**Date: 20071016**

**Docket: T-1818-06**

**Citation: 2007 FC 1061**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**TERRY BUFFETT and**
**THE CANADIAN HUMAN RIGHTS TRIBUNAL**

**Respondents**

## REASONS FOR ORDER

**HARRINGTON J.**

[1] This judicial review of a decision of the Canadian Human Rights Tribunal deals with the very essence of life itself: the ability to procreate. Warrant Officer Buffett is infertile; but not sterile. The only realistic chance he had to father a child was by *in vitro* fertilization with *intra*-cytoplasmic sperm injection. The Canadian Forces refused to fund this procedure. He claims he was denied an employment benefit which constituted adverse differential treatment based on his disability, his sex, and his family status, the whole in breach of the *Canadian Human Rights Act.* He compared himself to female members of the Canadian Forces afflicted with certain infertility problems who are entitled to *in vitro* fertilization at public expense.

[2] The matter worked its way through the Canadian Forces redress of grievance process to the Canadian Human Rights Commission, and then to the Canadian Human Rights Tribunal.

[3] The Tribunal held that his complaint was well-founded.

## BACKGROUND

[4] Terry and his wife Rhonda met in 1984 and married the next year. It was their desire to have children, perhaps three. It was not to be. After four miscarriages in the first six years, their dream remained elusive. A battery of tests and even surgery were performed on Rhonda. She was found to be fertile. Then Terry was tested. He was found to have a low sperm count, with below normal motility (mobility) and below normal morphology (form).

[5] His urologist, Dr. Mark Nigro, thought that a medical procedure known as varicocele embolization might help. Mr. Buffett consented but unfortunately a follow-up analysis showed only a mild, but insufficient, improvement.

[6] Come 1996, Dr. Nigro, an expert in male-factor infertility, recommended *in vitro* infertilization (IVF) with *intra*-cytoplasmic sperm injection (ICSI) as the next step. He ruled out another possibility, a male fertility drug, Clomid, as not being suitable in Mr. Buffett's case. His twin recommendations have not been contested.

[7] The IVF and ICSI treatment is expensive. The Buffetts decided they could not afford it.

[8] IVF is a process by which a woman's eggs are removed, fertilized with normal sperm in a Petri dish and then placed in her uterus. It begins with a series of injections over a number of days which are designed to stimulate her ovaries and mature several of her egg sacs (follicles). When at least 3 follicles of a certain size are developed, another drug is injected which causes the eggs to advance to a final stage of maturation. Then a needle is passed into an ovary and the eggs are removed from the follicles. They are combined with sperm, about 6,500, and allowed to fertilize naturally. If fertilization occurs, a catheter is used to place the fertilized eggs into the woman's uterus.

[9] However IVF alone has had very little success and is not recommended when there are abnormalities in the sperm. In ICSI, normal looking active sperm are isolated from the sample provided. Using a microscope and a delicate micromanipulation needle, one of these sperm is injected directly into the egg. When the experts testified before the Tribunal in late 2005 and early 2006, the cost of one cycle of IVF was some $5,500 to $6,000. ICSI costs up to an additional $1,500. Current medical opinion is that if pregnancy does not occur within three cycles the process should be discontinued.

[10] The pregnancy rate when using ICSI on poor quality sperm has now reached about the same level of success as that for standard IVF with normal sperm, 30% or more per cycle.

**THE CANADIAN FORCES, HEALTH CARE AND THE CONSTITUTION**

[11] As a general proposition, health care falls within provincial jurisdiction. However, the Federal Government contributes to the cost of providing health services in every province by virtue of the *Canada Health Act*. It is a requirement of that funding that each province, and the three territories, provide or "insure" minimum health care. However, the provinces may provide additional benefits so that coverage is not quite uniform across the country.

[12] National Defence is a federal matter. The *Canada Health Act* specifically provides that members of the Canadian Forces are not eligible to receive health care under any of the provincial health care plans. However, what was taken away was immediately given back. Chapter 34 of the *Queen's Regulations and Orders* issued pursuant to the *National Defence Act* requires the Canadian Forces to provide medical care, at public expense, to its members. The Canadian Forces insure a degree of health care comparable with, and probably better, than that to which members would be entitled as civilians under provincial plans. There is also a "company doctor" aspect to the service in order to ensure that the Canadian Forces are as fit as can be expected in order to perform what are often hazardous and dangerous duties.

[13] With a few exceptions, which are not relevant to the present case, the health care provided by the Canadian Forces does not extend to family members, in this case Mrs. Buffett. Mrs. Buffett was covered under the health services insured through the province in which she resided, in this case British Columbia and then New Brunswick. In addition, family members are eligible for supplemental third party insurance coverage through the Public Service Health Care Plan which is

funded by contributions from the employer and the Canadian Forces members. It provides additional coverage for services not covered under provincial plans. Mr. Buffett took out this coverage for his wife.

[14] The Canadian Forces working premise is that if any province covers a particular procedure, so will they. However, this policy is not cast in stone. For instance, in the mid-1990s, Quebec was the only province which covered reversal of vasectomies and tubal ligation, and the Canadian Forces followed suit. They later delisted that coverage on the basis that the medical condition arose from a deliberate act of will of the member. They apparently have recently modified their position, taking into account the desire by a couple to undo procedures voluntarily undertaken preventing them from having children after the subsequent death of a child.

[15] In the years immediately preceding Mr. Buffett's grievance, the only province that funded IVF was Ontario, but only if the infertility was the result of double fallopian tube obstruction. Furthermore, funding was limited to a maximum of three cycles. Ontario had earlier funded IVF in other instances as well, but restricted coverage following the finding of a Royal Commission in 1993 that IVF was only useful if the infertility resulted from fallopian tube obstruction. That finding may well be out of date.

[16] Neither Ontario nor any other province or territory has ever funded ICSI treatment.

[17] Until 1997, the Canadian Forces Health Care Plan did not fund IVF, with or without ICSI. That policy changed following a successful grievance by a female member of the Forces who was resident in Ontario, and whose infertility resulted from fallopian tube obstruction. The decision was then made to follow Ontario's lead in order to avoid the possibility that a member would lose the right to health services which would have been available to her in her province of residence if she were a civilian. Since this new policy is uniform throughout, female members not ordinarily resident in Ontario are also entitled to IVF.

[18] Although the first memos reflecting the change of policy were not crisp, it was always clear that the funding was only available to members of the Canadian Forces, and not to their dependants, spouses or partners. By 1998, the policy was codified in a Spectrum of Care document so as to match Ontario. The Public Service Health Care Plan offers the same coverage to Mrs. Buffett, subject to co-insurance and other modalities.

[19] When Mr. Buffett came to learn of this policy change, he made a formal request for funding. He was refused. His redress of grievance worked its way through various levels to the Canadian Forces Grievance Board. The Board's mandate is to review and provide findings and recommendations to the Chief of Defence Staff, who has the final decision. Although the Board found that the lack of coverage might be discriminatory under the Canadian Charter of Rights and Freedoms, it was also of the view that restricted funding was justified under section 1 thereof as being a reasonable limit prescribed by law, demonstrably justified in a free and democratic society.

Therefore, it recommended that the grievance be denied. The Chief of Defence Staff, General Henault, accepted that recommendation.

[20] Thereafter, Mr. Buffett filed a complaint with the Canadian Human Rights Commission. The complaint was not based on the Charter, but rather on sections 7 and 10 of the *Canadian Human Rights Act.*

**THE DECISION UNDER REVIEW**

[21] The member of the Tribunal, after stating the facts with clarity, and after a most careful review of the law, found that Mr. Buffett and the Canadian Human Rights Commission had established a *prima face* case which, unless rebutted, justified a decision in his favour (*O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536). Section 7 of the *Canadian Human Rights Act* provides:

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| **7.** It is a discriminatory practice, directly or indirectly,<br><br>(*a*) to refuse to employ or continue to employ any individual, or<br><br>(*b*) in the course of employment, to differentiate adversely in relation to an employee,<br><br>on a prohibited ground of discrimination. | **7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :<br><br>*a*) de refuser d'employer ou de continuer d'employer un individu;<br><br>*b*) de le défavoriser en cours d'emploi. |

Prohibited grounds of discrimination include sex, marital status, family status and disability.

[22] Section 10(a) of the *Canadian Human Rights Act* goes on to provide that it is a discriminatory practice for an employer to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunity on a prohibited ground of discrimination.

[23] The Tribunal found that a *prima face* case of discrimination had been established. An adverse comparison was made between Mr. Buffett and his female Canadian Forces colleagues on the basis of sex and on male-factor infertility (disability). The allegation of discrimination on the basis of family status was not substantiated.

[24] The next step was for the employer to rebut the *prima face* case by establishing that its refusal to fund was based on a *bona fide* occupational requirement under section 15(1) (a) of the *Canadian Human Rights Act*. More particularly, the Canadian Forces had to establish that accommodation of Mr. Buffett's needs or those of a similar class of affected individuals would impose undue hardship on them, considering health safety and cost.

[25] In this regard, the Tribunal accepted that the Canadian Forces policy was rationally connected to the goal of providing publicly funded health care to its members equal to the level of health care available under provincial health care plans, and that they had adopted their standard in good faith. However, he was not satisfied with their additional cost analysis. He considered their estimate of ten million dollars *per annum* to cover expanded IVF treatment and an additional $2.25

million for ICSI to be exaggerated, but even on those figures he was not satisfied that this cost would be so high as to impose undue hardship.

[26] By way of remedy it ordered:

a. if the Buffetts' specialist continued to recommend IVF with ICSI, the Canadian Forces were to fund the treatments to a maximum of three cycles;

b. payment of $7,500 to Mr. Buffett in compensation for his pain and suffering, with interest; and

c. the Canadian Forces to take measures in consultation with the Canadian Human Rights Commission to amend their policy for the funding of IVF treatments so that members with male-factor infertility receive substantially equal benefits as members with double fallopian tube obstruction, or all female members, as the case may be.

[27] In the light of these findings and orders, the Tribunal considered it was not necessary to deal with the alleged discriminatory practice under section 10 of the Act.

[28] The cost of funding IVF and ICSI for the Buffetts is no longer in issue. Mr. Buffett sought funding some ten years ago. During the hearing before me, he stated that since both he and his wife are now over 45, it has been recommended that they no longer seek this treatment. They have accepted that recommendation.

[29] The Attorney General, on behalf of the Canadian Forces, no longer takes the position that the funding of IVF and ICSI would constitute an undue hardship in accordance with section 15 of the *Canadian Human Rights Act.* Indeed, there is no real contestation of the Tribunal's findings of fact, but rather on how benefits under the health plan were characterized. One of the keys to the Tribunal's decision was its view that "…a distinction can be drawn between procedures that reverse infertility and those that induce or assist conception." Procedures intended to reverse infertility are performed exclusively on one person, such as surgery to reconstruct a woman's fallopian tubes or the varicocele embolization procedure that Mr. Buffett underwent.

[30] The next few paragraphs of the Tribunal's reasons are crucial:

> [52] IVF and ICSI, on the other hand, are entirely different in nature. These treatments do not reverse the patient's male or female factor infertility. Instead, the treatments offer the couple the opportunity to conceive and have a child that is biologically theirs, irrespective of who has the infertility problem. As Dr. Nigro stated in his evidence, "you don't use IVF unless you want a baby". In my view, the CF has construed the facts of this case too narrowly. The CF takes the position that since nearly all aspects of the IVF and IVF with ICSI treatments involve the woman, they are medical procedures that only relate to her. But this fails to take into account the fact that assisted conception procedures are different from all other medical procedures, including procedures to reverse infertility, in that by biological necessity, two individuals must be involved.
> [53] The CF's health care policy is structured in such a way as to provide the female member who has a form of female factor infertility with a publicly funded service that will afford her the opportunity to have a child. Physiologically, this procedure can only be completed with the contribution of a person of the opposite gender. The CF funds the service for the female member, even if the opposite-gender contribution comes from a non-member of the CF. On the other hand, the CF does not provide the equal benefit to a male member with male factor infertility, merely because the contribution from the opposite-gender non-member is much more

> medically complex. And yet, the same physiological reality exists that conception can only occur with the participation of both partners.
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> [54] This reality is a key factor in making an appropriate comparison in this case. The fact is that IVF is not merely a medical procedure that is being offered to female CF members. These women are being given a real opportunity to have a child. That is the essential purpose of this treatment. In my view, given this context, the proper comparative question to pose is, does the CF offer the same benefit to its male members with infertility problems that it is offering to its female members with infertility problems?
>
> [55] The answer is clearly no. It does not matter that the CF's original motivation for adding IVF treatment to its list of medical services for its female members who have a certain medical condition, was so as to ensure that the coverage provided under its health care plan was equal to that of a provincial scheme (in this case, OHIP). Considering the policy's true purpose and its effect, the result is that Mr. Buffett is denied a benefit that is at the same time being provided to female CF members, i.e. access to assisted conception by IVF. As such, the treatment is unequal.

**ISSUES**

[31] This application by the Attorney General on behalf of the Canadian Forces raises a number of issues. The first is the proper standard of review of the Tribunal's decision. Another way of putting it is to identify the degree of deference to be afforded the Tribunal.

[32] The next issue is to determine whether the health services of the Canadian Forces constitute an employment benefit within the meaning of section 7 of the *Canadian Human Rights Act*. The Attorney General takes the position that the supply of health services to Warrant Officer Buffett by the Federal Government was simply one of many methods by which health care to Canadian

residents is funded. If it is not an employment benefit, then the Canadian Human Rights Tribunal is without jurisdiction.

[33] Did the Tribunal err in defining the benefit available to female members of the Canadian Forces as the opportunity to conceive a child, as opposed to treatment of female infertility? Put another way, are benefits limited to individuals, or do they extend beyond, in this case to a married couple, or at least to a man and a woman?

[34] In concluding that Warrant Officer Buffett was discriminated against, did the Tribunal err in comparing him to female members of the Canadian Forces, rather than to members of the Canadian Forces who are seeking funding for medical procedures to be performed on their spouse?

[35] Did the Tribunal err in finding that the Canadian Forces offered benefits in a discriminatory manner?

[36] Did the Tribunal err in ordering the Canadian Forces to fund medical treatments which are not covered under the plan for an individual who is not a member of the Canadian Forces?

**STANDARD OF REVIEW**

[37] The functional and pragmatic analysis, which forms the basis of judicial review, was summarized by the Supreme Court in such cases as *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19, [2003] 1 S.C.R. 226 and *Law Society of New Brunswick v. Ryan,*

2003 SCC 20, [2003] 1 S.C.R. 247. The following four factors are at the forefront: a) the presence or absence of a privative clause or statutory right of appeal; b) the expertise of the Tribunal relative to that of the reviewing court; c) the purposes of the legislation and the particular sections; and d) the nature of the question: law, fact, or mixed fact and law.

[38] As applied to the Canadian Human Rights Tribunal, the Federal Court of Appeal has made it clear that questions of law are reviewable on a standard of correctness, questions of fact on the basis of patent unreasonableness, and mixed questions of fact and law on reasonableness *simpliciter* (*Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, [2005] F.C.J. No. 731 and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, 322 N.R. 50).

**EMPLOYMENT BENEFIT**

[39] For the vast majority of Canadians, including those in the Federal Public Service, basic health care derives from operation of law; the *Canada Health Act* and the various provincial and territorial plans. Parliament deprived Warrant Officer Buffett of this right which comes from the fact of Canadian residency. What it took away, however, it more than gave back through his employment. Leaving aside some provisions for veterans, Warrant Officer Buffett reverts back to provincial health plans when he leaves the Canadian Forces.

[40] I cannot accept the position of the Attorney General that infertility treatment was not, to use the language of section 7 of the Act, offered “in relation to an employee”. While it is true that it is not part of Warrant Officer Buffett’s employment duties to father children, the same as with any

employee in the private sector, Parliament could have chosen only to deprive him of those provincial health benefits that relate to his duties as a soldier, leaving other matters, including infertility treatments, to the provincial health plans. Instead it made it a condition of his employment that he be deprived of access to provincial health care plans. The corresponding health care services, as reflected in the Spectrum of Care Policy, can only be considered as benefits in the course of his employment.

[41] While members of the Canadian Forces are not considered employees in other contexts, they are employees within the meaning of the *Act* (*Rosin v. Canada (Canadian Forces)*, [1991] 1 F.C. 391, 131 N.R. 295).

**ESSENTIAL FACTS**

[42] The other issues raised by the Attorney General are very much intertwined, and arise from the following basic facts which are not in controversy.

[43] The recommendations of Mr. Buffett's urologist that he be treated by IVF and ICSI, and that he not take fertility drugs, have never been contested.

[44] ICSI is not covered by the Canadian Forces Health Care Plan, by any publicly funded provincial plan or by any third party insurance coverage such as that available through the Public Service Health Care Plan.

[45] The Canadian Forces Health Care Plan, like the Ontario Plan (OHIP), funds IVF for women, but only if they have blocked fallopian tubes and for only up to three cycles. This funding is also available through the Public Service Health Care Plan, subject to employee contributions, and deductible and co-insurance provisions. None of these plans provides funding with respect to the donor sperm. Medical procedures may be necessary to extract the sperm from the male and the sperm itself may be subject to treatment such as analysis, washing and freezing.

[46] As she is not a member of the Canadian Forces, Mrs. Buffett is not covered by the Canadian Forces Health Care Plan, but she is a beneficiary of the Public Service Health Care Plan. However, at the material time she was fertile, and more particularly did not have blocked fallopian tubes.

[47] Men and woman have different body parts when it comes to reproduction. Men do not have fallopian tubes. Thus, there are different infertility treatments for males and females. For instance, in this case, Mrs. Buffett was provided with medication to deal with her progesterone level and had a hysteroscopy. Funding came through the British Columbia Health Plan, the province in which she resided at the time. Likewise, Mr. Buffett was subjected to various tests, and analyses, as well as a varicocele embolization. All that was paid for through the Canadian Forces Health Care Plan.

**DISPOSITION**

[48] This brings me to the crux of the case which is the Tribunal's opinion that IVF and ICSI are completely different in nature from infertility treatments, in that they do not reverse infertility but rather "…offer the couple the opportunity to conceive and have a child that is biologically theirs,

irrespective of who has the infertility problem." I cannot agree with that characterization. It is not enough to simply say that I disagree. The issue is the degree of deference to which the Tribunal is entitled.

[49] In my opinion, the characterization of benefits which flow from the *Canada Health Act*, the *National Defence Act*, the *Queen's Regulations and Orders*, and the Spectrum of Care Policy, is a matter of law, an issue on which the Court must not defer but must make up its own mind. At paragraph 94 of *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539. Mr. Justice Binnie quoted from Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (H.L.) who said at page 1030: "The policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court." Many other authorities were cited in *C.U.P.E*. to the same effect. There is nothing in the *Canada Health Act*, the *National Defence Act*, the *Queen's Regulations and Orders*, or provincial health plans which detracts from the fact that health services are provided to patients; to individuals. This is not simply a bookkeeping entry issue. Bookeeping records only reflect the reality of the plans.

[50] Indeed, the interpretation section of the *Canada Health Act*, section 2, is most telling. "Insured health services" are provided to "insured persons" who are not, among other things, "a member of the Canadian Forces."

[51] Chapter 34 of the *Queen's Regulations and Orders* also makes it perfectly clear that medical care is to be provided at public expense to a member of the regular, special or reserve forces. There are instances when the family is involved, such as in the treatment of a member for substance abuse. However the focus is on the Canadian Forces member, and not his or her family. There are also instances in which medical services are provided to family members, such as in remote areas or overseas. However those exceptions have no application here.

[52] Another question of law is the identification of the group to which Mr. Buffett should be compared. Although the equality guarantee in section 15(1) of the Charter requires a much more complex analysis, discrimination always involves a comparison. As Mr. Justice Iacobucci stated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraphs 56 and 57:

> 56 […] Ultimately, a court must identify differential treatment as compared to one or more other persons or groups.[…]
>
> 57 To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally: see *Weatherall* [*v. Canada (Attorney General)*, [1993] 2 S.C.R. 872].

[53] I agree with the Tribunal that Mr. Buffett should have been compared to female members of the Canadian Forces. In certain circumstances, they are entitled to IVF for up to three cycles. Costs relating thereto are covered under the Canadian Forces Health Care Spectrum of Care Policy. Costs related to the sperm are not. The female member of the Canadian Forces need not be part of a "couple", heterosexual or homosexual. The donor may be anonymous. The point is that costs related to the sperm are not covered.

[54] Although a male member of the Canadian Forces may not have difficulty in providing sperm, that is not always the case. Major Chris Weisgerberg who had an adjudicative position in the Directorate of Health Services Delivery for Spectrum of Care requests, pointed out that the treatment available to men based on the physiological differences included impotency (erectile dysfunction) or prostate disease, both of which can contribute to fertility issues. Dr. Arthur Leader, an expert in both male and female infertility, testified that in some cases if the man cannot provide the sperm sample a biopsy is carried out. Apart from a biopsy, some men who are diabetic ejaculate sperm into the bladder, which requires a catheter to remove it. Some men may be required to take medication because of hormone problems. These are costs covered by the Canadian Forces Health Care Plan if the male is a member of the Canadian Forces.

[55] I see no basis for the Tribunal's characterization of IVF and ICSI as not constituting a cure, but rather as offering an "opportunity to conceive". The goal of all infertility treatments is to remove roadblocks to conception. A member might not take advantage of successful medical treatment. A

woman can always say no, even after successful fertilization in a Petri dish. Viagra and the insertion of the catheter into the bladder do not constitute cures.

[56] Nevertheless, I agree that Warrant Officer Buffett has been discriminated against within the meaning of section 7 of the *Canadian Human Rights Act*. However, that discrimination is much narrower in scope than that enunciated by the Tribunal. Consistent with the statutes, regulations and policies, the Canadian Forces Health Care Plan should only cover the ICSI aspect of the procedure, not the IVF portion. In the case of a female member of the forces, the IVF portion is covered, but not the ICSI portion. The fact that IVF is more expensive than ICSI is neither here nor there. It arises from a biological reality. One cannot claim discrimination because one treatment may cost more than another. For instance, if the costs of treating ovarian and prostate cancers are not equal, no one has cause for complaint.

[57] The Attorney General relied heavily on the equality cases decided under section 15(1) of the Charter, recently reviewed by the Federal Court of Appeal in *Tomasson v. Canada (Attorney General)*, 2007 FCA 265, [2007] F.C.J. No. 1084. The issue in that case was whether the provisions of the *Employment Insurance Act* which granted maternity benefits to biological mothers discriminated against adoptive mothers in violation of their equality rights under the Charter.

[58] Section 15(1) thereof provides:

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| 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of | 15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au |

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| the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. | même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques |

[59] Mr. Justice Nadon held that Ms. Tomasson's equality rights were not violated. He agreed with the earlier decision of the Ontario Court of Appeal in *Schafer v. Canada (Attorney General)*, (1997), 149 D.L.R. (4th) 705, 35 O.R. (3d) 1, and also with the decision of the British Columbia Court of Appeal in *British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Committee)*, 2002 BCCA 476, 216 D.L.R. (4th) 322, which dealt with the same issue but within the context of a collective agreement.

[60] More particularly, the decision of the Ontario Court of Appeal in *Schafer* survived the subsequent decision of the Supreme Court in *Law, supra.* As Mr. Justice Nadon noted, the section 15 test set out in *Law* was summarized by the Supreme Court in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at paragraph 22 as requiring: "(1) differential treatment under the law; (2) on the basis of an enumerated or analogous ground; (3) which constitutes discrimination".

[61] I fail to see how *Tomasson*, above, assists the Attorney General. At paragraph 47, Mr. Justice Nadon referred to *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 at page 169 where Mr. Justice MacIntyre said: "for the accommodation of differences, which is the

essence of true equality, it will frequently be necessary to make distinctions." The distinction in *Tomasson* was childbirth as opposed to no childbirth. In this case, the issue is infertility which comes about in different ways in men and women.

[62] Parliament has left it to the Director General, Health Services, subject to Ministerial control, to decide on the range of health services to be included or excluded in the Spectrum of Care Policy. It is not for the Court to second guess that policy decision. However, having decided to give female members of the Canadian Forces benefit of IVF, male members cannot be denied ICSI. The reality is that the female provides the egg and the womb, and the male the sperm. In the case of female members, the Spectrum of Care Policy covers matters relating to the egg and the womb, but not the sperm. It follows that in the case of a male member of the Canadian Forces suffering from infertility, if the circumstances warrant ICSI, the costs related to his sperm should be covered, but the cost related to the egg and womb should not.

[63] Having come to this conclusion, it is not necessary to consider section 10 of the *Act*, and as aforesaid the Attorney General is no longer pursuing the argument that accommodation of Mr. Buffett's needs, or those of a similar class of affected individuals, will pose undue hardship, considering health, safety and costs in accordance with section 15 of the *Canadian Human Rights Act*.

[64] If this were an appeal, unlike the Tribunal I would have ordered the Canadian Forces to fund the ICSI portion of Mr. Buffett's treatment to a maximum of three cycles. However, that point is

now moot. I would also have ordered the Canadian Forces to take measures in consultation with Canadian Human Rights Commission to amend their policy for the funding of ICSI treatments. There is no reason to disturb the order that Mr. Buffett be paid $7,500 in compensation for his pain and suffering with interest. However, as this is a case of judicial review, and not a case in appeal, the remedy is to set the decision aside and to refer it back for redetermination, with or without directions. I direct the Attorney General, in consultation with the other parties, to submit a draft order within 14 days hereof. If the parties cannot agree on appropriate wording, each shall make comments within the same delay. Thereafter, the Court will determine if a further hearing is needed. As success has been mixed, there shall be no order as to costs.

"Sean Harrington"

Judge

Ottawa, Ontario
October 16, 2007

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1818-06 |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA v. TERRY BUFFETT AND THE CANADIAN HUMAN RIGHTS TRIBUNAL |
| **PLACE OF HEARING:** | Edmonton, Alberta |
| **DATE OF HEARING:** | September 11, 2007 |
| **REASONS FOR ORDER:** | HARRINGTON J. |
| **DATED:** | October 16, 2007 |

**APPEARANCES:**

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| Ms. Elizabeth Richards | FOR THE APPLICANT |
| Mr. Terry Buffett | FOR THE RESPONDENT TERRY BUFFETT ON HIS OWN BEHALF |
| Mr. Philip Dufresne | FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION |

**SOLICITORS OF RECORD:**

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| Mr. Terry Buffett | FOR THE RESPONDENT TERRY BUFFETT ON HIS OWN BEHALF |
| Canadian Human Rights Tribunal | FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION |