

Protection against discrimination based on HIV/AIDS status in Canada: the legal framework

Respecting, protecting, and fulfilling the human rights of people living with, and vulnerable to, HIV/AIDS has been recognized as an essential element of ethical and effective responses to the epidemic. Human rights law provides one critical tool for implementing a human rights-based approach to HIV/AIDS. Freedom from discrimination is a foundational human rights principle, and is a touchstone of both international and domestic human rights law. This article examines the ways in which Canadian law currently protects people against discrimination based on HIV/AIDS status. The article also reviews the equality rights provision of the Canadian Charter of Rights and Freedoms; federal, provincial, and territorial anti-discrimination statutes and policies; and some of the key cases that have applied and developed these legislative protections. Finally, the article looks at the issue of remedies for discrimination under Canadian law. (Other forms of discrimination relevant to people living with HIV/AIDS – specifically, discrimination based on grounds relevant to people from groups disproportionately affected by HIV/AIDS-related stigma – will be analyzed in similar detail in a future issue of the Review.)

Introduction

More than 20 years after the emergence of HIV/AIDS, stigma and discrimination remain a reality for people living with the disease and for groups associated with the epidemic, particularly those who are socially and economically excluded. A recent survey of Canadians' attitudes about HIV/AIDS yielded mixed results.¹ About 85 percent of respondents said they could be friends with someone who has HIV/AIDS, although one in ten still believes that people infected with HIV through sex or drug use have got what they deserve. But when asked about their comfort with a person with HIV/AIDS in various scenarios, a disturbing picture emerges.

Almost one-third of respondents indicated they would not be comfortable working in an office with someone who is HIV-positive or shopping

in a grocery store whose owner is HIV-positive. Only 55 percent of respondents said they would be somewhat or very comfortable if their child were attending a school where one of the students is known to be HIV-positive. And half of respondents said that people living with HIV/AIDS should not be allowed to serve the public in positions such as dentists or cooks. Smaller-scale research projects in recent years have also reported that people living with HIV/AIDS continue to experience, and to fear, discrimination based on their serostatus or diagnosis of AIDS.²

In light of such findings, and of experiences regularly recounted by people living with HIV/AIDS, what protection and redress does the law in Canada provide for people who experience HIV/AIDS-related discrimination?

Canada is a federal state consisting of a federal government, ten

provinces, and three territories, with legislative authority over various spheres divided between these different levels of government. As a result, protection against HIV/AIDS-related discrimination is found in several different laws, applicable at different levels and to different actors or situations.

Constitutional equality rights protect individuals against discrimination by government, at whatever level, throughout the country. In addition, at both the federal level and in every province and territory, human rights statutes prohibit discrimination not only by governments but also by private actors (eg, private persons, corporations), in areas such as: employment; services, goods and facilities; contracts; accommodation; and membership in unions or other associations.³

In almost every jurisdiction, these anti-discrimination statutes also create a commission to receive and investi-

gate complaints of discrimination contrary to the act and a tribunal that can adjudicate such complaints if they proceed past the investigation stage and settlement attempts. These statutes often have a clause in them stating that they are superior to other statutes in that jurisdiction, unless the legislature clearly intends otherwise in the case of a particular statute. Even when such a clause is not present, the Supreme Court of Canada has ruled that a human rights act takes precedence over other statutes,⁴ and has described them as quasi-constitutional in nature.⁵

The full scope of civil, political, economic, social, and cultural rights recognized in the international treaties ratified by Canada does not find expression in domestic Canadian law.

It is important to understand that, while they are often named “Human Rights Acts,” these statutes are primarily focused on only one human right – namely, freedom from discrimination.⁶ Many other human rights, as recognized in international law, are reflected in other Canadian laws – most obviously, those rights that enjoy constitutional protection under the Canadian Charter of Rights and Freedoms.

But the full scope of civil, political, economic, social, and cultural rights recognized in the international treaties ratified by Canada does not, at this

time, find expression in domestic Canadian law – and in some cases, such as the right to the highest attainable standard of health, which binds Canada under the International Covenant on Economic, Social and Cultural Rights, governments have actively resisted recognition of these rights as subject to judicial application before Canadian courts.

In the case of protecting against discrimination, however, Canadian law is among the most progressive, at least on paper if not always in implementation. On balance, albeit with some lamentable exceptions, Canadian courts have taken relatively progressive approaches to interpreting and applying constitutional guarantees of equality.

In all jurisdictions – federal, provincial and territorial – discrimination on the following grounds is prohibited by the jurisdiction’s human rights statute: age, race, ethnicity, colour, religion, sex (including pregnancy), marital status, disability (or “handicap” in some statutes), sexual orientation, and place of origin. Some human rights codes also include provisions explicitly prohibiting discrimination based on family status, source of income, (pardoned) criminal conviction, and gender identity (in one jurisdiction).

Courts and tribunal decisions have, in some cases, expanded the scope of protection through their interpretations of the prohibited grounds that are explicitly mentioned in these statutes. Specific types of discrimination – such as discrimination against people with AIDS, or people with a chemical dependency – have been found to be covered by human rights tribunals or courts through their interpretation of terms such as “disability.” Some of the variation between

jurisdictions is reflected in the accompanying table.

Defining “discrimination”

Not all distinctions, and not all unfavourable treatment, amount to unlawful “discrimination.” The leading definition of discrimination, which has been widely applied by Canadian courts and tribunals, was set out in *Andrews v Law Society of British Columbia*, a 1989 decision of the Supreme Court of Canada:

discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.⁷

Discrimination may be direct, such as a landlord’s open refusal to rent an apartment to someone living with HIV/AIDS. Or, it may operate more indirectly, such as by applying rules or policies that, although facially neutral, have the effect of discriminating on a prohibited ground.

Under Canadian human rights statutes and jurisprudence, there is a legal duty of accommodation – that is, a duty to take reasonable steps, short of “undue hardship,” to accommodate difference (at least on the grounds recognized in human rights law).⁸ Legitimate (*bona fide*) requirements may be defensible as permissible

Table – Protection against discrimination based on HIV/AIDS status as a "disability" or "handicap"

Federal Law	
Canada	Canadian Human Rights Act prohibits discrimination in goods, services, facilities, accommodation, and employment. Canadian Human Rights Commission has a Policy on HIV/AIDS.
Provincial and Territorial Laws	
Alberta	Human Rights, Citizenship and Multiculturalism Act prohibits discrimination in public accommodation, tenancy, and employment.
British Columbia	Human Rights Code prohibits discrimination in public facilities, tenancy premises, purchase of property, and employment.
Manitoba	Human Rights Code prohibits discrimination with respect to employment or occupation; any service, accommodation, facility, good, right, licence, benefit, program, or privilege available or accessible to the public; contracts; membership in a union, employers' organization, occupational association, professional association or trade association; leasing or other lawful occupation of residential or commercial premises; purchase of real property. Manitoba Human Rights Commission has published a Fact Sheet: Prohibiting Discrimination Based on AIDS/HIV Infection.
New Brunswick	Human Rights Code prohibits discrimination with respect to employment, housing, accommodation, and services. New Brunswick Human Rights Commission has adopted General Criteria for the Investigation of Complaints of HIV/AIDS Discrimination.
Newfoundland	Human Rights Code prohibits discrimination with respect to employment, access to public services, and commercial residential tenancies.
Northwest Territories	Human Rights Act prohibits discrimination with respect to employment, goods, services, accommodation, and facilities customarily available to public.
Nova Scotia	Human Rights Act prohibits discrimination with respect to services and facilities, accommodation, purchase and sale of property, employment, volunteering public service, publication, or membership in a trade union.
Nunavut	Human Rights Act prohibits discrimination with respect to employment, goods, services, accommodation, and facilities customarily available to the public.
Ontario	Human Rights Code prohibits discrimination with respect to services, goods, and facilities; occupancy of accommodation; contracts; employment; membership in trade union, trade, occupational association, or self-governing profession. Ontario Human Rights Commission has adopted a Policy on HIV/AIDS-related Discrimination.
Prince Edward Island	Human Rights Act prohibits discrimination with respect to accommodation, property, and employment.
Québec	Charter of Human Rights and Freedoms prohibits discrimination with respect to accommodation, access to public places, and employment.
Saskatchewan	Human Rights Code prohibits discrimination in employment, purchase of property, accommodation, public places, and education.
Yukon	Human Rights Act prohibits discrimination with respect to employment, accommodations, and services.

kinds of distinctions. There is an extensive body of case law considering the parameters of the duty to accommodate and what constitute legitimate requirements.⁹ It would, for example, be discrimination if an employer failed to reasonably accommodate an HIV-positive employee with a sufficiently flexible work schedule to allow for medical appointments.

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Harassment is a form of discrimination, and has been expressly addressed in the human rights statutes of some jurisdictions. In other jurisdictions, as a matter of policy, it has been treated as falling under the general prohibition on discrimination.

Whether by statute or policy, harassment has generally been defined to include “sexual harassment” (including sexual advances or conduct of a sexual nature that is likely to be offensive or humiliating, or that places a condition of a sexual nature on something like hiring or promotion), as well as any course of abusive or vexatious conduct, on the basis of any prohibited ground of discrimination, that the person knows, or ought reasonably to know, is or would be unwelcome. Derogatory comments in the workplace that people with HIV/AIDS “deserve what they get” would constitute harassment prohibited by law.

Under Canadian law, discrimination can be found to exist even if there was no intention to discriminate. As the Supreme Court of Canada put it succinctly in *O'Malley*: “It is the result or the effect of the action complained of which is significant.”¹⁰ Furthermore, Canadian law prohibits discrimination based on a person’s *perceived* characteristics or membership in a particular group.¹¹ If, for example, a person is denied accommodation or employment because s/he is perceived to be HIV-positive or possibly HIV-positive, this is illegal discrimination.

Legal sources of protection against HIV/AIDS-based discrimination

(1) Constitutional protection: the Charter’s equality rights clause

The Canadian Charter of Rights and Freedoms is part of the Constitution of Canada, enacted in 1982 (although the equality rights section did not come into force until three years later).¹² The Constitution is the supreme law of the country. Any law that is inconsistent with constitutional provisions is “to the extent of the inconsistency, of no force or effect,”¹³ and may be struck down or modified by courts to render it constitutionally acceptable. This means that any other legislation – including the anti-discrimination statutes described in this article – must be consistent with the requirements of the Charter.

This includes the guarantee of equality rights, found in section 15 of the Charter, which states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of 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.¹⁴

The term “disability” in this section has been interpreted to include HIV/AIDS (as it has in various anti-discrimination statutes, as discussed below). This means that people living with HIV/AIDS enjoy constitutional protection against discrimination by the state based on this status.¹⁵

Section 15 uses the phrase “in particular” in listing, for greater certainty, some specific grounds on which discrimination is prohibited. This means the scope of the equality rights protection in section 15 is not limited just to the grounds that are listed. Grounds that are similar (“analogous”) to those which are expressly mentioned are also included.¹⁶ This has enabled courts to “read in” other grounds and thereby expand constitutional protection against discrimination in line with the spirit of the Charter. (This issue, which is relevant to the scope of protection offered by the Charter for various groups who are vulnerable to both HIV/AIDS and discrimination, will be explored further in a subsequent, companion article.)

The legally correct approach to interpreting section 15 has been in flux over the last decade. Under the Supreme Court of Canada’s current interpretation, in order to show a breach of section 15 equality rights, a person must show that the government’s law, policy or practice has drawn a distinction on a ground that is either listed in section 15 or is similar, and also that the distinction constitutes a “violation of essential human dignity.”

Until the late 1990s, it was sufficient to show a distinction based on a prohibited ground, at which point the onus then shifted to the government to

justify the discrimination, if it could, under the justification provision in section 1 of the Charter (see below). However, in some more recent decisions, the Supreme Court has added this extra requirement that human dignity be violated.¹⁷

While a concern for human dignity certainly lies at the heart of protecting equality rights, this additional criterion has been criticized, including by Canada's leading constitutional scholar, as "vague, confusing and burdensome to equality claimants,"¹⁸ as weakening the test for governments of justifying discriminatory distinctions,¹⁹ and as a step backward from the previously clear approach in Canadian constitutional law to analyzing cases claiming infringements of section 15's equality rights guarantee.²⁰ Notwithstanding this criticism, the Supreme Court has reiterated the human dignity element of the test in some of its most recent judgments, while hearkening back to some earlier jurisprudence in stressing that the purpose of section 15 is to "prevent the perpetuation of pre-existing disadvantage through unequal treatment" and to "ameliorate the position of disadvantaged groups within society."²¹

As has just been noted, the Charter includes a provision recognizing that rights are not absolute, and may justifiably be limited in some circumstances. Section 1 states that the Charter guarantees the rights set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Once it has been shown that a Charter right, such as the guarantee of equality in section 15, has been infringed, the onus then falls on the government in question to justify that

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infringement. In fleshing out the meaning of section 1 of the Charter, the Supreme Court of Canada has set out the tests the state must meet if it is to defend its legislation or other action that breaches Charter rights:

- (1) the objective of the legislation, policy or practice in question must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;
- (2) the measure must be rationally connected to the achievement of that objective, and not arbitrary, unfair or based on irrational considerations;
- (3) the measure should impair as little as possible the right or freedom in question; and
- (4) the benefits gained by limiting the right or freedom must be proportional to the negative effect on the right or freedom.²²

The Charter applies to all levels of government and to all government acts,²³ whether by the legislative, executive or judicial branches of government (including the courts, and human rights commissions and arbitrators exercising judicial functions).²⁴ This includes municipalities (which are created by provincial governments and exercise the powers delegated to them)²⁵ and to Aboriginal band coun-

cils (which form part of the system of governance established by the federal Indian Act).²⁶

The Charter also applies to Crown corporations (at least in respect of their activities in carrying out government functions).²⁷ It also applies outside the sphere of government to private persons or bodies if they are exercising authority granted by a statute,²⁸ or if they are implementing a specific government policy or program (eg, a hospital providing medically necessary services).²⁹

The Charter does not otherwise apply to acts by private citizens or entities,³⁰ meaning that discrimination by an employer, a landlord, or a private establishment is not a breach of constitutional equality rights (although it can be addressed under other anti-discrimination laws, as described below).

(2) Protection against HIV/AIDS-based discrimination under federal law

a) Canadian Human Rights Act

The Canadian Human Rights Act (CHRA) was first enacted by the federal Parliament in 1977.³¹ It prohibits discrimination on a wide range of grounds in areas such as employment; accommodation; the provisions of goods, services, and facilities; and membership in a union or employee organization.

"Disability" is among the prohibited grounds of discrimination in the CHRA,³² and is defined as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."³³ Harassing an individual on a prohibited ground is explicitly included in the definition of "discriminatory practice."³⁴

Unlike the Charter, the CHRA (and its counterparts at the provincial and territorial levels) applies to both public and private sector entities. In the case of the federal Act, it protects against discrimination by federal government departments, agencies, and Crown corporations, and by First Nations band councils. In the private sphere, it protects against discrimination by federally regulated entities such as chartered banks, airlines, TV and radio stations, interprovincial communications and telephone companies, buses and railways that travel between provinces, and other federally regulated industries (eg, certain mining operations).³⁵

Courts and tribunals have recognized HIV/AIDS as a disability within the meaning of the Canadian Human Rights Act.

b) Jurisprudence

Courts and tribunals have recognized HIV/AIDS as a disability within the meaning of the CHRA. For example, in one of the first such cases anywhere in the country, the Canadian Human Rights Tribunal ruled in 1989 that a man had been discriminated against, on the basis of disability, when his employment as a cook for a Canadian Pacific railway crew was terminated after it was discovered that he had HIV.³⁶ That decision was upheld by the Federal Court of Appeal.³⁷ This interpretation of the CHRA was affirmed again in *Thwaites*³⁸ in 1993, in which an HIV-positive man succeeded in his human

rights complaint against the Canadian Armed Forces for discrimination based on disability.

c) Policy

In 1996 the Canadian Human Rights Commission, the body established by the CHRA to receive and investigate complaints of discrimination contrary to the Act, adopted a Policy on HIV/AIDS.³⁹ The policy expressly states that the prohibition in the CHRA against disability-based discrimination extends to discrimination based on HIV/AIDS status.

The policy also recognizes that people who are not actually HIV-positive may nonetheless be subject to discrimination by virtue of a real or perceived membership in a risk group, or by an association with a person or people living with HIV/AIDS. According to the policy, these individuals are also entitled to protection, under the Human Rights Act, against discrimination on the grounds of perceived disability.

(3) Protection against discrimination under provincial and territorial law

a) Legislation

Each province and territory in Canada has its own anti-discrimination statute.⁴⁰ While the law in each province and territory prohibits discrimination based on a person's HIV/AIDS status, there is no explicit reference to HIV/AIDS in the various anti-discrimination statutes. Rather, they refer to "disability" or "handicap" (the language varies from jurisdiction to jurisdiction). Where more detailed definitions of this term are provided in the statute, it is clear that infection with HIV or a diagnosis of AIDS is covered by this term.

For example, the Northwest Territories statute defines "disability" to include "any degree of physical disability, infirmity, malformation or disfigurement that is caused by ... illness."⁴¹ Similar definitions are found in several of the provincial and territorial statutes.

Interestingly, the Nova Scotia Human Rights Act not only prohibits discrimination based on physical disability, but also on "an irrational fear of contracting an illness or disease,"⁴² which is listed as a separate ground on which discrimination is prohibited. This provision is of obvious relevance in combating the stigma and discrimination that too often continue to surround HIV/AIDS and adversely affect people living with HIV/AIDS or people from groups associated with the disease in the minds of many, such as gay men or drug users.

b) Jurisprudence

As has been the case with the federal anti-discrimination statute, courts and tribunals have decided cases of HIV/AIDS-based discrimination under several of the provincial and territorial statutes, further confirming that Canadian law protects the right of people living with HIV/AIDS to freedom from discrimination.

The 1988 case of *Biggs v Hudson* was one of the first reported decisions to address HIV/AIDS-based discrimination in Canada.⁴³ The BC Council of Human Rights, as the tribunal tasked with adjudicating complaints under BC's Human Rights Act was then called, found that AIDS constitutes a physical disability within the meaning of that phrase in the Act. The Council also considered whether, under the Human Rights Act, a person is entitled to protection from discrimination on the basis that the person

falls within a group considered to be at high risk of contracting HIV. After reviewing both Canadian and US case law, the Council said:

Unfortunately, myths and fears about HIV are varied and prevalent. That being so, individuals may be perceived by people outside these groups as being carriers of HIV and would, therefore, transmit the virus to others.⁴⁴ ...

[A]ny person who belongs to groups widely regarded as especially vulnerable to HIV infection but who are not HIV infected or whose HIV status is unknown (“high risk” groups), may be protected under the term “physical disability” in the Act. Similarly, any person who associates with persons in the groups described above or those who are seropositive may be protected under the term “physical disability” in the Act. Again, subject to any consideration of *bona fide* occupational requirement as may be applicable, these persons or classes of persons will be protected under ... the Act if there is discrimination because of a perception or impression that the person or classes of persons would be a carrier or transmitter of HIV or the commonly used term, AIDS.⁴⁵

Courts and tribunals have similarly recognized that HIV/AIDS-based discrimination is prohibited under other provincial and territorial human rights statutes. In the case of employment discrimination in unionized workplaces, labour arbitrators have also ruled that HIV/AIDS-based discrimination is prohibited by human rights codes. (Under Canadian law, arbitrators have jurisdiction to decide all workplace disputes arising under a collective agreement, and the Supreme Court of Canada has affirmed that the applicable human rights code is deemed to be an

implied term of every collective agreement.⁴⁶)

Some court, tribunal, and arbitration decisions establishing protection against discrimination based on HIV/AIDS status include:

- In *Pacific Western Airlines Ltd v Canadian Air Line Flight Attendants Association*, the Arbitration Board held in 1988 that dismissing a flight attendant from his job on the basis of his HIV status amounted to prohibited discrimination.⁴⁷
- In *Centre d'accueil Sainte-Domitille v Union des employés de services, local 298 (FTQ)*, the arbitrator ruled that an employer does not have the right to require a medical examination where the purpose is merely to obtain evidence that the employee is HIV-positive, when that status poses no danger to others.⁴⁸
- In *Re “Alain L”*, the Québec Human Rights Commission received a complaint from a registered nurse who alleged that a hospital had refused to hire him because he was HIV-positive. The Commission issued a preliminary “decision” in the matter, a step taken to assist parties to a dispute reach a settlement (failing which, the Commission may refer the case to a tribunal). The Commission was of the view that such conduct by the hospital would amount to discrimination on the basis of “handicap” contrary to the Québec Charter of Human Rights and Freedoms.⁴⁹
- In a 1989 Alberta case, *STE v Bertelsen*, the Board of Inquiry

found that firing a musician with AIDS was discrimination contrary to what was then the province’s Individual’s Rights Protection Act.⁵⁰ Importantly, the Board clarified that HIV could not be transmitted through casual contact, and the subjective belief or fear of infection held by others could not justify their discriminatory conduct.

- In 1990 a Board of Inquiry affirmed that “conditions such as AIDS and its related illnesses” constitute physical disabilities under the Nova Scotia statute (although the case in question was not a case of HIV/AIDS-based discrimination).⁵¹
- In 1992 an Ontario Board of Inquiry dealt with a case alleging discrimination by a dental practice against an HIV-positive person. Although it found, on the facts of the case, that there had been no discrimination, it did confirm that discrimination based on HIV status is covered by the prohibition on discrimination based on “handicap.”⁵² The following year, another tribunal decision affirmed that AIDS was a “handicap” within the meaning of the Ontario Human Rights Code, in a case in which a man known to be living with HIV/AIDS was denied service or received unequal service by the proprietors of a succession of fast-food restaurants in one location in Toronto.⁵³ In 1998, another case concluded that the Code provides protection to a person who suffers discrimination because he or she is perceived to have HIV/AIDS.⁵⁴
- In 1993, a BC human rights tribunal heard yet another case of

alleged refusal of a dentist to treat a person living with HIV. The tribunal reiterated that “AIDS” is a disability, and found that the dentist’s fear of contracting the disease was a significant factor in his statement that he did not wish to treat the patient.⁵⁵ However, upon judicial review, in a decision that is likely incorrect, the BC Supreme Court overturned this ruling, in essence saying it was the patient’s decision to then seek treatment elsewhere; therefore, it dismissed the complaint of discrimination.⁵⁶

- Also in 1993, the case of *Hamel v Malaxos* confirmed that an HIV-positive person is a person with a “handicap” within the meaning of that term in the Québec Charter of Human Rights and Freedoms, when a man with asymptomatic HIV infection succeeded in his action against a dentist for refusing to treat him. The court concluded this amounted to discriminatory treatment contrary to the provincial statute.⁵⁷ This position was reaffirmed in a similar case two years later, in which a dentistry practice was found liable for having breached the Québec statute by refusing to accept a patient because of his HIV-positive status.⁵⁸
- In 1999, building on the analysis in the earlier *Biggs* case, the BC Human Rights Tribunal found that the provincial statute also prohibits discrimination based on the perceived propensity of a person to become disabled in the future – and it therefore found that an insurance company had engaged in prohibited discrimination by

refusing to sell life insurance to an HIV-negative man married to an HIV-positive woman.⁵⁹

- In 2000 the Supreme Court of Canada issued a landmark ruling setting out a broad, progressive interpretation of the term “disability” as it appears in the Québec anti-discrimination statute. In the joint *Boisbriand* and *Montreal* judgment, the Court ruled that people are protected against discrimination based on disability even if their condition does not give rise to any functional limitation but the discrimination is based on the perception that they are disabled, which the Court decried as the “social phenomenon of handicapping.”⁶⁰ Although none of the cases giving rise to this decision dealt with HIV/AIDS, the Supreme Court’s unanimous judgment makes explicit reference to the status of being HIV-positive as an example of a condition covered by the prohibition against discrimination based on disability or perceived disability.

Several provinces have policies in place that assist in communicating to the public that discriminating against people living with HIV/AIDS is illegal.

c) Policy

Several provinces have in place policies that specifically address issues related to discrimination and HIV/AIDS, which assist in communi-

cating to the public (including such audiences as employers, landlords, and service providers) that discriminating against people living with HIV/AIDS is illegal.

- The Manitoba Human Rights Commission has produced a fact sheet addressing discrimination based on HIV/AIDS infection. The document explains that the province’s human rights act prohibits discrimination based on a person’s physical or mental disability, actual or perceived, and that this includes protection against discrimination that is based on a person having AIDS or HIV infection.⁶¹
- The province of New Brunswick has in place General Criteria for the Investigation of Complaints of HIV/AIDS Discrimination.⁶² Under these criteria, the New Brunswick Human Rights Commission will accept complaints that allege discrimination on the basis of physical disability where a person has, or is perceived to have, HIV or AIDS, or because of an association with persons identified by a prohibited ground of discrimination.
- Ontario also has in place a Policy on HIV/AIDS-related Discrimination,⁶³ in which the Ontario Human Rights Commission explains that AIDS and other HIV-related medical conditions are “handicaps” under the Human Rights Code.
- Finally, in Québec, the provincial statute’s prohibition of discrimination against persons with HIV/AIDS is outlined in a number of

policy documents, including an official policy statement found in a 1995 report by the provincial human rights commission.⁶⁴ This policy has also underscored the fact that an asymptomatic HIV-positive person does indeed fall within the category of “handicap” under the Québec Charter, even if there is no obvious manifestation of a physical impairment. The Commission has also published papers specifically addressing the question of employment-related medical examinations and the rights of children with HIV/AIDS in the context of childcare services.⁶⁵

Remedies for discrimination in Canada

(1) Court action for breach of Charter equality rights

In the case of discrimination by any level of government, acting in pursuit of its governmental functions – such as passing legislation or regulations, implementing policies, enforcing the law, providing government services – one remedy is to initiate a legal proceeding before a court alleging a breach of the equality rights guaranteed by the Charter (s 15). A “court of competent jurisdiction” has authority under the Charter (s 24) to grant “such remedy as the court considers appropriate and just in the circumstances.”⁶⁶ This can include such things as:

- declaring legislation unconstitutional and striking it down as being “of no force or effect” to the extent that it conflicts with Charter equality rights (under s 52);

- “reading down” an unconstitutional law by severing the offending portions, or “reading in” words to a statute to make it constitutionally acceptable;
- issuing a temporary or permanent injunction prohibiting the government from continuing or repeating the infringement of equality rights, or a *mandamus* order that compels the government to take certain action to comply with constitutional rights;
- staying a court or tribunal decision pending an appeal or review by a higher body; and
- awarding monetary damages to the person whose Charter rights have been breached by the government or its agents.

(2) Human rights complaints

In cases of discrimination that do not involve a government carrying out governmental functions, the remedy is to pursue a complaint under the applicable human rights statute, whether federal or provincial/territorial, alleging discrimination on one or more of the grounds prohibited by that statute. This would include all cases where discrimination is alleged against an employer, a landlord, a business providing goods or services, or in relation to membership in a union or other vocational association.

In most jurisdictions, the relevant human rights commission receives and investigates the complaint, and also undertakes mediation efforts between the person alleging discrimination (complainant) and the person or entity accused of discrimination (respondent) in an attempt to settle the matter. If these efforts prove unsuccessful, the commission will make a determination as to whether the case

will proceed to an independent tribunal, at which point the commission takes “carriage” of the complaint and argues its merits on behalf of the complainant.

If the commission decides not to refer the case to a tribunal, this is the end of the complaint, meaning the commission acts as a “gatekeeper” to tribunal hearings of discrimination complaints. However, it also means that the costs to the individual of a human rights complaint are minimal, making this remedy more accessible to those without the resources to hire a lawyer.

In British Columbia, the Human Rights Commission was abolished in 2003. This means that complainants now have direct access to a hearing before a human rights tribunal. The Tribunal’s Rules of Practice and Procedure state that individuals will now be given much more control over their own complaints.⁶⁷ Specifically, individuals will be responsible for formally initiating their own human right complaints, and will no longer have to worry about the possibility of their complaint being rejected before ever reaching a tribunal.⁶⁸ However, this also means that complainants must argue their own cases before the tribunal, without any legal advice or representation if they cannot afford it. One concern about access to justice has been replaced with another.

In contrast, in Québec there is both a commission and a tribunal, and the commission does not play this role of “gatekeeper.” Unlike most other jurisdictions, under the Québec Charter of Human Rights and Freedoms, after the Commission has performed the initial processing and investigation of a complaint, an individual can proceed with that complaint before a tribunal even if the Commission

decides not to take it forward on their behalf.

Only a minority of human rights complaints proceed to a full tribunal hearing. Complaints must usually be filed with the relevant human rights commission within a certain period of time after the discrimination occurred; if not, they will likely be dismissed out of hand by the commission unless there is adequate justification for the delay. Commissions may also dismiss complaints that are frivolous, vexatious, or in bad faith; that have no basis in the law; or that are outside the commission's jurisdiction. Of complaints that do proceed to an investigation, many are settled between the parties without a hearing.

Only a minority of human rights complaints proceed to a full tribunal hearing.

The Canadian Human Rights Commission and Tribunal have jurisdiction over complaints that arise against the federal government or private actors in federally regulated sectors. Provincial and territorial human rights commissions and tribunals deal with complaints against the provincial government or provincially or territorially regulated entities. A number of cases outlined above are decisions of those tribunals (which are referred to in some jurisdictions as Boards of Inquiry).

(3) Grievances before labour arbitrators

In the case of non-unionized employees who experience discrimination in

employment, the only remedy is to pursue a human rights complaint with the appropriate commission. However, in the case of a unionized employee alleging discrimination in employment, another option is to have the union file a grievance on the employee's behalf, alleging a breach of the collective agreement with the employer. As noted above, Canadian law has determined that the applicable human rights statute (either federal or provincial/territorial, depending on whether the employer is in a federally or provincially/territorially-regulated sector) is automatically an implied part of every collective agreement, and arbitrators are empowered to interpret and apply human rights statutes in deciding grievances.

In some cases, human rights commissions, citing provisions in the applicable human rights code, will refuse to address any complaint of discrimination if another statute (eg, a labour relations act) enables them to have their case dealt with in another forum (eg, filing a grievance through their union).⁶⁹ In such cases, pursuing a grievance under a collective agreement would de facto be a person's only option.

(4) No ability to sue for discrimination

Aside from these statutory remedies for discrimination based on human rights codes, Canadian law has been hostile toward other remedies. In its controversial judgment in *Seneca College v Bhadauria*, the Supreme Court of Canada unanimously overturned a lower court judgment that had recognized a tort of discrimination, which would have enabled an individual to bring a civil lawsuit for damages for discrimination.⁷⁰ The

court held that the federal and provincial legislatures have "covered the field" of legal protection for victims of discrimination, leaving no room, nor any need for, a tort of discrimination.⁷¹ (Roughly speaking, a tort may be defined as a civil wrong, other than a breach of contract, that gives rise to a right to sue for damages or other relief.)

The Supreme Court's controversial decision has been followed in many subsequent cases, but in several other cases, courts have attempted to distinguish the case in front of them from the *Bhadauria* decision in order to permit civil suits for discrimination to proceed. At the moment, unless and until the Supreme Court revisits the *Bhadauria* decision, the basic position is that Canadian law does not recognize a tort of discrimination, and those seeking redress for discrimination must pursue a remedy using the mechanisms established to enforce the human rights statutes in place in every jurisdiction. Creative legal arguments in future cases may eventually alter the state of Canadian law on this point.

Conclusion

Beyond what statutes say formally, in practice, successfully using Canadian law to remedy and challenge discrimination remains a challenge for many people living with HIV/AIDS or members of other groups facing discrimination, given systemic problems within the human rights enforcement mechanisms or the costs of litigating to defend Charter rights.

Strengthening access to legal services and representation for people living with HIV/AIDS is, therefore, one important part of a larger strategy to overcome HIV/AIDS-related stigma and discrimination in Canada, as is

strengthening human rights education and advocacy efforts across the country. The Canadian HIV/AIDS Legal Network has called on governments to take such measures, including adequate funding for legal aid services, resources to support the work of community workers and lawyers in addressing discrimination and defending the rights of people living with or vulnerable to HIV/AIDS, and funded campaigns challenging HIV/AIDS-related stigma.⁷²

This is in line with the International Guidelines on HIV/AIDS and Human Rights, which recommend that states should ensure speedy and effective legal and/or administrative procedures for seeking redress for discrimination, should implement legal support services that provide free legal services to enforce the rights of people infected or affected by HIV/AIDS and to utilize means of protecting those rights, and support education, training, and media programming designed to change stigmatizing attitudes associated with HIV/AIDS.⁷³

In the Declaration of Commitment on HIV/AIDS, adopted in June 2001 by Canada and all other UN Members, states committed to strengthen legislation and other measures to eliminate discrimination against people living with HIV/AIDS and members of vulnerable groups.

While Canada's legal framework on HIV/AIDS-related discrimination is strong, there is much that remains to be done to make these legal provisions practically applicable to the daily lives of people living with HIV/AIDS and other members of Canadian society.

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¹ Ekos Research Associates. *HIV/AIDS – An Attitudinal Survey*. Final Report. 24 June 2003. For more detail, see: T d Bruyn, D Garmaise. Survey reveals knowledge and attitudes of Canadians regarding HIV/AIDS. *Canadian HIV/AIDS Policy & Law Review* 2003; 8(3): 31-32.

² V Leauene et al. Sondage "Attitudes envers les personnes vivant avec le VIH dans la population générale du Québec." Institut national de santé publique du Québec, 2003; J Leech. Survey reveals human rights abuses in Alberta. *Canadian HIV/AIDS Policy & Law Review* 2003; 8(1): 24 (and see full results at www.aidsalgary.org/programs/humanRightsQuestion.shtml); A Handa, A Negash. HIV Endemic Task Force: Report on Phase Two of Community Consultation, April 2003; HIV Endemic Task Force. Complete Report of the Community Forum "For Us, By Us, About Us": An Opportunity for African and Caribbean Communities to Address the Issue of HIV/AIDS Related Stigma and Denial. Toronto: The Task Force, 2001; C Olivier. HIV-related discrimination in New Brunswick increasing. *Canadian HIV/AIDS Policy & Law Newsletter* 2000; 5(2/3): 52; S Matiation. *Discrimination, HIV/AIDS and Aboriginal People: A Discussion Paper* (2d ed). Montréal: Canadian HIV/AIDS Legal Network, 1999; S Kellington et al. Listen Up! Women are Talking About... The social determinants of women's risk for HIV infection and illness progression in lower mainland British Columbia. Vancouver: Positive Women's Network, 1999; Alliance for South Asian AIDS Prevention. *Discrimination and HIV/AIDS in South Asian Communities: Legal, Ethical and Human Rights Challenges – An Ethnocultural Perspective*. Toronto: ASAAP, 1999; W Lau et al. *Legal, Ethical and Human Rights Issues Facing East and Southeast Asian-Canadians in Accessing HIV/AIDS Services in Canada*. Toronto: Asian Community AIDS Services, 1999.

³ Some jurisdictions also prohibit the publication or display of notices, signs, etc, that imply or incite discrimination, and some jurisdictions also prohibit telecommunications that incite hatred or contempt of persons on the basis of prohibited grounds of discrimination.

⁴ *Winnipeg School Division No 1 v Craton*, [1985] 2 SCR 150.

⁵ *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145; *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd*, [1985] 2 SCR 536 [O'Malley].

⁶ There are some exceptions. For example, the Yukon Human Rights Act also includes provisions on freedom of religion and conscience, freedom of expression, freedom of assembly and association (ss 3-5). The Québec Charter of Human Rights and Freedoms explicit protects the right to privacy (ss 5 & 9).

⁷ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

⁸ Eg, *Eaton v Brant County of Board of Education*, [1997] 1 SCR 241; *Granovsky v Canada*, [2000] 1 SCR 703; *Eldridge v British Columbia*, [1997] 3 SCR 624.

⁹ *O'Malley*, supra, note 5.

¹⁰ *Ibid*; see also *Rodriguez v British Columbia (Attorney General)* (1993), 85 CCC (3d) 15 (SCC); *Eldridge*, supra, note 8.

¹¹ *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665; 2000 SCC 27.

¹² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, (UK) 1982, c 11 [Charter].

¹³ Constitution Act, 1982, c 52(1).

¹⁴ Note that section 15 actually protects equality in four different forms: equality before the law, equality under the law, equal protection of the law, and equal benefit of the law.

¹⁵ *Brown v British Columbia (Minister of Health)* (1990), 66 DLR (4th) 444 (BCSC); *Wakeford v Canada* (1998), 166 DLR (4th) 131 (Ont Ct Gen Div).

¹⁶ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

¹⁷ *Law v Canada*, [1999] 1 SCR 497; *M v H*, [1999] 2 SCR 203; *Corbiere v Canada*, [1999] 2 SCR 203; *Granovsky v Canada*, [2000] 1 SCR 703; *Lavoie v Canada*, [2002] 1 SCR 769.

¹⁸ P Hogg. *Constitutional Law of Canada, Looseleaf Edition*. Toronto: Carswell, at section 57.2(b).

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, 245 DLR (4th) 1 at paras 25 and 27.

²² *R v Oakes*, [1986] 1 SCR 103, as modified by *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835; applied in *Thomson Newspaper Co v Canada (Attorney General)*, [1998] 1 SCR 877.

²³ Charter, s 32; *R v Rahey*, [1987] 1 SCR 588; *British Columbia Government Employees' Union v British Columbia*, [1988] 2 SCR 214; *Slaight Communications v Davidson*, [1989] 1 SCR 1038.

²⁴ This would seem to include the act of governments making contracts of employment with their employees: *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570; *Lavigne v OPSEU*, [1991] 2 SCR 211.

²⁵ *Godbout v Longueuil (City)*, [1997] 3 SCR 844.

²⁶ *Corbiere v Canada (Minister of Indian and Northern Affairs)* (1996), 206 NR 85 (FCA). Whether the Charter applies to Aboriginal governments exercising an inherent right of self-government is a more contentious issue. This is the conclusion favoured by the Royal Commission on Aboriginal Peoples, but with the caveat that the Charter must also be interpreted in light of other relevant provisions – namely, the recognition of self-government as an inherent Aboriginal right that is constitutionally protected (s 35) and the direction that Charter rights are not to be interpreted in a way that abrogates or derogates from any Aboriginal, treaty, or other rights or freedoms of Aboriginal peoples in Canada (s 25). See: Royal Commission on Aboriginal Peoples. *Final Report*. Ottawa: Minister of Supply & Services, 1996; P Hogg, ME Turpel. Implementing self-government: constitutional and jurisdictional issues. *Canadian Bar Review* 1995; 74(2): 187; S

Matiation. *Discrimination, HIV/AIDS and Aboriginal People: A Discussion Paper* (2d ed). Montréal: Canadian HIV/AIDS Legal Network, 1999 (available via www.aidslaw.ca under "Aboriginal Communities and HIV/AIDS").

²⁷ *Canadian Union of Postal Workers v Canada Post Corp* (1987), 40 DLR (4th) 67 (Alberta QB); *Canada Post Corporation v CUPW* (1991), 84 DLR (4th) 150 (Ont Ct Gen Div).

²⁸ P Hogg, *supra*, note 18 at section 57.2(b).

²⁹ *Eldridge*, *supra*, note 8.

³⁰ *McKinney v University of Guelph*, [1990] 3 SCR 229.

³¹ SC 1976-77, c 33; RSC 1985, c H-6 [CHRA].

³² CHRA at s 3(1).

³³ *Ibid* at s 25.

³⁴ *Ibid* at s 14.

³⁵ For more information about the CHRA, see the website of the Canadian Human Rights Commission at www.chrc-ccdp.ca.

³⁶ *Fontaine v Canadian Pacific Ltd* (1989), 29 CCEL 192.

³⁷ *Canadian Pacific Ltd v Canadian Human Rights Commission*, [1991] 1 FC 571 (CA).

³⁸ *Thwaites v Canada (Canadian Armed Forces)*, [1994] 3 FC 38 (TD).

³⁹ Canadian Human Rights Commission. Canadian Human Rights Commission Policy on HIV/AIDS. Ottawa: The Commission, June 1996, available at www.chrc-ccdp.ca/legislation_policies/aids-en.asp, and also reprinted in *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 3(1): 7-8.

⁴⁰ Human Rights, Citizenship and Multiculturalism Act, RSA 2000, c H-14 [Alberta]; Human Rights Code RSBC 1996, c 210 [British Columbia]; Human Rights Code, CCSM 1987, c H175 [Manitoba]; Human Rights Act, RSNB 1973, c H-11 [New Brunswick]; Human Rights Code, RSNL 1990, c H-14 [Newfoundland & Labrador]; Human Rights Act, SNWT 2002, c 18 [Northwest Territories]; Human Rights Act, RSNS 1989, c 214 [Nova Scotia]; Human Rights Act, SNU 2003, c 12 [Nunavut]; Human Rights Code, RSO 1990, c H.19 [Ontario]; Human Rights Act, RSPEI 1988, c H-12 [Prince Edward Island]; Québec Charter of Human Rights and Freedoms RSQ 1975, c C-12 [Québec]; Saskatchewan Human Rights Code, SS 1979, c S-24.1 [Saskatchewan]; Human Rights Act, RSY 2002, c 116 [Yukon].

⁴¹ Human Rights Act, SNWT 2002, c 18, s 1(1).

⁴² NSHRA, s. 5(1)(p).

⁴³ (1988), 9 CHRR D/5391.

⁴⁴ *Ibid* at para 40354.

⁴⁵ *Ibid* at para 40360.

⁴⁶ *Weber v Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (SCC); *Parry Sound (District) Social Services Administration Board v OPSEU Local 324*, [2003] 2 SCR 157, 2003 SCC 42.

⁴⁷ (1987), 28 LAC (3d) 291 (Canada Labour Arbitration Board).

⁴⁸ [1989] TA 439 (Tribunal d'Arbitrage).

⁴⁹ File No 8706004809-001-0; COM-327-8.1.1.14 (Quebec Human Rights Commission).

⁵⁰ (1989), 10 CHRR D/6294 (Alberta Board of Inquiry).

⁵¹ *Morrison v O'Leary*, [1990] NSHRBID No 3 (QL) at para 61 (NS Board of Inquiry).

⁵² *Jerome v DeMarco* (1992), 16 CHRR D/402 (Ontario Board of Inquiry).

⁵³ *McCarthy v Kays Toronto Trading Ltd* (1993), 19 CHRR D/485 (Ontario Board of Inquiry).

⁵⁴ *Moffat v Kinark Child and Family Services*, [1998] OHRBID No 19 (QL) (Ontario Board of Inquiry).

⁵⁵ *Hinkel v Wood*, [1993] BCCHRD No 24 (QL) (BC Council of Human Rights).

⁵⁶ *Hinkel v Wood*, [1994] BC No 2104 (QL).

⁵⁷ (1993), 20 CCLT (2d) 272, [1994] RJQ 173 (Court of Québec, Civil Division – Small Claims Court). For a summary, see: D Patterson. Québec court finds asymptomatic HIV infection a Charter "handicap." *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 1, 3.

⁵⁸ *PM et Commission des droits de la personne v G*, [1995] RJQ 1601, (1996) 24 C.H.R.R. D/21.

⁵⁹ *J v London Life Insurance Co*, [1999] BCHRTD No 35 (BC Human Rights Tribunal). However, an Ontario court has also ruled that, in light of the special exemptions granted to insurance companies under that province's human rights code, it was not discrimination when an HIV-positive man was denied long-term disability benefits under his employee benefit plan. The plan's "pre-existing condition" clause disqualified an employee from receiving benefits for any disability resulting from a cause for which the employee visited a doctor within 90 days prior to the date his or her group insurance coverage becomes effective: *Thornton v North American Life Assurance Co* (1995), 123 DLR (4th) 709, 23 CHRR D/1 (Ontario Divisional Court), affirming 17 CHRR D/481 (Ontario Board of Inquiry).

⁶⁰ *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27.

⁶¹ Manitoba Human Rights Commission. *Fact Sheet: Prohibiting Discrimination Based on AIDS/HIV Infection*. Winnipeg: Manitoba Human Rights Commission (undated), available at www.gov.mb.ca/hrc/english/publications/

factsheets/aids.html (accessed 17 February 2005).

⁶² New Brunswick Human Rights Commission. *General Criteria for the Investigation of Complaints of HIV/AIDS Discrimination*. Moncton: New Brunswick Human Rights Commission, 1997, available at www.gnb.ca/hrc-cdp/e/gaids.htm.

⁶³ Ontario Human Rights Commission. Policy on HIV/AIDS-Related Discrimination. Toronto: Ontario Human Rights Commission, 1996 (www.ohrc.on.ca).

⁶⁴ Commission des droits de la personne du Québec. *La Prévention de la Discrimination Contre les Personnes Atteintes du VIH/SIDA et la Protection de leurs Droits au Québec: Contribution de la Commission au Rapport d'Information aux Nations Unies*. Québec: Commission des droits de la personne et de la jeunesse, 1995. See also the Commission publication *Le SIDA et le respect des droits et libertés de la personne* (April 1998). Both publications are available via www.cdpcj.qc.ca/fr/publications (under "SIDA").

⁶⁵ See the Commission's publications *Les examens médicaux en emploi* (June 1998) and *Le droit au service de garde pour les enfants atteints du VIH/SIDA* (May 1995), both available via www.cdpcj.qc.ca/fr/publications (under "SIDA").

⁶⁶ One of the leading cases on the appropriate use of some of these constitutional remedies is the Supreme Court's decision in *Schachter v Canada*, [1992] 2 SCR 679. There is a series of decisions from various courts analysing the circumstances in which it is appropriate to award monetary damages for breach of Charter rights (what have also been called "constitutional torts").

⁶⁷ British Columbia Human Rights Tribunal Rules of Practice and Procedure (March 31, 2003), available at www.bchrt.bc.ca/popt/rules_practice_procedure [BCHRT, Rules of Practice and Procedure].

⁶⁸ See BCHRT, Rules of Practice and Procedure, *ibid*, Part 4, ss 10(2) and 11.

⁶⁹ Eg, Ontario Human Rights Code, s 34.

⁷⁰ *Seneca College v Bhaduria*, [1981] 2 SCR 181.

⁷¹ T Witelson. Retort: revisiting *Bhaduria* and the Supreme Court's rejection of a tort of discrimination. *National Journal of Constitutional Law* 1999; 10: 149 at 159.

⁷² T de Bruyn. *A plan of action for Canada to reduce HIV/AIDS-related stigma and discrimination*. Canadian HIV/AIDS Legal Network. Montréal: Legal Network, 2004, available via www.aidslaw.ca (under "HIV/AIDS, Stigma, and Discrimination").

⁷³ Office of the UN High Commissioner for Human Rights and the Joint UN Programme on HIV/AIDS (UNAIDS). *HIV/AIDS and Human Rights: International Guidelines*. Geneva: OHCHR & UNAIDS, 1998, Guidelines 5, 7 and 9.