

# Challenges posed to workers with HIV/AIDS

## A Canadian perspective\*

By Daljit Nirman

*Published in Ontario Bar Association (OBA) Labour Relations Section, May 2004, Vol.6, No. 4*

*"AIDS has a profound impact on workers and their families, enterprises and national economies. It is a workplace issue and a development challenge."*<sup>1</sup>

AIDS (acquired immunodeficiency syndrome) is the late stage of infection with HIV (human immuno-deficiency virus).<sup>2</sup> HIV is not spread through ordinary social contact; for example by shaking hand, traveling in the same bus, eating from the same utensils, by hugging or kissing. The term HIV/AIDS was not known to the medical fraternity till about two decades ago, yet it has emerged as a leading cause of death among young adults in US today.<sup>3</sup> The last three years have seen a major increase in the scope and scale of the national, regional and international response to HIV/AIDS.<sup>4</sup> The AIDS epidemic is an emergency threatening human welfare and prosperity throughout large parts of the developing world. The epidemic is having a severe impact, reversing hard won development gains in life expectancy and health, as well as economic and social development.<sup>5</sup>

The significance of HIV/AIDS in the context of labour and employment may be understood from two perspectives. The first, a rights perspective, focuses on the fact that people living with HIV/AIDS face discrimination in most spheres of their lives, including the workplace. This has implications on the rights to life and equality. The second looks at the economic costs of the epidemic to industry and the economy in general. This issue of positive dialogue deals with some issues related to concerns of employers and employees and the workplace implications of HIV/AIDS. This is an area that has been largely ignored, perhaps because the workplace is not generally associated with behaviours that lead to the transmission of HIV.<sup>6</sup> The workplace remains a potentially unsafe environment for people with HIV/AIDS, whether they are currently at work, or looking for work for the first time.<sup>7</sup>

Canada has guaranteed equality rights in:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or mental or physical disability.<sup>8</sup>

In *Andrews Case*<sup>9</sup> McIntyre J. of the Supreme Court of Canada, referring to section 15 of the *Canadian Charter of Rights and Freedoms* defined Discrimination as:

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

As per the ILO Code of Practice on HIV/AIDS and the world of work,<sup>10</sup> in accordance with the definition given in the Discrimination (Employment and Occupation) Convention, 1958 ( No. 111)<sup>11</sup> to include HIV status. (this sentence needs redrafting) It also includes discrimination on the basis of a worker's perceived HIV status, including discrimination on the ground of sexual orientation. All provinces and federal government have enacted human rights legislation, which prohibits discrimination. Section 5 of the Ontario *Human Rights Code*<sup>12</sup> [hereinafter the "Code"] provides in respect of Employment:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic, origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap

and further in respect of harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic, origin, citizenship, creed, age, record of offences, marital status, same-sex, partnership status, family status or handicap.

In October 1988, the British Columbia Human Rights Council found that persons with AIDS have disabilities within the meaning of the B.C. *Human Rights Act*<sup>13</sup> and can avail themselves of the protection of that Act if they encounter discrimination, as can persons who are perceived to have AIDS or are likely to get AIDS.<sup>14</sup> A tribunal appointed at the request of the Canadian Human Rights Commission had occasion to consider a complaint of AIDS-related discrimination in 1989.<sup>15</sup> In that case, the employer conceded that a person suffering from HIV was under a

disability within the meaning of the *Canadian Human Rights Act*.<sup>16</sup> The tribunal held that Mr. Fontaine had been “constructively dismissed” by Canadian Pacific as a result of discovery that he was infected with HIV. Furthermore, policy statements issued by both the Ontario and Canadian Human Rights Commission have stated that those who are HIV positive, as well as those perceived to be HIV positive, will be considered as “handicapped” or “disabled” within the meaning of their respective statutes. In this connection, “an employer must take substantial and meaningful steps to accommodate an employee who is unable to perform essential duties because of handicap”.<sup>17</sup> They must make serious efforts to evaluate the employee’s capacity; considering the options, the views of the employee and the financial health or safety implications. However, the employee has a duty to assist the employer in arriving at an appropriate accommodation and to cooperate by making their needs known, providing information and facilitating the process. Accommodation must be both possible and not the cause of undue hardship to the employer.”<sup>18</sup>

This approach is consistent with the generous and liberal approach to interpretation of human rights legislation mandated by the Supreme Court of Canada.<sup>19</sup> Accordingly, the employer that identifies its workers based on exposure to HIV is differentiating between workers based on handicap and such a practice, therefore, *prima facie* violates the *Code*, unless the employer can establish that being HIV negative is a *bonafide* occupational qualification (BFOQ).<sup>20</sup> Further, section 5(1) of the *Code* prohibits racial harassment defined as a poisoned work environment that is, where there are instances of racial harassment by anonymous employees, or no one perpetrator carried out a course of harassing conduct; or a member of the protected group against which the harassment is directed is not personally harassed.<sup>21</sup>

In *Mount Sinai Hospital v. O.N.A.*,<sup>22</sup> the Arbitrator, laid out the governing principles of the employer’s duty to accommodate. These principles re-state, in a more concise form, the essence of the recent Supreme Court judgments. The duty to accommodate in Canadian labour law is not limitless and the reviewing courts have recognized that accommodation always require a balancing act between two underlying issues, the right of an employee with a disability to equal treatment, and the right of an employer to operate a productive workplace. The employer is not required to accommodate where undue hardship would result, nor is it obligated to create an unproductive position. In any permanent accommodation, an employee has to be able to perform the *essential job* duties of the existing, re-structured or newly assigned position.<sup>23</sup>

A collective agreement provision which apparently sanctions HIV testing, whether expressly or by way of “management right,” may be circumscribed or indeed overridden by the applicable human rights statute. An arbitrator must refuse to apply an enabling provision in a collective agreement that is prohibited by statute;<sup>24</sup> moreover, even if the provision does not directly offend a human rights statutory provision, the statute can influence or inform the interpretation of the agreement – for example, by imposing accommodation obligations when the agreement is silent in this respect.<sup>25</sup> In both the situations, a labour arbitrator was given the task of interpreting and applying the applicable human rights law. Where a contractual provision prohibiting discrimination because of disability or handicap would establish an arbitrator’s jurisdiction to assess the validity of an HIV-testing policy, quite apart from considerations of reasonableness and fairness.<sup>26</sup> Section 53 of the Ontario *Labour Relations Act*<sup>27</sup> provides:

An agreement between an employer or an employer’s organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act

Labour relations statute which underlies the collective agreement (I do not know what you mean by this!) may itself nullify the entire agreement if a provision is discriminatory. Section 54 of the *Act* states:

A collective agreement must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*

In *Gilmar Electric Inc.*,<sup>28</sup> the collective agreement contained terms which favoured “older employees.” The effect of the provisions was to provide some accommodation, security, recognition and assistance to older members of the trade. The board ruled that there was no *malice* intended and the purpose of the provision was reasonable and negotiated for sound bargaining relations. Therefore, there was no discrimination within the meaning of ss.15 and 53 of the *Act*.

*Trade Union’s liability for discrimination and breach of the obligation of fair representation*

Section 74 of the Ontario *Labour Relations Act*<sup>29</sup> provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Section requires that unions discharge their responsibilities in a manner that is not arbitrary, discriminatory or in bad faith. “Bad faith” and “discrimination” have been defined by the Ontario *Labour Relations Board* as

The prohibition against bad faith and discrimination describe conduct in a subjective sense- than an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. ...Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of individual conduct; and in prohibiting extreme forms of interpersonal breakdowns with a trade union.<sup>30</sup>

The union’s duty of fair representation may arise at the stage of negotiating the collective agreement. An HIV-testing requirement may result in adverse discriminatory effects upon some workers. Apart from the possibility that such a provision may be deemed not to form part of the collective agreement, the union may be in breach of its duty of fair representation with respect to those workers who are adversely affected. However, labour boards rarely interfere with a union’s determination of its priorities in negotiating a collective agreement if there is some rational basis for the decision. In addition to the duty of fair representation, there is a duty of “fair referral” found in the Ontario, British Columbia and federal statutes. Section 75 of the Ontario *Labour Relations Act*, 1995 reads:

Where pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation, or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.<sup>31</sup>

The union operates on a majority basis and it is quite proper for a union to negotiate a collective agreement that benefits the majority of its members. The current state of medical knowledge may lead to the conclusion that an HIV-testing requirement is completely unnecessary and even harmful to certain workers. It is arguable, therefore, that the union’s assent to such a requirement could be characterized as arbitrary, in bad faith or discriminatory. If the union is not precluded from agreeing to such terms in the collective agreement, it may be that the union is obliged to mitigate the effects of a testing requirement on members of the bargaining unit by ensuring that the employer’s ability to take disciplinary or other measures in furtherance of the text results is restricted. If the union fails to meet either of the above two obligations it may be in

breach of section 74 and a remedy may be sought under section 96(4) of the Ontario *Labour Relations Act*

In *Gohm v. Domtar Inc. and OPEIU, Loc. 267*<sup>32</sup>, the board held a union jointly and severally liable along with the employer for religious discrimination in employment and the same was upheld by the Ontario Court of Justice that dismissed the union's appeal. The *Gohm* holding that a union may be liable for employment discrimination where it directly commits or indirectly contributes to a discriminatory practice and fails to discharge its duty to accommodate has far reaching consequences for HIV-testing in the unionized workplace. The union's duty to accommodate may require them to negotiate prohibitions against HIV testing where the employer seeks to implement such a requirement. At the least, it will require unions to negotiate provisions mitigating the effects of any actions an employer may seek to take in furtherance of the test results. Concerns that fair representation requirements may inhibit a union's ability to agree to special accommodation or exemptions from general collective agreement terms in respect of individual workers as held by the Ontario *Labour Relations Board*<sup>33</sup> that a union which chose not to enforce the terms of its collective agreement in order to allow the promotion of a handicapped worker ahead of others was not in breach of its duty of fair representation.

A trade union in the United States may also be forced to balance its position on reasonable accommodation between the interests of a disabled member (with HIV/AIDS) and other members concerned. If a trade union opposes a reasonable accommodation, a disabled member (with HIV/AIDS) can bring an action under the ADA against the union for failure to provide fair representation.<sup>34</sup> The International Labour Organization has outlined general rights and responsibilities for the employers, workers and their organizations through a code of practice on HIV/AIDS and the world of work the same are being appended for reference.<sup>35</sup>

### ***The Final Word***

Employment discrimination strikes at a fundamental Canadian value - the right of each individual to do his or her job and contribute to society without facing unfair discrimination. Fairness in the workplace has been recognized as a fundamental right protected under federal law. While no Canadian jurisdiction has thus far enacted a specific statutory provision to deal with AIDS-related discrimination issues, as they arise in various social contexts, a growing number of American jurisdictions, particularly at the municipal level, are resorting to this form of legislation to deal with various public concerns. It is assumed that in view of the perceived

crisis and growing incidents of stigmatization and discrimination towards people suffering with HIV/AIDS the Canada shall bring a bill with tighter enforcement, which shall prohibit discrimination at the workplace suffering or exposed to suffering of this fatal disease and providing basic protection to ensure fairness for all the people who are currently denied equal protection under the law. This will be in conformity to the UN General Assembly Special Session wherein an appeal was made to the States to enact, strengthen or enforce as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS.<sup>36</sup> It is also expected that in formulation of any policy or regulation in this regard, the fears expressed by Bell<sup>37</sup> shall be given due significance and justice and fair play shall play the supreme.

<sup>1</sup> Director-General, ILO, Juan Somavia, June 2001, online: International Labour Organization

<<http://www.ilo.org/public/english/protection/trav/aids/index.htm>>

<sup>2</sup> National Aids Control Organisation, online: Government of India <<http://naco.nic.in/vsnaco/askdoctor/faq.htm>>

<sup>3</sup> *Ibid*

<sup>4</sup> Report on the Global HIV/AIDS epidemic, June 2000, online: UNAIDS

<[http://www.unaids.org/epidemic\\_update/report/Epi\\_report.pdf](http://www.unaids.org/epidemic_update/report/Epi_report.pdf)>

<sup>5</sup> *Ibid*

<sup>6</sup> L.Ndaba, "The most significant obstacle to progress against the AIDS epidemic is the threat of discrimination" online: The Lawyers Collective <<http://www.hri.ca/partners/lc/unit/newslet5F.shtml>>

<sup>7</sup> Theodore de Bruyn, *HIV/AIDS and Discrimination: A Discussion paper* (Montreal: Canadian HIV/AIDS Legal Network and Canadian HIV/AIDS Society, 1998) at 5

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11

<sup>9</sup> *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143

<sup>10</sup> An ILO Code of Practice on HIV/AIDS and the World of Work, online: International Labour Organization

<[http://www.ilo.org/public/english/protection/trav/aids/download/pdf/hiv\\_a4\\_e.pdf](http://www.ilo.org/public/english/protection/trav/aids/download/pdf/hiv_a4_e.pdf)>

<sup>11</sup> International Labour Organization, *International Labour Convention and Recommendations*, vol. 2 (Geneva: International Labour Office, 1977-1995)

<sup>12</sup> R.S.O. 1990, c. H.19

<sup>13</sup> S.B.C. 1984, c.22

<sup>14</sup> *Biggs v. Hudson* (1988), 9 C.H.R.R. D/5391

<sup>15</sup> *Fontaine v. CP Ltd.*, (1989), 11 C.H.R.R. D/288

<sup>16</sup> R.S.C. 1985, c. H-6, s 3(1)

<sup>17</sup> HIV infection is considered a disability or handicap within the meaning of human rights legislation in all jurisdictions in Canada. Accordingly redress can be sought for discrimination on the grounds of HIV infection in the areas specified in human rights legislation. See, Theodore de Bruyn, *Supra* note 7 at 8

<sup>18</sup> *Burns v. South Muskoka Memorial Hospital Board* (July 13, 1994), No. 633 (Ont. Bd. of Inquiry); and see *Hotel-Dieu Grace Hospital v. O.N.A.* (1996), 89 O.A.C. 249 (Ont. Div. Ct.)

<sup>19</sup> *Ontario (Human Rights Comm.) v. Simpsons Sears Ltd.* (1985) 23 D.L.R.(4<sup>th</sup>) 321 (S.C.C.); reversing 138 D.L.R. (3d) 122; affirming 133 D.L.R. (3d) 611 (QL); *Bhinder v. Canadian National Railway Co.* (1985), 23 D.L.R.(4<sup>th</sup>) 481 (S.C.C.); affirming 147 D.L.R.(3d) 312 (QL)

<sup>20</sup> To discuss this concept is beyond the scope of this paper.

<sup>21</sup> *McKinnon v. Ontario (Ministry of Correctional Services)* (1998), 32 C.H.R.R. D/1 ( Ont. Bd. of Inquiry); *Ghosh v. Domglas*(No. 2), 17 C.H.R.R. D/216 (Ont. Bd. of Inquiry), but see *Fit v. Ontario* (1985), 6 C.H.R.R. D/2797 ( Ont. Bd. of Inquiry); aff'd (November 17, 1986), No. 364/85 ( Ont. Div. Ct.); leave to appeal to Ont. C.A. refused ( February 2, 1987), Doc. No. 365/86

<sup>22</sup> (1996), 54 L.A.C. (4<sup>th</sup>) 261. The principles are:

(a)The duty to accommodate derives from the right to equal treatment under the *Ontario Human Rights Code*. That duty includes, “not only the duties and requirements associated with current jobs but also the duties and requirements associated with a bundle of existing tasks within the ability of a disabled employee.” (b) .The undue hardship test – which, if applicable, relieves the employer from accommodation requirements – requires the employer to do more than bear trivial or *de minimis* costs to accommodate the needs of a disabled employee.(c) Whether accommodation would amount to undue hardship entails a spectrum of considerations, including, but not limited to: (i) financial cost, (ii) disruption of a collective agreement, (iii) problems of morale of other employees, (iv) the interchangeability of the workforce and facilities, (v) safety, and (vi) the size of the operations.(d) The costs of accommodation should be compared with the resulting benefits in deciding whether the hardship caused by accommodation is “undue”. The results of this comparison will vary from case to case and (e) The employer bears the burden of proving the accommodative measures would amount to undue hardship See, M.Lynk, "Accommodating Disabilities in the Canadian Workplace" (1999) 7 C.L.E.L.J. 183 at 195-196

<sup>23</sup> See, Lynk , *Ibid*, citing *Boise Cascade Canada Ltd. v. U.P.I.U.Local 1330* (1994), 41 L.A.C. (4<sup>th</sup>) 291 ; *Toronto (City) Bd. of Education v. C.U.P.E., Local 134* (1994), 39 L.A.C. (4<sup>th</sup>) 137 at 196

<sup>24</sup> *McLeod v. Egan*, [1975] 1 S.C.R. 517 (QL)

<sup>25</sup> *Rothmans, Benson & Hedges Inc. and B.C.T. ,Loc 325-T* (1990), 10 L.A.C. (4<sup>th</sup>) 18 (QL); *Wentworth Country Bd. of Education and C.U.P.E., Loc.1572* (1984), 14 L.A.C. (3d) 310 (QL)

<sup>26</sup> Such internal human rights systems supplement the statutory human rights complaints process and combine advantages of increased accessibility, reduction in the delays experienced by human rights commissions, management of the grievance process by the affected parties, and the likelihood of increased protection from intervention on judicial review. Nevertheless, these localized processes entail service risks: reduced safeguards for disempowered minorities such as HIV sufferers in processes controlled by majority union and management officials; the potential to co-opt and submerge complaints; and concerns about the ability and expertise of unions and employers to implement human rights complaint systems.

<sup>27</sup> S.O. 1995, c.1, Sched. A, as am. 1997, c.4, s..83

<sup>28</sup> [1990] O.L.R.B. Rep.20

<sup>29</sup> S.O. 1995, c.1, Sched. A, as am. 1997, c.4, s.83

<sup>30</sup> *Prinesdomu and Ontario Hydro Employees Union*, [1975] 2 Can. L.R.B.R. 310 (Ont.) at 315

<sup>31</sup> G.W.Adams, *Canadian Labour Law*(Aurora, Ont: Canada Law Book, 1993) s13: 780

<sup>32</sup> (1990), 12 C.H.R.R. D/161

<sup>33</sup> *Falcombirdge Ltd.*, [1983] O.L.R.B. Rep. Aug. 1303

<sup>34</sup> L.N'Daba & J. Hodges-Aeberhard, “HIV-AIDS and Employment” (Geneva: International Labour Office, 1998) at 26

<sup>35</sup> An ILO code of practice on HIV/AIDS and the world of work, online:ILO<[http://www.ilo.org/public/english/protection/trav/aids/download/pdf/hiv\\_a4\\_e.pdf](http://www.ilo.org/public/english/protection/trav/aids/download/pdf/hiv_a4_e.pdf)>

<sup>36</sup> Fighting HIV-Related Intolerance: Exposing The Links Between Racism, Stigma and Discrimination, online: UNAIDS< <http://www.unaids.org/humanrights/Bpracism.doc>>

<sup>37</sup> Bell offers three generalizations about employment discrimination law that, he suggests, are equally applicable to other areas of anti-discrimination law.

1. Employment discrimination laws will not eliminate employment discrimination

2 Employment discrimination laws will not help millions of nonwhites

3 Employment discrimination laws could divide those blacks who can from those who can not benefit from its protection. See, A.D. Freeman, “Derrick Bell-Race and Class: The Dilemma of Liberal Reform” in R. Delgado, ed. *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple Univ. Press, 1995) at 461