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Full and Fair Payment of Pain and Suffering Compensation

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Executive Summary

We launched this review after receiving a complaint from a Veteran's loved one. The Veteran died after Veterans Affairs Canada (VAC) made a favourable Pain and Suffering Compensation (PSC) decision. He had no surviving spouse, common-law partner, or dependent children. The Veteran's estate was not entitled to full compensation because the Veteran had died before he could request to receive his compensation as a lump sum. The complainant—a loved one and a beneficiary of the Veteran's estate—could not apply for the remaining value of the lump sum compensation because only surviving spouses, common-law partners, and dependent children can do so.

Why this issue is important

The PSC benefit compensates Veterans for disabilities related to their service. How VAC pays the PSC can impact what happens to Veterans' compensation when they die. Veterans may receive more or less from monthly payments upon their death than from a lump sum payment. When they receive less, it is particularly unfair for Veterans who do not have a surviving spouse, common-law partner, or dependent child who may apply to receive the lump sum.

What we found

Our review found systemic unfairness for Veterans who die before they elect to cash out the full amount of PSC. This unfairness most impacts those who die without a surviving spouse, common-law partner, or dependent child because only these family members are eligible to receive the PSC lump sum after the Veteran's death.

We also found it fair that Veterans cannot elect the lump sum when they apply for PSC.

Key findings and recommendations:

- A new benefit regime implemented on April 1, 2019, changed the way pain and suffering compensation is paid. Previously, this compensation was a lump sum amount payable on the date VAC issued a favourable decision. If a Veteran died after this decision but before the payment, the full lump sum would be paid to their estate. Now the payment defaults to a monthly payment for life and if Veterans want a lump sum payment instead, they must request it in writing. The full lump sum is paid to the estate only when the Veteran has chosen the lump sum before their death but died before receiving it. When the Veteran has not made this choice, the lump sum is not paid out unless the Veteran has a surviving spouse, common-law partner, or dependent child. This is unfair. Lump sum PSC amounts are based on what Veterans could receive as lump sum compensation from Canadian courts, so Veterans have a fairness interest in entitlement to the full lump sum amount of the benefit.



- As set out above, when the Veteran’s loved ones do not fit within the categories of surviving spouse, common-law partner, or dependent child, the full amount of PSC may not always be paid. This limit on eligibility for payment is more likely to affect certain subgroups of Veterans, including women Veterans, Indigenous Veterans, and lesbian, gay, and bisexual Veterans. These limited eligibility categories do not account for the diversity of Veterans’ family compositions and they elevate the heterosexual man Veteran model.

Recommendation 1: Resolve the unfairness for single Veterans with no dependent children who would have received more through the Pain and Suffering Compensation lump sum than their monthly payments had they elected it before their death. One option would be for Veterans who die before making the election to be deemed to have elected the lump sum on the day before their death.

- Veterans cannot choose to receive PSC as a lump sum when they submit their application for benefits. According to the legislation, an election cannot be made before a favourable decision is made. We find that this is fair because it would be impossible for Veterans to make an informed decision at the time of application, and once they make an election it cannot be reversed.

No recommendation required

- When VAC notifies Veterans of a favourable PSC decision, the decision letter explains that they have the option to receive the compensation as a lump sum. However, the letter does not include information about the impact of their choice on their beneficiaries if they die without a surviving spouse, common-law partner, or dependent child. It is not reasonable to assume Veterans would be aware that their estate is not paid the remaining amount of their compensation if they die while receiving monthly payments. This omission in the cover letter compromises Veterans’ ability to make an informed decision on whether to choose the lump sum.

Recommendation 2: Until Recommendation 1 is implemented, ensure Veterans receive detailed and plain language information explaining what happens should they die without having elected the lump sum.

Summary

We found unfairness in the design of VAC’s PSC benefit. This unfairness most affects Veterans who did not choose the lump sum before they died and whose loved ones do not fit the definition of surviving spouse, common-law partner, or dependent child. This means the PSC is more likely to benefit men Veterans in traditional, heterosexual, nuclear families. We also found there was not clear communication to Veterans about the possible impact of not choosing the lump sum, which makes it harder to make an informed choice.



We made one recommendation to address the unfairness in the design of the benefit. We made a second recommendation that applies until the first is implemented: to communicate that there are possible consequences of not choosing to cash out the PSC as a lump sum.



Full and Fair Payment of Pain and Suffering Compensation

Introduction

The Office of the Veterans Ombud (OVO) received a complaint from the family of a Veteran who died shortly after Veterans Affairs Canada (VAC) had rendered a favourable Pain and Suffering Compensation (PSC) decision, but before the Veteran was able to elect to receive the benefit as a lump sum. In accordance with the legislation, VAC paid to the Veteran's estate only the monthly PSC payments that the Veteran would have been paid while he was alive from the month of decision to the month of his death. Because the Veteran did not have a surviving spouse, common-law partner, or dependent¹ child, no member of his family could apply to receive the remaining value of the lump sum. During the course of our investigation into the complaint, the family also contacted the media about the issue and subsequently VAC paid the Veteran's estate the remaining PSC lump sum.

While VAC made an exception and resolved the issue for this family, there are other families who have been similarly impacted by the payment model of the PSC. Accordingly, the OVO launched this systemic review to assess the fairness of the PSC design that prevents the payment of the remaining lump sum in cases where Veterans² die without a surviving spouse, common-law partner, or dependent child.

Methodology

The OVO reviews systemic issues using a fairness model with three components: fair treatment, fair process, and fair outcome (Annex A). We define systemic unfairness as a practice, policy, procedure, rule, law, or gap therein that improperly discriminates³ against and negatively impacts a group of people who share a common attribute.

Our guiding research question was, "In light of the fact that only surviving spouses, common-law partners, and dependent children may apply posthumously to receive the residual value of the PSC lump sum, is it fair that this lump sum is not paid to the estate when the Veteran dies without having elected to receive the lump sum?"

To answer this question our review included:

- reviewing the applicable legislation and regulations
- reviewing the purpose and intent of the relevant benefits as captured in Regulatory Impact Analysis Statements
- requesting and reviewing information from VAC on policy rationales and policy design

¹ To be consistent with VAC legislation, this review will use the spelling "dependent" for the adjective, and "dependant" for the noun.

² For this systemic review, unless otherwise noted the term "Veteran" includes serving members of the Canadian Armed Forces (CAF), but does not refer to members or former members of the Royal Canadian Mounted Police (RCMP), as they are not eligible for benefits under the *Veterans Well-being Act*.

³ "Discrimination" is not always improper. The Canadian Council of Parliamentary Ombudsman explains: "When delivering public services, to achieve the purposes of the program or service, public organizations are sometimes required to discriminate, in the sense of making distinctions between different people." For example, only those who have served in the CAF or the RCMP – and in some cases their dependants – can access VAC benefits. "Making distinctions between people becomes *improperly* discriminatory when it distinguishes between people based on personal characteristics (e.g. race, disability or religious belief) in a manner that is contrary to human rights legislation. Improper discrimination also occurs when the discriminating criteria is not reasonably required to meet the overall purpose of the legislation, program or service" (Canadian Council of Parliamentary Ombudsman, 2022, p. 14).



- requesting and reviewing client statistics and client communication information from VAC
- applying a Gender-Based Analysis Plus lens, researching available demographic data

We shared a draft of the report with VAC officials for validation prior to publication.

Background

Pension for Life

VAC introduced Pension for Life in 2019. Pension for Life is a package of three benefits: PSC, Additional Pain and Suffering Compensation, and the Income Replacement Benefit. Its introduction was the most extensive change to Veterans' benefits since the New Veterans Charter⁴ in 2006. Effected through amendments to the *Veterans Well-being Act* (VWA) and *Veterans Well-being Regulations*, Pension for Life consolidated financial benefits and discontinued the Disability Award (DA). Effective April 1, 2019, the PSC replaced the lump sum DA with a monthly payment for life. However, Veterans can choose to receive their PSC as a lump sum. The PSC is now the Department's principal disability benefit, which compensates for service-related disability and provides access to other VAC benefits such as healthcare coverage. Like the DA, when a Veteran has died, the PSC may be paid to their surviving spouse or common-law partner and/or dependent child(ren) for the non-economic impacts they have suffered due to the Veteran's service-related disability (Government of Canada, 2005, p. 4215; Government of Canada, 2018).

Pension for Life was Government's chosen option to fulfill the 2015 mandate letter commitment to "[r]e-establish lifelong pensions" (Prime Minister of Canada, 2015). Many in the Veteran community expected that this would mean a return to Disability Pensions⁵ for all injured Veterans (Forbes, 2023). Instead, the design of the PSC remains closer to that of the lump sum DA than to that of the Disability Pension. The Disability Pension has numerous complex components that are absent from the PSC: for example, additional amounts for dependants, a complicated annual adjustment process based in part on certain public service wages, and an intent to compensate for both economic and non-economic loss. In contrast, the only difference in design between the DA and the PSC is the payment model, primarily the monthly payment default and the option to elect the lump sum (explained in more detail below).

In addition to retaining the DA's broad design, the PSC retains the DA's purpose. According to the New Veterans Charter Regulatory Impact Analysis Statement (RIAS), the DA was "paid in recognition of pain and suffering, physical and/or psychological loss, functional impairment and impact on the member's or the Veteran's overall quality of life" (Government of Canada, 2005, p. 4215). The language in the Pension for Life RIAS describing the purpose of the PSC is almost identical (Government of Canada, 2018). Accordingly, and despite the "Pension for Life" naming, the PSC is more appropriately viewed as a benefit that retained the purpose and broad design of the DA, but modified that purpose and design to create the monthly payment default in fulfilment of the mandate letter commitment.

⁴ The formal name of the New Veterans Charter was the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*. This Act was renamed the *Veterans Well-being Act* in 2018, before the introduction of Pension for Life.

⁵ Before the 2006 introduction of the New Veterans Charter, all Veterans with service-related disabilities were eligible for Disability Pensions under the *Pension Act*.



Default monthly payment and election of the lump sum

When VAC makes a favourable PSC decision, the PSC becomes payable to the Veteran at the rate associated with their disability assessment (expressed as a percentage) for their entitled condition. For example, the 2024 PSC rate for a 20% disability assessment is \$271.08 per month (Veterans Affairs Canada, 2024). These rates are set out in Schedule 3 of the VWA, and derive from the maximum amount for 100% disability assessment (in other words, the rate for a 20% disability assessment is equal to 20% of the maximum rate). Because the date payable for the PSC is the date of application, Veterans who have been awarded a PSC or an increase to their PSC generally receive a payment reflecting the total sum of monthly payments that they would have received between the month they applied and the month of their favourable decision.⁶ They also begin receiving the current monthly rate of their PSC on a go-forward basis, and, in accordance with the legislation, that rate is increased annually by the percentage increase to the Consumer Price Index.

In lieu of a monthly payment for life, Veterans may choose to receive their PSC as a lump sum. VAC informs Veterans of this option with their favourable decision letter. Should they choose this option, the Veteran is instructed to request a PSC lump sum election form. Red Zone applicants—applicants flagged as at medical risk and triaged for priority adjudication—receive the election form with their favourable decision letter, and do not need to request it.⁷ The election form is not available on the VAC website because it includes the estimated amount that the Veteran would receive as a lump sum if they made the election on the date the form was issued to the client, which is information that is specific to each client. The calculation of the lump sum payment (referred to in the Department as a “cash-out”) requires the Department to subtract from the lump sum the monthly payments that the Veteran already received based on the monthly rate at the time of the election. In other words, the amount of the lump sum cash-out decreases with each month that the Veteran continues to receive the monthly payments. The legislation also sets out that Veterans cannot reverse their decision to elect the lump sum. Further, Veterans with multiple entitled conditions who have more than one monthly PSC cannot choose to cash out only one at a time; all PSC benefits that are in pay at the time of the election must be cashed out at the same time.

Potential areas of unfairness

The PSC retains the broad design of the DA, including many elements that are identical (for example, eligibility, associated lump sum rates, and access to other benefits). However, the introduction of the default monthly payment method brought with it some key differences between the PSC and the DA. Most notably for this review, the rules governing what may be paid when a Veteran dies result in some apparent gaps and potential inequities.

[Annex B](#) summarizes what happens when a Veteran dies, depending on the circumstances of the scenario and their family status,⁸ under both the previous New Veterans Charter regime (through the DA benefit) and the current Pension for Life regime (through the PSC benefit). The differences that were the basis for launching this systemic review are noted in red text. The analysis and findings section will discuss these differences in more

⁶ As a matter of policy, VAC generally treats the date of first contact as the date of application for disability benefits (Veterans Affairs Canada, 2022).

⁷ Email correspondence dated 2023-05-25 from VAC Centralized Operations Division c/o OVO Secretariat.

⁸ For this review, the term “family status” includes marital status.



detail. In brief, Veterans who have not elected to receive their PSC as a lump sum are not entitled to the cash-out upon their death; thus, the lump sum may not be issued to their estate. Only surviving spouses or common-law partners and dependent children are eligible to receive the cash-out after a Veteran has died; family members who are not surviving spouses, common-law partners, or dependent children are not eligible to receive the cash-out. As a result, the monthly default design of the PSC may create a potential unfairness for single Veterans with no dependent children.

Analysis and Findings

Finding 1: The design of the PSC is unfair to Veterans who die before electing the lump sum, in cases where the Veteran would have received more through the lump sum than through their monthly payments. This unfairness most impacts Veterans who die without a surviving spouse/common-law partner or dependent child(ren).

We base this finding on the following analysis.

1.1 Despite the monthly default, the PSC is a lump sum benefit also, and Veterans have a fairness interest in entitlement to the full lump sum amount.

The PSC is unique among VAC benefits in its design, in that it is a default monthly payment that is electable as a lump sum. Comparable to the [client case](#) that alerted our office to this issue, the case of another OVO client illustrates how the PSC's hybrid design works in practice, specifically in the event of a Veteran's death:

OVO client case

The family of a deceased Veteran contacted our office. The Veteran had been seriously ill and his niece provided care to him for the last two years of his life. VAC rendered a favourable PSC decision for the Veteran but sadly he died shortly thereafter. The Department had no authority to pay his estate the full PSC lump sum, because he had not completed the election form before his death. He left no survivor⁹ or dependent children, so no member of his family could apply to receive the residual lump sum. Instead, the estate received only the sum of the monthly payments that the Veteran would have received beginning with the month of his application and ending with the month of his death.

In general, VAC disability and financial benefits are either lump sum (for example, Critical Injury Benefit, Detention Benefit, Death Benefit) or monthly (for example, Income Replacement Benefit, Additional Pain and Suffering Compensation, Disability Pension, Allowances). While some benefits provide for a method of payment that differs from their principal design (for example, lump sum Disability Pension payments when the disability assessment is less than 5%, or a lump sum amount of the Income Replacement Benefit to certain survivors), these provisions apply in specific circumstances and are not subject to the recipient's choice. The PSC is the only VAC benefit that Veterans may *elect* to receive as a lump sum. If they do not elect to receive the PSC as a lump sum, they are not entitled to the lump sum under the legislation.

⁹For this review, the term "survivor" refers to the surviving spouse or common-law partner of the Veteran. This is consistent with the term's definition in the *Veterans Well-being Act*.



Despite this hybrid design as a monthly benefit that is electable as a lump sum, the basis of the PSC as a lump sum is built into the benefit. VAC has indicated that when the DA was introduced, its maximum amount was “based on extensive research into Canadian workers’ compensation board payments for non-economic loss, non-pecuniary awards by Canadian courts, benefits payable to members or Veterans in other countries for non-economic loss, and amounts payable through accidental death and dismemberment insurance plans. The conclusion drawn from the analysis was that establishing a \$250,000 tax-free Disability Award maximum would be consistent with other awards, particularly Canadian courts.” VAC advised further:

When the maximum lump sum amount of the Disability Award was increased to \$360,000 on April 1, 2017, it was based on research into the same organizations and systems that were used in determining the original amount in 2006. The analysis was conducted to determine whether the indexation of the Disability Award had “kept up” with increases to other maximum amounts [...]. The conclusion drawn from the research, particularly the amounts awarded for pain and suffering by Canadian courts, was that the indexation of the Disability Award had not “kept up”. As such, the Department sought approval for the maximum lump sum Disability Award amount to be increased to \$360,000 which was approved by Parliament.¹⁰

The lump sum rates of the PSC when it was introduced were unchanged from those of the DA.¹¹ Accordingly, the lump sum rates of the PSC reflect the department’s attempt to establish a reasonable recognition amount for pain and suffering. While there is no objective measure for the “correct” amount of money to compensate for the non-economic impacts of permanent disability, to the extent that these lump sum rates represent what Veterans could expect to receive in Canadian courts had their injury occurred elsewhere than in service to Canada, Veterans have a fairness interest in default entitlement to the full amount, rather than default entitlement only to a monthly payment. This interest is heightened because section 9 of the *Crown Liability and Proceedings Act* bars Veterans from claiming damages against the Government of Canada in respect of the disability for which they have received compensation from VAC (1985). Notably, since the introduction of the benefit, most recipients have chosen to receive the PSC as a lump sum (65% as of December 31, 2022).¹²

1.2 The legislation does not include sufficient provisions to prevent situations where the amount the Veteran has received is less—sometimes far less—than the lump sum.

We have learned that clients are confused about why PSC payments to estates may be so much lower than DA payments to estates, and there may be a misunderstanding among clients that VAC is withholding the full value of a payment that is owed to the Veteran’s estate. It is important to clarify that when the PSC replaced the DA, there were no changes to the legislation governing what is payable to the estate when a Veteran dies. However, in some cases the monthly default design of the PSC causes amounts payable at death to be different from the DA, thus affecting what may be paid to estates. As [Annex B](#) notes, if a Veteran dies after a favourable decision but before they have received payment, the full DA lump sum was paid to the estate, whereas the full PSC lump sum is paid to the estate only if the Veteran has elected the lump sum before their death. VAC advised our office

¹⁰ Email correspondence dated 2023-05-29 from VAC Disability and Healthcare Policy c/o OVO Secretariat.

¹¹ VAC internal archived 2019 rates for DA and PSC, documents 3185 and 3189.

¹² VAC Statistics Directorate data provided to OVO, stats file 3514 – OVO Investigation of Payment of PSC to Estates.



that “the right to the full [DA] lump sum vested¹³ with the Veteran prior to their death,” whereas “the right to the full PSC lump sum does not vest with the Veteran unless they elect the cash-out.”¹⁴ This limitation can result in enormous differences between the value of what is paid to the estate in monthly payments and the value of the remaining lump sum: for example, in the hypothetical scenario of a Red Zoned Veteran who has not elected the lump sum and who passes away shortly after a favourable decision for a new PSC assessed at 50%, the difference in value would be more than \$200,000. The disparity results from the monthly default model of the PSC and the absence of provisions to mitigate circumstances like those of our client. (The mitigating provision that Government did implement—the residual cash-out provision for survivors and dependent children under section 54 of the VWA—does not address the situation of our client and other Veterans like him who have no survivor or dependent children, and will be discussed in more detail in the next section.) In cases such as this, VAC is not withholding a payment to which the Veteran is legally entitled; according to the legislation, the lump sum may not be paid to the estate unless the Veteran elected it before their death.

In contrast, the legislation for the DA included provisions to ensure that the full lump sum always vested with the Veteran before their death (provided that a favourable decision had been rendered while the Veteran was alive). While the DA was a lump sum benefit only, with no lifetime monthly payment option, Veterans could choose to receive their lump sum as a series of annual payments under section 52.1 of the former VWA.¹⁵ Introduced in 2011, this periodic payment option for the DA differed importantly in design from the PSC: VAC anticipated how this program change would interact with Veterans’ entitlement to the full lump sum at death, and included a provision aimed at these circumstances. Specifically, VAC created a “deemed election” provision whereby Veterans who had elected to receive their DA as a series of annual payments are deemed to have elected the lump sum on the day before their death (subsection 52.1(6) of the former VWA). In other words, a Veteran who dies while receiving ongoing annual DA payments becomes entitled to the value of their remaining lump sum because the legislation deems them to have elected the lump sum on the day before their death. As a result, the remaining value of the DA lump sum will be paid to their estate when the Veteran dies, even when the Veteran did not elect to be paid the lump sum.

While the comparison between the DA periodic payment option and the PSC payment model must be qualified,¹⁶ their similarities are noteworthy and suggest that a similar deeming provision could apply to the PSC. First, they share a policy rationale. According to the RIAS accompanying the introduction of DA periodic payments, the annual payment option was intended to “give all individuals who receive a disability award options for how they want to receive the payment, thus providing flexibility to better meet the diverse needs of veterans and their families” (Government of Canada, 2011). The RIAS also identified the performance outcome of this program change: “eligible Canadian Forces members and veterans have choice in how they receive their disability award payments” (Government of Canada, 2011). The rationale for the PSC payment model was likewise to give Veterans choice in how they receive their disability benefit payments (Government of Canada, 2018). Second, DA periodic payments and the PSC payment model share provisions for cashing out at any time.

¹³ In law, “[a] right or an interest in property ‘vests’ when it is secured. This means that the beneficiary of the right or property interest is certain to receive a specific amount, either now or in the future” (Cornell Law School Legal Information Institute, n.d.).

¹⁴ Email correspondence dated 2021-12-15 from VAC c/o OVO Secretariat.

¹⁵ The “former VWA” refers to the VWA as it read on March 31, 2019.

¹⁶ DA periodic payments comprise a lump sum divided into a fixed number of installments, with unpaid amounts collecting interest. Unlike DA periodic payments, PSC monthly payments do not end when/if these payments reach the value of the lump sum; they continue for life.



In keeping with the intent to provide choice, the indefinite option to cash out reflects the basic policy concept that, at such time as the Veteran elects to receive it as a lump sum, the full amount of the benefit is a set lump sum that accounts for amounts already received. Third, the DA periodic payment option and the PSC payment model unavoidably result in cases where Veterans do not receive the full value of the lump sum over their lifetime, including cases where they receive only a small fraction of that value. However, the DA design included the “deemed election” provision that resolved the unintended consequence of not receiving the full value. In contrast, the PSC lacks a similar “deemed election” provision at death to resolve this same unintended consequence.

The omission of such a provision also appears to undermine the aim of the PSC, which includes enabling Veterans to maximize their financial advantage from the benefit. The RIAS notes that “[t]he new PSC payment model will incentivize eligible CAF members and veterans to receive the monthly payment for life instead of opting to cash it out as a lump sum amount, as the amount received over the recipient’s lifetime could exceed the lump sum PSC amount” (Government of Canada, 2018). An apparent contradiction results from the absence of provisions to prevent the reverse scenario, where the amount received over the recipient’s lifetime is less than the lump sum—particularly where it is far less, as would generally be the case for elderly and terminally ill Veterans receiving a new PSC or a new increase to their PSC. Notably, the benefit’s cash-out calculation under section 53 of the VWA itself provides a mechanism for identifying clients who have received less in lifetime monthly payments than the amount that remains in the lump sum, because this calculation produces an amount payable only in those circumstances.¹⁷ If the monthly amounts already received exceed the lump sum, the calculation does not produce a payment. The cash-out calculation thus protects against overpayments as it simultaneously can identify clients who, upon their death, have not received the amount they would have received through the lump sum nor the amount they may have received in Canadian courts. In other words, when performed in the event of a Veteran’s death, the cash-out calculation may be an instrument to ensure that Veterans have not been financially disadvantaged by the PSC monthly default design.

1.3 The limitation of the posthumous residual cash-out provision to survivors and dependent children excludes single Veterans who die without family who fit these definitions.

Anticipating the interaction of the monthly default design of the PSC with amounts payable at death, VAC created a provision to allow certain family members to apply for any remaining value of the lump sum after the Veteran has died. Upon the Veteran’s death, section 54 of the VWA provides that survivors (surviving spouses or common-law partners) and dependent children may apply to receive the remaining value of the PSC lump sum. This limitation to survivors and dependent children is in keeping with other posthumous components of the PSC, such as eligibility to continue with a pending application and/or make a new application. The Pension for Life RIAS sets out the rationale for these eligibility parameters, in that the PSC recognizes the non-economic effects of service-related disability on the Veteran, as well as “the impact on the lives of the CAF member’s or veteran’s family (that is, their surviving spouse or common-law partner and dependent children)” (Government of Canada, 2018). VAC has advised:

¹⁷ Simplified, the cash-out calculation is the lump sum minus amounts already received (VWA, ss 53(2)).



Paying the residual lump sum to estates or allowing estates to continue pending applications or make a new application for a PSC after a Veteran's death is not in line with the rationale for the PSC because estates do not suffer the non-economic effects of service-related disability.¹⁸

However, VAC does not know who among a given Veteran's loved ones may have suffered the non-economic effects of their service-related disability, because there is no assessment of these effects on family. Rather, the categories of survivor and dependent children are a proxy for who may be most likely to have suffered these effects. As a proxy, these categories may not account for the diversity of Veterans' experiences and family arrangements. In fact, these categories may be an even less reliable proxy for the Veteran population specifically given recent census data showing Veterans are more likely than other Canadians to live alone (Statistics Canada, 2022a). Since the 2019 introduction of the PSC, there have been 162 Veterans in receipt of the monthly PSC who died leaving no surviving spouses, common-law partners, or dependent children, and thus no family members who were eligible to receive the residual lump sum (data as of December 31, 2022).¹⁹

1.4 The posthumous residual cash-out limitation to survivors and dependent children privileges the heterosexual man Veteran model.

Available data suggest that the VWA section 54 cash-out limitation to survivors and dependent children may reflect the circumstances of heterosexual men Veterans more than it reflects those of other Veteran sub-populations, with the result that Veterans who are not heterosexual men may be inadvertently disadvantaged by it. Among the Canadian general population, widowed women outnumbered widowed men more than three to one in 2022 (Statistics Canada, 2022b). Assuming most of these marriages were opposite-sex marriages, this means that among the Canadian population, more men leave surviving spouses or common-law partners than women do. Data about the Veteran population provide more insight: Life After Service Studies (LASS) 2019 found that a smaller proportion of female Veterans than male Veterans were married or common-law (70% vs 80%), a greater proportion of female Veterans than male Veterans were widowed, separated, or divorced (15% vs 11%) and a greater proportion of female Veterans than male Veterans were single and never married (16% vs 10%) (Sweet et al., 2020, p. 11). LASS 2019 also found that while most Veterans reported that their spouse or partner was the person they can count on in an emergency, this prevalence was greater for male Veterans, and female Veterans were more likely than male Veterans to report a parent or sibling as their main source of social support in an emergency (Sweet et al., 2020, p. 21). In addition, the 2021 census found that while Veterans generally were more likely than Canadians to live alone, women Veterans were more likely than men Veterans to live alone (28.1% vs 22.2%). Further, this likelihood was found to increase with age: among the women Veterans who lived alone, 80.2% were 55 years old or greater (Statistics Canada, 2022a). Meanwhile, data from the Canadian Community Health Survey (CCHS) show that gay, lesbian, and bisexual persons among the Canadian general population were twice as likely to be single (Statistics Canada, 2021). Data appear to be lacking on the ways in which race and ethnicity may intersect with marital status and family composition in both the Veteran and the Canadian general population. However, the 2016 census showed that living with grandparents, foster parents, or other relatives was more common for Indigenous children than non-Indigenous children (Statistics

¹⁸ Email correspondence dated 2021-12-15 from VAC c/o OVO Secretariat.

¹⁹ VAC Statistics Directorate data provided to OVO, stats file 3083 – Deceased Veterans that were in receipt of PSC Monthly payments with no survivors.



Canada, 2017). Taken together, these data suggest that the nuclear family paradigm underlying the design of the PSC's posthumous residual cash-out provision may be less applicable to women Veterans, Indigenous Veterans, and lesbian, gay, and bisexual Veterans, as well as their loved ones and caregivers.

In summary, the PSC is a default-monthly payment that is electable as a lump sum. If Veterans do not elect the lump sum, they are not entitled to the lump sum under the legislation. However, Veterans have a fairness interest in default entitlement to the full lump sum value of the PSC, to the extent that the lump sum rates of the PSC are based on amounts that Veterans could expect to receive for pain and suffering particularly in Canadian courts. The current PSC payment scheme leads to situations in which the Veteran has received less—possibly far less—than the amount of the lump sum over the course of their lifetime. In contrast with the PSC payment model, legislation for DA periodic payments included a “deemed election” provision aimed at avoiding these circumstances and ensuring Veterans received the full value of the lump sum even when they have not elected to be paid the lump sum before their death. While the remaining value of the PSC lump sum may be paid posthumously to family members of Veterans in recognition of the non-economic impacts they have suffered due to the Veteran's service-related disability, the VWA limits the family members who may be paid the PSC to surviving spouses or common-law partners and dependent children. This provision excludes single Veterans with no dependent children. Available data suggest that Veterans who are not heterosexual men may be disproportionately represented among the population of Veterans who die without survivors and dependent children, pointing to a potential Gender-based Analysis Plus gap in the section 54 cash-out provision.

Accordingly, we find unfairness in the design of the PSC for Veterans who die before electing the lump sum, in cases where the Veteran would have received more through the lump sum, particularly where the Veteran has no survivors or dependent children.

To address this unfairness, we make the following recommendation to the Minister of Veterans Affairs.

Recommendation 1: Resolve the unfairness for single Veterans with no dependent children who would have received more through the Pain and Suffering Compensation lump sum than through their monthly payments had they elected it before their death. One option would be for Veterans who die before making the election to be deemed to have elected the lump sum on the day before their death.

This recommendation is intended to resolve the unfairness for single Veterans with no dependent children who die before electing the lump sum and who have received less through the monthly PSC than they would have received through the lump sum, as these Veterans have no family members who are eligible to receive the remaining value of the lump sum.

We do not wish to prescribe the method that VAC should adopt to address the intent of the recommendation, but offer an option for consideration. A “deemed election” provision would resolve the unfairness for these Veterans because it would entitle them to the full amount of the PSC lump sum rather than only a monthly payment, and ensure that any remaining value of the lump sum would vest with them when they die and accordingly be payable to their estate.



Finding 2: It is fair that Veterans cannot elect the lump sum when they apply.

We base this finding on the following analysis.

2.1 A decision at the time of application would not be an informed decision, and as such would not be administratively fair.

When our office began investigating this issue in response to a client complaint, we inquired with VAC about the possibility of allowing Veterans to elect the lump sum when they apply. OVO staff reasoned that such a pre-emptive election would prevent our client’s situation from happening to others. VAC explained that, per the legislation, an election may not be made before a favourable decision has been made. They further advised:

...Veterans cannot make an election at the time of application since it would not be an informed decision, and once an election is made it cannot be undone.

Subsection 53(3) [of the VWA] makes it clear that the election is irrevocable once made. Since the election is irrevocable, it is vital that the client have all relevant information to make an informed decision. At the time of application, clients do not know what their payment amount (either lump sum or monthly) will be. Additionally, an election affects every monthly PSC payment that is being paid at the time of the election; PSC entitlements cannot be cashed out “piecemeal”. So not only is it unknown how much the current application cash out will be, it is also unknown if there will be other entitled conditions in pay at the time a favourable decision is reached. A pre-emptive election would cash those out as well.²⁰

We agree that this rationale is sound. One can easily imagine how a Veteran may wish to reverse a pre-emptive election if their benefits change between the date of application and the date of decision, particularly given that disability benefit wait times may be lengthy. At the same time, it is administratively reasonable that the decision to elect the lump sum is irrevocable. The necessary conditions for such a decision to be administratively fair are that the Veteran is well advised and understands the consequences as clearly as possible. These conditions are not achievable at the time of application.

Accordingly, we find no unfairness in limiting the election of the lump sum to a date after the decision.

Finding 3: Veterans do not receive adequate information about the impact of not electing the lump sum.

We base this finding on the following analysis.

3.1 The pay cover letter included with the decision letter advises Veterans of their option to elect the lump sum without providing information about the impact for those who die without a survivor or dependent children.

Veterans are informed of their option to elect to receive their PSC as a lump sum with their favourable decision letter. The pay cover letter accompanying their decision letter includes a section titled “Payment Options,” which reads as follows:

²⁰ Email correspondence dated 2021-12-15 from VAC c/o OVO Secretariat.



Pain and Suffering Compensation is automatically paid as a monthly payment for the rest of your life. However, you may choose to receive the balance of your Pain and Suffering Compensation as a lump sum payment at any time. If you would like to know more information about this option, please contact us at the number below. We will send you an official *Election for Pain and Suffering Compensation Lump Sum* form which you will need to sign and return before your lump sum payment can be processed.²¹

The cover letter does not explain to the Veteran what happens to any remaining balance of their lump sum in the event of their death, specifically, that it does not vest with the Veteran and that only survivors and dependent children may receive the remaining value. The Election Form (VAC2521) also does not include this information.²²

It is not reasonable to assume Veterans would be aware of these implications without being advised. VAC's omission of this information compromises Veterans' ability to make an informed decision on whether to elect the lump sum payment.

In summary, Veterans require more transparent information about the consequences of not electing the lump sum than VAC currently provides. Such information is necessary to ensure that Veterans can make an informed decision regarding their choice of PSC payment method.

Accordingly, we find it unfair that VAC does not inform Veterans adequately about the potential consequences of not electing the lump sum.

To address this unfairness, we make the following recommendation to the Minister of Veterans Affairs.

Recommendation 2: Until Recommendation 1 is implemented, ensure Veterans receive detailed and plain language information explaining what happens should they die without having elected the lump sum.

This recommendation would allow Veterans to make an informed decision regarding their election or non-election of the PSC lump sum, as an interim measure until Recommendation 1 is implemented.

Conclusion

In 2020 we received a complaint from the family of a Veteran who died shortly after VAC had made a favourable PSC decision but before he could elect the lump sum. Because he had not elected the lump sum before his death, it was not payable to his estate, and because the Veteran had no surviving spouse, common-law partner, or dependent children, no member of his family could apply to receive it. Accordingly we launched this systemic review to answer the following question: in light of the fact that only surviving spouses, common-law partners, and dependent children may apply posthumously to receive the residual value of the PSC lump sum, is it fair that this lump sum is not paid to the estate when the Veteran dies unless the Veteran elected it?

²¹ For Red Zone applicants, who are proactively sent the election form with their decision letter, the last two sentences of the Payment Options section are replaced with the following: "For your convenience, the *Election for Pain and Suffering Compensation Lump Sum* form is enclosed. If you wish to elect for the lump sum payment option, please check the box in section D of the enclosed form, sign the form under section E, and return the form to us."

²² Centralized Operations Division provided copies of the Election Form and the pay cover letter to OVO, confirming these remained current in an email dated 2023-05-25. In the same email they advised that "information about PSC and estates, including legislation and policies, is available online on the VAC website. Centralized Operations Division does not outline that level of detail in the pay letters."



We found that the PSC is unique among VAC benefits in its hybrid design. It is a default monthly payment for life, yet electable as a lump sum. Despite its monthly payment default, its basis as a lump sum is built into the benefit in its design, with lump sum rates based on the amounts Veterans could expect to receive for their pain and suffering in Canadian courts had their injuries occurred elsewhere than in service to Canada. As a result, Veterans have a fairness interest in entitlement to the full lump sum rather than entitlement to the monthly payment only. In contrast to the DA periodic payment option with which the PSC payment model shares certain similarities in terms of design and rationale, Government did not see fit to ensure any remaining value of the PSC vests with the Veteran before their death.

Instead, the amended legislation included a posthumous residual cash-out provision under section 54 of the VWA, allowing surviving spouses, common-law partners, and dependent children to apply to receive any remaining value of the PSC lump sum. This limitation to survivors and dependent children may disproportionately disadvantage Veterans who are not heterosexual men. Among other patterns, available data show that in Canada, lesbian, gay, and bisexual persons are more likely to be single; women are more likely to be widowed than men; women Veterans are more likely than men Veterans to live alone; and Indigenous children are more likely than non-Indigenous children to live with grandparents, foster parents, or other relatives. Thus, the section 54 posthumous cash-out provision is insufficient as a mechanism to mitigate the potential disadvantages of the PSC's payment model, as it may not respond to the diversity of Veterans' family arrangements and support structures. Until these disadvantages are resolved, Veterans must be told that not electing the lump sum means that there may be a remaining value in their PSC that does not vest with them when they die. This information would enable Veterans to make an informed decision regarding the election of the lump sum.

Recommendations to the Minister of Veterans Affairs

- Resolve the unfairness for single Veterans with no dependent children who would have received more through the Pain and Suffering Compensation lump sum than through their monthly payments had they elected it before their death. One option would be for Veterans who die before making the election to be deemed to have elected the lump sum on the day before their death.
- Until Recommendation 1 is implemented, ensure Veterans receive detailed and plain language information explaining what happens should they die without having elected the lump sum.



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Annex A: OVO Fairness Triangle



Fair Outcome – What was decided?

The decision is based on relevant information; and made in accordance with applicable laws, regulations and rules that are fair. The decision should result in equitable outcomes and not be unduly oppressive. Similarly situated individuals should expect similar outcomes.



Fair Treatment – How was the Veteran or family member treated?

It includes being honest and forthright when communicating and providing clear, easy-to-understand information; respecting privacy rights; and treating Veterans with courtesy, dignity and respect.



Fair Process – How was it decided?

It includes an unbiased decision maker; notice of intent to make a decision; informing the Veteran of the decision-making criteria; an opportunity for the veteran to provide evidence; timely decisions; and meaningful reasons for the decision.



Annex B: What happens when a Veteran dies (Disability Award versus Pain and Suffering Compensation)

Scenario	Family status	Disability Award ²³	Pain and Suffering Compensation	
Veteran dies having made no application	Has survivor or dependent child(ren)	Survivor or dependent child(ren) may apply for the DA that the Veteran would have been eligible for (VWA, ss. 50(1))	Survivor or dependent child(ren) may apply for the PSC that the Veteran would have been eligible for (VWA, s. 56)	
	Has no survivor or dependent child(ren)	No application may be made	No application may be made	
Veteran dies with application pending	Has survivor or dependent child(ren)	Survivor or dependent child(ren) may continue with pending application (VWA, ss. 50(2-3))	Survivor or dependent child(ren) may continue with pending application (VWA, s. 55)	
	Has no survivor or dependent child(ren)	Pending application is withdrawn ²⁴	Pending application is withdrawn ²⁴	
Veteran dies after favourable decision but before receiving payment	Has survivor or dependent child(ren)	The full lump sum will be paid to survivor (VWA, ss. 87.1(1))	Veteran elected the lump sum before they died	The full lump sum will be paid to survivor (VWA, ss. 87.1(1))
			Veteran did not elect the lump sum before they died	The monthly amount(s) payable until date of death will be paid to survivor (VWA, ss. 87.1(1)); survivor or dependent child(ren)

²³ All legislative references for Disability Award provisions are to the *Veterans Well-being Act* as it read on March 31, 2019.

²⁴ OVO's 2018 recommendation addresses this gap: "When a Veteran dies with a disability benefit application in progress, continue to process the application and permit payment to the estate if the decision is favourable" (Office of the Veterans Ombud, 2018).



Scenario	Family status	Disability Award ²³	Pain and Suffering Compensation	
				may apply to receive the lump sum that the Veteran would have been entitled to had they elected it (VWA, s. 54)
	Has no survivor or dependent child(ren)	The full lump sum will be paid to the estate (VWA, ss. 87.1(2))	Veteran elected the lump sum before they died	The full lump sum will be paid to the Veteran's estate (VWA, ss. 87.1(2))
			Veteran did not elect the lump sum before they died	The monthly amount(s) payable until date of death will be paid to the estate (VWA, ss. 87.1(2)); any remaining lump sum is not paid out
Veteran dies while receiving ongoing payments (monthly PSC payments, or annual DA payments)	Has survivor or dependent child(ren)	Veteran is deemed to have elected to receive the remaining amount of their DA as a lump sum (VWA, ss. 52.1(6)); the value of the remaining lump sum will be paid to survivor (VWA, ss. 87.1(1))	Veteran elected the lump sum before they died	The remaining value of the lump sum will be paid to survivor (VWA, ss. 87.1(1))
			Veteran did not elect the lump sum before they died	The monthly amount(s) payable until date of death will be paid to survivor (VWA, ss. 87.1(1)); survivor or dependent child(ren) may apply to receive the lump sum that the Veteran would have been entitled to had they elected it (VWA, s. 54)



Scenario	Family status	Disability Award ²³	Pain and Suffering Compensation	
	Has no survivor or dependent child(ren)	Veteran is deemed to have elected to receive the remaining amount of their DA as a lump sum (VWA, ss. 52.1(6)); the value of the remaining lump sum will be paid to the estate (VWA, ss. 87.1(2))	Veteran elected the lump sum before they died	The remaining value of the lump sum will be paid to the Veteran's estate (VWA, ss. 87.1(2))
			Veteran did not elect the lump sum before they died	The monthly amount(s) payable until date of death will be paid to the estate (VWA, ss. 87.1(2)); any remaining lump sum is not paid out

