CANADIAN HIV•AIDS LEGAL NETWORK | RÉSEAU JURIDIQUE CANADIEN VIH•SIDA

CANADIAN ABORIGINAL AIDS NETWORK

Discrimination, HIV/AIDS and Aboriginal People

A DISCUSSION PAPER

Second Edition

Health Canada Santé Canada

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Published by the Canadian HIV/AIDS Legal Network and the Canadian Aboriginal AIDS Network

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The views expressed in this document are those of its author and do not necessarily reflect the views or policies of Health Canada, the Canadian HIV/AIDS Legal Network, or the Canadian Aboriginal AIDS Network. The views expressed by those interviewed are their personal opinions and do not necessarily represent those of any organizations or groups with which they may be affiliated.

Ce document est également disponible en français.

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SUMMARY

Background

In order to stimulate discussion about legal issues relating to HIV/AIDS and Aboriginal communities, the Canadian HIV/AIDS Legal Network and the Canadian Aboriginal AIDS Network are addressing three topics: (1) HIV/AIDS and discrimination; (2) problems of jurisdiction and funding; and (3) testing and confidentiality issues. This Discussion Paper deals with the first topic. A first edition of the papers was based on discussions with key informants who work in the field of Aboriginal people and HIV/AIDS, conducted from July to September 1997. In October 1997, draft discussion papers were distributed for comments. The discussion papers were first published in March 1998. Follow-up discussions were conducted and revisions made to the papers in January and February 1999. To the extent possible, the comments received have been incorporated in this second edition of the Discussion Paper.

Why Is This Discussion Paper Needed?

Statistics about cases of AIDS and the rate of HIV infection in the Aboriginal community suggest that the number of cases of HIV and AIDS is rising dramatically in the Aboriginal population and that the HIV epidemic among Aboriginal people shows no signs of abating. HIV/AIDS could have a devastating impact on First Nations, Métis, and Inuit communities. HIV/AIDS-related discrimination hampers efforts to deal with this epidemic.

What Does the Discussion Paper Contain?

The Discussion Paper examines issues raised for the Aboriginal community by HIV/AIDS-related discrimination, based on interviews with individuals working in the field of HIV/AIDS and Aboriginal people, and on research conducted by the author. Other aspects of HIV/AIDS related discrimination have been discussed in other papers and final reports that have been produced by the HIV/AIDS Legal Network/Canadian AIDS Society Joint Project on Legal and Ethical Issues Raised by HIV/AIDS. The Discussion Paper complements this work.

What Are the Issues?

Legal responses to discrimination usually involve filing a complaint and engaging in an adversarial dispute resolution process. For a variety of reasons this approach is not often used by Aboriginal people who experience HIV/AIDS-related discrimination. Many of those consulted do not think the human rights system is helpful for Aboriginal people.

Issues regarding the human rights system include:

- the application of federal and provincial human rights legislation to Aboriginal people;
- the impact of s 67 of the *Canadian Human Rights Act* (CHRA) on the human rights protections of First Nations people (s 67 acts as a shield against complaints based on discrimination flowing from the *Indian Act* or from actions taken pursuant to the *Indian Act*, including some actions of band councils and of Indian and Northern Affairs Canada); and
- weaknesses in the system, particularly for Aboriginal complainants.

The Charter is an important component in the legal approach to human rights, and raises issues such as:

- the application of the Charter to band councils and Aboriginal governments; and
- problems with the Charter and Charter litigation for Aboriginal people.

Other approaches dealing with discrimination discussed by those interviewed include:

- continuing to develop HIV/AIDS education for Aboriginal people;
- engaging the leadership in discussion of HIV/AIDS and in efforts to reduce discrimination;
- emphasizing Aboriginal control of, and participation in, the development of HIV/AIDS initiatives for the Aboriginal community.

What Is the Goal of the Discussion Paper?

The paper does not provide definitive answers. In the end, answers to the issues raised must come from within Aboriginal communities. The goal is to provide information and identify problems of HIV/AIDS-related discrimination faced by Aboriginal people. It is hoped that the conclusions contained in the Discussion Paper will stimulate discussion about the issues raised and contribute to the development of solutions to the problems identified.

What Does the Discussion Paper Conclude?

The Discussion Paper contains a number of broad conclusions. Among other things, it concludes that:

- Recourse to human rights legislation is not the best approach to reducing HIV/AIDS-related discrimination for Aboriginal people.
- There is confusion about whether federal or provincial human rights legislation applies to Aboriginal people living on or off reserve and about the application of the Charter.
- Although the gap in human rights protections created by s 67 of the CHRA is not wide, and for a variety of reasons discriminatory actions related to HIV/AIDS by band councils or federal and provincial governments is unlikely, it remains disturbing. It leaves open the potential for inappropriate actions, even if these might be susceptible to successful court challenge. It may be appropriate to revoke s 67.
- Problems with the human rights complaints system make it ineffective for everyone, but especially for Aboriginal people.
- Given the continuing development of concepts of Aboriginal rights, and the possibility that Aboriginal governments may develop their own charters of rights to complement the Canadian Charter, it is important that HIV/AIDS awareness be increased before inappropriate policies are proposed.
- Although the human rights system may not be the best approach to HIV/AIDS-related discrimination for Aboriginal people, and although the system is not often used by Aboriginal people, it can nonetheless be a tool in discouraging discrimination. It is therefore important that public legal information be available for Aboriginal people living with or affected by HIV/AIDS and for Aboriginal AIDS organizations, in Aboriginal languages where appropriate.
- Important approaches to dealing with HIV/AIDS-related discrimination for Aboriginal people include education and engaging the leadership in discussion and awareness about HIV/AIDS. Further, a commitment to Aboriginal control of, and participation in, proposals for action must guide HIV/AIDS initiatives for the Aboriginal community.

HIV/AIDS-related discrimination faced by Aboriginal people living with or affected by HIV/AIDS is often accompanied by misunderstandings and denial about HIV/AIDS and is reinforced by other forms of discrimination, including discrimination against two-spirited people (gay, lesbian, bisexual, transgender people), women, drug users, and Aboriginal people generally. Finally, it finds its roots in a history of oppression, racism, and colonization, and contributes to the disproportionate impact of HIV/AIDS on the Aboriginal community.

Next Steps

The revised and updated Discussion Paper is intended to be a resource for Aboriginal and other HIV/AIDS organizations, Aboriginal governments, federal and provincial governments, policymakers, departments and agencies, non-governmental organizations, and others. The Paper will be widely distributed and made available on the Network's website. Articles based on the Paper will be published in the *Canadian HIV/AIDS Policy & Law Newsletter* and submitted for publication in other journals and newsletters. Fact sheets summarizing the Paper's most relevant information have been produced.

Further copies of this Discussion Paper…

can be retrieved at the website of the Canadian HIV/AIDS Legal Network at <www.aidslaw.ca>

Copies can also be ordered through the Canadian HIV/AIDS Clearinghouse. For more information, contact:

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INTRODUCTION

In July 1997, the Canadian HIV/AIDS Legal Network (the Network) started a project on legal issues relating to Aboriginal people and HIV/AIDS. Three discussion papers were produced on: (1) HIV/AIDS and discrimination; (2) problems of jurisdiction and funding; and (3) testing and confidentiality issues. Funding for the project was initially provided by the HIV/AIDS Policy, Coordination and Programs Division, Health Canada, under the National AIDS Strategy Phase II. This paper deals with the first of the three project topics.[1]

As part of the initial project, from July to September 1997, discussions with key informants working in the field of Aboriginal people and HIV/AIDS were conducted. In October 1997, draft discussion papers were distributed for comments. The discussion papers were published and widely distributed in March 1998.

In the fall of 1998, the Legal Network and the Canadian Aboriginal AIDS Network (CAAN) agreed to jointly produce a second, revised edition of the discussion papers and a series of info sheets summarizing the main issues raised in the discussion papers. To this end, in January and February 1999, follow-up discussions were conducted with individuals representing Aboriginal HIV/AIDS organizations and Health Canada. Taking the comments received into account, the discussion papers were then revised. An attempt has been made throughout the paper to reflect and incorporate the comments of those consulted. A list of those interviewed appears in the Appendix to each paper. This second phase of the project was funded by Health Canada under the Canadian Strategy on HIV/AIDS.

[1] Parts of this paper are based on an unpublished paper prepared by Stefan Matiation in connection with the Human Rights Internship Program of the University of Toronto's Faculty of Law, for 2-Spirited Peoples of the 1st Nations, and entitled "HIV/AIDS and Aboriginal Communities: Problems of Jurisdiction and Discrimination." The paper was reviewed in the *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 3(1):1. In addition, an article based on this paper appeared in the December 1997 issue of *First Perspective* (Vol 6, No 10) under the title "HIV/AIDS, discrimination and the Aboriginal community." *First Perspective* is published monthly by Taiga Communications of Winnipeg; it is described as "Canada's source for Aboriginal news and events."

Background: HIV/AIDS and Aboriginal People

The Laboratory Centre for Disease Control (LCDC) reports that as of 31 December 1997, 255 of the 15,528 AIDS cases in Canada were reported as Aboriginal. Adjusted for reporting delays, the number of Aboriginal AIDS cases was estimated at 332 by the end of 1997, or 33.2 cases per 100,000 Aboriginal people. This number is regarded as underrepresentative of the true number of AIDS cases among Aboriginal people, due to delays in reporting, low HIV testing rates, and variations in the completeness of reporting of ethnic status between the provinces.[2]

LCDC estimates "that as of the end of 1996, a cumulative total of 50,000 to 54,000 Canadians had been infected with HIV since the onset of the epidemic and that at the end of 1996, 36,000 to 42,000 Canadians were living with HIV infection (including those living with AIDS)."[3] The number of cases of HIV infection among Aboriginal people is largely unknown.

LCDC reports a number of statistics that suggest that "Aboriginal people are infected earlier than non-Aboriginal people, that injection drug use is an important mode of transmission, and that the HIV epidemic among Aboriginal people shows no signs of abating":[4]

- Aboriginal AIDS cases are younger on average than non-Aboriginal AIDS cases (29.8 percent versus 18.6 percent diagnosed at less than 30 years of age).
- Aboriginal AIDS cases are more likely than non-Aboriginal AIDS cases to be attributed to injection drug use (19.0 percent versus 3.2 percent for men, 50.0 percent versus 17.4 percent for women).
- The proportion of AIDS cases attributed to Aboriginal people increased from 2.0 percent before 1989 to more than 10 percent in 1996-97.
- Recent data (1993-97) from British Columbia, Alberta, and Saskatchewan show that Aboriginal people comprise 15, 26, and 43 percent respectively of newly diagnosed HIV-positive cases.

The foregoing data, and anecdotal evidence from many of those consulted, indicate there is an HIV/AIDS epidemic among Aboriginal people in Canada that could have a devastating impact on First Nations, Métis, and Inuit communities.

[2] Laboratory Centre for Disease Control. *Epi Update: HIV/AIDS Epidemiology Among Aboriginal People in Canada*. Ottawa: Health Canada, May 1998.

[3] Laboratory Centre for Disease Control. *Epi Update: HIV and AIDS in Canada*. Ottawa: Health Canada, November 1997.

[4] Supra, note 2.

Scope of the Discussion Paper

The paper begins with a discussion of discrimination, Aboriginal people, and HIV/AIDS. Discrimination against Aboriginal people living with or affected by HIV/AIDS comes from a variety of sources. It is often associated with misunderstandings or lack of knowledge about AIDS. Such discrimination is often further reinforced by other social problems and forms of discrimination. Finally, it finds its roots in a history of oppression, cultural disintegration, and racism.

The next section discusses approaches to improving the human rights situation of Aboriginal people living with or affected by HIV/AIDS. The paper examines the human rights system, including human rights legislation and the *Canadian Charter of Rights and Freedoms*, to determine how it applies to Aboriginal people and to identify problems that make the system inaccessible and underutilized. The consultations conducted suggest that other approaches to reducing discrimination are more valuable than reliance on human rights litigation.

The final section of the paper discusses the importance of education, and the involvement of Aboriginal community leadership, in HIV/AIDS issues. Equally important is Aboriginal control of, and participation in, the development of appropriate programs and services to support Aboriginal people living with or affected by HIV/AIDS, control the spread of HIV among Aboriginal people, and reduce HIV/AIDS-related discrimination.

This is a time of transition for First Nations, Métis, and Inuit people. Hopefully this transition will take Aboriginal people from conditions of oppression and dependency to a position of cultural strength and self-determination. The risk during this process of change is that some people and some issues might be overlooked. Discrimination related to HIV/AIDS makes this risk that much greater. Aboriginal AIDS organizations and Aboriginal people living with or affected by HIV/AIDS are experts on issues related to HIV/AIDS and Aboriginal people. It is to them that federal, provincial, territorial, First Nations, Métis, and Inuit governments and leaders should look for advice.

Limitations

Changes over Time

In *HIV Testing and Confidentiality: Final Report*,[5] the author notes that HIV/AIDS issues may need to be reexamined over time as knowledge about HIV/AIDS increases and the epidemic evolves. It is important to note that the conclusions drawn in this Discussion Paper are far from timeless. Knowledge of the epidemic in the Aboriginal population in Canada is limited by a lack of concrete epidemiological data and a reliance on anecdotal evidence. While anecdotal evidence in this area should not be discounted – as it is generally provided by those who have the best opportunities to monitor the epidemic; namely, front-line workers working with Aboriginal HIV/AIDS organizations, health centres in reserve and urban areas, and others working in the field – it does not mean that there is much to be learned about the evolution and impact of the epidemic in the Aboriginal population. As knowledge increases, the conclusions drawn in this Discussion Paper may have to be changed and the issues reexamined.

It is also important to note the rapid political and social changes occurring among Aboriginal communities. Many of these changes may also have an impact on the conclusions and comments made in this Discussion Paper and necessitate a reexamination of these issues in the future.

Level of Detail

The Aboriginal population is diverse, consisting of a multitude of cultures, languages, traditions, living circumstances, and experiences. It is impossible in this Discussion Paper to provide the level of detail necessary to provide an account of these differences. In particular, it has been difficult to reflect the circumstances of Inuit and Métis communities. The impact of Nunavut, which came into being on 1 April 1999, on the lives and health of the predominantly Inuit population in the new territory has not been examined. It is acknowledged that more information concerning Métis people and Inuit and non-status Indians would be useful. It may be appropriate to address the specific issues of these groups in separate papers.

[5] Ralf Jürgens. *HIV Testing and Confidentiality: Final Report*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1998.

It is also important to bear in mind that the Aboriginal population has also shared in many ways in a common history. Unfortunately, this shared history has not always been positive, involving the ill effects of colonization, racism, and cultural denigration. This shared experience has contributed to the prevalence of risk factors for HIV transmission in the Aboriginal population as a whole.

The Aboriginal population also shares in a capacity to withstand the ravages of colonialism. Although their cultures and traditions have been weakened and, sadly, in some cases lost, Aboriginal communities are involved in a cultural and political resurgence: recent developments suggest that the Aboriginal population remains strong and that Aboriginal people are prepared to reassert their cultures and traditions and regain control of their future.

Although this Discussion Paper may not deal specifically with the concerns and experiences of certain groups, the issues raised may nonetheless resonate with the concerns and experiences of such groups. During the preparation of these papers, an attempt has been made to bear in mind the differences and similarities among Aboriginal groups, nations, and communities.

Scope of the Consultations

A third important limitation in this project is the scope of the consultations, which have been limited by time, financial resources, and geography. The discussions have focused on representatives of Aboriginal HIV/AIDS organizations and Health Canada, with additional input where possible. Due to the different circumstances of Aboriginal people across the country, it is important to obtain input from organizations operating in different regions. This has been attempted to the extent possible. However, while some face-to-face meetings could be arranged, many individuals and groups had to be interviewed by telephone.

This project is a small contribution to the discussion about legal and ethical issues related to Aboriginal people and HIV/AIDS. It is hoped that discussions will continue among an expanding group of people.

A Note about Terminology

This Discussion Paper adopts the terminology used by the Royal Commission on Aboriginal Peoples:

> The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.
>
> The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, rather than collections of individuals united by so-called 'racial characteristics'. The term includes the Indian, Inuit and Métis peoples of Canada.
>
> *Aboriginal people* (in the singular) means the individuals belonging to the political and cultural entities known as "Aboriginal peoples"...
>
> Our use of the term *Métis* is consistent with our conception of *Aboriginal peoples* as described above. We refer to the Métis as distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of Labrador Métis, and Europeans) and who associate themselves with a culture that is distinctly Métis…
>
> Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*…[6]

Terms such as Eskimo and Indian continue to be used where such terms are used in quotations from other sources, where the terms are found in legislation or case-law, or in relation to status or non-status Indians, as defined by the *Indian Act*.

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[6] Royal Commission on Aboriginal Peoples. A Note About Terminology. *Final Report*. Ottawa: Minister of Supply and Services, 1996.

Terms such as *Aboriginal community*, *First Nations community*, *Métis community*, or *Inuit community* refer to a group of Aboriginal people residing in a single locality and/or united through shared experiences. Such communities may arise in reserves, remote settlements, or rural or urban areas.

The term *two-spirited* or *two-spirit* is used in this Discussion Paper. The term has a number of meanings within different contexts and Aboriginal traditions. In general terms it means Aboriginal people who identify themselves as gay, lesbian, bisexual, or transgender. The term "two-spirited" or "two-spirit" is preferred because it is more culturally relevant to Aboriginal gay, lesbian, bisexual, and transgender people.

In some Aboriginal traditions, two-spiritedness was regarded as a gift. Two-spirited people were respected and honoured and were visionaries and healers in their communities. The term originates from the recognition of the sacredness in some traditions of people who maintain a balance by housing both the male and female spirits.[7]

[7] "Two-spirited" is defined in the *Ontario Aboriginal HIV/AIDS Strategy*. Toronto: The Strategy, 1996.

DISCRIMINATION AGAINST ABORIGINAL PEOPLE LIVING WITH OR AFFECTED BY HIV/AIDS

The Context of Discrimination

A discussion paper on HIV/AIDS and discrimination released by the Legal Network and the Canadian AIDS Society in March 1998 documents how, over fifteen years into the epidemic, HIV/AIDS still provoke fear, misunderstandings and irrational responses, and how discrimination against people living with or associated with the disease is still endemic.[8]

The consultations conducted for this paper suggest that Aboriginal people living with or affected by HIV/AIDS face discrimination in many of the same ways that non-Aboriginal people do. What differentiates discrimination against Aboriginal people living with or affected by HIV/AIDS is the history of oppression and social disintegration experienced by First Nations, Métis, and Inuit communities. The extent of the health, economic, and social problems in some Aboriginal communities is shocking. Canadian Aboriginal people die earlier than their fellow Canadians, on average, and sustain a disproportionate share of the burden of physical disease and mental illness. "A further characteristic of fourth-world health conditions is the high prevalence of socially derived problems such as domestic violence, suicide, and alcohol abuse, which reflect ... conditions of poverty, political alienation and racial discrimination."[9]

[8] Theodore de Bruyn. *HIV/AIDS and Discrimination: A Discussion Paper.* Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1998.

[9] John D O'Neill. Report from the Round Table Rapporteur. In: *The Path to Healing*. Royal Commission on Aboriginal Peoples, Ottawa: Minister of Supply and Services Canada, 1993, at 15.

The deplorable extent of health and social problems among Aboriginal people represents a human rights failure in Canada. After discussing economic conditions in a number of reserve communities, and describing the racism he has experienced during his life, one person interviewed for the paper asked, "Where are my human rights?" Another person suggested that it is lucky for Canada that the rage that Aboriginal people feel as a result of their marginalization has been internalized, resulting in a high degree of self-destructive behaviour instead of externalized acts of violence.

It is within the context of Aboriginal oppression in Canada that the issue of discrimination against Aboriginal people living with or affected by HIV/AIDS must be approached. Darcy Albert, Executive Director of 2-Spirited Peoples of the 1st Nations (TPFN), suggests that work in the area of HIV/AIDS is frustrating. Aboriginal AIDS organizations are dealing with a new issue in an environment defined by a destructive historical relationship, bad legislation, and internal and external divisions.[10]

The discrimination experienced by Aboriginal people generally is often deeply systemic. Systemic discrimination "refers to the 'big picture' in which the very operation of a 'system' or 'complex' of policies, rules and practices excludes members of disadvantaged groups to their detriment."[11] As suggested by one person consulted for this paper, this discrimination is characterized as much by an ability to turn a blind eye to a 10-year-old Aboriginal sex worker as by a reluctance to overcome jurisdictional barriers to the delivery of services.

Discrimination can also be individualized. One person who works for an AIDS organization related a story about waiting for a doctor for half an hour after the time of her appointment. When asked why she was being passed over in favour of other patients, the receptionist replied: "Oh, I thought you didn't have a job."

[10] Personal communication with Darcy Albert, 21 July 1997.

[11] Sandra A Goundry, Yvonne Peters. *Litigating for Disability Equality Rights: The Promises and the Pitfalls*. Winnipeg: Canadian Disability Rights Council, 6 April 1994, at 12.

Stories of Discrimination

The combination of racism, homophobia, and AIDSphobia means Aboriginal people living with or affected by HIV/AIDS are one of the most marginalized groups in Canada.[12] Stories of discrimination relating to HIV/AIDS described by persons consulted include the following:

> An Aboriginal man living with AIDS became ill and went to emergency at a Winnipeg hospital. While waiting for treatment the man became agitated. Security guards escorted the man out of the hospital, allegedly remarking that he was drunk (he was not). The next day the man went to another hospital, where he died.[13]

> There are stories of Aboriginal people living with HIV/AIDS being driven off the reserve or denied housing. There is often fear of disclosing HIV status because of homophobia and AIDSphobia, and concerns about ostracism, threats, and violence.

> Poverty forces many young people to take up the sex trade and drug-related activities to survive.

> Two-spirited people are often seen as unhealthy, sinful, and/or unbalanced. The atmosphere in many communities is homophobic.

> In one situation, now the subject of a human rights complaint, traditional healers are alleged to have discriminated against a two-spirited person by maintaining that there were no two-spirited people in Aboriginal communities before contact with Europeans, and that a two-spirited person is "out-of-balance."

> Members of a community refuse to visit a woman with HIV or her family for fear that her whole family is infected and that it might be contagious.

> The perception of women as vectors of disease exists among health professionals and the public. Women with HIV are often seen as prostitutes or sluts.

> Some bands cannot deal with HIV/AIDS at all because they are impoverished and overwhelmed by other problems. Sometimes arguments about limited resources are used to justify discrimination.

[12] Personal communication with LaVerne Monette, Provincial Coordinator of the Ontario Aboriginal HIV/AIDS Strategy, 16 July 1997.

[13] From a report by Maryann Flett in *Grassroots News*, January 1999, and personal communication with Albert McLeod, 22 January 1999.

> HIV/AIDS-related discrimination in health care continues, particularly for Aboriginal people. Even in cities some doctors are not knowledgeable about HIV.
>
> A study in Alberta revealed that Aboriginal people using the emergency facilities at a hospital in Edmonton were given substandard treatment. Aboriginal people face systemic discrimination in health care. This is particularly acute for inner-city and street-involved people.
>
> There are often problems with confidentiality in small communities because everybody knows everyone else.
>
> Sometimes the reaction of a band to a person's HIV status reflects the standing of that person's family in the community. If the family does not already have good standing, the return of a son or daughter with HIV will make it worse. In some communities, this will be seen as a source of shame for one's family.

These stories suggest that discrimination against Aboriginal people living with or affected by HIV/AIDS comes from a variety of sources, from band administrators and community members to health practitioners and the public at large. Discrimination is often associated with misunderstandings or lack of knowledge about HIV/AIDS, is often reinforced by other social problems and other forms of discrimination,[14] and finds its roots in a history of oppression and cultural disintegration.

[14] The inseparability of discrimination on the basis of HIV/AIDS from other forms of discrimination is discussed by de Bruyn, supra, note 8.

Discrimination and the Epidemic

Two issues with respect to discrimination and the epidemic need to be distinguished: the personal impact of discrimination on Aboriginal people living with or affected by HIV/AIDS, and the way that discrimination contributes to the prevalence of risk factors for HIV infection among Aboriginal people.

The systemic and individualized discrimination experienced by Aboriginal people generally, and by Aboriginal people associated with HIV/AIDS in particular, contributes to the disproportionate impact of HIV/AIDS on Aboriginal communities. Factors adding to a higher risk of HIV transmission in Aboriginal communities include: high rates of sexually transmitted diseases; high rates of teenage pregnancy, indicating a lack of safe-sex practices and a higher risk to youth; low self-esteem; high rates of sexual and physical violence; lack of access to health information and facilities; drug and alcohol abuse; and poor health in general.[15] LCDC reports that Aboriginal people are overrepresented in groups at high risk for HIV infection:

- In some cities, 25 to 75 percent of clientele using inner-city services such as needle exchange and counselling/referral sites are Aboriginal.
- 14 percent of federal inmates in Canada are Aboriginal, with rates up to 40 percent in provincial and federal prisons in some provinces.[16]

As mentioned above, Aboriginal AIDS cases are younger than non-Aboriginal AIDS cases and the proportion of cases among Aboriginal women is higher than among non-Aboriginal women.[17]

In light of these realities, LaVerne Monette, Provincial Coordinator of the Ontario Aboriginal HIV/AIDS Strategy, concludes that HIV/AIDS presents a considerable risk to the aspirations of Aboriginal people to form self-governing, independent First Nations.[18]

[15] This list is a combination of factors listed in the *Ontario Aboriginal HIV/AIDS Strategy*, 1996, and in the *Joint National Committee on Aboriginal AIDS Education and Prevention, Findings Document* (Ottawa: Ministry of Supply and Services, 1990).

[16] Supra, note 2.

[17] Ibid.

[18] Supra, note 12.

DEALING WITH DISCRIMINATION: THE LEGAL APPROACH

A number of approaches to improving the human rights situation of Aboriginal people living with or affected by HIV/AIDS were suggested throughout the discussions undertaken during the preparation of this paper. Significantly, very few persons consulted, particularly from the Aboriginal community, expressed much faith in human rights legislation. Nonetheless, as the principal source of human rights protection in the legal system, it is important to examine how the legislation applies to Aboriginal people and why it is not being used.

A number of other approaches to problems of discrimination against Aboriginal people living with or affected by HIV/AIDS were raised during the consultations. Virtually all those interviewed referred to the need for education efforts to continue in all First Nations, Métis, and Inuit communities and to the importance of increasing the involvement of leaders in HIV/AIDS issues. It was also argued that Aboriginal people should be involved in all aspects of the control, design, and direction of HIV/AIDS initiatives for Aboriginal communities.

Human Rights Legislation in Canada and HIV/AIDS-Related Discrimination: An Overview

The federal, provincial, and territorial governments have each enacted human rights statutes to protect individuals against discrimination based on specified prohibited grounds. It is beyond the scope of this paper to examine the extent of the protections afforded by each statute. The discussion will focus on the federal and Ontario legislation.

In all jurisdictions in Canada medical conditions related to HIV infection are recognized as "physical disabilities" or "handicaps," depending on the terminology used, and are therefore within the scope of the prohibited grounds of discrimination enumerated in human rights statutes.

The *Ontario Human Rights Code* (the Code)[19] governs human rights complaints falling within provincial jurisdiction. The policy of the Ontario Human Rights Commission (OHRC) with respect to HIV/AIDS is as follows:

> AIDS and other medical conditions related to infection by HIV are recognized as handicaps within the meaning of the Code. All persons who have or have had, or who are believed to have or have had, or are perceived to have, AIDS or HIV-related medical conditions, including those who do not show symptoms of AIDS or AIDS-related illnesses, are entitled to the protection of the Code in employment, services, housing, contracts and membership in trade unions.[20]

A person's human rights under the Code are also infringed where the discrimination is based on association or relationship with a person identified with HIV/AIDS, because of harassment on the basis of handicap, and based on sexual orientation.[21]

Finally, the Code imposes a duty to accommodate the needs of persons with "handicaps," including HIV/AIDS, short of undue hardship. The standard of undue hardship takes into account "cost, outside sources of funding, if any, and health and safety requirements, if any."[22] Studies have indicated that people with HIV infection pose virtually no risk to others with whom they interact. In most employment, service, and accommodation settings, compulsory or mandatory HIV testing or other protective measures would not be justified.[23]

[19] RSO 1990, c H.19.

[20] Ontario Human Rights Commission. *Policy on HIV/AIDS-Related Discrimination*. Toronto: The Commission, 27 November 1996.

[21] Discrimination on the basis of sexual orientation is a prohibited ground for discrimination in every jurisdiction in Canada except Prince Edward Island and the Northwest Territories.

[22] Supra, note 19 at s 17.

[23] Supra, note 20.

The policy of the Canadian Human Rights Commission (CHRC) reflects that of the OHRC. With the long-overdue amendment of the *Canadian Human Rights Act*[24] (CHRA) in 1997 to include sexual orientation as a prohibited ground of discrimination, the CHRA provides fairly comprehensive human rights protections for people living with or affected by HIV/AIDS. In its *1996 Annual Report*, the CHRC notes that although court decisions indicate that a duty to offset disadvantages to disabled employees or clients for services is implicit in the CHRA, an amendment "enshrining the principle of 'reasonable accommodation' would remove any remaining ambiguity ... and make the [CHRA] a more positive force for change."[25]

It should be noted that not all human rights agencies have adopted a broad approach to HIV-related discrimination. The National Advisory Committee on AIDS has recommended that all provincial human rights institutions adopt a comprehensive and universal definition of HIV-related discrimination, "including discrimination on the basis of both symptomatic and asymptomatic HIV infection, as well as HIV-related discrimination based on the perception that a person may be HIV-infected, or based on that person's association with a person with HIV infection."[26] The extent of a person's human rights should not vary depending on where they live in Canada.

The Application of Human Rights Legislation to Aboriginal People

The jurisdictional divisions that have been imposed on Aboriginal people constitute a major form of systemic discrimination. No other group in Canada has to deal with jurisdictional issues or the effects of jurisdictional divisions as much as Aboriginal people, and with respect to no other group is the line between jurisdictional responsibilities as unclear.

Not only do jurisdictional divisions constitute a form of discrimination; they complicate the application of human rights legislation to Aboriginal people. The Ontario Native Council on Justice has reported that some band offices have expressed confusion over whether the federal or provincial statute would be applicable in various situations. Members of First Nations express frustration and diminished faith in the system when denied services on the basis that a request falls outside the jurisdiction to which inquiries have been made.[27] This frustration was repeated by a number of people consulted for this paper, as was the report that some band councils take the position that human rights legislation does not apply to them or that recourse to such legislation by Aboriginal people with human rights complaints against band councils is inappropriate.

[24] RSC 1985, c H-6.

[25] Canadian Human Rights Commission. *1996 Annual Report*. Ottawa: Minister of Public Works and Government Services Canada, March, 1997, at 28. In a news release issued on 23 April 1997, the CHRC reported the introduction by the federal government of amendments to the CHRA that would incorporate a duty to accommodate. With the dissolution of Parliament for the 2 June 1997 federal election, however, the proposed amendments died on the Order Paper (personal communication with CHRC communications staff).

[26] National Advisory Committee on AIDS. *HIV and Human Rights in Canada*. Ottawa: The Committee, 1992, at 11.

[27] Fiona Sampson. *An Analysis of the Relationship between First Nations and the Ontario Human Rights Commission*. Toronto: Ontario Native Council on Justice, 1991.

The application of Canadian laws to Aboriginal governments is a controversial topic. The decision of the Supreme Court of Canada in *R* v *Pamajewon*[28] suggests that, presently at least, Canadian laws apply to band governments.

In *Pamajewon*, representatives of the Shawanaga First Nation argued that they live in a self-governing nation and that provincial gaming laws do not apply. The Supreme Court rejected the argument and the unilateral declaration of self-governing status that it implied. In the end, despite the declaration, the representatives of Shawanaga still faced a fine.

Aboriginal People and the Application of Provincial Human Rights Legislation

The human rights statute of a province or territory applies to human rights complaints that arise within the jurisdiction of that province or territory. The statutes apply to provincial and territorial governments and agencies and to private citizens and legal entities. For example, s 9 of the OHRC provides that "No person shall infringe or do, directly or indirectly, anything that infringes a right under [the OHRC]."[29]

Generally speaking, a provincial statute would be the appropriate avenue for a human rights complaint in circumstances including the following:

(a) an Aboriginal person living off reserve is discriminated against in contravention of the applicable provincial human rights statute by an individual or enterprise that is not federally regulated;

(b) an Aboriginal person is discriminated against with respect to a service or enterprise provided by a provincial government on or off a reserve; and

(c) an Aboriginal person living on reserve is discriminated against in contravention of the applicable provincial human rights statute by an individual or enterprise located on reserve that is not connected to the band council or the federal government and does not operate in a federally regulated industry.[30]

In example (c), the provincial statute applies by virtue of the general rule of constitutional interpretation that provincial laws apply to Aboriginal people and reserves so long as the law is in relation to a matter coming within a provincial head of power. "The situation of [Aboriginal people] is thus no different from that of ... banks, federally incorporated companies and interprovincial undertakings."[31]

[28] [1996] 4 CNLR 164 (SCC).

[29] Supra, note 19 at s 9.

[30] This example was confirmed by legal staff at the Ontario and Canadian human rights commissions (personal communications, 14 and 15 August 1997).

[31] Peter Hogg. *Constitutional Law of Canada*. 3rd ed. Toronto: Carswell, 1992, at 27-29. Jurisdictional issues, including the impact of s 88 of the *Indian Act*, are discussed in more detail in the second paper in this series, *HIV/AIDS and Aboriginal People: Problems of Jurisdiction and Funding*. Montréal: The Canadian HIV/AIDS Legal Network, 1999.

Particularly in situations of discrimination arising on reserve, in the absence of some involvement of a government or band council, an Aboriginal person will almost certainly need a legal opinion to sort out the question of jurisdiction.[32]

This latter confusion is primarily associated with the jurisdictional distinction between on and off reserve that arises for First Nations people who have involvement with band councils and/or reserve communities. Most Métis people and Inuit would fall under category (a) above.

Aboriginal People and the Application of Federal Human Rights Legislation

The issue of the application of the CHRA to Aboriginal people falling under federal jurisdiction is complicated for status Indians, as defined by the *Indian Act,* by the relationship between the *Indian Act*[33] and the CHRA. Section 67 of the CHRA provides that:

> Nothing in [the CHRA] affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.[34]

In most cases, s 67 does not affect the rights of an Aboriginal person to pursue a complaint falling under federal jurisdiction. Everyone in Canada is protected by the CHRA from discrimination in dealings with the following employers and service providers: federal departments, agencies and Crown corporations, Canada Post, chartered banks, national airlines, interprovincial communications and transportation companies, and other federally regulated industries.[35] The federal statute also applies to band councils and their enterprises except where s 67 applies. Section 67 immunizes the provisions of the *Indian Act* and actions taken pursuant to the *Indian Act* from complaints under the CHRA.[36] Issues raised by s 67 of the CHRA are relevant to status Indians but not to non-status Indians, Métis people, or Inuit. The issue of HIV/AIDS-related discrimination is, however, relevant to all Aboriginal people.

Many of those interviewed for the paper expressed concern about discrimination within Aboriginal communities. Stories of First Nations people losing employment because they are on the wrong side of an internal band dispute, or of housing being denied to First Nations people living with HIV/AIDS, are not uncommon. Anecdotal evidence suggests that band council resolutions adversely affecting First Nations people with HIV/AIDS have been contemplated.

[32] The best advice may be to contact a human rights commission (either provincial or federal) and have them provide an opinion on jurisdiction. This should be done early, since there are usually deadlines for filing a complaint with the appropriate commission.

[33] RSC 1985, c I-5.

[34] Supra, note 24 at s 67.

[35] Canadian Human Rights Commission. *The Canadian Human Rights Act: A Guide*. Ottawa: The Commission, Cat. no. HR21-18/1993.

[36] *Canadian Human Rights Commission* v *Canada (Department of Indian Affairs and Northern Development)*, [1995] 3 CNLR 28 (FCTD) at 40.

It is important to keep in mind that issues other than discrimination are at play in band decision-making. Kevin Barlow, former National Coordinator of the Canadian Aboriginal AIDS Network, emphasizes that many communities are not intentionally discriminating against people living with or affected by HIV/AIDS; rather, they are often dealing with an overwhelming number of health and social problems, with limited resources and an often nonexistent economic base.[37]

It is also important to recognize the impact of federal government policies on band decision-making. Jurisdictional divisions and government funding policies can adversely affect the delivery of HIV/AIDS-related health (and other) services both on and off reserve. Although inappropriate responses to HIV/AIDS-related issues by a few band councils are objectionable, the federal government must remain aware that, because of its contribution to the social disintegration of First Nations communities, its policies have contributed to an environment in which traditional forms of community support have been disrupted. The federal government has a responsibility to support First Nations in their cultural revitalization.

Finally, many people interviewed referred to improvements in the way that HIV/AIDS issues are being dealt with in all Aboriginal communities – First Nations, Métis, and Inuit – through education efforts. In many cases, through exposure to information about HIV/AIDS and education about healthy practices, initial reactions to the disease based on fear and denial have been replaced by compassion and understanding. Nonetheless, homophobia and AIDSphobia remain serious problems. It is important to examine whether there are gaps in the human rights system that affect Aboriginal people. Again, human rights protections should not vary depending on where a person lives in Canada.[38]

Section 67 of the CHRA

Amid some controversy, s 67 was included in the CHRA when it was adopted by Parliament in 1977. At the time, objections to the provision generally focused on its potential to perpetuate discrimination within the *Indian Act* against First Nations women. Before the Committee on Justice and Legal Affairs, Mary Two Axe Early argued that the whole *Indian Act* should be abolished because it discriminated against women.[39]

[37] Personal communication with Kevin Barlow, 23 July 1997.

[38] This is an oversimplification. It is arguable that human rights legislation applicable to Aboriginal people, at least as between themselves, should reflect Aboriginal values, and accordingly might be different from the current Canadian model for human rights legislation. The proposals for parallel Aboriginal charters of rights discussed below might accomplish this.

[39] *House of Commons Debates*. Official Report, 26 Elizabeth II Vol. VI, 1977, 2nd session of the 30th Parliament.

The express purpose of the CHRA exception is to protect legislation mandating different treatment for First Nations people.[40] In *Canadian Human Rights Commission* v *Canada*, Muldoon J offers a succinct rationale for the provision:

> The *Indian Act* is racist. It countenances the segregation of people by race, into racist enclaves according to racially discriminatory laws. ...
>
> If it were not for s. 67 of the *CHRA*, human rights tribunals would be obliged to tear apart the *Indian Act*, in the name and spirit of equality of human rights in Canada.[41]

A number of cases have considered the scope and effect of s 67. As anticipated by Mary Two Axe Early, most have involved human rights complaints by First Nations women. The most recent case concerned a decision by a human rights tribunal dismissing a complaint of discrimination against Indian and Northern Affairs Canada (INAC) on the basis that the act complained of came within the s 67 exemption. The CHRC unsuccessfully sought to have this decision overturned.[42]

The complainant argued that the discrimination was the result of an illegal exercise by INAC of its policymaking powers. The Court ruled that regardless of whether INAC's action was illegal, "it was nevertheless performed pursuant to the Minister's powers pursuant to the *Indian Act*" and therefore could not be the basis of a complaint to the CHRC.

> Section 67 of the *CHRA* immunizes not only the legislative provisions of the *Indian Act*, but also that which is done by the Minister and by [INAC] pursuant to the *Indian Act*, legally or illegally. ... [G]overnment officials who are actually administering ... the *Indian Act*, are immunized for so doing because of s. 67 of the [CHRA]. ... The tribunal was, accordingly, correct in declining jurisdiction.[43]

[40] Ibid.

[41] Supra, note 36 at 40.

[42] Ibid. The complainant, a status Indian and practising Catholic, wanted her daughter to attend a distant Catholic school rather than the public school located in her community, which was marred by incidents of conflict between students. In 1987 INAC changed its policy regarding the payment of boarding expenses of students attending the Catholic school to require that students attend the school closest to their home. The complaint alleged that the policy of INAC discriminated on the basis of religion. It was contended that an illegality arose because INAC failed to meet its obligations under s 118 of the *Indian Act*. Section 118 provides that "Every Indian child who is required to attend school shall attend such school as the Minister may designate," but that no child whose parent is a Catholic shall be assigned to a Protestant school except by direction of the parent. See *Indian Act*, supra, note 33 at s 118.

[43] Ibid at 40-41.

There are five important points to be drawn from the case law:

(1) decisions or policies that are not contemplated by the *Indian Act*, whether rendered by a band council or INAC, are not protected from scrutiny under the CHRA, and in such cases complaints of discrimination based on a prohibited ground may be successful;[44]

(2) section 67 does not constitute a bar to the jurisdiction of the CHRC to hear a complaint but findings of fact must first be made to establish whether s 67 applies;[45]

(3) the provisions of the *Indian Act* will be examined closely before the s 67 exemption will be applied, although where INAC's policymaking powers are concerned, the line to be drawn between what is and is not contemplated by the *Indian Act* is unclear;

(4) section 67 creates a disturbing situation in which a federal government department may be exempt from the provisions of federal human rights legislation; and

(5) the gap in human rights law created by s 67 is of concern to individuals who may experience discrimination as a result of the *Indian Act*, from band councils or from INAC – including First Nations women, two-spirited people, and First Nations people with HIV/AIDS.

The size of the gap created by section 67

The by-law making power

Various sections of the *Indian Act* confer authority on band councils to enact by-laws relating to certain subject matters.[46] "A by-law is a law in the true sense of the word made by the band council for the regulation of its own local or internal affairs or its dealings with its members or other governments."[47]

Two provisions of the general by-law making power under the *Indian Act* are of concern to people living with or affected by HIV/AIDS:[48]

> s.81(1) The council of a band may make by-laws ... for any and all of the following purposes, namely:
>
> (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases; ...
>
> (p.1) the residence of band members and other persons on the reserve;

[44] *Re Desjarlais and Piapot Band No. 75*, [1990] 1 CNLR 39 (FCA). Concerned a human rights complaint by an Aboriginal woman who was fired from her job as band administrator because of her age.

[45] *Courtois* v *Canada (Department of Indian Affairs and Northern Development)*, [1991] 1 CNLR 40 (Canadian Human Rights Tribunal), and *Gordon Band* v *Laslo* (13 March 1996), FCTD [unreported]. *Courtois* concerned the complaints of two Bill C-31 women who complained that INAC discriminated against them by denying their children access to a band-controlled school. Both experienced discrimination from members of their community as well. *Gordon* concerned a complaint by a First Nations woman that her band denied her residential accommodation because she was a Bill C-31 ("reinstated") Indian.

[46] Supra, note 33 at ss 81, 83 and 85.1.

[47] Robert Reiter. *An Examination of the Evolving Concept of Band Councils, Their Authorities and Responsibilities, and Their Statutory Instruments of Power.* Edmonton: First Nations Resource Council, 1990, at 4.1.

[48] Supra, note 33 at ss 81(1)(a) and (p.1).

The concern raised here is that a by-law may be proposed for the interests of the community that is in fact discriminatory and where community interest is misinterpreted based on misunderstandings about HIV/AIDS.

Band council resolutions (BCRs)

Along with their by-law making powers, band councils operating pursuant to the *Indian Act* may pass resolutions regarding the affairs of their community. A BCR represents the "formal expression of the opinion or will of the band council adopted by a vote."[49] Band councils generally use a BCR to record council decisions that require action or approval by INAC.[50] If a band does not require action on the part of INAC, a BCR may be adopted informally concerning almost any matter, although a controversial BCR may be challenged.

An informal BCR may be only one element in a course of conduct meant to discourage a person with HIV/AIDS from remaining on the reserve. A course of conduct adopted as council policy through an informal resolution should be subject to the CHRA because such conduct or policy is not mandated by the *Indian Act*. However, a discouraging course of conduct generally finds expression in a discriminatory atmosphere rather than in policy. Human rights legislation is not very useful for responding to systemic issues or subtle discrimination.

Controls on by-laws and BCRs

For several reasons, the possibility of passing HIV/AIDS-related discriminatory by-laws is limited. First, s 82 of the *Indian Act* requires that a copy of every by-law made under the authority of s 81 be forwarded to the Minister. A by-law comes into force 40 days after it is forwarded, unless it is disallowed.[51]

Health-related by-laws are infrequently used. The first band to exercise its power to regulate health on reserve by developing a by-law under s 81 of the *Indian Act* was the Mathias Colomb First Nation in the late 1980s. This was accomplished only after negotiations with INAC, which rejected early drafts of the by-law.[52]

Second, HIV is not considered to be a "contagious or infectious" disease for the purposes of health protocols, legislation, and regulations. The federal *Quarantine Act*, for example, does not include HIV/AIDS in its schedule of "contagious and infectious" diseases.[53] Similarly, HIV/AIDS is not found in the list of "virulent" diseases under the Ontario *Health Protection and Promotion Act*; rather, HIV is defined as "reportable" and "communicable."[54] Based on these legislative examples and on scientific evidence regarding HIV transmission, it seems that a by-law could not be passed under the rubric of "contagious or infectious" disease pursuant to s 81(a) of the *Indian Act*.

[49] Supra, note 47 at 4.1.

[50] J Stephen O'Neill. Decision Making on Reserves – The Current Situation. *Aboriginal Issues Today*. Stephen Smart and Michael Coyle (eds). Toronto: Self-Counsel Press, 1997, at 106.

[51] Supra, note 33 at s 82. O'Neill notes that section 82 places band by-law making authority "squarely under the control of the Minister, a situation that does not rest well with many communities.... For these reasons, many First Nations have chosen not to become involved in the drafting and passing of ... by-laws" (supra, note 50 at 102).

[52] G Connell et al. Implementing Primary Health Care Through Community Control: The Experience of Swampy Cree Tribal Council. *Circumpolar Health 90: Proceedings of the 8th International Congress on Circumpolar Health*. Brian D Postl et al (eds). Winnipeg: University of Manitoba Press, 1991, at 45.

[53] RSC 1985, c Q-1.

[54] RSO 1990, c H.7.

Sections 81(a) and 81(p.1) also provide for by-laws "to provide for the health of residents" and concerning "the residence of band members." A band may argue that a restrictive by-law respecting HIV is justified on community health grounds or on the grounds that limited resources make it impossible to provide for First Nations people living with HIV/AIDS on reserve.

A response to the first suggestion is straightforward. Albert McLeod, Executive Director of the Manitoba Aboriginal AIDS Task Force, notes that bands that exhibit fear and denial with respect to HIV/AIDS must be educated to show that rejecting people living with it does not stop the spread of HIV.[55] Health policies that frustrate efforts at education, prevention, and healing are not in the best interests of communities, as they tend to force people concerned about their security to hide their health status and avoid helpful treatment, counseling, and other support services.

Responding to arguments in support of restrictions based on limited resources is more difficult. Many bands experience severe financial constraints and have to make hard choices about priorities. Overcoming arguments of this nature requires that governments provide sufficient resources to bands to deal with HIV/AIDS issues and that band leaders become educated about HIV and appreciate that it needs to be a priority in Aboriginal communities.

Finally, the Charter forms an integral part of Canada's legal response to discrimination and constitutes a fourth limitation on the possibility of by-laws or BCRs that have a negative impact on people living with or affected by HIV/AIDS. Discussion of the Charter will follow.

Failures of the Human Rights System

It is not within the scope of this paper to review problems with the human rights agencies in every jurisdiction in Canada. While the comments of persons consulted from various regions of the country expressing concern about the value of the human rights system are reflected below, the discussion focuses on problems with the OHRC.

[55] Personal communication with Albert McLeod, 24 July 1997.

Problems with the Human Rights System Generally

Noelle Spotton, Clinic Director at Aboriginal Legal Services in Toronto, emphasizes that many of the problems with the human rights complaints system are not unique to Aboriginal complainants.[56] A backlog in cases and delays at certain stages of the process result in an average of five years for the resolution of complaints that are not resolved by early settlement, causing frustration for everyone.

A brief prepared by the Coalition for Reform of the Ontario Human Rights Commission (the Coalition) sets out an extensive list of problems that occur at all stages of the complaints process. Problems include the inaccessibility of the process, delays, misinformation and discouraging advice conveyed to complainants by intake workers, poor collection and preservation of evidence during the investigation of complaints, and low-quality work in general.[57]

The OHRC has suffered deep funding cuts under the present provincial government. This has contributed to low morale and frustration among OHRC staff and has increased instability at OHRC offices. The Coalition has identified a number of problems that might be related to these cuts, such as increased pressure to settle early and a reluctance to accept cases: "it appears that it is now [OHRC] policy to reject complaints whenever possible."[58]

Of particular concern to complaints relating to HIV/AIDS, the Coalition reports that "HIV-positive persons filing discrimination complaints on the ground of handicap are often told that they must supply medical confirmation of their HIV status or the complaint will not be accepted."[59] Further, the OHRC policy to provide fast-tracking in certain cases is applied unevenly and only extends to the stage at which an OHRC investigator is assigned to the file. After that, things tend to move more slowly.[60]

Add to these problems the unsatisfactory remedies available under the Code and it is understandable that the complaints system is discouraging for the disadvantaged.

[56] Personal communication with Noelle Spotton, 31 July 1997.

[57] *Dysfunction in the Human Rights Complaints System*. Brief of the Coalition for Reform of the Ontario Human Rights Commission. Toronto, June 1995.

[58] Ibid at 13. The OHRC relies on ss 34 and 36 of the Code to reject complaints. Section 34 permits the OHRC to decide not to deal with a complaint where a complaint could or should be dealt with under another Act; it is trivial, frivolous, vexatious, or made in bad faith; it is beyond OHRC jurisdiction; or the incident complained of occurred more than six months before a complaint was filed. Section 36 is permissive: the OHRC can decide not to appoint a Board of Inquiry.

[59] Ibid at 4.

[60] Ibid at 5-6.

Problems with the Human Rights System for Aboriginal People

The human rights complaints system is underutilized by Aboriginal people.[61] As discussed above, Aboriginal people experience a deeply ingrained racism. Tammy Abram, Family Liaison Worker with the Atlantic First Nations AIDS Task Force, notes that a sense of empowerment is integral to the ability to fight discrimination.[62] The weight of continuing patterns of discrimination and cultural dislocation has made low self-esteem pervasive among Aboriginal people, particularly vulnerable groups such as two-spirited people, those dependent on alcohol and drugs, street-involved people, and some young people and women. For many Aboriginal people the human rights complaints system is inaccessible because of systemic problems.

Racism is a daily routine for many Aboriginal people. Aboriginal street-involved people are often verbally abused and intimidated by police and others. Some Aboriginal people living below the poverty line may not want to antagonize their welfare worker or employer over racial slurs because they have little financial security. Many of these people refuse to take action because they do not think things will change. They are worn down.

Many of those interviewed were of the view that the human rights system in Canada does not reflect Aboriginal values. This reflects the findings of the Ontario Native Council on Justice report:

> The [Code] is based upon a liberal, individualistic ideology that is at odds with the idea of collective rights that is central to most Native philosophies. It is often argued ... that the collective rights claimed by First Nations are not admissible under the current Code.[63]

Although the bad experience of Aboriginal people with the justice system contributes to a widely held distrust of mainstream legal processes, it is important to recognize the complexity of cultural sensitivity. Some Aboriginal people have a high level of comfort with the system; many do not. For Aboriginal people who are comfortable using the system, a human rights complaint can often be an effective negotiating tool. However, people who have grown up with little exposure to the system are less likely to turn to it.[64]

One Aboriginal person consulted pointed out that for many Aboriginal people the human rights system is alien simply because they have not been exposed to or educated about the process. Another referred to concerns that human rights staff are racist or uneducated about Aboriginal cultures. This adds to the perception that the complaints process is insensitive to the circumstances of First Nations.[65]

[61] Supra, note 27 at 3.

[62] Personal communication with Tammy Abram, 17 July 1997.

[63] Supra, note 27 at 8.

[64] Supra, note 56.

[65] Supra, note 27 at 6.

Finally, one person stated that the human rights complaints system is ill-equipped to deal with systemic discrimination.[66] Again, discrimination against Aboriginal people is so deeply ingrained that only a concerted, directed, and coordinated effort will improve the human rights situation of First Nations, Métis, and Inuit communities. While governments have a responsibility for improving the social conditions of Aboriginal people, human rights agencies would do well to direct resources to the education of the public.

Solutions suggested for some of the problems identified above include the creation of an Aboriginal unit within human rights commissions that would reflect Aboriginal values in the settlement of disputes and claims, an amendment to human rights statutes to add to the list of prohibited grounds discrimination on the basis of "being an Aboriginal person," increasing the number of Aboriginal people employed by human rights commissions, and assisting the existing systemic discrimination unit of the OHRC to be more proactive.[67]

The problems enumerated above apply to discrimination complaints by Aboriginal people on the basis of any prohibited ground, including HIV/AIDS. It is important to note that there are additional reasons why an increase in the number of complaints by Aboriginal people living with or affected by HIV/AIDS is unlikely, including the following:

- many persons consulted expressed concern that filing a complaint entails loss of confidentiality;
- some persons referred to the divisiveness that results from using a mainstream system against a band council or Aboriginal organization, which can add to animosity toward the complainant; and
- the energy, time, and frustrations associated with the complaints system is discouraging for anyone living with HIV/AIDS.

Human rights legislation is useless in the absence of other processes directed at addressing issues of empowerment and self-confidence.

[66] This view is supported by the reports of the Coalition (supra, note 57) and the ONCJ (supra, note 27).

[67] See the ONCJ report, supra, note 27. The last suggestion was made by Noelle Spotton in her written submission, dated 19 December 1997, in response to the draft discussion paper.

The Charter and HIV/AIDS-Related Discrimination: An Overview

The source of human rights protection for people living with or affected by HIV/AIDS in the *Canadian Charter of Rights and Freedoms* (the Charter) is s 15(1):

> Every person 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 ... mental or physical disability.[68]

The right to be treated without discrimination, like all other Charter rights, is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[69]

The analytical framework developed by the Supreme Court of Canada in *Andrews* v *Law Society of British Columbia*[70] is the standard for the interpretation of s 15. In the context of disability-based discrimination, including discrimination on the basis of HIV/AIDS, the substantive and purposive approach to equality issues set out in *Andrews* is useful. Not only does such an approach attempt to redress direct discrimination; it extends to discrimination based on the adverse effects of a policy or practice, and to systemic discrimination. "Adverse effects discrimination occurs when seemingly neutral policies or practices that apply to all individuals in a given context have a disproportionately negative impact on individuals of a particular group."[71] As noted above, systemic discrimination refers "to the 'big picture' in which the very operation of a 'system' or 'complex' of policies, rules and practices excludes members of disadvantaged groups to their detriment."[72]

The Supreme Court of Canada has heard very few equality rights cases where disability-based discrimination was an issue. This is cause for some concern, as it means that concepts such as adverse effects and systemic discrimination are being developed without consideration for the impact on persons with disabilities.[73]

[68] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15. "Sexual orientation" has been included by judicial interpretation in the list of prohibited enumerated or analogous grounds for discrimination under s 15 (*Egan and Nesbit* v *Canada*, (1995) 124 DLR (4th) 609 (SCC).

[69] Ibid at s 1.

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

[71] Supra, note 11 at 12.

[72] Ibid.

[73] Ibid at 2-3.

Application of the Charter to Aboriginal Governments

Some Aboriginal people have reservations about the application of the Charter to Aboriginal governments. Turpel and Hogg note that "many Aboriginal people see the application of the Charter as simply inappropriate because it does not reflect Aboriginal values or approaches to resolving disputes."[74] This point was emphasized by LaVerne Monette, who considers that although the Charter is valuable as a standard against which Canada can be judged internationally and domestically, it is not of much use to Aboriginal people.[75] Despite its failure to incorporate Aboriginal views, however, some Aboriginal groups, such as the Native Women's Association of Canada, take the position that the Charter should apply to all Aboriginal governments.[76]

There is a distinction to be made between the question of the Charter's application to band councils and to Aboriginal governments exercising an inherent right to self-government. With regard to the former, from a legal perspective at least, the answer is clear. Section 32(1) of the *Constitution Act, 1982* (the Constitution) provides that the Charter applies to the federal and provincial governments, as well as all other governments and matters that fall under federal and provincial authority, including territorial governments.[77] The *Indian Act* establishes a system of band governance whereby band councils exercise delegated powers under the authority of the federal government. "Where the Parliament or a Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate."[78] This is the position adopted by the Royal Commission on Aboriginal Peoples (RCAP).[79]

[74] Peter Hogg, Mary Ellen Turpel. Implementing Self-Government: Constitutional and Jurisdictional Issues. *Canadian Bar Review* 1995; 74(2): 187 at 213.

[75] Supra, note 12.

[76] Supra, note 74 at 213.

[77] Supra, note 68 at s 32. "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

[78] Supra, note 31 at 34-39.

[79] Supra, note 6, vol 2 at 226.

It follows that the Charter could be used by First Nations people living with or affected by HIV/AIDS who experience discrimination arising from the *Indian Act* or actions taken pursuant to the *Indian Act*, including actions taken by band councils or INAC. The Charter could therefore be used to fill the gap created by s 67 of the CHRA, subject to the effects of ss 25 and 35 of the Constitution, as discussed below.

A more contentious issue is the application of the Charter to Aboriginal governments exercising inherent powers pursuant to s 35 of the Constitution. There is broad support for the proposition that s 35 enshrines the inherent right to self-government.[80] In August 1995, the federal government issued a policy framework stating its recognition of "the inherent right of self-government as an existing Aboriginal right under section 35 of the [Constitution]."[81] Further, the government "acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right."[82]

The federal government takes the position that self-government agreements must provide that the Charter applies to Aboriginal governments and institutions.[83] An approach to self-government that includes the application of the Charter to Aboriginal governments also finds expression both in the RCAP *Final Report* and in case law.

RCAP proposes a solution to the question of Charter application based on three principles:

> (1) [A]ll people in Canada are entitled to enjoy the protection of the [Charter] in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved.
>
> (2) Aboriginal governments occupy the same basic position relative to the Charter as the federal and provincial governments. Aboriginal governments should thus have recourse to ... [s 33 of the Constitution, the notwithstanding clause].[84]

[80] Supra, note 74 and infra, note 85. Anthony Long and Katherine Beaty Chiste have argued that "philosophical and pragmatic reasons exist to support a collective rights claim for exempting Indian peoples from the application of the Charter to their own governments." See Long & Chiste. Indian Governments and the Canadian Charter of Rights and Freedoms. *American Indian Culture and Research Journal* 1994; 18(2): 91-119.

[81] Indian and Northern Affairs Canada. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. Ottawa: Minister of Public Works and Government Services Canada, 1995, at 3.

[82] Ibid.

[83] Ibid at 4.

[84] Section 33(1) reads as follows: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature ... that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." See supra, note 68 at s 33. In its *1996 Annual Report* the CHRC expresses the view that "no government should have the power to suspend Charter rights." Further, although the CHRC supports the proposals of RCAP in the area of human rights, there is concern that the proposals do not go far enough. RCAP "makes no suggestions for establishing specific institutions to protect human rights or to prevent discrimination within self-government structures." See supra, note 25 at 23-24. Given the vulnerability of Aboriginal people infected or affected by HIV/AIDS and of two-spirited people, this oversight by RCAP is cause for concern.

> (3) [I]n its application to Aboriginal governments, the Charter should be interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions. This interpretive rule is found in section 25 of the Charter.[85]

Pentney describes s 25 as an "interpretive prism" that serves to alter the meaning of Charter rights in order to ensure that those rights do not obliterate the rights of Aboriginal people.[86]

The prism effect of s 25 has found some expression in Canadian case law. In *Corbiere* v *Canada*,[87] the Federal Court of Appeal held that the requirement under s 77(1) of the *Indian Act* that a band member be ordinarily resident on reserve to be eligible to vote in band elections is inconsistent with s 15 of the Charter.

The Court's analysis in *Corbiere* started with the question of whether the exclusion of non-resident band members from decision-making reflects the distinctive Aboriginal culture of the band and is therefore an Aboriginal right pursuant to s 35(1).[88] It was held that insufficient evidence was presented to support such a proposition. The Court notes that, if "the right to limit voting to on-reserve members of the [band] were recognized as an aboriginal right under s 35(1), then s 25 would operate to ensure that the right was not weakened by the operation of s 15(1)."[89] The Court did not exclude the possibility that such a right might be established by a band in different circumstances. Accordingly, the scope of the decision was limited to the Batchewana First Nation.[90]

Although it appears that there is broad support for the application of the Charter to Aboriginal governments exercising inherent powers, the Charter must be interpreted to reflect ss 25 and 35 of the Constitution. This "would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices."[91] Ultimately, it has been suggested that a First Nation exercising the inherent right to self-government should have the power to enact a charter of rights specific to its cultural practices that supplements but does not displace the Canadian Charter. In "construing the Canadian Charter in light of section 25, a court may well find the provisions of [an] Aboriginal charter a useful guide."[92]

[85] Supra, note 6, vol 2 at 230. Section 25 reads as follows: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired." See supra, note 68 at s 25.

[86] William Pentney. The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I – The Interpretive Prism of Section 25. *UBC Law Review* 1988; 22(1): 21 at 29.

[87] *Corbiere* v *Canada (Minister of Indian and Northern Affairs)* (1996), 206 NR 85 (FCA).

[88] In *R* v *Van der Peet*, the Supreme Court of Canada articulated the approach to be taken in establishing the existence of an Aboriginal right. In order to be an Aboriginal right, "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right." [1996] SCJ No 77 at para 46, per Lamer CJ.

[89] Ibid.

[90] The decision in *Corbiere* has been appealed to the Supreme Court of Canada. Possible intervenors on the appeal will argue that the decision should apply to all bands.

[91] Supra, note 5, vol 2 at 215.

[92] Ibid at 233. See also Turpel & Hogg, supra, note 74.

This is a time of transition for First Nations, Métis, and Inuit communities. Through health-care transfer agreements, the dismantling of INAC, and ongoing negotiations regarding self-government, broad changes are occurring in the affairs of Aboriginal people. During a process of change it is possible for some issues and people to be forgotten or ignored. It is imperative that HIV/AIDS issues be made a priority during this transition and that inappropriate actions and policies respecting HIV/AIDS be avoided.

Problems with the Charter

One problem with the Charter is that the rights and freedoms it guarantees only take effect as restrictions on the power of government over individuals. It has no bearing, beyond its symbolic value, on relationships between private persons.[93] Human rights statutes are intended to fill that void, but in practice they tend to do a poor job, particularly for Aboriginal people.

Some of the problems with the human rights complaints system apply to Charter litigation as well: the process is long and costly, and the system does not reflect Aboriginal conflict resolution processes and values. One person interviewed stated that the Charter is generally interpreted by people whose life experience rarely reflects that of most First Nations people and Inuit. Finally, like human rights statutes, the Charter has not gone far enough to alleviate systemic discrimination in Canadian society. Despite the Charter, many problems experienced by Aboriginal people continue to be ignored for as long as possible – often, it seems, forever.

It is important to recognize that the Charter does have some value. The Charter can be used to address important issues that might benefit many people.[94] Further, with regard to fighting discrimination against the two-spirited community, Gilbert Deschamps, formerly with TPFN, has expressed a reluctance to give up the advances, however slight, that have accompanied the adoption of human rights legislation and the Charter.[95] The language of rights has been important in the struggle for self-determination of First Nations and Inuit communities even if the concept and language of rights have been criticized for being unreflective of Aboriginal world-views.

[93] Supra, note 31 at 34-20.2.

[94] Supra, note 56.

[95] Personal communication with Gilbert Deschamps.

Human Rights Cases Involving Aboriginal People Living with or Affected by HIV/AIDS

Consultations for this paper yielded only two cases in Canada up to September 1997 in which the human rights system was used by an Aboriginal person living with or affected by HIV/AIDS. In one case, such a person filed a human rights complaint under the CHRA against a band over its failure to provide housing for the complainant on reserve. The complaint was effective in that it helped persuade the band to provide a house, but it did create some bad feelings toward the complainant. In another case, the threat of filing a human rights complaint was used to persuade a dentist to provide an explanation for his refusal to treat an Aboriginal person living with HIV/AIDS. No complaint was actually filed.

There have been no cases involving the Charter and an Aboriginal person living with or affected by HIV/AIDS.

The stories related by persons interviewed indicate that Aboriginal people living with HIV/AIDS are affected by discrimination. Evidently, this discrimination is not being dealt with through the human rights system in Canada, including the Charter. Other approaches are more effective.

DEALING WITH DISCRIMINATION: OTHER APPROACHES

Darcy Albert expressed his feeling that there is no solution to discrimination. His experience has left him discouraged about the prospects for a broad acceptance by the general public of the significance of HIV/AIDS issues.[96]

Overcoming homophobia and AIDSphobia will not happen easily. What follows is a brief discussion of three of the most important approaches to HIV/AIDS-related discrimination as revealed in the consultations for this paper.

Education

> In a remote community, a gay man returned with AIDS and was ostracized. In response, he would breath on people to scare them as they did not understand how HIV is transmitted.
>
> One woman in a small city was harassed. People thought she was HIV-positive because she was a drug user.

Misinformation about HIV/AIDS contributes to discrimination both within First Nations, Métis, and Inuit communities and in the rest of Canada. A lack of knowledge about HIV/AIDS is not only evident in remote communities; it is prevalent across the country.

[96] Supra, note 10.

The discrimination experienced by Aboriginal people, regardless of their HIV status, is sometimes rooted in stereotypes about Aboriginal people and lack of knowledge or sensitivity to Aboriginal cultures, traditions, and conditions. Art Zoccole, Project Coordinator of the BC Aboriginal HIV/AIDS Task Force, notes that there is not only a need to provide education about HIV/AIDS to Aboriginal people but a need to educate people working in health care, government offices, and others working in the field of HIV/AIDS about Aboriginal issues and the situation of Aboriginal people.[97]

Other comments about education issues include the following:

> Some people still do not accept that HIV/AIDS might be in their community or that it could get there. In many communities, education efforts have not yet reached behaviour. Communities need to be empowered to take responsibility for developing their own models for education, care, treatment, and support.

> There have been incidents where a person with HIV/AIDS has returned to a community and been ostracized. Interventions after the fact by AIDS educators have helped alleviate the tension.

> There may never be an end to health problems without an increase in education about all health issues. Aboriginal communities often have so many important health-related issues to deal with that there is a need for a holistic approach that diminishes competition between diseases and reflects the needs and resources of each community.

Reports on Aboriginal people and HIV/AIDS reflect the emphasis placed on education by those consulted for this paper:

> Education and the promotion of awareness in the communities must be made a priority.[98]

> A broad-based education program must be developed to prevent the potentially devastating spread of HIV/AIDS throughout Canada's Aboriginal community.[99]

The *Ontario First Nations AIDS and Healthy Lifestyle Survey* reports that survey respondents believed that the community should take care of members living with AIDS but felt they would be more likely to tolerate or ignore them.[100] Education efforts represent one way to help people overcome their fears and misunderstandings and move from "should" to "would." Education is a crucial component in both addressing the discrimination that often accompanies HIV/AIDS and reducing the spread of HIV among Aboriginal people.

[97] Personal communication with Art Zoccole, 17 July 1997. This view was echoed by another person who suggested that mainstream health care must be sensitized to Aboriginal needs and there must be an increase in services that are culturally appropriate for Aboriginal people.

[98] Pauktuutit Inuit Women's Association. *National Inuit HIV/AIDS and STDs Training Workshop: Final Report*. Ottawa: The Association, 1995, at 12.

[99] Aboriginal Nurses Association of Canada. *HIV/AIDS and its Impact on Aboriginal Women in Canada*. Ottawa: Health Canada, March 1996, Recommendation 9.0, at 44.

[100] Ted Myers et al. *Ontario First Nations AIDS and Healthy Lifestyle Survey*. Toronto, 1993, at 47.

LaVerne Monette suggested that HIV/AIDS workers cannot simply go into communities and talk about HIV/AIDS. All the issues around HIV and public health in Aboriginal communities must be addressed, including the impact of a foreign culture on community practices and traditions, residential schools, assimilationist policies, health problems, sexual and physical abuse, and alcohol. All these topics make it difficult to talk about sexuality issues.[101]

Engaging the Leadership

> Some Aboriginal leaders are reluctant to meet with representatives of Aboriginal AIDS organizations because they are homophobic or afraid of AIDS.[102]

> People who work at Aboriginal AIDS organizations are often thought to have AIDS themselves or to be two-spirited and experience harassment and discrimination. It is difficult to create a secure environment for people living with HIV/AIDS when care providers are being threatened.[103]

Those interviewed for this paper agreed on the need for more involvement of leaders in HIV/AIDS issues in order for some communities to overcome homophobia, AIDSphobia and reluctance to deal openly with sexuality and lifestyle issues, all of which hamper education and prevention initiatives and contribute to the stigmatization of Aboriginal people living with or affected by HIV/AIDS. Criticisms were not only leveled at Aboriginal leadership but at federal and provincial leaders as well.

> No one at a high enough level (in the federal and provincial governments) is prepared to take the bull by the horns and overcome jurisdictional problems that hamper the delivery of HIV services.

> There is a need for visionary leadership at the federal and provincial level to deal with HIV/AIDS.[104]

Some of the people interviewed for the paper indicated the importance of leadership by example.

> Specific directives from the top might help to prove there is a problem and increase the level of comfort with HIV/AIDS issues.[105]

[101] Personal communication with LaVerne Monette, 13 August 1997.

[102] Supra, note 10.

[103] Supra, note 12.

[104] Ibid.

[105] Personal communication with Arlo Yuzcapi Fayant, Project Coordinator, All Nations Hope AIDS Network, 22 July 1997.

The involvement of leaders would help focus attention on HIV/AIDS and keep it high on the list of band priorities. Some of those consulted expressed frustration at leaders becoming involved during the early stages of development of HIV/AIDS initiatives, then failing to carry things through. Others related situations in which leaders refused to be involved in early stages of program development, then expressed dissatisfaction when their communities were not included.

Finally, it is important to note that "Aboriginal leadership" includes a spectrum of people: band councils, elders, tribal councils, off-reserve Aboriginal organizations, and provincial and national political entities. The response of leadership has varied from community to community and between organizations. In some places, elders are keen supporters of HIV/AIDS education, while in others leaders continue to close their eyes. It is clear that Aboriginal AIDS organizations and activists consider the involvement of Aboriginal leaders to be imperative in the struggle to reduce the spread of HIV among Aboriginal people.

Kevin Barlow, formerly of the Canadian Aboriginal AIDS Network, was encouraged to see many delegates at the Assembly of First Nations meeting to elect the Grand Chief in early August 1997 wearing red ribbons they had received from activists the day before. Barlow suggests that support for HIV/AIDS issues might be growing quietly among Aboriginal leaders.[106] In the meantime, activists will continue trying to reach those who continue to deny or ignore the significance of these issues for Aboriginal communities.

Aboriginal Control and Participation

Throughout the process leading to self-government, Aboriginal people have emphasized the importance of Aboriginal control of, and participation in, decision-making affecting Aboriginal people and communities. The field of HIV/AIDS is no different: "proposals for action to support people with HIV/AIDS and for appropriate public education measures to prevent the spread of the infection among high-risk groups must come from within Aboriginal nations and their communities."[107]

[106] Personal communication with Kevin Barlow, 8 August 1997.

[107] Supra, note 6, vol 3 at 143.

Due to their personal experience with HIV/AIDS, Aboriginal AIDS workers and Aboriginal people living with or affected by HIV/AIDS have a particularly significant contribution to make to the development of a legal, educational, and health-care framework addressing HIV/AIDS issues. Aboriginal leaders and Canadian government officials with foresight will want to ensure that HIV/AIDS issues continue to be discussed, and that the interests of Aboriginal people living with or affected by HIV/AIDS are represented. The establishment of the Canadian Aboriginal AIDS Network, a national affiliation of Aboriginal AIDS organizations, contributes to the political voice of Aboriginal people.

An example of the benefits of Aboriginal control and expertise in the design and delivery of HIV/AIDS programs and services was discussed by Denise Lambert, a community educator in Alberta. Lambert's personal knowledge of the communities she visits allows her to convey HIV/AIDS information in a way that responds to the needs of each community and respects their views and traditions.[108] The expertise of Aboriginal people in issues affecting their communities is the greatest resource in the effort to control the spread of HIV and reduce HIV/AIDS-related discrimination.

[108] Based on personal communication with Denise Lambert, 19 August 1997.

CONCLUSIONS

The consultations for this paper suggest that Aboriginal people living with or affected by HIV/AIDS experience discrimination in many of the same forms as non-Aboriginal people do. What differentiates HIV/AIDS-related discrimination against Aboriginal people is the history of oppression and cultural devastation suffered by First Nations, Métis, and Inuit communities. The deplorable level of health and the social problems in Aboriginal communities represent a failure of human rights in Canada.

The stories of discrimination told by those consulted suggest that discrimination relating to HIV/AIDS and Aboriginal people comes from a variety of sources and takes many forms. Misunderstandings and denial about HIV/AIDS are often reinforced by other forms of discrimination, such as discrimination against two-spirited people, women, drug users, and Aboriginal people generally. Finally, it finds its roots in a history of oppression, racism, and colonialism.

The systemic and individualized discrimination experienced by Aboriginal people generally, and by Aboriginal people living with or affected by HIV/AIDS in particular, contributes to the disproportionate impact of HIV/AIDS on Aboriginal communities. The risk factors associated with HIV transmission are overrepresented among Aboriginal people. The prevalence of such risk factors reflects, again, the disturbing historical relationship between Aboriginal people and Canadian society, governments, and institutions.

The following conclusions may be drawn:

1. Recourse to human rights legislation is not the best approach to reducing HIV/AIDS-related discrimination for Aboriginal people, for several reasons.

(a) Questions about which human rights regime applies to Aboriginal people, depending on where they live and which jurisdiction they fall under, particularly with respect to the distribution between on and off reserve, and about when the Charter is available, create confusion about the human rights system.

(b) The impact of s 67 of the CHRA on human rights protections for First Nations people living with or affected by HIV/AIDS who live on reserve is unclear. Although the gap created by s 67 is not large, and a discriminatory action by a band council or by INAC is contrary to the Charter, the existence of an exception to the CHRA is disturbing. It might encourage inappropriate actions with respect to HIV/AIDS, even if those actions might be successfully challenged in court.

(c) The human rights complaints system is laden with problems that make it ineffective for everyone. For many Aboriginal people these problems are compounded by racism and cultural difference. Aboriginal people who live on the street, who depend on social assistance, or who are uncomfortable with the justice system are unlikely to utilize the human rights process. Those living on reserve may be concerned that a complaint against the band or a community member will result in further ostracism. Finally, the complaints-based system is not effective against systemic discrimination and it does not respect Aboriginal values and traditions about the interplay between collective and individual rights.

2. The ongoing transition from an *Indian Act* regime to a renewed relationship between Aboriginal communities and Canada presents an opportunity to re-examine s 67 of the CHRA. Given the existence of the Charter and s 35, and recognition of the inherent right to self-government, s 67 may no longer be necessary. If so, it should be revoked.

3. The Charter applies to band councils, and despite some controversy, it likely applies to Aboriginal governments exercising inherent rights. Given the scope for arguments defining Aboriginal rights through the interplay of ss 35 and 25, the view that the notwithstanding clause should be available to Aboriginal governments, and the possibility that Aboriginal governments will create their own charters of rights, it is imperative that awareness about HIV/AIDS be increased before inappropriate policies are proposed through any of these mechanisms.

4. Most of the persons consulted do not think that recourse to the human rights system is the most likely or useful approach to HIV/AIDS-related discrimination for Aboriginal people. Based on the comments collected, the system is rarely used by Aboriginal people in response to discrimination based on HIV/AIDS. Despite problems with the human rights system, in some circumstances a complaint, or the threat of a complaint, may discourage inappropriate actions with respect to HIV/AIDS. For this reason, it is important that public legal education material be available for Aboriginal people living with or affected by HIV/AIDS and for Aboriginal AIDS organizations.

5. Education is imperative in the effort to control the spread of HIV/AIDS and reduce the impact of discrimination related to HIV/AIDS and Aboriginal people. Education efforts must continue in Aboriginal communities and among Aboriginal organizations. In addition, non-Aboriginal people working in such fields as health care, HIV/AIDS, and human rights, particularly those who deal with Aboriginal clients, should be exposed to information about the living conditions, cultures, and traditions of Aboriginal people in Canada.

6. There needs to be more involvement of all levels of leadership in HIV/AIDS issues in order to overcome the denial and discrimination that frustrate community education and prevention strategies.

7. HIV/AIDS initiatives must be guided by a commitment to Aboriginal control of, and participation in, proposals for action to support people with HIV/AIDS and for appropriate public education measures to control the spread of the epidemic. Aboriginal people are the experts in addressing issues affecting their communities.

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