

CANADA / JUDGMENT

Canada (Attorney General) v. Irvine

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T-533-04 Citation: 2005 FC 122 Ottawa, Ontario, Wednesday the 26th day of January, 2005 Present:
THE HONOURABLE MR. JUSTICE CAMPBELL BETWEEN: THE ATTORNEY GENERAL OF
CANADA (CANADIAN ARMED FORCES) Applicant and RAYMOND IRVINE Respondent and
CANADIAN HUMAN RIGHTS COMMISSION Respondent REASONS FOR ORDER AND ORDER

- [1] In 1996, Mr. Irvine left his position as a Warrant Officer (Aviation Technician) with the Canadian Armed Forces ("CAF") because he was found unfit for service due to his heart condition. This decision was made because Mr. Irvine was found not to meet the standard of "universality of service" ("the Universality Standard"), which, by statute, requires all members of the Canadian military to maintain a certain level of health. Mr. Irvine felt that he was discriminated against by application of the Universality Standard, and, consequently, filed a complaint for relief under the Canadian Human Rights Act, R.S.C. 1985, c. H-6 ("the Act").
- [2] In its first decision, the Tribunal appointed to deal with the complaint found in Mr. Irvine's favour; the Tribunal decided that the medical decision finding that Mr. Irvine fell below the Universality Standard did not meet the test for accommodation set down in 1999 by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (Meiorin Grievance), [1999] 3 S.C.R. 3 ("Meiorin").
- [3] The Tribunal's decision was challenged on judicial review, and the matter was referred back to the same Tribunal for redetermination with the direction that it analyse the application of Meiorin in the context of the Universality Standard.

- [4] In its second decision, it is agreed that the Tribunal followed the direction, and, in the result, confirmed that Meiorin was the correct test to apply. In the present judicial review of the Tribunal's second decision, the CAF takes no issue with this aspect of the Tribunal's decision, but argues that the Tribunal exceeded its jurisdiction in applying the authority. Thus, the issue for determination is: what was the Tribunal entitled to do in applying Meiorin? I. Preliminary Considerations A. The Universality Standard
- [5] The statutory source of the Universality Standard is s.33 of National Defence Act, R.S. 1985, c. -5 which reads as follows: Service Liability in case of regular force
33. (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty. [...] Meaning of "duty"
- (4) In this section, "duty" means any duty that is military in nature and includes any duty involving public service authorized under section 273.6. R.S., 1985, c. -5, s. 33; R.S., 1985, c. 31 (1st Supp.), s. 60; 1998, c. 35, s. 8. Service Obligation de la force régulière
33. (1) La force régulière, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, sont en permanence soumis à l'obligation de service légitime. [...] Définition de « service »
- (4) Pour l'application du présent article, « service » s'entend, outre des tâches de nature militaire, de toute tâche de service public autorisée sous le régime de l'article 273.6. L.R. (1985), ch. N-5, art. 33; L.R. (1985), ch. 31 (1er suppl.), art. 60; 1998, ch. 35, art. 8.
- [6] Respecting the history of the Universality Standard, in its second decision the Tribunal writes: Universality of service in the Canadian Armed Forces requires every member to be fit to be "a soldier first". Universality of service is the term given to a set of principles which govern the service of members in the CAF. The Federal Court of Appeal articulated the principles in three cases decided in the early 1990s, St. Thomas, Husband and Robinson. Each of these cases turned on the issue of whether a military employment standard constituted a Bona Fide Occupational Requirement ("BFOR"). Universality of service is comprised of three essential principles:
1. Whatever their trade or profession might be, members of the CAF are soldiers first and foremost.
 2. The duty of a soldier is to be ready to serve at all times in any place and under any conditions.
 3. The duty is universal in that it applies to all members of the CAF. In each of these trilogy cases, the Court of Appeal held that the medical standards at issue were reasonably necessary to assure the efficient and economical performance of universal military duties. As such, they were BFORs. These cases were adjudicated under the pre-Meiorin, bifurcated analysis of direct versus indirect discrimination arising out of Central Alberta Dairy Pool. In

these cases, because the discrimination was direct discrimination, once a BFOR was established, the CAF was not obliged to accommodate the particular employees. The CAF had no duty to accommodate persons who did not comply with the principles of universal service. (Second Tribunal Reasons, paras. 30 to 32)

- [7] With Meiorin, the law on human rights advanced beyond that stated in the trilogy cases. B. The test in Meiorin
- [8] It is agreed that: to prove his complaint under the Act, Mr. Irvine and the Human Rights Commission ("the Commission") bore the onus of establishing a prima facie case of discrimination; the application of the Universality Standard met this onus, and, as a result, the CAF was required to prove that the conduct was justified; and justification could be found if the Universality Standard met the test of being a BFOR.
- [9] Applied to Mr. Irvine's complaint, it is agreed that Meiorin establishes three points of inquiry before the Universality Standard can be considered a BFOR; first, the CAF was required to show that it adopted the Universality Standard for a purpose rationally connected to the performance of Mr. Irvine's duties; second, the CAF adopted the Universality Standard in good faith; and third, the CAF met the burden of proving that the Universality Standard was reasonably necessary for the CAF to accomplish its purpose, being safe and efficient performance. It is agreed that the first two points of inquiry are not in issue. To prove the Universality Standard was reasonably necessary, the CAF bore the onus of proving that it was impossible to accommodate employees sharing the characteristics of Mr. Irvine without imposing undue hardship on the CAF.
- [10] With respect to the duty to provide accommodation, Meiorin sets a high standard; this point is made in paragraph 64 of the case: Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances. C. Factual background
- [11] To explain the CAF's decision making in Mr. Irvine's case, it is convenient to quote the statement of facts set out in Justice Noël's reasons on the first judicial review of the Tribunal's decision: Mr. Irvine joined the CAF in 1967. He enrolled in the trade of aviation technician. In 1991, he was promoted to the rank of Warrant Officer (WO) and held that rank until 1996. In March 1994, Mr. Irvine suffered a heart attack and underwent coronary bypass surgery. In July 1994, he was promoted to Master Warrant Officer subject to confirmation of his medical category. Each member of the CAF is assigned a medical category by the CAF's medical staff. The medical category identifies employment limitations, if any, to the

administrative personnel. There are six medical categories of which only the G (geographic - the places where the member can work) and O (occupational limitations) categories are relevant to this application. Each category is assigned a number from 1 to 6 with increasing value indicating greater limitations. For Military Occupation Code 513 (Aviation technician), which Mr. Irvine occupied, the employment limitation is a G3O3 medical category. Prior to his heart attack on March 30, 1994, Mr. Irvine had a medical category of G2O2 which was within the minimum standards for his occupation. Following the heart attack, his category was temporarily downgraded to G4O4 to allow for stabilization after his surgery. This temporary downgrading meant that Mr. Irvine's medical category was below the minimum standard of G3O3 of his occupation. Over the approximately 16 months of downgrading of his medical category, Mr. Irvine was seen by various physicians in the CAF which resulted in upgrades to G4O3 in February 1995 and to G3O3 in July 14, 1995. After Mr. Irvine advised his career manager that he now had the minimal required medical category to reenter his position and receive his promotion, his medical category was permanently downgraded to G4O3 on September 1, 1995 [by the Coronary Artery Disease Committee]. Since the permanent category of G4O3 assigned to Mr. Irvine is below the minimum medical category for his occupation, his case was referred to the Career Review Board (Medical) ("Career Board"). The Career Board considers all cases in which a medical board permanently lowers the medical category of a member below the acceptable minimum for his classification or trade. The Career Board can recommend either continued employment in the members [sic] present capacity, with or without career limitations, transfer to another unit or trade, or release. The Career Board considered Mr. Irvine's case in April 1996. After reviewing the medical limitations established by the Coronary Artery Disease Committee and submissions from Mr. Irvine and his commanding officer, the Career Board approved his release under Item 3(b) of Article 15.01 of the Queen's Regulations and Orders, as being disabled and unfit to perform the duties in the member's present trade or employment as an aviation technician and not otherwise advantageously employable under the existing service policy. The Career Board determined that Mr. Irvine did not meet the requirements of universality of service: "Subsect [sic] 33(1) of the [National Defence Act] requires all CF members to perform any lawful duty. The employment limitations drastically restrict the member's capacity to perform the full spectrum of the GMDs [general military duties] and preclude the member from performing them in any operational theatre. The CF has BFORs for WO AVN TECH to perform their duties in a tactical environment and at sea and to perform arduous tasks. As WO Irvine's employment limitations preclude this as OT [occupational transfer] is not an option, release is the only alternative." [National Defence Headquarters, Career Disposition Sheet, Applicant's record, p. 323] On April 23, 1997, Mr. Irvine filed a complaint with the Canadian Human Rights Commission alleging that the CAF had discriminated against him because of his disability, contrary to sections 7 and 10 of the Canadian Human Rights Act. His complaint was referred to the Canadian Human Rights Tribunal [the "Tribunal"]. Meanwhile, in August 2000, Mr. Irvine suffered a second heart attack. Finally, on November 23, 2001, following a hearing of 19 days, the Tribunal rendered its decision. It held that the CAF discriminated against Mr. Irvine on the basis of a disability, coronary

artery disease. The Tribunal further held that the discrimination could not be justified as per subsections 15(1) and (2) of the Canadian Human Rights Act, on the ground that the medical standards did not constitute a bona fide occupational requirement. Although the CAF had shown that the standards were rationally connected to the performance of the job and that they were adopted in an honest and good faith belief that they were necessary to fulfill the work-related purpose, it could not show that the standards were reasonably necessary. It was determined that the CAF failed to accommodate Mr. Irvine to the point of undue hardship. ([2003] F.C.J. 850, paras. 2 to 11)

- [12] In its second decision, the Tribunal made the following critical findings on its jurisdiction: Based upon the totality of the jurisprudence, and the statutory provisions of s.7 and s.10 of the Act, the Tribunal has jurisdiction to deal with discriminatory, and arbitrary, hasty, imprudent or inadequate medical assessments in the application of standards proffered as BFORs. To state otherwise, would be to undermine the entire purpose of human rights legislation. For example, a respondent could establish that a standard constitutes a BFOR, and then despite discriminatory, hasty or deliberate misapplication of the standard to the complainant, justify the complainant's dismissal. In other words the respondent would accomplish indirectly, what it is prohibited from doing directly. In Mr. Irvine's case, the issue of attacking the diagnosis of CAD [Coronary Artery Disease Committee] does not arise. The diagnosis is not in dispute. Rather, the issue remains that of whether the CAF conducted a non-discriminatory, adequate and comprehensive investigation into the medical evidence sufficient to justify its "G4" employment limitation categorization and its prima facie discriminatory discharge of Mr. Irvine on the ground of disability. Did the CAF's individual assessment of Mr. Irvine, categorizing him as "G4" (subject to discharge) versus "G3" (retainable for service as a soldier), meet the requirement of individual testing consistent with the most accommodating standard available as per Meiorin and the stated Federal Court jurisprudence? [Emphasis added] (Second Tribunal Reasons, paras. 43 and 44)
- [13] Indeed, in its decision, the Tribunal found that, in assigning Mr. Irvine a G4 designation, the CAF failed to provide him with an individual assessment consistent with its most accommodating standards.
- [14] Questions of law and fact arise from these findings. D. The standard of review of the Tribunal's decision
- [15] It is agreed that, on findings of law, the standard of review of the Tribunal's decision is correctness. There is, however, a difference of opinion between the CAF and the Commission on the standard of review on findings of fact; the CAF argues that the standard is reasonableness, while the Commission argues that the standard is patent unreasonableness.

- [16] In support of its argument, the CAF cites Justice Noël's decision on the first judicial review of the present case. In the decision, Justice Noël found, without analysis, that the standard of review on findings of fact is reasonableness, and, as authority for this proposition, cites the Ontario Court of Appeal's decision in *Entrop v. Imperial Oil Ltd.*, 50 O.R. (3rd) 18. Entrop concerned the decision of a Board of Inquiry under the Ontario Human Rights Code.
- [17] In support of its argument, the Commission cites the recent decision of this Court in *Quigley v. Ocean Construction Supplies Ltd.*, Marine Division, 2004 F.C. 631. In Quigley, Justice Gibson, using the practical and functional approach, made a thorough analysis of the standard of review to be applied to a decision of a Tribunal under the Act. Justice Gibson concluded that: for findings of law, the standard is correctness; for findings of mixed fact and law, the standard is reasonableness; and for findings of fact, the standard is patent unreasonableness.
- [18] In comity with Justice Gibson, I find that, in the present case, the Tribunal's findings of fact are to be reviewed on the standard of patent unreasonableness, and, accordingly, I dismiss the CAF's argument on this issue. However, in its written argument, the CAF quotes the terms of s.18.1(4)(d) of the Federal Court Act, and argues that the Tribunal based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it; this argument was made with particular reference to the medical evidence. I accept that, if a finding of fact made by the Tribunal is not supported by evidence on the record, the finding is patently unreasonable. I. Determination of the Questions of Law A. The scope of the Tribunal's jurisdiction
- [19] The primary question of law in the present Application is whether the Tribunal was correct in its jurisdictional findings expressed in its second decision at paragraphs 43 and 44 as quoted above.
- [20] It is agreed that the critical point of decision making in Mr. Irvine's case was the Coronary Artery Disease ("CAD") Committee's G4O3 designation; that is, once the CAD Committee made the designation, the Career Board had no choice but to release him. Therefore, the question is: was the Tribunal entitled to examine the CAF's decision making to determine whether it met the test of proving it conducted a non-discriminatory, adequate, and comprehensive investigation into the medical evidence sufficient to justify the G4 designation placed on Mr. Irvine? With respect to the Tribunal's focus on this point, the CAF argues that the Tribunal was not correct in deciding what it was entitled to do.
- [21] The Tribunal found that it had jurisdiction to make two findings of fact: whether discriminatory medical assessments were conducted, and, whether arbitrary, hasty, imprudent or inadequate medical assessments were made. As to the first finding, it is agreed that the Tribunal had jurisdiction to determine whether Mr. Irvine suffered differential treatment which amounts to discrimination on a prohibited ground under the Act; that is, whether the CAF's policy or practice is discriminatory. However, with respect to the second finding, the CAF argues that the Tribunal has no jurisdiction to judge the quality of the

medical decision making which resulted in the G4O3 designation. The CAF argues that the medical decisions made with respect to Mr. Irvine are matters of professional practice on which reasonable doctors can disagree. With respect to any complaint about allegations of poor decision making in the application of the Universality Standard, the CAF argues that recourse can only be had by Mr. Irvine either making a complaint to the medical profession governing body, or making a judicial review application to the Federal Court for a finding of error under the Federal Court Act.

- [22] In response, the Commission argues that the objective of finding whether the G4O3 designation was reached on "discriminatory, and arbitrary, hasty, imprudent or inadequate medical assessments" is a required discovery of whether the third point of inquiry stipulated in Meiorin was met, and not an exercise of examining the decision making for reviewable error, as would be the case in a judicial review.
- [23] To support its argument that the CAF's argument is flawed, the Commission points out that, since the application of the Universality Standard is *prima facie* discrimination, the onus is on the CAF in Mr. Irvine's case to establish that it has a defence to his complaint by proving, by its medical decision making with respect to him, that the Universality Standard is a BFOR. Thus, the Commission argues that, since all possible accommodation must be shown before the Universality Standard becomes a BFOR, and since the medical decision making must be examined to decide whether all possible accommodation was provided, it is inconsistent with Meiorin to shift the onus to Mr. Irvine to challenge the medical decision making by the judicial review process.
- [24] I agree with the Commission's arguments as expressed. It is agreed that the G4 designation imposed on Mr. Irvine is the key feature of the decision making upon which he grounds his complaint under the Act. It happens that the decision making with respect to this key feature involved a medical decision making process. The obligation imposed by Meiorin was to decide whether the correct level of accommodation had been provided to Mr. Irvine. I agree with the Tribunal's finding that this obligation cannot be met without a careful analysis of the medical decision making.
- [25] As a result, I find that the Tribunal correctly decided the question for investigation: Did the CAF's individual assessment of Mr. Irvine, categorizing him as "G4" (subject to discharge) versus "G3" (retainable for service as a soldier), meet the requirement of individual testing consistent with the most accommodating standard available as per Meiorin and the stated Federal Court jurisprudence? (Second Tribunal Reasons, para. 44) B. The scope of the requirement of accommodation
- [26] Before the Tribunal, in order to have a defence to the discrimination imposed on Mr. Irvine by the Universality Standard, the CAF bore the onus of proving that it had met the test of accommodation imposed by Meiorin. At paragraph 44 of the decision under review, as just quoted above, the Tribunal found that the CAF had to meet "the most accommodating standard"; at paragraph 54, the Tribunal provides specific detail on the content of this

standard: The CAF had to take all possible measures to fairly assess [Mr. Irvine's] ability to obtain a "G3" pre-release and meet universality of service principles. The CAF had the onus of demonstrating that more probably than not Mr. Irvine would have received a "G4" rating had such measures been attended to. Based on the facts of this case, I do not accept that the CAF met this onus.

- [27] With respect to the scope of the accommodation required, the CAF makes the following two arguments: ...even if assessment, diagnosis and prognosis can be considered part of the process of accommodation, the standard must be more practical and reasonable than "all possible testing". The law should not require an employer to perform medical tests that will not yield relevant and useful information. The Applicant proposes that the test must be whether there is sufficient medical information upon which a professionally qualified medical doctor might reasonably form the opinion at issue. (Applicant's Memorandum of Fact and Law, para. 84) and The Tribunal's finding that further accommodation was necessary appears to rest on the assumption that further testing might have made a difference to the decisions made by the Canadian Forces. This assumption is not supported by the evidence. Even if the Canadian Forces had a duty to carry out additional diagnostic testing of the complainant before determining that he was at serious risk of another cardiac event, there must be at least some evidence to show that such testing might have led to a different result. (Applicant's Memorandum of Fact and Law, paras. 105 and 106)
- [28] With respect to the first argument respecting "all possible testing", I find it has no weight because it misquotes the test for accommodation applied by the Tribunal. The Tribunal did not say that "all possible testing" is required; it said that the CAF was required to take "all possible measures to fairly assess" [my italics] Mr. Irvine's medical condition.
- [29] With respect to the second argument, I have found that the Tribunal was correct in its finding of law that the CAF had the onus of demonstrating that, more probably than not, Mr. Irvine would have received a G4 rating had greater accommodation measures been applied. Thus, the CAF bore the onus of proving that further testing probably would not have made a difference. As a result, I dismiss the argument that the evidentiary onus was on Mr. Irvine to prove the reverse. C. Conclusion
- [30] For the reasons provided, I find no errors of law in the decision under review. II. Determination of the Questions of Fact
- [31] The evidentiary record discloses that, up to the CAD Committee's decision, the medical evidence tended in the direction of giving Mr. Irvine a G3 designation. Thus, as already stated, the CAD Committee's decision to give him a G4 designation is a central feature of the decision under review. It is readily apparent that the Tribunal saw this to be the case, and, as a result, spent a great deal of effort on analysing the evidence before the CAD Committee, and the quality of its decision making.

- [32] As found, the standard of review on findings of fact made by the Tribunal is patent unreasonableness. Thus, the primary question is whether the findings made are supported by the evidence.
- [33] In order to determine that the CAF had not met the onus stated in paragraph 54 of the Tribunal's second decision, the Tribunal made a number of findings of fact critical of the medical decision making leading up to the G4 designation. Again, paragraph 54 reads as follows: The CAF had to take all possible measures to fairly assess [Mr. Irvine's] ability to obtain a "G3" pre-release and meet universality of service principles. The CAF had the onus of demonstrating that more probably than not Mr. Irvine would have received a "G4" rating had such measures been attended to. Based on the facts of this case, I do not accept that the CAF met this onus.
- [34] I find that the CAF's arguments with respect to the Tribunal's findings of fact raise three questions about the way in which the Tribunal evaluated the medical evidence. A. Did the Tribunal make findings of fact outside of its expertise?
- [35] In oral argument, Counsel for the CAF raised the question of whether the Tribunal had the expertise to embark on a scrutiny of the medical evidence. In effect, the CAF argues that the Tribunal acted outside of its expertise in concluding that the CAF failed to provide Mr. Irvine with an individual assessment consistent with the most accommodating standards of the CAF. That is, the CAF argues that the Tribunal gave a medical opinion which it was not qualified to give. I do not agree with this argument.
- [36] In reaching its opinion on the failure of the CAF to accommodate as required, I find that the Tribunal was not applying medical expertise which it did not have, but analytical decision making expertise, involving findings of fact based on the medical opinions provided.
- [37] The G4O3 designation was the result of competing evidence, upon which the Tribunal made findings of weight. I find that in doing so, the Tribunal was not acting outside the limits of its expertise, but was weighing expert opinion to arrive at a conclusion, which is something the Tribunal was entitled to do. In the end result, the Tribunal found that certain tests were not conducted which should have been conducted. I find that this conclusion was within the Tribunal's expertise to reach.
- [38] As a result, I dismiss the CAF's argument on the expertise issue. B. Are the Tribunal's findings of fact supported by evidence on the record?
- [39] In the decision under review, the Tribunal made the following critical findings of fact at paragraph 50 of the decision: On August 30, 1995, a CAD Committee reviewed Mr. Irvine's medical file and noted that a consultant [Dr. Kafka] had recommended a "G4O3", but if lipids come down, "G3", and that a base surgeon [Dr. Buchholtz] had recommended "G3O3" - "closer medical supervision". Thus, the CAD Committee had two potentially conflicting employment limitation category assignments before it: one made by Dr. Buchholtz, Chief of Medicine, who had examined Mr. Irvine, and one made by Dr. Kafka, who had conducted a paper

review of Mr. Irvine's file. There is little or no evidence that the CAD Committee carefully considered that Dr. Kafka was prepared to recommend a "G3" category on the basis of better LDL levels, a new exercise Mibi and an angiography. There is little or no evidence that the CAD Committee carefully considered the extent of the congruence of the two opinions and their respective bases. There is little or no evidence that the CAD Committee chose to take measures to explore whether Mr. Irvine could have met the "G3" rating, contemplated by its own physicians. Rather, the CAD Committee summarily and arbitrarily assessed him as unfit for two or more specific military environments and recommended a permanent medical category of "G4". [Emphasis added]

- [40] The CAF takes objection to the Tribunal's decision as follows: The Tribunal's characterization of the work of the Coronary Artery Disease Committee as summary and arbitrary is not supported by the medical evidence. Her conclusion that further testing was necessary is based on speculation. There was no evidence to show that the Committee was negligent, that it failed to consider all relevant information or that it formed its opinion in the teeth of contrary evidence. For those reasons, it was not open to the Tribunal to find that the Canadian Forces acted arbitrarily, hastily or imprudently, that the medical limitations were inappropriate or that further assessment might have yielded a different result. (Applicant's Memorandum of Fact and Law, para. 102)
- [41] In these passages, two features are being addressed: the care that the CAD Committee gave to the medical evidence; and the level of accommodation provided to Mr. Irvine in the CAD Committee's decision making.
1. The care the CAD Committee gave to the medical evidence
- [42] Placing a person in the G4 category means that he or she requires medical services, and is, therefore, unfit for a medically isolated posting. In Mr. Irvine's case, the issue the CAD Committee had to consider was whether his medical condition placed him with the G4 designation criteria. Thus, the focus of the CAD Committee's inquiry was on whether Mr. Irvine was at significant risk of another heart attack. The CAD Committee found that he was, and, as a result, imposed the G4 designation.
- [43] The Tribunal's findings that the CAD Committee did not give careful consideration to the evidence in reaching the G4 designation is a key element of its decision. It is obvious from the decision that the Tribunal was not looking for negligence; but was evaluating the decision making to conclude whether it was deficient according to established standards.
- [44] At the time the CAD Committee's decision was made, there were two sets of standards in existence. The Medical Standards of 1979 ("the 1979 Standards") awarded numerical categories according to specific criteria; these standards did not allow for flexibility or individualization. However, by September 1995, new standards were adopted that emphasized a more individualized and descriptive approach to a member's limitations ("the 1995 Guidelines"). The 1995 Guidelines also changed the decision-making process in that they: provided more guidelines and fewer standards to Medical officers in assessing the

medical fitness of members and in determining their employment capabilities. They emphasized consultation and a "team approach" assessment. Medical officers were to confer with each other, specialists, DHTS, and member's supervisors. The policies included questions designed to prompt the Medical Officer to reflect upon a number of issues in making the assessment. (First Tribunal Reasons, para. 20)

- [45] The Tribunal found that the CAD Committee reached its decision according to the 1979 Standards, but should have been made according to the 1995 Guidelines. However, the CAF argues that, in fact, the decision was made according to the more accommodating 1995 Guidelines. Therefore, since both the Tribunal and the CAF bring the 1995 Guidelines into play, for the purposes of the present judicial review, I find that it is appropriate to consider the CAD Committee's decision as being made against the 1995 Guidelines. Indeed, an analysis of the 1995 Guidelines and the evidence of the CAD Committee's compliance with them was the focus in the Tribunal's decisions.
- [46] The 1995 Guidelines read as follows: The board also tries, in each case, to determine a prognosis or probability of recurrence of a significant cardiac event (ie., MI) in the foreseeable future. The board considers many factors including:
- a. the recency of symptoms and cardiac events;
 - b. types of activities, including their intensity, duration and frequency, which provide ischemic events;
 - c. the frequency and level of medical care needed to appropriately manage this member's disease;
 - d. the employability-limiting side effects of any cardiac medications being taken;
 - e. whether there would be any exacerbation of ischemia if the medications were withheld, for whatever reason?
 - f. the results of testing, such as coronary angiography or treadmill testing, used to identify the extent of the disease and the functional capacity of the member; and
 - g. the presence of any associated risk factors such as hypertension, smoking, family history and other systemic diseases such as diabetes or dyslipidemia. [Emphasis added] (Applicant's Application Record, Vol. III, p. 540)
- [47] The Tribunal found that the CAD Committee did not give careful consideration to the 1995 Guidelines in assessing the probability of recurrence of a significant cardiac event. In particular, the Tribunal stated: [...] the factors that Mr. Irvine did not have ischemia; that Mr. Irvine had performed well on prior treadmill testing and ought to have been given an opportunity to perform another one pre-release, in accordance with Dr. Kafka's early conditional assessment; that while Mr. Irvine exhibited a number of risk factors, he did not possess others such as hypertension or diabetes. Nor, is there sufficient evidence that the Committee obtained and considered carefully Mr. Irvine's ejection fraction which would

have been helpful in determining both his functional capacity and the likelihood of another event, particularly if considered in conjunction with the results of an exercise Mibi. (Second Tribunal Reasons, para. 51)

[48] Consistent with its argument cited above that the CAD Committee did not act in a summary or arbitrary way, the CAF argues that: It is not essential that the assessment record disclose express consideration of the seven criteria listed in the 1995 Guidelines for assessing probability of recurrence. The Committee members are fully qualified doctors. One was a cardiologist. They reached the correct medical diagnosis taking into account the evidence they believed was relevant. There is no evidence that express consideration of other factors might have led to a different result. Nor is there any basis to doubt the reliability of their conclusion simply because they did not personally examine WO Irvine. (Applicant's Memorandum of Fact and Law, para. 98)

[49] I give no weight to the CAF's arguments. In my opinion, the Tribunal was entitled to judge the CAD Committee's decision making according to the precise wording of the 1995 Guidelines, and was also entitled to conclude, on the evidence, as it did, that the decision making was deficient. In my opinion, the Tribunal's finding is not patently unreasonable.

2. The level of accommodation provided to Mr. Irvine by the CAD Committee

[50] The question of fact that the Tribunal had to determine was whether the CAF met the legal test for accommodation described in Part I of these reasons. In this regard, as expressed in the paragraph 47 of these reasons, the Tribunal focussed on three medical areas of concern: the ejection fraction data, the treadmill testing, and the MIBI testing. The Tribunal found that the CAF failed to meet the legal onus upon it. The issue is whether this finding is supported by the evidence.

[51] Dr. Leach was the only cardiologist on the CAD Committee. Questions asked of him during the hearing before the Tribunal elicited evidence respecting testing. Under questioning by Counsel for the Commission, with respect to ejection fraction data giving an important indication of prognosis of probability of recurrence of a significant cardiac event, he testified as follows: Q: [...] in terms of what it tells you about the left ventricle function, is the ejection fraction the most important data you want to know about the left ventricle? A: It is one important piece of information, yes. Q: What are some of the other important data? A: The other important data is the extent of the disease and the arteries themselves which lead to the ability of the heart to function normally or not. Q: If you want to know how the left ventricle is functioning, what do you look at? Is it the ejection fraction? A: That is one commonly used figure that everyone can understand and come up with sort of a mental image as to how well the heart is performing. Q: Would you say it is the primary indicator? A: The primary indicator as to how well the heart is performing? Q: No - of how well the left ventricle is functioning. A: It is an estimate of how efficient the heart is. Q: I guess what I am trying to ask you about is its relative importance to other indicators about the left ventricle. A: Yes, it is one of the things that we use in determining how to treat an individual. It gives

us an indication of prognosis as well. (Applicant's Application Record, Vol. VII, pp. 2478-2479) Under questioning by Counsel for the CAF with respect to use of treadmill tests he testified as follows: A: They can give us a rough idea, a rough estimate of prognosis, but that is all it can give. A normal stress test does not mean that the individual is not going to have disease progression, and it doesn't tell me when an event might or might not occur. (Applicant's Application Record, Vol. VI, p. 2061) Under questioning by Counsel for the Commission with respect to the use of exercise MIBI tests he testified as follows: Q: Among the investigative tools available to a cardiologist, if I understand correctly, there is the invasive procedure of angiography. A: Yes. Q: There are other tools such as a physical exercise test. A: Yes. Q: A stress test, in other words. A: Yes. Q: And there is something else, I understand, in an abbreviated way, the "MIBI test". A: Yes. Q: And that is an investigative tool, isn't it? A: Yes, it is. Q: And it is similar, if I understand correctly, to an exercise stress test, but it allows for recording [...]. A: It is another type of functional test of the heart. [A] stress test is a functional test. [...] It is another way of assessing the perfusion of the heart, and what they do is they stress the heart with that kind of test. They can stress it medically with medication or they can stress it on a treadmill or a bicycle. So it provides a bit more functional information about the heart's circulation. The angiogram is a structural test that gives information about the anatomy, but not the function. (Applicant's Application Record, Vol. VI, pp. 2124-2125) [...] Q: [...] Staying with the MIBI test for a moment, that test, if I understand correctly, it can generate an individual's ejection fraction for the left ventricle function. Isn't that correct? A: It can. (Applicant's Application Record, Vol. VI, p. 2128)

- [52] However, Dr. Leach also testified that data on each of the three areas of concern was not before the CAD Committee at the time it made its decision in Mr. Irvine's case. Dr. Leach's evidence respecting the ejection fraction data, in answer to questions posed by Counsel for the Commission, is provided in the passage which follows; in this evidence he confirmed that the CAD Committee's decision was based only on a "synopsis" of Mr. Irvine's medical file: Q: There is nothing in this synopsis that indicates that coronary artery disease has progressed following bypass surgery? A: No. Q: There is nothing here in this synopsis that there is graft disease? A: Correct. Q: In the statements you made to Mr. Graham [opposing counsel] in answering about these three points, you referred to information that came out of the August 2000 angiogram? A: Yes, we discussed the angiogram that was done subsequent to the second infarct. Yes. Q: That gave you the information you needed in order to be able to say, "There was coronary disease progression and there is graft disease in this patient." A: At that time, yes, definitely. Q: But without the information from the year 2000, you couldn't have made those statements could you? A: No. I could still have made the statement that I would be concerned about that occurrence, but, if it hadn't happened yet, that doesn't mean that it is still not a possibility. That is the problem. Q: Once again, those are concerns you would have for all patients with coronary artery disease. Correct? A: Yes. Q: There is a journal article [of yours] [...]. In the right-hand column at the bottom under the heading "Prognostic Stratification - Prognosis Modification", in the second sentence it reads: "The most powerful prognostic indicators are left ventricular function and the extent of coronary

heart disease." A: Yes. Q: [...] In 1995 you told us you didn't know what Mr. Irvine's ejection fraction was. Correct? A: We didn't have the number. There were no numbers available. [...]. Q: You told us earlier today that there is nothing in that synopsis that tells you about the extent of the heart disease. A: The coronary anatomy is not described in the synopsis. The ventricular function is not described in the synopsis. [...] (Applicant's Application Record, Vol. VII, pp. 2493-2496) Dr. Leach's evidence respecting the absence of data on MIBI testing, in answer to questions posed by Counsel for the Commission, is as follows: Q: Going to the top of the next page [of Dr. Leach's article], the first sentence that appears in that page reads: "The 1984 CASS data support these conclusions. Furthermore, the CASS data show that is the individual achieved only Stage I of less of the BRUCE Protocol treadmill test and had ST segment depression of more than 1mm, 5-year survival was 72%, but this would rise to 95% if stage 3 or greater was reached with less than 1 mm of ST depression". A: Yes. Q: In Mr. Irvine's case, there is no evidence of ST depression. A: Correct. Q: And you have just pointed out that he reached the fourth stage of the BRUCE Protocol. A: Correct. Q: So, according to the CASS data, that would put him in excess of the 95% survival - A: At five years. [...] Q: And that is with respect to mortality, I believe. A: Mortality, correct. Q: To turn it round the other way, a five per cent chance that he could die in five years? A: Correct. Q: Five per cent or even less? A: Yes. I would go to five per cent. If that type of analysis was done in August 1995, one could say there was a 95 per cent chance that he will survive or he will live until August of the year 2000. A: I guess using that one criteria, but mortality is not the only thing we look at. That is only one thing in the list of events that have to be considered. Q: I am just asking about this statement here that you have written about. A: Using that statement alone? Yes. Q: A MIBI or even a MUGA study would have given you greater information that you had in August 1995 about the left ventricular function, wouldn't it? A: I think the nuclear imaging study they did give some information about function. Q: I'm sorry. When was that? A: They didn't put a number on the ejection fraction, but they comment on a large defect. Q: You are unable to tell us, though, today if you actually looked at that in 1995. You said that earlier. A: I can't remember all that many years back, but I assume that the information was there. (Applicant's Application Record, Vol. VII, p. 2501) Dr. Leach's evidence respecting the lack of data on treadmill testing, in answer to questions posed by Counsel for the CAF, is as follows: Q: If I understand your answer correctly, this [as quoted in the above passage] is an estimate of mortality. Is that right? A: Yes. Q: That estimate says nothing about the risk of morbidity. Is that fair? A: Correct. Q: What is morbidity? A: Morbidity is, I guess, any event short of mortality that effects the individual as a result of the disease. Q: Are you able to say how the risk of morbidity would be based on this study? A: I think in general one could say the risk of morbidity would be lower, but it is a very difficult thing to estimate because the treadmill, all it shows at a point in time is that there is sufficient flow through the arteries to nourish the heart at that point in time. [...] Q: You said that the risk of morbidity would be lower, meaning there would be less risk of morbidity. Is that right? A: If the treadmill test were [sic] performed extremely well, I would just assume that the morbidity data would follow mortality data. (Applicant's Application Record, Vol. VII, p. 2516)

- [53] I find that there was evidence upon which the Tribunal could base its finding that the CAF failed to take all possible measures to fairly assess Mr. Irvine's medical condition, and, correspondingly, there was evidence to find that the CAF had not discharged the onus of demonstrating that, more probably than not, Mr. Irvine would have received a G4 rating had greater accommodation measures been applied. As a result, in my opinion, the Tribunal's findings are not patently unreasonable. C. Conclusion
- [54] For the reasons provided, I find that the Tribunal made no reviewable error of fact in its decision. ORDER Accordingly, as I find no reviewable error in the Tribunal's decision, the Application is dismissed. By agreement between the parties to the present Application, I make no order as to costs. "Douglas R. Campbell" J.F.C. FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-533-04 STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA (CANADIAN ARMED FORCES) v. RAYMOND IRVINE and CANADIAN HUMAN RIGHTS COMMISSION PLACE OF HEARING: Edmonton, AB DATE OF HEARING: December 14, 2004 REASONS FOR ORDER: CAMPBELL J. DATED: January 26, 2005 APPEARANCES: J. Sanderson Graham FOR APPLICANT Raymond Irvine (on his own behalf) FOR RESPONDENT (RAYMOND IRVINE) Patrick O'rourke and Philippe Dufresne FOR RESPONDENT (CHRC) SOLICITORS OF RECORD: John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario FOR APPLICANT Canadian Human Rights Commission Ottawa, Ontario FOR RESPONDENT (CHRC)

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