular period of time should the Minister consider when determining whether the separated spouse would have possessed a legally enforceable claim to be supported by the Veteran?

The Panel cannot accept that it is only necessary to look at the limited time period immediately after the marriage broke down in determining the question raised under subsection 47(3) of the *Act*. The point is that in a case where many years elapsed after the marriage ended, then the years subsequent to the marriage breakdown is a period of time which cannot be ignored by the Minister in determining whether an Applicant under subsection 47(3) of the *Act* would have been entitled to spousal support, had they applied for it.

As the Review Panel commented in its decision, the legally enforceable right to make a claim for support under due process of law which is referred to in subsection 47(3) of the *Act*, may exist upon marriage breakdown, but does not necessarily continue indefinitely. This Panel notes that the passage of time may have an adverse effect on subsequent attempts to obtain spousal support is clear from the case law in this area. Case law on spousal support indicates that where there is a delay by a spouse in enforcing their legal right to spousal support, and there is no reasonable explanation put forth to explain the delay, a court may refuse to award support. It is therefore clear that under "due process of law" before Canadian courts, the presence of a delay in requesting spousal support is an important circumstance to be considered.

Given this, clearly the presence of significant delay or passage of time after the marriage breakdown, without payment of support, is a relevant factor to be considered by the Minister under subsection 47(3) of the *Act* in determining whether an Applicant for a survivor's pension would have been entitled to receive support had they requested it under due process of law. This Panel is not suggesting that any delay or lapse of time after marriage breakdown - no matter how insignificant - should be considered problematic. It is simply saying that the entire period of time, between the marriage breakdown and the Veteran's death must be taken into account when considering an application under subsection 47(3) of the *Act*. A lengthy lapse of time after marriage breakdown without payment of support, and with little or no connection between the spouses may suggest a case where there would no longer have been a viable or enforceable legal right to spousal support to be recognized under due process of the law. In such a case, an application under subsection 47(3) of the *Pension Act* could not succeed because there would be no grounds on which the Minister's discretion could properly be exercised.

This Panel also agrees with the conclusions of the Review Panel in its 20 February 2002 decision on the issue of the proper time-frame or time-frames to be considered by the Minister in considering whether the Applicant would have been entitled to support had she or he applied for it, under due process of law. In its decision, the Review Panel examined the other sections of the Pension Act which provided for payment of pensions to spouses, children, common-law partners, or even parents of a Veteran, after a Veteran's death.

The Panel concluded that the clear intent and objective of the Pension Act in providing for such pensions was to provide some means of support for persons who were financially dependant on, or who were financially supporting, a Veteran at the time of death, not persons whose dependency on the Veteran, had ceased to exist as of the date of death.

In this regard, reference is made to the words of the Review Panel at page 9 of their decision:

Subsection 47(3) of the *Pension Act* makes no explicit reference to the date of, [death] or [nor to] a reasonable time prior to death. However, it is a discretionary provision, which should be read in light of the overall objectives and the purpose of the *Pension Act* and interpreted in a manner consistent with the other provisions relating to pensions for surviving relatives of a veteran prior to death. The overall intent of the *Pension Act* in relation to pensions after a Veteran's death is to provide for persons who were dependent on, receiving support from or entitled to receive support from the veteran around the date of death, rather than at an isolated point in time in the past. Subsection 47(3) of the *Pension Act* should be interpreted with the same objective in mind. If it were not, an absurd interpretation would result in that a former spouse or former common-law partner would seem to have a less onerous legal test under the *Act*, than a person who was actually a spouse of a veteran at the time of death. (emphasis added)

This Appeal Panel affirms this interpretation as it is consistent with the interpretive provisions in section 2 of the *Pension Act*, and section 3 of the *Veterans Review and Appeal Board Act* which states that the purpose of the legislation is to provide compensation to members of the forces and their dependants.

This Panel notes that subsection 47(3) of the *Pension Act* appears to recognize that a Veteran may die having a separated spouse or former partner who was *legally entitled* to be considered a dependant, at the time of death. Although the former spouse's or former partner's opportunity to obtain support under a formal legal order or agreement would have expired when the Veteran died, subsection 47(3) would allow the person to be constructively considered a dependant of the Veteran prior to the death, by virtue of their legally subsisting and enforceable - although unenforced - right to support.

The question of whether a person could constructively be considered a "dependant" of a Veteran is question of fact which has to be answered by reference to a particular point in time. The particular point in time for determining the question of whether a person could have been a constructive dependant of a Veteran would have to be some time reasonably prior to the Veteran's death. This would ensure that pensions under subsection 47(3) of the *Act* are provided only to those persons who could reasonably have been considered to be legally or constructively dependant upon the Veteran prior to and around the time of the death. This interpretation would be consistent with the stated objective and purpose of the *Pension Act* in section 2 to provide support to dependants - and not former dependants - of Veterans, and would also be consistent with the other provisions in the Pension Act which provide pensions to dependants of a deceased Veteran.

For the foregoing reasons, the Panel finds that it is not appropriate to look only at the limited time period immediately after the marriage breakdown in determining the issue of whether the Minister or any Review Panel could have reasonably formed the opinion that "... the person would have been entitled to an award of alimony, support, maintenance, or an alimentary or other allowance had the person made application for it under due process of law in any jurisdiction in Canada... ."

In the exercise discretion in cases under subsection 47(3) of the *Act*, the relevant factors to be taken into account would include the circumstances and length of the marriage, and its breakdown, the division of labour during the marriage, the financial contributions made by the spouse during the marriage, the relationships and circumstances of the spouses after the marriage breakdown, and length of time which elapsed between the marriage breakdown and the date of the Veteran's death. These are the same considerations which are taken into account in resolving questions of entitlement to spousal support in Canadian Courts under due process of law. The relevant and uniform considerations and principles which apply to the determination of applications for spousal support by the courts throughout Canada are set-out in section 15.2 of the *Divorce Act*.

A review of the facts and circumstances of this particular case, do not suggest that if there had been a legal right to claim support from the Veteran after the marriage ended in 1945, that the right to support would have continued to exist or subsist up to a reasonable period of time before the death of the Veteran. The marriage was brief, lasting about 2 years, before the Appellant and Veteran separated in 1945. There was

one child of the marriage. After the marriage ended with the separation of the parties in 1945, there was a 21 year period of separation with no evidence of financial inter-dependence, or any significant or intimate social contact between the Veteran or Appellant, in the years between marriage breakdown and the Veteran's death in 1966.

The lengthy delay of the Appellant in making a claim for spousal support was not explained. The Appellant's subsequent relationship, the Veteran's poor health and his apparent inability to provide support, and societal attitudes would all be factors which would understandably discourage a separated spouse from pursuing support. However, these are also factors which suggest that this would not be a case where the Veteran would have been ordered or compelled to pay spousal support, even applying the relatively liberal modern principles which govern spousal support under the *Divorce Act*. The main question which arises in modern-day spousal support cases is whether the spouse seeking support has been economically disadvantaged by the marriage and by its breakdown. The Supreme Court of Canada had stated that the right to support and its amount, involves a balancing of all the factors and objectives specified in section 15.2 of the *Divorce Act* and will include a range of issues such as the length of the marriage, spousal contributions, means, needs and self-sufficiency; and the need to try to find a fair distribution of the economic consequences of the marriage through the medium of spousal support: *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

It appears that the social and economic hardship and burdens arising out of this marriage and its breakdown were shared equally by both parties, with the notable exception of the burden of care for the child, which was not shared equally. The case law on support indicates that even in long-term marriages, a spouse is not automatically entitled to a permanent spousal support order simply because that spouse cared for the children: the right to, duration and amount of spousal support, if any, is always dependant on the entire set of circumstances of the particular case. Accordingly, this factor while compelling, does not support the conclusion that it would have entitled the Appellant to claim permanent spousal support from the Veteran throughout his lifetime, particularly when considered in light of the other compelling factors present in this case, such as the short duration of the marriage, the Veteran's health and his lack of means, the Appellant's subsequent common law relationship and the fact that there was no actual economic dependency by the Appellant on the Veteran, or vice versa.

While the Advocate argued that the Appellant was the legal spouse of the Veteran at the time of his death, and that this would be a factor entitling her to a pension under subsection 47(3) of the *Act*, the Panel is unable to accept this. While it is true that the marriage was never formally annulled or terminated by a formal legal decree, the marriage had ceased to exist in fact, long before the Veteran died. The Appellant left the marital home in 1945, and the parties lived separate and apart from that day forward. Beginning in 1946, the Appellant entered into a common law relationship with another partner. The relationship endured until 1952. Two children were born of this subsequent relationship, and it was 6 years in length. That the Appellant clearly considered herself to be in a marital type relationship with another partner is clear from the fact that she took his surname, and never resumed the use of the late Veteran's.

Under principles of law relating to divorce and separation which apply in every jurisdiction in Canada, a marriage is considered to have broken down, or ended when the spouses begin to live separate lives, and fully intend to live separate and apart from the other, without resuming cohabitation. Therefore, while it is true that there was no judicial or legal decree issued declaring the Veteran and the Appellant to be formally separated, or divorced, the actual conduct of the Appellant indicates that the marriage ended in 1945, when the parties began to live separate and apart. This Appeal Panel must conclude that the Appellant had not been a spouse of the Veteran at the time of his death: in fact, she was a former spouse. As a "former spouse", the Appellant would not satisfy the definition of "surviving spouse" or "survivor" under subsection 3 (1) of the *Pension Act*.

The facts in this case do not support the inference that the Appellant would have possessed an enforceable legal entitlement to spousal support from the Veteran prior to the date of his death, or for any reasonable time prior to his death. Thus, this Panel was unable to find that the facts of this case disclose the existence of appropriate legal or factual grounds, upon which the Minister - or the Review Panel - could form the opinion required under subsection 47(3) of the *Act*, that the Appellant was a "... person would have been entitled to an award of alimony, support, maintenance, or an alimentary or other allowance had the person made application for it under due process of law in any jurisdiction in Canada..." In the absence of the required grounds, the Panel is unable to reasonably infer that this case is an appropriate one for the exercise



of the discretionary power under subsection 47(3) of the *Pension Act*, and must affirm the Review Panel's decision.

## RELEVANT LEGISLATION

Section 2 of the *Pension Act* states that the provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

Subsection 3(1) of the *Pension Act* states that in this Act,

'dependent condition', with respect to a person, means the condition of being without sufficient income or assets, other than the premises in which the person resides, to maintain that person;

'surviving spouse', in relation to an individual, does not include, for greater certainty, a person who, at the time of the individual's death, was a former spouse of that individual.

'Survivor', in relation to an individual, means the surviving spouse or surviving common-law partner of that individual.

Subsection 45(1) of the *Pension Act* states that no pension shall be paid to the surviving spouse of a member of the forces unless the spouse was living with the member, was maintaining or being maintained by the member or was entitled to be maintained by the member at the time of the member's death and for a reasonable time before the death.

Subsection 47(1) of the *Pension Act* states that a spouse of a member of the forces who has died and who had been judicially separated or separated from the member, or a former spouse or former common-law partner of a member of the forces who has died, is not entitled to a pension unless the person was awarded alimony, support or maintenance or was entitled to an allowance under the terms of a written agreement with the member, in which case the Minister may award to the person the lesser of

(a) the pension the person would have been entitled to as a survivor of that member, or

(b) a pension equal to the alimony, support or maintenance awarded to the person or the allowance to which the person was entitled under the terms of the agreement.

Subsection 47(3) of the *Pension Act* states that where a person described in subsection (1) is in a dependent condition, the Minister may award a pension at a rate not exceeding the rate provided for a survivor in Schedule II or determined pursuant to subsection 45(3) or (3.01), whichever rate is applicable, although the person has not been awarded alimony, support, maintenance or an alimentary allowance or is not entitled to an allowance under the terms of a written agreement, if, in the opinion of the Minister, the person would have been entitled to an award of alimony, support, maintenance, or an alimentary or other allowance had the person made application for it under due process of law in any jurisdiction in Canada.

Section 25 of the *Veterans Review and Appeal Board Act* states that an applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

Section 26 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the *War Veterans Allowance Act* or any other Act of Parliament, and all matters related to those appeals.

Section 3 of the *Veterans Review and Appeal Board Act* states that the provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and the Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

Section 39 of the *Veterans Review and Appeal Board Act* states that in all proceedings under this act, the Board shall draw from all the circumstances of the case and all the evidence presented to it every reasonable

inference in favour of the applicant or appellant; accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

Subsection 28(1) of the *Veterans Review and Appeal Board Act* states that an appellant may make a written submission to the appeal panel or may appear before it, in person or by representative and at their own expense, to present evidence and oral arguments.

Subsection 29(1) of the *Veterans Review and Appeal Board Act* states that an appeal panel may

- (a) affirm, vary or reverse the decision being appealed;
- (b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or
- (c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

## **DECISION BEING APPEALED**

### ELIGIBILITY TO WIDOW'S PENSION

The Minister's Decision of 1 February 2000 is affirmed.  
Subsections 45(1) and 47(3), *Pension Act*  
Subsection 21(a), *Veterans Review and Appeal Board Act*

VRAB Entitlement Review Decision dated 20 February 2002.

## **OTHER RELEVANT DECISION**

### ELIGIBILITY TO WIDOW'S PENSION

Widow's pension is not indicated pursuant to subsection 47(3) as there is no evidence to indicate you would have been entitled to an award of alimony, support, maintenance or an alimentary or other allowance had you made application for it under due process of law.

Minister's decision dated 1 February 2000

The late Veteran's spouse first applied for pension entitlement for eligibility to widow's pension more than three years ago.